

SOAH DOCKET NO. 582-20-1895

TCEQ DOCKET NO. 2019-1156-IWD

IN THE MATTER OF THE	§	BEFORE THE STATE OFFICE
APPLICATION OF PORT OF	§	
CORPUS CHRISTI AUTHORITY OF	§	OF
NUECES COUNTY FOR TPDES	§	
PERMIT NO. WQ0005253000	§	ADMINISTRATIVE HEARINGS

**PORT OF CORPUS CHRISTI AUTHORITY'S
REPLY TO PROTESTANTS' CLOSING ARGUMENTS**

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Applicant Port of Corpus Christi Authority of Nueces County (the "Port Authority") files this Reply to the Closing Arguments of Protestants and Office of Public Interest Counsel, and in support would show the Administrative Law Judges ("ALJs") as follows:

**I.
INTRODUCTION**

The Texas Legislature has found that desalination projects should be developed as a potential new source of public drinking water to help the state meet its current and future water needs. For more than two years, the Port Authority has followed the Texas Commission on Environmental Quality's ("TCEQ") permitting process to obtain a desalination permit to help the residents of Nueces and San Patricio Counties meet their current and future water needs.

The TCEQ Executive Director maintains his position that the Draft Permit complies with all statutory and regulatory requirements, recommending that the ALJs recommend that the TCEQ issue the Draft Permit without changes. Only two non-governmental organizations and nine individuals ("Protestants") are trying to stop the issuance of the Port Authority's permit for a desalination facility that would help alleviate the disastrous effects of drought that have repeatedly plagued this region. By their opposition, Protestants disagree with every other government who represents the public and even their own elected officials who do not oppose this important project.

Oddly -- as demonstrated on the first page of Port Aransas Conservancy's ("PAC's") Closing Arguments -- PAC now disagrees with TCEQ about what questions are referred by the TCEQ for decision in this matter. PAC simply fabricates its own set of questions and spends the first ten pages of its Closing Arguments complaining that the record is devoid of evidence on its seven fabricated questions. However, those seven questions are not the questions that the TCEQ referred to the ALJs and are not the subject of this Contested Case Hearing.¹ PAC is obviously attempting to re-frame the discussion by posing questions to the ALJs that are different questions than those referred by the TCEQ and certified by the ALJs. Undoubtedly, PAC is trying to re-frame the discussion inasmuch as the established TCEQ rules and regulations favor issuance of the Draft Permit (as requested by the Port Authority and recommended by TCEQ).

In addition to PAC's attempt to present new (and different) questions to the ALJs, Protestants also disagree with the TCEQ Executive Director and staff who have demonstrated that the Port Authority's Draft Permit meets the legal requirements to be issued. Protestants go too far by arguing that the State agency's personnel (at TCEQ) did not do their jobs properly -- thus accusing them of "ignorance."² These same Protestants fundamentally disagree with the TCEQ's permitting process, yet the ALJs have not been charged with the responsibility of passing new legislation or re-writing any part of the TCEQ process requirements. There is only one obvious explanation for this: Protestants are trying to re-frame the issues, discredit TCEQ staff, and re-write (re-interpret) TCEQ rules and regulations because the Protestants cannot otherwise deprive the Port Authority and the public of the much-needed and properly supported Draft Permit. Protestants' "not-in-my-back yard" ("NIMBY")' crusade has Protestants willing to launch any and

¹ Of course, PAC cannot simply refocus the hearing on issues of its own choosing as it is trying to do here -- the contested case hearing is to address the questions that the TCEQ has referred and the ALJs have certified.

² See page PAC's Closing at 10.

all attacks (except a scientific one) to achieve their goal. However, the TCEQ is not under review here, although Protestants have tried mightily to put the TCEQ's competence and processes on trial.

Even more disturbing is that PAC now confesses that “ultimately, the primary issue here is not so much about desalination and brine discharge, in general, but the location chosen.”³ Tellingly, the location of the proposed facility is also **not** one of the questions certified to be decided in this Contested Case Hearing. It is somewhat refreshing to see PAC admit that the ‘primary issue’ is not brine or desalination, but something else entirely. PAC's admission demonstrates again the true goal of PAC and its Protestants: to stop all industrialization near the Corpus Christi Ship Channel and Harbor Island – a vital economic driver for the economy of Texas.⁴ If the erroneous arguments that Protestants have advanced in this case were accepted, it would be difficult to see how a seawater discharge permit could ever be issued in the State of Texas (and Protestants would have achieved their goals).

Finally, it should be noted that the individual pro-se protestants elected not to put on a single piece of evidence during the hearing when they had every opportunity to do so. Rather, only after the hearing and close of evidence was over did they try to make unsubstantiated and erroneous arguments in the guise of a closing statement. However, because these individual pro-

³ See PAC's Closing at p. 20.

⁴ It must be pointed out that while Protestants are trying to use the contested case process to thwart industrial activities on Harbor Island, the very location to which they object has been consistently used for industrial purposes for more than 100 years. In fact, the City of Port Aransas intentionally zoned it for industrial use – a use that properly continues to this day. City of Port Aransas, Tex., Code of Ordinances, § 85-22 (1985) (Harbor Island's approved uses included storage of petroleum and petroleum products, crew boat docking facilities, manufacturing, etc.); § 97-8 (1997) (Harbor Island zoned for “I-2 Heavy Industry”); ch. 25, art. III, § 25-121 (2010) (Harbor Island approved for industrial and other non-residential uses). The fact that the Protestants dislike the fact that their City has zoned Harbor Island for industrial use does not change the fact that its authorized use is indeed intended for and it is being used for industrial activities.

se Protestants decided not to offer any evidence during the hearing itself, their post-hearing closing statement cannot constitute evidence and must be disregarded entirely.

II. ARGUMENT

A. PAC’s Seven Questions Have Been Answered.

In its Closing, PAC claims that there are “many basic, critical questions” that “remain unanswered in this case.”⁵ It claims that “the record is void of evidence or contains clearly contradictory evidence” on seven questions.⁶ Each of PAC’s seven supposed riddles has already been answered:

- “Who will construct, own, or operate the desalination plant and will they have any expertise in managing the discharge facility?” This question was not referred to SOAH. The Port Authority is applying for the Draft Permit and will own and operate the Facility, and as established in the Administrative Record (“AR”), this will be the first desalination facility that the Port Authority has operated. The Port Authority has had discussions with others in the past about constructing and operating the Facility, but there are no current discussions. If the Port Authority enters into an agreement with another entity to own and operate the Facility, it will seek a transfer of the permit pursuant to 30 TAC § 305.64.⁷
- “Where will the facilities, including the discharge outfall and diffuser, be located.” The Port Authority has identified specifically where the discharge outfall and diffuser are going to be located in the AR, in the direct testimony of its expert witnesses, and in its Closing.⁸
- “What diffuser design is actually going to be used, thus impacting the potential mixing of the discharge with the ambient water in the Aransas Pass tidal inlet?” Again, this is not one of the questions referred to SOAH. The answer is clear in the AR and transcript of the hearing. The diffuser design is contained in the Application and has not changed.⁹ PAC is attempting to create a question when

⁵ PAC’s Closing at 1. In addressing these issues on Closing, the Port Authority is not requesting that these issues be addressed by the ALJs.

⁶ *Id.*

⁷ Port Authority’s Closing at pp. 32-35.

⁸ Port Authority’s Closing at pp. 34.

⁹ Port Authority’s Closing at pp. 42-47.

there is none by virtue of the Port Authority's expert reviewing the work of PAC's experts.

- “What chemicals will be used in the reverse osmosis process and discharged in the wastewater and what are their characteristics?” The Port Authority's Application addressed the type of chemicals used in the Process Design Basis and Narrative in the Application.¹⁰ This is sufficient under TCEQ rules.¹¹ As with any new facility, the specific chemicals will be determined during the final design phase.¹² The Draft Permit requires the effluent to be sampled and analyzed for 77 different chemicals of concern, and the results reported to the TCEQ to determine whether any constituents require permit limits, insuring that the effluent does not exceed the levels determined to be protective of the environment by the Texas Surface Water Quality Standards (“TSWQS”).¹³
- “What are the chemicals in the intake water, such as copper, that will be concentrated in the desalination process and discharged in the effluent?”¹⁴ As the testimony of TCEQ permit writer Shannon Gibson made clear, TCEQ does not look at the intake water to determine permit limits, TCEQ looks at the results of sampling of the effluent itself, which is performed when there is an actual discharge.¹⁵ Again, the Draft Permit requires that the effluent be sampled and analyzed for 77 different chemicals of concern, including copper, and the results reported to determine whether any constituents require permit limits, insuring that the effluent does not exceed the levels determined to be protective of the environment by the TSWQS.¹⁶
- “What will be the minimum volume of discharge that might be released daily, thus resulting in less mixing and more concentrated salinity in the mixing zone?” The Draft Permit allows for an average daily discharge of 95.6 million gallons per day and that the Facility must meet the requirement of 18.4 percent effluent at the ZID. Port Authority expert Dr. Tischler confirmed that if the Facility operates at levels that produce less effluent, it is as simple as closing some of the diffuser ports to achieve mixing consistent with the Draft Permit requirements.¹⁷ (PAC offers its own riddle as to why it would now complain that the Facility will not emit enough

¹⁰ AR-4, S-Application 000336-339.

