

**SOAH DOCKET NO. 582-23-01502  
TCEQ DOCKET NO. 2021-0421-WR**

**APPLICATION BY THE PORT OF  
CORPUS CHRISTI AUTHORITY OF  
NUECES COUNTY FOR WATER USE  
PERMIT NO. 13630**

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**BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS**

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**APPLICANT’S REPLY TO THE EXECUTIVE DIRECTOR AND PROTESTANTS’  
EXCEPTIONS TO THE PROPOSAL FOR DECISION**

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TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:

Applicant Port of Corpus Christi Authority of Nueces County, Texas (the “Port Authority”) respectfully files this reply to the exceptions submitted by Ingleside on the Bay Coastal Watch Association and Encarnacion Serna (together, “Protestants”) and the Executive Director (“ED”) of the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”).

Protestants’ exceptions largely revisit arguments from post-hearing briefing. The ALJs carefully considered these arguments, and the entire record in this case, before they issued a detailed Proposal for Decision (“PFD”) and Proposed Order recommending that the Commission approve the application for Water Right Permit No. 13630 (the “Application”) and issue the Draft Permit with certain changes to Special Condition 5.B. The ED and the Port Authority support the ALJs’ ultimate determination in this case—that the Commission should issue the Draft Permit to allow for development of a new water supply for beneficial use in San Patricio County.

Below, the Port Authority addresses Protestants’ exceptions to the PFD, referencing prior work wherever possible to avoid duplicative argument. Protestants’ exceptions do not raise new issues or otherwise affect the outcome of this case. The Port Authority respectfully requests that the Commission grant the Proposed Order with minor changes to Conclusions of Law (“COL”) 26

and 27 and certain modifications to Special Condition 5.B., as discussed more fully in the Port Authority’s February 20, 2024 exceptions brief and as reiterated herein.

## **I. Background**

The Port Authority applied for Water Right Permit No. 13630 to create additional water supply for beneficial use in the greater Corpus Christi area. Because Protestants disagree with the intended beneficial use,<sup>1</sup> they have attempted to block the Port Authority’s efforts through various distortions of Chapter 11 of the Texas Water Code.

A central theme in Protestants’ arguments is that the Application is too “speculative” because the Port Authority “identified no particular users the water is for” and “has no contracts with any person to provide water.”<sup>2</sup> The problem with this argument—which underpins many of the 11 issues Protestants have raised in this case—is that it is entirely inconsistent with Texas’s approach to water supply planning.<sup>3</sup>

The State’s water planning process—and, embedded within that process, each individual water right application—is inherently forward-looking.<sup>4</sup> Under the State’s “bottom-up” approach, regional groups identify population trends, anticipate future water demands and shortages, and recommend strategies to meet those future demands.<sup>5</sup> The planning cycle occurs every five years, looks out fifty years into the future, and categorizes users into groups instead of identifying individual water-supply needs.<sup>6</sup> To that end, there are no requirements that an applicant identify specific end users or provide individual contracts when obtaining a water right.<sup>7</sup> Despite

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<sup>1</sup> See, e.g., Protestants’ Exceptions to the Proposal for Decision at 8–9 (“desalination as proposed by [the Port Authority] is clearly designed to encourage increased consumption of water by industry.”).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> See APP-SG-15 at 4–5 (2022 State Water Plan) (describing long-term water planning as “necessary to responsibly manage and develop the state’s water resources for the benefit of future generations”).

<sup>4</sup> *Id.* at 18 (describing state water plan as “forward looking”).

<sup>5</sup> *Id.* at 4–5.

<sup>6</sup> *Id.* at 21.

<sup>7</sup> Tr. Vol. 3 at 564–65 (Cross Examination of Stefan Schuster).

Protestants’ own witness conceding this point, Protestants continue to criticize the Application on this issue.<sup>8</sup>

The procedural history behind this Application further illustrates the wisdom of a forward-looking approach to water supply planning. The Port Authority submitted the Application to the Commission in September 2019, nearly five years ago.<sup>9</sup> This delay is typical of other pending water rights applications in the State, since water supply projects “often require many years to implement.”<sup>10</sup> To that end, the statutes and regulations do not require the Application to specify individual end users for the appropriation, but instead ask if the proposed appropriation: (1) is intended for beneficial use; (2) impairs existing water rights or vested riparian rights; (3) is detrimental to the public welfare; (4) considers application environmental flow standards; and (5) addresses a water supply need consistent with state and regional water plans.<sup>11</sup> The ALJs properly determined that the Port Authority has carried its burden in demonstrating compliance with each of these requirements.<sup>12</sup>

The Port Authority addresses Protestants’ arguments to the contrary below. Following the order of issues raised in Protestants’ exceptions brief, the Port Authority reinforces the ED and ALJs’ determination that the Application does not require a Drought Contingency Plan (“DCP”) (section II.A.), reiterates the sufficiency of the Application’s Water Conservation Plan (“WCP”) (section II.B.), clarifies Protestants’ misapplication of concepts related to “surplus water return” (section II.C.), summarizes the sufficiency of the ED’s environmental flows analysis (section II.D.), and re-urges the Port Authority’s position on Special Condition 5.B. (section II.E.).

