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THE LONE STAR CURRENT

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SERVICE FAILURES DURING HURRICANE BERYL ATTRACT LEGISLATIVE AND REGULATORY ATTENTION

by Roslyn M. Warner and Jake Dyer

On the heels of a May 2024 derecho, Hurricane Beryl made landfall near Matagorda, Texas on July 8, 2024 leaving more than 2.7 million Texans without power and resulting in ongoing political and regulatory fallout for Houston-area utilities.

Legislative Response

Shortly after the storm, Lt. Gov. Dan Patrick formed the Senate Special Committee on Hurricane and Tropical Storm Preparedness, Recovery, and Electricity. Since its creation, the Special Committee has devoted significant attention to CenterPoint Energy ("CenterPoint") who, among other services, maintains the electric poles and wires for more than 2.9 million customers in the greater Houston area.

In a series of hearings, Senate lawmakers invited testimony from regulators, public officials, and other utility executives. Several politicians also addressed the committee. Houston Mayor John Whitmire said that CenterPoint should reinforce its poles and take other action to prevent prolonged outages in the future. He said the city had to come up with its own online outage tracker "on the fly" because the CenterPoint outage map had failed. "I don't have any more patience [with CenterPoint]," he said.

But it was CenterPoint CEO Jason Wells who drew the most scrutiny. The Special Committee questioned Wells regarding the utility's faulty public communications, its lack of vegetation management, and other operational failures. Sen. Paul Bettencourt told Mr. Wells: "I know you say [the utility's response] is inexcusable, but it's really horribly inexcusable." Lawmakers also took the company to task for the failure of its online outage maps, noting that many Houstonians were forced to turn to online maps created by the Whataburger fast-food chain to determine which neighborhoods had power. Wells said the utility had employed internal servers to host its own maps, but that those servers became overwhelmed after more than 1 million Houstonians lost power. CenterPoint has since implemented a more versatile cloud-based outage tracker on its website.

Throughout multiple months of investigating CenterPoint's service failures at all levels of government, one concern has continually resurfaced: *was CenterPoint's recent $800 million expenditure for emergency generation (known as "Temporary Emergency Electric Energy Facilities" or "TEEEF") justified?* CenterPoint's $800 million sum far surpasses similar spending by other comparable Texas utilities, and the largest of the "emergency" generators went unused during Hurricane Beryl.

Questioning the company's priorities, Sen. Charles Schwertner, Chair of the Special Committee, noted that CenterPoint receives a rate of return — that is, profit — on its TEEEF expenditures but not on its expenditures for vegetation management. He noted that the CEO of the company that secured CenterPoint's TEEEF contract is a convicted felon, and that the TEEEF contract amount was far more expensive than that of a second bidder. "This doesn't smell good at all," he said. "I don't think it smells to anybody on this dais. Whose pockets are getting lined here?"

CEO Wells said it deployed all eighteen of its smaller TEEEF units in response to Beryl

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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

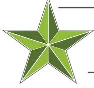
Stephen Malish has joined the Firm's Water Practice Group as an Associate. Stephen focuses on water-related legal and policy issues, including statutory and regulatory compliance, permitting, water rights, water resource management and development, contested cases, litigation and administrative proceedings, governmental relations, and open government. He also provides counsel in the governance, organization, and operation of local government entities. Prior to joining the Firm, Stephen clerked at law firms in Austin and for the Texas Board of Pharmacy. While in law school, he participated in the Mock Trial events. Stephen received his doctor of jurisprudence at the University of Houston Law Center and his bachelor's degree from the University of Texas.

Samantha Tweet has joined the Firm's Districts, Water, and Energy and Utility Practice Groups as an Associate. Samantha assists clients with matters relating to certificates of convenience and necessity, water supply, water quality, and water rights in addition to providing general counsel services. She represents various clients including municipalities, water districts, and water supply corporations. Samantha received her doctor of jurisprudence from Texas Tech School of Law. During law school, she was a Research Fellow at the Texas Tech Center for Water Law & Policy and clerked at the Texas Parks & Wildlife Department. She was also President of the Environmental Law Society. She received her bachelor's degree from Texas State University.

The sixth season is out now! You can listen to all six seasons by visiting lg.buzzsprout.com or our website at lglawfirm.com. You can follow us on LinkedIn, X, and Facebook to be notified when the latest episodes are released.

Season 6 Episodes

- The 15th Court of Appeals & The New Business Court | Gabrielle Smith featuring Chief Justice Darlene Byrne
- Employment Law Update | Employment Law Practice Group
- Unpacking Wastewater Regionalization | Nathan Vassar and Lora Naismith
- Making an Impact: A Primer on Impact Fees | David Klein
- Life as an Associate | Samantha Miller, Jake Steen, and Mattie Neira



MUNICIPAL CORNER

The Attorney General resolves question concerning public service appointments and nepotism laws. Tex. Att'y Gen. Op. KP-0471 (2024).

The Erath County Attorney requested an opinion from the Texas Attorney General (the "AG") to resolve questions relating to the Erath County Appraisal District Chief Appraiser's employment if their sibling is elected as the County Tax Assessor-Collector, and the effect of the siblings' simultaneous public service.

Appraisal districts, responsible for valuing property for *ad valorem* tax purposes, are managed by a board of five directors (the "Board") appointed by the taxing units in counties with fewer than 75,000 residents, such as Erath County. If the County Tax Assessor-Collector is not an appointed director on the Board, the Tax Assessor-Collector generally serves as a sixth, nonvoting director. The Chief Appraiser serves as the chief administrator of the appraisal office. The appraisal district's Board appoints the Chief Appraiser, who serves at the pleasure of the Board, and the Board sets the compensation of the Chief Appraiser.

The Erath County Attorney asked for guidance about Chapter 6, subsection 6.05(f) of the Texas Tax Code and whether this statute bars the Chief Appraiser's employment at the Erath County Appraisal District if their sibling becomes a member of the Board. This statute prohibits the Chief Appraiser from hiring individuals related to them, but the statute does not address whether the Board may employ someone as the Chief Appraiser if a member of the Board is related to the Chief Appraiser. The AG found that a court would likely conclude the Texas Tax Code does not prevent the Board from continuing to employ the Chief Appraiser if their sibling later joins the Board.

The AG also addressed whether the Chief Appraiser's employment violated nepotism laws outlined in the Texas Government Code, specifically Section 573.041. This statute prevents public officials from appointing, or confirming the appointment of, individuals related to them if those positions are compensated with public funds. Importantly, Section 573.041 does not apply if the public official does not hold appointment or confirmation authority. The AG determined here that the Chief Appraiser's sibling, who serves as the Erath County Tax Assessor-Collector and sits on the Board as a nonvoting director, lacks appointment authority over the Chief Appraiser since the sibling does not hold voting powers on the Board. Therefore, the AG concluded the nepotism prohibition in Section 573.041 doesn't apply here. However, if the Chief Appraiser continues serving in their role, their sibling cannot participate in any Board decisions related to the Chief Appraiser's employment or compensation.

The AG further determined that, even if the nepotism prohibition of Section 573.041 hypothetically applied in this circumstance, the Chief Appraiser could still retain their position under the continuous-employment exception in Section 573.062 of the Texas Government Code. This exception allows individuals to retain their positions if the individual was employed for at least 30 days before the related public official's appointment. Thus, if the Chief Appraiser was employed for 30 days prior to their sibling joining the Board, they could remain in their position.

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(along with such units on loan from other utilities), but that its larger TEEEF units can only be moved with some difficulty and not without proper permitting — which the company did not obtain. He said the larger units are useful for transmission-scale outages like those experienced during Winter Storm Uri in 2021, but that the company's hardened transmission system weathered Hurricane Beryl.

