

Jon Niermann, *Chairman*  
Emily Lindley, *Commissioner*  
Bobby Janecka, *Commissioner*  
Toby Baker, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

July 11, 2022

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

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

Dear Ms. Gharis:

Please find the Executive Director's Exceptions to the Proposal for Decision on Remand for the above referenced matter.

Best Regards,

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

Kathy Humphreys  
TCEQ Staff Attorney

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

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

EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE PROPOSAL FOR  
DECISION ON REMAND

**I. Overview**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) supports the Administrative Law Judges' (ALJs') conclusions that the Port of Corpus Christi Authority of Nueces County (POCC) has met its burden of proof regarding all the referred issues in this case and that the Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0005253000 should be issued with the clarifications and changes recommended below.

**II. Recommended Changes to PFD**

**A. Discussion and Analysis**

**1. Typographical Error**

Throughout the Proposal for Decision and the Draft Order the permit number is incorrectly cited as WQ00052530001; the correct permit number is WQ0005253000.<sup>1</sup>

**2. Clarification**

The last sentence on the bottom of page 1 of the PFD, provides "With these modifications, the ALJs recommend that the TCEQ grant the Revised Application." The Commission does not grant applications, rather it grants permits. The Executive Director recommends this sentence be modified to read "With these modifications, the ALJs recommend that the TCEQ grant the Permit ~~Revised Application~~."

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<sup>1</sup> Admin. Record Tab K, pg. 1

### 3. Clarification

The discussion on page 47 regarding Mr. Schaefer's testimony regarding his determination that the discharge would not have more than a de minimis impact mischaracterizes his testimony. Mr. Schaefer didn't calculate effluent percentages; he used the percentages provided by Ms. Cunningham, based on her CORMIX modeling to calculate the predicted salinity at the aquatic life mixing zone.<sup>2</sup>

The Executive Director respectfully recommends the first paragraph on page 47 of the PFD be revised to read:

Mr. Schaefer testified that "de minimis" is not defined by the Texas Water Code, TCEQ rules, or IPs. He also testified how he determined de minimis in the absence of any definition from the rules. First, he indicated that by following the IPs' guidance, he can ensure no more than de minimis degradation. At the hearing, he testified that his process—finding red drum's salinity tolerance from that TWDB paper; calculated the salinity at the edge of the aquatic life mixing zone using the effluent percentage in light of the optimal range of 20-35 ppt; seeing that the salinity would be within that level; confirming that through modeling, WET test results, and PAC witness Dr. Nielsen's data (discussed below)—ensures that the receiving water will not be degraded. He then used that optimal range and calculated the salinity at the edge of the aquatic life mixing zone using the effluent percentage. As discussed below, he was able to define items like salt mass flux in a way that reflected an understanding of them.

### 4. Typographical Error

On page 90, in the first full paragraph "feet" was used instead of "meters." All other distances referenced in the PFD and during the hearing were in meters. The Executive Director assumes this was a typographical error. "Given the importance of the proposed discharge site for estuarine-dependent species and the likelihood that the more sensitive early life stages of such organisms will encounter the discharge, the ALJs conclude that the more conservative distance of 100 meters ~~feet~~ is warranted and is further supported by the recommendation of TPWD and GLO."

### 5. Clarification

Ms. Cunningham's testimony is mischaracterized on page 39 of the PFD. Specifically:

The remaining three issues raised by the parties—the site-specific bathymetry that cannot be modeled, salinity concentrations the Executive Director used to

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<sup>2</sup> ED-PS-1 Remand; 0040:29-33.

define the critical conditions, and CORMIX's margin of error—do not criticize the modeling inputs themselves, but rather implicate how the outputs should be evaluated.

The critical conditions were not defined based on the salinity concentrations at the mixing zone boundaries. Ms. Cunningham testified that the critical conditions are the highest effluent percentages derived from the CORMIX modeling.<sup>3</sup> It is also important to note that, despite modeling a range of ambient and effluent scenarios, the predicted effluent percentages at the ZID and mixing zone were identical in 38 of the 43 cases modeled by the Executive Director, including the case that PAC argued should be the “critical case.”<sup>4</sup>

The Executive Director respectfully recommends that the statement be clarified as: The remaining three issues raised by the parties—the site-specific bathymetry that cannot be modeled, salinity concentrations that were calculated using the Executive Director's CORMIX model results ~~the ED used to define the critical conditions~~, and CORMIX's margin of error—do not criticize the modeling inputs themselves, but rather implicate how the outputs should be evaluated.”

## 6. Clarification

Ms. Cunningham's testimony on page 40 of the PFD is mischaracterized.

Thus, the Executive Director did not use the worst-case scenario for salinity. Yet, this fact does not indicate an error in the modeling, but instead calls into question whether the critical conditions derived from the modeling are protective of aquatic life with respect to salinity.

Ms. Cunningham testified that the CORMIX model is used to “predict effluent percentages, or critical dilutions, at distances from a point source when an applicant proposes using a diffuser.”<sup>5</sup> The results predicted by the CORMIX model are used to assign the effluent percentages at the edges of the regulatory mixing zones.”<sup>6</sup> Ms. Cunningham did not testify that the CORMIX results are or should be used to determine the worst-case for salinity, or any other parameter.

The Executive Director respectfully recommends both sentences be deleted from the PFD. If the ALJs determine it would be helpful, the Executive Director respectfully

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<sup>3</sup> ED-KC-1 0021:27-0022:9 (Remand); ED-KC-1 0022:19-31(Remand)

<sup>4</sup> ED-KC-1, 0022:22 to 0023:10.

<sup>5</sup> ED-KC-1.