¹¹ ED-SG-1, 24:12 – 25:2.

¹² APP-LT-1, 26:24 – 27:18.

¹³ See AR-8, Tab F ED 0014-18.

¹⁴ Randy Palachek, the Port Authority's expert witness that PAC did not question on cross-examination, has identified the copper levels in the intake water and demonstrated that potential copper levels in the effluent will be far below even the TCEQ screening level for copper. APP-RP-1, 36:23 – 37:8.

¹⁵ TR 11/09/20, 16:3 – 18:10.

¹⁶ See AR-8, Tab F ED 0014-18.

¹⁷ APP-LT-1, 36:21 – 36:31.

effluent when it has spent the entire proceeding complaining that the Facility will emit too much.).

- “How will the bathymetry in the vicinity of the outfall/diffuser impact mixing? (which will determine the pollutants that aquatic life will actual encounter).” The testimony is clear from Dr. Tischler and Dr. Furnans that the hole and the eddy about which PAC focuses so much attention will enhance the mixing estimated by both the CORMIX and SUNTANS modeling which was performed.¹⁸ As Dr. Tischler testified at the hearing the bathymetry in the area of the outfall for the proposed discharge will enhance the mixing of the proposed discharge and the dilution of saline. Dr. Tischler, whose testimony on this issue has not been challenged, also explained that while CORMIX does not have specific inputs for such localized conditions, it is designed to be run in such conditions through the use of schematization.¹⁹

As is discussed below, the remainder of PAC’s arguments in closing are incorrect and can be answered by reference to the AR or the testimony and evidence introduced at the hearing.

B. The Proposed Discharge Will Not Harm the Marine Environment²⁰ Because It Will Only Have a De Minimis Effect on the CCSC.

The dispute about whether the salinity in the outfall is going to harm the Marine Environment in the Corpus Christi Ship Channel (“CCSC”) is not complicated or difficult. It can be analyzed based upon unchallenged evidence, data, and calculations.

Dr. Furnans’ salt mass balance calculations demonstrate that at most, the mass of salt from the Facility will amount to less than 1% of the total salt flowing into and out of the CCSC at the location of the discharge on a daily basis. Dr. Tischler’s tidal volume calculations demonstrate that the total volume of water coming from the Facility will amount to no more than 0.5% of the total water flowing into and out of the CCSC at the location of the discharge on a daily basis. Protestants have not challenged the data or the math behind these calculations.

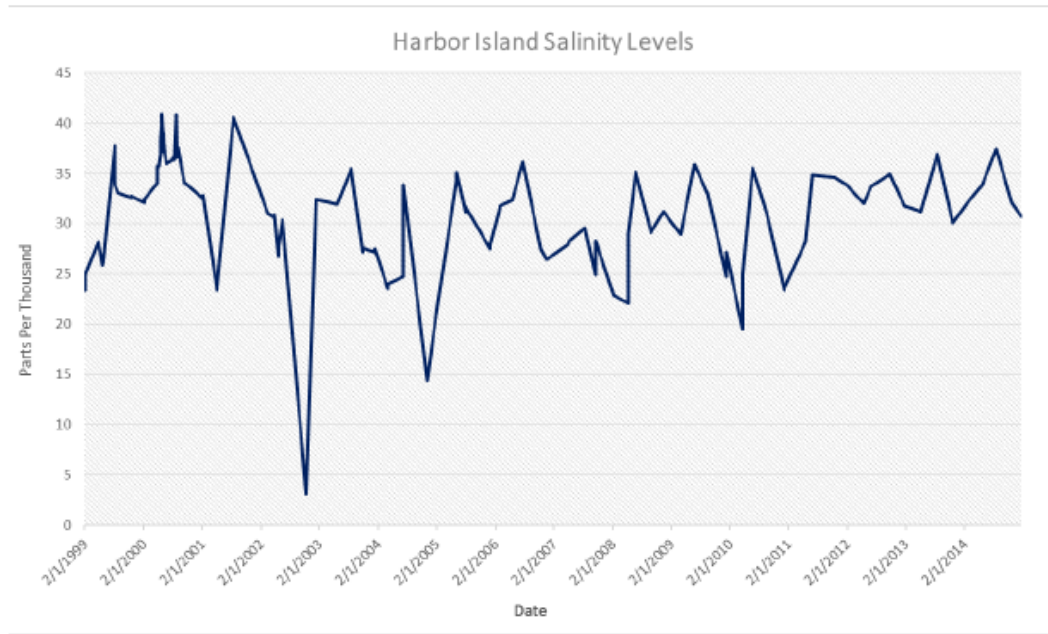
¹⁸ APP-LT-1, 33:13 – 33:31; TR 11/05/2020, 196:5 – 197:1.

¹⁹ APP-LT-1, 38:23 – 39:29.

²⁰ The Port Authority will use the term “Marine Environment” to refer to the following: marine environment, aquatic wildlife, including birds and endangered species, spawning eggs, and larval migration.

Protestants have also not challenged the Port Authority’s evidence establishing that the CCSC is subject to a wide variety of natural and rapidly changing ambient salinity concentrations. The following chart and data supporting it also remain unchallenged.

Figure 4 – Variability of Salinity Levels Over Time



Note: Data from Buoy 16492

The evidence demonstrates that the proposed discharge will have only a de minimis effect on the salinity in the CCSC and the CCSC already experiences substantial natural fluctuations in ambient salinity. Therefore, it is not possible for the proposed discharge to have an adverse impact on the Marine Environment in the CCSC. Palachek testified that “[g]iven that the Aransas Ship Channel experiences normal salinity fluctuations from 18 to over 39 parts per thousand during the

year, the transient changes in salinity from the effluent in the surrounding waters will not adversely affect aquatic life.”²¹ He also testified that

[T]he total increase in salinity from the Facility will be de minimis and will not adversely affect the environment or human health. As my earlier testimony discusses, because of the conservative nature of the permitting process, the modeling data, the fact that the amount of salinity from the outfall will be de minimis in comparison to the overall tidal exchange and salinity, and other requirements in the Draft Permit, the outfall from the Facility does not pose a threat to either commercial fishing or fisheries.²²

Neither in cross examination nor its Closing Arguments did PAC directly challenge Palachek’s testimony on this issue. With effluent concentrations at the edge of the ZID at 18.4% effluent, PAC’s own evidence demonstrates that the total increase in salinity at the edge of the ZID would be 1.23 ppt or 4.12% above ambient velocity, resulting in a total level of salinity at the outfall of 31.17 ppt well within the natural ambient salinity for the CCSC.²³ The Draft Permit will require additional monitoring and WET testing that will examine the effects of effluent on larvae a few days old and in young individuals to provide an additional safeguard against adverse effects on the Marine Environment.²⁴

The evidence also demonstrates that it is not possible for the proposed discharge to have an adverse impact on the ZID, Mixing Zone, or Zone of Passage. As Dr. Tischler testified, less than 1% of the cross-sectional area of the channel is affected more than minimally under all conditions of effluent and ambient densities and currents.²⁵ The zone of passage assures that migrating aquatic life in all life stages is assured protection from any adverse effect caused by a

²¹ APP-RP-1, 28:21 – 28:24.

²² APP-RP-1, 22:26 – 23:1.

²³ PAC-3, BW-6.

²⁴ Exhibit AR-8, Tab F ED 0001 – 34.

²⁵ APP-LT-1, 39:2 – 39:12.

discharge.²⁶ Palachek’s testimony also establishes that zone of unimpacted passage is many times greater than the plume dimensions and that the plume itself carries a concentration of just a few percentages at the edge of the mixing zone and human health zone.²⁷ Protestants have not provided any data to support their opinions that the mixing zone will not be adequate.

Given this data, it is not credible to assert that the proposed discharge will adversely affect the Marine Environment in the ZID or in the other mixing zones given the relative size of the plume of the proposed discharge.

C. Protestants’ Experts Are Not Credible.

Because PAC’s expert witnesses did not base their opinions upon data, or any scientific methodology, their opinions are not competent or credible. PAC’s witnesses’ conclusory opinions – given the bias, conflicts of interest, and lack of proper methodology – most certainly preclude PAC’s meeting 30 TAC § 80.117(c)’s burden.

1. Protestants cannot successfully meet their burden by offering testimony from biased marine biologists who admit the gaps in their analysis.

PAC’s expert witnesses on marine biology—Stunz, Erisman, and Holt—have admitted in writing to their bias against the Port Authority in general and the Facility specifically. In this matter, the fact finder is not challenged to read between the lines or make an inference about whether PAC’s expert witnesses are biased. PAC’s expert witnesses admit their bias and conflicts of interest and ignore the gaps in the data that they claim they need to offer opinions.

On July 30, 2019, Tammy King sent an email to Dr. Greg Stunz, Scott Holt and Joan Holt (his wife), Ken Dunton, and Dr. Brad Erisman, that in pertinent part, reads:

Greg, Joan, Ken, Brad,

²⁶ *Id.*

²⁷ APP-LT-1, 39:13 – 39:18; APP-RP-1, 27:24 – 27:29, 34:8 – 34:10.

Our lawyers . . . suggested we find Scientists who agree with Port Aransas Conservancy’s position They said it also would give us credibility if you would consider joining our membership at the link below.

