

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

<b>IN THE MATTER OF THE APPLICATION OF PORT OF CORPUS CHRISTI AUTHORITY OF NUECES COUNTY FOR TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT NO. WQ0005253000</b>	<b>§ § § § §</b>	<b>BEFORE THE STATE OFFICE  OF  ADMINISTRATIVE HEARINGS</b>
---	----------------------------------	---

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW  
BY JAMES KING, TAMMY KING, EDWARD STEVES, AND SAM STEVES**

James King, Tammy King, Edward Steves, and Sam Steves (“Protestants”) file this their proposed findings of fact and conclusions of law, and, in support thereof, would respectfully show the following:

**I. Joinder in PAC’s Findings of Fact and Conclusions of Law**

Protestants support the findings of fact and conclusions of law filed by Port Aransas Conservancy (PAC).

**II. Protestants Additional Proposals for Findings and Conclusions**

Protestants have interests in this proceeding that go beyond those of PAC. And there are currently a number of proposals for desalination facilities, in addition to this one subject to this hearing, proposed by the Port of Corpus Christi Authority, the City of Corpus Christi and others on Corpus Christi Bay.

This case can have significant impacts on how applications for TCEQ wastewater permits will be processed by TCEQ and SOAH.

Protestants’ proposed findings of fact and conclusions of law are based on the arguments PAC has presented and the evidence in the record. Protestants’ proposed findings and conclusions address process issues that are likely to arise in other desalination discharge cases impacting the Bay. Process

issues that arose in the instant proceeding should not be forgotten but should be highlighted in the proposal for decision to allow the Commissioners to decide how to best address similar ones in the future.

As the attached proposed findings of fact and conclusions of law explain, the three related issues that Protestants urge the Judges to address in their findings of fact and conclusions of law are, in short:

1. The need for TCEQ to increase incentives that it receives permit applications that are accurate and complete and that are prepared or vetted by an identified “qualified person who is competent and experienced in the field to which the application relates and thoroughly familiar with the operation or project for which the application is made,” the legal requirement of 30 TAC Section 305.45(a)(8).
2. The need for the ED to assure that the agency staff consult fully with the staff of Texas Parks and Wildlife Department on the impacts of proposed discharges that may affect the fish and wildlife and their habitats to assure the “careful consideration”<sup>1</sup> required by law and compliance with Chapter 12, Tex. Parks & Wildlife Code.
3. The need for all reasonable steps to be taken to facilitate public participation and reduce the burden of discovery under the compressed SB 709 hearing process by assuring that
  - a) the administrative record has all of the staff documents the staff developed for the evaluation of the application or that may be relied on by staff members in their testimonies,
  - b) the administrative record includes the original and final version of the application with the documentation of all changes made to the application,
  - c) the applicant corrected any errors or omissions in relevant facts in the application before the administrative record is filed with SOAH and, thereafter, as soon as the error or omission is discovered based on the requirements of 30 TAC 305.66(a)(4),
  - d) any statements of fact or opinion in the application and any revisions or amendments that would not be admissible under the Texas Rules of Evidence can only be relied upon for all purposes, if there is sufficient support separately in the evidentiary record for admitting the statements.

Respectfully submitted,

/s/ Richard Lowerre

---

<sup>1</sup> 30 TAC §307.4 (g)(3).

Richard Lowerre  
State Bar No. 12632900  
[rl@lf-lawfirm.com](mailto:rl@lf-lawfirm.com)

David Frederick  
State Bar No. 07412300  
[dof@lf-lawfirm.com](mailto:dof@lf-lawfirm.com)

FREDERICK, PERALES, ALLMON & ROCKWELL,  
P.C  
1206 San Antonio  
Austin, Texas 78701  
512-469-6000 (t)  
512-482-9346 (f)

**ATTORNEYS FOR JAMES KING, TAMMY KING,  
EDWARD STEVES, AND SAM STEVES**

**CERTIFICATE OF SERVICE**

I certify that a copy of this document was served on all parties of record on this date, December 7, 2020, in accordance with the applicable service procedures.

/s/ Richard Lowerre  
Richard Lowerre

## PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. The Port's Lack of Competence and the Port's Intention not to Operate the Facility:

#### Additional Findings Related to the Following Conclusions of Law

- The Port has not met its burden of proof pursuant to TCEQ rules<sup>1</sup> that any of its Application was prepared by a “qualified person who is competent and experienced in the field to which the application relates and thoroughly familiar with the operation or project for which the application is made.”
- The Port has not met its burden of proof pursuant to TCEQ rules<sup>2</sup> that it has submitted all of the information reasonably required by the Executive Director to ascertain whether the facility will be constructed and operated in compliance with all pertinent state and federal statutes.
- The Port's Application should be rejected and the permit denied pursuant to TCEQ rules<sup>3</sup> for its failure to “disclose fully all relevant facts” or its “misrepresentations of relevant facts.”

