Lloyd Gosselink
ATTORNEYS AT LAW

VOLUME 24, NO. 1 JANUARY 2019

THE LONE STAR CURRENT

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

HERE WE GO: PREVIEW OF REGULAR SESSION OF 86TH TEXAS LEGISLATURE

by Ty Embrey and Troupe Brewer

The 86th Texas Legislature is now underway, after convening at noon on Tuesday, January 8th at the State Capitol in Austin. There are many new faces among the Legislature, and there is new leadership in the Texas House of Representatives. State Representative Dennis Bonnen was elected Speaker on the first day of the Regular Session after collecting the support of a significant majority of the 150 State Representatives. Bonnen was first elected at the age of 24, and he has served Texas House District No. 25 since 1997. There are six new members of the Texas Senate and 32 new members in the Texas House. It is important to note that the Republican majority in the House shifted from 95 Republicans and 55 Democrats to 83 Republicans and 67 Democrats, and from 21 Republicans and 10 Democrats to 19 Republicans and 12 Democrats in the Senate. This shift will impact how the House and Senate operate during the Regular Session.

This past legislative interim time period leading into the Regular Session was full of substantial activity. Interim Committee Reports were recently released, summarizing the testimony and findings gathered by House and Senate Committees in hearings conducted throughout the interim and making recommendations to the Legislature thereon. Two of the committees that were particularly active were the House Natural Resources Committee, which conducted a "tour of Texas" style hearing schedule, holding hearings in several cities all over the state to address various issues, and the Sunset Advisory Commission, which held multiple hearings to evaluate and receive recommendations on numerous important agencies in Texas (among them the Texas Board of Professional Geoscientists, the Texas Alcoholic Beverage Commission, the Lower Colorado River Authority, the Texas Historical Commission, the State Securities Board, and the Texas Windstorm Insurance Association).

The window to 'pre-file' legislation opened on Monday, November 12th, and nearly 400 bills were filed that day, and over 1,000 bills were 'pre-filed' in all. The topics of those bills include, in part, the reduction and eventual elimination of the state's franchise tax, removal of daylight savings time in Texas, guardianship reform, and public school funding.

The biggest challenges that the Texas legislative leadership has expressed an interest in addressing during the Regular Session are the intertwined issues of property tax relief and public school finance. As you may recall, there was a standoff on this very issue between the House and Senate throughout the legislative sessions in 2017, including a special session. No resolution occurred. In a press conference where Speaker Bonnen announced the end of the Speaker of the House race, he stated the House's main priority during the Regular Session would be public school finance. Texas Legislature will also likely consider legislation to address Hurricane Harvey relief (along with the financing of flooding infrastructure and mitigation), as well as a variety of health-related issues including

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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

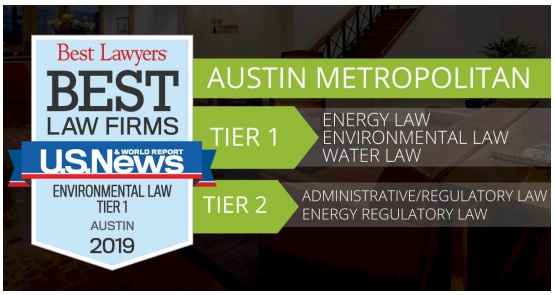
Troupe Brewer gave a "Legislative Preview - What Happened Thus Far and What to Expect" at the Austin Bar Association's Administrative Law Section CLE on January 16 in Austin.

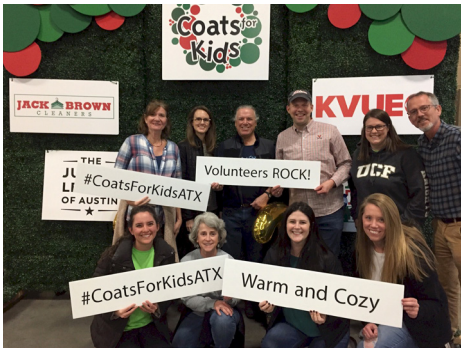
James Aldredge will discuss the "Impact of S.B. 3" at the 20th Annual Course Changing Face of Water Law on February 22 in San Antonio.

Sheila Gladstone will present "Reframing Workplace Behavior in 2019" at the Texas Public Employer Labor Relations Association Annual Workshop on January 31 in Arlington.

Sheila Gladstone will present "Sex, Drugs, and Political Patronage: Why Employment Law is So Much Fun" at the Texas Municipal League Elected Officials Conference on February 28 in San Marcos.

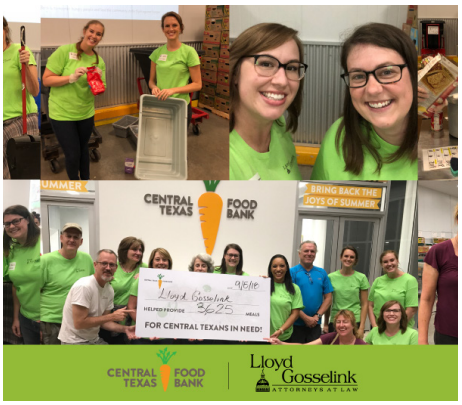
We are proud to announce that the Firm has been listed in the 2019 *U.S. News - Best Lawyers* "Best Law Firms" with the rankings shown. This recognition reiterates the values Lloyd Gosselink was built upon: delivering exceptional service and providing maximum value to our clients. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise.

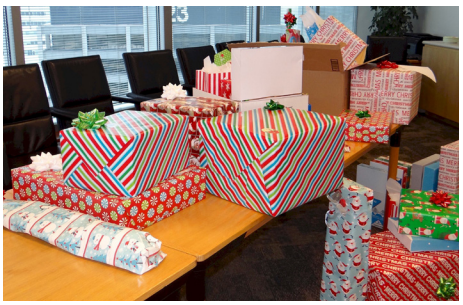




Winter has arrived! Our office was happy to collect and donate coats to this cause, as well as volunteering to sort thousands of coats for children in Central Texas. After all, every child should have a warm coat to wear on those cold days.

Every year we volunteer and help sort thousands of pounds of food that will provide meals for those in need. This year we helped sort over 4,000 pounds of food that will provide over 3,600 meals.





The Firm collected gifts for Travis County Brown Santa, a community service program of the Travis County Sheriff's Office.

Ballot language for annexation that gives voters enough information about the implications of a choice between limited purpose annexation and land use regulations satisfies the "definiteness and certainty" standard established by the Texas Supreme Court. Tex. Att'y Gen. Op. KP-0221 (2018).

The 2017 Legislature made dramatic changes to annexation law in Texas. See Act of August 13, 2017, 85th Leg., 1st C.S., ch. 6 §§ 1-57, 2017 Tex. Gen. Laws 4505, 4505-4526. Now, in order to effect annexation, certain large municipalities must get the prior approval of a majority of the voters in the territory to be annexed. See TEX. LOC. GOV'T CODE § 43.0691.

The changes in annexation law included some flexibility for annexations near active military bases, however. See *id*. § 43.0117(b). While the general rule gives voters the option to reject annexation outright for an area within five miles of an active military base, § 43.0117(b) gives voters a choice between annexation or lesser municipal land regulation. See *id*.

Here, the City of San Antonio (the "City") sought to annex property adjacent to a military base, and given the depth and novelty of the 2017 changes to Texas's annexation laws, the City sought guidance from the Attorney General ("AG") as to whether its proposed ballot language is permissible under Texas law in two respects: the ballot language, itself, and the counting of votes.

As to the proposed ballot language, the City gave voters two options that tracked the requirements of § 43.0117(b). Option One provided for limited purpose annexation, "which includes the authority to impose related fines, fees and other charges . . . and within three years following [full purpose annexation] to provide city services and impose taxes." See City of San Antonio Resolution, "Camp Bullis," #2018-08-02-0032R-A (Aug. 2, 2018) at 3-4. Option Two excluded annexation, but allowed for land use regulations "in the manner recommended by the most recent joint land use study, for the purpose of protecting the military missions, including the authority to adopt and impose related fees, fines and other charges." City of San Antonio Resolution, "Lackland Air Force Base," 2018-08-02-0032R-B (Aug. 2, 2018) at 3-4.

