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JURISDICTIONAL WATERS – TAKE 3: ACTION!

by Nathan E. Vassar and Lauren C. Thomas

What's old is new again for those tracking the latest in the decades-long regulatory wrangling over the definition of "waters of the United States." To the cheers of some, disdain of others, and confusion for the rest, the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") announced plans to re-write regulatory provisions defining the scope of the Clean Water Act's definition of jurisdictional waters. As of right now, the re-write is in a pre-proposal phase, as the EPA and the Corps are gathering stakeholder input before outlining a new rule.

For those keeping track, this re-write represents the third draft to define jurisdictional waters in just seven years, spanning three different administrations. By way of context, the most recent jurisdictional rule – the Navigable Waters Protection Rule ("NWPR") – was established by the Trump Administration, and was premised upon Justice Antonin Scalia's concurring opinion in the 2005 *Rapanos* case that focused upon "relatively permanent" waters subject to the jurisdiction of EPA and the Corps. See *Rapanos v. United States*, 547 U.S. 715 (2006). The NWPR carved out certain ditches and even ephemeral streams from consideration as jurisdictional waters, particularly in more arid parts of the southwest where flows were shown to be limited over time. A federal judge in Arizona vacated the NWPR in August 2021. See *Pascua Yaqui Tribe v. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021). As a result, EPA's re-write will focus on the new meaning, rather than undertaking an administrative repeal.

At this point, it is too soon to predict the direction of the new jurisdictional waters rule, although many anticipate the continued exclusions of critical carve-outs, such as groundwater and waste treatment systems. Based on environmental group push-back on the Trump Administration's treatment of ephemeral streams, it is almost a guarantee that ephemeral streams will re-enter the jurisdictional fold, and perhaps be subject to a new threshold analysis. Similarly, in light of agricultural and other interests, we do not currently anticipate a return to the Obama Administration's 2015 "Clean Water Rule," which provided a measuring-tape approach that included land within certain distances of wetlands and traditional navigable waters. EPA and the Corps will need to consider stakeholder input and decide whether to cherry-pick provisions of the past two rules or to chart a new course entirely with new criteria.

What this means for publicly owned treatment works in Texas and across the United States is that the 1980s EPA/Corps guidance is back in play, along with the overlay of the federal Supreme Court decisions in 2001 (*Solid Waste Agency of Northern Cook County*) and 2005 (*Rapanos*), until a new jurisdictional rule is published and eventually adopted. See *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 169 (2001); *Rapanos*, 547 U.S. 715 (2006). The Texas Pollutant Discharge Elimination System regime is not likely to change at all, given the breadth of the Chapter 26 state jurisdictional coverage, capturing water in the state and areas adjacent to water in the state. However, for projects implicating dredge and fill Clean Water Act Section 404 authorization, mitigation requirements may increase, subject to the new rule, once adopted.

The move comes as Administrator Michael Regan's EPA is pushing new initiatives for environmental justice, climate resiliency, and other projects, while also repealing certain environmental policies from the

Jurisdictional Waters continued on page 4

IN THIS ISSUE

Firm News p. 2
Municipal Corner p. 3
State Agencies and Electric and Gas Industries Respond to Winter Storm Uri with Market Reform Efforts and Securitization Implementation
Taylor P. Denison p. 4
Buying and Selling Water and Wastewater Systems - Let's Make a Deal, but How?
David J. Klein p. 7
Ask Sheila
Sheila B. Gladstone and Emily R. Linn p. 8
In the Courts p. 9
Agency Highlights p. 11

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

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

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

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

FIRM NEWS

Thomas Brocato will present "Winter Storm 2021 - What Really Happened and Why? What Next? Legislative and Regulatory Response to the Winter Storm Power Outage," and Thomas Brocato and Jamie Mauldin will present a "State Agency Update on Electric, Gas and Water Utility Matters" at the Texas Coalition of Cities for Utility Issues Annual Seminar on October 15 in Houston.

Robyn Katz will be presenting "Legislative Updates on 'the Link' - Nexus Between Human Violence and Animal Cruelty Laws in Texas and the U.S." at Texas Unites on October 29 virtually.

Thomas Brocato will be discussing the "Legal Fallout from Winter Storm Uri" at the Gulf Coast Power Association After the Storm Virtual Series on November 9.

Lloyd Gosselink Rochelle & Townsend, P.C. is happy to announce that the Chair of our Energy and Utility Practice Group has been named Lawyer of the Year in Austin, and five principals have been included in the 2022 Edition of The Best Lawyers in America®. Since this resource was first published in 1983, Best Lawyers® has become universally regarded as the definitive guide to legal excellence. Only a single lawyer in a specific practice area and location is honored with "Lawyer of the Year" designation.

Thomas Brocato, named Best Lawyer and "Lawyer of the Year" in Energy Regulatory Law, chairs the Firm's Energy and Utility Practice Group and represents clients before regulatory agencies, the courts, and the legislature.

Lambeth Townsend, named Best Lawyer in Energy Law, is a Principal in the Firm's Energy and Utility Practice group and represents companies and political subdivisions across a wide spectrum of regulatory and commercial activities. Lambeth focuses on all aspects of utility and water law.

Mike Gershon, named Best Lawyer in Water Law, chairs the Firm's Water Practice Group and assists clients with a variety of water resource management, permitting, transactional, and water utility matters, including representation in court and before state regulatory agencies.

Sheila Gladstone, named Best Lawyer in Employment Law - Management and Litigation - Labor and Employment, chairs the Firm's Employment Law Practice Group and assists employers with all aspects of labor and employment law, including counseling employers on the legal issues and strategic decisions involved in personnel decisions, auditing employment practices for legal compliance, defending employers from claims, and conducting internal investigations of employee complaints.

Lauren Kalisek, named Best Lawyer in Administrative/Regulatory Law, is the Firm's Managing Director and leads the Firm's Districts Practice Group. She has practiced for more than 20 years in Texas water utility and water quality law and focuses on providing counsel to cities, river authorities, water districts, and other local governmental organizations.

MUNICIPAL CORNER

Texas state agencies and political subdivisions may not condition an individual's access to a governmental facility on receipt of a vaccine administered under emergency use authorization and not yet approved by the Food and Drug Administration. Tex. Att'y Gen. Op. No. KP-379 (2021).

In a recent opinion, the Office of the Attorney General addressed whether Texas state agencies and political subdivisions could condition an individual's access to a governmental facility on receipt of a vaccine administered under emergency use authorization and not yet fully approved by the Food and Drug Administration ("FDA"). The Office of the Attorney General concluded that such agencies and governmental entities could not do so.

The Opinion first discusses the "comprehensive regulatory framework" established by Congress and administered by the FDA to develop and distribute vaccines in the United States. See generally 21 U.S.C. § 301-399i. This discussion includes a brief history and summary of the stages of vaccine approval, including the process as it relates to COVID-19 vaccine trials and emergency use authorization. The Attorney General noted that, to date, the FDA has not granted full approval for any COVID-19 vaccine for use in the United States.

Next, the Opinion addresses the implications of Executive Order GA-38, which prohibits state agencies and political subdivisions from conditioning an individual's access to a government facility on receipt of a vaccine issued under emergency use authorization. Because executive orders issued by the Governor have the force and effect of law, such orders supersede any local ordinances or policies that are inconsistent with the Governor's action. Any attempt to enforce an "order, ordinance, policy, regulation, rule or similar measure" that would require proof of vaccination would be in violation of state law. See Office of the Governor, Order GA-38 (2021).

Furthermore, Attorney General Paxton concluded that under Senate Bill 968, passed by the 87th Legislature, a governmental entity in Texas may not issue a COVID-19 vaccine passport or any other documentation certifying COVID-19 vaccination status for any purpose other than healthcare. The Attorney General noted that implicit in this prohibition is that a governmental entity may not issue a COVID-19 vaccine passport and condition entry to a governmental facility on possession of it. This particular prohibition regarding COVID-19 vaccine passports is not limited to vaccines issued under emergency use authorization and therefore applies to COVID-19 vaccines that obtain full FDA approval.

Texas Executive Order GA-38 prohibits governmental entities from requiring any person to wear a face covering or mandating another person to wear a face covering. Tex. Att'y Gen. Op. No. KP-380 (2021).

The Attorney General recently addressed the implications of the Governor's Executive Order GA-38 and concluded that governmental entities are prohibited from requiring or mandating any person to wear a face covering. Despite Federal orders issued by the Center for Disease Control ("CDC") and the Transportation Security Administration ("TSA"), which attempt to require persons traveling on public transit to wear a mask and require local transit authorities to enforce such a federal mandate, the Attorney General concluded that a court could hold that the CDC and the TSA lack statutory authority to issue the face covering mandates, particularly in respect to intrastate public transit systems. Additionally, the Attorney General noted that a court could have a basis to hold that the TSA's directive violates the Americans with Disabilities Act and is an unconstitutional attempt to commandeer local officials to enforce federal regulations. However, the Attorney General stated that due to concerns regarding the authority of the CDC and TSA to issue federal mask mandates on public transport, the Office of the Attorney General was unable to issue a definitive conclusion regarding whether those orders preempt the Governor's Executive Order GA-38.

Type B general law cities are authorized to provide for two-year staggered terms for mayor and city alderman by local ordinance under Section 23.026(b) of the Texas Local Government Code. Tex. Att'y Gen. Op. No. KP-0384.

