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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 7, 2020

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STATE OFFICE OF
ADMINISTRATIVE HEARINGS
Jessie Harbin, CLERK

Honorable ALJs Rebecca Smith and Cassandra Quinn
State Office of Administrative Hearings
P.O. Box 13025
Austin, Texas 78711-3025

Re: Port of Corpus Christi Authority of Nueces County
Contested Case Hearing for TPDES Permit No. WQ0005253000
SOAH Docket No. 582-20-1895; TCEQ Docket No. 2019-1156-IWD
Executive Director's Reply to Closing Arguments

Honorable Administrative Law Judges Smith and Quinn:

Enclosed please find a copy of the Executive Director's Reply to Closing Arguments for the contested case hearing listed above.

If you have any questions, please do not hesitate to call me at (512) 239-3417, or email at Kathy.humphreys@tceq.texas.gov.

Sincerely,

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

Kathy Humphreys
Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division
512-239-3417
Kathy.humphreys@tceq.texas.gov

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 REPLY TO CLOSING ARGUMENTS

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 Reply to Closing Arguments.

I. Introduction

i. Pro-se Group and Audubon Texas

The Executive Director appreciates the time and effort the pro-se group put into participating in the hearing on the POCC application and understands the challenge of learning about the administrative process while participating in the administrative process. The pro-se group requested that changes be made to TCEQ's processes to encourage meaningful public participation. The Texas Water Code (TWC) describes who may be considered an affected person, and directs the Commission to adopt rules specifying the factors that must be considered.¹ As part of the public participation process, the Executive Director responded to all of the public comments received in a 99 page Response to Comments.²

In their closing arguments, the pro-se group raised several issues that are outside the issues the Commission referred to SOAH. While the Executive Director appreciates the importance of these issues to the pro-se group, the Executive Director respectfully recommends the ALJs not consider any issues that the Commission did not refer to SOAH.

¹ TWC § 5.115.

² ED-SG-3.

The Executive Director also appreciates the involvement in the hearing process by Audubon Texas. Unfortunately, Audubon's testimony was largely struck from the record for failure to provide a sponsoring expert witness, including all opinions on negative impact on fisheries, wildlife, water quality, activities, modeling, and the impact to water birds, fishes, mollusks and other invertebrates and other desalination plants.³ In their closing, Audubon discusses much of the same topics that were struck from their prefiled testimony. The Executive Director respectfully requests that such topics discussed in their closing also be set aside.

ii. TPDES Hearings under Texas Government Code § 2003.047(i-1) through (i-3)

The Texas Government Code provides that when the commission files the application, draft permit and preliminary decision, and other documentation with SOAH as the administrative record, the record establishes a prima facie demonstration that the draft permit meets all state and federal legal and technical requirements, and the permit, if issued, would protect human health and safety, the environment, and physical property.⁴ The prima facie case may be rebutted by presentation of evidence that demonstrates that at least part of the *draft permit violates a specifically applicable state or federal requirement*.⁵ If there is such a rebuttal, the applicant and the executive director may present additional evidence to support the draft permit.⁶ Additionally, the Texas Water Code (TWC) explains the Executive Director's role as a party in a Contested Case Hearing is to complete the administrative record and support his position developed in the draft permit; however, the Executive Director's position can be changed if he has revised or reversed his position on the draft permit that is part of the administrative record.⁷

None of the protestants provided any rebuttal evidence that the draft permit violates a specific state or federal legal or technical requirement. Rebuttal evidence is "evidence giving to disprove facts given in evidence by an adverse party."⁸ Instead, PAC offered testimony from six individuals who were largely unfamiliar with the statutory and regulatory requirements governing the issuance of TPDES permits. PAC offered

³ Pretrial Hearing Transcript at 13:2-11

⁴ Tex. Gov't Code § 2003.047(i-1).

⁵ Tex. Gov't Code § 2003.047(i-2), Tex. Admin. Code § 80.17.

⁶ Tex. Gov't Code § 2003.047(i-3).

⁷ Tex. Water Code § 5.228(c).

⁸ *Valley Industries, Inc. v. Cook*, 767 S.W.2d 458 at 462.

testimony about how additional studies should be done, different models should be used, and why they believe the location of the proposed outfall is not appropriate, but they did not demonstrate the draft permit violates a specifically applicable state or federal requirement.