In general, the AG noted that the City's ballot language implicated two Texas Supreme Court cases, *Reynolds* and *Dacus*. See *Reynolds Land & Cattle Co. v. McCabe*, 12 S.W. 165 (Tex. 1888); and *Dacus v. Parker*, 466 S.W.3d 820 (Tex. 2015). *Reynolds* requires that the language of a proposition submit the question with "such definiteness and certainty that the voters are not misled." *Reynolds*, 12 S.W. at 165. *Dacus* clarified that the ballot must "identify the measure by its chief features, showing its character and purpose." *Dacus*, 466 S.W.3d at 825. Further, the ballot language is inadequate if it affirmatively misrepresents the measure's character and purpose or its chief features, or if it misleads by omitting certain chief features reflecting character and purpose. *Id*. at 826.

The AG concluded that the City's ballot language passes both tests. The language presents the voters with a clear choice, as required by Local Government Code § 43.0117(b), between a limited purpose annexation or land use regulation in an area surrounding a military base. In addition, it avoids obscuring this chief feature from the voters. The language identifies the financial consequences of each option, and it does not misinform or mislead the voters as to the financial consequences of their votes. Thus, the AG determined the City's proposed ballot language was sufficiently definite and certain under *Reynolds* and *Dacus*.

However, while the City enjoyed a positive response to its proposed ballot language, the AG went the other way on the City's process for counting blank or double votes. The City included language in the annexation resolutions stating that "[l]eaving the ballot blank or voting for both Options 1 and 2 will result in authorization of Option 2." City of San Antonio Resolution, "Camp Bullis," #2018-08-02-0032R-A (Aug. 2, 2018) at 3; City of San Antonio Resolution, "Lackland Air Force Base," #2018-08-02-0032R-B (Aug. 2, 2018) at 3.

The AG took issue with the City's attempt to count a ballot reflecting a vote for none or both options as a vote for Option Two. The AG noted that counting the vote in this manner conflicts with Election Code § 65.009, which provides that a "vote on a . . . measure shall be counted if the voter's intent is clearly ascertainable." TEX. ELEC. CODE § 65.009(c); see also *id*. § 64.006 ("A vote on a particular measure must be indicated by placing an 'X' or other mark that clearly shows the voter's intent.").

The AG found that the City's proposed counting technique ignored the possibility that the voter might have intended to signal he or she opposed both options, might have misunderstood the

instructions, or might have simply forgotten to mark a choice. In any of those instances, the AG found it to be impossible for counting officials to clearly ascertain the voter's intent, much less a clear intent to vote for Option Two. Thus, the AG concluded that blank or double votes should not be counted.

Absent facts establishing that a city possesses a contractual right of control over the work of a person employed by the water works system, a court will likely determine such a person is not an employee of the municipality for the purposes of Texas Local Government Code § 392.031. Tex. Att'y Gen. Op. KP-0223 (2018).

The City of Eagle Pass (the "City") sought a determination by the AG of whether an employee of the City's waterworks system could legally serve as commissioner of the municipal housing authority. Section 392.031 of the Local Government Code prohibits a municipal employee from serving as a commissioner of a municipal housing authority. TEX. LOC. GOV'T CODE § 392.031(b). Thus, the AG took on the question of whether a waterworks system employee is also an "employee of the municipality" for the purposes of the § 392.031 prohibition.

Chapter 392 does not define the word "employee", and no judicial or administrative opinion exists to interpret the meaning within the context of § 392.031. Without an accepted interpretation to reference, the AG looked to the overall statutory scheme to illuminate the meaning in this context. The AG pointed to several provisions within that Chapter to suggest that the spirit is shaped by the goal of providing a housing authority with its own governing body, separate and largely independent of the municipal governing body.

Based on the overall spirit of the Chapter, the AG reasoned that whether a person is an employee is a fact-specific inquiry, and a court would likely determine a person's status as an employee of a municipality in accordance with any express or implied contract establishing the municipality's right to control the person's work.

In the case of the City's waterworks system employee, the AG determined that the individual was not barred from serving as commissioner of the municipal housing authority because the individual was not an employee of the City for Chapter 392 purposes.

Though the City does include waterworks employees in its retirement system, ultimately the waterworks system supervises and provides a paycheck to the employee. Consequently, the AG found that the contractual right of control was lacking in this particular employee's relationship with the City in order to be considered its employee for Chapter 392 purposes.

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

Legislature continued from 1

insurance coverage, mental health, maternal mortality, and opioid addiction.

The Texas House and Senate also worked during the interim on municipal solid waste issues and how the State of Texas regulates the disposal of municipal solid waste. The Texas Legislature continues to look at electric and gas utility issues. The House Energy Resources Committee had an interim charge aimed at studying the Gas Reliability Infrastructure Program ("GRIP") and its effect on gas utility ratemaking and ratepayers and held a hearing on April 18 to receive testimony on the topic.

As they have done in the past, during the interim leading up to this Regular Session, the Texas Water Conservation Association ("TWCA") formed committees aimed at developing consensus-based legislation to address water-related issues facing the State of Texas, including flood response and groundwater issues. The TWCA Board of Directors recently approved six pieces of legislation developed by the Groundwater Committee for the upcoming 86th Regular Session. Those draft bills are as follows:

1. Groundwater Export – This bill builds upon a bill from last session aimed at clarifying how a groundwater conservation district shall issue permits requesting the export of groundwater beyond a district's boundaries.

2. Water Conservation Education – This bill would authorize a groundwater conservation district to use its funds on water conservation education programs, water conservation facilities, or water conservation projects.

3. Abandoned Wells – This bill is focused on clarifying the existing authority of groundwater conservation districts to repair and/or plug abandoned wells.

4. Groundwater Omnibus Bill – This bill builds upon omnibus groundwater legislation developed by Chairman Perry of the Senate Agriculture, Water, & Rural Affairs Committee last session.

5. Brackish Groundwater Production – This bill continues the effort of prior legislation authored by Chairman Larson that passed both legislative chambers last session but was eventually vetoed by Governor Abbott. The bill provides guidelines for the development of groundwater conservation district rules related to the production of groundwater from "brackish groundwater production zones."

6. TWDB Funding – The TWCA expressed support for funding for Groundwater Availability Model updates and the development of other scientific tools and data by the Texas Water Development Board.

TWCA also created a Flood Response Committee for the purpose of providing a central place for discussing potential education and policy responses to the

devastation caused by Hurricane Harvey and other flood events. Members of the committee represented river authorities, municipalities, regional water districts, drainage districts, and firms related to engineering, law, communications, and consulting. The Flood Response prepared white papers and educational materials about the roles and responsibilities of the entities involved in flood response, the purpose of reservoirs, different flood mitigation strategies, and flood-related liability.

Ty Embrey is a Principal in the Firm's Water, Government Relations, Districts, and Air and Waste Practice Groups. Troupe Brewer is an Associate in the Firm's Water, Government Relations, Litigation, and Districts Practice Groups. If you have any questions concerning legislative issues or would like additional information concerning the Firm's legislative tracking and monitoring services or legislative consulting services, please contact Ty at 512.322.5829 or tembrey@lglawfirm.com or Troupe at 512.322.5858 or tbrewer@lglawfirm.com.

POWER PLAY: LIMITS OF PUBLIC OFFICIALS IN DISMISSING EMPLOYEES BASED ON POLITICAL AFFILIATION

by Ashley D. Thomas

The end of the mid-term election season means the beginning of new political realities for many governmental entities. Indeed, following victory at the polls, newly-elected public officials may desire to terminate existing employees because of their political loyalties to the prior administration, based on a belief that holdover employees will not aggressively pursue the new official's policy priorities. Referred to as political patronage dismissals, such terminations are generally prohibited as violating public employees' free speech rights, including rights to associate with the political parties and beliefs of their choice. However, there are narrow circumstances in which such terminations are legally permissible. This article provides a brief overview of the legal framework public employers and officials must work within when deciding whether to terminate employees because of their political affiliations or beliefs.

