

## The Lone Star Current

### Don't Miss Out!

### \$500 Million in Federal Grants Available for Energy Efficiency Initiatives

by Paul Gosselink and Jeff Reed

The mind-boggling amount of nearly \$500 million in federal grant money has been made available to Texas cities and counties through several different grant programs that are designed to reduce greenhouse gas ("GHG") emissions, promote energy efficiency, and create jobs across the state. In addition to receiving federal funding, projects that reduce GHGs may have the added benefit of being eligible for carbon credits that can be sold on the voluntary carbon market. There are numerous opportunities available to public and private entities, and the time is ripe to apply for these funds!

#### Funding Sources

You might ask, where is all this money coming from? The primary funding source for these grants is the American Recovery and Reinvestment Act of 2009 ("ARRA"), commonly called the Stimulus Bill. The primary mechanism to deliver the grant money is the Department of Energy's ("DOE") Energy Efficiency and Conservation Block Grant ("EECBG") Program. The DOE has four programs under the EECBG umbrella, three of which are discussed in this article:

√ The "Formula City and County Program," through which \$163 million was allocated to Texas for use by larger cities (35,000 population or greater) and larger counties (200,000 population or greater). These will be referred to here as "Formula Cities and Counties."

√ The "State Program," through which almost \$46 million was allocated to Texas to pass through to the smaller cities and counties.

√ The Competitive Grant Program, to which the DOE has allocated approximately \$453 million. No specific allocations have been made to the state under this program; instead, competition will occur on a nationwide scale. This competitive grant program has not yet been opened, but it will award grants under (1) the "Retrofit Ramp-up Program"; and (2) the "General Innovation Fund for Ineligible Entities."

State funds are also available, although in lower amounts, through the Texas Loan Star Program administered through the State Energy Program ("SEP"). Approximately \$218 million is available to provide low interest loans that will be awarded on a competitive basis.

#### The Time to Act is Now!

The application deadline for the Formula Cities and Counties was August 10, 2009. However, the DOE's "State Program" was opened for applications on September 28, 2009, by the Texas State Energy Conservation Office ("SECO"). The State Comptroller, Susan Combs, has sent letters to all these cities and counties highlighting the availability of these funds. First, the funds will be distributed on the basis of population, meaning that this group of cities and

counties will not be competing with each other. Second, a city or county simply has to indicate its preliminary acceptance within 45 days. As with the Formula Cities, each of the cities applying under the "State Program" must then propose a project or projects that will

*(Don't Miss Out continued on page 5)*

### Inside This Issue

<b>Don't Miss Out! \$500 Million in Federal Grants Available for Energy Efficiency Initiatives</b> <i>Paul Gosselink &amp; Jeff Reed</i>	<i>Page 1</i>
<b>Firm News</b>	<i>Page 2</i>
<b>Interview</b>	<i>Page 3</i>
<b>Municipal Corner</b>	<i>Page 4</i>
<b>Lilly Ledbetter Fair Pay Act of 2009 and Record Retention Practices</b> <i>Sheila Gladstone</i>	<i>Page 6</i>
<b>Crazy for CREZ -- Transmission Line Projects and Their Impact on Texas Landowners and Municipalities</b> <i>Patrick Jackson</i>	<i>Page 7</i>
<b>Can a "Tweet" Land You Out on the Street? Hiring and Firing in the Age of Social Networking</b> <i>Sheila Gladstone</i>	<i>Page 7</i>
<b>The Three Branches of Carbon Regulation</b> <i>Paul Gosselink &amp; Jeff Reed</i>	<i>Page 9</i>
<b>In the Courts</b>	<i>Page 10</i>
<b>Agency Highlights</b>	<i>Page 12</i>

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

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

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



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## FIRM NEWS

Congratulations to three of our attorneys who have been recognized as outstanding in their fields. **Paul Gosselink** has been named a Super Lawyer 2009 by *Law & Politics* and the publishers of *Texas Monthly*. **Lambeth Townsend** and **Geoffrey Gay** have been included in the 2010 edition of *The Best Lawyers in America* in the specialty of Energy Law.

**Mike Gershon** has been elected Chairman of the State Bar of Texas Environmental & Natural Resources Law Section.

**Chris Brewster** served as Conference Chair of the Gulf Coast Power Association's Annual Fall Conference and Exhibition October 6-7.

**Sheila Gladstone** has a busy schedule this fall. She will be presenting "Top Ten Mistakes Employers Make" and "Can a Tweet Land You on the Street? Social

Networking and Employment Law" for the Texas Credit Union League on October 20 in Austin; "Employment Rights of Returning Soldiers" at the Texas City Attorney's Association Conference on October 22 in Fort Worth; and "Hot Topics in Employment Law" for the Juvenile Justice Association of Texas on October 27 in San Antonio.

**Brian Sledge** will be discussing "Comparison of Funding Alternatives for Underground Water Conservation Districts" at the Central Texas Commissioners Court Conference on November 4 in Waco.

**Brian Sledge** will also be presenting a "Legislative Update" at the Bell County Water Symposium on November 12 in Belton.

## Announcement

The Firm is proud to announce the formation of its new **Climate Change and Carbon Management Section** in the Air & Waste Practice Group. Our experts have been helping develop projects to control and capture methane and other greenhouse gases since 2001. We also have assisted in the sale of environmental attributes such as carbon credits, renewable energy credits, and compliance premiums. More recently, the team at Lloyd Gosselink has helped in the acquisition of state and federal grant money on behalf of clients. The new Climate Change and Carbon Management Section consists of Paul Gosselink, Lambeth Townsend, Duncan Norton, Brad Castleberry, Jeffrey Reed, and Chris Brewster. Look for more information on our website.



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## The Lone Star Current Interview

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### Representative Burt Solomons

Chairman of the House Committee on State Affairs

Burt Solomons was first elected to the Texas House of Representatives in November 1994 to represent District 65. As a member of the Texas House of Representatives, Solomons is active in the Republican Caucus. He currently serves as the Chairman of the House Committee on State Affairs and is a member of the House Calendars Committee. Since serving in the Texas House, Solomons has written and passed a variety of business, real estate, tax and crime bills, including the telemarketing Texas No-Call List bill which became a model for the federal no-call list, major workers' compensation reform with HB 7, the Texas Finance Code Modernization Act (HB 955), and HB 716, the Texas Mortgage Fraud Act. Solomons has been honored as a Fighter for Free Enterprise by the Texas Association of Business and was a *Texas Monthly* Honorable Mention 80th Session Best Legislator.

Representative Solomons was raised in Dallas, Texas. He received his Bachelor of Arts in Government from Texas Tech University, his Masters of Public Administration from Southern Methodist University, and his law degree from the University of Tulsa. Solomons has practiced law in Denton County since 1978. Representative Solomons, his wife Jamie, and their daughter, Haley, reside in North Carrollton in Denton County.