PAC argued that the Executive Director's review was not sufficient because he did not offer testimony on various issues from enough experts or the correct expert(s). Specifically, PAC noted that Dr. Wallace was the only expert to testify on referred issues A, B, and C. Issues A, B, and C are all part of the Executive Director's antidegradation review, thus fall squarely within Dr. Wallace's review. As Dr. Wallace testified, she conducted the Standards Implementation portion of the technical review of the POCC application.⁹ Complaining about which witnesses a party chooses to offer is not proper rebuttal. The fact that none of the Executive Director's other witnesses testified on these issues does equate to any flaws in the Executive Director's review.

Additionally, PAC argued the draft permit should be denied for many reasons, several of which are outside of the issues referred by the commission. The scope of a hearing is limited to the issues referred by the commission, however, the ALJ may consider an issue that was not referred by the commission if requested by a party.¹⁰ None of the parties to the hearing requested the addition of any additional issues.

1. The Port has no experience with design or operation of a desalination facility or the related discharge.

Whether an applicant must have experience with the design or operation of a facility was not a referred issue and should not be considered by the ALJs.

2. The Port has no intention of ever owning or operating the desalination facility.

This issue is discussed in detail in Referred issue D and will not be reiterated here.

3. The design of the discharge facility in the Application cannot meet the draft permit's requirements.

⁹ ED-MW-1; 4:16.

¹⁰ Tex. Gov't Code § 2003.047(f).

Whether the design of the discharge facility can meet the requirements in the draft permit was not a referred issue and should not be considered by the ALJs. If POCC is unable to meet the effluent limits in its permit it may be subject to an enforcement action.

4. The facility is proposed to be directly inside the Redfish Bay State Scientific Area, an environmentally sensitive state-designated scientific area—the only one on the Texas coast, and one for which special protections exist in state law.

This issue was discussed in Referred issue H and will not be reiterated here.

5. As noted by TPWD and numerous aquatic experts, Aransas Pass is one of the most critical fish spawning habitats on the Texas coast, and high salinity is fatal to fish larvae and highly disruptive to migration of early stages of fin and shellfish.

This issue was discussed in Referred issue A and will not be reiterated here.

6. The multimillion dollar fish stocking efforts of TPWD would be wiped out by the discharges from this proposed facility.

The potential impact of the discharge on fish stocking was not a referred issue and should not be considered by the ALJs.

7. The location proposed for the desalination facility directly conflicts with another pending application before TCEQ and the State Office of Administrative Hearings (SOAH).

Whether a permit can be issued when another similar application is pending was not a referred issue and should not be considered by the ALJs.

8. The facility is proposed for an area that TPWD and the Texas General Land Office (GLO) have specifically excluded from being appropriate for desalination facilities.

Whether a discharge permit under Texas Water Code Chapter 26 is must comply with the location restrictions imposed in the “GLO/TPWD” report required for an expedited permit under TWC Chapter 18 was not a referred issue. As it was discussed at length in relation to various referred issues in prefiled testimony and at the hearing on the merits, the Executive Director fully addressed this issue in his Closing Arguments and briefly reiterates his position below.

iii. Marine Seawater Desalination Diversion and Discharge Zones Study (Desalination Study)

The Executive Director discussed the relevance of the Marine Seawater Desalination Diversion and Discharge Zones Study (Desalination Study) at length in his Closing Arguments and will not reiterate the entire discussion here. Briefly stated the Protestants’ reliance on the desalination study is misplaced. House Bill (HB) 2031 (84th Legislature)¹¹ created new Texas Water Code (TWC) Chapter 18 (Marine Seawater Desalination Projects). TWC § 18.005(e) requires the TCEQ to provide an “expedited procedure for acting on an application for a **permit under this section.**” (emphasis added). The POCC permit that is the subject of this hearing was submitted under Chapter 26 of the Texas Water Code, not Chapter 18, thus the requirements in TWC Chapter 18 do not apply to this application. This limitation is clearly laid out in the Desalination Study which states, “A person has the option to submit an application under TWC Chapter 11 or 26 to seek a permit to divert or discharge in a bay or estuary.”¹² The Protestants reliance on this issue is unfounded. The Executive Director respectfully recommends the ALJs disregard all testimony regarding the Marine Seawater Desalination Diversion and Discharge Zones Study.

iv. Dr. Wallace’s Testimony

Both PAC and OPIC spent considerable time discussing various words and phrases that Dr. Wallace used in her deposition and on cross-examination to express her professional opinions. What PAC and OPIC did not discuss was Dr. Wallace’s credentials as a biologist who has been employed at the TCEQ since 2009, and as an

¹¹ Exhibit PAC-1 at 10:11-21.