<sup>6</sup> ED-KC-1, page 0018, lines 5-9.

recommends the aforementioned sentences be replaced with: CORMIX predicts mixing of a wastewater discharge and a receiving water body, which is expressed as effluent percentages.<sup>7</sup> From the Executive Director’s model cases, the highest effluent percentages at the mixing zone boundaries are selected as the critical conditions.<sup>8</sup> While the resulting salinity can be calculated at the mixing zone boundaries using the effluent percentage, this calculation also requires a value for ambient salinity and a value for effluent salinity.<sup>9</sup> All three of these variables impact the resulting salinity at the edge of the mixing zones. However, the CORMIX model only predicts the effluent percentage.<sup>10</sup>

## 7. Clarification

During the hearing there was a great deal of discussion regarding the appropriate test species. Page 85 of the PFD provides “Thus, the ALJs find that, although the Port Authority’s testing provides relevant information, it is not definitive.” The Executive Director notes that as Mr. Pfeil testified the *only two species* that the TCEQ may use for Whole Effluent Testing are mysid shrimp (*Mysidopsis bahia*) inland silverside (*Menidia beryllina*).<sup>11</sup> Thus, the Executive Director respectfully recommends that the ALJs clarify this statement to “Thus, the ALJs find that, although the Port Authority’s testing provides relevant information, it is not definitive. For purposes of compliance with the permit, the Port Authority must use mysid shrimp (*Mysidopsis bahia*) and inland silverside (*Menidia beryllina*). The Port Authority is not required to use red drum as a test species to demonstrate compliance with the permit.”

## 8. Typographical Error

It appears that two words are missing in the first sentence on pg. 91. The Executive Director respectfully recommends the words “for salinity” be added to the sentence: “Accordingly, after considering the evidence and argument, the ALJs conclude that, with the addition of a permit limit for salinity of 2.0 ppt at 100 meters from the proposed discharge . . .”

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<sup>7</sup> ED-KC-1, 0024:16-32.

<sup>8</sup> ED-KC-1, 0021:28 to 0022:9.

<sup>9</sup> ED-KC-1, 0022:32 to 0023:11.

<sup>10</sup> ED-KC-1, 0021:33 to 0022:9.

<sup>11</sup> ED-MP-1, page 0005, lines 30-32.

## **B. Finding of Facts**

### **Finding of Fact 95**

This finding of fact is incorrect. As provided by POCC, the effluent salinity value of 68.7 ppt represents the 95<sup>th</sup> percentile effluent salinity during summer months when the facility is operating at a 50% recovery rate.<sup>12</sup> This was one of several effluent salinity values used to model the discharge in CORMIX, and it is representative of the effluent salinity prior to discharge.<sup>13</sup> Ms. Cunningham testified that her CORMIX modeling is limited to determining effluent percentages; her CORMIX review does not determine potential salinity concentrations.<sup>14</sup> PAC did additional calculations, using Ms. Cunningham's CORMIX results to determine the resulting salinity concentration at the mixing zone boundaries. PAC's calculations indicated that where the effluent salinity was 68.7 ppt, the ambient salinity was 40.57 ppt, the resulting salinity concentration would be 44.68 ppt at the edge of the ZID.<sup>15</sup>

The Executive Director respectfully recommends FOF 95 be modified to read "Under the worst-case conditions modeled by the Executive Director, the proposed discharge will result in salinity levels at the ZID boundary as high as 44.68 ~~68.7~~ ppt."

### **Finding of Fact 114**

It appears that there is a typographical error in this Finding of Fact. On page 91 of the Analysis and Discussion section, the ALJs say "it is undisputed that the diffuser will be more than 60 feet below the water surface and therefore will not interfere with boating or other surface water uses of the ship channel."

The Executive Director respectfully recommends Finding of Fact 114 be modified as follows: "The proposed discharge will be located at least 60 ~~50~~ feet below the water surface, so humans will not be directly exposed to the discharge."

### **Finding of Fact 122**

For clarity, the Executive Director recommends that the mixing limits for the mixing zones be delineated in the draft permit. The recommended mixing limits are

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<sup>12</sup> APP-LT-5-R, Table 2, Page 3

<sup>13</sup> *Id.*

<sup>14</sup> Tr. Vol. 9, 2272: 17-23.

<sup>15</sup> King-Steves-Exhibit-21R. Ms. Cunningham confirmed that Kings-Steves-Exhibit 21R were her CORMIX modeling runs from the latest diffuser design. See, Tr. Vol. 9, 2287:12-16.

from the Statement of Basis.<sup>16</sup>

The Executive Director respectfully recommends:

Other Requirements (Draft permit page 15)

10. The permittee shall maintain the diffuser at Outfall 001 to achieve maximum effluent percentages at the edge of each regulatory mixing zone:

Chronic Aquatic Mixing Zone: 8.9%

Zone of Initial Dilution (ZID): 14.6%

Human Health Mixing Zone: 5.4%

### **III. Conclusion**

The Executive Director supports the ALJs' finding that the POCC met its burden of proof on all referred issues and their recommendation to issue the Executive Director's proposed permit. Therefore, the Executive Director respectfully requests that the Commission adopt the ALJs' proposed order with the Executive Director's recommended changes presented herein and issue the proposed permit with the changes recommended by the ALJs and the Executive Director.

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<sup>16</sup> Administrative Record, Tab L, page 00003.

Respectfully submitted,

Texas Commission on Environmental  
Quality

Toby Baker, Executive Director

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Environmental Law Division



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REPRESENTING THE  
EXECUTIVE DIRECTOR OF THE TEXAS  
COMMISSION ON ENVIRONMENTAL  
QUALITY



## CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2022, the “Executive Director’s Exceptions to the Proposal for Decision on Remand” was served: electronically, by first class mail, or hand delivered to the parties listed below.



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

## SERVICE LIST – SOAH DOCKET NO. 582-20-1895

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