In an extraordinary turn, Sen. Phil King even apologized for sponsoring the 2021 legislation that authorized the TEEEF units and pledged to revisit the issue when the Texas Legislature reconvenes next year. "I feel like I've been taken advantage of," said Sen. King.

Regulatory Response

Within one week of the storm, the Compliance and Enforcement division of the Public Utility Commission of Texas ("PUC") opened a docket dedicated to investigating the emergency preparedness and response of utilities in the greater Houston area following severe weather events. PUC issued a lengthy list of objectives, including analysis of emergency operations plans, vegetation management plans, after-action reports, and storm hardening plans.

Since the docket was opened, PUC has issued Requests for Information

to numerous local governments, power generation companies, electric utilities, water and sewer utilities, and telecommunication utilities. In addition to formal discovery mechanisms, PUC Staff issued a Public Questionnaire for members of the public and small business to "share their experiences with electric service outages and restoration following Hurricane Beryl and the May 2024 derecho." PUC Staff is expected to prepare a draft report for the commissioners' consideration at the November 21 open meeting and finalize a report for the Governor and the Legislature by December 1.

During a PUC open meeting in mid-August, the commissioners echoed legislators' skepticism surrounding the $800 million TEEEF expenditures, particularly regarding the lease under which CenterPoint procured the generators. Commissioner Hjaltman recommended that CenterPoint renegotiate its options to terminate the TEEEF lease and consider the possibility of subleasing the assets. Commissioner Glotfelty requested more information about the parties involved in the TEEEF lease. Stakeholders have similarly weighed in on the issue. In mid-September, the Texas Consumer Association filed a complaint with PUC requesting revocation of CenterPoint's TEEEF expenditures.

Hurricane Beryl has additionally impacted CenterPoint's ongoing rate applications before PUC. On August 1, 2024, CenterPoint filed to withdraw its application to increase rates, which the company filed on March 6, 2024. CenterPoint was required to file the application according to PUC's filing schedule and a PUC order from February 2024, but the company argued that withdrawal is appropriate to focus on post-storm efforts and prepare for the next hurricane season.

When CenterPoint filed to withdraw, the case had been progressing for nearly five months and settlement discussions were ongoing. Intervenors, including municipal groups and the Texas Consumer Association, opposed the withdrawal, arguing that the company was required to file the case and does not have a unilateral right to withdraw. Municipal intervenors also argued that the company's application showed a rate decrease is warranted. In its application, the utility sought an approximate $60 million increase; the testimony of municipal intervenors recommended a $150 million decrease. The administrative law judge presiding over the application denied CenterPoint's withdrawal, finding no good cause for dismissing the case. On August 23, CenterPoint appealed the ruling to PUC, which has not yet been decided.

During an open meeting on September 12, 2024, PUC said that it would not decide on CenterPoint's pending appeal until its October 24, 2024 open meeting. CenterPoint also filed to withdraw from immediate consideration its separate multi-billion-dollar Resiliency Plan, a move that was unopposed by intervenors.

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SUD CONVERSION: A HAIL MARY FOR WSCs

by Danielle Lam

While the population in Texas hit 30 million in 2022, the State's water supplies are struggling to keep up with the growth.[1] The Texas Water Development Board's ("TWDB") 2022 State Water Plan predicts that in the next five decades, the State's water needs will exceed existing supplies as the demands for water for municipal use continue to grow.[2] Many wholesale and retail water providers are working on regional water supply projects to meet these growing demands, and these projects are often funded by low-interest state or local bonds.

However, non-profit water supply corporations have limited access to these projects due to federal law limiting the tax-exempt financing of "private activities." Under 26 U.S.C. § 141, a bond is considered a private activity bond if more than ten percent of its proceeds are used for private business purposes, and if either the principal or interest on more than ten percent of the bond's proceeds is directly or indirectly secured by, or payments are derived from, a private business use. Therefore, water supply projects funded by tax-exempt bonds often cap the participation of non-profit water supply corporations ("WSC") at ten percent to avoid jeopardizing the tax-exempt status of the bonds. If there are multiple WSCs participating, then those WSCs must split that ten percent.

There are over 750 active WSCs in Texas, many of which are located in the fast-growing counties surrounding Austin, Dallas, Fort Worth, Houston, and San Antonio. Some of these WSCs may be feeling the pressure of the exponential demand in service, but may be unable to increase their water supplies due to limited access to regional water projects and/or limited financing options. This is where special utility districts ("SUD") play a role. Under Chapter 65 of the Texas Water Code ("TWC"), a WSC may apply to the Texas Commission on Environmental Quality ("TCEQ") or submit a bill to the State Legislature to convert into a SUD.

WSCs and SUDs share many similarities. They are both subject to the Texas Open Meetings Act and Public Information Act, may have eminent domain authority, cannot levy *ad valorem* taxes, may be exempt from sales and property taxes, and may set their own rates.

But as a government entity, SUDs are not limited to only ten percent of regional water supply projects financed by tax-exempt bonds. Further, SUDs can issue their own tax-exempt revenue bonds or apply for a loan from the TWDB at tax-exempt rates. Other perks include eligibility for the Texas Municipal League Intergovernmental Risk Pool, Texas Counties and Districts

Retirement System, and TexPool, as well as governmental immunity. SUDs may also serve customers inside or outside of the SUD's jurisdictional boundaries as long as the customer is not in another certificate of convenience and necessity. Lastly, only out-of-district customers can appeal a SUD's rates or fees at the Public Utility Commission of Texas. On the other hand, SUDs are subject to federal and state election laws, public procurement and contract laws, the Public Funds Investment Act, and Chapter 395 of the Local Government Code regarding impact fees.

Interested WSCs can file a conversion application at TCEQ, which first requires a two-thirds vote of the WSC's membership. Also, if the boundaries of the proposed SUD overlap with a municipality, then the WSC needs to submit proof of the municipality's written consent. TCEQ will review the application to ensure it meets the criteria in TWC Chapter 65 and it may even conduct a hearing on the application. Alternatively, WSCs can work with a State Legislator to sponsor and carry a bill during a Legislative Session. The 2025 Legislative Session begins on January 14, 2025, and state legislators may begin filing bills on November 11, 2024, so WSCs interested in the legislative route should start taking action now.

However, SUD conversion is a multi-phase process, and obtaining a final TCEQ Order or enabling legislation is only the first part. Once a SUD is created it still needs to hold a confirmation election, subject to the Election Code, to confirm the district's creation and the permanent board of directors. Then, if the SUD was created by a bill from the Texas Legislature, the WSC must hold a meeting of its membership to vote on the dissolution of the WSC and conveyance of assets and debts. The SUD also needs to organize itself and submit regulatory compliance filings and create service and personnel policies in order to begin operations. Lastly, the WSC must wind up its business and convey all of its assets and debts to the SUD, which may be complicated if the WSC has loans, real property, and/or contracts to assign. Ultimately, although SUD conversion may sound like a daunting process, the benefits—especially access to regional water supply projects and better financing options—may be worth the effort for many WSCs.

[1]U.S. Census Bureau, Texas Population Passes the 30 Million Mark in 2022 (Mar. 30, 2023), https://www.census.gov/library/stories/2023/03/texas-population-passes-the-30-million-mark-in-2022.html.

[2]Texas Water Development Board, Texas State Water Plan, https://texasstatewaterplan.org/statewide (last visited Oct. 13, 2024). Texas Public Utility Commission, Water Utility Search, https://www.puc.texas.gov/watersearch (last visited Oct. 13, 2024).