The First Amendment and the Elrod-Branti Exception

It is well-established law that a governmental entity or public official violates an employee's First Amendment free speech rights guaranteed by the United States Constitution, including free speech rights expressed through political beliefs, association, and affiliation, when the entity terminates or fails to hire an employee because of the employee's perceived or actual exercise of those rights. However, the U.S. Supreme Court in the seminal cases of *Elrod v. Burns* (1976) and *Branti v. Finkel* (1980) created a narrow exception to this general prohibition.

The Elrod-Branti exception provides that public employees in policymaking positions may be lawfully terminated when political loyalty is a valid job qualification or otherwise necessary for the effective performance of the job; when the position involves the exercise of political judgment or giving advice to the elected official; or because the job requires access to the elected official's confidential political beliefs. For example, an executive assistant entrusted with politically-sensitive information working closely with and as a confidant to the official, as well as a speechwriter, legislative liaison, and policy advisor are usually subject to termination under the exception. Positions for which an employee usually cannot be terminated because of their political beliefs include a football coach, teacher, police officer, janitor, payroll clerk, or other general administrative or operations employee, as such positions do not involve policymaking or confidential political information sharing with the official. The inquiry is fact-specific and intensive, erring on the side of protecting employees' free speech rights, thereby requiring a showing by the employer or official that the exception affirmatively applies.

A recent case out of the Seventh Circuit Court of Appeals provides an example of how courts apply the exception. In *Bogart v. Vermilion County*, Illinois (Nov. 26, 2018), a Democratic financial resources director was terminated when a Republican took control over the county board for which she worked. The director sued, asserting that her First Amendment rights were violated because she was terminated based on her political affiliation as a Democrat. The appellate court explained that its analysis would "focus on the inherent powers of the [position] as presented in the official job description." After reviewing the description and finding that its accuracy was confirmed by the director's own testimony, the court determined that the position included keeping county board members apprised of the county's finances, developing long- and short-term financial plans, and assisting with the preparation and review of the annual budget. The court also found that the position was essentially a "cabinet-level" position, requiring the trust and confidence of the elected board members, including the county chair.

Based on this analysis, the court held that the financial resources director position entailed substantial policymaking authority and confidentiality and thus fell within the Elrod-Branti exception. Therefore, the court upheld the termination as legally permissible. If the director position was purely fiscal, more akin to an accounting position, or lower-level, then the court may have ruled otherwise. Because of the court's deference to the job description, the case is a good reminder of the importance of ensuring job descriptions are complete,

accurate, and updated to demonstrate the actual authority, duties, and requirements of the position.

Note that certain employees in Texas, such as sheriff's deputies, are automatically terminated under Texas law at the end of the elected official's term of office. However, the incoming elected official is still bound by these same rules prohibiting political patronage, as well as various discrimination laws, when determining which of the former official's staff to rehire/retain. For example, failing to rehire a sheriff's deputy who would not be serving in an exempted policymaking or confidential position with the new administration would be subject to the same First Amendment scrutiny, despite the automatic termination.

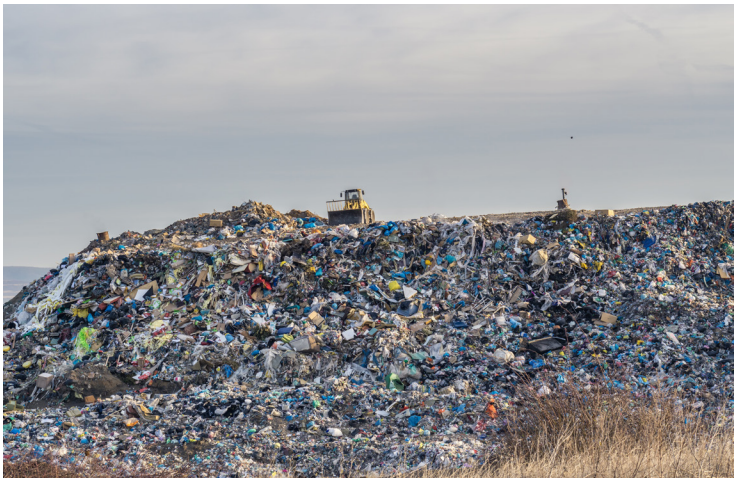
Conclusion and Recommendations

Public employers and officials have a higher duty to their public employees than private employers, since the First Amendment applies to governmental, rather than private, actions. Public employers and officials must determine whether a position is one that requires a high level of political loyalty before terminating or invoking other adverse employment action on such grounds. Job descriptions should be reviewed and updated to ensure they accurately reflect the position's duties and responsibilities. Employers and officials should consult counsel for a fact-intensive analysis before making rash decisions during a victory lap or after seeing an employee's yard sign or Facebook "like" of a political opponent, especially when the position at issue may be a close call. In doing so, public employers will increase the chance that their decisions will be able to withstand legal scrutiny.

Ashley D. Thomas is an Associate in the Employment Law and Litigation Practice Groups. If you would like additional information or have questions related to this article or other matters, contact Ashley at 512.322.5881 or athomas@lglawfirm.com.

WASTE NOT, WANT NOT: RENEWABLE IDENTIFICATION NUMBERS TURN LANDFILL GAS INTO A HOT COMMODITY

For over a decade, the energy industry in the United States has been regulated under the Renewable Fuel Standard ("RFS"), a program created by Congress to reduce greenhouse gas emissions, expand the renewable fuels sector, and increase national energy independence by reducing reliance on imported petroleum. Congress promulgated the RFS by amending the Clean Air Act with the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007. These amendments established RFS requirements through the year 2022 and required certain "obligated parties" nationwide to utilize renewable fuel to replace or reduce the quantity of petroleum-based transportation fuel, heating oil or jet fuel that they use.



Parties obligated to comply with the RFS include both refiners and importers of gasoline or diesel fuel. Under the RFS, an obligated party's compliance with utilization requirements can be achieved by (1) blending renewable fuels into transportation fuel or (2) obtaining credits called Renewable Identification Numbers ("RINs"). A RIN acts as a tracking number for biofuel generated by a producer or importer. In addition, a specifically coded RIN can be utilized to represent a "batch" of biofuel. RINs also act as commodities or credits that entities can trade and purchase in order to achieve compliance with the RFS. Oil and gas companies often purchase these credits to meet their RFS threshold requirements. The energy industry has undergone a tremendous amount of technological innovation in the fuel production and fuel blending processes, and this coupled with RFS regulatory requirements has made biofuels in particular more valuable to produce than ever before.

There are four categories of biofuels under the RFS: renewable fuel, advanced biofuel, biomass-based diesel, and cellulosic biofuel. In 2017, the EPA placed landfill gas under the category of cellulosic biofuel, or biofuel produced from organic plant matter. Over time, federal law has required obligated parties to utilize an increasing amount of cellulosic biofuel in order to achieve compliance with the RFS. While the calculation for each obligated party's specific compliance requirements is detailed and technical, the EPA has set the nationwide cellulosic biofuel utilization volume at 288 million gallons for 2018, and 381 million gallons for 2019. That means that obligated parties must utilize 93 million more gallons of cellulosic biofuel in their total fuel portfolios in 2019 as compared to 2018. Put simply, the designation of landfill gas as cellulosic biofuel means that obligated parties can turn to landfill gas as a mechanism for meeting these increasing renewable fuel utilization standards,

which makes landfill gas highly valuable in the energy market. In addition, the current regulatory scheme for RIN generation and utilization allows for an unretired RIN—a RIN that an entity does not utilize in the same year that it generates or purchases the RIN—to be carried over into the next compliance year. However, RINs may only last for the current or following compliance year, and carried over RINs may only be utilized to meet 20% of an obligated party's annual RFS compliance requirements.

So, how can a landfill gas producer generate RINs? The first step is to register with the EPA as a renewable fuel producer. This process allows the EPA to issue the producer both a facility and company identification number for use in RIN generation. After meeting registration and reporting requirements, producers may generate and assign RINs to batches of compliant fuel using a D-code. D-codes are codes attached to RINs in order to categorize biofuel. Obligated parties can utilize D-codes D-3 (cellulosic biofuel) and D-7 (cellulosic diesel) to demonstrate regulatory compliance with cellulosic biofuel RFS requirements. Cellulosic biofuel D-3 RINs are currently more valuable than any other RIN category. In general, a single RIN represents one physical gallon of biofuel and about 11.72 million British Thermal Units ("mmbtu") of landfill gas. According to EPA, as of August 27, 2018, the average market price for a cellulosic biofuel RIN was $2.27. EPA's website provides historical data for RIN prices over time, and this information is updated on a monthly basis. Slower than anticipated technological and business development, as well as ambitious initial statutory benchmarks for cellulosic biofuel, have contributed to the biofuel industry's inability to generate enough D-3 RINs for obligated parties to meet their RFS requirements. Because of this, the EPA issues annual cellulosic biofuel waiver credits at a set price each year, and obligated parties can purchase these waiver credits in lieu of RINs in order to maintain compliance. The current cellulosic biofuel waiver price is $1.96 for 2018.