[LINK:]

It was a year ago this month that a group of us got together to consider how to effectively resist the major industrial development that the Port of Corpus Christi Authority (POCCA) planned for Harbor Island. . . . [P]lease click on the following link where you can sign up. Thank you for your interest and ongoing support. We greatly appreciate it.²⁸

On July 30, Dr. Erisman replied:

Hi Tammy –

Thanks so much for sending this along. . . . I am against the industrialization of our local waters and thus support PAC. . . . I reject the public statement by representatives of the Port of Corpus Christi that these planned developments will have “no impact.” . . . “So, I think I can join PAC as a resident and would happily do so in that regard, but I cannot allow my professional status to be used in any advocacy role.”²⁹

On July 31, Greg Stunz (PAC’s expert witness) replied:

Hello Tammy and Everyone:

I would have to echo Brad’s comments. Joining as a private PA citizen is not an issue, but not sure if that would put us in a conflict of interest position rather than an independent resource you can use. . . . I certainly don’t support these [Port] activities for many of the same reasons below. However, we’ll need to be cautious about maintaining our scientific independence as “honest brokers” and unbiased providers of data. So, direct advocating could blur that distinction. . . . I can’t directly advocate professionally.³⁰

Even in a light most favorable, these PAC witnesses’ emails show bias. Initially, the degree of familiarity between “Tammy,” on the one hand, and “Greg,” “Brad,” and “Scott,” on the other

²⁸ APP-2 at 2.

²⁹ APP-2 at 1.

³⁰ APP-3 at 1.

hand, should not go without notice. Tammy King reveals her plan by saying: “Our lawyers . . . suggested we find Scientists who agree with Port Aransas Conservancy’s position” (Tammy King did not engage in a search for objective science, but rather reached out to friends who would agree with their pre-determined positions).³¹ Moreover, PAC’s witnesses unequivocally reveal their bias with statements such as: (1) “Hi Tammy – I am against the industrialization of our local waters and thus support PAC”; and (2) “Hello Tammy . . . I would have to echo Brad’s comments. . . . I certainly don’t support these [Port] activities for many of the same reasons below. . . . So, direct advocating could blur that distinction [between PAC membership and being an “independent resource”].”³² PAC’s witnesses’ private email statements demonstrate a bias that cannot ever be erased – no matter how hard these witnesses endeavor to walk-back their statements (in fact, these PAC witnesses’ testimony to attempt some clarification (walk-back) only proves the bias).

These emails also highlight the conflicts of interest for PAC’s experts. Dr. Erisman’s email expressly stated: “I am against the industrialization of our local waters and thus support PAC;” and stated “ . . . I cannot allow my professional status to be used in any advocacy role.”³³ Nonetheless, Dr. Erisman ignored the conflict of interest he (himself) noted by allowing his professional status to be used in an “advocacy role.” Dr. Stunz’s email concedes his support of PAC, and notes: “ . . . but not sure if that would put us in a conflict of interest position rather than an independent resource you can use”³⁴ “So, direct advocating could blur that distinction.”³⁵

³¹ APP-2 at 2.

³² APP-2 at 1.

³³ *Id.*

³⁴ APP-3 at 1.

³⁵ *Id.*

Nonetheless, Dr. Stunz went ahead and engaged in “direct advocating” to “blur that distinction” which is a conflict of interest.

PAC’s expert witnesses admitted that they do not have a scientific basis for their current opinions.³⁶ As late as July 2020, Holt, Dr. Erisman and others were exchanging emails in which they conceded that they did not know how two-dimensional modeling works for the CCSC and that they would need other inputs to be able to offer the same opinions that they have offered in this matter: “I agree we would need a 3-D model to add biology—maybe can at least get some preliminary data that would support a future expended modeling effort.”³⁷

These PAC witnesses’ bias and willingness to ignore conflicts of interest is spotlighted by the entirety of these biologists’ participation in this administrative proceeding. By his email, Holt concedes his scientific belief that a biologist’s truthful testimony about lethality to any species is impossible in the absence of 3-D modeling.³⁸ For this reason alone (and other reasons as pointed out with previous filings), PAC’s expert witnesses’ opinions are not supported by science.

Bias is one reason that PAC’s expert witnesses lack credibility, but PAC’s experts’ demanding that the fact finder ignore that bias is another. PAC’s experts could have been candid with the ALJs about their bias and conflicts of interest, and then explained how they attempted to correct for that bias. They did neither. Instead, PAC’s experts asked to be believed that they can be biased as human beings and homeowners but not as scientists and that their expertise in marine

³⁶ APP-4.

³⁷ *Id.*

³⁸ APP-4 (“I am not really sure how a 2D model works” “I don’t think we can realistically model any particular species, there is no biology that can be included in a 2D model.”)

biology should be stretched to include psychology. PAC's experts' fantastic explanation for their self-confessed bias takes a wrecking ball to their already battered credibility.

2. Each one of PAC's four experts has conceded that they do not have basic information that they would need to support their opinions that the proposed discharge would harm the Marine Environment.

As is discussed in more detail in the Port Authority's Closing Arguments, PAC's experts have insufficient bases for their opinions.³⁹ They do not have sufficient information regarding the terms and conditions of the Draft Permit, the alleged amount that the proposed discharge will increase the salinity in the CCSC, whether that unknown increase in salinity will cause harm to aquatic life, and the SWQS. None of PAC's experts has calculated what increase they think the proposed discharge will have on the salinity in the CCSC, and without this information their opinions on potential harm have no weight.

3. None of PAC's experts account for Dr. Furnans' salt mass balance and Dr. Tischler's tidal velocity calculations demonstrating that whether by weight (mass) or volume, the proposed discharge will contribute less than 1% to the overall salinity in the CCSC.

Much as they may try, PAC and the other Protestants cannot wish away the salt mass balance calculations or the tidal volume calculations. Neither PAC nor its experts even mention those calculations, and their failure to do so is a damning indictment of their opinions and a disastrous blow to their credibility. It is well established in Texas that an expert who fails to account for alternative explanations or looks at only evidence in support of the expert's opinion does not provide credible nor reliable testimony.⁴⁰

³⁹ Port Authority's Closing at 24-29.

⁴⁰ *Cerny v. Marathon Oil Corp.*, 480 S.W.3d 612, 621-22 (Tex. App.—San Antonio 2015, pet. denied) (holding that “[a]n expert's failure to rule out alternative causes of injury renders the opinion unreliable, and legally constitutes no evidence.”); *Guzman v. State Farm Lloyds*, 456 F. Supp.3d 846, 853 (S.D. Tex. 2020) (“An expert who is trying to find a cause of something should carefully consider alternative causes.”) (quoting *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 559 (Tex. 1995)); *Oliver v. Saadi*, 05-17-01403-CV, 2019 WL 4126614, at *5 (Tex.

4. Dr. Esbaugh’s claim that Nature is killing fish in the CCSC is not based on sound science or adequate data.

Dr. Esbaugh admitted that he did not know how much the salinity in the CCSC would increase as a result of the proposed discharge. More damning still, he admitted that he would need to know that fact—the increase in the salinity—to know whether the proposed discharge would have any adverse effect on a species of fish.⁴¹ Dr. Esbaugh cannot give a conclusion on harm to the Marine Environment when he admits he does not have the data necessary to form such an opinion. Neither Dr. Esbaugh nor the other PAC experts offer an explanation as to how the proposed discharge could affect the Marine Environment given that it will be less than 1% of total salt in the CCSC or less than .5 % of the ambient tidal volume in the area of the outfall.

To distract from Dr. Esbaugh’s absence of data from which to form an opinion, PAC now claims that Dr. Esbaugh was able to calculate a number of 37.4 ppt that is the limit for acute salinity exposure for the most sensitive species.”⁴² For Dr. Esbaugh, the water of the CCSC is already hazardous to fish in the CCSC. Dr. Esbaugh’s opinion is that the fish who feed, spawn, and live out their lives in the CCSC do so in an ambient environment that is hazardous to them 10% of the time or over one-month a year.⁴³ Dr. Esbaugh used the wrong data incorrectly in attempting to reach this number. Of course, he had never attempted to calculate a predictive no effect number

App.—Dallas Aug. 30, 2019, no pet.) (mem. op.) (“When an expert is challenged, the proponent of the expert opinion must prove the reliability of each opinion. The proponent bears this burden ‘regardless of the quality or quantity of the opposing party’s evidence on the issue and regardless of whether the opposing party attempts to conclusively prove the expert testimony is wrong.’ This burden includes ensuring that the expert’s testimony contains no internal inconsistencies.”) (internal citations omitted); *Johnson & Johnson v. Batiste*, 05-14-00864-CV, 2015 WL 6751063, at *4 (Tex. App.—Dallas Nov. 5, 2015, pet. dismissed) (mem. op.) (“The expert’s failure to rule out other causes of the damage renders the opinion little more than speculation.”) (citing *Robinson*, 923 S.W.2d at 558–59).

⁴¹ TR 11/05/2020, 45:13—46:3.

⁴² PAC’s Closing at p. 17.

⁴³ PAC’s Closing at p. 13.

prior to trying to do so a couple of days before his deposition.⁴⁴ That may provide a partial explanation for why he misused the data, miscalculated the number and reached a wrong result.