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PUBLIC UTILITY COMMISSION ESTABLISHES THE ERCOT RELIABILITY STANDARD

by Rick Arnett

The Public Utility Commission of Texas ("PUC"), after a year and a half of deliberation, adopted the Electric Reliability Council of Texas ("ERCOT") reliability standard. ERCOT will now simulate market conditions—such as available power supply, weatherization efforts, and power demand—to determine whether the Texas grid meets the standard. Modeling results that meet the standard suggest market conditions that, theoretically, produce a reliable grid.

The reliability standard is one of many Winter Storm Uri related regulatory efforts, and the Steering Committee of Cities Served by Oncor and Texas Coalition for Affordable Power (collectively, the "Cities") have been active throughout the rulemaking process. Cities consistently questioned whether the rulemaking establishes an unattainable standard, driven by modeling assumptions, with unproven benefits and uncertain costs to consumers. PUC, in large part, heeded these concerns and established a less rigorous and more flexible standard than originally contemplated. Texas consumers should achieve savings as a result.

PUC Establishes a "Three-Legged" Standard

ERCOT recommended a reliability standard based on three criteria: (1) frequency—the expected number of Loss of Load Events ("LOLE"), or blackout events, in days per ten years; (2) magnitude—the maximum hourly gigawatt shed during a LOLE; and (3) duration—the maximum hours of a single LOLE. On August 29, 2024, PUC approved this framework, establishing the first "three-legged" reliability standard in the country. Most, if not all, jurisdictions outside ERCOT utilize a single metric standard based on the frequency criteria.

Cities Urged Flexibility—Generators Urged a Mandatory and Costly Standard

Throughout the rulemaking, Cities questioned whether the contemplated standard is attainable. Indeed, the proposed standard's *effective* frequency—the frequency threshold necessary to meet the magnitude target, and thus necessary to meet the entire standard—is one outage every twenty-seven years, or 0.037 LOLE. This is over 100% more exacting than the industry standard reliability target. As such, Cities urged PUC to raise "exceedance tolerances," or embedded values that allow the grid to exceed the magnitude threshold under certain circumstances, from 0.25% to a 1.0% floor. Greater tolerances would counteract an overly prescriptive standard and thus reduce system—and consumer—

electricity costs. Additionally, Cities argued PUC should refrain from repeatedly adjusting the market to meet a mandatory standard. Regulatory vacillation would impose undue cost and undermine market stability.

Generators argued otherwise. NRG Energy, Inc. asserted that the Public Utility Regulatory Act ("PURA") requires a mandatory reliability standard. Thus, if the ERCOT grid fails to meet the reliability standard, PUC must "trigger" market changes—market changes that would inevitably inflate market costs. Generators, moreover, argued PUC should codify more stringent exceedance tolerances. This would establish a more rigorous standard, and thus raise resulting market costs.

PUC Heeds Cities' Concerns, Adopts a Relaxed Standard

The final rule set exceedance tolerances at 1.0% and rejected Generators' call for a mandatory standard. PUC Staff echoed Cities' concerns nearly verbatim, explaining that a 1.0% exceedance tolerance "more appropriately balances" reliability with "expensive outcomes driven solely by modeling assumptions.[1]" If ERCOT fails to meet the standard, moreover, PUC Staff recommended ERCOT assessments—with opportunities for stakeholder comment—rather than mandatory market "triggers." PUCers agreed on both counts and adopted 1.0% exceedance tolerances and rejected calls for a mandatory standard.

The final rule is a critical policy outcome. First, it shields Cities and ERCOT consumers from an overly prescriptive standard and inflated market costs. Second, it ensures Cities—and all other stakeholders—have an opportunity to review and contest future market changes proposed to meet the reliability standard.

[1] *Reliability Standard for the ERCOT Region*, Project No. 54584, Order Adopting New § 25.508 (Sept. 2024).

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IMPACT FEES: WHAT'S THE IMPACT OF THAT?

by David J. Klein

Adopting and implementing water and wastewater impact fees can be a very useful (and in some instances critical) tool for a municipality or water district ("District") to generate the needed revenues to pay for the rising costs for certain new water and wastewater facilities.

According to the 2022 State Water Plan, "Texas' population is projected to increase by more than 70% during the [50 year] planning horizon, from 29.7 million in 2020 to nearly 51.5 million in 2070." With such striking amount of growth to come in our great State, it naturally follows that there also will be a significant increase in the need for water and wastewater services. Consequently, our Texas cities and water districts will need to have the water and wastewater facilities necessary to meet the demands for utility services from such new residents.

How can and will those cities and Districts pay for such facilities? Traditionally, such entities generate revenue through one or two ways: (1) water and wastewater rates, and (2) levying an *ad valorem* tax (for those entities that have such authority) on landowners within the jurisdictional boundaries of such cities and Districts. Impact fees, however, can offer a third source of revenue, generated solely from the new customers, not the existing residents/rate base, through the initial payment of a one-time fee.

While there certainly are unique factors and laws to be taken into consideration, impact fees, generally speaking, are fees paid by new customers to pay for the costs of the new central facilities needed to serve those new customers. The exact manner in which impact fees are calculated, assessed, collected, and used are subject to a strict set of laws, found in Texas Local Government Code ("TLGC") Chapter 395. Such laws allow certain water districts, such as special utility districts, to adopt impact fees by filing an application at the Texas Commission on Environmental Quality. However, many districts and all municipalities adopt water and wastewater impact fees independently, following the strict procedural and substantive requirements of Chapter 395 of the TLGC.

Under Chapter 395, the municipality/political subdivision must first adopt land use assumptions and a capital improvements plan ("CIP"). Then, based upon those assumptions and CIP, the entity must determine the maximum allowable impact fee amount and the actual amount that it wants to charge the regulated community. Under Texas law, "land use assumptions" consist of a description of the impact fee service area and the projected changes in land uses, densities, intensities, and population over at least a 10-year period. Simply put, these assumptions provide the entity's expected growth for the next decade. A CIP is a plan identifying capital improvements/expansions that will be needed to meet anticipated growth in the upcoming 10 years. A CIP must be prepared by a qualified engineer licensed in the state of Texas to provide engineering services, and the Texas Legislature has set the parameters in TLGC §§ 395.012-395.014 for the facilities that an engineer can and cannot include in a CIP.

To summarize those laws, subject to certain exceptions, the allowable capital improvements/facility expansion costs in a CIP are for the construction, surveying, engineering, and projected interest charges for new facilities that will be used to serve new customers. Repairing, updating, or upgrading existing facilities to serve existing customers are not eligible to be included in the CIP for the purposes of calculating the impact fee.

Once the land use assumptions and CIP are approved, then the governing body of the entity will calculate the maximum allowable impact fee and set the desired impact fee amount. An entity must be careful to ensure that there is no double recovery of the CIP costs through the rates, taxes (if levied), and impact fees. Otherwise, the validity of the impact fee could be at risk. When considering how much of the maximum allowable impact fee should be charged through the adopted impact fee, the governing body will be faced with balancing the placement of costs of new facilities on new customers with the potential for stifling growth. To assist with that issue, the municipality/District also needs to establish an Impact Fee Advisory Committee ("IFAC"), where the IFAC will review the proposed land use assumptions, CIP, and maximum allowable impact fee, and provide the governing body with its recommendations. An IFAC is composed of not less than five members, appointed by a majority vote of the governing body; and, not less than 40% of the membership of the advisory committee must be representatives of the real estate, development, or building industries who are not employees or officials of a political subdivision or governmental entity.

Once the CIP is prepared, it should take about 6 months to adopt land use assumptions, the CIP, and impact fees. Texas law requires that the governing body publish (and potentially mail) notice and hold a public hearing for adopting the land use assumptions and the CIP, and then perform those same notice/hearing steps again for adopting the impact fee.