The process for generating a RIN also involves a third-party quality assurance review, where auditors evaluate the biofuel production process to certify compliance. Once the RINs attach to the biofuel, they allow both the producer and a potential RIN purchaser to verify that utilization of the biofuel will count towards RFS compliance requirements. This verification process is extremely important, especially considering a string of cases involving fraudulent RIN transactions. From 2011 to the present, the EPA has investigated and prosecuted numerous fraudulent RIN transactions where renewable fuel producers had not actually produced the amount of biofuel claimed in the transaction. This series of fraudulent transactions initiated the promulgation of the third-party quality assurance review process, but RIN fraud remains a concern even with this process in place. In a 2016 case entitled *United States v. Witmer*, the defendants, co-owners of a biofuel processing company, pleaded guilty to conspiracy, fraud, and falsification of statements associated with renewable fuel production and RIN generation. One defendant was sentenced to 57 months and the other to 30 months in prison. Cases like this one have put the energy industry on high alert when it comes to verifying the validity of RINs.

While compliance with the RFS is a complex process, it provides a valuable opportunity for the energy industry to engage in a practice that both expands the renewable fuels market and encourages nationwide energy independence. Landfill gas producers are in a particularly advantageous position given that the EPA has recently categorized landfill gas as cellulosic biofuel. This designation creates added value to landfill gas and encourages demand for the fuel in the marketplace. It is a win-win for both the energy industry and the environment. While a certain level of political uncertainty exists as to what the nature of the RFS will be in the future, landfill gas producers should make every effort not to allow their product to go to waste, and to realize the value of landfill gas while the market remains hot.

For questions regarding this article or any other information, please contact Duncan Norton at 512.322.5884 or dnorton@lglawfirm.com. The Air and Waste Practice Group was assisted by Zachary Tavlin, a law student at the University of Texas School of Law.

ASK SHEILA

Dear Sheila,

Our HR department inadvertently placed some sensitive personnel information on a shared drive accessible to all employees in our organization. As soon as we discovered this, we took it down. Is there anything we are required to do now?

Signed,
Oops

Dear Oops,

Under Texas Law, you are required to notify, as soon as possible, those employees and former employees whose "sensitive personal information" was subject to a data breach, unless you have solid evidence that no unauthorized access of the shared files occurred.

There is currently no federal notification requirement, other than for financial institutions dealing with customer information.

Under Texas state law (Tex. Bus. & Com. Code § 521.053), both private companies and governmental entities are required to notify affected individuals of security breaches. State agencies are also covered by this requirement (Tex. Gov't Code § 2054.1125). An unintentional upload of confidential employee files meets the definition of a security breach.

You must disclose the breach as quickly as possible to any individual whose sensitive personal information is reasonably believed to have been acquired by an unauthorized person. You can delay giving notice, however, for the limited purpose of determining the scope of the breach or restoring the data system following the discovery of the breach. You do not have to send the notice to all employees, but you might have to notify former employees.

First, you have to determine whether sensitive personal information was in the shared file, and whose it is. Sensitive personal information is defined as:

- an individual's first name or first initial and last name in combination with any one or more of the following items, if the name and the items are not encrypted:
  - social security number;
  - driver's license number or government-issued identification number; or
  - account number or credit or debit card number in combination with any required security code, access code, or password that would permit access to an individual's financial account; or
- information that identifies an individual and relates to:
  - the physical or mental health or condition of the individual;
  - the provision of health care to the individual; or
  - payment for the provision of health care to the individual.

Next, you must provide the affected individuals with notice. For current employees, you can send each an individual email or hard copy letter; for former employees, you can mail the letter to their last known address. The notice does not need to be detailed or specifically outline the disclosed information individually for each recipient, but you should be prepared to answer such questions should the recipient contact you.

This law is enforced by the Office of the Texas Attorney General. Failure to abide by these requirements may result in the AG's Office bringing an enforcement action to recover significant penalties.

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

IN THE COURTS

Judicial Elections

We spend most of our time here at "In the Courts" discussing the sausage—i.e., the delicious and satisfying blend of meat and spices that make up a judicial decision. But November's elections remind us that we ought to occasionally discuss how the sausage is made.

For nearly thirty years, the sausage in Texas has been made almost exclusively by Republicans. That will change in January, as new Democratic justices take a majority of the seats on seven of Texas' fourteen courts of appeals (Houston (1st District), Austin, San Antonio, Dallas, El Paso, Corpus Christi, and Houston (14th District)). The seven courts of appeals now controlled by Democrats are some of the busiest in the state, with jurisdiction over eight of the ten largest counties. Moreover, the Austin Court of Appeals is particularly important as it handles all administrative appeals and most other cases involving the State. The changeover is therefore significant. What can we expect as a result?

In the near term, it means that the dockets may move a little bit slower as the new justices read the briefs on pending cases for the first time. The outgoing justices have worked over the past six weeks to clear as many cases as possible, so as to minimize the catching-up the new justices will have to undertake. And much of the courts' staff will remain in place, so there should be some continuity. But many of the new justices will still be "drinking from a firehose," even if the firehose's pressure is reduced somewhat by the outgoing justices and the professional court staff.

In the longer term, it is difficult to speculate how the partisan change will affect the decisions from Texas' intermediate courts of appeals. Most of the cases before the courts of appeals do not have any particular partisan flavor. A breach-of-contract case is a breach-of-contract case, whether one is a Democrat or a Republican. So we believe that much of the analysis in the popular media about the changeover may be overblown.

Nonetheless, one area in which it may be significant is in administrative appeals of agency decisions, which all go through the Austin Court of Appeals. The Austin Court has historically been relatively deferential to agency decision-making. This trend predates the current partisan makeup of the court—deference to agency decision-making has been a feature of both

Republican and Democratic justices. But in a more partisan atmosphere, will the new Democratic justices be more skeptical of the decisions reached by Republican appointees and defended by a Republican attorney general?

Rather than speculate, we'll let you know the answers in future editions of "In the Courts."

Governmental Immunity Cases

Wasson Interests, Ltd. v. City of Jacksonville, 559 S.W.3d 142 (Tex. 2018).

The Texas Supreme Court continued to refine its governmental immunity protections with its holding in *Wasson Interests, Ltd. v. City of Jacksonville* ("*Wasson II*"). This case involved a 99-year lease between the City of Jacksonville and Wasson Interest, Ltd. for lakefront property owned by the City. Under the terms of the lease, which incorporated the City's zoning ordinances, Wasson was prohibited from engaging in commercial activity on the property.

Nevertheless, Wasson developed the property as a bed and breakfast and leased the property to individuals, which the City determined was prohibited commercial activity. The City terminated the lease and sent Wasson an eviction notice. Wasson sued for breach of contract and the City asserted it was immune.

That lawsuit—Wasson I—went to the Supreme Court on the question of whether the governmental/proprietary dichotomy that applies to tort cases also applies to breach-of-contract claims. The Wasson I Court concluded that it does, and hence the City does not have immunity to breach-of-contract claims arising from proprietary functions. Proprietary functions are those functions performed by a city primarily for its benefit and not as an arm of the government.

But the Supreme Court did not at that time answer the determinative question—whether the City was engaged in a governmental or proprietary function when it leased property to Wasson. The Court of Appeals determined that the City's actions were governmental, and thus the City retained its immunity from suit.