The Attorney General addressed the enforceability of city action transitioning to staggered elections for city officials under Section 23.026(b) of the Texas Local Government Code in a recent opinion. The City of San Augustine (the "City") posed a series of questions to the Office of the Attorney General regarding the enforcement power of the City to transition to staggered elections for the City's six elected officials. The Attorney General noted that unlike home-rule cities, which have all power not reserved or restricted by the Legislature, a city incorporated under the general laws of the State is limited to the powers expressly provided for by the Legislature in addition to those necessarily implied therefrom. Generally, Type B general law cities have the authority to "adopt an ordinance or bylaw, not inconsistent with state law, that

the governing body considers proper for the government of municipal corporation," as described in Texas Local Government Code Section 51.032(a).

The Honorable Wesley Hoyt, San Augustine County Attorney, asked whether the City's action to re-stagger the terms of office was lawful; however, he did not include in his question whether the City Council re-staggered the election by ordinance or resolution. The Attorney General observed that while an ordinance is a legislative act, a resolution is not a law, but "an expression of opinion." *City of Carrollton v. Tex. Comm'n on Env't Quality*, 170 S.W.3d 204, 215 (Tex. App. – Austin 2005, no pet.). Under Section 23.026(b), an ordinance is required to transition to staggered terms. Therefore, if the City's action was taken by resolution, it did not conform to Section 23.026(b) and is likely void.

Additionally, the Attorney General addressed whether the council members could opt out of drawing lots and whether the City's Secretary could draw lots for them. Under Section 23.026(b), the Attorney General concluded a court would likely hold that the new council members could not opt out of drawing lots because the Texas Local Government Code does not provide an alternative for council members drawing lots. Furthermore, the Attorney General noted that while a Type B general-law city may repeal a prior ordinance, such a repeal does not necessarily revive the prior law. Here, if the City wished to return to non-staggered elections, the City must affirmatively adopt a new ordinance providing for the change in form of government. Finally, the Attorney General addressed the notice requirements for adopting a local ordinance as provided for by the Texas Open Meetings Act and Chapter 52 of the Local Government Code. The Attorney General concluded that the failure to follow the posting and publication requirements would render the ordinance voidable under the Open Meetings Act or unenforceable under Chapter 52. Such requirements include posting the notice in three public places in the City or in a newspaper of general circulation, as well as on the City's website.

"Municipal Corner" *is prepared by Kathryn Thiel. Kathryn is an Associate in the Firm's Districts Practice Group. If you would like additional information or have questions related to these or other matters, please contact Kathryn at 512.322.5839 or kthiel@lglawfirm.com.*

Jurisdictional Waters continued from page 1

Trump Administration. To that effect, on the federal level, EPA also recently rescinded the *Maui v. Hawaii Wildlife Fund* guidance addressing discharges from the "functional equivalent" of point sources, pursuant to the 2020 U.S. Supreme Court ruling that required a federal discharge permit for deep-well injected wastewater in Maui County, Hawaii that migrated underground to the Pacific Ocean. As EPA and the Corps proceed with this initiative and others impacting permittees and the regulated community, we will continue to provide updates and analysis as federal decisions impact entities, water/reuse/wastewater projects, and individuals in Texas.

Nathan Vassar is a Principal in the Firm's Water Practice Group. Nathan assists communities and utilities with environmental permitting and enforcement matters with both state and federal regulators, with a focus on water quality-related enforcement. Lauren Thomas is an Associate in the Firm's Water Practice Group. Lauren assists clients with water quality matters, water resources development, regulatory compliance, permitting, enforcement, and litigation. If you would like additional information or have questions related to these or other matters, please contact Nathan at 512.322.5867 or nvassar@lglawfirm.com, or Lauren at 512.322.5850 or lthomas@lglawfirm.com.

STATE AGENCIES AND ELECTRIC AND GAS INDUSTRIES RESPOND TO WINTER STORM URI WITH MARKET REFORM EFFORTS AND SECURITIZATION IMPLEMENTATION

by Taylor P. Denison

As reported in our April issue of *The Lone Star Current*,[1] Winter Storm Uri, which hit the state February 15 through February 19, 2021 and left millions of Texans without power during single-digit temperatures, turned the electric industry on its head. The devastating event prompted the 87th Texas Legislature to pass a significant package of bills in an effort to address reliability and weatherization issues, which we reported on in our July issue of *The Lone Star Current*.[2] The Public Utility Commission of Texas ("PUC"), the Railroad Commission of Texas ("RRC"), the Electric Reliability Council of Texas ("ERCOT"), and the electric and gas industries as a whole are now working to implement the sweeping changes passed by the Legislature and signed into law by Governor Abbott.

The first of these sweeping changes relates to the membership of the PUC. In response to Senate Bill ("SB") 2154, which increased the number of PUC Commissioners from three to five, Governor Abbott has appointed a new slate of Commissioners. In the wake of Winter Storm Uri, all three existing PUC Commissioners resigned. Since that time, Governor Abbott has appointed four new Commissioners—Chairman Peter Lake (appointed on April 12), Commissioner Will McAdams (appointed on April 1), Commissioner Lori Cobos (appointed on June 17), and Commissioner Jimmy Glotfelty (appointed

on August 6). There remains one vacant PUC Commissioner position.

The new board has wasted no time implementing market redesign changes required by the Texas Legislature. The Commissioners have initiated a number of new rulemakings and are hosting regular "work sessions" designed to focus on different aspects of redesigning the ERCOT market, inviting panels of leading industry experts to come speak at each session. PUC Staff has opened various new rulemaking projects and has published a rulemaking calendar in Project No. 51715, providing insight about the rulemaking and implementation process the agency will undertake to address the recently enacted legislation.

In the broadest proposed rulemaking, Project No. 52373, *Review of Wholesale Electric Market Design*, the PUC has outlined its plan to issue a series of "Commissioner Guidance" memos, which include requests for comments on a variety of topics related to the overall restructuring of the ERCOT market design. Following each set of "Commissioner Guidance" is a deadline for stakeholder comments related to that specific request for comments. To date, the PUC has issued three sets of "Commissioner Guidance" and received a large number of stakeholder comments in response to each one. The PUC plans to issue its "Market Design Draft Plan" by October 21, 2021, with the final Market Design Plan issued by December 19, 2021.

In the only completed rulemaking to date, Project No. 51871, *Review of the ERCOT Scarcity Pricing Mechanism*, the PUC adopted amendments to 16 Texas Administrative Code ("TAC") § 25.505, relating to reporting requirements and the scarcity pricing mechanism in the ERCOT power region, with changes to the proposed text as published in the May 21, 2021 issue of the *Texas Register* (46 TexReg 3227). These amendments modify the value of the low system-wide offer cap ("LCAP") by eliminating a provision that ties the value of the LCAP to the natural gas price index and replaces it with a provision that ensures resource entities are able to recover their actual marginal costs when the LCAP is in effect.

For Project No. 51830, *Review of Certain Retail Electric Customer Protection Rules*, the PUC proposes amendments to existing 16 TAC §§ 25.43, 25.471, 25.475, 25,479, and 25.498, and also proposes new 16 TAC § 25.499, relating to Acknowledgement of Risk Requirements for Certain Commercial Contracts. These proposed rules will implement an amendment to Texas Utilities Code § 17.003(d-1)(c) enacted by the Texas Legislature requiring electric utilities and retail electric providers to periodically provide to customers information concerning load shed, type of customers and procedure to be considered for critical care or critical load, and reducing electricity use at times when involuntary load shed events may be implemented. These proposed rules will also prohibit the offering of wholesale indexed products to residential or small commercial customers and require customers other than residential or small commercial customers to sign an acknowledgment of risk prior to enrolling in any indexed products or products that contain a separate assessment for ancillary service charges. The amendments will also pass additional, related customer protections.

With regard to weatherization, in Project No. 51840, *Rulemaking to Establish Weatherization Standards*, the PUC proposes new 16 TAC § 25.55, relating to weather emergency preparedness, to implement weather emergency preparedness measures for generation entities and transmission service providers in the ERCOT power region, as required by SB 3. Proposed 16 TAC § 25.55 represents the first of two phases in the PUC's development of robust weather emergency preparedness reliability standards. The PUC said the primary objective of phase one is implementing weather emergency preparedness reliability standards to ensure that the electric industry is prepared to provide continuous reliable electric service throughout this upcoming winter season and to comply with the statutory deadline for the adoption of weather emergency preparedness reliability standards set forth in SB 3. Further, the proposal requires a notarized attestation from the highest-ranking representative, official, or official with binding authority over each entity attesting to the completion of all required activities. The PUC will develop phase two of the weather emergency preparedness reliability standards in a future project, which will consist of a more comprehensive, year-round set of weather emergency preparedness reliability standards that will be informed by a robust weather study that is currently being conducted by ERCOT in consultation with the Office of the Texas State Climatologist.

In Project No. 52312, *Review of Administrative Penalty Authority*, the PUC proposes amendments to existing 16 TAC § 22.246, relating to Administrative Penalties, and 16 TAC § 25.8, relating to a Classification System for Violations of Statutes, Rules, and Orders Applicable to Electric Service Providers. These proposed rules will implement an amendment to the Public Utility Regulatory Act ("PURA") § 15.023(b-1) enacted by the 87th Texas Legislature that establishes an administrative penalty not to exceed $1,000,000 for violations of PURA § 35.0021 or § 38.075, each relating to Weather Emergency Preparedness.