Last, as to the implementation of the impact fees, the municipality/District is statutorily required to place those funds in a separate account, which can only be used to pay for the costs of the projects contemplated in the CIP.

There are a number of potential pitfalls for entities when going through this process and then assessing, collecting, and using such funds, and those entities should rely upon their experts (staff, demographers, engineers, rate/fee consultants, and attorneys) to ensure that those pitfalls are avoided. Regardless, while these steps may at first glance seem onerous, the potential benefits of taking the burden of paying for new, expensive water and wastewater treatment plants off of an existing community through rates and taxes, and onto those new customers that will actually utilize those facilities through a one-time fee, can certainly justify the need to undertake this important process.

David Klein is a Principal in the Firm's Districts and Water Practice Groups. If you would like additional information or have questions related to this article or other matters, please contact David at 512.322.5818 or dklein@lglawfirm.com.

TEXAS SUPREME COURT HEARS ORAL ARGUMENTS IN CRITICAL WATER QUALITY CASE

by Nathan E. Vassar

The Supreme Court of Texas heard oral argument on October 1, 2024 in a case that carries implications for both deference to the Texas Commission on Environmental Quality's ("TCEQ's") discharge permitting as well as to underlying antidegradation requirements administrated by TCEQ, and pursuant to the Clean Water Act.

The case, *Save Our Springs Alliance, Inc. v. Texas Commission on Environmental Quality and the City of Dripping Springs*, asks whether TCEQ's decision in issuing a Texas Pollutant Discharge Elimination System ("TPDES") permit to the City of Dripping Springs was in violation of the antidegradation rules administered by the state agency. After TCEQ issued the permit, it was administratively appealed to Travis County District Court, where the judge opined that allowing an increase in certain nutrient loadings would "turn the Clean Water Act upside down," and reversed the TCEQ permitting decision. On appeal at the El Paso Court of Appeals, the appellate justices reversed, finding that TCEQ followed applicable law in supporting the permit.

On the ultimate appellate stage, justices' questions circled around topics tied to EPA's withdrawal of its initial objections on the permit and whether a federal guidance applied to state policy in asking whether the anti-degradation standard of no greater than a *de minimis* lowering

of water quality was met. Counsel for TCEQ and the City of Dripping Springs repeatedly drew attention to the rule that asks whether, broadly speaking, water quality would be degraded, rather than focusing on particular parameters that are impacted by the discharge. By using comparisons to blood oxygen levels, Dripping Springs's counsel noted that a few points' drop in blood oxygen levels does not result in overall health decline. By extension, counsel argued that in the antidegradation context, whether discussing dissolved oxygen or phosphorous levels, a numeric change does not necessarily equate to decline in overall stream health.

With respect to the influence of the EPA decision on the matter, Save Our Springs's attorneys noted that EPA's withdrawal of its opposition to the permit occurred prior to the development of evidence at the State Office of Administrative Hearings and that, consequently, it could not have known the full extent of numeric impacts as testified by witnesses at such hearing. TCEQ and Dripping Springs's side held that EPA had the full administrative record at its disposal, including TCEQ's technical memoranda in support of issuing the permit, and also acknowledged that the City accepted a more stringent permit than was originally requested.

Although the question of substantial evidence arose a few times throughout the argument, the questions and presentation veered away from deference-based arguments, and instead emphasized governing language for Tier 2 antidegradation reviews. The key question is whether the justices are inclined to accept Save Our Springs's contention that the *de minimis* standard should equate to a numeric change, or whether the Court will agree with TCEQ's determination that water quality, on the whole, is protected, despite alterations to particular parameters. A decision is anticipated in 2025.

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ASK SARAH

Dear Sarah,

Our employee handbook has a policy which says if an employee needs time away from work for a medical issue like an illness or injury, they must provide a doctor's note which says they are released to return to work without restrictions before they can come back. Now we have an employee who says he can come back to work, but his doctor has listed some restrictions in the note. What are our obligations?

Signed,
Not a Doctor

Dear Not a Doctor,

I am glad you asked because this is an area that many employers get wrong, for reasons I do not always understand. The Equal Employment Opportunity Commission's ("EEOC's") position on this has been clear—you have an obligation under the Americans with Disabilities Act ("ADA") to discuss the employee's restrictions with him and see whether there is an accommodation you can provide that will enable him to return to work. This process is typically called the "interactive process."

According to the EEOC, any employer who requires an employee to be free of any medical restrictions as a condition of returning to work (also known as "100% Healed Policies") violates the ADA's requirement that the employer engage in an interactive process with the returning employee to determine whether there are reasonable measures that could be taken to accommodate restrictions or limitations placed on an employee's activities.

The ADA does not require an employer to return every employee to work after a medical leave, but employers are prohibited from automatically denying an individual's return to work simply because they have restrictions or limitations. Instead, an employer should look at each situation on a case-by-case basis, looking at the nature and extent of the employee's limitations, the requirements of the job, and the employer's operations. Employers are not obligated to grant an accommodation that would cause an undue hardship to their operations or that would result in a direct safety concern to the employee or others.

You should do two things in short order – first, begin the interactive process with this employee to see if you can accommodate his restrictions, and second, change your policy language to remove any provisions which indicate that an employee may not return to work with restrictions.

"Ask Sarah" *is prepared by Sarah Glaser, Chair of the Firm's Employment Law Practice Group. If you would like additional information or have questions related to this article or other employment matters, please contact Sarah at 512.322.5881 or sglaser@lglawfirm.com.*

Water Cases

Aqua Tex., Inc. v. Hays Trinity Groundwater Conservation Dist., No. 1:23-CV-1576-DAE, 2024 U.S. Dist. LEXIS 172442 (W.D. Tex. 2024).

Aqua Texas, a Texas retail public utility, alleged that on April 13, 2023, the Hays Trinity Groundwater Conservation District ("Hays Trinity") sent Aqua Texas a Notice of Alleged Violation ("NOV") for exceeding its permitted production limit for the 2022 year. Specifically, the NOV alleged that three of Aqua Texas's operating wells had exceeded the annual drought-adjusted permit allotments. Based on this violation, Hays Trinity ordered Aqua Texas to pay $448,710 in penalties.

Aqua Texas further alleged that NOVs were issued to several other water providers who over-pumped during drought conditions, but Hays Trinity engaged in settlement negotiations with four providers, resulting in the forgiveness of penalty payments in exchange for the water providers' commitment to expend funds on conservation efforts. Aqua Texas approached Hays Trinity with a request for the same forgiveness based on what Aqua Texas asserted is millions of dollars spent to reduce water loss and address leakage caused by aging infrastructure in its own systems. Aqua Texas contended that Hays Trinity denied its request and threatened to not renew Aqua Texas's permits if the penalty was not paid. Aqua Texas also alleged that Hays Trinity disparaged Aqua Texas in the media and has repeatedly shown "unequal treatment and unlawful bias" against Aqua Texas.

On December 29, 2023, Aqua Texas filed suit in the United States District Court for the Western District of Texas alleging among other procedural claims: (1) a violation of equal protection based on Hays Trinity's refusal to forgive Aqua Texas's penalties despite Hays Trinity's "establishment of a policy and practice of granting penalty forgiveness to other similarly situated water utilities" for money spent on conservation efforts; and (2) a regulatory taking of Aqua Texas's vested right to drill for and produce groundwater located beneath its real property based on Hays Trinity's issued permit moratorium on new wells. Hays Trinity filed a motion to dismiss, and in this case the district court determined whether to allow the claims to proceed.