¹² PAC-7 Page 6 of 43.

Aquatic Scientist since 2015.¹³ Dr. Wallace specializes in marine, estuarine, wetland, and freshwater ecological sciences including food web/trophic and nutrient ecology.¹⁴ Dr. Wallace is a highly qualified biologist; however, she does not have much experience as a witness, and because testifying was new to her, she admitted that she was uncomfortable and nervous during her cross-examination.¹⁵ During her deposition and cross examination Dr. Wallace spoke colloquially, using conversational terms instead of legal or scientific terms; this does not diminish the quality of Dr. Wallace's antidegradation review in any way, or imply she took short-cuts. Dr. Wallace's prefiled testimony describes her antidegradation review in detail, and demonstrates that her review was thoughtful, complete, accurate and complied with all applicable rules.

II. 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.

PAC brought up that Dr. Wallace's did not perform studies on larvae in Corpus Christi Bay or the estuaries.¹⁶ However, as discussed in her prefiled testimony, TCEQ's rules for TPDES permits contain no such requirement for surveys, monitoring, or research regarding larval activities.¹⁷ Protestants attempt to argue that Dr. Wallace's review was inadequate and insufficient.

PAC misstates that Dr. Wallace did not properly consider salinity in the review of this permit application. As discussed in the Executive Director's Response to Comments, TCEQ staff used Buoy 16492 of TCEQ Surface Water Quality Monitoring (SWQM) station to monitor physical, chemical, and biological characteristics of the ambient water body. This monitoring station records measurements of temperature and salinity at various depths in the water column and throughout the year, capturing seasonal variation over time.¹⁸

¹³ ED-MW-2.

¹⁴ ED-MW-2.

¹⁵ TR. Vol. 5 at 177:16-18; Vol. 6 at 10:18-19;

¹⁶ Tr. Vol. 5 at 148:11-13.

¹⁷ ED-MW-1 at 5:6-16.

¹⁸ ED-SG-3 at 31: Response 34.

As discussed by Ms. Gibson at the hearing, Whole Effluent Toxicity testing would normally not be required in a permit like this.¹⁹ In fact, here the Port was voluntarily asked to accept WET testing, which they accepted.²⁰ If POCC were to have WET testing failures, a WET limit would be added to the permit.²¹

PAC goes on to erroneously claim Dr. Wallace adopted an imagined “zone of passage” not found in applicable standards. A glance at the rules quickly dissuades this notion. Page 70 of the aforementioned IPs includes the following for mixing zone regulations: “Mixing zone size and shape may be varied in individual permits to account for differences in: stream flow; bay, estuary, and reservoir morphometry; effluent flow; stream geometry; ecological sensitivity at the discharge site; zone of passage concerns; discharge structures.”²²

Dr. Wallace relied on Appendix B of the 2010 Procedures to Implement the Texas Surface Water Quality Standards to quantify the aquatic life that exists in the water today and determined the piping plover was found in the watershed of Segment 2481.²³

PAC argued that TCEQ rules allow for no lethality in the ZID, citing to 30 TAC § 307.8(b)(2) emphasizing, “there must be no lethality to aquatic organisms that move through a ZID.” PAC has again, improperly presented TCEQ’s rules to the court. The first sentence of the subsection clearly states that this provision applies to, “Numerical acute aquatic life criteria for toxic materials...” As has been addressed throughout the entire hearing process and through PAC’s own witnesses, there is no such criteria for salt. Therefore, the requirements in 307.8(b)(2) do not apply. Rather, 30 TAC § 307.6(e)(1) directly addresses total toxicity and states, “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...” Contrary to PAC’s assertions, this section clearly establishes that TCEQ rules allow for minor or de minimis lethality. Protestants have consistently argued that this lack of numerical criteria for salt is a basis to deny the

¹⁹ Tr. Vol. 5, at 126:24-127:1

²⁰ Tr. Vol. 5, at 25:24-26:3.