The PUC requested comments from stakeholders in Project No. 52287, *Power Outage Alert Criteria*, regarding provisions of SB 3 that directed the PUC to participate in a multiagency effort to develop a power outage alert system to be activated when the power supply in the state may be inadequate to meet demand. The legislation directed the PUC to adopt criteria for the content, activation, and termination of the alert system. In its request for comments, PUC Staff said the power outage alert system "could represent a critical component of the state's ability to respond to future power emergencies," and accordingly, PUC Staff welcomed "other insights and contributions on how to design this system."

In Project No. 52345, *Critical Natural Gas Facilities and Entities*, the PUC proposes amendments to existing 16 TAC § 25.52, relating to Reliability and Continuity of Service. These proposed amendments will implement changes made to PURA § 38.072(a) and (b) enacted by the 87th Texas Legislature, adding end stage renal disease facilities to the list of health facilities prioritized during system

restoration following an extended power outage. These amendments will also implement PURA § 38.074 by requiring a critical natural gas facility to provide critical customer information to the utility from which it receives electric delivery service and requiring the utility to incorporate this information into its load-shed and restoration planning.

The PUC seeks to amend 16 TAC § 25.505 to adjust the high system-wide offer cap ("HCAP") from $9,000 per mega-watt/hour ("MWh") to $4,500 per MWh in Project No. 52631, *Review of 25.505*. In addition, the PUC requested comments from stakeholders related to any consequences the HCAP change could have relating to the value of lost load, which is set at the HCAP when the HCAP is in effect. PUC Staff has identified other topics for future rulemakings, which include Project No. 51888, *Review of Critical Load Standards and Processes*; Project No. 51841, *Review of 16 TAC § 25.53 Relating to Electric Service Emergency Operations Plans*; and Project No. 52301, *ERCOT Governance and Related Issues*, among others.

In parallel with the multitude of PUC rulemakings, RRC Staff has proposed new rules to implement energy reliability reforms included in House Bill ("HB") 3648 and SB 3. Filed by Staff on September 10, 2021, the proposed rules specify the criteria and processes by which Texas natural gas facilities are to receive energy emergency critical designations. Under HB 3648, the RRC is to collaborate with the PUC to designate certain natural gas facilities as critical during energy emergencies. SB 3 includes reform measures to identify gas units critical for the state's energy grid, and requirements for the weatherization of such units. The proposed rules would implement Section 4 of SB 3 as well as Section 1 of HB 3648 by specifying various criteria and processes by which natural gas facilities receive critical customer or critical gas supplier designations. If designated as critical under the new rules, a natural gas facility's operator must directly provide "Critical Customer Information" to relevant electric entities, which can include electric utilities, municipal-owned utilities and electric cooperatives. The proposed new rules require an operator of a natural gas facility designated as critical to acknowledge the facility's critical status by filing a new form with the RRC. However, the proposed rules allow for exemptions if operators certify that their facilities are not prepared to operate during a weather emergency. The rules create a new $1,000 penalty for operators that fail to file appropriate forms relating to critical unit designation, and a new $2,500 penalty for failure to provide critical customer information. The agency estimates that 6,200 operators will be required to comply with the proposed new rule and amendments.

In addition to the above-listed rulemakings at both the PUC and RRC, securitization cases have been opened and are ongoing at both agencies. Back in June, Governor Abbott signed legislation authorizing the use of securitized debt to recover some expenses incurred by ERCOT and ERCOT market participants during Winter Storm Uri. The law, HB 4492, identified two specific categories of expenses—"Default Balance" expenses, which HB 4492 defined as money owed to ERCOT because of financial defaults by market participants, and "Uplift Balance" expenses, which HB 4492 defined as ancillary service charges and reliability deployment price adders imposed in excess of the system-wide offer cap ("SWOC"). On July 16, 2021, ERCOT made two filings with the PUC relating to both the Default Balance provisions and the Uplift Balance provisions of HB 4492. These filings can be found on the PUC interchange in Docket Nos. 52321 and 52322, respectively.

Under its Default Balance filing, ERCOT seeks a PUC order to finance up to $800 million. ERCOT proposes to recover the Default Balance by assessing non-bypassable default charges on Qualified Scheduling Entities ("QSEs") and Congestion Revenue Right ("CRR") Account Holders. ERCOT proposes to allocate default charges on a monthly basis and base the allocation on the QSE's or CRR account holder's volume of activity in the market during the most recent month for which final settlement data is available. Further, ERCOT proposes to allocate default charges to existing wholesale market participants, including QSEs and CRR account holders that are in payment breach with ERCOT but still participate in the market, as well as market participants who enter the ERCOT wholesale market after the issuance of the Debt Obligation Order. The PUC held a hearing on ERCOT's Default Balance filing on August 23, 2021, and issued a Draft Order on October 8, 2021.

For its Uplift Balance filing, ERCOT seeks authorization to obtain financing of an amount of up to $2.1 billion. ERCOT also seeks reasonable costs to implement the related Debt Obligation Order. Eligible costs for financing include documented Reliability Deployment Price Adder ("RDPA") charges and Ancillary Service costs above the PUC's SWOC during the Winter Storm Uri emergency period. The PUC has also opened a third related docket, Docket No. 52364, in which load-serving entities will provide documentation of exposure and opt out from the Uplift Balance (and associated recovery). Entities eligible to make a one-time opt-out election include municipally-owned utilities, electric cooperatives, river authorities, some transmission voltage customers, and some retail electric providers. ERCOT proposes to disburse the proceeds of the Uplift Balance financing by issuing an invoice for payment to each QSE that represents an LSE that the PUC deems eligible to receive such proceeds. To recover the Uplift Charge, ERCOT proposes to allocate a non-bypassable charge to QSEs on a daily basis. The PUC held a hearing on ERCOT's Uplift Balance filing on August 24 and August 25, 2021. Following the hearing, the parties reached a partial settlement, which was filed on September 20, 2021 and was considered at a specially-called open meeting on September 30, 2021. Minutes before the Commissioners took up the docket, they received a letter from Lieutenant Governor Dan Patrick in opposition to the proposed settlement agreement. However, the Commissioners proceeded to approve the settlement agreement. Commission Counsel issued a Draft Order on October 8, 2021. The statutory deadline for the PUC to issue Final Orders in both dockets is October 14, 2021.

On the gas side, 11 local distribution gas utilities have filed with the RRC for approval of $3.6 billion in extraordinary gas costs related to Winter Storm Uri in response

to HB 1520, which authorized utilities to seek securitization of these costs. Under these applications, the utilities seek securitization in order to be reimbursed for the costs incurred during the storm. The securitized amount for all the utilities will be combined and collected (with interest) and charged to customers for the next several years—possibly decades. During the storm, gas prices rose from $3 per million British Thermal Units (MMBtu) to approximately $400 per MMBtu. This resulted in a massive jump in gas expenses incurred by the utilities. Atmos Energy, the state's largest gas utility, is seeking more than $2 billion through the securitization process. CenterPoint Energy and Texas Gas Service, the state's second and third largest gas utilities, are seeking $1.1 billion and $290 million, respectively. The remaining eight utilities are seeking anywhere from $69 million to $285,000. Under HB 1520, the RRC has 150 days to review the requested securitization amounts and determine how much may be collected from customers. This is the first such proceeding ever considered at the RRC.

As these rulemaking projects, market reform efforts, and securitization implementations proceed at the PUC, RRC, and ERCOT, we will continue to provide updates and analysis of the impacts to utilities and customers across the state.

[1]See "Historic Winter Storm Prompts Widespread Outages," by Taylor Denison, Chris Brewster, and R.A. ("Jake") Dyer.
[2]See "A Regular Session like no Other – Recap of the Regular Session of the 87th Texas Legislature," by Ty Embrey.

Taylor Denison is an Associate in the Firm's Energy and Utility Practice Group. If you would like more information about this article or have questions related to these or other matters, please contact Taylor at 512.322.5874 or tdenison@lglawfirm.com.

BUYING AND SELLING WATER AND WASTEWATER SYSTEMS – LET'S MAKE A DEAL, BUT HOW?

by David J. Klein

There are over 3,000 water systems and over 800 wastewater systems registered with the Public Utility Commission of Texas ("PUC"), meaning, that they possess a certificate of convenience and necessity ("CCN") or an exempt registration from the PUC. There are even more systems out there that, right or wrong, are not registered with the PUC. Like any other asset, utility systems are bought and sold every day by two willing parties; and they are typically transferred for at least one of the following three reasons: (1) investors are looking to enter the utility service industry in Texas, (2) existing utility service providers are looking to expand their footprint in Texas to achieve better economies of scale, and/or (3) utility system owners are looking to downsize or exit the utility service industry altogether, either voluntarily or involuntarily.

When looking to buy or sell a water or wastewater system, the process is unfortunately more complicated than just finding a willing buyer or seller and then quickly closing on a transaction. There are regulatory approvals that the parties must secure from the PUC and Texas Commission on Environmental Quality ("TCEQ") to complete a transaction. To that end, some approvals are obtained pre-closing, and others are completed post-closing.

The extent of the regulatory hoops that a buyer and seller have to jump through depends on their corporate classification. Generally speaking, water and wastewater systems are owned by either (1) for profit corporations, known as investor-owned utilities ("IOUs"); (2) non-profit corporations, known as water supply corporations or sewer service corporations (collectively "WSCs"); (3) water districts, such as municipal utility districts, water control and improvement districts, and special utility districts; and (4) municipalities.