Regarding the equal protection claim, the Court found that Aqua Texas sufficiently alleged a class-of-one equal protection claim against Hays Trinity. Hays Trinity asserted that there is no right to settlement created by any of its rules or policies. In response Aqua Texas alleged that its claim was not based on a right to settlement, but rather Hays Trinity's established policy and practice of penalty forgiveness for conservation efforts. Aqua Texas specifically pointed to Wimberley Water Supply Corporation, who was assessed $140,620 in penalties but was then allowed to forgo penalty payment based on $90,000 spent on conservation efforts. Aqua Texas states that the Hays Trinity Board of Directors ("Board") determined then that it would forgive the penalty if a water service provider spent money to fix leaks or prevent water loss, thus setting a precedent and policy for how the Board would handle penalty forgiveness. The Court found that Aqua Texas successfully alleged that it was intentionally treated differently from other similarly situated water providers and there was no rational basis for the difference in treatment. The Court allowed the equal protection claim to proceed.

Regarding the takings claim, the Court found that Aqua Texas alleged a regulatory takings claim sufficient to survive dismissal. The Court looked to (1) the economic impact of the permit moratorium; (2) the extent to which the moratorium interfered with investment-based expectations; and (3) the character of the government action involved. The Court used a previous Fifth Circuit opinion which held that denial of permits can "undoubtedly" reduce the value of a property to find that Aqua Texas suffered an economic impact on the first issue. The Court considered money spent by Aqua Texas to purchase property and drill wells with the expectation of pumping groundwater and found that Aqua Texas sufficiently alleged interference with investment-backed expectation as to the second issue. Lastly, the Court acknowledged that the State is empowered to regulate groundwater production, but government actions that may be characterized as acquisitions of natural resources have often been held to be a taking. However, the Court noted that this factor would likely weigh in favor of Hays Trinity at a later stage of the case.

Though the Court did not get to the merits of either claim, the Court's finding that Aqua Texas alleged sufficient facts to allow

the claims to proceed is notable. Going forward, water districts may be cautious in how they address penalties and issue moratoriums, particularly as drought conditions continue.

Dobbin Plantersville Water Supply Corp. v. Lake, 108 F.4th 320 (5th Cir. 2024).

Dobbin Plantersville ("Dobbin") is a nonprofit water supply corporation created under Chapter 67 of the Texas Water Code. Dobbin holds a water Certificate of Convenience and Necessity ("CCN"), which grants it the exclusive right to provide retail water service within its CCN area in Montgomery and Grimes Counties. In 1997, Dobbin took out two 40-year loans from the United States Department of Agriculture ("USDA") through the USDA's lending program, which are still outstanding. At the time, Dobbin's CCN area was primarily rural or semi-rural.

SIG Magnolia L.P. ("SIG") and Redbird Development L.L.C. ("Redbird") (collectively, the "Developers") each own several hundred acres of land within the boundaries of Dobbin's CCN. In 2021, the Developers filed separate petitions with the Texas Public Utility Commission ("PUC") seeking a streamlined expedited release of their developments from Dobbin's CCN. Dobbin intervened and alleged that it was actually providing water service even though there were no active water taps or facilities on either of the properties.

Dobbin filed suit in the United States District Court for the Western District of Texas against the PUC's chairman and commissioners, as well as the two Developers. Dobbin sought an injunction prohibiting the PUC from considering or enforcing the decertification petitions, which were pending at the time. Dobbin also requested a declaration that the streamlined expedited release process was preempted by a federal law that grants monopoly protection to recipients of federal loans for "service provided or made available" during the term of the loan. The claims were dismissed at the district court level primarily on procedural grounds, and after the Developers' petitions for release had been granted by the PUC, Dobbin appealed to the Fifth Circuit Court of Appeals.

In the Fifth Circuit, Dobbin asserted that the district court erred in finding that Dobbin lacked standing to seek an injunction prohibiting the PUC officials from enforcing the decertification orders. The Court of Appeals noted that sovereign immunity protects PUC officials unless an exception applies. One exception permits prospective relief if there is an ongoing violation of federal law that may be remedied by court action. Though the Court of Appeals found that Dobbin is suffering an ongoing injury caused by PUC eliminating its right to serve the Developers' developments, enjoining PUC officials from further enforcement would not redress this injury. Since PUC had already granted the petition for release, no further enforcement action was required. The Developers sought service subsequent to the release from a municipal utility district and a municipality, respectively, which are not required to receive PUC approval before servicing the developments once they were no longer in Dobbin's CCN. Thus, enjoining PUC would have no practical effect.

Further, without a redressable injury, Dobbin lacked standing to assert its preemption claim against PUC. Therefore, the Court did not address whether the streamlined expedited release process is preempted by the federal law granting monopoly protection to recipients of federal loans for "service provided or made available" during the term of the loan.

Litigation Cases

Dickson v. Am. Gen. Life Ins. Co., No. 22-0730, 67 Tex. Sup. Ct. J. 1617, 2024 Tex. LEXIS 785 (Sep. 6, 2024).

Justice Young's concurrence in a recent denial of a petition for review before the Texas Supreme Court emphasizes and reiterates Texas courts' obligation to determine subject-matter jurisdiction before turning to the merits of a case.

Anna Dickson ("Dickson") initially sued American General Life Insurance Company ("American General") for withholding interest due on life-insurance policies, and later amended her petition to assert claims on behalf of a putative class. American General filed a plea to the jurisdiction arguing that the court lacked subject matter jurisdiction because Dickson was requesting a declaration that the Insurance Code statute was unconstitutional but failed to join the Insurance Commissioner as a necessary and indispensable party. In response to Dickson's class-certification motion, American General argued that, along with a lack of subject matter jurisdiction, Dickson's equitable claims on behalf of a varied class did not satisfy Texas Rule of Civil Procedure 42's predominance requirement, which states that for a class action to be maintained as a class action, the common questions of law or fact must predominate over any questions affecting only individual members of the class.

The trial court did not expressly rule on American General's plea to the jurisdiction. Instead, the trial court granted Dickson's class-certification motion, and American General appealed. On appeal, American General argued that Rule 42's predominance requirement was not met but also continued to maintain that the trial court lacked subject-matter jurisdiction. The court of appeals found that it lacked jurisdiction to consider American General's jurisdictional challenge. The court of appeals then turned to American General's challenge to Dickson's Rule 42 predominance requirement and agreed with American General, thereby reversing Dickson's certification order.

Dickson filed a petition for review, which the Texas Supreme Court denied. Justice Young agreed that there was no substantial basis to grant review of the class-certification ruling. However, Justice Young warned that "a court must not reach the merits of a dispute when its jurisdiction is in doubt without first determining whether it has jurisdiction." The court of appeals was wrong to disregard the jurisdictional challenge because "[c]ourts *always* have jurisdiction to determine their own jurisdiction." *See Houston Mun. Emps. Pension Sys. v. Ferrell*, 248 S.W.3d 151, 158 (Tex. 2007) (emphasis added). And appellate courts have jurisdiction to determine their own and the lower courts' jurisdiction. *See Abbott v. Mexican Am. Legis. Caucus*, 647 S.W.3d 681, 699 (Tex.

2022). Determining subject-matter jurisdiction is an obligation of the courts, who "not only may but should raise jurisdictional doubts *sua sponte*." Justice Young emphasized that jurisdictional determinations are conditions precedent to reaching the merits of a legal dispute because otherwise the court's opinion would be advisory and beyond the power granted to courts by the Texas Constitution.

Justice Young agreed that American General was correct in raising its jurisdictional challenge before the court of appeals even though the lower court had not ruled on its plea to the jurisdiction. He reiterated that "[e]very party has a duty to the court to raise any potential defects in its (or a lower court's) subject-matter jurisdiction whenever a jurisdictional doubt arises." Raising jurisdictional challenges "helps protect the tribunal from undertaking objectively unauthorized action" and ensures "that judges do not assume power—even inadvertently or about seemingly trivial matters—that do not belong to them." A party raising a jurisdictional challenge is given great leeway in how that challenge is presented to the court. "No special pleading device is needed to do so, and courts should welcome rather than resist efforts to ensure that the judiciary is empowered to step into the merits."

