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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 12, 2022

Laurie Gharis, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC - 105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: Port of Corpus Christi Authority of Nueces County
SOAH Docket No. 582-20-1895
TCEQ Docket No. 2019-1156-IWD

Dear Ms. Gharis:

Please find the Executive Director's Closing Argument On Remand for the above referenced matter.

Best Regards,

A handwritten signature in cursive script that reads "Kathy J. Humphreys".

Kathy Humphreys
TCEQ Staff Attorney

cc: Mailing List

SOAH DOCKET NO. 582-20-1895
TCEQ DOCKET NO. 2019-1156-IWD

APPLICATION OF	§	BEFORE THE STATE OFFICE
PORT OF CORPUS CHRISTI	§	
AUTHORITY OF NUECES	§	
COUNTY FOR TEXAS	§	OF
POLLUTANT DISCHARGE	§	
ELIMINATION SYSTEM	§	
PERMIT NO. WQ0005253000	§	ADMINISTRATIVE HEARINGS

EXECUTIVE DIRECTOR'S CLOSING ARGUMENTS on REMAND

To the Honorable Administrative Law Judges Smith and Quinn:

COMES NOW, the Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) and files this, his Closing Arguments on Remand.

Introduction

A. Overview

The Executive Director maintains that the draft permit for the Port of Corpus Christi Authority of Nueces County (POCC) meets all applicable statutory and regulatory requirements. The Executive Director reviews all applications for TPDES permits to ensure compliance with the Clean Water Act (CWA), Texas Water Code (TWC), and the rules in Chapter 30 of Texas Administrative Code (TAC). After an exhaustive review of POCC's Application, Revised Application, POCC's Response to the Executive Director's Requests for Additional Information, the Prefiled Testimony of all the Parties, and the Testimony from the Hearing on the Merits, the Executive Director's position remains that the POCC draft permit complies with TCEQ's rules, and actually goes beyond the regulatory requirements because the draft permit includes WET limits.

The Executive Director presented evidence from five very experienced staff members, with a combined total of 85 years of experience in evaluating applications for the Texas Pollutant Discharge Elimination System (TPDES), or in the case of Mr. Pfeil, both TPDES permits and TNRCC Wastewater Discharge Permits. Both the initial and revised POCC applications were reviewed by highly experienced members of the Executive Director's staff:

- Ms. Shannon Gibson (8 years of experience performing TPDES permit reviews of over 100 applications);
- Ms. Katie Cunningham (4 years of experience performing modeling for

TPDES permits and over 1,300 reviews);

- Mr. Peter Schaefer (20 years of experience in performing antidegradation reviews for TPDES permits. Mr. Schaefer has personally reviewed over 1,500 applications in addition to his review of his staff's memos);¹
- Mr. James Michalk (21 years of experience performing modeling for TPDES permits and over 2,800 dissolved oxygen modeling analysis reviews); and
- Mr. Michael Pfeil (32 years of experience focused on Whole Effluent Toxicity Testing (WET), more than 2,000 WET evaluations).²

The experience of the Executive Director's witnesses, coupled with their testimony, clearly demonstrates that the Executive Director performed a thorough review of the additional information provided by the POCC, and that the draft permit, if issued, will comply with all applicable and relevant statutes and rules. Each of the Executive Director's witnesses has considerable experience in their specific aspect of the review and drafting of the POCC draft permit. Conversely, none of the witnesses for the Protestants have any current, relevant, experience in drafting permits under the TPDES program.³

B. EPA review of the POCC Draft Permit

As discussed in more detail below, the Commission referred six specific issues to the State Office of Administrative Hearings (SOAH) for the development of additional evidence. The six issues the Commission referred to SOAH do not include whether the Executive Director was required to send the POCC application to the United States Environmental Protection Agency (EPA) for review, or whether the Executive Director properly classified the POCC facility as a minor facility. The Executive Director objected to the Protestants' prefiled testimony regarding correspondence between the EPA and TCEQ because the testimony is outside of the

¹ Mr. Schaefer did not perform the initial antidegradation review, however he reviewed it in his supervisory role.

² Mr. Pfeil did not review the original application because WET testing was not required; Mr. Pfeil provided information to assist Ms. Gibson in drafting WET language which was added to the original draft permit in response to public comment.

³ PAC-53R BW-1; According to Mr. Wiland's resume he worked for the Texas Water Commission, a predecessor agency to the TCEQ, from 1976 to 1986. Texas assumed authority to administer the National Pollutant Discharge Elimination System (NPDES) program in 1998.

referred issues; however, the Administrative Law Judges (ALJs) overruled the objection. After the ALJs overruled the Executive Director's objections, the Executive Director requested an opportunity to file rebuttal testimony on the issues that were not within the scope of what the Commissioners had referred to SOAH, as provided by 30 TAC § 80.117(b).

The applicant shall present evidence to meet its burden of proof on the application, followed by the protesting parties, the public interest counsel, and the executive director. In all cases, the applicant shall be allowed a rebuttal. **Any party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated.** . . . (emphasis added).

30 TAC § 80.117(b).

The ALJs denied the Executive Director's request to file rebuttal testimony because they held that the Executive Director could have reasonably anticipated the testimony. The Executive Director asserts he could not have reasonably expected the protestants would be allowed to provide testimony on an issue that is not tangentially related to any of the referred issues and which is not relevant to the processing of POCC's application, and thus should have been allowed to provide rebuttal testimony.

The Executive Director maintains his position that all testimony and exhibits regarding correspondence between EPA and the TCEQ are outside of the scope of this hearing and should not be considered in this matter.

Procedural History

The TCEQ received an application from the POCC for a new Texas Pollutant Discharge Elimination System (TPDES) permit on March 3, 2018. As required by the Texas Water Code (TWC) and the Texas Administrative Code (TAC), the Executive Director reviewed the comments submitted during the comment period and prepared a Response to Comments (RTC), which was mailed to everyone who commented and the persons on the mailing list maintained by the Office of Chief Clerk. The Executive Director also prepared a response to all the requests for a contested case hearing. During an Open Meeting on November 6, 2019, the Commission considered the hearing requests, responses to the hearing requests, all timely public comments, and the Executive Director's Response to Comments.

An evidentiary hearing was held by SOAH in November of 2020. At the conclusion of the hearing, the ALJs recommended that the POCC application be denied.

The Commission considered the ALJs' recommendation at an open meeting on May 19, 2021, and after considering the ALJs' Proposal for Decision, oral argument of the parties, and the filings, the Commission remanded the POCC application to SOAH to take additional evidence on six issues:

- A) Whether the proposed discharge will adversely impact: the marine environment, aquatic life, and wildlife, including birds and endangered or threatened species, spawning eggs, or larval migration;
- C) Whether the proposed discharge will adversely impact recreational activities;
- D) Whether the Application, and representations contained therein, are complete and accurate;
- G) Whether the modeling complies with applicable regulations to ensure the Draft Permit is protective of water quality, including utilizing accurate inputs;
- H) Whether the Executive Director's antidegradation review was accurate; and
- I) Whether the Draft Permit includes all appropriate and necessary requirements.