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

**LSC: The Public Utility Commission is up for Sunset review during the next legislative session, and the Electric Reliability Council of Texas also faces a special review. As former chair of the Sunset Advisory Commission and current chair of the House State Affairs Committee, do you have any observations about those reviews and what important issues you believe should be addressed?**

**Solomons:** The Sunset review process is one of the very best things we do as a legislative body. It is vitally important that we ensure our government agencies are periodically reviewed and we know that they are operated efficiently and serving their intended purposes, which are to appropriately regulate the industries that they have jurisdiction over and be responsive to the public and its concerns. From a State Affairs Committee stand-

point, I believe there are serious consumer questions that still surround our state's future electric reliability, cost and generation sources, such as:

- Are current electric rates reasonable?
- Do electric consumers in deregulated areas have true choices?
- Does Texas have an efficient electric delivery system and can it be improved?
- Is Texas investing enough in "green" technologies for electric power generation?
- Do electric consumers need additional protections to challenge rate increases?
- Do low income and elderly electric customers have sufficient protections?
- Are the state agencies responsible for oversight of electricity fulfilling their purpose?
- Is Texas headed in the right direction to meet our growing population's energy needs?

These are but some of the questions that the Texas House Committee on State Affairs will be asking in open public interim hearings held across Texas during the next year. I'm sure that the Sunset Advisory Commission members will have questions of their own, as well.

**LSC: What other issues do you see as the most significant during the upcoming interim period?**

**Solomons:** Probably the most significant issue to be addressed next session will be the budget. We balanced the budget this past session, but with the global economic recession this past year and probably into next year we may have serious appropriation issues and a significant budget shortfall in 2011.

**LSC: What do you consider to be the greatest challenges facing our state in the next several years?**

**Solomons:** The challenges with having the second largest state in the country are many and require careful planning, and we will need to balance the needs of our growing population with the costs involved. Job creation, ensuring an educated workforce and a quality transportation system will be crucial to keeping Texas great. It is clear to me that we must have practical and cost effective energy, electric, environmental and water plans in place to satisfy our business and consumer needs throughout the state. We must accomplish all this while keeping in mind that Texans want (and deserve to have) the lowest taxes possible.

*(Solomons continued on page 4)*

(Solomons continued from page 3)

**LSC: What facet of your job as a state legislator do you enjoy the most?**

**Solomons:** I truly enjoy learning and trying to solve problems, creating good public policy and working with people every day that are experts in their fields. I believe that a state legislator has the responsibility to not only respond to the issues of the day, but also think about what may happen in the future.

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

**Solomons:** I've become quite a fan of some of the cooking shows on television. The Food Network is great, especially since I am interested in knowing what I should eat and how to prepare it.

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

**Solomons:** I began reading *The Lost Symbol* by Dan Brown. I doubt it would be classified as "great" literature, but it is a fun read as were his other books.

**LSC: If you weren't a state legislator or lawyer, and it was possible to pursue any trade or profession, what would it be?**

**Solomons:** I worked in television production for a CBS affiliate while attending college and have always enjoyed the movies and some of the trivia facts surrounding the film and television industry. I think it would be a very interesting job to be a film or television director and have the opportunity to direct at least one great classic movie or television show. That or be a rock star!



## MUNICIPAL CORNER

**A municipality may not contract with an appraisal district board to collect special assessments imposed on a public improvement district.** The Public Improvement District Assessment Act authorizes a municipality to establish a district to help finance public improvements within the district's boundaries. The municipal governing body "shall apportion the cost of an improvement to be assessed against property" in the district "on the basis of special benefits accruing to the property because of the improvement." The Attorney General was asked whether Tax Code § 6.24 authorizes a

contract between a municipality and a central appraisal district or a local taxing unit to collect these special assessments. Tax Code § 6.24 authorizes contracts to perform duties relating to the assessment or collection of *ad valorem* property taxes, but *ad valorem* property taxes are different than the special assessments contemplated under the Act. Thus, Tax Code § 6.24 does not authorize such a contract. However, Government Code Chapter 791 authorizes a local government to contract with another local government "to perform governmental functions and services... that each party to the contract is authorized to perform individually." Thus, a municipality may not contract with an appraisal district board for collection of special assessments, but may contract with another local government to collect such assessments, provided the governmental entity has authority to collect assessments for public improvements. Tex. Att'y Gen. Op. GA-0724 (2009).

**The Texas Asbestos Health Protection Act may be enforced against a municipality, however this enforcement authority may be limited by governmental immunity in certain instances.**

The Attorney General was asked various questions regarding the potential application of the Texas Asbestos Health Protection Act (§1954 of the Texas Occupations Code) to a municipality. The AG determined that the Act's definition of "person" includes a municipality, meaning that a municipality could be accountable for violations of the Act. However, a municipality's inclusion in the Act's definition of "person" does not constitute a waiver of governmental immunity from suit. This definition of "person" is not considered a "clear and unambiguous waiver of immunity" simply because the term "person" includes a municipality. Thus, although the Act may be enforced against a municipality, to the extent that a municipality enjoys immunity from suit, an enforcement action is barred. Tex. Att'y Gen. Op. GA-0729 (2009).

**Local Government Code § 43.052(h) does not require that a residence be located on each tract of the area proposed for annexation.**

Texas Local Government Code § 43.052(c) requires a municipality to prepare a three-year annexation plan to identify areas to be annexed. However, § 43.052(h)(1) provides an exception if "the area contains fewer than 100 separate tracts on which one or more residential dwellings are located on each tract[.]" The Attorney General was asked by the City of Cibolo whether the § 43.052(h)(1) exception may be applied in a situation where an area to be annexed by the City was composed of fifty-seven lots, but only fifty-six lots contained a residence. The AG examined both the history of the statute as well as the legislative intent that § 43.052(h) was intended to address perceived problems with the annexation of highly-populated areas. The AG opined that annexing an area that did not have a residence on each tract would not be contrary to the intent of this statute, and thus was permissible. Further, the AG determined that an annexation under § 43.052(h) would not be void for failure by a municipality to adopt a three-year plan. Tex. Att'y Gen. Op. GA-0737 (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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reduce GHG or promote energy efficiency. These grants range in amount from \$20,000 to \$150,000.

#### DOE's Competitive Grant Program

As mentioned above, the DOE has two competitive grant programs available to Texas cities and counties.

**Retrofit Ramp-Up Program.** Formula Cities are eligible for the DOE Competitive Grant Retrofit Ramp-up Program. This program will provide up to \$390 million nationwide toward projects that demonstrate a sustainable business model for providing cost-effective energy upgrades for residential, commercial and/or public buildings in a specific community.

**General Innovation Fund for Ineligible Entities.** This fund totals \$64 million and is reserved for non-Formula cities and counties. These funds are intended to expand local energy efficiency efforts and reduce energy use in the commercial, residential, transportation, manufacturing or industrial sectors. The DOE anticipates awarding between 15 and 60 grants under this fund in amounts between \$1 million and \$5 million.

#### State Energy Program

The SEP is also administered by the Texas SECO. Eligible entities include all units of state and local government, public schools, public colleges and universities, public hospitals, and municipal utilities. The Texas SEP contains several programs, including the Building Efficiency and Retrofit Program, the Transportation Program, and the Distributed Renewable Energy Technology Program.