Justice Young noted that in this particular case, remand was not necessary because American General's jurisdictional challenge was not persuasive and would have led to the court of appeals reaching the merits issue anyway. Going forward, courts should resolve any and all jurisdiction issues before reaching any merits issues.

In re Dall. HERO, No. 24-0678, 2024 Tex. LEXIS 786 (Sep. 11, 2024).

Ballot propositions that seek to nullify citizen-initiated ballot propositions, but do not identify the ways it seeks to nullify, will mislead and confuse voters and must therefore be removed from the ballot. A grassroots organization, Dallas HERO, sought to include three citizen-initiative propositions on the November 5, 2024 ballot. Dallas HERO's ballot propositions sought to grant standing to any City resident and waive government immunity for claims brought pursuant to the charter amendment, require the City to conduct a survey on quality-of-life issues which would affect the City Manager's compensation and potentially lead to their termination, and require certain revenues to be expended on police and fire issues (the "Dallas HERO Propositions"). Dallas HERO obtained the requisite signatures to qualify its propositions for places on the ballot.

Several City Council members disapproved of the Dallas HERO Propositions and, in response, moved to include three additional charter amendments on the ballot, which passed (the "Council Propositions"). The Council Propositions, among other things, sought to prevent the charter from granting residents standing to sue the City or waive the City's immunity and to allow its propositions to have primacy in the case of conflicts within the charter. Dallas HERO then sought mandamus relief against the City and several officials arguing, among other things, that the Council members' propositions were misleading under the *Dacus* standard. See *Dacus v. Parker*, 466 S.W.3d 820 (Tex. 2015). Dallas HERO specifically argued that under *Dacus*, the Council's ballot language omitted "certain chief features that reflect its character and purpose." *Dacus*, 466 S.W. 3d at 826.

The Fifth Court of Appeals denied mandamus relief, but the Texas Supreme Court conditionally granted in part. The Texas Supreme Court found that "the text of each challenged [Council Proposition] demonstrates that its purpose is to nullify a citizen-initiated proposition." Providing both sets of propositions on the ballot creates a dilemma in two ways. First, the ballot language did not acknowledge the conflicting character of the propositions so voters could attempt to avoid the dilemma of casting consistent votes. Second, the ballot language failed to inform voters of the conflict provisions that would resolve dilemmas in favor of the Council Propositions, not the Dallas HERO Propositions. Based on these omissions, the Council Propositions fail the *Dacus* standard.

The Court did not fully prohibit any ballot propositions that seek to nullify citizen-initiative propositions. Instead, it found that the Council Propositions failed to meet the *Dacus* standard because the ballot language did not identify the ways in which the Council Propositions sought to nullify the Dallas HERO Propositions. Without the ballot language's guidance, voters would not be able to understand how the propositions contradicted one another and therefore could not vote consistently.

Given the Council Propositions' failure to meet the *Dacus* standard, Dallas HERO argued that Council Propositions must be removed from the ballot, while the City argued that the Court could only correct the propositions to not be misleading. The Court determined that the proper remedy was to remove the Council's Propositions from the November ballot in order to not interfere with or delay the upcoming election. The Court noted that the Council Propositions were the converse of the Dallas HERO Propositions, therefore removal was the only way to avoid confusing voters.

In a footnote, the Court isolated its holding to scenarios when two conflicting propositions are on the same ballot, and it did not hold "that the ballot description for any charter amendment that clarifies or contradicts other existing or proposed parts of the city charter must flag that inconsistency to comply with *Dacus*."

Air and Waste Cases

Waste Management Hi-Acres Landfill in New York Wins "Green Amendment" Suit.

In 2022, a private environmental group filed suit against the State of New York, New York State Department of Environmental Conservation ("DEC"), the city of New York as a customer of the landfill, and owner of the Hi-Acres Landfill, a private entity, under the state's Green Amendment to its constitution which grants citizens of New York a constitutional right to clean air, water, and a healthful environment. The environmental group asked the court to either require the owner to close the landfill or reduce its

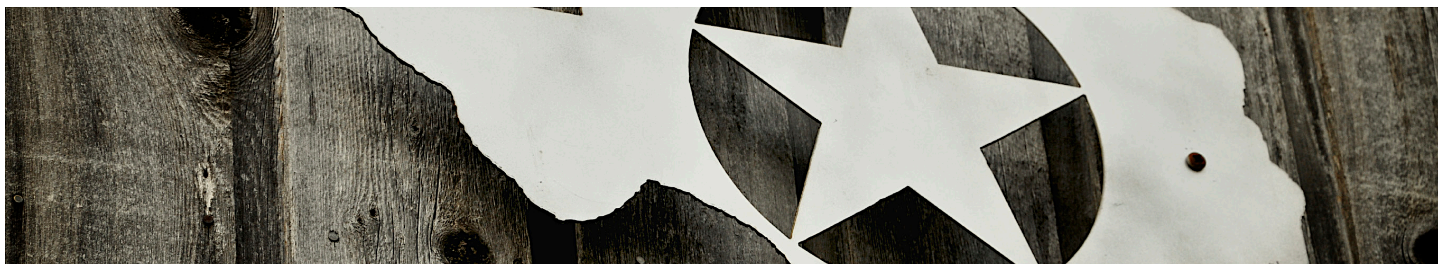
emissions. The district court judge dismissed the claims against the owner, finding that the Green Amendment could not be used to sue a private party, and against the city, finding that its status as a customer was not a violation of the Green Amendment. The court, however, denied the motion to dismiss claims against the state and DEC due to their obligation to protect citizens of the state. Upon appeal, the court reversed the finding in part and dismissed the claims against the state and DEC, ruling that the Green Amendment does not permit citizens to demand specific enforcement actions from state agencies. *Fresh Air for the Eastside, Inc. v. State of New York*, 229 A.D.3d 1217 (N.Y. App. Div. 2024).

Court Rejects Challenges to Nuclear Waste Storage Site.

On August 27, 2024, a D.C. Circuit panel of three judges upheld federal approval for a privately-owned temporary nuclear waste storage site in New Mexico, stating that Nuclear Regulatory Commission ("NRC") regulations allow licenses to have forward looking conditional terms. The license, issued last year, allows the license holder, a private entity, to temporarily store spent nuclear waste until Congress passes a law to allow the federal government to take ownership of and permanently store the waste. An anti-nuclear group argued that the Nuclear Waste Policy Act prohibits the Department of Energy from taking ownership of spent fuel from private reactors until a permanent repository is established. In March 2024, the Fifth Circuit invalidated the license, claiming the Atomic Energy Act does not authorize NRC to approve temporary storage sites. The D.C. Circuit, however, upheld NRC's authority to regulate and license spent nuclear fuel storage. Anti-nuclear groups continue to contend that the ruling undermines congressional safeguards designed to ensure radioactive waste is ultimately stored in deep geologic repositories rather than remaining in above-ground facilities. *Beyond Nuclear Inc. v. United States NRC*, 113 F.4th 956 (5th Cir. 2024).