The SOAH remand hearing on the merits was held March 14-25, 2022. Because the POCC application was received after September 1, 2015, the application is subject to the procedural requirements adopted pursuant to House Bill (HB) 801, 76th Legislature (1999), and Senate Bill (SB) 709, 84th Legislature (2015), both implemented by the Commission in its rules in 30 TAC Chapters 39, 50, and 55. The Texas Legislature enacted Senate Bill 709, effective September 1, 2015, amending the requirements for comments and contested case hearings. This application is subject to those changes in the law. One of the major changes to the contested case hearing process as a result of SB 709 is that the filing of the draft permit, the preliminary decision issued by the Executive Director and any other documentation, establishes a prima facie case that the draft permit meets all applicable state and federal legal and technical requirements and if issued will protect human health and safety and the environment.

The statute further provides that a party may rebut the prima facie case by presenting evidence relating to one of the issues the Commission referred and demonstrating that the draft permit violates an applicable state or federal

requirement. The statute also provides that the applicant and the Executive Director may present additional evidence to support the draft permit.

Referred Issues

Issue A: Whether the proposed discharge will adversely impact: the marine environment, aquatic life, and wildlife, including birds and endangered or threatened species, spawning eggs, or larval migration.

The Executive Director maintains his position that the proposed discharge will not adversely impact: the marine environment, aquatic life and wildlife, including birds and endangered or threatened species, spawning eggs, or larval migration.

WET Testing

Total toxicity of discharges is determined using biomonitoring (often referred to as Whole Effluent Toxicity, or WET, testing) of effluent samples at appropriate dilutions.⁴

Total toxicity is described in the rules as:

Total (whole-effluent) toxicity of permitted discharges, as determined from biomonitoring of effluent samples at appropriate dilutions, must be sufficiently controlled to preclude acute total toxicity in all water in the state with the exception of small ZIDs at discharge points and at extremely low streamflow conditions (one-fourth of critical low-flow conditions) in accordance with § 307.8 of this title. Acute total toxicity levels may be exceeded in a ZID, but there must be no significant lethality to aquatic organisms that move through a ZID, and the sizes of ZIDs are limited in accordance with § 307.8 of this title. Chronic total toxicity, as determined from biomonitoring of effluent samples at appropriate dilutions, must be sufficiently controlled to preclude chronic toxicity in all water in the state with an existing or designated aquatic life use of limited or greater except in mixing zones at discharge points and at flows less than critical low-flows, in accordance with § 307.8 of this title. Chronic toxicity levels may be exceeded in a mixing zone, but there must be no significant sublethal toxicity to aquatic organisms that move through the mixing zone. (emphasis added)

30 TAC § 307.6(e)(1)

TCEQ's rules define ZID (Zone of Initial Dilution) as "[T]he small area at the immediate point of a permitted discharge where initial dilution with receiving waters

⁴ 30 Tex. Admin. Code § 307.3(78).

occurs and that may not meet certain criteria applicable to the receiving water. A zone of initial dilution is substantially smaller than a mixing zone.”⁵

The draft permit defines both “lethality” and “significant lethality” in terms of WET testing. Lethality in the ZID is determined by the 24 hour acute WET testing and is defined as “mean mortality of 50% or greater to organisms exposed to 100% effluent.”⁶ Significant lethality at the edge of the mixing zone is determined by the chronic biomonitoring testing requirements and is defined as “a statistically significant difference in survival at the critical dilution when compared to the survival in the control.”⁷ Thus, neither the acute WET test nor the chronic WET test require 100 % survival of the test organisms; some lethality is to be expected in the ZID mixing zone.

Both POCC and the Protestants provided WET test results; POCC provided data from Stillmeadow Incorporated, Environmental Toxicology Laboratory, the Protestants provided data from Dr. Nielsen’s academic laboratory. Stillmeadow is a NELAP accredited Laboratory, Dr. Nielsen’s laboratory is not NELAP accredited. TWC § 5.134 requires that all environmental testing laboratory data and analysis used by the commission for decisions under the Commission’s jurisdiction must be from an accredited environmental testing laboratory. Additionally, TWC §§ 5.801 – 5.806 provide the framework for the Commission’s accreditation of environmental testing laboratories. The preamble to the rules implementing TWC §§ 5.134 and 5.801 – 5.826 explain that the Sunset Advisory Staff Report indicated that requiring all data used in Commission decisions be from an accredited laboratory “should increase confidence in agency decision making, providing greater assurance of protecting public health, and minimize unnecessary cost for the agency.”⁸

Equally important as using an accredited environmental testing laboratory is adherence to the applicable rules. The 2010 Procedures to Implement the Texas Surface Water Quality Standards (2010 IPs) require that the organisms used for WET testing when the discharge is to a marine environment are the *Mysidopsis bahia* (mysid shrimp) and *Menidia beryllina* (inland silverside).⁹ As Mr. Pfeil testified, the mysid

⁵ 30 Tex. Admin. Code § 307.3(87).

⁶ Admin. Record Tab K, at 00033.

⁷ Admin. Record Tab K, at 00020.

⁸ 27 Tex.Reg. 8480, Referencing Sunset Advisory Commission Staff Report, Texas Natural Resource Conservation Commission, 2000, Page 54.

⁹ ED-1 Remand, at 105.

shrimp and inland silverside are the marine species approved by EPA,¹⁰ while Dr. Nielsen used red drum, which is not an approved species. Mr. Pfeil also testified that according to the 1991 EPA Technical Support document, EPA does not require the use of resident species because the standard test species represent the sensitive range of the ecosystem.¹¹ Moreover, for the chronic WET test, the draft permit requires dilution concentrations of 4%, 5%, 7%, 9% and 12% effluent and defines the critical dilution as 9% effluent.¹²

Dr. Nielsen testified that the mysid shrimp and inland silverside have the ability to survive extreme salinity fluctuations from an early age, making them unsuitable for use in evaluating the potential impacts to the receiving water from the POCC discharge.¹³ Because of her concern with the hardiness of the mysid shrimp and inland silverside, Dr. Nielsen performed all of her testing using red drum – a species not approved by the EPA for WET testing in Texas. Because Dr. Nielsen’s work is not from an accredited laboratory and did not use the EPA approved species, the Commission should not consider this data in its decision to issue the permit. The Executive Director respectfully recommends the ALJs not give her testimony any weight.

Impact to marine environment, aquatic life, spawning eggs and larval migration

30 TAC § 307.8(b)(6) provides that “[M]ixing zones must not preclude passage of free-swimming or drifting aquatic organisms to the extent that aquatic life use is significantly affected . . .” This zone of passage ensures that larval and other sensitive stage organisms will only be subject to the Zone of Initial Dilution (ZID) or the Aquatic Life Mixing Zone for short time period. The Protestants did not provide persuasive evidence to prove that aquatic organisms, in any significant quantity, that rely on tidal stream transport to distribute from spawning areas to estuarine nurseries would remain in the mixing zone for more than a transitory period of time. The longest amount of time that planktonic organisms could remain in the mixing zone would occur during slack tide conditions, which occur infrequently (i.e., twice per day) and for a short duration (i.e., time scale of minutes).¹⁴ During slack tide conditions, it is also important to note that the CORMIX model predicts better mixing (i.e., lower

¹⁰ ED-MP-1, at Bates 0007:3-10.

¹¹ ED-MP-1, at Bates 0012:14-16.

¹² Admin. Record Tab K, at 00019.

¹³ PAC-48R, at 19:15-22.