²¹ Tr. Vol. 5, at 207:14-18.

²² ED-MW-3, pg. 70.

²³ ED-MW-1- at 26: 8-28.

permit. And yet, TCEQ rules mandate that, “Absence of numerical criteria must not preclude evaluations and regulatory actions based on estuarine salinity...”.²⁴

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 B: Whether the proposed discharge will adversely impact the health of the requesters and their families, including whether fish and other seafood will be safe for human consumption.

PAC states that there is “almost no evidence in the record” on this issue. It was PAC’s burden to rebut the prima facie demonstration that the proposed discharge will not adversely impact the health of the requesters and their families, including whether fish and other seafood will be safe for human consumption.²⁵ The Texas Government Code requires that the rebuttal evidence demonstrates the draft permit violates a “specifically applicable state or federal requirement.”²⁶ PAC did not make such a showing.

The Executive Director respectfully recommends the ALJs find the proposed discharge will not adversely impact the health of the requesters and their families, including whether fish and other seafood will be safe for human consumption.

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

PAC relies on the Magnuson-Stevens Act as its rebuttal evidence on this issue. PAC however does not state what provision of the Magnuson-Stevens Act the Executive Director did not consider in his review of the POCC application. As discussed elsewhere in this Reply, any rebuttal must “demonstrate that one or more provisions in the draft permit violate a specifically applicable state or federal law.”²⁷ PAC failed to provide the required demonstration.

²⁴ 30 TAC § 307.4(g)(3).

²⁵ Tex. Gov’t Code § 2003.047(i-2).

²⁶ Tex. Gov’t Code § 2003.047(i-2).

²⁷ Tex. Gov’t. Code § 2003.047(i-2)(2).

The Executive Director respectfully recommends the ALJs find 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.

All of the Executive Director's witnesses testified that the application included all the information they needed to prepare a draft permit. Ms. Cunningham expressly testified that she presumes that the information in the application is correct.²⁸ Additionally, Ms. Gibson testified that the application, as amended is complete and accurate.²⁹ Applications for TPDES permits must be submitted by the owner of the facility,³⁰ and, if the owner is a corporation, the application must be signed by a "responsible corporate officer."³¹ The application was signed by John P. LaRue, the Executive Director of the Port of Corpus Christ of Nueces County.³²

i. Owner of the Facility

Both the pro-se group and PAC argued that the application is not complete and accurate because the POCC is listed as the owner of the facility. In support of their argument, the pro-se group directs the ALJ to PAC Exhibit 24. PAC Exhibit 24 was admitted into evidence, but there was no testimony regarding the context of the exhibit. The Executive Director does not dispute the veracity of the transcription, however, the transcript does not identify the permit(s) that were discussed. It is clear that at least part of the discussion was about a water rights permit; there is one phrase from Charles Zahn about "both of these permits" but it is not clear what other permit was discussed. The Executive Director directs the ALJs to various locations in the POCC application where the Port of Corpus Christi Authority of Nueces County is listed as the Facility Owner.³³

²⁸ TR V. 6 at 84:22 and TR V. 6 at 85:6.

²⁹ ED-SG -1; 12:14-16.

³⁰ 30 TAC § 305.43(a).

³¹ 30 TAC § 305.44(a).

³² Application 000012; S-Application 000012; S-Application 000219

³³ Tab D Application 000004; Tab D Application 000008; Tab D S - Application 000004; Tab D S - Application 000008; Tab D S - Application000182 (Item 6); Tab D S - Application 000211.

ii. Location of the Outfall

PAC argues that the application is inaccurate because the location of the outfall is depicted in a different location on several exhibits. The location of the outfall is depicted in the application as being located just offshore and is described using latitude and longitude.³⁴ The Executive Director acknowledges that the POCC depicts the outfall being located in the middle of the channel in at least two locations, however, as Dr. Tischler testified the location of the diffuser in conjunction with the scale on the figures makes it clear that that the arrow locating the location of the diffuser is incorrect.³⁵