**Building Efficiency and Retrofit Program.** At \$158.2 million this is the largest of the loan programs. The purpose of this program is to increase the energy efficiency of public sector buildings and other facilities by establishing a revolving loan mechanism to provide loans to eligible entities for the purpose of performing energy efficiency and retrofit activities on these buildings and facilities. SECO plans to issue a Request For Applications ("RFA") and will score applications based on the following selection criteria: (1) ready-to-go projects are given priority; (2) projects with quicker payback periods are given more points; (3) projected energy savings; (4) projected greenhouse gas emissions reduction; (5) number of jobs created/retained; (6) other funds leveraged; and (7) geographic diversity. The RFA has not yet been issued for this program at press time.

**Transportation Efficiency Program.** This program is intended to reduce GHG emissions and decrease dependence on foreign

oil. Public entities will be able to submit proposals through two programs: (1) the Traffic Signal Project, which includes signal retiming, placing LEDs in old units, purchasing new signals, replacing existing traffic signal control hardware and accommodating enhanced signal operations, and monitoring new signal timings to ensure correct synchronization; and (2) the Alternative Fuels Project, whose purpose is to pay for incremental costs related to the purchase of alternative fuel vehicles and/or equipment necessary for the development of alternative fuel refueling stations for public entities. The RFA for the \$6 million Traffic Signal Project has been issued and is open until October 19, 2009. The RFA for the \$11 million Alternative Fuels Project has also been issued and is open until October 30, 2009.

**Distributed Renewable Energy Technology Program.** This program provides grants to increase the amount of installed renewable energy in Texas and advance the market for renewable technologies. Such technologies include biomass, geothermal, solar, hydro, and wind. A specific minimum size has not been determined, but no residential or commercial buildings will be eligible for funding. The RFA for this \$30 million program has been issued and is open until October 30, 2009.



The significant amount of federal funding allocated to the EECBG Program and the SEP revolving loan program has created many opportunities for Texas cities and counties and other public entities to

benefit from these programs. If you are interested in applying for funding or a loan under one of these programs, be sure to file a timely request and strictly follow the guidelines established by the DOE and SECO. When evaluating potential projects, also remember to consider the potential availability of carbon credits that may provide a revenue source in addition to the other goals of the various programs discussed.

*Paul Gosselink is the head of the Firm's Air & Waste Practice Group and counsels clients on many issues related to climate change and carbon credits. Jeff Reed is an Associate in the Air & Waste Practice Group. If you have any questions about these programs or what projects might be eligible, you may contact Paul Gosselink at [pgosselink@lglawfirm.com](mailto:pgosselink@lglawfirm.com) or 512-322-5806, and Jeff Reed at [jreed@lglawfirm.com](mailto:jreed@lglawfirm.com) or 512-322-5835.*

# Lilly Ledbetter Fair Pay Act of 2009 and Record Retention Practices

by Sheila Gladstone

On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act. The law is retroactive to May 28, 2007, one day before the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber*. The new Act not only reverses that highly controversial decision, but also goes much further than a mere "legislative fix." The scope and intent of the Act is still unclear and will likely need to be litigated over the next few years.

The main impact of the Act is to reset the statute of limitations on pay discrimination claims *each time the employee gets a paycheck or pension payment*, for claims based on gender, minority status, religion, disability, or any other class protected by the Equal Employment Opportunity Commission ("EEOC"). Under the old law, the deadline to file an EEOC charge was 300 days after the date of the original decision affecting pay, even if the employee did not understand the discriminatory effects of that decision at the time. Under the Ledbetter Act, claimants now have 300 days from their last paycheck, bonus check, or pension payment, if the amount of the check is lower because of the original compensation decision. Thus, a 1990 (or 1960) pay decision or compensation plan could be challenged today, if the claimant received a paycheck in the last ten months.

There is controversy over the scope of the new Act. The language is broad and seems to encompass not just pure "equal pay claims," such as in the *Ledbetter* case, but also claims of discriminatory demotion, promotion, and performance appraisals that have an effect on future pay. However, proponents of the Act argue the legislative intent was narrower, and the law was intended to cover only discriminatory compensation decisions. It appears that the issues regarding the scope of the Act will be played out in the courts over the next few years. Meanwhile, the "word on the street" is that many "stale" discrimination claims are now being refiled as pay disparity claims. The EEOC has announced its stepped-up enforcement of pay disparity claims in view of the Act, and expects a great increase in

charges. In the current economy, recently retired or separated employees may claim current economic losses based on unequal treatment long ago that caused them to fall behind in the level of their pay. Damages include two years' back wages and attorney fees.

## Practice Pointers for Employers:

### ***Keep compensation and personnel records indefinitely until more guidance on the scope of the Act is available:***

This includes *all* employment records surrounding decisions affecting pay, including justification for compensation, demotion, and promotion decisions. Consider changing your record retention policies, or at least putting a hold on personnel documents for the time being. Because pay disparity claims are based on comparing the employee's pay with other similarly situated employees at the time the decision was made, it will be crucial to the defense of these claims to have not only the claimant's records, but also the records of other employees during the critical time period.

***Do a "self-audit" of statistical compensation patterns so as to correct any pay disparity and start the limitations period:*** Having an employment lawyer do this audit will offer protections under the attorney-client privilege.

***Train supervisors to document objective reasons for decisions affecting pay.***

Stay tuned for updates in *The Lone Star Current* on this new statute and its application to employers.

*Sheila Gladstone heads the Firm's Labor and Employment Law Practice Group. Sheila is available to help with employee training sessions and any other employment-related matter. For additional information, you may contact Sheila at (512) 322-5863 or [sgladstone@lglawfirm.com](mailto:sgladstone@lglawfirm.com)*

## Crazy for CREZ -- Transmission Line Projects and Their Impact on Texas Landowners and Municipalities

by Patrick Jackson

On July 17, 2008 the Public Utility Commission (“PUC”) adopted a plan to build approximately 2,400 miles of new transmission lines to bring wind energy from regions known as Competitive Renewable Energy Zones (“CREZ”) in West Texas and the Panhandle to serve demand in East and Central Texas. The building of these CREZ projects will have a major impact on landowners and municipalities crossed by the lines. This article provides an overview of the process that the PUC will use to choose the routing of the transmission lines.

Generally speaking, Texas law provides that an electric utility must obtain a Certificate of Convenience and Necessity (“CCN”) in order to build a new transmission line. The CCN application must describe the proposed line and include a preferred route and multiple alternate routes. The PUC must conduct an administrative proceeding in which it considers a list of factors, determines the impact of the line, and decides which route the line should follow. The utilities are required to provide notice of the filing of their applications for transmission line CCNs with all persons owning property within 500 feet of the routes that are being considered, to all municipalities within five miles of the proposed routes, and to all counties through which the routes pass.

Landowners, municipalities, and counties that are affected by the line have a right to participate in the proceedings by either formally intervening in the administrative process or by simply filing comments. Intervening parties have an opportunity to argue for alternate routes that will have less of an impact on their interests. In order to intervene in a CCN proceeding, an affected party must file a state-

ment with the PUC no later than the intervention deadline set for the proceeding.

The PUC is currently in the process of certificating between \$5 billion and \$8 billion in CREZ transmission line projects. The PUC and the companies that have been chosen to build these transmission projects have rejected the notion of seeking federal stimulus money in the form of renewable energy project loan guarantees, despite the fact that the loan guarantees would have led to significant savings on the CREZ projects. The stated reasons that the Commission and the companies gave for rejecting the federal assistance was that the environmental assessment and “buy American” requirements that are tied to the federal dollars may outweigh the savings that would be achieved.