In Texas, if the buyer of a water or wastewater system is an IOU or a WSC, then the parties must obtain PUC approval of the transfer of the utility system and CCN. Specifically, Texas Water Code § 13.301 provides that on or before the 120th day before the effective date of a sale, acquisition, lease, or rental of a water or sewer system owned by an IOU or a WSC…shall: (1) file a written application with the [PUC] and (2) issue notice of the application, unless public notice is waived by the PUC. In other words, the parties must first negotiate and enter into a contract to transfer the utility system(s) and CCNs. But, the parties cannot close on the transfer of the system and CCN, until they prepare and file an application at the PUC and secure the agency's approval of that application. If the buyer is a water district or a municipality, then PUC approval is still required, but it is subject to a different process.

As to the PUC application process for a buyer that is an IOU or WSC, there are many potential pitfalls that can delay or potentially bring the acquisition process to a halt. Even worse – the PUC could deny the application! In processing a utility system transfer application that is subject to Texas Water Code § 13.301, the PUC will likely require the buyer to demonstrate that it has the financial, managerial, and technical capability for providing continuous and adequate service to the service area to be transferred. In the event that the PUC believes that the buyer cannot prove up those factors, the PUC could require that the buyer provide a bond or other financial assurance in a form and amount specified by the PUC to ensure continuous and adequate utility service is provided. The buyer and seller will also need to have detailed maps of the CCN area to be transferred. Plus, in addition to the PUC's review of the transfer application, the customers of the system are entitled to notice of the application, and they could protest the application, causing further delay and expense.

As a final note on utility system transfer applications, another important consideration is determining the rates that the acquiring entity will charge the customers, post-closing. To that

end, the Texas Legislature enacted a new law in 2021, providing buyers with some additional flexibility.

As noted above, the parties will also need to seek approval from the TCEQ to transfer either the public drinking water system authorization or wastewater treatment plant permit. Plus, there could be other local permits or authorizations that would need to be transferred too, such as groundwater permits or contractual rights/obligations. The timing of these steps may be post-closing events, but it will depend on the permit.

Ultimately, the buyers and sellers must evaluate a host of factors to get from negotiating an agreement to closing, with some factors being shared and others being unique to just one party. Consequently, it is clear that preparation for the transfer process, as well as creating a well-prepared utility system and CCN transfer application, are critical steps.

David Klein is a Principal in the Firm's Districts and Water Practice Groups. If you have any questions regarding buying or selling a water or wastewater system, please contact David at 512.322.5818 or dklein@lglawfirm.com.

ASK SHEILA

Dear Sheila:

I'm a small business owner with 10 employees total and serve as both the owner and general manager. I've always been told that small employers can't be sued for sexual harassment. Is this true? Could I be held individually liable for sexual harassment that occurs in my workplace? As a business owner, what steps can I take to prevent sexual harassment, and what should I do when an allegation of harassment is brought to my attention?

Sincerely,
Small Business Owner Concerned about Sexual Harassment Liability

Dear Small Business Owner:

During the latest regular Texas Legislative Session, two new laws (SB 45 and HB 21) were passed that directly relate to your question about small businesses' exposure to sexual harassment liability.

First, you are correct that the longstanding Texas law was that employees could bring a claim of harassment or discrimination against their employer only if the employer had 15 or more employees. However, SB 45 changed the definition of employer for the limited purpose of sexual harassment to include any person who "employs one or more employees." Now, even employers with one employee will be liable for sexual harassment in their workplace (though the 15+ employee rule still applies for discrimination claims based on other protected classes, or for claims under federal law).

You also raised the issue of individual liability. Under SB 45, the definition of employer was extended to include not just employers, but any person who "acts directly in the interests of an employer." Such persons could include managers and supervisors, human resource professionals, and general managers, like yourself. This means that not only could your small business be held liable, but you, or any supervisor or manager at the company, could also be individually liable if you knew or should have known about a claim of sexual harassment and didn't take "immediate and appropriate" remedial action. While the definition of "immediate" is not yet defined, we anticipate it requires a swift employer response to an allegation of sexual harassment.

Finally, you asked about ways to prevent sexual harassment, and how you should respond to harassment complaints. We recommend your small business adopt a clear anti-harassment policy, and provide sexual harassment training to your employees with specific instruction on how to report harassment. When you receive a complaint, you need to act quickly. Remove the subject from direct contact with the complainant or place the subject on paid administrative leave pending investigation, if separation is impossible. Conduct a fact-finding investigation, or hire an independent investigator to do so, and determine whether the harassment occurred. If evidence of harassment or other wrongdoing is found, address with prompt disciplinary action and keep the complainant informed of all remedial actions taken.

"Ask Sheila" *is prepared by Sheila Gladstone, Chair of the Firm's Employment Practice Group, and Emily Linn, an Associate in the Firm's Employment Practice Group. If you would like additional information or have questions related to this article or other employment matters, please contact Sheila at 512.322.5863 or sgladstone@lglawfirm.com, or Emily at 512.322.5869 or elinn@lglawfirm.com.*

IN THE COURTS

Water Cases

Prototype Mach. Co. v. Boulware, Kinney Cty. Groundwater Conservation Dist., et al., No. 13-19-00491-CV, 2021 WL 3196235 (Tex. App.—Corpus Christi July 29, 2021, no pet. h.).

This case focused on a groundwater dispute which arose when several entities (the "Applicants") filed permit applications with the Kinney County Groundwater Conservation District (the "District") seeking authorization for the withdrawal of groundwater. In August 2004, the District held a preliminary hearing on the applications at which protestants could contest the permit applications. Under the District's rules, a protestant needed to submit a registration form at the preliminary August 2004 hearing in order to protest the applications at a later date.

Ultimately, the District approved the Applicants' requests, but authorized the use of significantly less groundwater than the Applicants sought. The Applicants were dissatisfied with the decision and filed a lawsuit against the District to contest the decision. The District and the Applicants eventually negotiated a settlement agreement and were preparing to dismiss the lawsuit when suddenly, over two years after the Applicants first filed suit against the District, Prototype Machine Company ("Prototype") sought to intervene in the lawsuit. Prototype attempted to challenge the District's 2005 decision to grant permits to the Applicants. The District and the Applicants filed a joint motion to sever all of Prototype's causes of action into a separate suit, which the trial court granted.

Prototype's subsequent attempt to prosecute its claims in the new, separate lawsuit failed—the trial court determined "that Prototype's claims were untimely, that Prototype's intervention would unduly complicate the case, and that Prototype lacked standing to bring its claims." Prototype appealed this finding to the Thirteenth Court of Appeals. The court upheld the trial court's determination, stating that "[t]o the extent that Prototype attempts to challenge the 2005 District-issued permits… we conclude that Prototype did not exhaust its administrative remedies as required by the water code to challenge the 2005 [D] istrict-issued permits." The court reasoned that participation in the August 2004 preliminary hearing on the permit applications was a prerequisite to judicially challenging the 2005 District-issued permits. In other words, because Prototype did not administratively challenge the applications as allowed under the District's rules, Prototype failed to exhaust its administrative remedies and lost its right to subsequently challenge the applications or related permits.

Neches and Trinity Valleys Groundwater Conservation Dist. v. Mountain Pure TX, LLC, No. 12-19-00172-CV, 2019 WL 4462677 (Tex. App.—Tyler Sept. 18, 2019, pet. denied) (petition for review denied by the Texas Supreme Court on September 3, 2021).

The dispute in this case arose from the efforts of the Neches and Trinity Valleys GCD (the "District") to enforce its permitting rules against Mountain Pure TX, LLC ("Mountain Pure"). The District's rules stated that generally all persons owning a groundwater well must obtain permits to drill and operate the well. As a governmental entity, the District was protected by governmental immunity, meaning that the District could not be sued in Texas courts except for in specific circumstances allowed by the State of Texas. Mountain Pure owned a spring water bottling plant within the District's jurisdiction. Mountain Pure had never applied for a permit from the District because Mountain Pure contended that it did not own or operate a water well. Mountain Pure instead argued that the water it bottled and sold came from an "underground formation from which water flow[ed] naturally to the surface of the earth," and that the District did not have authority to regulate spring water.

When the District demanded that Mountain Pure apply for groundwater operating permits and Mountain Pure refused, the District sued Mountain Pure and an affiliated entity, Ice River. Ice River immediately ceased its business with Mountain Pure. Mountain Pure proceeded to file two counterclaims against the District: (1) a claim for tortious interference with the Ice River contract; and (2) a takings claim alleging that the District's regulation of Mountain Pure's property (i.e. groundwater) entitled Mountain Pure to compensation. The trial court determined that the District's governmental immunity protected the District against the claim for tortious interference, but allowed Mountain Pure to continue pursuing its takings claim against the District, reasoning that the Texas Constitution allows for takings claims against governmental entities. The District immediately appealed that decision to the Tyler Court of Appeals.

The Tyler Court of Appeals' analysis largely focused on whether Mountain Pure properly asserted a takings claim. The court

explained that a regulatory taking may occur in one of two ways. First, when a governmental agency imposes restrictions denying landowners all economically viable use of their property, rendering the property valueless. Second, when a governmental agency imposes restrictions that unreasonably interfere with landowners' rights to use and enjoy the property. The Court ultimately held that no regulatory taking had occurred because: (1) even after the District's threatened enforcement of its rules, the bottling plant retained a value of $4,090,000, meaning that Mountain Pure retained economically viable uses for the property; (2) Mountain Pure had only alleged economic impacts stemming from future lost profits, which are not generally considered in the takings analysis; and (3) Mountain Pure's investment-backed expectation was "the bottling of spring water" and there was "no showing that the enforcement of the [rules] and accompanying… fee [would] affect production." Because Mountain Pure failed to allege facts showing a regulatory taking under Texas law, the court found that the takings claim was not properly asserted and the District retained its governmental immunity insulating it from suit. Accordingly, the court reversed the trial court's decision that had allowed Mountain Pure to maintain its takings claim, and the court dismissed Mountain Pure's takings claim against the District.