This minor error did not impact the Executive Director's review. The Executive Director uses the location of the outfall throughout the administrative and technical review of an application. The TCEQ's Applications Review and Processing Team worked with the POCC to ensure the adjacent landowner map was correct.³⁶ The affected landowner map used by the POCC depicted the outfall in the correct location.³⁷ Additionally, as Dr. Wallace testified, part of her technical review includes verifying the location of the outfall.³¹ Moreover, Ms. Cunningham testified that as part of her review she plots the outfall location in the TCEQ geographic information system.³² The information provided in the application regarding the location of the outfall was sufficient for the Executive Director to complete a thorough review of the POCC application and prepare a draft permit that complies with all applicable statutory and regulatory requirements.

iii. Diffuser design

Ms. Cunningham testified that as part of her review of the POCC application she reviewed the diffuser design.³⁸ Ms. Cunningham also testified that if the POCC requested a change to the diffuser design that would result in different effluent percentages and/or mixing zone dimensions the POCC would be required to submit an application for a major amendment.³⁹ TCEQ's rules define a major amendment as “. . .

³⁴ Tab D - Application 000010; Application 000025; Application 000028; Application 000038; Application 000049; S-Application 000025; S-Application 000029; S-Application 000035; S-Application 000046; S-Application 000189; S-Application 00201; S-Application 00232; S-Application 00236; S-Application 000258.

³⁵ APP-LT-1; 47:8-15; Tr. Vol. 3 at 235:19 to 236:5.

³⁶ Tab D - S Application 000176 - 000179; 000192-000194.

³⁷ Tab D - S-Application 000201 - 202.

³⁸ ED-KC - 1; 4:8-12.

³⁹ ED-KC - 1; 22:10-18.

an amendment that changes a substantive term, provision, requirement, or a limiting parameter of a permit.”⁴⁰

The Executive Director respectfully recommends the ALJs find the application, and representations contained therein, are complete and accurate.

Issue E: Whether the Applicant substantially complied with applicable public notice requirements.

i. Pro-se Protestants and Audubon Texas

The pro-se group argued that the public notice was insufficient because it was published in a regional paper that “no one buys.” The pro-se group also argued that the POCC application should have been put in a library in Port Aransas, not the La Retama library in Corpus Christi.

The Executive Director provided an exhaustive discussion in his closing arguments on this issue and will not repeat it here. Briefly, the POCC complied with all applicable notice requirements by publishing the various required notices in the *Port Aransas South Jetty*, the *Corpus Christi Caller Times*, and the *Aransas Pass/Ingleside Index*. Additionally, the POCC placed the application in four locations: La Retama Central Library, Sinton Public Library, Ed and Hazel Richmond Public Library, and the Port Aransas City Hall.

ii. PAC

PAC argued that because of “conflicting” information in the application the exact location of the outfall is unknown, and thus the appropriate landowners may not have been identified. PAC’s argument is without merit. PAC also argued that POCC did not comply with all public notice requirements because the location of the outfall is not identified in the draft permit as required by the TWC. The Executive Director has addressed this in conjunction with Referred Issue 9 (Whether the draft permit includes all appropriate and necessary requirements).

Before the close of the comment period TCEQ received over 500 comments on the POCC application. Because of the amount of public interest in the application, the TCEQ held a Public Meeting in Port Aransas on April 8, 2019, where over 40 individuals, and 12 entities made formal comments on the draft permit. The TCEQ

⁴⁰ 30 TAC § 305.62(c)(1).

received over 100 hearing requests from individuals, three hearing requests from organizations and a governmental entity.⁴¹

TCEQ's Instructions for Completing the Industrial Wastewater Application describe which landowners must be included on the Affected Landowner Map.⁴² According to the instructions, for discharges into lakes, bays, estuaries, or areas affected by tides, the affected landowner map must show the property boundaries of landowners along the shoreline as a 1/2 - mile radius from the outfall. The affected landowner map used by the POCC, and verified by the Applications Review and Processing team, for the mailing list is the one with the outfall in the correct location.⁴³ As is evidenced by the correspondence in the record, the TCEQ's Applications Review and Processing Team worked diligently with the POCC to ensure the adjacent landowner map was correct and the appropriate persons were sent the appropriate notices.⁴⁴

PAC did not identify a single person that should have received notice but did not. Rather it made vague statements that someone might not have received notice that should have because of confusion over the ambiguity of the location of the outfall on one page of the application. Finally, as OPIC noted PAC does not have standing to assert the interest of a third party.⁴⁵

The Executive Director respectfully recommends the ALJs find the applicant substantially complied with applicable public notice requirements.