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<sup>8</sup> *Id.*

<sup>9</sup> ED-JA-1 at 0005 (prefiled testimony of Jennifer Allis).

<sup>10</sup> APP-SG-15 at 4; *see also* TCEQ, View Pending Water Right Applications, [https://www.tceq.texas.gov/permitting/water\\_rights/wr-permitting/view-wr-pend-apps](https://www.tceq.texas.gov/permitting/water_rights/wr-permitting/view-wr-pend-apps) (noting numerous pending water rights applications dating as far back as 2005).

<sup>11</sup> *See* Tex. Water Code § 11.134(b).

<sup>12</sup> PFD at 77.

## II. Argument

Because most of Protestants' exceptions pull directly from closing arguments, the Port Authority provides citations to prior briefing wherever possible below.

### A. Drought Contingency Plan

First, Protestants assert that the ALJs improperly and impermissibly rely on “context” in determining that the Application does not require a DCP.<sup>13</sup> Protestants' proposed alternative—that the relevant regulation should be taken out of context to impose a requirement that does not exist—fails for the same reasons articulated in prior briefing.<sup>14</sup>

After carefully analyzing the text, purpose, and rules related of 30 TAC § 288.22, the ALJs correctly determined that a “wholesale public water supplier” (an entity that sells water for human consumption) must submit a DCP, whereas a “wholesale water supplier” (an entity that does *not* sell water for human consumption) need not.<sup>15</sup> Protestants mischaracterize the ALJs' DCP analysis in arguing that the ALJs “hang their hat on the use of definite articles for some of the requirements listed in § 288.22.”<sup>16</sup> In actuality, the ALJs make the point that the regulatory text uses varying terminology (*e.g.*, “wholesale public water supplier,” “water supplier” and “wholesale water supplier”) to refer to one entity—the applicant to which the rule applies.<sup>17</sup> The ALJs point out the logical inconsistencies that would exist if the section applies to a “wholesale water supplier”: subsection (a)(2), for example, if read as Protestants advocate, would require a wholesale water supplier, like the Port Authority, to submit a DCP that documents coordination with the regional

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<sup>13</sup> See Protestants' Exceptions to the Proposal for Decision at 4. Protestants' criticism of the ALJs relying on “context” goes against statutory and common-law rules of construction. See Tex. Gov't Code § 311.011(a) (“Words and phrases shall be read in context”); see also *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003) (“We determine legislative intent from the entire act and not just its isolated portions.”).

<sup>14</sup> See Applicant's Closing Argument at 9–12; ED's Closing Argument and Post-Hearing Brief at 5; Applicant's Reply to Protestants' Closing Argument at 6–8; ED's Reply to Closing Arguments at 2–3.

<sup>15</sup> PFD at 15–18.

<sup>16</sup> Protestants' Exceptions to the Proposal for Decision at 3.

<sup>17</sup> PFD at 17.

planning group “for the service area of the wholesale *public* water supplier.”<sup>18</sup> Illogically, this would require the Port Authority (a wholesale water supplier) coordinate over a type of service area it does not have (that of a wholesale *public* water supplier).<sup>19</sup> The ALJs interpret Rule 288.22 in the only way that makes sense—that a wholesale *public* water supplier, not a wholesale water supplier, must comply with these requirements and submit a DCP.<sup>20</sup> Protestants’ assertion that certain subsections of the rule apply to wholesale water suppliers, while other subsections apply to wholesale public water suppliers, does not align with the text and context of the regulation.<sup>21</sup> The ALJs, like the ED, correctly determined that the Application does not require a DCP.

## **B. Water Conservation Plan**

Second, Protestants except to the ALJs’ determination that the Port Authority’s Water Conservation Plan meets all statutory and regulatory requirements.<sup>22</sup> The ED also weighs in on this issue, arguing that 30 TAC § 288.6, and not just § 288.5, should apply in evaluating the Port Authority’s WCPs.<sup>23</sup> The Port Authority agrees with the ALJs that the WCPs meet all elements of 30 TAC §§ 288.5, 288.7, and 295.9, as incorporated by the ED through her review under Rule 288.6.<sup>24</sup> The Port Authority incorporates its prior briefing on this issue<sup>25</sup> and will briefly respond to each of Protestants’ four points below.

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<sup>18</sup> See 30 Tex. Admin. Code § 288.22(a)(2) (emphasis added).

<sup>19</sup> PFD at 17–18.