Randy Palachek identified numerous errors in Dr. Esbaugh's work. Specifically, Palachek testified that Dr. Esbaugh did not calculate his number using established EPA methodology, nor would he have been able to do because he did not have adequate data to do so.⁴⁵ He explained when questioned by counsel for OPIC:

I disagree that [Dr. Esbaugh] used any proper EPA protocol to calculate that number because in the paper he references, he's mixing—No. 1, there is no data, short-term data in there. There is no 24-hour LC50 data in there. And No. 2, he mixes lethality data with sublethal growth and other types of sublethal effects. And so when you're calculating a criteria using the EPA protocol, you can't mix and match those together. You calculate, you know, an acute value, and then you calculate a chronic value. And, therefore, his calculations are not correct.⁴⁶

Again, neither PAC nor any other Protestant challenged Palachek's indictment of Dr. Esbaugh's faulty no effect concentration.

Even assuming that Dr. Esbaugh's analysis was correct for the sake of argument, his opinion on this issue does not mean that any species of fish will be harmed from the proposed discharge. Dr. Esbaugh did not offer an opinion that the proposed discharge will increase the salinity in the CCSC above his incorrectly calculated 37.4 ppt.⁴⁷ No other expert offered that opinion either. Dr. Esbaugh also did not testify that any species of fish or marine life would be exposed to his 37.4 ppt long enough to have an adverse effect.

⁴⁴ TR 11/05/2020, 62:16 – 62:19.

⁴⁵APP- RP-1, 29:18—31:3.

⁴⁶ TR 11/06/20, 14:18 – 15:3.

⁴⁷ TR/11/05/2020, 45:13—46:3.

D. The Proposed Discharge Does Not Violate the SWQS.

In its Closing Argument, PAC claims that the proposed discharge will violate specific SWQS. Aside from the fact that neither standard that PAC identified in its closing is contained in any of PAC’s pre-filed testimony, PAC is both legally and factually incorrect.

1. PAC misinterprets the TSWQS.

At the time of the contested case hearing, PAC asserted that TCEQ rules require that there “must be no lethality to aquatic organisms that move through a ZID.”⁴⁸ That is a misapplication of the TCEQ rules in the present case because 30 TAC § 307.6(e)(1), not § 307.6(c)(6) applies to the potential effects of salinity in the proposed discharge. Per 30 TAC § 307.6(e)(1) “there must be no significant lethality to aquatic organisms that move through a ZID.”⁴⁹ PAC and Protestants have provided no competent evidence that there will be any lethality to organisms moving through the ZID, and they have certainly provided no competent evidence that there will be significant lethality to organisms moving through the ZID.

Section 307.8(b)(2) of the TCEQ rules requires that § 307.6 be used to determine “[n]umerical acute aquatic life criteria for toxic materials” and “preclusion of total acute toxicity.”⁵⁰ Section 307.6(c) provides the “numerical acute criteria for toxic substances.”⁵¹ It sets limits for a number of substances, including arsenic, cyanide, and mercury.⁵² But § 307.6(c) does not set limits for salt or salt’s constituents, sodium and chloride.⁵³ Section 307.6(c)(6) provides that (1) “specific numerical acute criteria for toxic substances are applicable ... except for small

⁴⁸ PAC’s Closing at 52 (quoting 30 TEX. ADMIN. CODE § 307.6(c)(6) & 30 TEX. ADMIN. CODE § 307.8(b)(2)).

⁴⁹ 30 TEX. ADMIN. CODE § 307.6(e)(1).

⁵⁰ 30 TEX. ADMIN. CODE § 307.6(e)(1).

⁵¹ 30 TEX. ADMIN. CODE § 307.6(c)(6).

⁵² 30 TEX. ADMIN. CODE § 307.6(c)(6)(1) (Table 1).

⁵³ 30 TEX. ADMIN. CODE § 307.6(c)(6)(1) (Table 1).

zones of initial dilution (ZIDs);” (2) “[a]cute criteria may be exceeded in the ZID;” and (3) there “must be no lethality to aquatic organisms that move through a ZID.”⁵⁴ Given that § 307.6(c)(6) contains no “[n]umerical acute aquatic life criteria for toxic materials” for salinity which is at issue here, the “no lethality” standard of Section 307.6(c)(6) or Section 307.8(b)(2) clearly does not apply to the Draft Permit in this case for the salinity in the proposed discharge.

Instead, Section 307.6(e)(1) governs “preclusion of total acute toxicity”⁵⁵ for the proposed discharge. Section 307.6(e)(1) states that “[a]cute total toxicity levels may be exceeded in a ZID, but there must be no *significant* lethality to aquatic organisms that move through a ZID.”⁵⁶ So under the TCEQ rules, the requirement for the salinity in the proposed discharge is that there be “no significant lethality”—not that there “must be no lethality.”⁵⁷ If salt were a listed substance in § 307.6(c), then the “no lethality” standard would apply. But because it is not, the “no significant lethality” standard applies.⁵⁸

When interpreting a statute or a rule, courts must give “effect to every word, clause, and sentence.”⁵⁹ PAC’s interpretation of the rule ignores the “no significant lethality” provision. The Port Authority’s interpretation accounts for every word in the rule, as the Texas Supreme Court requires. Therefore, the rule requires that there be “no significant lethality to aquatic organisms that move through a ZID”—not that there be no lethality.⁶⁰ However, even assuming *arguendo*

⁵⁴ 30 TEX. ADMIN. CODE § 307.6(c)(6).

⁵⁵ 30 TEX. ADMIN. CODE § 307.8(e)(1).

⁵⁶ 30 TEX. ADMIN. CODE § 307.8(e)(1) (emphasis added).

⁵⁷ *Cf.* 30 TEX. ADMIN. CODE § 307.8(e)(1) *with* 30 TEX. ADMIN. CODE § 307.6(c)(6).

⁵⁸ None of the witnesses in this matter testified on the legal issues of how §§ 307.6(e) and 307.8(b)(2) should be interpreted. PAC’s witnesses offered no explanation, and PAC did not question Palachek on this issue. Dr. Tischler’s testimony regarding no significant lethality in the mixing zones was not tied to either chemicals of concern that had a numeric limit or, like salinity, did not. TR 11/05/20 215:1 -- 215:16; 243:18 -- 247:17.

⁵⁹ *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014).

⁶⁰ 30 TEX. ADMIN. CODE § 307.8(e)(1).

that the “no lethality” standard of § 307.6(c) applies, the evidence in this matter supports issuance of the Draft Permit.

2. No Lethality in the ZID.

Palachek testified that there will be no lethality in the ZID or mixing zone because of the velocity of the effluent.⁶¹ He testified that larval organisms and other aquatic species will be immediately pushed outside of any mixing zone before suffering any adverse effects from the proposed discharge.⁶² Palachek explained that the plume of effluent is not a wall of hyper-saline water, but rather a very small plume along the bottom that does not affect the upper parts of the water column.⁶³ Palachek’s credentials are persuasive on this important point (especially when contrasted with the bias of PAC’s proffered expert witnesses.)

E. The TPWD and GLO Study Does Not Support Objections to the Draft Permit.

PAC repeatedly cites to the “Marine Seawater Desalination Diversion and Discharge Zones Study” (sometimes referred to as “Seawater Discharge Study”),⁶⁴ yet PAC’s reliance upon this study is misplaced. The Seawater Discharge Study -- by its express terms -- relates exclusively to *expedited* permits (which the Draft Permit is not). Even if the Seawater Discharge Study did apply, it does not prohibit a desalination facility in the subject area based upon consideration of the criterion set forth therein.⁶⁵

The stated reason for the Seawater Discharge Study is to comply with House Bill 2031 (84th Legislature) and “inform the new optional expedited permit application program authorized

⁶¹ TR 11/06/20, 17:15 – 19:7; 22:9 – 22:24.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ PAC-7 at 4, 6, 41, 42.

⁶⁵ PAC-7 at 6 (“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.”).

by HB 2031.”⁶⁶ HB 2031 created a new chapter to the Texas Water Code—Chapter 18, instituting an “expedited procedure” for TCEQ’s actions on permits under that section.⁶⁷ Of course, the Port Authority did not apply for an *expedited* permit.⁶⁸ Given that no *expedited* procedure has been invoked, the more time honored and established regulatory safeguards that the Port Authority and TCEQ must comply with (and have complied with) are in place. No provision of the Texas Administrative Code (or testimony from any TCEQ witness) even suggests that the Seawater Discharge Study is applicable, or infers that it would preclude approval of the Draft Permit.

Randy Palachek – whose opinions PAC did not challenge at the time of the hearing – discussed the Seawater Discharge Study at length in his prefiled testimony. Palachek confirmed that this study relates only to *expedited* permits, and further confirmed that all of the study’s recommended evaluations have been performed and met for approval of the Draft Permit. More specifically, Palachek noted that the several different conditions that the study supports consideration of were accomplished with respect to this Draft Permit—thus, the current outfall for the proposed facility is appropriate.⁶⁹ Palachek stated: “throughout the consideration of the Application and the Draft Permit the considerations listed on p. 3 of the TPWD and GLO report for the discharge from a desalination facility have been evaluated;”⁷⁰ and that “the TPWD and GLO report does not state that desalination facilities cannot be located at other locations and makes recommendations for locating discharges on p. 3 which this Facility meets.”⁷¹ In his testimony, Palachek cites to twelve different considerations, each of which were considered “throughout the

⁶⁶ PAC-7 at 1

⁶⁷ TEX. WATER CODE § 18.005(e).