¹⁴ ED-KC-1 Remand, Bates 0013:12-30.

effluent percentages) during this time than during periods of higher ambient velocities, which are more representative of average tidal conditions.¹⁵ Since the final effluent percentages used to develop the draft permit are based on the highest effluent percentages from all of the modeling cases, the draft permit is developed such that it will be protective under all tidal conditions, including slack tide. Under normal (i.e., non-slack tide) tide conditions, the effluent trajectory is controlled by the ambient velocity. There is a significant zone of passage during normal tidal conditions for the majority of organisms to travel through and beyond the ZID and mixing zone without coming into direct contact with the plume.¹⁶ Given the large zone of passage, and the results of the WET testing provided by POCC which demonstrated that significant mortality or lethality, as defined in the Implementation Procedures (IPs) will not occur.

Published literature (TWDB study) and the Protestant's witness (Dr. Nielsen) indicates that 50% of larvae will not survive when exposed to 43.3 practical salinity units (psu) for 48 hours. CORMIX modeling performed by POCC indicates the worse-case scenario of conditions would result in a salinity of 45 psu within the ZID at 19.8 seconds after exiting the outfall.¹⁷ While some lethality may occur within the ZID, those organisms within the ZID will be subject to increases of salinity for very short periods of time as the plume of effluent that includes these larvae is pushed out toward the ambient receiving waters where salinities will be approaching background levels.¹⁸ This further indicates aquatic life uses will be maintained and impacts to red drum larvae and other sensitive organisms will not be significant.

Dr. Esbaugh suggested that a salinity of 37.7 ppt (based on Dr. Nielsen's studies) should be used as the acute criterion standards.¹⁹ The Executive Director disagrees; TCEQ's permitting process accounts for mixing and dilution in receiving waters as provided in the Critical Conditions Memo.²⁰ The Critical Conditions Memo requires the POCC maintain the diffuser to achieve a maximum of 14.6% effluent at the edge of the Zone of Initial Dilution (ZID).²¹

The Executive Director develops effluent limits for TPDES permits for the

¹⁵ *Id.*

¹⁶ App-RP-1-R at 47:18-24.

¹⁷ ED-7 Remand, at 7.

¹⁸ Rebuttal Testimony of Nathan Knott, PH.D, at 2:23-3:15.

¹⁹ PAC-45R, at 8:19-21.

²⁰ Admin. Record Tab J, at 00135 - 00136.

²¹ Admin. Record Tab J, at 00136. Admin. Record Tab K, at. 00014.

protection of aquatic life using the numerical water quality criteria found in 30 TAC § 307.6(c)(1). It is important to note that the water quality criteria and effluent limits are not the same. The water quality criteria is the quality that must be maintained in the waterbody to ensure that the waterbody will not be harmful to aquatic organisms or people.²² Specific numeric criteria are based on ambient water quality criteria documents published by the EPA and represent the concentration of a given substance that must not be exceeded within the receiving water body at the edge of the ZID and aquatic life mixing zone.²³

The water quality criteria for toxic substances do not have to be met at the end-of-pipe where the treated effluent first meets the receiving water.²⁴ Mixing zones are allowed at the point of discharge.²⁵ The effluent limits are developed to ensure that the proposed discharge will not exceed the required water quality criteria after complete mixing has occurred.²⁶ The rules clearly define that certain aspects of the TSWQS do not apply within mixing zones.²⁷ While the specific numerical acute criteria for toxic substances are applicable to all water in the state, it may be exceeded within the ZID.²⁸ Once the mixing zones are defined by the critical conditions reviewer (i.e., Ms. Cunningham), the permit coordinator (i.e. Ms. Gibson) performs screening calculations (TexTox) to ensure that criteria will be met at the edge of the various mixing zone.²⁹ If necessary, the permit coordinator will add effluent limits to the draft permit to ensure that the water quality criteria will be met.

Dr. Esbaugh appears to misunderstand the difference between effluent limits and criterion. As Ms. Gibson testified, screening thresholds and potential permit limits for toxic substances are calculated using numerical acute and chronic water quality criteria from 30 TAC § 307.6(c)(1) and the effluent percentages provided in the Critical Conditions memo.³⁰ These screening thresholds and limits are developed using the methodology set forth in the IPs are contained in the TexTox calculations presented in

²² 30 Tex. Admin. Code § 307.3(16)

²³ ED-SG-1 Remand at Bates 0018:11-20. Due to a scrivener's error, the footer to the entirety of Ms. Gibson's prefiled testimony references ED-Ms. Gibson-1 Remand, rather than ED-SG-1 Remand as it should have referenced.

²⁴ 30 Tex. Admin. Code § 307.6(c)(6).

²⁵ 30 Tex. Admin. Code § 307.8(b).

²⁶ ED-SG-1 Remand, at Bates 0015:26-29.

²⁷ 30 Tex. Admin. Code § 307.8(b)(1).

²⁸ 30 Tex. Admin. Code § 307.6(c)(6).

²⁹ ED-SG-1 Remand, at Bates 0016:27 - 0017:1-7.

³⁰ Admin. Record Tab J, at 00135-00136.

Appendix A of the Statement of Basis.³¹ Ms. Gibson testified that, after developing the screening thresholds and potential permit limits using TexTox, she was unable to perform the subsequent screening because the proposed facility has not been constructed or commenced discharging and; therefore, could not provide the necessary provide analytical data. The draft permit requires POCC to sample its effluent an submit the data to the Executive Director when it begins to discharge.³² Once the facility commences discharge and can conduct and submit the effluent sampling and analysis stipulated by Other Requirement No. 8, the full TexTox screening will be performed and the permit may be reopened to include additional monitoring requirements, effluent limits, or both, at that time.³³ The TexTox screening thresholds and calculated limitations included in the Statement of Basis (Appendix A) provide direction to the applicant regarding the design of their wastewater treatment system that will be necessary to meet the potential permit limits.

Additionally, the SUNTANS modeling performed by POCC indicates no more than 1 ppt increase in far field (edge of the mixing zone), and that salinities do not accumulate in the Corpus Christi Ship Channel (CCSC) or Corpus Christi Bay.³⁴ This indicates that the salinity gradient of the estuaries will be maintained. Additionally, During the hearing there was some discussion about the ship traffic that occurs along the Corpus Christi Ship Channel.³⁵ While the TCEQ critical conditions review does not consider additional mixing from ship traffic, the movement of large vessels through the Corpus Christi Ship Channel is common, and results in additional mixing in the channel.³⁶ This action would serve to further mix the treated effluent in the receiving waters.

All of these factors considered together provide an overwhelming weight of evidence that indicates no more than *de minimis* change to water quality and that aquatic life will not be impacted significantly by this proposed discharge.

Endangered Species

Mr. Schaefer testified that he determined that there are no federal endangered

³¹ Admin. Record Tab L, at 00008-00013.

³² ED-SG-1 Remand at Bates 0025: 23-27.

³³ Admin. Record Tab K, at 00014.

³⁴ APP-JF-1-R at 5:23 to 6:5.

³⁵ Tr. Remand Vol. 6, at 1464: 12-25; at 1465: 1-8.

³⁶ Tr. Remand Vol. 5, at 1154: 5-14.

or threatened species in the watershed, apart from the piping plover. As Mr. Schaefer testified, the piping plover is found in the area, but EPA review is only required for applications for petroleum facilities.³⁷ To make his determination, Mr. Schaefer relied on the IPs which describe the review process in detail.³⁸

Conclusion

While the Protestants' experts testified at great length about potential effects of increased salinity in the vicinity of the outfall, none of them were able to demonstrate how the draft permit violated a specific state or federal requirement. Therefore, the Executive Director respectfully recommends the ALJs find the proposed discharge will not adversely impact: the marine environment, aquatic life, and wildlife, including birds and endangered or threatened species, spawning eggs, or larval migration.