"In the Courts" *is prepared by Samantha Tweet in the Firm's Districts Practice Group; Sydney Sadler in the Firm's Litigation Practice Group; and Mattie Neira 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 Samantha at 512.322.5894 or stweet@lglawfirm.com, or Sydney at 512.322.5856 or ssadler@lglawfirm.com, or Mattie at 512.322.5804 or mneira@lglawfirm.com.*

AGENCY HIGHLIGHTS



United States Environmental Protection Agency ("EPA")

EPA Launches New Study Into "Produced Water" From Drilling Projects. EPA updated its website to announce plans for a study to investigate treatment technologies to reduce "produced" water from oil and gas drilling. "Produced" water is a term used in the oil industry to describe water that is a byproduct of the extraction process. This water is typically brackish, saline, and is considered a pollutant. The EPA announcement contains little information about the study's specifics, only that there will be one conducted. Current rules of Subpart E, initially regulated in 1979, allow for the discharge of some "produced" water in lands west of the 98th meridian, which encompasses parts of west Texas. The study will aim to examine whether there is a greater ability to reduce "produced" water contamination due to the recent technologies and developments in the extraction industry. The results of this study may impact future oil and gas production, but any policy shift stemming from the findings of a study, if any, will likely not be implemented for several years.

Office of Management and Budget Begins Review of EPA's Lead Pipe Rule. EPA has submitted its final rules setting a ten-year timeline for utilities to replace all lead service lines ("LSL") to the Office of Management and Budget ("OMB") for final review. This proposed rule would override the currently pending proposal from the Trump Administration's EPA, which set lower targets for lead pipe removal. The Trump era proposal set a thirty-three-year window for lead pipe removal, compared to the more aggressive push of ten years by the Biden Administration's EPA. The Trump Administration proposal is set to go into effect by October 16, 2024, unless the OMB finalizes its decision before that date.

Environmental groups are concerned that the proposed rule still has shortfalls regarding adequate protection from lead exposure. Lead pipes that utilities do not "control" such as the pipes in homes, are not within the scope of the proposed rule. Additionally, the proposed rule does not require a water system to pay the full cost of LSL replacements, which could lead to heavy cost shifting onto consumers, and further slow the pace of LSL replacement. Additionally, although the proposed rule gives a timeline of ten years, cities can get extensions, pushing back total LSL replacement, potentially

by decades. Despite these caveats, the primary concern for EPA is feasibility in implementing the broad program. The program will cost billions and will require heavy cooperation between local municipalities, services providers, the states, and the federal government.

Army Agrees to using EPA's PFAS MCL as Testing Threshold. The U.S. Army is committing to a joint pilot project with EPA's enforcement office for sampling PFAS at private drinking wells surrounding nine bases and will respond if the results exceed EPA's maximum containment levels ("MCL"). This is the first time a military service branch has used EPA's MCL standards for PFAS exposure for private wells near military bases. Currently, the Department of Defense ("DOD") follows EPA guidance for PFAS exposures inside of bases, but not for areas surrounding the base.

The program emerged as a compromise between EPA and the service branches when EPA sought to exercise jurisdiction over all DOD cleanups. The nine bases were selected out of a list of 235 locations where the DOD has identified contamination from PFAS. Current DOD regulations regarding PFAS are based on a 2016 EPA drinking water regulation, but the MCL standards have gotten significantly more stringent with the newest rule. Although the move is an EPA-Army initiative, not all armed service branches support further partnership with EPA. The U.S. Air Force is in dispute with EPA over the agency requiring the Air Force to develop a PFAS wastewater treatment facility for exposure in a site in Arizona. The Air Force argues EPA lacks legal jurisdiction to enforce a cleanup program, and that the superfund process is sufficient in cleaning up environmental waste.

EPA and the Army will weigh expanding the pilot program to other bases following the results of the current survey.

EPA Supports Calls to Bolster Water Systems Cybersecurity Measures. EPA is agreeing with calls from the Government Accountability Office ("GAO") to bolster its cybersecurity program regarding water and wastewater systems. EPA has been making moves to improve its cybersecurity programs, such as imposing mandatory cybersecurity requirements on utilities in their "sanitary surveys" mandated by the Safe Drinking Water Act. This plan faced challenges in federal courts and was ultimately blocked, and EPA retracted the policy altogether.

These changes are part of a larger national security effort pushed by the Biden Administration to promote "critical infrastructure security and resilience." The GAO notes that while EPA is taking steps to assess aspects of cybersecurity risk, the agency has failed to conduct a comprehensive sector-wide risk assessment to guide its actions. EPA wrote in a response to GAO that a water sector risk assessment is forthcoming in its upcoming 2025 plan. The risk assessment will be released in January 2025 and updated biannually. EPA has convened a Water Sector cybersecurity task force comprised of local, state, and federal representatives, as well as industry input to develop further risk-informed decisions on cyber security issues.

EPA Proposes Advisory Screening for 6PPD Chemical. EPA has released water screening values for the chemical 6PPD—a chemical used in the manufacture of tires—and its byproducts. In high enough concentration, the substance has been linked to fish kills. The data of 6PPD toxicity is not sufficiently robust enough to support binding water quality criteria, however, and EPA guidance remains purely advisory. The screening levels are expected to support protection of marine life in freshwater sources and function as a tool for states and local governments to keep their water quality clean. The advisory notes levels of 6PPD exceeding 8,900 nanograms per liter and just eleven nanograms of 6PPD-Q (a byproduct of 6PPD) could pose dangers for marine life. These non-binding screening values only address freshwater as EPA found insufficient data for 6PPD and 6PPD-Q in non-freshwater sources. Ensuring proper data quality for these sources remains a goal, but there is insufficient empirical data to make any binding decisions for any body of water.

United States Occupational Safety and Health Administration ("OSHA")

OSHA Proposes New National Heat Rules. On August 30, 2024, OSHA published a proposed rule for new heat related regulations. This proposed rule, if finalized as proposed, would require employers subject to OSHA to implement a Heat Injury and Illness Prevention Plan ("HIIPP") which must include compliance policies, designation of heat safety coordinators, and a response strategy. As part of their HIIPP, employers would be required to track the local heat index for outdoor workers and identify heat-exposed areas and update monitoring plans based on changes in temperature for indoor workers. The proposed rule would also require employers to provide an acclimation period for new employees, cool potable water (one quart per hour to each employee), and break areas with air conditioning or increased air movement for the initial heat trigger. For the secondary, higher heat trigger, employers would need to remind employees of heat safety protocols, implement a buddy system or check in with employees every two hours, and provide 15-minute paid rest breaks every two hours. Comments will be accepted until December 30, 2024.

Texas Commission on Environmental Quality ("TCEQ")

TCEQ Anticipates Publication of Proposed Rule on Reclaimed Water Disposal Issues. Soon, the TCEQ will be accepting public comments and holding a public hearing on its proposed rulemaking for disposal of reclaimed water to a wastewater collection system. The rule is said to simplify the ability of reclaimed water production facilities ("RWPFs") to dispose of treated wastewater through a traditional wastewater collection system by simplifying the permitting process for disposal of reclaimed water. The rulemaking would amend 30 Tex. Admin. Code Chapter 321 and essentially allow RWPFs to cut out TCEQ as the middleman by obtaining consent directly from the owner of a wastewater treatment plant ("WWTP") or collection system to dispose of water through the WWTP rather than an RWPF obtaining a separate Texas Pollutant

Discharge Elimination System permit to discharge to the separate WWTP. There will be separate design elements required if a RWPF has consent to dispose of wastewater to a WWTP.

TCEQ anticipates that the proposed rule will be published in the *Texas Register* on October 11, 2024, thereby commencing the public comment period which will be open for 30 days. Further, TCEQ anticipates a public hearing on or around November 12, 2024 for the proposed rule.