In *Wasson II*, the Supreme Court disagreed. Overturning the Court of Appeals, the Supreme Court held that the City was performing a proprietary function when it leased its property to Wasson. The key inquiry, the Court held, was whether the City was acting in a governmental or proprietary capacity when it entered into the contract, rather than the nature of the City's actions when allegedly breaching the contract. The City's main argument was that it breached the contract with Wasson because it was enforcing its ordinances prohibiting commercial activity on the property—i.e. a governmental function. The Supreme Court disagreed and held that the proper inquiry is whether the lease was entered into in the City's proprietary or governmental capacity.

Stated differently, the focus of the governmental/proprietary dichotomy belongs on the nature of the contract, not the nature of the breach. The Supreme Court concluded that because the City's act of entering into a lease with Wasson was discretionary, for the primary benefit of its residents, on its own (rather than the State's) behalf, and not as part of an essential governmental function, it was proprietary and not governmental. Thus, the City lacks governmental immunity to the breach-of-contract suit and must defend the suit as though it were a private party.

City of Wimberly Bd. Of Adjustment v. Creekhaven, LLC, No. 03-18-00169-CV (Tex. App.—Austin Oct. 18, 2018, no pet. h.) (mem. op.).

The Court of Appeals continued to hold that the Uniform Declaratory Judgment Act ("UDJA") does not waive immunity when a party seeks a declaration of rights under a statute or ordinance. In *City of Wimberly*, the City Board granted several variances to a property owner for a barn she constructed on her property. Creekhaven, an adjacent landowner, sought judicial review of the orders under the UDJA. The Board filed a plea to the jurisdiction, contending that the trial court lacked jurisdiction over Creekhaven's UDJA claims on the basis of immunity. The trial court denied the Board's plea.

On appeal, the Court noted that the UDJA does not waive immunity when a plaintiff seeks a declaration regarding the effect of a variance. The UDJA only waives immunity to construe the validity of an ordinance. The Court held that the Board was immune and reversed and dismissed the trial court action.

City of Wimberly does not plow any particularly new ground on this issue. But it is a new and concise statement of the scope of the UDJA waiver of immunity. That waiver is very narrow, and only applies to suits challenging the legality or constitutionality of statutes or municipal ordinances. So entities that aren't the State or cities don't need to worry about the UDJA's waiver at all, as they do not pass either statutes or municipal ordinances. And for cities, the waiver is still very narrow because most suits challenge the application—and not legality—of the city's ordinances.

Water Cases

Petition for Writ of Certiorari, County of Maui, Hawaii v. Hawai'i Wildlife Fund, et al., 866 F.3d 737 (No. 18-260); and Petition for Writ of Certiorari. Kinder Morgan Energy Partners, L.P., et al. v. Upstate Forever, et al., 887 F.3d 637 (No. 18-268).

These two August 2018 petitions for certiorari filed with the U.S. Supreme Court are the latest progression in the current federal circuit court split on the question of whether a discharge to groundwater that is hydrologically connected to waters of the U.S. can constitute a regulated discharge within the meaning of Clean Water Act ("CWA") section 402 and the National Pollutant Discharge Elimination ("NPDES") permit program. The federal circuit split over whether the CWA applies to discharges into soil and water—in instances where there is a direct or fairly traceable hydrological connection between groundwater and jurisdictional water — and currently sits with the Fourth and Ninth Circuits answering

that question affirmatively and the Fifth, Sixth, and Seventh Circuits answering in the negative. The petitioners in *County of Maui, Hawaii v. Hawai'i Wildlife Fund*, et al., 886 F.3d 737 (9th Cir. 2018) and *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 886 F.3d 637 (4th Cir. 2018) seek review of circuit decisions holding that their respective releases of pollutants that reached jurisdictional surface waters through groundwater are subject to the CWA's prohibition against unpermitted discharges. The County of Maui filed its petition in late August, and *Kinder Morgan* filed in early September. See October 2018 *The Lone Star Current*. On December 3, 2018, the U.S. Supreme Court invited the federal government to file briefs in these cases and specified a date of January 4, 2019 for the Solicitor General to file such briefs, which is a somewhat unusual request due to the deadline imposed on the federal government. Typically, there is no deadline for the federal government to respond to this type of request. The deadline may be intended to ensure that, should the justices decide to grant certiorari, hear oral arguments and decide the case by the end of the current term. The government's briefs will likely provide insight on the plans of the Environmental Protection Agency ("EPA") to take regulatory action, which may counsel against the Supreme Court granting review.

Columbia Riverkeeper, et al. v. Pruitt, et al., No. C17-289RSM (W.D. Wash. Oct. 17, 2018).

In response to claims brought by environmental and fishing industry groups that the EPA violated the CWA by failing to regulate water temperatures in the Columbia River and Snake River, the federal district court ordered EPA to do so, finding that EPA unlawfully delayed establishing a temperature total maximum daily load ("TMDL") under the CWA for 17 years. The Columbia River Basin once held the largest salmon populations in the world, and thirteen total salmon and steelhead trout species are listed as endangered or threatened under the Endangered Species Act ("ESA"). Rising river temperatures due to point-source discharges and dams have long been understood to negatively impact the success of migration and spawning of these salmon and steelhead. Prior to 2000, the states of Washington and Oregon placed segments of the Columbia and lower Snake Rivers on their CWA 303(d) lists due to impaired water temperature. In 2000, the EPA signed a Memorandum of Agreement ("MOA") with the states of Washington, Oregon, and Idaho that established a cooperative multi-state and federal approach to address temperature-related impairments in the two rivers and included an EPA commitment to produce a TMDL for temperature for the two rivers (which represents a change from the typical process where states produce TMDLs to be approved by EPA). However, after publishing such a draft rule in 2003, EPA took no further formal action on the rulemaking, and the TMDL rule was never finalized due to disagreements between federal agencies. In the following years, warm water temperatures in the rivers led to deaths of high proportions of migrating salmon and steelhead, with a survival rate of only four percent of endangered steelhead salmon in 2015 and population collapse possible. The Court ultimately agreed with the plaintiffs that the EPA violated the CWA by failing to issue a TMDL for the Columbia River and lower Snake River, based upon the 2000 MOA, and ordered the EPA to issue a temperature TMDL within 60 days. Although the plaintiffs did not assert any claim under the ESA, this case is of nationwide importance because the endangered salmon and steelhead species reliant upon state surface waters were the driver behind the agreed-upon need for a temperature TMDL.

Waller, et al. v. Sabine River Authority of Texas, No. 19-18-00040 (Tex. App.—Beaumont Dec. 6, 2018).

Landowners downstream of the Toledo Bend Reservoir and Dam Project (the "Project") brought suit against the Sabine River Authority of Texas ("SRA-T") for inverse condemnation, private nuisance, and trespass to real property based upon temporary flooding of their properties. The lower court had granted SRA-T's plea to the jurisdiction and dismissed the case and the appellate court affirmed. The Project was built for the primary purpose of water supply and the secondary purposes of hydroelectric power generation and recreation. Notably, the Project was not designed as a flood control dam. Downstream landowners had previously, and unsuccessfully, sought to have flood control measures incorporated into Project operation (namely, draw-down of the reservoir in advance of storms) during a prior process to renew the Project's operating license issued by the Federal Energy Regulatory Commission ("FERC"). In 2016, a historic rainfall event occurred in areas upstream and downstream of the Project, flooding the lower Sabine River and its downstream tributaries. At the height of the storm, peak inflows exceeded 600,000 cubic feet per second (cfs), and peak discharge was 207,644 cfs. The appellant landowners acknowledged that SRA-T released the water in a manner consistent with its operating license, but nonetheless the appellants asserted that their properties flooded due to SRA-T release of water and that such flooding caused an unconstitutional taking of their property. In its analysis, the Court stressed that takings claims turn on the specific facts that led to the flood. The Court distinguished the Supreme Court's opinion in *Arkansas Game and Fish*, 568 U.S. 23 (2012), based on the fact that: (1) the hydroelectric power dam in this case is subject to FERC regulations; (2) the dam was not created for the specific purpose of controlling floods; and (3) the operation of the dam had not deviated from established procedures. Further, the Court reasoned that SRA-T did not deliberately damage the appellants' property and determined that SRA-T's act of opening the floodgates was not the proximate cause of damage to their property. The Court rejected the claim of a temporary taking.

Air and Waste Cases

Wilson v. Texas, No. 05-17-00776-CR, 2018 WL 6187435 (Tex. App.—Dallas 2018, no pet. h.).