Issue C: Whether the proposed discharge will adversely impact recreational activities, commercial fishing, or fisheries in Corpus Christi Bay and the ship channel.

The Executive Director maintains his position the proposed discharge will not adversely impact recreational activities, commercial fishing, or fisheries in Corpus Christi Bay and the ship channel.

Mr. Schaefer testified on behalf of the Executive Director that the proposed discharge will not adversely impact recreational activities, commercial fishing, or fisheries in Corpus Christi Bay or the ship channel, as indicted in his antidegradation review.³⁹ In addition to his own diligent review, Mr. Schaefer testified that this antidegradation determination is also based on the contributions of other technical specialists within the TCEQ who performed rigorous technical reviews of this application and proposed discharge.⁴⁰

As a result of the Tier 2 antidegradation review, Mr. Schaefer determined that no significant degradation of water quality is expected in Corpus Christi Bay, which has been identified as having exceptional aquatic life use.⁴¹ After performing the Tier 1 antidegradation review, Mr. Schaefer determined the permit will not impair primary

³⁷ ED-PS-1 Remand, Bates 32:3-6 and ED-1 Remand, at 22.

³⁸ ED-PS-1 Remand, at Bates 0032: 7-9; ED-1 Remand, at 21.

³⁹ ED-PS-1 Remand, at Bates 0022:15-19.

⁴⁰ ED-PS-1 Remand, at Bates 0005:20-25.

⁴¹ Admin. Record Tab J, at 00101.

contact recreation, exceptional aquatic life use, oyster waters, or existing water uses.⁴²

During Mr. Schaefer's cross examination the Protestants used an excerpt from Mr. Schaefer's deposition to insinuate that the TCEQ has never found degradation in any application submitted to the agency.⁴³ Mr. Schaefer has reviewed hundreds of applications in his tenure at TCEQ.⁴⁴ He clarified on redirect that it is not uncommon for the TCEQ to find degradation in application reviews.⁴⁵ As Mr. Shafer testified, when that happens staff works with the applicant to address the underlying cause of the potential degradation.⁴⁶ Mr. Schaefer then clarified that the TCEQ does not keep a record of those determinations.⁴⁷ This may explain why the Protestants are so confused about TCEQ's rules and processes. When the Commission remanded the application back to SOAH to take additional evidence, Executive Director staff requested that the applicant provide additional information and make clarifications about the application in order for Executive Director staff to be absolutely sure that their reviews were complete and accurate.

Upon receipt of the new information throughout the summer of 2021, Executive Director staff performed fresh reviews and prepared new memos demonstrating the careful consideration Executive Director staff devoted to this application, contrary to the Protestants' supposition. Furthermore, Mr. Schaefer testified that if an applicant fails to address the issues Executive Director staff have identified as indicative of potential degradation, Executive Director staff will not issue a draft permit and will ask the applicant to withdraw its application.⁴⁸ As further discussed in Issue H below, Mr. Schaefer demonstrated that the application passed the Tier 1 and Tier 2 reviews, complies with all other applicable TCEQ rules, and should not impact fisheries beyond a *de minimis* level.

Mr. Schaefer further testified that there is an, "ample zone of passage that will allow a vastly greater proportion of the organisms passing by to avoid the ZID in waters that are essentially at background salinity concentrations."⁴⁹ Besides the benefit

⁴² *Id.*

⁴³ Tr. Remand Vol. 9, at 2373:5-16.

⁴⁴ ED-PS-1 Remand, at Bates 0002:15-18.

⁴⁵ Tr. Remand Vol. 9, at 2387:25.

⁴⁶ Tr. Remand Vol. 9, at 2387:25 - 2388: 19.

⁴⁷ Tr. Remand Vol. 9, at 2390:9-14.

⁴⁸ Tr. Remand Vol. 9, at 2390:4-8.

⁴⁹ ED-PS-1 Remand, at Bates 0010:5-8.

of an ample zone of passage, Mr. Schaefer testified that because of water currents and the velocity of effluent coming out of the diffuser, “there are physical limitations to the number of organisms that could occupy the ZID space...” further demonstrating the limited impact the permit will have upon fisheries.⁵⁰

The Protestants’ experts offered testimony regarding the potential negative impact of the proposed discharge on the fisheries, which would also negatively impact both recreational and commercial fishing; however, they did not demonstrate that the draft permit does not comply with the applicable statutory and regulatory requirements governing the proposed discharge. Therefore, the Executive Director respectfully recommends the ALJs find that the proposed discharge will not adversely impact recreational activities, commercial fishing, or fisheries in Corpus Christi Bay and the ship channel.

Issue D: Whether the Application, and representations contained therein, are complete and accurate.

The Executive Director maintains his position that the Application, and representations contained therein, are complete and accurate.

As the permit coordinator for this application, and as a TCEQ staff person who has reviewed over one hundred applications prior to this one, Ms. Gibson testified in her expert opinion that to the best of her knowledge the revised application and the revisions therein are complete and accurate.⁵¹ While TCEQ cannot independently verify everything in an application, Ms. Gibson testified that TCEQ’s application review process does include some independent verification.⁵² The Application Review and Processing Team independently verifies information in the application relating to physical addresses, facility location coordinates (latitude and longitude), discharge routes, and other administrative information.⁵³ Ms. Gibson testified that 30 TAC § 281.5 also requires that Executive Director staff verify the legal status of the applicant and that the signature of the applicant is checked against agency requirements.⁵⁴ In response to the protestants’ criticism regarding the lack of independent verification,

⁵⁰ ED-PS-1 Remand, at Bates 0014:20-24.

⁵¹ ED-SG-1 Remand, at Bates 0013:5-6.

⁵² ED-SG-1 Remand, at Bates 0013:9.

⁵³ ED-SG-1 Remand, at Bates 0013:10-20.

⁵⁴ ED-SG-1 Remand, at Bates 0014:1-4.

Ms. Gibson testified that in order to insure the quality of information in an application, 30 TAC § 305.44 requires that a responsible corporate officer sign the application thereby swearing under penalty of law that the information contained in the application is true and accurate.⁵⁵

At issue from the previous hearing were disputes about the depth of the channel at the outfall, velocity in the channel, efficacy of the diffuser, and configuration of the mixing zone. In response to the Commission remanding the application to SOAH, the Executive Director requested additional information from the applicant in a series of requests through the summer of 2021. The POCC collected site-specific data at the location of the proposed outfall. This data included bathymetry modeling, dissolved oxygen sampling, salinity levels at the location of the outfall, and velocity data at the location of the outfall. The Executive Director's experts testified that they used the information the applicant provided in the revised application in order to complete their reviews.

There is no legitimate dispute regarding the location of the outfall, the depth of the outfall, the depth of discharge, or the velocity in the channel. The Executive Director's experts, having the benefit of the extensive reporting POCC conducted, possess even more information than at the previous hearing. Ms. Cunningham testified that after she received the protestants second response to the Executive Director's request for clarification that she had enough information to complete her review.⁵⁶ Contrary to the Protestants assertions regarding the completeness of the record, Mr. Schaefer, as TCEQ's regulatory antidegradation expert, testified that there was nothing missing from the application that would prevent him from completing his review.⁵⁷

The Protestants have criticized the Executive Director for allowing POCC to submit additional information regarding the application, but as Mr. Schaefer testified it is not uncommon for an Applicant to amend its application in response to technical issues.⁵⁸ In this case, the Executive Director wished to obtain as much relevant information as could be gathered and the Applicant provided all the information which was requested. The Executive Director notes that it is inconsistent for the Protestants

⁵⁵ ED-SG-1 Remand, at Bates 0013:11-27.