<sup>20</sup> *Id.*

<sup>21</sup> See *id.* at 15–18.

<sup>22</sup> Protestants’ Exceptions to the Proposed Order at 5–9.

<sup>23</sup> ED’s Exceptions to the Proposal for Decision and Proposed Order at 2–3. The Port Authority again references plural WCPs instead of one WCP, consistent with the ALJs’ PFD and Proposed Order. See Applicant’s Exceptions to the Proposal for Decision at 3, n.2.

<sup>24</sup> See Tr. Vol. 4 at 745, 750–55, 793–94 (cross-examination of Jennifer Allis).

<sup>25</sup> See Applicant’s Exceptions to the Proposal for Decision at 3–12 (describing extensive record evidence supporting sufficiency of WCPs under relevant regulations); Applicant’s Closing Argument at 15–20; Applicant’s Reply to Protestants’ Closing Argument at 8–10.

*i. Level of detail*

Consistent with Protestants’ general critique that the Application is too “speculative,” Protestants pick at the level of detail in the Port Authority’s most recent WCP.<sup>26</sup> But the WCP provides the level of detail consistent with the current stage of the project: as Kirk Dean testified, the WCP cannot, and therefore does not, “provide details which cannot be identified at this phase (e.g., customers, storage tank sizes, and operations).”<sup>27</sup> Notwithstanding these practical limitations, the WCP meets each and every applicable requirement.<sup>28</sup> Protestants’ assertion that the WCP, as written, deprives the public of “meaningful comment” is simply incorrect, especially given (1) the copious comments that Protestants have already provided on the WCP throughout this proceeding<sup>29</sup> and (2) the fact that the WCP will be revised and updated at least every five years in a public setting, with the opportunity to provide comment, in front of the Port of Corpus Christi Commission.<sup>30</sup> As explained more fully in the Port Authority’s exceptions brief, there is extensive record evidence to support the ALJs’ determination that the Port Authority complied with all relevant WCP requirements in 30 TAC §§ 288.5, 288.7, and 295.9.<sup>31</sup>

*ii. Description of water distribution system*

In a similar vein, Protestants argue that the Port Authority has not provided sufficient detail to meet Rule 288.5(1)(A), which requires “a description of the wholesaler’s service area, including . . . water supply system data.”<sup>32</sup> Protestants point to a line in TCEQ’s form WCP for

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<sup>26</sup> See Protestants’ Exceptions to the Proposal for Decision at 5–6.

<sup>27</sup> APP-KD-1 at 15–16 (prefiled testimony of Kirk Dean).

<sup>28</sup> See Applicant’s Exceptions to the Proposal for Decision at 3–12 (describing extensive record evidence supporting sufficiency of WCPs under relevant regulations).

<sup>29</sup> See, e.g., Protestants’ Written Closing Argument at 20–23 (commenting on WCP’s service area description and flowchart of water system).

<sup>30</sup> 30 Tex. Admin. Code § 288.5(3) (requiring wholesale water provider to review and update WCP); Applicant’s Reply to Protestants’ Closing Arguments at 9–10 (discussing how Port Authority adopts WCP resolutions in open meetings).

<sup>31</sup> See Applicant’s Exceptions to the Proposal for Decision at 3–12.

<sup>32</sup> 30 Tex. Admin. Code § 288.5(1)(A).

wholesale *public* water suppliers that reads: “Please attach a description of the water system. Include the number of treatment plants, wells, and storage tanks.”<sup>33</sup> Protestants read this instruction to require the WCP to describe, in detail, “the conveyance to be used to carry the water from the desalination facility.”<sup>34</sup>

Protestants’ position suffers from two major problems. First, as TCEQ Staff testified, this form is “specifically geared towards wholesale *public* water suppliers,” which the Port Authority is not.<sup>35</sup> Accordingly, not every detail in the form will apply, such as the note to list “treatment plants,” which more logically applies to a system supplying water for human consumption, as opposed to a distribution system for wholesale industrial use.<sup>36</sup> Second, the form language on which Protestants fixate does not in itself indicate a requirement for providing a detailed conveyance system to “customer(s) for the water,” as Protestants assert.<sup>37</sup> Instead, the language asks for “*the number of* treatment plants, wells, and storage tanks,” and the Port Authority’s attached Process Flow Diagram does just that, listing storage tanks where applicable (*i.e.*, three storage tanks), and omitting wells and treatment plants, which are not a part of the desalination process (*i.e.*, zero wells or treatment plants).<sup>38</sup>

Protestants again lose sight of the overarching water rights process: an applicant need not identify specific customers to obtain a water right, and, as follows, no WCP regulation requires an applicant to provide a detailed description of end-user conveyance to individual customers.<sup>39</sup>

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<sup>33</sup> APP-SG-3 at 000062.