On November 27, 2018, the Texas Court of Appeals in Dallas held that photo and testimonial evidence from an environmental investigator was sufficient to establish that the bulk of material on the appellant's land constituted litter, and that the estimated weight or volume of such litter constituted a state jail felony.

In the underlying case, the appellant admitted to living on property that he claimed to be using for a reclaimed fence and recycling business. The property at issue contained thousands of pounds of scrap fence panels, household trash, and debris. Under the Texas Litter Abatement Act (Act), a person commits the offense of illegal dumping, and such an offence constitutes a jail felony, if the person disposes of over 1,000 pounds or more of litter in a location that is not approved for solid waste disposal. At trial, the environmental investigator estimated the average weight of each fence panel as 50 pounds, and testified that a photo containing at least 83 panels was evidence that the appellant had undoubtedly violated the Act. The trial court convicted the appellant of illegal dumping, and sentenced him to two years in state jail. Imposition of the sentence was then suspended, and the appellant was placed on community supervision for five years. On appeal, the appellant argued that there was insufficient evidence to prove that he violated the Act and committed a state jail felony because (i) the bulk of materials was inventory for his recycling business, and (ii) testimonial and photo evidence was not sufficient to establish the weight of the materials. The appellate court disagreed, holding that no reasonable fact finder would have found that the materials were "inventory" and not "litter," and that evidence presented by the environmental investigator was sufficient to establish a violation of the Act.

Giles v. BFI Waste Serv. of Tex., No. 14-17-00383-CV, 2018 WL 5660714 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.).

On November 1, 2018, the Court of Appeals in Houston (14th District) held that an appellant's testimony that the driver of a recycling truck's failure to obey the speed limit and fully engage the recycling truck's breaks during an "emergency" did not amount to negligence on the part of the recycling truck driver. This suit arose from a traffic accident where the appellant's daughter was killed while riding as a passenger in a pickup truck. The driver of the pickup truck, who also died in the collision, was driving over the speed limit, lost control of the pickup truck, and collided into the recycling truck. The issue at trial was whether the driver of the recycling truck was negligent in failing to avoid the collision based on the "sudden emergency" theory, which states that "[i]f a person is confronted by an emergency arising suddenly and unexpectedly, which was not proximately caused by any negligence on his part and which, to a reasonable person, requires immediate action without time or deliberation, his conduct in such an emergency is not negligence or failure to use ordinary care if, after such emergency arises, he acts as a person of ordinary prudence would have acted under the same or similar circumstances." At trial, the court also introduced a jury instruction on "new and independent cause" rather than "concurring cause," and the appellant argued on appeal that this was done in error because the appellant believed that the recycling truck driver's negligence for failing to avoid the collision was a "concurring," and not a "new and independent," cause of the collision. The appellate court affirmed the trial court's finding that the recycling truck driver was not negligent, because he applied his breaks and tried to pull over in a reasonable manner. The appellate court further held that, because the jury failed to attribute any negligence to the recycling truck driver based on the "sudden emergency" theory, any error potentially caused by the "new and independent cause" instruction by the trial court was harmless.

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AGENCY HIGHLIGHTS

United States Environmental Protection Agency ("EPA")

On December 11, 2018, EPA and the Army Corps of Engineers (the "Agencies") released a prepublication draft of the forthcoming proposed rule revising the definition of "waters of the United States." The Agencies' proposed revision is the second step in a two-step process to repeal and revise the 2015 rule that had defined the term "waters of the United States" (the "WOTUS Rule")- a definition that expanded federal jurisdiction under the Clean Water Act (the "CWA"). In step one, the Agencies proposed a rule repealing the WOTUS Rule and recodifying the regulations in place prior to its issuance. The public comment period on the step one repeal of the WOTUS Rule has closed, but the repeal rule has not been finalized and the Agencies are continuing to review the comments received in step one. This step two proposal, if adopted, would apply nationwide, thereby remedying significant jurisdictional confusion that has resulted from numerous legal challenges to the WOTUS Rule and the February 2018 rule that

suspended its applicability. Currently, the WOTUS Rule is in effect in only 22 states, the District of Columbia, and the U.S. territories, while pre-2015 regulations remain in effect in the other 28 states.

The proposed rule would limit the role of the federal government under the CWA by defining "waters of the United States" to include only those waters that are physically and meaningfully connected to traditional navigable waters. Categories of water that would qualify as "waters of the United States" under the proposed rule include: (1) traditional navigable waters used in interstate or foreign commerce, like large rivers and lakes, tidal waters, and the territorial seas; (2) naturally occurring perennial or intermittent tributaries (rivers and streams that flow to traditional navigable waters); (3) ditches that are traditional navigable waters or subject to the ebb and flow of the tide, or ditches satisfying conditions of the tributary definition and constructed in a tributary or adjacent wetlands; (4) lakes and ponds that are traditional navigable waters, contribute perennial or intermittent flow to traditional navigable waters, or that are flooded by a "water of the United States" in a typical year, such as many oxbow lakes; (5) impoundments of "waters of the United States"; and (6) wetlands that physically touch other jurisdictional waters. Waters that would not fall under the new, proposed categories of "waters of the United States" include ephemeral features that contain water only during or in response to rainfall, groundwater, and ditches that do not meet the conditions necessary to be jurisdictional, containing most farm and roadside ditches. The Agencies will take comment on the proposed WOTUS Rule revision for 60 days after its publication in the Federal Register; and once the public comment period opens, written comments, identified by Docket ID No. EPA-HQ-OW-2018-0149, may be submitted to the Federal eRulemaking Portal at https://www.regulations.gov.

EPA's top drinking water official retired December 14, 2018. Peter Grevatt, the Director of EPA's Office of Ground Water and Drinking Water, announced his retirement on November 19th and spent his last day at the agency in mid-December. Grevatt had worked at the EPA for more than 30 years, and he led the agency's efforts to police lead, copper, arsenic, E. coli, and other contaminants in public drinking water. Prior to his departure, Grevatt was also serving as the point person on EPA's response to perfluorinated chemical contamination, which has been linked to immune, developmental, and cancer-related health problems. Grevatt's retirement is not expected to impact the EPA's continued work to determine whether the agency will set legally binding limits on water utilities that would require them to filter out such chemicals. While Grevatt has not yet announced his next position, he emphasized that his retirement was not motivated by a desire to leave EPA, but rather the offer of another opportunity outside the agency. The Association of State Drinking Water Administrators has indicated that Grevatt will be taking a position as the head of a national water association.

EPA partially approves revision to Texas's State Implementation Plan for Clean Air Act NAAQS emissions requirements, 83 Fed. Reg. 62468 (December 4, 2018). On December 4, 2018, the EPA published a final rule approving a portion of the State Implementation Plan ("SIP") revision submitted by the State of Texas for the 2008 8-hour ozone NAAQS. This portion includes the requirement for an owner or operator of a stationary source to provide the State with a statement of each emission's inventory, attesting that the information contained in the inventory is true and accurate to the best knowledge of the certifying official in accordance with 30 Tex. Admin. Code § 101.10(d)(1). On August 21, 2018, Texas submitted a SIP revision addressing NOx emissions for a cement manufacturing plant in Ellis County located in the Dallas/Fort Worth ozone nonattainment area. The SIP revision also included an explanation of how the Clean Air Act requirement for emissions statements is being met in the DFW area. Both of these revisions have been approved by the EPA.

EPA issues final rule regarding Renewable Fuel Standard Program. On November 30, 2018, the EPA finalized a rule establishing renewable fuel percentage standards for 2019 and biomass-based diesel volume requirements for 2020. The Renewable Fuel Standard program ("RFS") is a program that requires transportation fuel producers and sellers (i.e., obligated parties) to utilize a specified volume of renewable fuel—including cellulosic biofuel, advanced biofuel, biomass-based diesel, and total renewable fuel—in their transportation fuel annually. Obligated parties can either purchase renewable fuel credits or blend the renewable fuels into their traditional transportation fuels in order to meet the annual compliance requirements. The new rule sets the 2019 volume requirements at 418 million gallons for cellulosic biofuel, 2.1 billion gallons for biomass-based diesel, 4.92 billion gallons for advanced biofuel, and 19.92 billion gallons for total renewable fuel. The new rule sets 2020 biomass-based diesel requirements at 2.43 billion gallons. The EPA calculates and establishes a renewable volume obligation annually, and obligated parties are assigned a percentage of the volume that they are required to meet.