#### Findings of Fact

- Prior to the filing of the Application, the Port and the City of Corpus Christi had discussed working together to develop two desalination facilities on Corpus Christi Bay with the City as a potential operator of them. (PAC-18, at 25:4-26:16; PAC-12, at 48, 53)
- On April 18, 2017, the Port engaged its consulting firm AMEC Foster Wheeler (now Wood) to prepare its Application. (S-APP 001, et seq.; PAC 22, at 1).
- In March 2018, the Port filed its Application along with a second application for TPDES discharge permits for its proposed facility in another area of Corpus Christi Bay. (PAC-22, at 3-4).
- In 2018, the City of Corpus Christi, the water supply entity for the region, also filed its own two applications for discharge permits for desalination facilities in the Corpus Christi Bay system, Permit applications #WQ0005290000 and WQ0005289000. (<https://www.cctexas.com/desal>).
- There is no evidence that the Port had any experience with the design or operations of any desalination facility at the time the application was filed.
- There is no evidence that any of the employees of the Port's consulting firm who prepared the Application had any such experience or were “competent and experienced in the field to which the application relates and thoroughly familiar with the operation or project for which the application is made,” as required by TCEQ rules.<sup>4</sup> (PAC-19, at 5, 11).

---

<sup>1</sup> 30 TAC §305.45(a)(8).

<sup>2</sup> 30 TAC §305.45(a)(8).

<sup>3</sup> 30 TAC §305.66 (a)(4).

<sup>4</sup> 30 TAC §305.45(a)(8).

- In its initial application, the Port indicated that it would not be the operator. (S-App 020:14).
- The Port later revised its Application and indicated it would be the operator. (S-APP 227:14).
- Representatives of the Port have, during the time when the application was pending at TCEQ and even during the period for the contested case hearing, stated that the Port would not be the operator, including the statement of the Port’s Corporate Representative at the TCEQ public meeting on the Application. (PAC-18, at 4:25-11:16, 25:2-29:15).
- In a September 2020 Port Commission meeting, the Chairman of the Commission stated:

I think we’ve said consistently on both of these permits that we are not going to own, operate, or build a desalination plant. We are in the process of trying to get the permits in order to meet one of the concerns that our industry partners had several years ago about having an uninterruptable source of water. (PAC-24, at 5).

- The Port filed its Application with numerous inaccuracies and omissions. (See the Argument of PAC on Referred Issue D and G for the details on the errors).
- The Port, after learning of its errors, never corrected its inaccuracies, its errors in the data for the CORMIX modeling, the error in its modeling, its conclusions based on the erroneous modeling, and its misunderstanding of the bathymetry under its outfall. (See the Argument of PAC on Referred Issue D and G for the details on the errors.)
- As a result, the ED and many parties wasted time and resources working with facts and opinions in the Application that were not accurate or complete.
- As a result, TCEQ prepared an original and a revised draft permit that were not based on actual conditions in the receiving waters at the outfall.
- The failure of the ED to require accurate and complete applications will encourage others to short cut the work to prepare other discharge permit applications at the expense of engaging a competent operator or consultant to develop the Application.

**B. Ignoring the Role of the Texas Parks and Wildlife Department:**

Additional Findings Related to the Following Conclusion of Law:

- The draft permit is not protective of aquatic resources pursuant to 30 TAC Chapter 307.

Findings of Fact:

- The Texas Parks and Wildlife Department (“TPWD”) is “the state agency with primary responsibility for protecting the state’s fish and wildlife resources.”<sup>5</sup>
- TPWD is required under Texas law to enforce permits and laws for discharge of pollutants that affect aquatic life and wildlife.<sup>6</sup>
- TPWD receives notice of applications for discharge permits and provided comments. (ED-SG-1, at 23:4-6; PAC-14 at 17:10-18:15).
- TPWD is directed by law to provide comments to other state agencies to protect aquatic life and wildlife.<sup>7</sup>
- TCEQ is required by law to respond in writing to TPWD’s comments.<sup>8</sup>
- The ED completed the Technical Summary and Preliminary Decision on August 20, 2018 (Tab F, ED-0035-40), before the agency received the comments of TPWD on August 24, 2018. (PAC-37).
- TPWD raised issues regarding its concern with the location of the outfall in an important migration path for marine species (PAC-37, at 2) and that increased water temperatures could pose a problem to spawning habitat in the area. (PAC-37, at 1).
- The ED never responded to TPWD’s 2018 comments.
- The ED disregards the analyses in the report by TPWD and the General Land Office that form the bases of the state preference for locations for discharges of effluent from seawater desalination away from passes, arguing, without considering the substance of the analyses, that the report is not relevant, because it was prepared to guide expedited permitting. (ED Closing Argument, at 3-4).
- The ED staff permit writer knew of no duty to advise TPWD of or consult with TPWD on information obtained by TCEQ after the public notice period or after a permit is issued regarding the impacts on aquatic species, even if the information is in response to a permit condition or for a revision or amendment to the permit. (PAC-14 at 17:6-18:15; Tr. Vol 5 at 38:24-39:22).