<sup>34</sup> Protestants’ Exceptions to the Proposal for Decision at 7.

<sup>35</sup> See Tr. Vol. 4 at 759 (cross-examination of Jennifer Allis).

<sup>36</sup> See *id.* at 759–60 (noting ED’s review of “applicable” requirements).

<sup>37</sup> See Protestants’ Exceptions to the Proposal for Decision at 7.

<sup>38</sup> APP-SG-3 at 000070.

<sup>39</sup> Tr. Vol. 3 at 564–65 (Cross Examination of Stefan Schuster).

*iii. Feasible Alternatives*

Protestants' exceptions reassert the argument that the Port Authority has not met its burden in demonstrating that "no feasible alternative to the proposed appropriation exists."<sup>40</sup> Prior briefing covers this point,<sup>41</sup> and the ALJs correctly determined that no feasible alternative exists to the proposed appropriation,<sup>42</sup> as evidenced by the 2021 Region N Water Plan (noting "[n]o alternative water management strategies are recommended" other than desalination to meet manufacturing needs in Nueces and San Patricio Counties)<sup>43</sup> and the 2022 State Water Plan (recommending that 179,000 acre-feet per year of desalinated water come online by 2030).<sup>44</sup>

On this point, Protestants also repeat the argument that Region N's prioritization list imposes a "burden of proof" on the Port Authority to show that all other listed projects "are not feasible alternatives to the requested appropriation."<sup>45</sup> Protestants do not, and cannot, cite any authority supporting this point. As a practical matter, not every project ranked above the Port Authority's project on Region N's prioritization list aims to serve the same beneficial use as the Application (industrial use in San Patricio County).<sup>46</sup> Moreover, not every water supply project will go forward, and planning groups oftentimes recommend multiple water-management strategies that, if implemented, would provide more water supplies than required to meet needs.<sup>47</sup> Rule 288.7 makes clear that an applicant's WCP need not evaluate every single other proposed

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<sup>40</sup> Protestants' Exceptions to the Proposal for Decision at 7–8.

<sup>41</sup> See Applicant's Exceptions to the Proposal for Decision at 11; Applicant's Closing Argument at 19–20.

<sup>42</sup> PFD at 31–34.

<sup>43</sup> APP-SG-14 at 15.

<sup>44</sup> APP-SG-15 at 107.

<sup>45</sup> Protestants' Exceptions to the Proposal for Decision at 8.

<sup>46</sup> See APP-KK-3 (listing irrigation, mining, and other pending water supply projects).

<sup>47</sup> APP-SG-15 at 117 (2022 State Water Plan) ("Eventually, some recommended projects may become politically or financially infeasible and, therefore, will be shelved or abandoned. To account for uncertainties, including the possibility of projects being downsized or not being implemented at all, planning groups sometimes recommended a combination of water management strategies that, if implemented, would provide more water supplies than are required to meet needs.").



water supply project in existence, but should instead evaluate “feasible alternative[s] *to new water development* including, but [] not limited to, waste prevention, recycling and reuse, water transfer and marketing, regionalization, and optimum water management practices and procedures.”<sup>48</sup> Protestants’ attempt to require the Port Authority to explain Region N’s prioritization list within the WCP has no basis in the applicable regulations.

iv. *Desalination as “conservation”*

Finally, Protestants object to the ALJs’ COL that “[t]he practice of utilizing desalination technology to establish an alternate water supply source is supported under the definition of ‘conservation.’”<sup>49</sup> Protestants argue that Application will not “reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling or reuse of water so that a water supply is made available for future or alternative uses.”<sup>50</sup> Protestants assert, without citing any relevant evidence, that the Application “is clearly designed to encourage increased consumption of water by industry.”<sup>51</sup> However, Protestants’ disagreement with industrial water use as a general concept does not change the regulatory definition of “conservation,” nor does it negate the fact that the Application meets such definition. The definition of “conservation” centers around the idea that “water supply is made available for future or alternative uses,” and the Application proposes exactly that: by creating additional freshwater supply through desalination and meeting industrial water demand through this additional supply, existing surface water supplies are necessarily “made available” for future or alternative uses.<sup>52</sup>

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<sup>48</sup> 30 Tex. Admin. Code § 288.7(a).

<sup>49</sup> Proposed Order at COL 42.

<sup>50</sup> Protestants’ Exceptions to the Proposal for Decision at 8–9 (quoting 30 Tex. Admin. Code § 288.1(4)).

<sup>51</sup> *Id.*

<sup>52</sup> See APP-RP-1 at 6 (Prefiled Testimony of Randy Palachek) (“The diversion authorized in the Draft Permit . . . will reduce pressure on the supplies of freshwater into the Corpus Christi Bay.”); APP-SG-14 at 15 (recommending desalination as the only water management strategy to meet projected shortages).