Issue F: Whether the draft permit is consistent with the Texas Coastal Management Program's goals and policies.

None of the Protesting parties presented any evidence that the draft permit is not consistent with the Texas Coastal Management Program's (CMP) goals and policies. However, in its closing argument PAC argues that the Executive Director's CMP determination was wrong. The Executive Director's CMP determination complied with TCEQ's policy for determining consistency with the Texas Coastal Management

⁴¹ <https://www14.tceq.texas.gov/epic/eCID/>

⁴² ED-SG-7; Page 31, 1.a.ii.

⁴³ Tab D - S-Application 000201 - 202.

⁴⁴ Tab D - S Application 000176 - 000179; 000192-000194.

⁴⁵ *McDaniel v. Texas Nat. Res. Conservation Comm'n*, 982 S.W.2d, 654 (Tex.App. -Austin 1998, pet. denied).

Program. PAC did not provide any rebuttal testimony that the Executive Director's CMP review was not complete and accurate.

PAC states that the Executive Director's CMP review was based on inaccurate and incomplete information in the application, and on flawed CORMIX modeling. PAC also opined that Dr. Wallace should have performed the CMP review instead of Ms. Gibson. Once again PAC is opining who should have performed which review for the Executive Director and how it should have been done. As discussed below, the POCC permitting action does not meet the threshold to be referred to the Coastal Coordination Council (CCC) for review.

The Executive Director's CMP determination that the draft permit is consistent with the CMP's goals and policies is supported by the testimony of Ms. Shannon Gibson on behalf of the Executive Director.⁴⁶ The rules governing consistency with the CMP are found in 30 TAC Chapter 281, Subchapter B and include an "exclusive list of actions taken or authorized by the Texas Natural Resource Conservation Commission (Commission) or executive director that may adversely affect a coastal natural resource area and that must be consistent with the CMP goals and policies. . . ."^{47,48} One of the actions subject to a CMP review is an application for a wastewater discharge permit.⁴⁹ The rules also provide a list of the actions that may be referred to the CCC for review.⁵⁰ According to the rules, new industrial TPDES permits that authorize a discharge subject to the United States Environmental Protection Agency's categorical limits into a priority segment that is inside the program boundary may be referred to the CCC.⁵¹ Finally, rules also require the Executive Director to provide "a brief summary" of this analysis in the draft permit and technical summary.⁵²

Ms. Gibson testified regarding her CMP review on behalf of the Executive Director. Ms. Gibson testified that she completed the CMP threshold worksheet and determined the POCC draft permit is above the CMP threshold and is consistent with the CMP's goals and policies.⁵³ To support her opinion, Ms. Gibson included her CMP

⁴⁶ ED-SG-1; 16:17-31.

⁴⁷ 30 TAC § 281.45.

⁴⁸ The Texas Natural Resource Conservation Commission is a predecessor agency to the TCEQ.

⁴⁹ 30 TAC § 281.45(a)(2)(H).

⁵⁰ 30 TAC § 281.46.

⁵¹ 30 TAC § 281.46(2)(C).

⁵² 30 TAC §281.43(b).

⁵³ ED-SG-1; 16:14-31.

Threshold Review Sheet documenting her review.⁵⁴ Additionally, as required by the rules, the POCC draft permit and Statement of Basis/Technical Summary include:

The executive director has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP) in accordance with the regulations of the General Land Office and has determined that the action is consistent with the applicable CMP goals and policies.⁵⁵

The Executive Director complied with the requirements in 30 TAC Chapter 281, Subchapter B regarding the CMP review. The Executive Director respectfully recommends the ALJs find that the draft permit is consistent with the CMP goals and policies.

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

PAC has criticized the TCEQ's use of the CORMIX model and has argued that it is insufficient to fully model the effluent as it mixes with the ambient water in the ship channel. PAC argues that because of the 90-foot depression in the channel and that it wasn't included in the model runs, CORMIX cannot possibly represent an accurate depiction of the channel.