EPA has proposed a rule to extend the deadline for landfills to submit plans to control methane gas, 83 Fed. Reg. 54527 (October 30, 2018). On October 30, 2018, the EPA published a proposed rule to amend the 2016 Emissions Guidelines and Compliance Times for Municipal Solid Waste Landfills. This proposed rule would extend the compliance deadline from May 2017 to August 2019 for landfills to meet the Obama-era deadline to submit plans to control methane, and would make the new deadline consistent with the proposed Affordable Clean Energy Rule. The deadline to submit comments is December 14, 2018.

TCEQ responds to EPA call for information regarding the adverse impacts of the National Ambient Air Quality Standards (NAAQS). On June 26, 2018, the EPA published a call for information in 83 Fed. Reg. 29784, requesting comments to facilitate consideration of any adverse public health, welfare, social, economic, or energy effects which might result from various strategies for attainment and maintenance of NAAQS. On October 22, 2018, the TCEQ submitted comments to the EPA. The EPA's deadline to submit comments closed on October 24, 2018, and the public comments will be utilized by an independent scientific review committee

charged with periodically reviewing the existing air quality criteria and recommending any new standards or revisions in accordance with Section 109(d)(2)(A–B) of the Clean Air Act.

EPA announces reconsideration of final rule regarding startup, shutdown, and malfunction (SSM) emissions at industrial facilities. On March 15, 2017, the TCEQ submitted a petition for reconsideration of an EPA final rule requiring states to submit plans for compliance with air emissions rules during facility startup, shutdown, or malfunction ("SSM") periods. On October 16, 2018, the EPA Region 6 Administrator issued a letter notifying the TCEQ that the EPA had partially granted Texas's petition, and that the EPA would utilize its discretion to reconsider the Texas State Implementation Plan for SSM emissions. In its letter, the EPA indicated that it will provide notice and an opportunity for public comment if the EPA proposes changing the rule.

Texas Legislature

The Senate Committee on Agriculture, Water, and Rural Affairs ("Senate Ag. & Water") has submitted its interim report, including findings and recommendations for consideration by the 86th Legislature, to Lieutenant Governor Dan Patrick. The year and a half between legislative sessions in Texas is known as the "interim" period. Committees of the House of Representatives (the "House") and Senate use this period to conduct hearings and hold public meetings to study certain issues, or charges, assigned to them by the Speaker of the House or the Lieutenant Governor, the presiding officers of their respective chambers. At the close of the 85th Legislative Session, the Lieutenant Governor's interim charges to Senate Ag. & Water directed it, among other things, to study and evaluate water right permit issuance, the regulatory framework for groundwater conservation districts ("GCDs") and river authorities, and prioritization in the Regional Water Plan. Having done so, Senate Ag. & Water recently published its interim report. Noteworthy findings in the interim report include a recommendation that the length of time it takes the TCEQ to process surface water permits be improved upon, and the conclusion that Texas landowners and producers would be better served by a GCD regulatory process that was similar across neighboring GCDs. The TCEQ also produces a biennial report for the state's lawmakers before every regular legislative session. That report was delivered to the state Capitol on December 7, 2018, and, perhaps prophetically, contained an appendix addressing "Permit Time-Frame Reduction and Tracking." A full copy of the interim report prepared by Senate Ag. & Water of the 85th Legislative Session is available here: https://senate.texas.gov/cmtes/85/c505/c505.InterimReport2018.pdf, and the TCEQ's biennial report can be accessed at: https://www.tceq.texas.gov/publications/sfr/tceq-biennial-report/biennial-report-to-the-86th-legislature-fy2017-fy2018/biennial-report-to-the-86th-legislature-fy2017-fy2018.

Texas Commission on Environmental Quality ("TCEQ")

New TCEQ General Counsel. On December 6, 2016, TCEQ Chairman Jon Niermann announced the Commission's appointment of Mary Smith to the role of General Counsel, effective January 1, 2019. Smith will bring a wealth of environmental law experience to her new role, having spent the last 15 years at the Office of the Attorney General ("OAG"). During her time at the OAG, Smith represented and advised the TCEQ, Texas Parks & Wildlife Department, General Land Office, Railroad Commission, Texas commissioners for both the Pecos and Canadian River Compacts, and Texas' representative to the RESTORE Council. As part of her role in the OAG's Environmental Protection Division, Smith not only served as counsel in both enforcement and defense matters, but also managed staff attorneys in both the Environmental Enforcement and Natural Resources Sections. Smith has a Bachelor of Arts in History and English from the University of Kansas, and earned her Juris Doctorate from the University of Texas at Austin.

The TCEQ is still working to renew General Permit TXR040000 for Phase II Municipal Separate Storm Sewer Systems ("MS4s"), which expired on December 13, 2018. While Phase II (i.e., small) MS4s must obtain authorization under this permit in order to discharge stormwater to surface water in the state, current permittees may continue to operate under their existing authorizations until issuance of the renewed general permit is approved by the TCEQ. Accordingly, the submission of annual reports is unaffected by the expiration of the previous general permit, and such reports should be submitted to the TCEQ in compliance with any existing authorizations.

In anticipation of the December 13th expiration date, the TCEQ proposed renewal with amendment of the general permit, and issued a draft permit and fact sheet on August 24, 2018, both of which are available on the TCEQ's website at: https://www.tceq.texas.gov/permitting/stormwater/ms4/WQ_ms4_small_TXRO4.html. The period for public comment on the draft permit began that day and closed following a public meeting on September 24, 2018. In total, the TCEQ received 33 comments, which resulted in only minor revisions to the draft permit. A decision on this matter will be made in early 2019. Within 180 days following the effective date of the renewed general permit, current permittees must either apply for a waiver or reapply for coverage by submitting a Notice of Intent and updated Stormwater Management Plan.

In December, TCEQ's Executive Director, Toby Baker, hosted three meetings to receive public input on priorities for available RESTORE Act funding. "RESTORE Act" refers to the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act, which established the Gulf Coast Ecosystem Restoration Council (the "Council"). Under the RESTORE Act, eighty percent (80%) of all administrative and civil penalties related to the 2010 Deepwater Horizon oil spill are dedicated to a Gulf Coast Restoration Trust Fund (the "Trust Fund"), and thirty percent (30%) of the money directed to the Trust Fund is administered by the Council under a Comprehensive Plan developed with input from the public.

Baker, who is Governor Greg Abbott's appointee to the Council, recently hosted meetings in Brownsville, Corpus Christi, and

Galveston to receive public input on priorities for about $350 million of available RESTORE Act funding to be spread out among the five impacted Gulf Coast states. The Council will consider this input in determining which projects and programs receive funding to restore and protect the natural resources, ecosystems, fisheries, marine and wildlife habitats, beaches, coastal wetlands, water quality, and economy of the Gulf Coast. According to Baker, the intent of these meetings was "to gather information to inform the development of a priority framework document," a draft of which is expected to be published by the Council for public comment in spring 2019.

TCEQ has published a Notice of Intention to Review Medical Waste Management regulations, 43 Tex. Reg. 7474 (November 9, 2018). On November 9, 2018, the TCEQ published a Notice of Intention to Review the 30 Tex. Admin. Code Chapter 326 Medical Waste Management regulations. The proposal is limited to review of the rules for re-adoption, amendment, or repeal in accordance with Texas Government Code § 2001.039. The deadline for comments was December 12, 2018, so the TCEQ should be taking action soon.

Public Utility Commission of Texas ("PUC")

Oncor to Acquire InfraREIT and Sharyland Utilities. On November 30, 2018, Oncor Electric Energy Delivery Company LLC ("Oncor"), Sharyland Distribution & Transmission Services, L.L.C. ("SDTS"), Sharyland Utilities, L.P. ("Sharyland") and Sempra Energy ("Sempra") filed a Joint Report and Application for Regulatory Approvals at the PUC. The application seeks approval for several transactions: (1) the exchange of transmission assets between SDTS and Sharyland, and the respective CCN amendments required; (2) the acquisition of InfraREIT, Inc. ("InfraREIT") by Oncor; and (3) the acquisition of a 50% indirect interest in Sharyland by Oncor and Sempra.