The ALJs correctly determined that the Port Authority met its burden in demonstrating that the Application complies with the applicable TCEQ WCP rules in 30 TAC §§ 288.5, 288.7, and 295.9. The Port Authority respectfully requests that the Commission adopt without change all FOFs and COLs on this issue.

### **C. Location of Return Water**

Another generalized approach that Protestants take in challenging the Application is to improperly impose wastewater considerations from the Texas Pollutant Discharge Elimination System (“TPDES”) program.<sup>53</sup> In one such attempt, Protestants argue that because the Application does not specify an exact location for “surplus water,”<sup>54</sup> the Port Authority has (1) submitted an insufficient Application pursuant to 30 TAC § 295.8 and (2) failed to demonstrate that the appropriation will not affect Mr. Serna’s right to build a dock.<sup>55</sup> Both of Protestants’ arguments miss the mark.

#### *i. Location requirement*

30 TAC § 295.8 requires an application to “describe the location at which return water or surplus water will be returned to the stream.”<sup>56</sup> This requirement derives from section 11.046 of the Water Code, which authorizes (but does not require) the TCEQ to “include conditions in the water right providing for the return of surplus water . . . *as necessary to protect senior downstream permits, certified filings, or certificates of adjudication or to provide flows for instream uses or bays and estuaries.*”<sup>57</sup> Rule 295.8 requires the Application to “describe the location” at which

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<sup>53</sup> Protestants’ Exceptions to the Proposal for Decision at 9–13, 22–23.

<sup>54</sup> Protestants frequently mischaracterize wastewater brine from the proposed facility as “surplus water.” *Id.* The Port Authority’s prior briefing has fully detailed the history and context of the term “surplus water,” and the ALJs properly determined that “the wastewater generated by the desalination process is not ‘surplus water’ but is more appropriately considered wastewater.” See Applicant’s Closing Argument at 24–28; PFD at 74.

<sup>55</sup> Protestants’ Exceptions to the Proposal for Decision at 9–13, 22–23.

<sup>56</sup> 30 Tex. Admin. Code § 295.8.

<sup>57</sup> Tex. Water Code § 11.046(b) (emphasis added).

return water will be returned, but it does not mandate the specificity of that locational requirement. Importantly, TCEQ may impose a locational condition only “as necessary” to protect downstream water rights and environmental flows into bays and estuaries.<sup>58</sup>

The Port Authority’s Application complies with Rule 295.8’s locational requirement in stating that “[w]astewater generated at the desalination plant will be treated and put back in the bay where originally diverted from” and, more specifically, within the La Quinta Ship Channel.<sup>59</sup> Because these statements “describe the location of the return water,” the ALJs correctly concluded that “[t]he designation of the location of the discharge of the effluent provided in the Application materials is sufficient under 30 Texas Administrative Code § 295.8.”<sup>60</sup> Protestants’ demands for a more specific return flow point have no basis in Chapter 11. The Application notes that the wastewater brine will return directly to the Corpus Christi Bay, where there are no downstream water rights of concern,<sup>61</sup> nor can the wastewater brine affect “flows for instream uses or bays and estuaries.”<sup>62</sup> Tellingly, Protestants do not provide any citation requiring a more demanding locational requirement beyond what the Port Authority has already provided.

*ii. Impacts on Mr. Serna’s dock*

Because Protestants can find no legal authority to support their position on return flow locations, they attempt to engineer a water-rights issue by arguing that return flows could impact “Mr. Serna’s littoral rights, including his right to wharf.”<sup>63</sup> Protestants’ argument proceeds as follows: A proposed water application cannot impair vested riparian rights. Riparian rights

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<sup>58</sup> *Id.*

<sup>59</sup> APP-SG-3 at 000065, 97.

<sup>60</sup> Proposed Order at COL 32.

<sup>61</sup> *See* Tr. Vol. 1 at 190 (cross-examination of Dr. Tischler) (return water cannot impact water rights because “the bay is essentially continually replenished by water coming from the Gulf”); *Id.* at 247 (cross-examination of Dr. Kirk Dean) (location of return flows in Corpus Christi Bay cannot “impair senior water rights” because “there is not going to be a depletion of the water in the bay”).

<sup>62</sup> *Id.*; *see also* Tex. Water Code § 11.046(b).