Texas Water Development Board ("TWDB")

Bryan McMath is New Executive Administrator for the TWDB. On September 4, 2024, the TWDB announced that Bryan McMath was selected as the new head of the agency. Mr. McMath has served as TWDB's Interim Executive Administrator since March 2024. In 2021, Mr. McMath joined the TWDB as the Director of Governmental Relations after working at the Texas State Capitol for fifteen years in a variety of roles for lawmakers and gaining expertise in natural resources law and policy. The TWDB is the state agency responsible for gathering and sharing water-related data, supporting regional water and flood planning, and developing the state's water and flood plans. TWDB also oversees affordable financial assistance programs for projects related to water supply, wastewater treatment, flood mitigation, and agricultural water conservation.

TWDB Publishes & Approves State-wide Flood Plan. Texas has never had a state-wide flood plan—that is, until now. Due to a variety of geographical areas, topographical differences, and climate considerations, the flood plans for each of the fifteen water planning regions of Texas can present unique challenges. In 2019, the Texas State Legislature passed Senate Bill 8 ("S.B. 8") that recognized that each region has some level of flood concern and tasked TWDB with developing a state-wide flood plan. S.B. 8 mandates that TWDB produce a new flood plan every five years. On August 15, 2024, TWDB published the 2024 State Flood Plan, which was subsequently approved by the TWDB. The plan presents over 4,000 recommendations for local, regional, and state entities as well as private property owners to address flooding concerns. The recommendations include proposed improvements to stormwater infrastructure, increased and targeted financial aid for recovery projects, reworking emergency response protocols, and implementing new modeling and supporting studies to better identify flood risks.

Public Utility Commission of Texas ("PUC")

CenterPoint, Oncor, and Texas-New Mexico Power System Resiliency Plan Update. As previously reported, PUC recently established a rate recovery mechanism specific to transmission and distribution utility ("TDU") system resiliency. Under the rule, TDUs file "Resiliency Plans" detailing resiliency related efforts and infrastructure, and PUC reviews and approves the plans in a contested case. Subsequently, the TDU applicant may charge the approved rate to recover costs associated with resiliency efforts.

CenterPoint Energy Houston Electric, LLC ("CenterPoint") filed a Resiliency Plan in early May 2024. After Hurricane Beryl, however, PUC Staff initiated its "Investigation of Emergency Preparedness and Response by Utilities in Houston and Surrounding Communities." CenterPoint ultimately withdrew its application on August 16, 2024.

Oncor Electric Delivery Company LLC ("Oncor") similarly filed a Resiliency Plan in May 2024. During the contested case, intervening parties identified several investments and programs ineligible for Resiliency Plan recovery. Oncor, accordingly, agreed to reduce its resiliency request by approximately $30 million, defer $309.1 million for future recovery contingent on certain conditions, and implement reporting metrics that provide greater transparency for future Resiliency Plan requests. The settlement entitles Oncor to $3.073 billion in rate recovery, and depending on the recovery period, would increase monthly residential bills by $4.85 to $6.29.

Texas-New Mexico Power Company ("TNMP") filed its Resiliency Plan on August 28, 2024. TNMP's Resiliency Plan requests $751.1 million over the next three years. PUC opened a contested case under PUC Docket No. 56954, and intervening parties have initiated review.

Oncor and Texas-New Mexico Power file Distribution Cost Recovery Factor Applications. TDUs continue to file periodic Distribution Cost Recovery Factors ("DCRFs")—interim rate filings that authorize rate recovery related to distribution infrastructure. Due to a recent change in law, the Public Utility Regulatory Act ("PURA") authorizes two DCRFs in a "year." This spring, intervening parties moved to dismiss a DCRF application on the grounds that "year" refers to a 12-month period, and the TDU applicant filed three DCRFs in 12 months. PUC, however, clarified that "year" refers to "calendar year," and thus authorized up to four DCRFs in a 12-month period.

Oncor proceeded accordingly. On August 16, 2024, it filed its second DCRF in the 2024 calendar year—but its fourth DCRF since its May 2022 comprehensive base-rate proceeding. In Oncor's most recent DCRF, the TDU seeks to increase its DCRF by approximately $90.3 million. Because administrative rules authorize only four DCRFs between comprehensive base-rate proceedings, however, Oncor has now exhausted its DCRF recovery until its next base rate case. PUC is processing Oncor's current DCRF in PUC Docket No. 56963.

TNMP also filed its second DCRF in the 2024 calendar year. On July 30, 2024, the TDU filed its application seeking an approximately $7.8 million increase to its DCRF. Cities Served by TNMP ("Cities"), Alliance of Texas-New Mexico Power Municipalities ("ATM"), and Alliance for Retail Markets ("ARM") each filed direct testimony or recommendations. Cities argued that projects totaling approximately $6.4 million should be

removed from TNMP's DCRF, resulting in a revenue requirement reduction of approximately $735,000.00. ATM did not have any adjustments—but noted the lack of adjustments was in large part due to the limited review period. ARM requested that PUC set the DCRF's effective date beyond TNMP's 45 days' retail electric provider notice. TNMP initially proposed an effective date of September 30, 2024, but agreed with ARM's arguments and proposed a new effective date of October 27, 2024. The Administrative Law Judge ultimately recommended approval of TNMP's requested rates and upheld TNMP's effective date adjustment. PUC is processing TNMP's filing in Docket No. 56887.

PUC Rulemaking Update. PUC Staff filed the current 2024 rulemaking calendar in Docket No. 56060. Status updates on PUC's outstanding rulemakings are below:

- Project No. 53404 – Power Restoration Facilities and Energy Storage Resources for Reliability; Proposal for Publication issued June 8, 2024; additional comments filed on August 2, 2024
- Project No. 54224 – Cost Recovery for Service to Distributed Energy Resources ("DERs"); Commissioner Glotfelty filed memorandum on August 28, 2024
- Project No. 54233 – Technical Requirements and Interconnection Processes for DERs; Commissioner Glotfelty filed memorandum on August 28, 2024
- Project No. 54584 – Reliability Standard for the ERCOT Market; PUC adopted the rule on August 29, 2024
- Project No. 55718 – Reliability Plan for the Permian Basin Under PURA § 39.167; Comments filed on August 9, 2024
- Project No. 55000 – Performance Credit Mechanism; Comments filed on June 20, 2024

Other rulemaking projects waiting next steps:

- Project No. 52059 – Review of PUC's Filing Requirements
- Project No. 56199 – Review of Distribution Cost Recovery Factor
- Project No. 55249 – Regional Transmission Reliability Plans
- Project No. 51888 – Critical Load Standards and Processes
- Project No. 53981 – Review of Wholesale Water and Sewer Rate Appeal
- Docket TBD – Water Financial Assurance

Railroad Commission of Texas ("RRC")

TGS CGSA Rate Case Update. On June 3, 2024, Texas Gas Service Company ("TGS") filed an application to raise rates in its Central-Gulf Service Area ("CGSA"). TGS filed the application with RRC (GUD No. 00017471) and with cities retaining original jurisdiction. In its application, TGS proposed to increase revenues by $25.8 million (15.59% excluding gas costs) and increase its Return on Equity from 9.5% to 10.25%. TGS's application proposed a decrease for commercial classes and an increase for residential customers. Additionally, TGS sought approval of several new rate riders, implementation of new depreciation rates, and a prudence finding regarding the TGS's capital investment.

As of mid-September, TGS and other parties, including RRC Staff and city groups, reached a settlement in principle. If finalized and approved by RRC, the settlement would eliminate the need for the case to go to hearing. More details about the settlement will be available in the next edition.

RRC Approves CenterPoint Gas Settlement. On June 25, 2024, RRC Commissioners approved a settlement in CenterPoint Gas's most recent rate case. The settlement significantly reduced CenterPoint Gas's initial request. It entitles CenterPoint Gas to a $5 million overall revenue increase—$33.8 million lower than CenterPoint Gas's request. Additionally, the settlement entitles the utility to a 9.8% Return on Equity, 0.07% less than originally requested.

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