In February of 2020, Mountain Pure filed a petition for review with the Texas Supreme Court. After receiving briefing on the petition, the Texas Supreme Court denied the petition for review on September 3, 2021.

Litigation Cases

Austin Court of Appeals Decides Contract Dispute by Analyzing the Entire Contract as Opposed to Analyzing a Clause in Isolation.

In *Groba v. Loree & Lipscomb*, the Austin Court of Appeals held a contingent-fee provision was unambiguous when read together with another provision limiting its scope. No. 03-20-00137-CV (Tex. App.—Austin July 22, 2021, no pet. h.) (mem. Op.). Groba hired the Loree & Lipscomb law firm ("Law Firm") to represent him in litigation against Groba's insurance company. Groba entered into a contingent-fee contract with Law Firm. Law Firm informed Groba of a settlement offer from Groba's insurance company, advising Groba to accept. Groba refused, instructing Law Firm to continue the litigation. Groba's counsel informed Groba that, due to Groba's unreasonable refusal of the settlement offer, Law Firm would be withdrawing from representation. The withdrawal was authorized by the parties' contingent-fee contract. Law firm then asserted its interest in fees and expenses. Groba challenged the interest. The trial court held in favor of Law Firm. Groba appealed.

The issue before the Austin Court of Appeals was whether the contractual provision obligating Groba to reimburse Law Firm's costs and expenses was ambiguous. In analyzing the issue, the Austin Court of Appeals found the pertinent provisions of the Contract came from paragraph 2 and paragraph 6. Paragraph 2 provided, in relevant parts:

"If Attorney chooses not to pursue or to discontinue any litigation, unless otherwise herein provided, Client shall not be obligated to pay attorney's fees or reimburse Attorney's expenses advanced on behalf of client."

Paragraph 6 provided, in relevant parts:

"Nevertheless, if in Attorney's opinion a fair and reasonable settlement offer has been made and Client rejects the advice of Attorney to settle, Client, at Attorney's option, shall be obligated to immediately reimburse Attorney for costs and expenses incurred to that time. Attorney may also withdraw from the case and retain a lien on said claims and causes of action for the attorney's fees and expenses referred to above."

Groba argued there was an issue of material fact concerning the meaning of paragraph 2, because the paragraph "would cause an ordinary person to believe that if the representation ended by attorney's choice then there would not be any funds required to be paid." The court disagreed, concluding that the only reasonable interpretation is that Paragraph 6 set forth an exception to paragraph 2. Thus, the Contract provision was interpreted in the context of the entire contract. The Contract was held to be unambiguous as a matter of law.

Austin Court of Appeals Denies Motion to Compel Arbitration.

In *St. David's Healthcare Partnership, LP et al. v. Fuller*, the Austin Court of Appeals affirmed the denial of a motion to compel arbitration, because the binding arbitration policy was not incorporated by reference into the employment agreement. No. 03-19-00820-CV (Tex. App.—Austin June 3, 2021, no pet. h.). Appellant Fuller sued St. David's Healthcare Partnership (the "Hospital") for wrongful termination. In response, the Hospital filed a motion to compel arbitration under the Federal Arbitration Act ("FAA"). The trial court denied the motion. The Hospital filed an interlocutory appeal.

Upon being hired, Fuller signed an employment agreement with the Hospital which waived her right to a jury trial in the event of litigation arising out of the Agreement. The Employment Agreement contained an amendment provision, which stated:

"Amendment. No amendment or other modification of this Agreement will be effective unless and until it is embodied and until it is embodied in a written document signed by [the Hospital] and [Fuller]."

Later, in employment orientation, Fuller signed a separate agreement, agreeing to the Hospital's "Mandatory Binding Arbitration Policy." This separate agreement was not signed by the Hospital.

On appeal, the Hospital asserted that Fuller received notice of the Mandatory Binding Arbitration Policy and accepted its terms; Fuller's claims fell within the scope of the policy and therefore the Court should compel arbitration. Fuller contended the Hospital's

Mandatory Binding Arbitration Policy was an invalid amendment, because it was not signed by the Hospital.

The Austin Court of Appeals concluded that the clear and unambiguous language of the Employment Agreement established "that the parties intended to require any amendment or modification to the term of Fuller's employment to be in writing and signed by both parties." Thus, the Court held the arbitration agreement was invalid.

Air and Waste Cases

TJFA, L.P. v. Tex. Comm'n on Envtl. Quality, No. 03-19-00815-CV, 2021 WL 3118423 (Tex. App.—Austin July 23, 2021, no pet. h.).

On July 23, 2021, the Third District Court of Appeals in Austin rendered a decision in *TJFA, L.P. v. TCEQ and 130 Environmental Park, LLC* concerning whether or not TCEQ erred in issuing a municipal solid waste ("MSW") permit to 130 Environmental Park, LLC ("130 EP") to construct and operate a new Type I MSW landfill in Caldwell County. The appellate court found in favor of TCEQ and 130 EP after examining a range of issues raised by the plaintiff-appellant, TJFA, L.P.

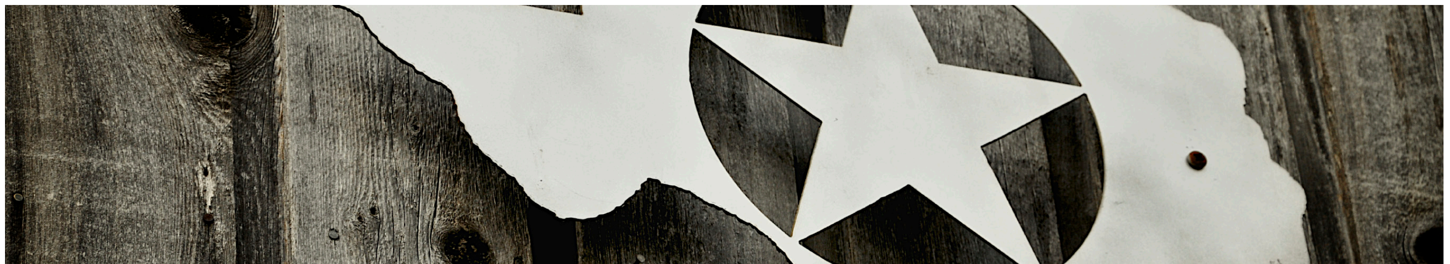
First, the Court considered whether filing a Parts I/II MSW permit application effectively grandfathers an application from a later enacted county siting ordinance. The Court ruled that if a Parts I/II permit application is declared administratively complete before a siting ordinance is enacted, it is sufficient to grandfather the application from the later enacted county siting ordinance.

Second, the Court upheld the TCEQ's long-standing practice of allowing access roads and screening berms to be outside of the permit boundary. The Court's reasoning is notable because it found that the TCEQ has authority to make the applicant comply with the permit conditions even outside of the permit boundary.

Finally, the Court also examined issues pertaining to alleged spoliation of evidence, drainage, and land-use, finding in favor of TCEQ and 130 EP on each of those issues.

"In the Courts" *is prepared by James Muela in the Firm's Water Practice Group; Wyatt Conoly in the Firm's Litigation Practice Group; and Sam Ballard in the Firm's Air and Waste Practice Group. If you would like additional information or have questions related to these cases or other matters, please contact James at 512.322.5866 or jmuela@lglawfirm.com, Wyatt at 512.322.5805 or wconoly@lglawfirm.com, or Sam at 512.322.5825 or sballard@lglawfirm.com.*

AGENCY HIGHLIGHTS



United States Environmental Protection Agency ("EPA")

EPA Takes Class-Based Approach to Assess Per- and Poly-fluoroalkyl Substances ("PFAS"). EPA has recently accelerated its comprehensive, multi-agency approach to assess the risks posed by PFAS. First, pursuant to its authority under the Safe Drinking Water Act ("SWDA"), on July 12, 2021, EPA released its contaminant candidate list 5 ("CCL5"), which lists broad classes of PFAS chemicals for potential future regulation as groups and will provide federal officials with comprehensive data regarding the effect PFAS have on drinking water. Second, on July 14, 2021, EPA released a national PFAS testing strategy under the Toxic Substances Control Act that requires industry to test the toxicity and other properties of PFAS and report the results to EPA's waste and water offices. Third, on July 14, 2021, the White House Council on Environmental Quality announced that it is supervising efforts by the U.S. Department of Agriculture to respond to livestock exposed to PFAS and by the Food and Drug Administration to study the risks of PFAS in cosmetics. Finally, EPA is considering regulating PFAS as a "hazardous substance" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and as a "hazardous waste" under the Resource Conservation & Recovery Act ("RCRA"). Although chemical industry critics believe that the class-based approach is unduly broad because it targets individual PFAS substances that may not be harmful, proponents contend that such regulation is necessary due to the toxin's known bioaccumulation and mobility properties.

EPA Plans to Revise Discharge Limits to Target PFAS and Nutrients. On September 8, 2021, EPA released the "Preliminary Effluent Guidelines Program Plan 15" ("Plan"), which announced new rulemakings and studies regarding PFAS in wastewater discharges and plans to revise effluent limitation guidelines ("ELGs") for power plants, landfills, the metal industry, and the Organic Chemicals, Plastics,

and Synthetic Fibers ("OCPSF") industry. The Plan also detailed EPA's intent to implement Meat and Poultry industry regulations that update ELGs to account for phosphorus and nitrogen in discharges from slaughterhouses, meat processing plants, and rendering operations. Importantly, the Plan is the first time EPA has publicly committed to implement rules that limit PFAS in wastewater discharges. Further, EPA will update Meat and Poultry ELGs for the first time since 2004. EPA will take comments on the Plan for 30 days after publication in the *Federal Register*.