<sup>63</sup> Protestants’ Exceptions to the Proposal for Decision at 12.

include “littoral” rights (shoreline rights). Mr. Serna’s littoral rights include “the right to build a dock.” Return water flows associated with the Application may impact Mr. Serna’s right to build a dock because the “pressure and velocity” of the return flows (for instance, if the Port Authority decided to “jet” the return flows through a “high-pressure hose” near Mr. Serna’s property)<sup>64</sup> could affect the “structural integrity of nearby appurtenances.”<sup>65</sup>

Protestants’ argument goes beyond the bounds of Chapter 11. Even assuming that the term “riparian rights” encompasses “littoral rights” (which it does not, as the Port Authority has already briefed<sup>66</sup>), the “right to build a dock” simply is not a water-rights concern relevant to permits granted under Chapter 11. In fact, the case that Protestants cite to equate littoral rights with riparian rights explicitly holds that “littoral rights do not entitle an owner to construct recreational boat docks.”<sup>67</sup> Assuming that Mr. Serna has properly demonstrated that he has littoral rights over the land (which he has not, as the Port Authority has already briefed<sup>68</sup>), courts have held that riparian rights center around the “right of access” and the use of water for human, livestock, and domestic purposes.<sup>69</sup> Importantly, “[t]he majority of cases *do not include the right to build boat docks as a littoral or riparian right.*”<sup>70</sup> Riparian rights pertain to landowners’ water access and use for human, livestock, and domestic purposes, not to recreational activities like the ones Protestants have referenced throughout these proceedings, such as kayaking or swimming.<sup>71</sup> Recreational

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<sup>64</sup> See Tr. Vol. 1 at 163–163 (cross-examination of Dr. Tischler) (Q: “let’s say, to kind of jetting an effective physical property, that would also be a -- potentially be an impairment?”) (Q: “So if you were to put a discharge -- put your return surplus flows through a high-pressure hose...”).

<sup>65</sup> Protestants’ Exceptions to the Proposal for Decision at 9–13 (“Issue E: [the Port Authority] has failed to demonstrate that the proposed appropriation will not impair Mr. Serna’s vested water rights.”).

<sup>66</sup> See Applicant’s Reply to Protestants’ Closing Arguments at 11–14.

<sup>67</sup> *Cummins v. Travis Cnty. Water Control & Improvement Dist. No. 17*, 175 S.W.3d 34, 50 (Tex. App.—Austin 2005, pet. denied).

<sup>68</sup> See Applicant’s Reply to Protestants’ Closing Arguments at 11–14.

<sup>69</sup> *Cummins*, 175 S.W.3d at 47.

<sup>70</sup> *Id.* (emphasis added).

<sup>71</sup> *Id.*; see Protestants’ Closing Arguments at 33–34.

activities are not embedded within Chapter 11’s protection of “vested riparian rights.”<sup>72</sup> Contrary to Protestants’ position, the Port Authority’s Application does not impair any vested riparian or littoral right.

In addition to these legal deficiencies, the record evidence shows that Protestants’ theoretical concerns about the “velocity” of return flows have no practical implications.<sup>73</sup> The Application references the location of wastewater discharge as within the La Quinta Ship Channel, which is not within the vicinity of Mr. Serna’s property such that any discharge “velocity” could affect his shoreline property or its appurtenances.<sup>74</sup> Any additional concerns that Mr. Serna may have regarding potential water-quality impacts of wastewater brine and the exact location of that discharge can be raised in the subsequent TPDES permitting process under Chapter 26.<sup>75</sup> To this end, the ALJs correctly determined any “impacts of future discharges (as opposed to the impacts diversions) are governed by water quality permitting.”<sup>76</sup>

#### **D. Environmental flows**

Having extensively briefed the issue of environmental flows, the Port Authority incorporates previous arguments herein.<sup>77</sup> Protestants’ exceptions do not raise any new issues, and the Port Authority maintains its position—consistent with the clear intent of the Legislature in adopting Section 11.147(e-3) of the Texas Water Code and the Commission’s position on the issue—that additional, side-specific assessments are not required for the Application because the Commission has adopted environmental flow standards for the San Antonio-Nueces Coastal

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<sup>72</sup> See *Cummins*, 175 S.W.3d at 47.

<sup>73</sup> See Tr. Vol. 1 at 164 (cross-examination of Dr. Tischler) (“the hypothetical is, in my mind, nonsensical, because no one would do that, in locating a discharge”).

<sup>74</sup> See Tr. Vol. 3 at 561–62 (cross examination of Stefan Schuster).

<sup>75</sup> Applicant’s Closing Argument at 32–33. Protestants may seek to participate in the TPDES permit proceeding, but they cannot shoehorn the entirety of Chapter 26 into a single provision in Chapter 11.

<sup>76</sup> PFD at 42–43.

<sup>77</sup> See Applicant’s Exceptions to the Proposal for Decision at 13–15; Applicant’s Closing Argument at 35–38; Applicant’s Reply to Protestants’ Closing Argument at 17–26.