**C. The SB 709 Process:**

Additional Findings Related to the Following Conclusions of Law:

- The requirement in TCEQ rules at 30 TAC § 80.127(h) conflicts with Section 2001.081, Tex. Gov’t Code requiring application of the Texas Rules of Evidence.

---

<sup>5</sup> Section 12.0011(A), Tex. Parks & Wildlife Code

<sup>6</sup> Section 26.129 & Section 7.109, Tex. Water Code.

<sup>7</sup> Section 12.0011(B)(3), Tex. Parks & Wildlife Code.

<sup>8</sup> Section 12.0011(C), Tex. Parks & Wildlife Code.

- As applied in this case, the SB 709 process denies opposing parties the due process rights to prepare for and address facts and issues raised by the ED and applicants after the parties have rebutted the *prima facie* case.

Findings of Fact:

- TCEQ filed the Administrative Record with SOAH on February 19, 2020.
- On March 12, 2020, Protestants filed their Objection to the Completeness of the Administrative Record and Motion for Abatement or Continuance with SOAH, objecting to the fact that the record filed by TCEQ was not complete and did not include all of the supporting memos of ED staff, such as the “Diffuser Review” on the CORMIX modeling, the final Application materials reflecting the relocation of the intake structure into the Gulf of Mexico, the ED’s notices of deficiency and requests for information, and the Port’s responses.
- At the May 29, 2020 deposition of the ED’s modeling staff the ED learned of the errors in its modeling that would raise the allowable concentration of salinity 10-fold. (PAC-13, at 26:13-20; PAC-2 at 20:3 -21:8.)
- Despite knowing that the Port could not comply with its draft permit, the ED did not seek a remand for a major permit amendment but instead simply amended its draft permit and, on June 9, 2020, filed a revised Administrative Record which included the revised permit.
- The revised Amended Record also included the revised Diffuser Report for the revised modeling, a revision to the original document that the ED earlier argued it did not need to include in the Record.
- Then on July 20, 2020, the ED filed a second revised Administrative Record that this time included the Port’s final Application showing the new location for the outfall in the Gulf and the notices, requests, and the Port’s responses that the objecting parties had argued should not be included in that record.
- With the revised administrative records, the ED essentially agreed with Protestants in the Objection to the failure of the agency to file the complete Administrative Record required by the SB 709 process.
- The Protestants then filed their Objection to the Admission of the Administrative Record for All Purposes and Motion to Limit the Admission of Certain Documents on June 24, 2020, because the facts, opinions, reports, figures etc. were not sealed or shown to be made with a person who was qualified under TCEQ rules<sup>9</sup> and there were numerous statements of fact or opinion that were hearsay or otherwise not admissible under the Texas Rules of Evidence.

---

<sup>9</sup> 30 TAC §305.45(a)(8).

- At the July 9, 2020, preliminary hearing, the objections to acceptance of the final Application into the evidentiary record were denied, and the Administrative Record was accepted into the evidentiary record. (Order No. 5).
- On September 25, 2020, protesting parties filed their evidence that rebuts the Applicant's *prima facie* case.
- The Port and TCEQ prefiled their written testimony and other documents on October 16, 2020, with numerous statements of fact and opinions that were contrary to the Application and not supportive of the facts, modeling, and conclusions of the Application, including modeling that showed that the discharge would not meet the predicted effluent percentages at the aquatic and human health mixing zone boundaries that the ED model had identified as the worst case scenario. (APP-LT-9).
- The new modeling had been performed using the CORMIX model within a week or so of the filing of the Port's direct testimony but with a major change in design for the diffuser using, for the first time, intake water quality data for Gulf waters. (APP-LT-9).
- All protesting parties then had only two weeks to evaluate this new CORMIX modeling for the design, a new spread sheet model, and the Port's new theory on why the ED's CORMIX modeling could be relied upon for permit limitations on salinity, in essence completely revising the modeling and basis for it that was in the Application that all parties had been using for over 18 months to evaluate the impacts of the discharge.
- A schedule for an SB 709 hearing that provides sufficient time for protesting parties to prepare and present their rebuttal does not provide time to allow these parties to prepare to respond to new evidence that the ED or an applicant presented that changes the application or the basis for the ED's draft permit.