New EPA Draft Testing Method for 40 PFAS Substances. On September 2, 2021, EPA published Draft Method 1633, the first draft laboratory analytical method with the ability to test for forty PFAS substances in several different environmental media including wastewater, surface water, and soil. Although EPA will not require the test method in CWA compliance monitoring until it officially promulgates Draft Method 1633, EPA is strongly encouraging state regulators to start using the new method to set discharge limits for National Pollutant Discharge Elimination System ("NPDES") permit holders and applicants. Further, upon official promulgation, EPA intends to use the testing method to establish technology-based PFAS effluent limits for several industry sectors. Finally, the testing method is likely to facilitate state efforts to regulate PFAS as a class, which was previously impracticable due to a lack of uniform and approved testing methods for PFAS in soil and water. Accordingly, proponents of the testing method, including state regulators and clean water groups, assert that it provides agencies with a valuable tool to limit PFAS exposure. Discharge limits for PFAS could potentially reduce the amount of chemicals that reach drinking water, hopefully reducing treatment costs for public water systems.

U.S. House of Representatives Passes PFAS Action Act of 2021. On July 21, 2021, the U.S. House of Representatives passed the PFAS Action Act of 2021 ("the Act") and it is now pending in the U.S. Senate Committee on Environment and Public Works. The Act seeks to designate PFOA and PFOS, the two main categories of PFAS, as "hazardous substances" under CERCLA, the Comprehensive Environmental Response Compensation and Liability Act. The Act is virtually identical to the PFAC Action Act of 2019, which passed in the U.S. House of Representatives but ultimately died in the Senate. The Act's goal of designating PFOA and PFOS as hazardous substances aligns with the EPA's objectives outlined in the agency's PFAS Action Plan, released in 2019.

Designating PFAS as hazardous substances under CERCLA could significantly expand the scope of potentially responsible parties and cleanup costs at CERCLA sites, impact compliance obligations and costs, increase enforcement actions, and trigger future litigation. Therefore, it is imperative that entities involved in the generation, transportation, disposal, or storage of PFAS-contaminated materials monitor the U.S. Senate's forthcoming decision on the Act.

EPA Updates Nutrient Water Quality Criteria for Lakes and Reservoirs. In response to climate change and its effect on harmful algal blooms, on August 13, 2021, EPA released the "Ambient Water Quality Criteria to Address Nutrient Pollution in Lakes and Reservoirs" ("Criteria"), the first revision of its nutrient water quality criteria for lakes and reservoirs in twenty years. In the Criteria, EPA established nitrogen and phosphorous standards for states to use in regulations to protect drinking water sources, aquatic life, and recreation from excess nutrients. Although several critics, including wastewater and drinking water utilities, assert that the Criteria will limit a state's ability to implement its own nutrient standards, EPA reasons that, due to flexibilities in the recommendations, states may adopt the Criteria or merely use them as guidance. Accordingly, EPA emphasizes that, because the Criteria provides general water quality standards, states can customize the standards and implement nutrient regulations based on local environmental conditions.

EPA & Corps Revert to Pre-2015 WOTUS Regime Following District Court's Vacatur Ruling. In response to an Arizona federal district court's ruling in *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency* that vacated and remanded the Navigable Waters Protection Rule ("NWPR"), a Trump-era rule that amended the definition of waters of the United States ("WOTUS"), EPA and the U.S. Army Corps of Engineers ("Corps") announced that they have halted NWPR's implementation and are now interpreting WOTUS in accordance with pre-2015 regulations, essentially returning to policies written during the 1980s and 1990s. After the Arizona court's ruling, three other federal district court judges declined to vacate NWPR; rather, because EPA and the Corps announced their intent to revise NWPR, the judges granted the agencies' request for voluntary remand. Based on the subsequent rulings, it is unclear whether the Arizona district court can issue a blanket vacatur that applies nationwide or if the vacatur only applies locally. Nonetheless, EPA and the Corps stated that, in light of the Arizona district court ruling, they are working "expeditiously" to establish a new WOTUS definition.

EPA Rescinds Guidance on CWA Permit Requirements. EPA's Office of Water is rescinding guidance interpreting the Supreme Court's decision in *County of Maui v. Hawaii Wildlife Fund*. The Court established seven criteria to consider when analyzing whether a discharge to groundwater is the "functional equivalent" to a direct discharge to navigable waters. Those factors are transit time, distance traveled, the nature of the material through which the pollutant travels, the extent to which the pollutant is diluted or chemically changed as it travels, the amount of pollutant entering the navigable waters relative to the amount that leaves the point source, the manner by or area in which the pollutant enters the navigable waters, and the degree to which the pollution at that point has maintained its specific identity. The Trump-era guidance added an eighth criteria for "the design and performance of the system or facility from which the pollutant is released." The Biden EPA is rescinding this eighth factor because it goes beyond the Court's seven criteria and because the guidance was issued without proper deliberation within EPA or its federal partners. The Office of Water is determining the next steps, but EPA has said in the interim that

the Supreme Court's decision "provides guiding principles regarding when a discharge to groundwater is jurisdictional under the Clean Water Act that permit writers can use to implement the decision." EPA's September 15, 2021 memo finds the decision does not suggest that the existing, or lack, of a state groundwater protection program has any bearing on whether the "functional equivalent" analysis applies, thus the existence of a state program does not obviate the need for NDPES permitting authorities to apply the Supreme Court's seven factor test. EPA will continue to conduct a site-specific, science-based evaluation.

White House's Justice40 Initiative to Include Critical Clean Water and Wastewater Infrastructure. On July 20, 2021, the White House released an interim implementation guidance to agency heads that selected several EPA programs, including the drinking water state revolving fund, the clean water state revolving fund, the reducing lead in drinking water program, and the Superfund remedial program, to implement its Justice40 initiative, which aims to allocate forty percent of the benefits from certain federal spending initiatives to environmental justice ("EJ") communities. The guide does not instruct agencies how to calculate EJ benefits and orders them to develop their own approach to implement the pilot program. However, according to the guide, within sixty days each participating agency must send to the White House Office of Management & Budget ("OMB") an assessment of the benefits the program provides. Further, within 150 days, each agency must provide the OMB with the method the agency uses to calculate the program's EJ benefits. The guidance also includes a draft definition of disadvantaged communities eligible to receive benefits under Justice40, including high and/or persistent poverty, high transportation cost/low transportation access, high energy cost/low energy access, disproportionate environmental stressor burden and high cumulative impacts, and access to healthcare. Covered programs include investments in climate change, clean energy, energy efficiency, and critical clean water and wastewater infrastructure.

EPA Releases Environmental Justice Guidance Documents. In the July 2021 edition of *The Lone Star Current*, we reported on EPA's plans to release a series of three Environmental Justice guidance documents. We reported on the first guidance document, released in April 2021, outlining actions intended to strengthen enforcement and advance the protection of "overburdened communities" with Environmental Justice concerns. Since that time, EPA has released the remaining two guidance documents.

EPA released the second guidance document in the series, entitled "Strengthening Environmental Justice Through Criminal Enforcement," on June 21, 2021. This second guidance document outlines actions to advance EPA's Environmental Justice goals through criminal enforcement matters by:

- Strengthening detection of environmental crimes in overburdened communities;
- Improving outreach to victims of environmental crimes; and
- Enhancing remedies sought in environmental criminal cases.

On July 1, EPA issued the third guidance document, entitled, "Strengthening Environmental Justice Through Cleanup Enforcement Actions," which urges EPA Regional Offices to increase cleanup program enforcement under CERLCA and RCRA, particularly at sites that "most impact overburdened communities." The document sets forth five general objectives:

- Require responsible parties to take early cleanup actions;
- Ensure prompt cleanup actions by responsible parties;
- Improve enforcement instruments;
- Increase oversight of enforcement instruments; and
- Build trust and capacity through community engagement.

EPA Proposes Revisions to Federal Greenhouse Gas Emissions for Vehicles. On August 5, 2021, EPA issued a Notice of Proposed Rulemaking ("NPRM") to revise the federal greenhouse gas ("GHG") emissions standards for light-duty vehicles for model years 2023-2026. The proposed revisions generally set forth more stringent GHG emissions standards for the light-duty vehicle models, beginning with a 10 percent stringency increase for the 2023 models and increasing by about 5 percent year over year for future models. The written comment period on the NPRM ends on September 27, 2021.

In conjunction with the NPRM, on August 5, 2021 the Biden Administration issued an Executive Order on Strengthening American Leadership in Clean Cars and Trucks. The Executive Order sets a nationwide target to make half of all new passenger car and light truck sales in 2030 be zero-emission vehicles ("ZEVs"), including battery electric, plug-in hybrid electric, or fuel cell electric vehicles. Furthermore, the Executive Order directs the EPA and National Traffic Safety Administration to establish new fuel efficiency and emissions standards by July 2024, establish GHG standards for light- and medium-duty vehicles for model years 2027-2030, and establish GHG standards for heavy-duty vehicles through model year 2029.