⁶⁸ ED-SG-1, 11:9 – 11:26.

⁶⁹ APP-RP-1, 22:14 – 22:18.

⁷⁰ APP-RP-1, 24:13 – 24:17.

⁷¹ APP-RP-1, 24:17 – 24:19.

evaluation of the Draft Permit.”⁷² For these reasons, among others, Palachek disagrees with Dr. Stunz⁷³ and Holt⁷⁴ who have opined that the Seawater Discharge Study applies and prohibits approval of the Draft Permit. Palachek reminds the ALJs that the report 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.”⁷⁵ If it were not so, the new *expedited* procedure would make superfluous these other chapters, which clearly was not the intent of our Texas Legislature.

Dr. Stunz admitted that the TPWD and GLO Report applied to expedited permitting in an email that he sent in November 7, 2018 discussing the Report and conceding that TWPD and GLO “did an **offshore** expedited permitting option for interested parties.”⁷⁶ Dr. Stunz, when asked about the Seawater Discharge Study,⁷⁷ was forced to admit that the Draft Permit is not an *expedited* permit.⁷⁸ Dr. Stunz confirmed that study was initiated to inform the TCEQ about expedited seawater permits,⁷⁹ and he (Stunz) knew of no similar study from any agency relating to issuance of traditional desalination permits (like the Draft Permit).⁸⁰ In sum, PAC’s claims based on this Seawater Discharge Study fail to meet PAC’s burden. The location of the outfall in the Draft Permit is perfectly appropriate—it should be approved considering the applicable guidelines—and it certainly is not prohibited by the Seawater Discharge Study.

⁷² APP-RP-1, 24:27 – 25:8.

⁷³ APP-RP-1, 25:20 – 26:10.

⁷⁴ APP-RP-1, 26:12 – 27:6.

⁷⁵ APP-RP-1, 27:3 – 27:6.

⁷⁶ APP-1.

⁷⁷ PAC-7.

⁷⁸ TR 11/05/20, 78:17 – 78:19.

⁷⁹ TR 11/05/20, 78:70 -- 78:23.

⁸⁰ TR 11/05/20, 78:24 – 79:3.

F. Dr. Tischler’s Testimony Does Not Support Objections to the Draft Permit.

The Port Authority agrees with the surprising reliance of PAC upon the Port Authority’s expert witness, Dr. Tischler. However, Dr. Tischler’s opinions provide no salvation for PAC’s arguments. If PAC is going to rely upon Dr. Tischler’s testimony, then PAC should accept his following opinions:

- The federal Clean Water Act required Texas to establish the TSWQS to be protective of aquatic life, contact recreation and public water supply uses.
- The TSWQS are established by the TCEQ to be protective not just of public health but also aquatic resources, terrestrial life and other environmental and economic resources.
- The proposed discharge from the Facility will be protective of water quality and the uses of the receiving waters.
- The Draft Permit will protect the exceptional aquatic life use classification for all surface waters upstream and downstream.
- Discharges that meet the effluent limits and other terms and conditions of the Draft Permit will maintain the water quality consistent with protection of human health from ingestion of water, consumption of aquatic organisms, or contacts with skin.
- There will be no adverse effect on aquatic organisms or terrestrial or aquatic life because the level of pollutants anticipated from the Facility will be too low.⁸¹

While the Port Authority agrees with PAC that Dr. Tischler is an accepted expert whose opinions support the issuance of the Draft Permit on all of the issues referred to the SOAH, it is important that his testimony be cited in context without misrepresentation. In the passage that PAC references (which must be placed in context), Dr. Tischler testified that in order to review PAC’s experts’ opinions, he (Dr. Tischler) assumed some of their hypothetical ambient tidal velocities.⁸² If such hypothetical ambient tidal velocities are used, then the existing diffuser in the

⁸¹ See Port Authority’s Closing at p. 22.

⁸² TR 11/05/20, 258:13 – 259:9.

Application might have difficulty meeting the permit limitations at the edge of the ZID. Moreover, Dr. Tischler also testified that the TCEQ *Procedures to Implement the Texas Surface Water Quality Standards* (June 2010) (“IP”) and TCEQ’s CORMIX standard operating procedures (“CORMIX SOP”) required the Port Authority to use a conservative ambient tidal velocity of .05 m/sec.⁸³ Dr. Tischler also testified that the CORMIX modeling performed in compliance with TCEQ IP and SOP proves that the proposed diffuser meets the TCEQ requirements and will comply with the limits of the Draft Permit.⁸⁴ Undoubtedly, had the Port Authority used an ambient tidal velocity that was not provided in the TCEQ’s CORMIX SOP, PAC and Protestants would be demanding that the Draft Permit be rejected for failing to follow TCEQ’s CORMIX SOP. As is discussed in the following section, PAC’s own expert admits that the CORMIX modeling for the Draft Permit and the .05 m/sec for ambient tidal velocities complies with TCEQ’s rules and its CORMIX SOP. It was appropriate to use the TCEQ’s CORMIX SOP because of the absence of ambient tidal data at the area of the outfall.⁸⁵

Dr. Tischler did not concede that the existing diffuser would not meet the Draft Permit requirements. Dr. Tischler denied that the Port Authority had plans to submit any different diffuser design, and the questioning regarding how such a hypothetical future request for a design change in the diffuser is, therefore, irrelevant. PAC’s taking Dr. Tischler’s testimony out of context is little more than a parlor trick, and the Port Authority’s expert testimony should be read in context with the entirety of his (Tischler’s) sworn testimony. Such a gimmick by PAC is unpersuasive,

⁸³ APP-LT-1, 29:1 29:19.

⁸⁴ *Id.*

⁸⁵ TR 11/10/2020, 15:16 – 16:8. Trungale also agreed that the ambient tidal velocity for the location of the discharge should be gathered. *See* TR 11/04/2020, 115:8 – 24.

and certainly insufficient to comply with the burden of proof placed on PAC by 30 TAC § 80.117(c).

G. PAC Does Not Raise Valid Questions Regarding the Legitimacy of the Modeling.

PAC witness Joseph Trungale, who conducted all of the CORMIX modeling for Protestants, admitted that TCEQ and the Port Authority complied with TCEQ's CORMIX SOP. This forces PAC to now argue—without support—that the CORMIX SOP are not rules and do not need to be followed.”⁸⁶ PAC shifts to argue that the Port Authority failed to follow 30 TAC § 305.45(a)(8)(C) and 30 TAC § 305.48.⁸⁷ PAC's argument is obviously incorrect. 30 TAC § 305.45(a)(8)(C) requires the applicant to provide “such other information as reasonably may be required by the executive director for an adequate understanding of the project.” Moreover, 30 TAC § 305.48 requires the applicant to “submit any other 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.” PAC does not offer any evidence to show that there was anything requested by the Executive Director that was not provided. To the contrary, the testimony from the Executive Director's staff confirms that the Port Authority's Application provided complete and accurate information (thus, PAC's CORMIX SOP argument fails from the

⁸⁶ PAC's Closing at 42. The Port Authority notes that the portions of the depositions to which PAC cites as supposed support of this claim are not in evidence in this matter. PAC-14 (the deposition excerpts for Shannon Gibson) does not include page 6, lines 3-4, and PAC-15 (deposition excerpts for James Michalk) does not include page 8, lines 1-9. Even assuming that the citation was intended to be to the exhibit pages and not the deposition pages, the lines cited are not included in either of the offers. *See* Port Aransas Conservancy's Clarification of Offer of Deposition Excerpts in Prefiled Testimony filed 1/26/2020. PAC-14 page 6 is Shannon Gibson deposition page 32. The offer for Shannon Gibson's deposition on page 32 starts at line 5. PAC-15 page 8 is James Michalk deposition page 55. The offer for James Michalk's deposition on page 55 starts at line 19.

⁸⁷ PAC's Closing at 43.

outset).⁸⁸ As such, PAC’s argument fails to raise any issue to rebut the Port Authority’s/Executive Director’s prima facie demonstration.

PAC further endeavors to discredit CORMIX by arguing that CORMIX is unable to model the local bathymetry. PAC’s argument demonstrates a lack of understanding of the model’s abilities, and is—therefore—unpersuasive. PAC’s primary objection to CORMIX is that the “CORMIX model is not capable of modeling salinity plumes when bathymetry slopes upward.”⁸⁹ As noted in the evidentiary record, Dr. Tischler testified to CORMIX’s ability to model complex bathymetry and the need for schematization.⁹⁰ Dr. Tischler’s testimony is supported by the CORMIX User Manual.⁹¹ PAC compounds its error by suggesting that there is no evidence of turbulence in the area of the hole and the eddy, and that Dr. Tischler’s testimony regarding the existence of the hole and the eddy making the CORMIX predictions conservative is the equivalent of throwing out the modeling.⁹² The evidence of the increased turbulence in the area of the outfall is essentially undisputed. Sarah Garza first identified the eddy when she emailed Katie Cunningham explaining the depth of the area below the dredged channel depth.⁹³ The impact of the currents was confirmed by the testimony of Dr. Tischler about the scour hole,⁹⁴ and it was further explained by Dr. Furnans in relation to his SUNTANS modeling.⁹⁵ The fact that the exact velocities at the diffuser are not known at this time and therefore could not be calculated in the

⁸⁸ ED-KC-1, 10:4 – 10:9; ED-SG-1, 12:12 – 12:16; TR 11/09/2020, 102:24 – 103:3; TR 11/10/2020, 83:10 – 83:15.