The CORMIX model is the only EPA-approved model that the Executive Director uses for its diffuser reviews due to its wide applicability and because it allows consistency in the review process for other diffusers across the state.⁵⁶ While PAC is correct that the depression could not be included into the CORMIX model due to the constraints in the model's input variables, its absence actually indicates that the modeling results are more conservative than the actual mixing that would occur, as Ms. Cunningham and the Port's witnesses testified.^{57,58} Because the effluent is more dense than the receiving water, it will continue to sink until it contacts the bottom of the channel. Because Ms. Cunningham's modeling used an ambient water body depth of 63 feet, the model predicts the plume sinking to this depth.⁵⁹ However, in reality, the plume would continue to sink until reaching the true bottom depth of the channel. As

⁵⁴ ED-SG-6.

⁵⁵ Tab F ED - 0014 (Item 1) and Tab F ED - 0039 (Item 11).

⁵⁶ ED-KC-1 at 5: 16-18.

⁵⁷ ED-KC-1 at 14: 5-6.

⁵⁸ Tr. Vol. 5, at 169: 7-22.

⁵⁹ ED-KC-1 at 12:3-8.

the plume sinks, it will further dilute with the ambient water, and thus the model predictions are conservative.⁶⁰

Throughout the course of the hearing, there was considerable discussion of the eddy at the base of the outfall. Occurring at a depth of 90 feet, Ms. Cunningham testified that the additional 30 feet of depth the effluent would travel upon reaching the eddy would provide ample opportunities for mixing.⁶¹ Furthermore, the presence of the eddy suggests that the hydrodynamic forces that have carved it into the base of the channel, removing sediments of higher densities than that of the effluent, suggests that the effluent would not remain trapped within this depression.⁶² Additionally, given the turbulent nature of an eddy, it is likely that it would further mix the effluent more so than if the eddy were absent.⁶³ The CORMIX model was unable to reflect this unique topography of the channel but by not doing so, it has underestimated the amount of mixing that will occur. In her prefiled testimony, Ms. Cunningham stated that the CORMIX model is used to predict the effluent percentages at the edges of regulatory mixing zones.⁶⁴ When Dr. Wallace and Ms. Gibson both used the CORMIX model results for their respective reviews, the final permit was more restrictive than necessary because the results they used to derive the permit limits did not include the enhanced mixing qualities of the eddy and deeper water column.

30 TAC § 307.4(g)(3) states that, “careful consideration must be given to all activities that may detrimentally affect salinity gradients.” When Ms. Cunningham performed her last CORMIX review and relayed those results to Dr. Wallace, Dr. Wallace’s antidegradation determination did not change.^{65,66} The existence of the CORMIX and antidegradation reviews and the sworn testimony that those reviews were done in accordance with all applicable TCEQ rules are evidence that the TCEQ has given careful consideration of the desalination facility’s impact on the ship channel’s salinity gradient. Having satisfied the requirements set forth in 30 TAC § 307.4, the regulatory action sought in this permit must not be precluded.

⁶⁰ Tr. Vol. 6, at 18: 5.

⁶¹ *Id.*

⁶² ED-KC-1 at 19: 28-31.

⁶³ *Id.*

⁶⁴ ED-KC-1 at 5: 11-15.

⁶⁵ ED-KC-1 at 11: 28-31.

⁶⁶ Tr. Vol. 6, at 99:10-14.

The Executive Director respectfully recommends the ALJs find the modeling complies with applicable regulations to ensure the draft permit is protective of water quality, including utilizing accurate inputs.

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

PAC engaged in a series of mischaracterizations regarding Dr. Wallace’s testimony and her antidegradation review. PAC stated that Dr. Wallace’s antidegradation review is incorrect because it was based on Ms. Katie Cunningham’s initial critical conditions memo. As Ms. Cunningham testified during the hearing, Dr. Wallace’s review did not need a change because the percentage of effluent at the mixing zone boundary did not change between the 2018 and 2020 review.⁶⁷ In her prefiled testimony, Dr. Wallace thoroughly explained her entire antidegradation process and how she completed it. While claiming that Dr. Wallace’s antidegradation review was faulty, PAC failed to produce any evidence actually showing inaccuracies, or that her review violated an applicable state or federal requirement.

The Executive Director respectfully recommends the ALJs find the Executive Director’s antidegradation review was complete and accurate.