On October 18, Sempra announced this deal that will result in Oncor acquiring, and co-investing by the parties in, Sharyland. InfraREIT owns and leases rate-regulated electric transmission assets in Texas. Sharyland is an electric transmission utility. Sempra Energy owns an approximate 80-percent ownership stake in Oncor. Last July, Oncor and Sharyland agreed to swap assets in a transaction valued at approximately $400 million. Sharyland received approximately 258 miles of 345 kV transmission lines from Oncor, and Oncor received all of Sharyland's distribution network and its approximately 54,000 retail delivery customers. Under this new agreement, Oncor will acquire 100% of the equity interests of InfraREIT, including all the limited-partnership units in its subsidiary InfraREIT Partners, LP, for approximately $1.275 billion. Upon closing, Oncor will own and operate all of Sharyland's existing electric transmission assets located in Central Texas, West Texas, and the Texas Panhandle and South Plains. Sharyland will continue as an independent privately-held transmission utility, owned by the new holding company, and will own the transmission assets that it developed in South Texas.

Concurrently, Sempra Energy will acquire a 50-percent limited-partnership interest in a holding company that will own Sharyland for approximately $98 million. The other 50% of the holding company will be owned by entities controlled by Hunter L. Hunt (founder and Chairman of Sharyland) and other members of the family of Ray L. Hunt.

The application enumerates the benefits of the proposed transaction, including elimination of the Sharyland/SDTS REIT structure, consolidation of geographically compatible transmission systems, and Sempra's financial investment in the South Texas region. The transactions will ultimately require the approval of the PUC, as well as a vote of approval from the majority of InfraREIT shareholders, among other approvals. Currently, the hearing on the merits is scheduled for April 10-12, 2019.

The PUC Still Contemplating Decision on Market Changes after Summer 2018 ERCOT Review Project. As the summer peak season ended, the PUC opened Project No. 48551, seeking comments from interested parties on a number of questions related to the performance of the ERCOT wholesale market and whether any changes need to be made to account for the current state of the market.

Leading up to summer, observers expressed concern that ERCOT could experience rolling blackouts due to high temperatures and plant retirements. Thankfully, no such grid emergency developed, and the system appeared to have handled record electricity usage and persistent high temperatures. However, because summer 2018 experienced so few days of constraint, generators did not benefit from as many instances of peak pricing as expected.

In their comments and at the PUC workshop, power generators such as Calpine Corp., NRG Energy, and Exelon Corp. asked the PUC to change the way ERCOT determines wholesale prices, by shifting the Loss of Load Probability ("LOLP") factor in the Operating Demand Reserve Curve ("ORDC"). Exelon estimates that this shift in the ORDC would raise electricity prices by $4 billion for Texas consumers. Generators insist that this change is needed to guarantee higher revenues, which would provide the much needed incentive necessary to invest in new power plants, and accordingly, provide more reliability to consumers. Others, including Texas Industrial Energy Consumers ("TIEC") and the independent market monitor, Potomac Economics, believe that the ORDC is working within the intended parameters and that an LOLP shift may not be absolutely necessary.

Ultimately, it is a policy decision for the PUC to determine whether changing the wholesale price structure is necessary to incentivize future generation growth and ensure grid reliability. ERCOT's recent forecast of tightening reserve margins over the next five years will certainly be a factor in the PUC's decision.

While the Project was listed on the December 7 and 20, 2018 Open Meeting agenda, and stakeholders were prepared for a contentious discussion, the PUC opted not to discuss the matter. There is no current estimate for when the Project will come up

again for consideration, but we can likely expect a decision in early 2019.

Commission Holds Workshop in Substation Rulemaking. On April 10, 2018 the PUC opened Project No. 48251, Rulemaking Regarding the Review and Approval of Substations. The PUC issued a request for comments from parties regarding whether high-voltage switching substations should remain exempt from the requirement to obtain a certificate of convenience and necessity ("CCN"). Comments were filed on October 30, and on November 7, the PUC held a workshop for stakeholders to discuss their views and comments.

A number of utilities opposed the removal of the existing exemption for substations to obtain a CCN. The Oncor Cities Steering Committee filed comments and advocated for the creation of some process by which cities can express their concerns over the effects of a proposed substation, preferably through the Commission's existing CCN process. The utilities and other industrial level consumers raised concerns over slowing down the process by which substation infrastructure could be completed, and thus affecting economic growth.

The Commissioners have expressed a desire to have some sort of review over these types of projects, so we anticipate some form of change will occur, but it remains to be seen as to whether it will be the creation of an Electric Reliability Council of Texas ("ERCOT") review process, PUC review process, or a combination of the two. PUC Staff has been directed to summarize the comments received and file those with the Commission. We anticipate seeing the summary within the first few months of 2019, after which the Commission will provide Staff with further direction on whether to draft proposed rule changes.

PUC Project No. 48540 - *Review of Real-Time Co-optimization in the ERCOT Market*. At its August 9 Open Meeting, the PUC issued questions for stakeholders to address pertaining to the June 29 ERCOT Report regarding its studies of the benefits of (i) real time co-optimization of energy and ancillary services and (ii) including marginal losses in security-constrained economic dispatch. Parties filed comments in Project 48540 - Review of Real-Time Co-optimization in the ERCOT Market. According to Potomac Economics (the firm that provides Independent Market Monitoring services for the ERCOT system), real-time co-optimization would result in significant savings to customers for costs associated with congestion on the transmission system, ancillary services, and the cost of energy itself. Potomac's results indicated that the market would see a $257 million reduction in system congestion costs, a $155 million reduction in the cost of ancillary services, and a $1.6 billion savings in energy costs, equating to approximately $4/Mwh. ERCOT also issued a review of the benefits of real-time co-optimization in June.
Several parties supported the transition to real-time co-optimization, citing benefits such as lower production costs and other market improvements. Other parties expressed support but raised some concerns with the transition itself on the market. Very few parties opposed the transition.

PUC Project No. 48023 - *Rulemaking to Address the Use of Non-Traditional Technologies in Electric Delivery Service*. The PUC received initial and reply comments in Project 48023 – Rulemaking to Address the Use of Non-Traditional Technologies in Electric Delivery Service. Many parties filed comments addressing the uncertainty of the law surrounding a transmission and distribution utility ("TDU") owning and implementing an energy-storage device; yet, others argue that the law clearly prohibits a TDU from owning such a device.

The PUC has not yet determined whether a TDU-owned energy-storage device falls within the Public Utility Regulatory Act's ("PURA") definition of "generation asset," or whether TDU ownership and use violates PURA's prohibition against a TDU providing competitive services. However, the Chairman did informally mention at the December 20, 2018 Open Meeting that she believes the statute is unclear.

Utility-owned energy-storage devices have the potential to provide reliability and cost-saving benefits over traditional transmission and distribution approaches, but stakeholders must first be given clarity on the PUC's application of the relevant PURA provisions. On the basis that the PUC determines PURA and PUC rules currently provide a legal avenue for utilities to own and operate energy-storage devices, many parties argue that a CCN or similar pre-approval process should be required, providing further oversight of such projects.

The Commissioners also discussed whether the PURA definition of "generation asset" regarding batteries requires municipalities or co-ops (either is considered a "Non-Opt-In Entity" or "NOIE") to register as a power generator. While the Scope of Competition Report explains how the PURA definition of a "generation asset" may require NOIEs to register as a power generator, Commissioner D'Andrea, at the December 20 Open Meeting, made a lengthy, convincing argument for why Chapters 40 and 41 of the Texas Utilities Code make clear that NOIEs can own batteries without having to register. While this discussion does not have any binding effect, the unanimous agreement amongst the Commissioners regarding Commissioner D'Andrea's argument is a strong indication of how the Commission will view any potential conflicts or issues regarding NOIE ownership of batteries.

At the December 20 Open Meeting, the Chairman indicated that the Commission would make a decision regarding Commission Project No. 48023 at the January 17, 2019 Open Meeting.

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