⁸⁹ PAC’s Closing at 44 n.183, (citing to testimony of Bruce Wiland and Joseph Trungale).

⁹⁰ APP-LT-1, 38:23 –39:29.

⁹¹ See ED-KC-3 at xxiv (definition of Schematization) and at 44, figure 4.4.

⁹² PAC’s Closing at 46.

⁹³ ED-KC-7.

⁹⁴ APP-LT-1, 33:13 – 33:31.

⁹⁵ TR 11/05/2020, 196:5 – 197:1.

CORMIX modeling is the reason that Other Requirement 9 was added to the Draft Permit. None of PAC's arguments on this point change the fact that the existence of the local bathymetry results in conservative modeling results, further insuring the protectiveness of the Draft Permit.

H. PAC's Superficial Critique of TCEQ's Antidegradation Review, Which Met the Statutory Requirements, is Incorrect.

PAC's attack on the antidegradation review is full of half-truths and misdirection. PAC makes much of the wording used by Dr. Wallace on cross examination, elevating form over substance in its critique of Dr. Wallace's review. While Dr. Wallace admitted that she feels she is always in a hurry because of the amount of work there is to do, and that she would have preferred to have more time, she testified that she "thought very long and hard about every single step" of her permit review and that she worked on this review even harder than most.⁹⁶ Dr. Wallace also acknowledged that antidegradation reviews for new facilities are more difficult, and that she feels uncomfortable doing them because "I hold myself to an impossible standard."⁹⁷ PAC's arguments do not alter the simple fact that Dr. Wallace complied with "all of the TCEQ's guidelines" for her antidegradation review,⁹⁸ and that Dr. Wallace's antidegradation analysis was reviewed by TCEQ staff members Brad Caston and Peter Schaefer, who agreed with her analysis.⁹⁹ PAC's focus on things such as the pH screening analysis and the supposedly incorrect modeling data demonstrates the lack of substance to PAC's arguments. Most notably, PAC claims that the antidegradation review is invalid based on an incorrect salinity concentration at the mixing zone for Dr. Wallace's pH screening. However, PAC ignores the consequence of PAC's suggested correction: using the

⁹⁶ TR 11/09/2020, 157:2 – 157:21.

⁹⁷ TR 11/09/2020, 187:5 – 187:7.

⁹⁸ ED-MW-1, 13:6 – 13:7.

⁹⁹ ED-MW-1, 11:23 – 11:26.

maximum potential salinity concentration for the effluent in the pH screening calculation does not significantly alter the outcome.¹⁰⁰

Similarly, PAC claims that the antidegradation review was based on incorrect modeling data because Dr. Wallace performed the review before Katie Cunningham updated her CORMIX modeling report. Again, PAC's argument appears to be an intentional case of misdirection. Katie Cunningham's update of the CORMIX modeling report impacted only the percentage of effluent at the ZID. The update did not change the values of the percentage of effluent at the mixing zone or the human health mixing zone.¹⁰¹ As was explained by Dr. Wallace, the portion of the CORMIX report which she used to support her antidegradation review was the finding of 1.34% at the boundary of the mixing zone, a value that did not change with Katie Cunningham's update of the CORMIX modeling report.¹⁰² Katie Cunningham confirmed that Dr. Wallace's review would not require revision or updating because the percentage of effluent at the boundary of the mixing zone stayed the same in Katie Cunningham's 2018 and 2020 reports.¹⁰³ The IP's discussion of antidegradation confirms that the relevant inquiry for the antidegradation review is the percentage effluent at the edge of the mixing zone, not at the ZID.¹⁰⁴ PAC's attempt to discredit the antidegradation review on the basis of a change in the effluent level at the edge of the ZID is invalid and a clear attempt to mislead the ALJs.

¹⁰⁰ ED-MW-1, 20:16 – 20:24; *See also*, AR-8, Tab F ED 0047 Revised (Based on the CO2SYS program used by the TCEQ, changing the salinity inputs from 32.00 for background and 18 for effluent to 40.57 background and 78.5 for effluent (both calculated at Summer 95th percentile for intake in the Gulf and ambient at Lydia Ann Channel) only changes the pH from 7.80 to 7.79.).

¹⁰¹ TR 11/09/2020, 13:3 – 13:20.

¹⁰² TR 11/09/2020, 203:13 – 204:2.

¹⁰³ TR 11/10/2020, 98:17 – 99:14.

¹⁰⁴ ED-KC-5 at 64 (New discharges that use less than 10% of the existing assimilative capacity of the water body *at the edge of the mixing zone* are usually not considered to constitute potential degradation.) (emphasis added).

I. The Magnuson-Stevens Act Does Not Require a Change in the Draft Permit.

PAC’s Closing Argument includes several references to the Magnuson-Stevens Act (“MS Act”),¹⁰⁵ but fails to cite to any direct testimony demonstrating that this Act specifically applies to the issuance of this Draft Permit. PAC fails to tie the MS Act, a federal regulatory scheme concerning marine fishery management,¹⁰⁶ to the issuance of this permit, or TPDES permitting, generally. Again, PAC should not be allowed to re-write TCEQ’s processes and, thereby, fabricate a unique, new process for the issuance of the Draft Permit.

No PAC expert affirmatively states that the MS Act is a legally-required part of the TCEQ’s wastewater permit review and approval process.¹⁰⁷ In fact, when confronted about this testimony, Dr. Erisman admitted he is not a legal or permitting expert,¹⁰⁸ and could not say whether the MS Act applies or impacts TCEQ’s review of this Draft Permit:

Q. And do you recall how that [16 U.S.C. § 1802] should impact the TCEQ’s review of the water quality permit?

A. I’m only familiar generally how it—how EFH governs kind of precautionary management of such sites.

¹⁰⁵ 16 U.S.C. § 1801, *et seq.*

¹⁰⁶ The Magnuson-Stevens Act “is the principal Federal statute providing for management of the U.S. marine fisheries. . . . This management system established eight Regional Fishery Management Councils charged with developing FMPs [Fishery Management Plans]/Amendments . . . which are submitted to the NMFS [National Marine Fisheries Service], on behalf of the Secretary of Commerce for review, approval, and implementation by regulations. MSA’s fishery management system was established to meet the goals of conserving fish resources and promoting the U.S. commercial and recreational fishing industry. Under a set of statutes, the Councils were tasked to make major management recommendations, such as the size of the allowable catch, the length of the fishing season, the allocation of any quotas to states and fishers, and permitting and licensing provisions. . . . Passage of the Sustainable Fisheries Act (SFA) in 1996 . . . added new National Standards concerning (a) the minimization of bycatch to the extent practicable, and (b) the sustained participation of fishing communities and the minimization, to the extent practicable, of adverse economic effects on such communities. Also, the SFA established new requirements to rebuild overfished stocks and to minimize, to the extent practicable, adverse effects on essential fish habitat (EFH) caused by fishing.” See <https://www.epa.gov/sites/production/files/2014-08/documents/reviewing-eiss-fishery-management-plans-pg.pdf>; <https://www.fisheries.noaa.gov/topic/laws-policies>.

¹⁰⁷ In fact, when Sue Ayers (counsel for PAC) asked Dr. Erisman about the Act, the question was presented as “**And not the TCEQ regs**, but if we go back to the Magnuson-Stevens Act with which you are familiar” TR 11/04/20, 95:10 – 95:12 (emphasis added). The way in which the question is phrased presumes that the Act is not a part of TCEQ’s analysis here.

¹⁰⁸ TR 11/04/20, 105:15 – 106:1.

Q. So you don't have any knowledge of if TCEQ is required to consider Section 1802 in its review of a TPDES permit?

A. You know, I'm a scientist. I'm not an expert on regulatory permits, obviously, but I can only just say there is guidance, and strict guidance from National Marine Fisheries Service about state and federal agencies should seek out NMFS in terms of any potential impacts on – on essential fish habitats, which includes this area, and that's really the limit of my understanding.¹⁰⁹

Q. But you do not know how TCEQ implements the Magnuson & Stevens Act?

A. That's -- no, I do not.¹¹⁰

While PAC's expert's discussions of the MS Act do not prove the MS Act's application in this permitting process, the testimony of Shannon Gibson demonstrates that the TCEQ applied the specifically applicable statute and regulations regarding this Draft Permit, including various provisions from Title 30 of the Texas Administrative Code, including Chapters 281, 213, 305, 307, 309, 319, 312, and 311, as well as portions of the federal Clean Water Act, the Texas Water Code, TCEQ's IP, Commission policies, EPA guidelines, and the memoranda from the Water Quality Assessment Section, the applicant's responses to requests for additional information, and reference materials, if necessary.¹¹¹ Gibson is the permit coordinator for the Industrial Permits Team, Wastewater Permitting Section, Water Quality Division, and therefore *very* familiar with what is required for such review and approval (she has worked for TCEQ for 6 years and worked on or reviewed over 100 wastewater permit applications in that time).¹¹²

¹⁰⁹ TR 11/04/20, 62:19 – 63:24.