It is expected that over the next year there will be in excess of 35 CCN applications filed relating to the CREZ transmission line projects. These applications will be handled on a fast-track basis at the PUC, therefore if you receive notice from a utility that your property will either be crossed by a transmission line or will be within 500 feet of the proposed line, you should assume that the train is pulling out of the station and you need to get on board in order to have an opportunity to influence where the line will be located.

*Pat Jackson is an Associate in the Utilities Practice Group of the Firm, and has been charged with monitoring all the CREZ transmission line applications filed at the Commission. If you have any questions about the CREZ CCNs, you may contact Pat at [pjackson@lglawfirm.com](mailto:pjackson@lglawfirm.com) or (512) 322-5825.*

## Can a “Tweet” Land You Out on the Street? Hiring and Firing in the Age of Social Networking

by Sheila Gladstone

Imagine you are considering making a job offer to a promising candidate. Would you like to know whether the applicant is posting information on the Internet giving negative impressions of the job for which she applied and asking friends for their advice? Might this conduct impact your assessment of the candidate’s attitude? Judgment? Plain old stupidity? Here is a real posting on Twitter.com:

*“Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work.”*

To no one’s surprise, the candidate received a response:

*“Who is the hiring manager? I’m sure they would love to know that you will hate the work. We here at Cisco are versed in the Web.”*

Needless to say, the job offer was withdrawn.

The term “social media” refers to online content that is highly accessible by others. It is used to communicate to large groups, keep in touch, vent, have large group conversations, and to narrate one’s life. Types of social media include social networking sites (such as MySpace, Facebook, Twitter, and LinkedIn), blogs (where anyone can post a comment, video, or picture, such as PostSecret), YouTube, and the “comments” sections attached to on-line news articles. In addition, many individuals have their own websites that may reflect the lifestyle and views of the owner of the site. For example, a family might post their travel pictures and stories on a website, or they may choose to use a Facebook account.

This is a big deal and getting bigger. Facebook has over 220 million users; Twitter grew over 1,000% between 2008 and 2009. The fastest growing demographic for new users of Facebook and

*(Can a “Tweet” continued on page 8)*

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(Can a “Tweet” continued from page 7)

Twitter is the 35 to 54 age group, proving that social networking is not just for kids anymore.

What does all this mean for employers trying to make sound hiring decisions? What about on-line conduct of current employees that could hurt the employer’s reputation, workplace harmony, or confidentiality? Bottom line, are applicants’ and employees’ off-duty, on-line postings any of our business as employers? Probably so, with some limitations.

There is no right to privacy in information that a simple Google search can uncover on the Web. For example, a picture of three college-aged men apparently smoking marijuana, *with their names included*, came up under a search for “bong.” This was their travel log website, and had the caption “world’s biggest bong.” Is this who you want to hire as a management trainee? Even if you don’t have a problem with the use of a bong, you likely want to hire someone with better judgment than to post a picture of himself on the Web smoking pot.

At least a quarter of U.S. hiring managers actually research job applicants on the Web in order to find pictures and information about drug use and public drunkenness, provocative and inappropriate photos, bad-mouthing or posting confidential information about previous employers, and general dishonesty about qualifications. Employers should at least Google applicants to avoid claims for negligently hiring dangerous employees. Sometimes the Internet will show you things that a criminal background check can miss, such as convictions in other states. For instance, the author found a “rap sheet” someone had posted on the Internet and tagged with the individual’s name, showing a conviction for the rape and stabbing death of a 13-year-old boy. Not exactly someone you should hire as a residential meter reader, room service waiter, or security guard.

It is worth keeping track of current employees. Sometimes coworkers have access as “friends” into employees’ social networking sites. Coworkers definitely will be interested if an employee is faking illness while the coworkers carry the load. We found an employee who posted the following “tweet” on Twitter: *“I lied about being sick on Friday, now I am really sick. \*\*\*\* karma!”* Here is another tweet that could impact morale and undermine management’s authority: *“I used a new Auto-send email feature last night on my boss. Completely fooled him! He called me this a.m. to thank me for working so late!”*

Internet posts can create discrimination and harassment claims against coworkers, as well as assist in investigating these claims. Posts are date- and time-stamped and can help prove violations and the timing of complaints. Here’s a creepy tweet: *“I have a crush on a woman at work so I stole her watch so she’d have to get it from*

*me. I keep smelling it, it smells so good.”* Or: *“The Asian Database Administrator is so \*\*\*\*ing annoying.”* This one is the first evidence of a complaint: *“Just sexually harassed at work – reminded that I have large boobs.”*

So what should you do and where should you be careful?

- First, don’t believe everything you see on the Internet. Cases of mistaken identity, especially for those with common names, happen all the time. Similarly, anyone can post doctored pictures and fake profiles. A high school teacher almost lost his job when his students created a fake Facebook profile on him, filled with drug references and sexual indiscretions. Before taking employment action, talk to the affected individual to make sure there is not a mistake.
- Second, don’t check the Web too early in the hiring process. You don’t want to have information about age, race, disability, and religion if you weren’t planning on hiring the person anyway. Wait until you are doing the final candidate checks.
- Third, for public sector employers, be careful of constitutional free speech claims. Don’t make decisions based on political affiliations or opinions posted on the Web, unless you are comfortable that you can make a strong case for work-related impact (for example, a police officer with a white supremacy site).
- Fourth, designate a person familiar with social networking to conduct the searches in order to separate the final decision-maker from information on the Internet that is not relevant to the employment decision. Train that person on confidentiality and on what types of information should not be passed on to the decision-maker.
- Fifth, update your employment policies for current employees, reminding them they have no expectation of privacy on the Internet and their activity at work may be monitored, that they may not post pictures or videos of the workplace or of coworkers, that workplace confidentiality applies to postings, and that they should not blog or post during work time. Also, give notice to applicants and employees that such searches may be conducted.

There is no avoiding the fact that the impact of social networking on the recruitment and hiring process is growing exponentially. Employers must keep up and be creative, not only to avoid bad employment decisions, but also to recruit qualified applicants and protect against harm from current employees. “Business as usual” just won’t cut it anymore.

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# The Three Branches of Carbon Regulation

by Paul Gosselink and Jeff Reed

In the April 2009 edition of *The Lone Star Current* we reported that the probability of a mandatory federal cap-and-trade program for greenhouse gases (“GHG”) was higher than ever. Since then, a number of events have decreased the likelihood that this program will come to fruition this legislative session. However, many factors still suggest the eventual passage of a comprehensive cap-and-trade climate change bill. Specifically, pressure for legislative action is mounting as both the executive and judicial branches take independent steps toward carbon regulation. Because the tools available to the non-legislative branches of government are widely considered to be inadequate to appropriately regulate GHGs, many believe that recent actions on these other fronts will stimulate cooperation between environmentalists and the soon-to-be regulated industries on reaching a legislative solution to climate change.