Texas Commission on Environmental Quality ("TCEQ")

TCEQ Releases Emergency Preparedness Plan Template. During the 87th Regular Legislative Session, the Texas Legislature passed Senate Bill 3 ("SB 3") to improve reliability and weatherization efforts for utilities. SB 3 create Texas Water Code § 13.1394 to require "affected utilities," essentially water service providers, to provide critical infrastructure information to the Public Utility Commission by November 1, 2021, and submit an Emergency Preparedness Plan ("EPP") to TCEQ by March 1, 2022, for implementation by July 1, 2022. TCEQ published an EPP template, available at: https://www.tceq.texas.gov/drinkingwater/homeland_security/disasterprep/epp. TCEQ has also created an EPP Help Form for affected utilities to get help with SB 3 and EPPs: https://bit.ly/3pdqAZK

TCEQ Personnel Update. TCEQ's Districts section manager, Chris Ulmann, left the agency on August 23, 2021. In the

interim, Dan Finnegan will serve as acting manager for the Districts section until the position is filled. Finnegan is the TCEQ Water District Bond Team Leader and is familiar with processing water district bond applications, water district creation applications, emergency authorization approvals, and regional service provider certifications.

TCEQ Adopts Final Rule to Amend Public Notice and Participation Requirements. In the April 2021 edition of *The Lone Star Current*, we reported on TCEQ's proposed rulemaking to amend TCEQ's public notice and participation requirements related to waste, water, and air permit applications. The TCEQ Commissioners adopted a final rule on August 25, 2021 and published the final rule in the *Texas Register* on September 10, 2021.

The final rule creates additional alternative language requirements for applicants and the TCEQ on waste, water, and air permit applications. When they apply, the new language requirements affect public meeting notices and responses to hearing requests, and require an alternative language plain language summary of applications and live translation services during public meetings. During the rulemaking process, the public was very engaged and filed many comments requesting clarification of certain aspects of the proposed rule. In response to the public comments, TCEQ made clarifications or amendments to the proposed rule, including the following, before adopting it as a final rule:

- in the event of an alleged translation error, the original English version of a document shall be deemed conclusive;
- the rule does not require translation of any permit documents unless the applicant chooses to include such a document in a response to hearing request;
- the rule does not require licensed individuals (for example, engineers, surveyors, and geoscientists) to seal documents that are required to be translated and does not require translation of documents that are required to be sealed or stamped, unless the applicant includes them in a response to hearing request;
- new rule language provides for remedies in case of errors in translation and specifies that the English document controls and that if egregious or substantive errors are made with respect to notice, then re-notice may be required; and
- the rule provides definitions of "professional" and "competent" translation services.

The final rule went into effect on September 16, 2021. However, many of the requirements are not triggered until May 1, 2022. The requirements that are triggered now apply to Notices of Receipt of Application and Intent to Obtain Permit ("NORIs") and Notices of Application and Preliminary Decision ("NAPDs").

TCEQ Adopts Amendment to Air Quality Standard Permit for Concrete Batch Plants. On September 22, 2021, the TCEQ adopted an amendment to the air quality standard permit for concrete batch plants. TCEQ originally issued the concrete batch plant standard permit in 2000, amended it in 2003, and again in 2012. This latest amendment reinstates an exemption from emissions and distance limitations that was inadvertently removed during the 2012 amendment. The exemption operates to reduce crystalline silica air emissions accounting when TCEQ considers issuing the standard air permit.

TCEQ Proposes Rulemaking to Amend Industrial Solid Waste and Municipal Hazardous Waste Rules to Maintain Equivalency with RCRA Revisions. In the July 2021 edition of *The Lone Star Current*, we reported on a potential future TCEQ rulemaking to amend, repeal, and replace a number of sections of 30 Texas Administrative Code Chapter 335, Industrial Solid Waste and Municipal Hazardous Waste, in order to maintain equivalency with Resource Conservation and Recovery Act ("RCRA") revisions promulgated by EPA. On July 30, 2021, TCEQ published the proposed rulemaking, which seeks to update Chapter 335 to include federal rule changes set forth in parts of RCRA Clusters XXIV – XXVII. The most notable of the proposed changes involve:

- Revising the existing hazardous waste generator regulatory program by (1) reorganizing the regulations to improve their usability by the regulated community and by (2) providing greater flexibility for hazardous waste generators to manage their hazardous waste in a cost-effective and protective manner;
- Revising existing regulations regarding the export and import of hazardous wastes from and into the United States by applying a confidentiality determination such that no person can assert confidential business information claims for documents related to the export, import, and transit of hazardous waste;
- Revising rules to adopt EPA's methodology for determining the user fees applicable to the electronic and paper manifests to be submitted to the e-Manifest system;
- Revising rules to prohibit disposal of hazardous waste pharmaceuticals into the sewage system and codify the exemption for unused pharmaceuticals that are expected to be legitimately reclaimed from being classified as a solid waste; and
- Adding rules to add hazardous waste aerosol cans to the universal waste program.

TCEQ anticipates adopting a final rule in January of next year.

TCEQ Proposes Rulemaking to Clarify Composting Notice Process and Obsolete Terms. In the July 2021 edition of *The Lone Star Current*, we reported on a potential future TCEQ rulemaking to clarify and update existing notice language and requirements for composting facility applications. On July 30, 2021, TCEQ published the proposed rulemaking, which seeks to provide clarity on who will receive notice for compost Notifications of Intent ("NOIs"), and to remove other

vague mailing requirements. In addition, this rulemaking would incorporate applicability, fees, and reporting requirements from 30 TAC Chapter 330, Subchapter P into sections for registered and permitted facilities. Revisions and clarifications would also be made to various citations and other conflicting rules between multiple chapters. Lastly, broken and obsolete links, typos, misspellings, and grammar mistakes would be fixed throughout the rule to ensure clarity and readability, and provide overall effectiveness.

TCEQ anticipates adopting a final rule on December 15, 2021.

TCEQ Releases 2021 Recycling Market Development Plan. On September 1, 2021, TCEQ released the *2021 Recycling Market Development Plan* (the "2021 plan") as a follow up to the 2017 Study on the Economic Impacts of Recycling in Texas. The 2021 plan studies the use of recyclable materials as feedstock in processing and manufacturing and includes an update of economic impacts information for the recycling industry. The 2021 plan indicates that the recycling industry currently represents $4.8 billion of the Texas economy. The 2021 plan also discusses tools and mechanisms that can be used for material specific and cross-material strategies and opportunities to increase market development, decrease barriers, and promote recycling in the State of Texas.

Public Utility Commission of Texas ("PUC")

Governor Abbott Appoints New Commissioner to the PUC; One Vacancy Remains. In the previous two issues, we reported that all three Commissioners of the PUC resigned in the wake of Winter Storm Uri, and since that time, Governor Abbott has appointed a new Chairman, Peter Lake, and two new Commissioners, Will McAdams and Lori Cobos, to the PUC. Since then, on August 6, 2021, Governor Abbott made a new appointment to the PUC: Jimmy Glotfelty. Glotfelty is the former Director of Government Solutions for Quanta Services, the former Founder and Executive Vice President for Clean Line Energy Partners, and the former Managing Director for ICF Consulting. Additionally, Mr. Glotfelty was the former Director of the Office of Electric Transmission and Distribution and a Senior Policy Advisor to the Secretary of Energy for the U.S. Department of Energy, according to information provided by the Governor's office. Glotfelty's term will expire September 1, 2025. There remains one vacant PUC Commissioner position.

Update on PUC Rulemaking Projects. The PUC continues to implement market redesign changes required by the 87th Texas Legislature. The Commissioners are hosting regular "work sessions" designed to focus on different aspects of redesigning the ERCOT market, inviting panels of leading industry experts to come speak at each session. PUC Staff has opened various new rulemaking projects and has published a rulemaking calendar in Project No. 51715, providing insight about the rulemaking and implementation process the agency will undertake to address the recently enacted legislation. The PUC has published the following list of upcoming, pending, or completed rulemakings, among others:

- Project No. 52373, *Review of Wholesale Electric Market Design*
- Project No. 51871, *Review of the ERCOT Scarcity Pricing Mechanism*
- Project No. 51830, *Review of Certain Retail Electric Customer Protection Rules*
- Project No. 51840, *Rulemaking to Establish Weatherization Standards*
- Project No. 52312, *Review of Administrative Penalty Authority*
- Project No. 52287, *Power Outage Alert Criteria*
- Project No. 52345, *Critical Natural Gas Facilities and Entities*
- Project No. 52631, *Review of 25.505*
- Project No. 51888, *Review of Critical Load Standards and Processes*
- Project No. 51841, *Review of 16 TAC § 25.53 Relating to Electric Service Emergency Operations Plans*
- Project No. 52301, *ERCOT Governance and Related Issues*

ERCOT's Securitization Cases Progress at PUC. In June, Governor Abbott signed legislation authorizing the use of securitized debt to recover some expenses incurred by ERCOT and ERCOT market participants during Winter Storm Uri. The law, House Bill 4492, identified two specific categories of expenses—"default balance" expenses, defined as money owed to ERCOT because of financial defaults by market participants, and "uplift balance" expenses, defined as ancillary service charges and reliability deployment price adders imposed in excess of the PUC's System-Wide Offer Cap (SWOC). On July 16, 2021, ERCOT made two filings with the PUC relating to both the Default Balance provisions and the Uplift Balance provisions of HB 4492. These filings can be found on the PUC interchange in Docket Nos. 52321 and 52322, respectively. For more information, see Taylor Denison's Winter Storm Uri article on page 4.