⁵⁶ ED-KC-1 Remand, at Bates 0009:3-4.

⁵⁷ ED-PS-1 Remand, at Bates 0023:22-24.

⁵⁸ Tr. Remand Vol. 9, at 2387:23-25.

to say that the Executive Director does not have sufficient information to complete an application and then upon seeing the voluminous and detailed record of the application, argue that it is unfair of the Executive Director to receive additional information and revise the draft permit.

Throughout this hearing the Protestants have tried to conflate academic standards with regulatory requirements as if they are or should be the same. The Protestants attempted to impeach Ms. Gibson by showing her an excerpt of her deposition in which she effectively stated that there would never be enough tests for the application.⁵⁹ She is correct and not just about this application. There are an infinite number of variables and hypotheticals that can be conjured up for every permit TCEQ has issued. Countless experiments could be performed about dissolved oxygen, salinity, ambient velocity, temperature, diffuser efficiency, eddy effects; the list is endless. The TCEQ developed a set of rules which attempt to address the probable and realistic effects a discharge might have in a regulatory framework that is both manageable for the State and the regulated community while ensuring a reasonable degree of scientific certainty. The POCC provided the Executive Director with information that is not ordinarily provided when applications are submitted. Not only does the Executive Director have the sworn statement from the applicant from which to rely on, but also an independent confirmation of that sworn application from the voluminous responses to the Executive Director's requests for additional information. Thus, while the Protestants may object to the additional data submitted with this application, this data illustrates that this application has received a more thorough review than what is required for a typical TPDES application.

The Protestants offered testimony regarding what they perceived as errors in the application. The Protestants did not demonstrate that the POCC Application or any representations in the Application are incorrect. Therefore, the Executive Director respectfully recommends the ALJs find that the Application, and representations contained therein, are complete and accurate.

Issue G: Whether the modeling complies with applicable regulations to ensure the draft permit is protective of water quality, including utilizing accurate inputs.

⁵⁹ Tr. Remand Vol. 9, at 2231:14-2233:3.

The Executive Director maintains his position that the modeling complies with applicable regulations to ensure the draft permit is protective of water quality, including utilizing accurate inputs.

As Ms. Cunningham testified the CORMIX model is the only model that TCEQ uses to predict effluent percentages or critical dilutions when the applicant is using a diffuser.⁶⁰ Ms. Cunningham is an expert in the CORMIX model and testified that she has reviewed 18 applications with diffusers that required a CORMIX evaluation and performed over 700 model runs.⁶¹ While the Protestants offered testimony critical of the model's limitations, they failed to offer any evidence showing that the TCEQ could have used alternative models to evaluate the diffuser.

Ms. Cunningham testified that her diffuser review and CORMIX modeling were reviewed in accordance with the TCEQ's guidance document, *Mixing Analyses Using CORMIX*.⁶² She also testified that the model inputs related to the diffuser design, effluent density, depth, and ambient velocity were based on information provided in the revised application.⁶³ She further testified that the model inputs for ambient densities were based on data from TCEQ's Surface Water Quality Monitoring (SWQM) stations and default values were used for other model inputs such as the bottom roughness coefficient and wind speed.⁶⁴

As a result of the application being remanded to SOAH, the Executive Director requested additional information from the applicant regarding the depth and design of the diffuser. Ms. Cunningham used the information from the applicant to complete her review. That review was completely independent and separate from POCC's evaluation. In response to the Executive Director's request for clarification, POCC provided more information about the application which Ms. Cunningham used to complete her review. The information the Applicant provided included the design specifications of the diffuser, location of the diffuser in the channel, channel bathymetry, and the velocity of water through the channel.⁶⁵ Ms. Cunningham further testified that she had enough

⁶⁰ ED-KC-1 Remand, at Bates 0005:11-18.

⁶¹ ED-KC-1 Remand, at Bates 0018:4-12.

⁶² ED-KC-1 Remand, at Bates 0033:29-33.

⁶³ ED-KC-1 Remand, at Bates 0033:33- 0034:3.

⁶⁴ ED-KC-1 Remand, at Bates 0034:3-6.

⁶⁵ APP-RP-3-R.

information from what the Applicant submitted regarding the depth of the diffuser to perform her review.⁶⁶

The Protestants offered testimony criticizing Ms. Cunningham for “acquiescing” to the applicant when she configured the dimensions of the mixing zone.⁶⁷ This is utterly incorrect. Ms. Cunningham testified that the area of the mixing zone for the current permit is the same as it was in the original hearing.⁶⁸ The configuration of the mixing zone is different because the Applicant submitted a redesigned diffuser. Based on the design of the diffuser, Ms. Cunningham testified in great detail that she reconfigured the mixing zone due to the specific design of the diffuser which is ultimately why the mixing zones’ dimensions changed.⁶⁹ Rather than attempting to demonstrate the errors in the modeling performed by POCC and the Executive Director, the Protestants instead chose to use model inputs that produce the most damaging CORMIX model results.

The Protestants also offered testimony criticizing Ms. Cunningham for failing to address the possibility of an eddy at the location at the outfall. In response, Ms. Cunningham testified CORMIX does not have the ability to model an eddy.⁷⁰ To ensure that the diffuser will achieve the same or better dilutions during different ambient velocity conditions, Other Requirement No. 9 in the draft permit requires the applicant to submit velocity data to the TCEQ:

During the term of the permit, the permittee shall complete a study of ambient water velocity and submit a report to the TCEQ Water Quality Assessment Section (MC-150) summarizing measured ambient water velocity at the location of Outfall 001. The report must include results of measurements of speed and direction of the tidal current collected at the depth of the proposed/installed diffuser barrel. The measurements shall capture velocities encompassing a complete tidal cycle and be collected during a period in which maximum tidal amplitude typically occurs.⁷¹

Based on public comments received during the formal comment period, the Executive Director added the above requirement to the draft permit to ensure Executive Director staff is aware of channel conditions. By requiring POCC to provide

⁶⁶ ED-KC-1 Remand, at Bates 0012:16-22.

⁶⁷ PAC-53 R at 24: 11-18.

⁶⁸ ED-KC -1 Remand, at Bates 0012:26.

⁶⁹ ED-KC-1 Remand, at Bates 0012:32- 0013:32.

⁷⁰ ED-KC-1 Remand, at Bates 0035:25-28.

⁷¹ Admin. Record Tab K, at 00015.

additional information on the receiving water body, the Executive Director has taken steps to insure that the agency possesses as much data as possible to further confirm that the Executive Director's reviews are accurate, contrary to the Protestants' assertions.