## Legislative Steps

So far, both the Obama Administration and Congressional Democrats have expressed a preference for a cap-and-trade approach to GHG reduction. In general terms, a cap-and-trade approach to pollution reduction involves placing limitations or “caps” on the permissible emission levels of target pollutants and either allocating or selling “allowances” (a share of allowable emissions) to industries. These industries are then free to: (1) reduce their emissions to the level of their allowances; (2) further reduce their emissions beyond that level and sell their excess allowances to other industry members; (3) purchase additional allowances from others who have surpassed their own emissions reduction goals; or (4) purchase credits from industries that are not capped, but who voluntarily reduce their emission of GHGs.

The Waxman-Markey bill, outlining such a plan, passed the U.S. House of Representatives on June 26. Cap-and-trade was thought to be stalled in the Senate as the Senate and the Obama Administration have concentrated on health care reforms rather than climate change, until September 30 when a cap-and-trade bill was introduced by Senators Kerry and Boxer. This bill is considered unlikely to pass in this legislative session. As the legislature temporarily flounders on climate change, the executive and judicial branches are moving forward with carbon reduction strategies of their own.

## EPA Takes First Steps

Perhaps the most tangible step taken towards carbon regulation in the past few months was the EPA’s final adoption of a mandatory GHG reporting rule. This rule will require roughly 10,000 covered facilities to report their annual GHG emissions beginning in January 2010, with the first report due on March 31, 2011. As our ear-

lier article explained, the data collected in these annual reports will serve as an indispensable resource in defining the scope of future GHG regulations. The facilities slated for regulation under this rule consist of 29 distinct categories of covered sources identified by the EPA, including power plants and landfills, as well as oil refiners, manure managers, and producers of cement, steel, and aluminum. Several of these categories include “upstream” sources, such as importers of petroleum products and mobile sources, such as heavy-duty truck manufacturers. Depending upon which category a covered facility falls in, the reporting requirements apply to either the entire category or to facilities within the category that emit more than 25,000 tons annually. Together, these sources are thought to be responsible for approximately 85% of GHG emissions in the country.

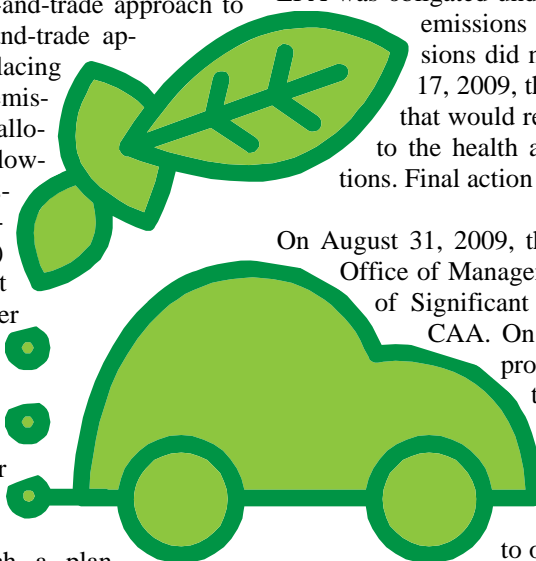
## EPA Continues to March Forward

In 2007, the Supreme Court held in *Massachusetts v. EPA*, that the EPA was obligated under the Clean Air Act (“CAA”) to regulate emissions of GHGs unless it found that these emissions did not contribute to climate change. On April 17, 2009, the EPA proposed an endangerment finding that would recognize the threat that the six GHGs pose to the health and welfare of present and future generations. Final action on that finding is still pending.

On August 31, 2009, the EPA submitted a proposed rule to the Office of Management and Budget (“OMB”) for Prevention of Significant Deterioration (“PSD”) review under the CAA. On September 30, EPA followed this up by proposing the “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule” (the “Tailoring Rule”). Under the Tailoring Rule, the EPA proposes to require facilities that will emit more than 25,000 tons of GHGs annually to obtain permits that would demonstrate they are using the best practices and technologies to minimize GHG emissions. This represents a departure from the text of the CAA, which is triggered when a facility emits 250 tons per year of a regulated pollutant. However, EPA has recognized that in the case of GHGs, regulation of sources with annual emissions of 250 tons could reach venues as small as individual restaurants, vastly expanding the scope of the CAA.

The Tailoring Rule also proposes new thresholds for GHG emissions that require CAA permits under the New Source Review and Title V operating permits programs for new or existing industrial facilities. EPA will be taking comments on the proposed Tailoring Rule for 60 days after the rule is published in the Federal Register.

Responding to an administrative order by the Obama Administration, the EPA and Department of Transportation have also  
*(Three Branches continued on page 10)*



(Three Branches continued from page 9)

submitted a proposal to OMB implementing stricter fuel economy standards and tailpipe emissions standards on August 25. This proposal aims to bring corporate average fuel economy (“CAFÉ”) standards up to the level required by California law. If implemented, by 2016 the standards would require manufacturers of cars and light trucks to achieve a fleet-wide average of 39.9 and 30 mpg, respectively. These standards would also establish the first nationwide regulation for GHGs by limiting the tailpipe carbon dioxide emissions of all new automobiles to 250 grams per mile.

#### Concerns for EPA’s Path

The concept of EPA regulating carbon issues has left many dissatisfied. Environmentalists are concerned that the EPA cannot go far enough to regulate stationary sources with PSD review because this section of the CAA is primarily for new sources of pollutants. They also worry that BACT standards for technologies such as clean coal will be ineffective for at least a decade because the relevant control technologies have yet to be developed. On the other hand, many carbon intensive industries are apprehensive about the potential scope of regulation under the CAA, anticipating that EPA’s proposed Tailoring Rule will be challenged. This creates uncertainty for businesses that must project expenses in order to plan for the future.

#### The Courts Step In

Aside from the urging of the Obama Administration and the looming threat of EPA regulation, Congress is now under additional pressure to address climate change after an unexpected decision by the Second Circuit Court of Appeals to allow injured parties to bring nuisance claims against major utilities for their contribution to climate change under federal common law. In *Connecticut v. American Electric Power*, eight states, the City of New York, and three land trusts brought suit against six electric power corporations for present and future injuries caused by climate change. The plaintiffs argued that the defendants, who own and operate coal-fueled power plants across twenty states, contributed significantly to climate change.

The district court dismissed the plaintiff’s suit on political question grounds, ruling that among other things, solutions to global warming are global in nature, and that the judicial branch lacked the discretion to make the policy determinations necessary to solve them. The Circuit Court rejected this decision, holding that despite the global nature of global warming, parties can still be held responsible for their contribution to global warming by the courts when there is an injury involved. In this case, the court found that injuries such as California’s loss of drinking water due to the shrinkage of snowcaps qualified as such.

*American Electric Power* has now been remanded back to the district court level to determine if the plaintiffs are entitled to the injunctive relief they seek. Specifically, they are requesting that the emissions of the six utilities be capped with a 3% reduction annually. The decision by the Circuit Court, unless overturned by the Supreme Court, could open up virtually every industrial emitter of GHGs to nuisance claims under federal common law. From the

perspective of both environmentalists and the industries, this amounts to a case-by-case, cap-and-trade plus attorney’s fees, regulatory process.

#### Conclusion

Ultimately, judicially or administratively created cap-and-trade systems may prove to be unworkable. However, the hope of cap-and-trade proponents is that the movement by the non-legislative branches towards GHG regulation will pressure Congress to move forward on comprehensive climate change legislation.