¹¹⁰ TR 11/04/20, 103:9 – 104:1.

¹¹¹ ED-SG-1, 4:10 – 4:31.

¹¹² ED-SG-1, 2:7 – 2:24.

PAC must not be permitted to create a new, unique process for issuance of this Draft Permit. TCEQ (and the State of Texas) must adhere to a consistent process applied in like manner to all applicants. Thus, PAC's attempt to require compliance with the MS Act must be rejected. At a minimum, the TCEQ's witnesses' (Wallace and Cunningham) testimony persuasively assures that PAC has failed to show that the MS Act is specifically applicable to the TCEQ's review of the Draft Permit (PAC has failed to carry its burden of proof under 30 TAC § 80.117(c)).

J. The Draft Permit Meets the Requirement of the Texas Coastal Management Program.

PAC proffered no evidence that the Draft Permit is not consistent with the Texas Coastal Management Program's ("CMP's") goals and policies. That should be the end of the issue. Nonetheless, PAC argues that the evidence admitted by the ALJs proving such a completed CMP review is insufficient. PAC's argument is both factually and procedurally illegitimate. The AR demonstrated the prima facie case.¹¹³ The Port Authority showed in its Closing that this standard was not only met but exceeded. Shannon Gibson described the review in her prefiled testimony,¹¹⁴ and the ED addressed this issue in its responses to comments.¹¹⁵ Given this evidentiary record and the legislated process, PAC has the burden under 30 TAC § 80.117(c) to rebut this evidence. PAC wholly failed to rebut the Port Authority's and ED's evidence of record, and thus a finding is proper that the Draft Permit is consistent with the CMP's goals and policies.

PAC's weak attempts to minimize the testimony of Shannon Gibson are based on inconsequential timing issues. First, PAC decries that the CMP review was performed before the

¹¹³ AR-8, Tab F ED 0005.

¹¹⁴ ED-SG-1, 16:12 – 16:31.

¹¹⁵ ED-KC-6 at 36, 95.

2018 and 2019 letters from TPWD—but neither letter mentions the CMP.¹¹⁶ Moreover, the public comments to which PAC refers were responded to by the ED (which, axiomatically had to occur after the comments were filed). The Port Authority cited to those comments and responses that actually referred to the CMP in its arguments. But it did not mention comments by Dr. Erisman or Dr. Stunz, because their comments do not mention the CMP.¹¹⁷ The fact that the CMP review was performed before these letters or events that do not specifically call consistency with the CMP into question is meaningless. And the post-CMP Threshold Review comments addressed by the ED only add to the evidence that the Draft Permit is consistent with the CMP’s goals and policies.

PAC’s parting statement that “the complete failure to do a detailed evaluation of consistency leaves an empty record” is inaccurate. There is credible and sufficient evidence weighing in on the side of the Port Authority and the Draft Permit; the evidentiary record is only empty on PAC’s side of the scale.

K. The Proposed Discharge Will Not Harm the Marine Environment from Copper.

PAC’s attempt to raise copper as a factor in the review of the proposed permit is specious. First, PAC misrepresents the data relied upon by Wiland for his opinions on copper. PAC’s Closing states: “data from the Lydia Ann Channel station indicated a range of 0.00083 mg/L [.83 ug/L] to 0.012 mg/L [12 ug/L] dissolved copper, this upper bound being six times higher than the value the Port estimated.”¹¹⁸ As explained by Palachek and shown in Exhibit APP-RP-16, the only detection of copper reported for the Lydia Ann Channel station was 0.83 ug/L. The four other

¹¹⁶ PAC-37; PAC-9.

¹¹⁷ PAC-1, attached BE-1; PAC-6, attached GS-2.

¹¹⁸ PAC’s Closing at 18 (emphasis in original) (For purposes of the discussion, the Port Authority will use micrograms per liter (ug/L) which is the unit of measurement used in the TCEQ rules, the Draft Permit’s Statement of Basis, APP-RP-15 (the paper cited by Palachek) and APP-RP-16 (the summary of the copper data derived from the SWQM stations. To convert from mg/L to ug/L, the concentration in mg/L is multiplied by 1000.)

entries for dissolved copper were all non-detect, as shown by the < marking before the value.¹¹⁹ PAC's argument that copper levels were as high as 12 ug/L in Lydia Ann Channel is not supported by the evidence, and is also inconsistent with the concentrations of dissolved copper from the other samples in section 2471 (which includes the Lydia Ann Channel station) which report dissolved copper levels from .64 ug/L to 1.47 ug/L.¹²⁰

Second, PAC misinterprets the study relied upon by Palachek and then—worse yet—misapplies the TCEQ standards for dissolved copper concentrations. As explained by Mr. Palachek in his direct testimony, Palachek oversaw the sampling plan for the study found in APP-RP-15 when he worked for the Texas Water Commission. The data for dissolved copper concentrations from this study showed a maximum concentration in Gulf water of 2 ug/L. Assuming this worst case scenario of 2 ug/L, the dissolved copper concentration in the Facility's discharge would be 4 ug/L, at most.¹²¹ PAC's Closing then mistakenly argues that this dissolved copper concentration *in the discharge*, at a concentration of 4 ug/L, exceeds the copper chronic criteria and the limit of 3.6 ug/L copper in a discharge to oyster waters set by TCEQ rules.¹²² However, PAC's argument wrongly ignores the fact that the 3.6 ug/L criterion for a dissolved copper concentration applies to the concentration of dissolved copper in the water *outside the mixing zone* – not to the level in the discharge (in the effluent) before any dilution.¹²³ The Draft Permit's screening level for dissolved copper concentration *in the discharge* from the Facility is

¹¹⁹ APP-RP-1, 37:10 – 38:11; APP-RP-16.

¹²⁰ APP-RP-16.

¹²¹ APP-RP-1, 35:12 – 37:8.

¹²² PAC's Closing at 18 and n.74 (citing 30 TEX. ADMIN. CODE § 307.6(c)(1) Table 1, note 1).

¹²³ Note 1 states: “an acute saltwater copper criterion of 3.6 micrograms per liter [or 0.0036 mg/L] applies outside of the mixing zone of permitted discharges” 30 TEX. ADMIN. CODE § 307.6(c)(1), Table 1, note 1.

39.2 ug/L,¹²⁴ or almost ten (10) times the maximum dissolved copper level (worst case of 4 ug/L) that might be anticipated in the undiluted effluent from the Facility.¹²⁵

Third, the Port Authority would be remiss to not make one final observation. While segment 2471 is designated as oyster waters for purpose of the TCEQ's review, there are no actual oyster beds in the zone of initial dilution or the mixing zone.¹²⁶ In short, all of the data regarding copper in seawater in and around the Gulf demonstrates that even at 50% RO recovery rates, the expected level of copper does not even approach the screening level for copper found in the Draft Permit, meaning that the Facility's outfall will absolutely not pose a risk to the environment from copper.¹²⁷

L. PAC's Complaints about the Application are Incorrect.

As noted previously, PAC's complaints regarding the ownership of the Facility are baseless.¹²⁸ The TCEQ's application form for a TPDES permit requires the name of the applicant which must be the Facility owner¹²⁹ and, if there is another legal entity which will have overall responsibility for the operation of the Facility, the co-applicant.¹³⁰ The Application correctly lists the Port Authority as the owner, with no co-applicant listed.¹³¹ PAC claims that the Application is wrong based on something which may happen in the future. For the Application to be wrong, however, there would have to be some other entity which currently held legal title to or had the

¹²⁴ See AR-8, Tab F ED 0042 Revised.

¹²⁵ APP-RP-1, 35:12 – 37:8.

¹²⁶ TR 11/09/2020, 171:12 – 171:25 (In fact, the evidence admitted shows there are no oyster beds within approximately 5 miles of the outfall. TR 11/09/2020, 172:18 – 173:1).

¹²⁷ *Id.*

¹²⁸ See *supra*; see also Port Authority's Closing at 34.

¹²⁹ AR-4, S-Application 000211.

¹³⁰ *Id.*; see also Form TCEQ-10411_10055-inst at 23. (The operator of the facility does not need to be listed as a co-applicant if it does not have "overall responsibility of the facility operations.").

¹³¹ PAC-18, 119:10 – 119:16.

right to control overall operations of the prospective Facility. There is none. Sarah Garza's testimony makes clear that, while there have been discussions with other parties in the past, there is no current deal with any other party to own or operate the Facility.¹³² The application form does not contain any questions regarding whether the applicant may, in the future, transfer the ownership or operation of the Facility. Permit transfers are common, and TCEQ rules provide for how a permit may be transferred to a new owner.¹³³ In fact, the permit itself has a section on permit transfer requirements.¹³⁴ The Port Authority cannot obtain a permit then transfer it to another entity without getting approval from the Commission, nor would it attempt to do so.¹³⁵ PAC's continued clamoring about the ownership of the Facility is purely a distraction.