The inputs Ms. Cunningham used were correct, accurate, and included in the revised application and supplemental materials. To perform a complete review of the application, the Executive Director's experts relied on the results of Ms. Cunningham's Critical Conditions memo.⁷² Mr. Schaefer testified that the antidegradation review incorporates the results from the Critical Conditions memo that Ms. Cunningham prepared.⁷³ The Protestants are correct as to the importance that the Critical Conditions be as accurate as possible due to its impact on the other reviews of the application. That is why it was critical for Executive Director staff to use the information that the applicant provided. The Protestants were in fact able to replicate the same modeling results as Dr. Tischler and Ms. Cunningham but chose to deviate from TCEQ's standard procedures in order to show a variety of theoretical outcomes - all with worse results than what Ms. Cunningham predicted. Ms. Cunningham testified that Dr. Socolofsky deviated from TCEQ standard procedures when he calculated the distance from shore.⁷⁴ Ms. Cunningham also testified that Dr. Osting made the same mistake as Dr. Socolofsky in calculating the distance from shore.⁷⁵ Contrary to what the Protestants assert, Executive Director staff cannot flippantly decide what procedures to follow or what inputs they may use when performing modeling.

The Protestants offered testimony critical of the Executive Director's modeling but ultimately failed to demonstrate that it was done contrary to any established rule, regulation, or law applicable to this proceeding. The Executive Director respectfully recommends the ALJs find the Executive Director's modeling performed on this application complies with applicable regulations to ensure the draft permit is protective of water quality, including utilizing accurate inputs, based on representations made by the POCC in its revised application and supplemental materials.

⁷² Admin. Record, Tab J, at 00135 - 00136.

⁷³ ED-PS-1 Remand, at Bates 0040:29-33.

⁷⁴ ED-KC-1 Remand, at 0026:1-22.

⁷⁵ ED-KC-1 Remand, Bates 0029:2-9 0030:3.

Issue H: Whether the Executive Director’s antidegradation review was accurate.

The Executive Director maintains his position that the draft permit, if issued, complies with the applicable antidegradation review requirements as set forth in the Texas Surface Water Quality Standards in 30 TAC Chapter 307 (TSWQS) and the Implementation Procedures (IPs). The evidence in the record fully supports the conclusion that the Executive Director properly applied the TCEQ’s antidegradation policy for the proposed discharge. The Executive Director’s witness, Peter Schaefer is the only individual has actually performed an antidegradation review for a TPDES application, using the input from his colleagues. Mr. Schaefer has reviewed over 1,500 wastewater applications and has been the Team Leader of the Standards Implementation Team for seven years.⁷⁶ As Mr. Schaefer testified, he performed his antidegradation review according to all relevant requirements.⁷⁷ Mr. Schaefer also testified that he considered the Protestants’ testimony, however, their information did not change the outcome of his antidegradation review.⁷⁸ In fact, the Protestants’ testimony confirmed the Executive Director’s antidegradation review, specifically with respect to bioassays of red drum larva.

While the IPs neatly divide the Executive Director’s antidegradation review into three Tiers, the Executive Director’s antidegradation review actually consists of an evaluation of multiple technical reviews, including the CORMIX modeling, dissolved oxygen modeling, WET testing review, TEXTOX screening, information provided by the applicant and, if available, information from protesting parties.⁷⁹

Mr. Schaefer testified that after reviewing the revised information submitted by POCC, he requested additional information regarding the near field and far field effects of the discharge on the receiving waters.⁸⁰ Mr. Schaefer testified that he needed the additional information to assess the effects of the discharge both near the outfall and on the larger bay system as a whole.⁸¹ Mr. Schaefer memorialized his conclusions

⁷⁶ ED-PS-1 Remand, at Bates 0002:15-18; ED-PS-2 Remand.

⁷⁷ ED-PS-1 Remand, at Bates 0009:26-29, 25:12-27:3.

⁷⁸ ED-PS-1 Remand at Bates 0009:26-33.

⁷⁹ ED-PS-1 Remand, at Bates 0008:27-0009:7; 0029:5-7; 0035:4-8.

⁸⁰ ED-PS-1 Remand, at Bates 0006:26-0007:3.

⁸¹ ED-PS-1 Remand, at Bates 0007:12-13.

regarding the near field effects and the far field effects in his Permit Review for Classified waters by Standards Team.⁸²

Throughout his testimony, Mr. Schaefer stated he used the weight of evidence approach in his consideration of information provided by both the POCC and Protestants in his review.⁸³ Mr. Schaefer further testified that that he used the percentage of effluent at the edge of the aquatic life mixing zone, and from there he calculated the expected salinity at the edge of the aquatic life mixing zone using information from POCC.⁸⁴

As part of his antidegradation review, Mr. Schaefer also considered the WET testing performed by both POCC (Stillmeadow Incorporated) and Dr. Nielsen on behalf of the Protestants. Stillmeadow Incorporated is a NELAP accredited laboratory;⁸⁵ however, Dr. Nielsen's laboratory is not a NELAP accredited laboratory.⁸⁶ Additionally, Dr. Nielsen testified that she didn't follow the NELAP standards.⁸⁷ TWC § 5.134 requires that all environmental testing laboratory data and analysis used by the commission for decisions under the commission's jurisdiction must be from an accredited environmental testing laboratory. Mr. Schaefer testified that he used the WET testing results provided by POCC in his weight of evidence evaluation of the fate of organisms passing through the ZID and beyond the ZID.⁸⁸ It is important to note that the test species used by Stillmeadow Laboratory are the species that are included in the draft permit and are the species that EPA requires the TCEQ to use for WET testing in wastewater permits.

Mr. Schaefer also considered Dr. Nielsen's WET testing in his review, but contrary to Dr. Nielsen's testimony, Mr. Schaefer testified that "the studies Dr. Nielsen performed confirmed my previous conclusions that the discharge would not have adverse effects on aquatic life, especially with respect to red drum."⁸⁹ (*emphasis added*). Mr. Schaefer also testified that Dr. Nielsen's tests did not resolve the issue of

⁸² Admin. Record. Tab J, at 00103-00105.

⁸³ ED-PS- Remand; at Bates 0026:29-32; 0027:29-31; 0034:33 - 0035:3; 0035:5-7; 0037:11-16; and 0040:17-19.

⁸⁴ Tr. Remand Vol. 9, at 2359:2 -2360:15.

⁸⁵ Admin. Record Tab I, at 00008.

⁸⁶ Tr. Remand Vol. 7, at 1797:5-7.

⁸⁷ Tr. Remand Vol. 7, at 1797:8-23.

⁸⁸ ED-PS-1 Remand, at Bates 0035:5-7.

⁸⁹ ED-PS-1 Remand, at Bates 0036:23-28.

whether the proposed discharge would cause significant mortality as required in 30 TAC § 307.6(e)(1).⁹⁰ Finally, Mr. Schaefer testified that he could not determine how Dr. Nielsen derived the salinity levels within the ZID.⁹¹ It is important to note that the Implementation Procedures require WET testing use the *Americamysis bahia* (mysid shrimp), and the *Menidia beryllian* (inland silverside), however Dr. Nielsen used red drum in all of her WET tests.⁹²

Antidegradation Review

Tier I Antidegradation Review

TCEQ's antidegradation policy is found at 30 TAC § 307.5. Tier 1 provides "Existing uses and water quality sufficient to protect those existing uses must be maintained. Categories of existing uses are the same as for designated uses, as defined in § 307.7 of this title (relating to Site-Specific Uses and Criteria)." Additionally, the IPs provide that a Tier 1 antidegradation ensures that existing water quality uses are not impaired by increasing pollutant loading.⁹³

Mr. Schaefer described his Tier 1 Antidegradation Review in detail in his prefiled testimony.⁹⁴ As Mr. Schaefer testified, he paid particular attention to the potential impact of the salinity in the proposed discharge because of the potential effect of the increase in salinity on aquatic life and the salinity gradient.⁹⁵ Mr. Schaefer testified that while the numeric standards in the TSWQS do not apply to the POCC application, the narrative criteria (which include salinity) do apply.⁹⁶ The TSWQs require that "effluent of discharges to waters in the state must not be acutely toxic to sensitive species of aquatic life, as demonstrated by effluent toxicity tests."⁹⁷

⁹⁰ ED-PS-1 Remand, at Bates 0037:7-8.