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## IN THE COURTS

**U.S. v. Apex Oil Co., Inc.**, --- F.3d ----, 2009 WL 2591545, (7th Cir. August 25, 2009).

Apex Oil appealed the ruling of a federal district court that an injunction requiring it to clean up a site contaminated by a predecessor corporation was not discharged after the company went through bankruptcy proceedings. Apex argued that since it is no longer capable of cleaning up the contaminated site, it would have to contract out the job to a third party for up to \$150 million. The Circuit Court rejected this argument, holding that equitable remedies are only discharged by bankruptcy proceedings when a breach of performance creates a right of payment. The court held that because RCRA does not authorize any financial recovery of clean-up costs for the government if the liable party fails to act, equitable relief claims arising under RCRA do not create a right of payment and are not discharged by Chapter 11 bankruptcy.

**Cordiano v. Metacon Gun Club, Inc.**, 575 F.3d 199, (2nd Cir. July 31, 2009).

In a suit brought against a local gun club by adjacent landowners, the Second Circuit held that special munitions, bullets, and their remains are not solid waste under the Resource Conservation and

(In the Courts continued on page 11)

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(In the Courts continued from page 10)

Recovery Act (“RCRA”). Plaintiffs contended that the gun club was dumping hazardous waste without the requisite permit. The court held that under RCRA the ammunitions do not qualify as solid waste because they were not discarded as required by the definition of solid waste, but were left on the ground as part of their intended use. The court also held that even though the accumulation of lead on the range might possibly pose an imminent and substantial danger to human health, the filing parties did not present sufficient evidence to establish this claim, because the independent study they commissioned recommended further risk assessment of the site to determine the level of risk to human health.

**Ophir v. City of Boston**, --- F.Supp.2d ---, 2009 WL 2606341, (D.Mass. August 14, 2009).

A federal district court in Massachusetts held that a Boston city ordinance effectively requiring all taxis operating within city limits to be hybrid vehicles was pre-empted by federal fuel economy standards. The ordinance required that all newly purchased cabs be gasoline/electric hybrids. Coupled with an existing requirement that all cabs be replaced every 6 years, this rule effectively mandated conversion to an all hybrid fleet over a six-year time span. The court held that this was expressly preempted by the Energy Policy and Conservation Act, because it related to fuel economy standards.

**Connecticut v. American Electric Power**, 2009 WL 2996729 (2nd Cir. 2009).

On September 21, 2009, the Second Circuit held that electric utilities can be held liable for injunctive relief under the federal common law of nuisance. In 2004, eight states, three land trusts, and New York City filed suit against six electric power corporations that owned and operated fossil-fuel-fired power plants in twenty states for their contributions to global warming. Alleging concrete injuries due to climate change, such as California’s diminishing snowcap-fed water supply, plaintiffs sought injunctive relief in the form of a 3% annual reduction of the defendants’ combined carbon emissions for at least a decade. These emissions reductions would be achieved through a mandatory cap-and-trade style emissions limit imposed on the six electric companies. On September 15, 2005, a federal district court dismissed plaintiff’s claims as presenting non-justiciable political questions. Among other things, the court held that solutions to climate change are global in nature, and that the judicial branch lacks the discretion to make the policy determinations necessary to address them. The circuit court rejected this decision. It held that despite the global nature of global warming, parties can still be held responsible for their contribution to global warming by the courts when there is an injury involved. The court also recognized that the relief sought by the plaintiffs was not a comprehensive emissions reduction policy, but a curtailment of the contributions made to global warming by individual parties. The case has been remanded to the district court for a trial on the merits. For the context of this case in relation to other attempts to regulate carbon emissions, see the article by Paul Gosselink and Jeff Reed in this edition of *The Lone Star Current*.

**Bluefield Water Association, Inc. v. City of Starkville**, 2009 WL 2153287 (5th Cir. July 21, 2009).

The United States Court of Appeals for the Fifth Circuit recently considered the appeal of a preliminary injunction against a city for the alleged encroachment by that city into a rural water association’s certificated water service area. Here, Starkville was serving retail water customers within a portion of Bluefield’s certificated water service area. Bluefield is a federal debtor, having accepted a loan from the United States Department of Agriculture-Rural Development. In its request for injunction, Bluefield invoked its rights under 7 U.S.C. § 1926(b), which provides that the retail water service provided or made available through any association having incurred such debt shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body. Bluefield also requested that the court enforce Bluefield’s contract with the City by ordering the City to allow Bluefield to connect to a larger city water main.

The trial court granted the preliminary injunction, ordering the City to turn over to Bluefield billing information and customer relations for the customers located in the disputed water service area. The appellate court reversed, holding that since the City had been serving the retail customers in question for a long time without objection by Bluefield, there was nothing to suggest that any harm suffered between the time of suit and the time of ultimate decision in this case would seriously prejudice Bluefield’s opportunity for full recovery. In short, Bluefield did not meet its burden to obtain a preliminary injunction. While the appellate court’s opinion does not provide an analysis of 7 U.S.C. § 1926(b), this statute will likely be considered if the case progresses and is decided on the merits. Thus, if this case does not settle, it could provide the first new opinion within the Fifth Circuit interpreting 7 U.S.C. § 1926(b) since *North Alamo Water Supply Corporation v. City of San Juan, Texas*, decided in 1996.

**New York v. EPA**, No. 06-1148 (D.C. Cir. September 20, 2009).

On September 4, 2009, the U.S. Court of Appeals for the District of Columbia Circuit granted the EPA’s request to remand but not vacate a 2006 emissions standards rule for steam-generating units at power plants. This rule set performance standards for nitrogen oxides, sulfur dioxide, and particulate matter. The EPA made this request so that it could develop a multi-pollutant approach to emissions regulation in the power sector. By merging these rules with the maximum achievable control technology standards for mercury and other air toxics, the new approach would address all air pollution requirements of the electric power industry.

**Coastal Habitat Alliance v. Public Utility Commission of Texas**, No. 03-08-00205-CV, 2009 WL 1981400 (Tex. App. – Austin, July 8, 2009).

At issue in this case is the district court’s subject-matter jurisdiction to review the Public Utility Commission of Texas’ (“Commission”) denial of a motion to intervene in a proceeding before the Commission. The Commission denied Coastal

(In the Courts continued on page 12)

*(In the Courts continued from page 11)*

Habitat Alliance's ("Alliance") Motion to Intervene in the Commission's consideration of an electric utility's application to amend a certificate of convenience and necessity ("CCN"). The Alliance filed suit in district court challenging the Commission's decision. The district court dismissed the suit for lack of subject-matter jurisdiction. The Third Court of Appeals affirmed the district court, holding that: (1) the Administrative Procedure Act does not authorize a non-party to independently pursue judicial review of a final order of the Commission; (2) dismissal of Alliance's claim for declaratory relief was proper because by statute the Commission had the discretion to deny Alliance's intervention; and (3) dismissal of Alliance's constitutional due process claim was proper because Alliance failed to allege that it was deprived of a vested property right.

**Texas Parks and Wildlife Dept. v. The Sawyer Trust**, 2007 WL 2390434 (Tex. App.--Amarillo, 2007, pet. denied May 1, 2009).