PUC Extends Waiver of ERCOT Protocol Related to Confidential Outage Information. On June 24, 2021, the Commissioners voted to waive ERCOT Nodal Protocol § 1.3.1.1(1)(c), consistent with Chairman Lake's memo from the previous day, which protects outage information for sixty days for forced outages, effective for the time period of June 1, 2021 through September 30, 2021. Chairman Lake's memo stated that "we need more transparency and information about forced outages and that information should quickly be made available to the public." Under the ERCOT protocols, information regarding forced outages is considered protected and confidential for a 60-day period. However, after a call for conservation in early June due in part to a higher than expected number of forced generation outages, Chairman Lake stated that the public deserved to know "what generation units are unavailable, the amount of unavailable capacity, the cause of the outage, and when the units are expected to return to service." At the September 23, 2021 Open Meeting, the Commissioners voted to extend Chairman Lake's order directing ERCOT to make outage and derate reports available to the public within three days instead of the

standard 60 days. The current order was set to expire on September 30, 2021, so the Commissioners approved a motion to extend the order from October 1, 2021 to May 31, 2022.

PUC Opens Proceeding to Nominate Texas Energy Reliability Council Members. Senate Bill 3, passed by the 87th Texas Legislature, created a new Texas Energy Reliability Council ("TERC") to "(1) ensure that the energy and electric industries in this state meet high priority human needs and address critical infrastructure concerns; and (2) enhance coordination and communication in the energy and electric industries in this state."[1] Chapter 418, Subchapter J of the Texas Government Code describes the function and the membership of TERC and requires the PUC to nominate eight members to TERC. The PUC has opened a new proceeding, Project No. 52557, to nominate those members to TERC. The Executive Director filed a memo in that proceeding providing instructions for interested individuals to indicate their interest and describe their qualifications by submitting a letter of interest, a resume, at least one letter of support for the candidate's appointment from someone with a connection to the energy industry in Texas, and any additional information to inform the decision. The deadline to file the required information was September 30, 2021. Executive Director Thomas Gleeson stated during the September 23 Open Meeting that he intended to make selections for all eight spots by October 8, 2021. However, no selections have been publicly made.

PUC Report Details Reliability and Spending for Distribution Utilities. The PUC published its annual "Electric Utility Distribution System Spending and Reliability" report, which tracks reliability and reliability-related spending by the state's investor-owned electric utilities with distribution service. Included in the report are figures and calculations for Oncor Electric Delivery Company LLC ("Oncor"), CenterPoint Energy Houston Electric, LLC ("CenterPoint"), and six other utilities: El Paso Electric, Entergy Texas, Sharyland, Southwestern Public Service Company, Southwestern Electric Power Company, and Texas-New Mexico Power. Oncor and CenterPoint hold positions roughly in the middle of the pack as compared to other utilities with regard to the frequency and duration of outages on their distribution systems, the report shows. However, the Sharyland distribution system—a system acquired by Oncor in December 2016—rates comparatively high among all utilities with regard to the frequency and duration of outages, according to the report. The report also showed that in recent years, Oncor and CenterPoint—the state's two largest electric transmission and distribution utilities—more than doubled their gross capital expenditures for additions to their distribution system. The "Electric Utility Distribution System Spending and Reliability" report can be found under Docket No. 46735.

Electric Utility DCRF Applications Settle. As we previously reported, Texas-New Mexico Power Company ("TNMP"), AEP Texas ("AEP"), and Oncor filed applications with the PUC in April to adjust their Distribution Cost Recovery Factor (DCRF) to recover new investment in distribution equipment. All three of the cases have settled, and details on each are below:

TNMP filed its DCRF Application on April 5, 2021, in PUC Docket No. 51959, requesting an increase in its distribution revenues of $13,959,505. The parties unanimously reached an agreement in principle on all issues and filed the Stipulation and Settlement Agreement on July 1, 2021. In the Stipulation and Settlement Agreement, TNMP agreed to reduce its total distribution revenue requirement request by approximately $440,000, for a DCRF revenue requirement increase of $13,519,505, effective September 1, 2021. A Final Order approving the unanimous agreement is still pending.

On April 6, 2021, AEP filed its DCRF Application, in PUC Docket No. 51984, requesting an increase in its distribution revenues of approximately $54.56 million. The parties unanimously reached an agreement in principle on all issues and filed the Stipulation and Settlement Agreement on June 30, 2021. In the Stipulation and Settlement Agreement, AEP agreed to reduce its total distribution revenue requirement request by approximately $16.475 million, for a DCRF revenue requirement increase of $38,083,523, effective September 1, 2021. A Final Order approving the unanimous agreement is still pending.

Oncor filed its DCRF Application on April 8, 2021, in PUC Docket No. 51996, requesting an increase in its total distribution revenue requirement by $97,826,277. The parties unanimously reached an agreement in principle on all issues and filed the Stipulation and Settlement Agreement on June 17, 2021. In the Stipulation and Settlement Agreement, Oncor agreed to reduce its total distribution revenue requirement request by $10 million, for a DCRF revenue requirement increase of $87,826,277, effective September 1, 2021. A Final Order approving the unanimous agreement was issued on July 30, 2021.

Electric Utility EECRF Applications Settle. As we previously reported, TNMP, Oncor, CenterPoint, and AEP filed applications with the PUC in May and June to adjust their Energy Efficiency Cost Recovery Factor ("EECRF") to reflect changes in program costs and bonuses, and to minimize any over- or under-collection of energy efficiency costs resulting from the use of the EECRF. All four of the cases have settled, and details on each are below:

On May 27, TNMP filed its 2022 EECRF application with the PUC, seeking to adjust its EECRF to collect $7,225,543.49 in 2022. The parties unanimously agreed to a reduction of the adjustment by $49,187. Pursuant to the agreement, TNMP will collect $7,176,355.99 in 2022. On August 6, TNMP filed the Proposed Order, pending approval by the PUC. TNMP's EECRF filing can be found under Docket No. 52153.

Oncor filed its 2022 EECRF application with the PUC on May 28, 2021, seeking to adjust its EECRF to collect $83,760,515 in 2022. The parties have identified adjustments that should be made to Oncor's request and have reached an agreement in principle on the issues. The parties are currently working on finalizing the settlement agreement and documents, which are due to be filed by September 17, 2021. Oncor's EECRF filing can be found under Docket No. 52178.

On June 1, CenterPoint filed its 2022 EECRF application with the PUC, seeking

to adjust its EECRF to collect $63,367,922 in 2022. The parties have unanimously reached an agreement in principle on all issues, including a $115,000 reduction to CenterPoint's EECRF revenue requirement and the removal of $200,000 in historical administrative expenses, for a total reduction of $315,000 to CenterPoint's total EECRF tariff revenue requirement. Pursuant to the agreement, CenterPoint's revenue requirement will total $63,052,922 in 2022. The agreement was filed with the PUC on September 15, 2021. CenterPoint's EECRF filing can be found under Docket No. 52194.

AEP filed its 2022 EECRF application with the PUC on June 1, 2021, seeking to adjust its EECRF to collect $27,021,197 in 2022. Under a unanimous agreement that settles all issues in the case, the parties agreed to a reduction of $100,000 from the original request, so AEP will recover $26,921,197. The agreement was filed at the PUC on August 20, 2021. AEP's EECRF filing can be found under Docket No. 52199.

PUC Grants Oncor's Request for Extension of Deadline to File Base Rate Case. On May 10, 2021, Oncor filed an application with the PUC, requesting the PUC grant a good-cause exception to the October 2021 deadline to file its comprehensive base-rate review under 16 Texas Administrative Code (TAC) § 25.247. Under the PUC's rate review schedule rule for investor-owned electric utilities, each utility must file its comprehensive rate proceeding on or before the date listed in the rule, which is October 1, 2021 for Oncor. Oncor is also subject to a prior PUC order that it make a rate filing by that date (Docket No. 48929). In its good cause application, Oncor stated that good cause supported an extension of Oncor's filing deadline until June 1, 2022, due to challenges from the historic February 2021 winter storm event and the COVID-19 pandemic. Oncor also stated that an extension was necessary to "avoid further constraining the Commission and other parties' resources" during the transitional period of the PUC gaining "an entirely new slate of commissioners." PUC Staff and the parties who typically intervene in Oncor's base rate cases indicated that they either supported or were unopposed to Oncor's extension. On July 30, 2021, the PUC issued a Final Order granting Oncor's request and extending the deadline for Oncor to file its base-rate case from October 1, 2021 to June 1, 2022.

Railroad Commission of Texas (RRC)

RRC Staff Proposes Rules for HB 3648 and SB 3 Implementation. RRC Staff has proposed new rules to implement energy reliability reforms included in House Bill (HB) 3648 and Senate Bill (SB) 3. Filed by Staff on September 10, 2021, the proposed rules specify the criteria and processes by which Texas natural gas facilities are to receive energy emergency critical designations. For more information, see Taylor Denison's Winter Storm Uri article on page 4.

Gas Utilities File for Securitization. On June 30, 2021, eleven local distribution gas utilities across Texas filed for regulatory permission to charge their customers more than $3.6 billion in incremental gas costs incurred during Winter Storm Uri. Under the applications, the utilities would employ a unique form of financing known as "securitization" to receive the reimbursements, which then would be combined and collected (with interest) and charged to customers statewide for two to three decades. For more information, see Taylor Denison's Winter Storm Uri article on page 4.

[1]See Tex. Gov't Code § 418.302(a), enacted by Tex. S.B. 3, 87th Leg., R.S. (2021).

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