⁹¹ ED-PS-1 Remand, at Bates 0037: 8-9.

⁹² ED-1 Remand, at 105.

⁹³ ED-1 Remand, at 56.

⁹⁴ ED-PS-1 Remand, at Bates 0028:1-30

⁹⁵ ED-PS-1-Remand; at Bates 0028:12-14.

⁹⁶ ED-PS-1-Remand; at Bates 0028:14-19.

⁹⁷ 30 Tex. Admin. Code § 307.6(e)(2)(B).

Tier 2 Antidegradation Review

30 TAC § 307.5(b)(2) provides:

Tier 2. No activities subject to regulatory action that would cause degradation of waters that exceed fishable/swimmable quality are allowed unless it can be shown to the commission's satisfaction that the lowering of water quality is necessary for important economic or social development. Degradation is defined as a lowering of water quality by more than a de minimis extent, but not to the extent than an existing use is impaired. Water quality sufficient to protect exiting uses must be maintained. Fishable/swimmable waters are defined as waters that have quality sufficient to support propagation of indigenous fish, shellfish, terrestrial life, and recreation in and on the water.

Mr. Schaefer described his Tier 2 Antidegradation Review in detail in his prefiled testimony and in his permit review checklist.⁹⁸ As Mr. Schaefer testified, he relies on information from various TCEQ technical staff to develop his Tier 2 antidegradation determination.⁹⁹ First, Mr. Schaefer determined the water quality uses and criteria for the receiving water, in this case Corpus Christi Bay using the TSWQS.¹⁰⁰ Mr. Schaefer memorialized his determination in his Interoffice Memorandum dated August 19, 2021. As noted in his memo, the designated uses and dissolved oxygen criterion for Segment 2481 are primary contact recreation, exceptional aquatic life use, oyster waters, and 5.0 mg/L dissolved oxygen.¹⁰¹ The criteria for Segment 2481 are: dissolved oxygen 5.0 mg/L, pH between 6.5 and 9.0 standard units, Enterococci 35 per 100 m/L, 14 per 100 mL fecal coliform, and 95 degrees F.¹⁰²

After determining the water quality uses and criteria, Ms. Cunningham determined the critical conditions.¹⁰³ Ms. Cunningham determined:

1. Human Health criteria apply to fish only;
2. The Zone of Initial Dilution (ZID) is a 184-foot by 43-foot rectangle centered on the diffuser with the longer edge extending along the diffuser barrel. This area is approximately equal to the area of a circle with a 50-foot radius. Acute toxic criteria apply at the edge of the ZID;

⁹⁸ ED-PS-1 Remand, at Bates 0025:10-0027:31, 0029:18-0030:22. Admin. Record Tab J, pg. 00103-00105.

⁹⁹ ED-PS-1 Remand, at Bates 0025:10-27:31, 0029:18-30:22. Admin. Record Tab J, pg. 00103. ED-PS-1 Remand, at Bates 0024:9-12.

¹⁰⁰ ED-PS-1 Remand, at Bates 0025:15-20.

¹⁰¹ Admin. Record Tab J, 00101-00105, 30 TAC § 307.10.

¹⁰² 30 Tex. Admin. Code § 307.10(1), Appendix A.

¹⁰³ ED-PS-1 Remand, at Bates 0025:21-24.

3. The Chronic Aquatic Life Mixing Zone is a 553-foot by 227-foot rectangle centered on the diffuser with the longer edge extending along the diffuser barrel. Chronic toxic criteria apply at the edge of the mixing zone;
4. The Human Health Mixing Zone is defined as a volume within a 1,053-foot by 477-foot rectangle centered on the diffuser the long edge along the diffuser barrel. This area is approximately equal to the area of a 400-foot radius circle.¹⁰⁴

Mr. Schaefer used the Dissolved Oxygen analysis performed by Mr. Michalk to ensure the draft permit would comply with the baseline dissolved oxygen levels.¹⁰⁵

Additionally, Mr. Schaefer used information from the permit coordinator (Ms. Gibson), to assess the potential impact to the receiving water from toxic pollutants. Ms. Gibson's evaluation of the potential impact to the receiving water from toxic pollutants is found in Appendix A of the Statement of Basis/Technical Summary and Executive Director's Preliminary Decision (Statement of Basis).¹⁰⁶ Additionally, the draft permit includes both chronic and 24-Hour acute whole effluent toxicity (WET) testing. As Mr. Pfeil testified, WET testing assesses the aggregate toxicity of the discharge.¹⁰⁷

Mr. Schaefer also considered the anticipated effects of the proposed discharge on the salinity gradient of the receiving waters and the salinity of the bay system as a whole. Mr. Schaefer relied on information provided by Dr. Furnans, on behalf of POCC, that under the most extreme conditions, "the mass of total salt would increase by less than 1% at the diffuser location."¹⁰⁸ Mr. Schaefer noted that an increase in the salt concentration of less than 1% would not constitute degradation with respect to salts.¹⁰⁹

After compiling and evaluating the weight of evidence including information in the POCC application, the applicable rules, the Implementation procedures, the technical reviews from his colleagues, the additional information the POCC submitted in response to his request for additional information, and information on red drum larva (from TWDB paper and Dr. Nielsen's data). Mr. Schaefer preliminary determined

¹⁰⁴ Admin. Record Tab J, at 136.

¹⁰⁵ ED-PS-1 Remand, at Bates 0025:28-0026:2.

¹⁰⁶ Admin. Record Tab L, at 00008-00013.

¹⁰⁷ ED-MP-1 Remand; at Bates 003:28- 0004:5.

¹⁰⁸ Admin. Record Tab J, at 00105.

¹⁰⁹ *Id.*

that the proposed discharge will not cause significant degradation of water quality in Corpus Christi Bay.¹¹⁰

Mr. Schaefer also addressed the question of whether the Executive Director fully complied with the requirement in 30 TAC § 307.5(b)(2) (regarding the requirement that an applicant must demonstrate that “the lowering of water quality is necessary for important economic or social development”) in both his prefiled testimony and during his redirect testimony. As Mr. Schaefer testified, the TCEQ does not issue permits that might degrade the receiving waters.¹¹¹ The Executive Director does not turn a blind eye to potential degradation, or simply “rubber stamp” every application. Rather, the Executive Director works with applicants to ensure the discharge will not degrade the receiving water. If during the course of his review, the Executive Director determines that a proposed discharge will cause degradation, the Executive Director notifies the applicant that they will either have to revise their application or withdraw it.¹¹²

C. Tier 3 Antidegradation Review

Mr. Schaefer testified that a Tier 3 Antidegradation was not required for the POCC application because a Tier 3 Antidegradation is only required if the proposed discharge is to an outstanding natural resource water.¹¹³ Outstanding natural resource waters are defined as “high quality waters within or adjacent to national parks and wildlife refuges, state parks, wild and scenic rivers designated by law and other designated areas of exceptional recreational or ecological significance.”¹¹⁴ There are no such waters designated in the State.¹¹⁵

Issue I: Whether the draft permit includes all appropriate and necessary requirements.