This case demonstrates the limitations of sovereign immunity for entities that are entitled to assert this affirmative defense. The Amarillo Court of Appeals ruled that sovereign immunity is not a valid defense for a state agency when a landowner files a declaratory judgment action against that agency and seeks injunctive relief. In this case, the Sawyer Trust desired to sell sand and gravel from a river travelling through the Trust property. However, the Texas Parks and Wildlife Department claimed title to the sand and gravel of that riverbed on the basis that the stream is navigable. Under Texas law, if a stream is navigable, then its bed is owned by the State, and if it is not navigable, then its bed is owned by the landowner. The Trust sued the Department, seeking relief against the Department for unlawfully taking real property of the Trust in violation of both the United States and Texas Constitutions, for declaratory judgment regarding the purported navigability of a stream lying on Trust realty, and for temporary and permanent injunctions prohibiting the Department from "interfering with its property rights." The State filed a plea to the jurisdiction of the trial court, contending that sovereign immunity barred prosecution of the suit. The appellate court affirmed the trial court's decision to deny the Department's plea to the jurisdiction, holding that sovereign immunity did not apply to the declaratory judgment action because seeking a determination of a disputed fact issue is not a suit against the State that implicates sovereign immunity. Although it may have the collateral consequence of resolving a factual dispute that impacts a claim being made by the State, it is not an action that is in essence one for the recovery of money from the State or for determination of title. Therefore, legislative permission to prosecute is unnecessary. The Supreme Court denied rehearing.

*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.*



## AGENCY HIGHLIGHTS

### Environmental Protection Agency

**EPA to consider additional ambient monitoring requirements for airborne lead.** On July 22, 2009, the EPA announced it would reconsider portions of its ambient monitoring requirements for airborne lead. Existing standards, issued on October 15, 2008, require monitoring near urban areas with populations greater than 500,000 and sources that emit one or more tons of lead a year. In response to a petition to reconsider these newly promulgated standards, the EPA will consider whether additional monitoring should be required near industrial sources of lead. The EPA will also reconsider the monitoring requirements for urban areas. The agency expects to issue a final rule in the spring of 2010, after public review and comment.

**EPA to reject flexible permits.** On September 23, 2009, the EPA proposed to disapprove of Texas' use of flexible permits as an alternative form of Clean Air Act ("CAA") new source review ("NSR"). Flexible permitting, which has been a part of Texas' state implementation plan ("SIP") since November 16, 1994, allows an operator of a plant site to exceed emissions limits at an individual facility as long as the plant site as a whole stays beneath an overall emissions cap. Despite claims by the Texas Commission on Environmental Quality that flexible permitting only applies to the construction of minor sources, existing grandfathered sources, and to minor modifications, the EPA has indicated that the state statutes governing Texas' Flexible Permit Program are not clearly limited to minor sources. Moreover, the EPA claims that the program is a substitute for Texas' Major NSR program, allowing operators to circumvent the more stringent Major NSR requirements. The EPA has until June 10, 2010, to issue a final decision on this matter; the deadline for public comments on the EPA's proposed action is November 13, 2009.

**EPA reconsiders hazardous waste rules.** On October 7, 2008, the EPA issued a Definition of Solid Waste rule ("DSW") in order to streamline the regulation of hazardous secondary materials under the Resource Conservation and Recovery Act ("RCRA").

*(Agency Highlights continued on page 13)*

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*(Agency Highlights continued from page 12)*

This rule excluded eligible hazardous secondary materials from the definition of solid waste if they were properly recycled according to the specifications of the rule. Because being a solid waste is one component of the definition of hazardous waste, the DSW rule provided a path around hazardous waste regulation and encouraged the recycling of hazardous secondary materials. In response to concerns by the Sierra Club concerning the rule's impact on human health and the environment, the EPA held a public hearing on possible revisions to the DSW rule on June 30, 2009. The EPA has not yet announced either future action or resolution of this matter.

**EPA considers repeal of ECF rule.** The EPA is preparing a proposal to repeal the Emission Comparable Fuel rule ("ECF"), which became effective on January 29, 2009. This rule was an attempt to reduce regulatory costs by allowing the burning of hazardous waste without a hazardous waste air permit so long as the emissions profile of the burning waste is comparable to that of burning fuel. Since its implementation, ECF has been criticized for allowing hazardous waste to evade regulatory control. The EPA has also determined that this rule is difficult to administer. The agency plans on completing its proposal for ECF revocation by November of this year.

**EPA Climate Leaders Program approved.** The EPA has approved the first carbon offset project for its Climate Leaders Program. This Program is an industry-government partnership that assists volunteer companies in creating an inventory of their GHG emissions, setting aggressive GHG reduction goals, and achieving these goals. In exchange, program participants receive national recognition opportunities, environmental credibility, and reduced utility costs. With EPA approval finalized, participant companies are now able to purchase carbon offsets from landfill methane destruction projects to count towards their emissions reductions. To date, there are 285 Climate Leaders Partner companies, nearly half of which are members of the Fortune 1000. Thus far, 21 companies have achieved their emissions reduction goals.

## **Texas Commission on Environmental Quality**

**TCEQ to adopt conforming RCRA rule changes.** On October 7, 2009, the TCEQ Commissioners will vote on whether to incorporate new federal rule changes relating to solid and hazardous waste into Texas Administrative Code ("TAC") Chapter 305 (Consolidated Permits) and Chapter 335 (Industrial Solid Waste and Municipal Hazardous Waste). The rules primarily affect industrial hazardous waste generators. If adopted, these rules will exclude recycled cathode ray tubes ("CRT") from the definition of solid waste to encourage the recycling and reuse of used CRTs, amend the F019 listing to exempt wastewater treatment sludges produced from the manufacturing of motor vehicles, and exempt wastewater mixtures with benzene and 2-ethoxyethanol from the definition of hazardous waste. These rule updates will also streamline the permitting process by making a standardized permit available to treatment, storage and disposal facilities that store and non-thermally treat waste on-site in tanks, containers,

and containment buildings. Moreover, waste management facility owners will no longer be required to use the SW-846 monitoring requirement. Instead, they can propose alternate methods for sampling and their analysis plan. National Emission Standards for Hazardous Air Pollutants Phase I and II standards will also be updated to require hazardous waste combustors to meet hazardous air pollutant emissions standards reflecting the performance of the most available control technology. Corrections to checklist 206, listing K181 hazardous dyes and pigments, are also included in this rule package.

**Proposed Rules for Emergency Operations.** During the 81st Legislative Session, SB 361 was passed requiring the TCEQ to promulgate rules to require that certain water service providers ensure emergency operations during an extended power outage. These rules seek to address the problem with availability of drinking water and effective wastewater treatment during extended power outages due to natural disasters such as those experienced during Hurricane Ike. The Commission proposed the new rules on August 12, 2009, and expects to adopt the rules on November 18, 2009.

**Rule Revisions to Notice Requirements for Certain Water Applications.** The Commission proposed rule changes to notice requirements on July 8, 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 rulemaking will 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 when it is scheduled to be mailed more than two years after the Notice of Receipt and Intent to Obtain a Permit. For water rights applications, the rulemaking changes the timing of notice to later in the process when the technical review is complete. The rules are currently set to be adopted on December 9, 2009.