Basin.<sup>78</sup> The Port Authority re-urges the changes to Conclusions of Law 26 and 27 to clarify this issue.<sup>79</sup>

Protestants argue that the Commission’s position on environmental flow standards “warrants no deference” because, according to Protestants, the statutory language is “unambiguous” in imposing fish and wildlife assessments beyond adopted flow standards.<sup>80</sup> In contrast to governing code construction rules requiring statutes to be “read in context” and words given “common usage,”<sup>81</sup> Protestants’ argument disregards Section 11.147(e-3):

***Notwithstanding Subsections (b)-(e), for the purpose of determining the environmental flow conditions necessary to maintain . . . fish and aquatic wildlife habitats, the commission shall apply any applicable environmental flow standard . . . adopted under Section 11.1471 instead of considering the factors specified by those subsections.***

This statutory language is clear: where TCEQ has adopted environmental flow standards, it uses those standards “*instead of*” considering the factors in 11.147 subsections (b)-(e), which specifically incorporate any Section 11.152 assessment under 11.147(e).<sup>82</sup> To the extent any ambiguity exists, the Commission’s interpretation should be given deference because it is reasonable and aligns with the text of the statute.<sup>83</sup>

Moreover, even if Section 11.152 did apply in this context (which it does not), Protestants’ assertion that this provision extends to non-flow-related applications, such as dredging or intake-

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<sup>78</sup> See Applicant’s Exceptions to the Proposal for Decision at 13–15.

<sup>79</sup> See *id.*

<sup>80</sup> See Protestants’ Exceptions to the Proposal for Decision at 16–17.

<sup>81</sup> See Tex. Gov’t Code § 311.011(a); see also *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003) (“We determine legislative intent from the entire act and not just its isolated portions.”).

<sup>82</sup> See Applicant’s Exceptions to the Proposal for Decision at 13–15; Applicant’s Closing Argument at 35–38; Applicant’s Reply to Protestants’ Closing Argument at 17–26.

<sup>83</sup> See *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 629 (Tex. 2011) (“[W]e must uphold the enforcing agency’s construction if it is reasonable and in harmony with the statute.”). Moreover, where the legislation entails a complex regulatory scheme, such is the case here for water rights permitting, deference is particularly important because “governmental agencies have a ‘unique understanding’ of the statutes they administer.” *Id.*

structure design, likewise fails to align with the correct statutory context. TCEQ's Chapter 11 jurisdiction is limited to the appropriation of water and the environmental impacts of that appropriation.<sup>84</sup> For the latter consideration, TCEQ's authority relates to freshwater inflow and how the availability of water impacts downstream ecology.<sup>85</sup> Nothing in Chapter 11 obligates TCEQ to conduct site-specific fish and wildlife assessments for each aspect of construction related to a water appropriation, or to non-flow related issues such as dredging or intake-structure design. To the extent the Commission imposes special conditions relating to impingement and entrainment, it can, and has, implemented such conditions pursuant to its catch-all authority in 30 TAC § 297.59(a).<sup>86</sup>

#### **E. Permit Conditions**

Lastly, Protestants ask for two additional permit conditions: one that includes a 0.5 feet per second (fps) intake velocity limit, and another that imposes certain conditions for the discharge location of wastewater brine.<sup>87</sup> Protestants' request for the former is addressed in the Port Authority's proposed Special Condition 5.B., which would require engineering of the intake structure to "follow[] design criteria that achieves a maximum intake structure velocity of 0.5 feet per second."<sup>88</sup> To the extent Protestants request "through-screen velocity be measured at each intake screen instantaneously during all times when screens are in operation," the Port Authority

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<sup>84</sup> See, e.g., Tex. Water Code §§ 11.021–23 (defining state water and the purposes for which it may be appropriated), 11.0235 (outlining policies regarding appropriation of state water).

<sup>85</sup> *Id.* §§ 11.147, 11.1471.

<sup>86</sup> See 30 TAC § 297.59(a) (authorizing TCEQ to impose any "condition, restriction, limitation, or provision" in a water rights permit that is "reasonably necessary for the enforcement and administration of the water laws of the state and the rules of the commission").

<sup>87</sup> Protestants' Exceptions to the Proposal for Decision at 21–22.

<sup>88</sup> See Applicant's Exceptions to the Proposal for Decision at 15–17; *infra* page 17.

reiterates that flow velocity would be maintained through the structure's design.<sup>89</sup> No record evidence shows that it is necessary, or even possible, to install instantaneous velocity monitors on the intake screens.<sup>90</sup> Protestants' second request, relating to siting the wastewater discharge, exceeds the bounds of Chapter 11 but will be considered in any relevant TPDES proceeding relating to the La Quinta project.<sup>91</sup>

The ED also excepts to the ALJs' Special Condition 5.B., noting that the original condition in the Draft Permit "is sufficient as written," and, in the alternative, proposing the following provision replicated from Water Use Permit No. 12378:

"Prior to construction of any diversion structure hereunder, Permittee shall submit to the Executive Director a detailed statement and plans under Tex. Water Code § 11.144 for alterations and changes to the plans for its diversion structure(s) submitted as evidence in the record in support of this permit, including identifying the specific locations and planned construction of such structure, and a summary of any measures required by the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act or pursuant to 33 C.F.R. Parts 320-330. Permittee shall implement reasonable measures in order to reduce impacts to aquatic resources due to entrainment or impingement. Such measures shall include, but shall not be limited to, the installation of screens at the diversion structure."<sup>92</sup>

This proposed condition incorporates language on entrainment and impingement from the original Draft Permit (*i.e.*, it would not include specific screen size or intake velocity limits) but adds a

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<sup>89</sup> See Tr. Vol. 1 at 210–211 (cross-examination of Dr. Tischler) (intake flow rate monitoring also measures velocity at intake screens "because of the way the screen system is designed. The screen system is designed to have a velocity of less than .5 feet per second at the maximum pumping rate that they can take water to the plant"), 234 ("as material might build up in the openings, you have the ability to keep -- maintain the flow that you needed and were allowed to divert, while still achieving the .5 feet per second maximum through the screens"); 243 ("when the designers design the plant, they have to take into account all the rules that apply, including the through screen velocity, the maximum flow in the permit, and that's how they ultimately size the pumps in the pipeline and the screens"); APP-LT-1 at 16 (prefiled testimony of Dr. Tischler) ("The wedge-wire screens are designed so that if there is an accumulation of biological material at the screen openings there will be sufficient remaining porosity to allow time for scheduled maintenance to remove deposited material"); APP-RP-1-R at 8 (rebuttal testimony of Randy Palachek) ("The screens will be cleaned multiple times a day by either air blasts or by brushes on the rotating screen. Biofouling accumulation will be managed so as not to obstruct the intake slots and reduce the efficiency of the intake"); APP-SG-3 at 000046 (intake-structure sizing design allows two screen intakes per pipeline to be taken out of service for maintenance purposes while still meeting the 0.5 fps limit).

<sup>90</sup> PFD at 73.

<sup>91</sup> See *supra* at 12–13; Applicant's Closing Arguments at 32–33.

<sup>92</sup> ED's Exceptions to the Proposal for Decision and Proposed Order at 3–5.



provision requiring Permittee to submit “a detailed statement and plans” for the diversion structure(s) prior to construction.<sup>93</sup> The Port Authority does not oppose the additional language requiring Permittee to submit detailed plans prior to construction, nor does it oppose the original Draft Permit language on reasonable measures to reduce impacts to aquatic resources due to entrainment or impingement. However, in keeping with the design representations in the Application, the Port Authority maintains its proposal for Special Condition 5.B. that includes the 0.5 fps velocity limit, as well as measures at least as protective as 1/4-inch by 1/4-inch wire mesh screens.<sup>94</sup> The Port Authority’s proposed Special Condition 5.B. is copied below.

### III. Conclusion

Protestants’ exceptions do not introduce concepts beyond what the ALJs already considered and disposed of in the PFD. The Port Authority respectfully requests that the Commission grant the Proposed Order recommended by the ALJs with the following modifications to COL 26, COL 27, and Special Condition 5.B.:

26. The Legislature has effectively made the majority of the Texas Water Code § 11.152 review a part of the broader fish and wildlife instream uses review in Texas Water Code § 11.147(e), and Texas Water Code § 11.147(e-3) substitutes these broader fish and wildlife reviews during the permit process with the environmental flows rulemaking for those protections once the Commission adopts those rules for a river basin.

27. Regarding any further review of fish and wildlife concerns beyond what is that may be required under the amended statutory scheme for the on-stream diversion facilities, Special Condition 5.B of the Draft Permit adequately complies with and exceeds applicable provisions of the Texas Water Code and TCEQ rules.

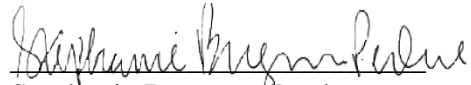
5.B. Permittee shall implement reasonable measures in order to reduce impacts to aquatic resources due to entrainment or impingement. Such measures shall include, but shall not be limited to, following design criteria that achieves a maximum intake structure velocity of 0.5 feet per second, and the installation of a screening device at least as protective as 1/4 inch by 1/4 inch wire mesh at the diversion structure(s).

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<sup>93</sup> *Id.*

<sup>94</sup> See Protestants’ Exceptions to the Proposal for Decision at 15–17.

Respectfully submitted,



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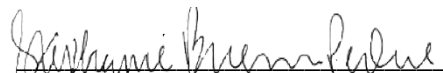
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Applicant's Reply to the Executive Director and Protestants' Exceptions to the Proposal for Decision has been e-filed and served by electronic mail on this 29th day of February, 2024.



Stephanie Bergeron Perdue