The Executive Director maintains his position that the draft permit includes all appropriate and necessary requirements. All of the Executive Director’s witnesses testified that the POCC draft permit includes all appropriate and necessary requirements. Mr. Pfeil testified that, in fact, the POCC draft permit goes beyond the appropriate and necessary requirements because the draft permit includes WET

¹¹⁰ Admin. Record Tab J, pg. 00101.

¹¹¹ ED-PS-1 Remand, at Bates 0029:31-0030:2.

¹¹² ED-PS-1 Remand, at Bates 0030:2-5.

¹¹³ ED-PS-1 Remand, at Bates 0031:12-16

¹¹⁴ 30 Tex. Admin. Code § 307.5(b)(3).

¹¹⁵ ED-PS-1 Remand, at Bates 0031:26-27.

testing, which is not required for minor facilities.¹¹⁶ POCC, however, voluntarily accepted WET Testing.¹¹⁷

Ms. Gibson testified in depth regarding the development of the draft permit. Ms. Gibson explained that the POCC draft permit includes both standard language that is included in all industrial TPDES permits, as well as language that is specific for the POCC draft permit. Every TPDES permit includes a cover page, an effluent limitation and monitoring page(s), boiler plate language, and the “Other Requirements” section.¹¹⁸ The cover page for every industrial TPDES permit includes basic information regarding the permit number, permittee information, location of the discharge route, issue date, and standard language regarding the limit of the authorization.¹¹⁹

Page 2 of the draft permit describes the effluent limits and monitoring requirements. The draft permit limits the discharge from the POCC facility to a daily average flow not to exceed 95.6 million gallons per day and a daily maximum flow not to exceed 110 million gallons per day.¹²⁰ Ms. Gibson testified extensively regarding how she determined the appropriate effluent limits to include in the POCC draft permit.¹²¹ As described by Ms. Gibson, the effluent limits for an industrial TPDES permit are based on the Texas Surface Water Quality Standards (30 TAC Chapter 307) as implemented in the Implementation Procedures.¹²² TPDES permits may include both technology-based effluent limits and/or water quality based effluent limits depending on the nature of the discharge.¹²³ Ms. Gibson’s calculations are found in Appendix A of the Statement of Basis (Tab L, page 00008).

Ms. Gibson described that she used Best Professional Judgement and the requirements in 30 TAC § 307.9(a), (b), and (c) to justify including reporting limits for total suspended solids, total dissolved solids, chloride, and sulfate.¹²⁴ Because the POCC facility has not been constructed, Ms. Gibson could not screen the discharge against water quality-based effluent limits, therefore, she added Other Requirement

¹¹⁶ ED-MP-1 Remand, at Bates 18:13-14.

¹¹⁷ ED-MP-1 Remand, at Bates 18:15.

¹¹⁸ ED-SG-1 Remand, at Bates 0022:15-21.

¹¹⁹ ED-SG-1 Remand, at Bates 0022:22-28.

¹²⁰ Admin. Record Tab K, at 00002.

¹²¹ ED-SG-1 Remand, at Bates 0023:16 - 0027:13.

¹²² ED-SG-1 Remand, at Bates 0023:14-21.

¹²³ ED-SG-1 Remand, at Bates 0023:22-28.

¹²⁴ ED-SG-1 Remand, at Bates 0024:5-8.

No. 8 to the draft permit.¹²⁵ Other Requirement No. 8 provides:

Wastewater discharged via Outfall 001 must be sampled and analyzed as directed below for those parameters listed in Tables 1, 2, and 3 of Attachment A of this permit. Analytical testing for Outfall 001 must be completed within 60 days of initial discharge. Results of the analytical testing must be submitted within 90 days of initial discharge to the TCEQ Industrial Permits Team (MC-148).

Based on a technical review of the submitted analytical results, an amendment may be initiated by TCEQ staff to include additional effluent limitations, monitoring requirements, or both.

Tab K, pg. 00014-00015

Ms. Gibson testified that she added reporting requirements for:

- total suspended solids because of the sludge generation and handling activities proposed in the application;¹²⁶
- total dissolved solids because of the water treatment activities proposed in the application and POCC's request to discharge water treatment waste;¹²⁷
- chloride and sulfate because of the water treatment activities POCC included in its application and POCC's request to discharge water treatment waste.¹²⁸

Ms. Gibson stated that she included minimum and maximum effluent limits for pH based on the requirements in 30 TAC §§ 307.4(m) and 307.7(b)(4)(B).

Ms. Gibson also testified in detail regarding her decision to include each of the OTHER REQUIREMENTS. Ms. Gibson added Other Requirements:

1. Regarding consistency with the Texas Coastal Management Program which is standard practice for discharges that are located within a coastal county or whose discharge enters a coastal segment.
2. Regarding the definition of water treatment waste because it is standard practice for permits which authorize the discharge of water treatment wastes.

¹²⁵ ED-SG-1 Remand, at Bates 0025:20-30.

¹²⁶ ED-SG-1 Remand, at Bates 0026:4-7.

¹²⁷ ED-SG-1 Remand, at Bates 0026:8-13.

¹²⁸ ED-SG-1 Remand, at Bates 0026:14-23.

3. Regarding the mixing zone which is standard practice for discharges which require development of a mixing zone definition. Ms. Gibson obtained the information regarding the Mixing Zones from Ms. Cunningham's Memo (Tab J, pg. 00135).
4. Regarding the location of the diffuser which is standard practice for discharges which utilize a diffuser. Ms. Gibson obtained the information regarding the location of the diffuser from Ms. Cunningham's Memo (Tab J, pg. 00135).
5. Regarding a prohibition of the discharge of domestic wastewater is standard practice for all permits which do not authorize the discharge of domestic wastewater.
6. Regarding sludge which is standard practice for all authorization for facilities which propose to generate sludge during the treatment process.
7. Regarding reporting requirements which is a standard provision which suspends reporting requirements until a facility commences discharge under the issued permit.
8. Regarding sampling and analysis requirements which is a standard provision included in permits for facilities which are not generating an effluent that can be sampled and analyzed.
9. Regarding ambient water velocity which was developed and recommended by Ms. Katie Cunningham of the Water Quality Assessment Team.¹²⁹

None of the Protestants provided testimony that the draft permit is missing any requirement that is required by the governing statutes or rules, rather they opined that the draft permit should include additional requirements, or that the discharge should be moved to a different location. As Mr. Pfeil testified, the draft permit actually exceeded the regulatory requirements because it requires WET testing.

Conclusion

The Executive Director maintains his position that the draft permit meets and even exceeds all applicable statutory and regulatory requirements. Additionally, the

¹²⁹ ED-SG-1 Remand, at Bates 0029:29 to 0031:31.

Executive Director maintains that the correspondence between the TCEQ and EPA regarding this application is outside of the issues referred to SOAH by the Commission.

The Executive Director respectfully recommends the Administrative Law Judges issue a Proposal for Decision recommending the Commission issue the draft permit without changes.

Respectfully submitted,

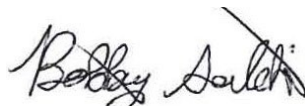
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REPRESENTING THE
EXECUTIVE DIRECTOR OF THE TEXAS
COMMISSION ON ENVIRONMENTAL
QUALITY

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2022, the “Executive Director’s Closing Arguments” was served electronically, and by either first class mail or hand delivered to the parties listed below.



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