**Proposed Rules for Water Rights Sediment Control Pond Exemption.** The TCEQ proposed rules on August 12, 2009, to implement SB 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 of the 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 rule is set to be adopted on December 9, 2009.

**Rules for New Bacteria Limits.** New rules on bacteria limits were proposed on May 20, 2009, followed by the public comment period from June 5, 2009, to July 5, 2009. The Commission expects to adopt the rules on November 4, 2009, with the rule becoming effective December 31, 2009. Bacteria limits for all new, renewal, or amendment TPDES permits are planned to go into effect on January 1, 2010.

**Imported Water Rules to be Proposed.** TCEQ expects to propose new rules on November 4, 2009 to implement HB 4231  
*(Agency Highlights continued on page 14)*

(Agency Highlights continued from page 13)

from the 81st Legislative Session to allow the use of bed and banks to convey water imported from out of state and to exempt transfers of the same imported water from existing interbasin transfer requirements. Public comment period is proposed for November 20, 2009, to January 11, 2010. The rule is set to be adopted on April 14, 2010.

**Proposed Revisions to Water Quality Standards.** On November 18, 2009, the Commission expects to propose 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). A public comment period is proposed for December 4, 2009, to January 3, 2010. The rule is set to be adopted on May 19, 2010.

**Proposed Rules on CCN Notice and Submetering.** The TCEQ expects to propose new rules on December 9, 2009, 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. SB 2126 allows owners/managers of apartments to add up to a 9% service charge to the water bills for tenants in submetered apartment units. A public comment period is proposed for December 25, 2009, to February 1, 2010. The rule is set to be adopted on May 19, 2010.

## **Public Utility Commission**

**Docket No. 35717 – Application of Oncor Electric Delivery Company, LLC, for Authority to Change Rates.** The Commission approved an Order in Oncor’s rate case, granting Oncor an overall rate increase of approximately \$115 million. This is an increase of approximately \$100 million over the amount recommended in the Proposal for Decision (“PFD”) issued on June 2. The Commission ordered the rate increase despite substantial evidence that Oncor’s rates should actually be reduced by over \$100 million. The average residential customer in Oncor’s service territory will see a monthly electric bill increase of approximately \$3. The Commission reversed the PFD on multiple issues. Monetarily, the most significant ruling was the PUC’s decision not to adopt a consolidated tax savings adjustment (“CTSA”). The impact of the CTSA decision will be to allow the Company to recover an additional approximately \$90 million annually. Furthermore, the PUC allowed the Company to recover an additional \$39 million in costs associated with advanced meters that were installed prior to the adoption of rules on advanced metering that do not meet the functionality requirements set out in the rules. The Commission also ruled that the demand ratchet provision for all loads with maximum annual demand of 20kW or less should be waived, and it limited any street lighting rate increase to no more than 10% of existing rates. Motions for rehearing urging reconsideration of those issues the parties believe warrant further consideration were filed on September 21.

**Docket No. 36918 – Application of CenterPoint Energy Houston Electric, LLC for Determination of Hurricane Restoration Costs.** CenterPoint filed an application in April seeking approval of \$678 million in Hurricane Ike restoration costs. If approved, the estimated impact to an average (1245 kWh) residential customer is approximately \$3.10 per month for ten years. After several weeks of discussion, a settlement of all issues was reached by the parties in early August. Under the terms of the settlement agreement, CenterPoint agreed to reduce its Hurricane Ike cost recovery to \$663 million, which includes costs incurred through February 28, 2009, plus carrying costs on that amount through August 31, 2009. The settlement also provides that, in the event that CenterPoint receives any insurance proceeds, grants, or other types of compensation in connection to Hurricane Ike damage or restoration costs, it will credit such payments to reduce the amount of recoverable costs, or it will account for the payments in a future proceeding. The settlement agreement was approved by the Commission on August 14, 2009.

**Docket No. 36958 – Application of Oncor Electric Delivery Company LLC for 2010 Energy Efficiency Cost Recovery Factor.** Oncor filed a request in May for approval of 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 has 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 the parties are awaiting a Proposal for Decision.

**Docket No. 37364 – Application of Southwestern Electric Power Company for Authority to Change Rates.** On August 28, 2009, Southwestern Electric Power Company (“SWEPCO”) filed its first rate application since 1984. The filing requests a total system-wide increase of \$82 million, or 37.75%. Major components of the request include: a base rate increase of \$27 million; “Generation Recovery Riders” of \$31.6 million; a “Reliability Rider” (vegetation management) of \$16.3 million; and “Termination of Merger Savings/Rate Reduction Riders” of \$6.9 million. If granted, the proposed rates will increase an average (1000 kWh) residential customer’s bill by \$16.41 per month. The rate application also presents several issues of first impression, including SWEPCO’s request for several generation and reliability riders which would authorize future automatic increases in rates contrary to longstanding prohibitions against automatic rate adjustments and piecemeal ratemaking. The two generation riders will require continued increases in construction work in progress (“CWIP”) to be flowed through to ratepayers in the future without any further determinations that CWIP is financially necessary or that SWEPCO continues to qualify for exceptional rate relief. One of the generation riders will also include depreciation and operations and maintenance expense for placing a generation plant into commercial operation without also recognizing growth in overall utility demands and revenues that would offset the cost

(Agency Highlights continued on page 15)

(Agency Highlights continued from page 14)

of increasing the utility's generation plant capacity if traditional ratemaking was applied.

**Docket No. 36924 – Application of AEP Texas North Company and AEP Texas Central Company to Implement a Mechanism to Address Energy Trading Margins.**

On April 23, AEP filed its advanced metering infrastructure (“AMI”) case for both Texas Central Company (“TCC”) and Texas North Company (“TNC”). In addition, the Company filed its system integration agreement (“SIA”) refund case at the same time, in response to the Federal Energy Regulatory Commission (“FERC”) decision last December that the Company incorrectly allocated a larger portion of profits from off-system sales to its eastern operating companies than those located in Texas. The Company proposes to net the amount of the refund, \$68.3 million for TCC and \$24.8 million for TNC, against the cost of the advanced meters. The Company proposes to install the new meters over the next four years. Once approved by the Commission, all residential customers in TCC’s service area will be surcharged for 11 years to pay for the meters. The charge will be \$3.25 per month for the first four years and approximately \$2.70 per month for seven additional years.

**Texas Railroad Commission**

**GUD Docket No. 9902 – Statement of Intent of CenterPoint Energy Resources Corp., d/b/a CenterPoint Energy Intex and CenterPoint Energy Texas Gas to Increase Rates in the Unincorporated Areas of CenterPoint’s Houston Division.**

On July 31, 2009, CenterPoint Energy Gas (“CenterPoint” or “Company”) filed a Statement of Intent to increase rates with all cities that retain original jurisdiction in the Company’s Houston Division. The Statement of Intent indicates that the Company is seeking a \$25.4 million base rate increase. If approved, the increase would raise base rates for the average residential customers by almost 34%.

*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).*

**Take Time to Opine**

**Remember to check OPINE, the Online Policy and Information Network on Energy, the blog hosted by the Firm’s Utility Practice Group. For up-to-date new items, go to <http://energylawpolicy.blogspot.com>.**

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