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

According to the TWC each permit issued by the commission must include: the duration of the permit; the location of the outfall; maximum quantity of waste that may be discharged, and monitoring and reporting requirements.⁶⁸ Ms. Gibson provided a comprehensive discussion regarding this issue in her prefiled testimony. PAC did not demonstrate that the draft permit does not include all appropriate and necessary requirements, rather it argues that the Executive Director did not perform a thorough review of the POCC application. PAC does not point to a single requirement that is missing from the draft permit or demonstrate that the draft permit violates an applicable state or federal requirement.

PAC did not provide any testimony that any of Dr. Wallace’s pH screening inputs were incorrect, rather it attempts to discredit Dr. Wallace’s pH screening based on her

⁶⁷ Tr. Vol. 6, at 99:10-14.

⁶⁸ TWC § 26.029(a).

deposition testimony and her cross-examination testimony. As discussed previously, Dr. Wallace experienced challenges as a witness during both her deposition and while on the stand, however, that is not evidence that her pH review was deficient.

OPIC expressed concern that the Executive Director's pH screen was performed using inaccurate inputs. As Ms. Gibson testified, minimum and maximum effluent limits for pH were developed based on the requirements in 30 TAC §§ 307.4(m) and 307.7(b)(4)(B).⁶⁹ Dr. Wallace performed the saltwater screening to determine if the discharge from the POCC facility will be protective of the pH criteria for Corpus Christi Bay, her results are presented as part of the Statement of Basis/Technical Summary.^{70,71}

The Executive Director respectfully recommends the ALJs find the draft permit includes all appropriate and necessary requirements.

III. Conclusion

PAC, Audubon, and the pro-se group were provided an opportunity to provide rebuttal evidence that the draft permit violates a specifically applicable state or federal requirement. They all failed to do so. PAC provided testimony that additional studies could be done, a different model could be used, that different inputs could be used, but it failed to meet the requirements in Tex. Gov't. Code 2003.074(i-2) to demonstrate that the draft permit does not comply with a specifically applicable state or federal requirement.

The Executive Director's prefiled testimony clearly demonstrates that the Executive Director completed a thorough review of the application, carefully considered all public comments, and drafted a permit that exceeds all applicable statutory and regulatory requirements. The draft permit includes a requirement for the POCC to perform a study of ambient water velocity and includes biomonitoring (WET) requirements. Neither of these provisions are required by either TCEQ or EPA's rules. Thus, the Executive Director maintains his position that the draft permit meets or exceeds all applicable statutory and regulatory requirements and respectfully

⁶⁹ 30 TAC § 307.4(m) provides "pH. Consistent with §307.1 of this title, pH levels in all surface water in the state must be maintained so as to not interfere with the reasonable use of such waters." 30 TAC § 307.7(b)(4)(B) provides "pH. Site-specific numerical criteria for pH are established as absolute minima and maxima."

⁷⁰ ED-MW-1; 20:17-19.

⁷¹ Tab F ED - 0047.

recommends the Administrative Law Judge issue a Proposal for Decision recommending the Commission issue the draft permit without changes.

Respectfully submitted,

Texas Commission on Environmental Quality

Toby Baker,
Executive Director

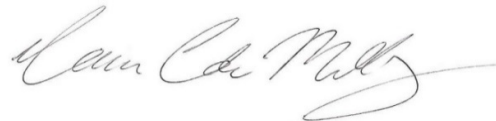
Robert Martinez, Deputy Director
Environmental Law Division



Kathy Humphreys
Staff Attorney
Environmental Law Division
State Bar of Texas No. 24006911
MC-173, P.O. Box 13087
Austin, Texas 78711-3087
Phone: (512) 239-3417
Fax: (512) 239-0626



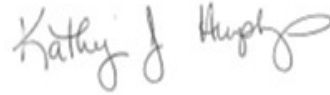
Bobby Salehi, Staff Attorney
Environmental Law Division
State Bar No. 24103912
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
Phone (512) 239-5930
Fax: (512) 239-0606



Harrison Cole Malley, Staff Attorney
Environmental Law Division
State Bar No. 24116710
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
(512) 239-1439 (phone)
(512) 239-0606 (fax)
REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2020, the “Executive Director’s Reply Closing Arguments” was served electronically, and by either first class mail or hand delivered to the parties listed below.



Kathy Humphreys, Staff Attorney
TCEQ’s Environmental Law Division
State Bar of Texas No. 24006911