As discussed in the Port Authority's Closing Argument, the location of the outfall is clearly designated in the Application.¹³⁶ Now PAC also asks that the permit be denied because the location of the Desalination Facility allegedly conflicts with another proposed facility. As support, PAC presents aerial photos showing renderings for potential vessel berths and an aerial with the general location for the Desalination Facility.¹³⁷ The maps presented show that the two facilities are planned for the same tract of land, but not that there is an irreconcilable conflict. But even if some of the planned facilities must be relocated slightly to accommodate the other facility's plans, completely absent from PAC's argument is what impact this supposed conflict could have on the effluent discharge or any of the other issues that the TCEQ referred.¹³⁸ The permit in question is

¹³² PAC-18, 119:10 – 119:16; 171:5 – 171:16; 172:14 – 172:23.

¹³³ 30 TEX. ADMIN. CODE § 305.64.

¹³⁴ AR-8, Tab F ED 0009.

¹³⁵ *Id.*; 30 TEX. ADMIN. CODE § 305.64.

¹³⁶ Port Authority's Closing at 34-35.

¹³⁷ PAC's Closing at 34-35.

¹³⁸ *See* PAC's Closing at 33-36.

for a wastewater discharge, and PAC has cited to no notice or other requirements that would be implicated if the location of the Desalination Facility was moved, because there are none. PAC's complaints are of no legal consequence and no remand is warranted.

M. PAC Has No Legitimate Objection to the Admission of the Administrative Record.

Prior to the Preliminary Hearing in this matter, PAC and other Protestants filed multiple motions asking the ALJs to both add documents to the administrative record¹³⁹ and at the same time asking that the AR be admitted only for a limited purpose.¹⁴⁰ At the Preliminary Hearing on July 9, 2020, the ALJs overruled Protestants' objections to the AR, and Exhibits AR-1 through AR-8 (containing the AR) were admitted for all purposes.¹⁴¹ The Order confirming the admission of the AR for all purposes was signed on July 15, 2020,¹⁴² and a revision to a portion of Exhibit AR-8 was admitted without objection during the hearing on November 9, 2020.¹⁴³

Now, almost five months after the AR was admitted for all purposes, and after lodging no additional objection to its admittance throughout the hearing on the merits, PAC now revives the same argument it made before—that the Texas Rules of Evidence control over the Texas Government Code and prohibit the consideration of the entire AR for all purposes.¹⁴⁴ But instead

¹³⁹ See *Objection to the Completeness of the Administrative Record and Motion for Abatement or, in the Alternative, a Continuance of City of Port Aransas and the Port Aransas Conservancy*, March 12, 2020; see also *Protestants' Amended Objection to the Completeness of the Administrative Record and Motion for Continuance*.

¹⁴⁰ See *Objection to the Admission of the Administrative Record for All Purposes and Motion to Limit the Admission of Certain Documents* (June 24, 2020); *Port Aransas Conservancy's Joinder in the Objections to the Administrative Record* (June 26, 2020); *Movants' Reply to Responses to Movants' Objection to the Admission of the Administrative Record for All Purposes and Motion to Limit the Admission of Certain Documents* (July 7, 2020); *Port Aransas Conservancy's Reply in Support of the Objections to the Administrative Record* (July 7, 2020).

¹⁴¹ Order No. 5 at 1.

¹⁴² *Id.*

¹⁴³ TR 11/092020, 246:11 – 246:21.

¹⁴⁴ See PAC's Closing at 60; see also *Port Aransas Conservancy's Reply in Support of the Objections to the Administrative Record* at 3.

of pointing to specific portions of the AR that it claims are inadmissible, PAC argues that because the Port Authority did not present anyone at the hearing to repeat the information in the Application at the hearing, the ALJs should deem the entire Application as unreliable unless it was specifically introduced by other testimony or other documents.¹⁴⁵ The ALJs admitted the AR for all purposes as proscribed in the rules governing this proceeding. Apparently, PAC does not like the rules governing the proceeding, and so PAC is once again trying to get the ALJs to disregard the applicable processes. PAC cites to no authority for such a request because there is no legal basis for PAC's request. Once again, PAC is trying to insist upon a new, unique process that is not supported by the TCEQ rules (or Texas law), and PAC's objections to the AR are properly denied.

N. Response to OPIC's, Audubon Texas', Individual Protestants' Closing.

The Individual Protestants should not be permitted in closing to game the system by introducing photographs, references to hearsay documents, and arguments based upon unadmitted evidence. All that needs to be said about the Individual Protestants is that they were unwilling to make the statements under oath that they have now made in their closing arguments, and they were unwilling to permit their statements or their credibility to be tested under cross examination. As for the closing arguments of Audubon Texas, they are also not based upon facts and they are based upon opinions that the ALJs struck from the transcript. Given that there is no competent evidence that the proposed discharge will adversely affect the Marine Environment, there is even less argument that the Facility will adversely affect Audubon Texas leaseholds or the birds that feed over a vastly larger range than the CCSC.

¹⁴⁵ PAC's Closing at 60-61. Of course, there was no reason for the Port Authority to present a witness to repeat the information in the Application which was already in evidence.

Finally, arguments set forth by counsel for OPIC also miss the mark. Counsel for OPIC ignored important evidence, failed to apply § 80.117(c)(3), and based some of its opinions upon a misreading of §§ 307.6(c) and (e) and 307.8(b)(2). Counsel for OPIC acknowledges that any opposition to the Draft Permit must introduce evidence that one or more of the provisions of the Draft Permit violates a specifically applicable state or federal requirement on an issue referred to the ALJs,¹⁴⁶ but counsel then fails to identify any specific standard aside from the so-claimed “no lethality” standard contained in §§ 307.6(c) and (e) and 307.8(b)(2). As is demonstrated herein, counsel for OPIC is wrong on the “no lethality” standard, and his failure to identify any other violation of a specifically applicable requirement is fatal to the balance of his arguments against issuance of the Draft Permit.

As noted above, counsel for OPIC’s opinion that the TCEQ regulations do not permit any lethality in the ZID is incorrect. Of course, such a TCEQ regulation would forbid issuance of any and all desalination discharge permits throughout the State of Texas (and thus, such a TCEQ regulation does not exist). As explained above, the correct regulation to apply to mixing zones for concentrations for which there are no specific numeric limits (such as salinity) is found in § 307.6(e) (such regulation precludes ‘significant lethality’). In any event, counsel for OPIC is incorrect in arguing that the proposed discharge will cause any lethality in the mixing zones.¹⁴⁷ Based upon his closing, it is apparent that counsel for OPIC failed to consider the following evidence in this matter:

- Dr. Furnans’ SUNTANS modeling and salt mass balance calculations both of which establish that the proposed discharge will have a de minimis effect on the CCSC;

¹⁴⁶ 30 TEX. ADMIN. CODE § 80.117.

¹⁴⁷ See *supra* Part II(B).

- Dr. Tischler’s tidal volume calculations demonstrating that proposed discharge will reflect only 0.5% of the total ambient tidal velocity. Again, this establishes that the proposed discharge’s effect will be de minimis.
- The admitted bias of PAC’s experts, including Holt who testified that “I probably should not say it out loud, but I too, am biased in my opinion about this facility. If nothing else, I just don’t want the damn thing built here.”
- The fact that no witness has testified in this matter that the TCEQ’s CORMIX modeling violated any TCEQ SOP or IP.
- The effect of the monitoring and testing requirements in the Draft Permit.

Because counsel for OPIC misconstrued the applicable regulations, failed to identify a regulation that the Draft Permit violated, and ignored the evidence in favor of the Draft Permit, the opinions he offers in opposition to the Draft Permit should be disregarded.

III. PRAYER

The ALJs did *not* request that the parties submit proposed Findings of Fact and Conclusions of Law. In the event the ALJs request that the parties do so, the Port Authority will comply with the ALJs’ request.¹⁴⁸

For the reasons set forth above, the Port Authority requests that the ALJs issue the following findings:

1. 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;
2. The proposed discharge will not adversely impact the health of Protestants and their families, and fish and other seafood will be safe for human consumption;
3. The proposed discharge will not adversely impact recreational activities, commercial fishing, or fisheries in the Corpus Christi Bay and the ship channel;
4. The Application, and representations contained therein, are complete and accurate;

¹⁴⁸ See 30 TEX. ADMIN. CODE § 80.135 (“The judge *may* request that the parties submit proposed findings of fact and conclusions of law separately stated.”) (emphasis added).

5. The Applicant substantially complied with applicable public notice requirements;
6. The Draft Permit is consistent with the Texas Coastal Management Program goals and policies;
7. The modeling complies with applicable regulations to ensure the draft permit is protective of water quality, including utilizing accurate inputs;
8. The Executive Director's antidegradation review was accurate;
9. The Draft Permit includes all appropriate and necessary requirements; and
10. The cost of the reporting and transcription of the hearing on the merits should be assessed 100% to PAC, James King, Tammy King, Edward Steves and Sam Steves, jointly and severally.

Respectfully submitted,

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**ATTORNEYS FOR PORT OF CORPUS
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CERTIFICATE OF SERVICE

I certify that on December 7, 2020, a true and correct copy of the foregoing was sent *via* e-mail to all parties or, if there is no email address shown, by mail.

/s/ Earnest W. Wotring

Earnest W. Wotring

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