

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

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

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

**EXECUTIVE DIRECTOR’S EXCEPTIONS TO PROPOSAL FOR DECISION AND
PROPOSED ORDER**

TO THE HONORABLE COMMISSIONERS:

The Executive Director (or ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files these exceptions to the Proposal for Decision (PFD) and proposed order issued by the Administrative Law Judges on January 22, 2024, regarding the application by the Port of Corpus Christi Authority of Nueces County (Port or Applicant) for Water Use Permit No. 13630.

I. Introduction.

The Executive Director respectfully excepts to the PFD on pages 21-30 regarding whether 30 Tex. Admin. Code Sec. 288.5 or 288.6 applies. The Executive Director excepts to the PFD’s analysis of the water conservation plan (WCP) requirements because the PFD correctly concluded that a drought contingency plan (DCP) is not required.

The Executive Director also excepts to the proposed order on page 6 Finding of Fact No. 37 because it includes “DCP” and the correct term should be “WCP.” The Executive Director excepts to the proposed order on page 18 Conclusions of Law 39 and 40 because they reference only 288.5 and should include 288.6.

The Executive Director excepts to the PFD on page 73 regarding the draft permit’s special condition 5.B.

The Executive Director also excepts to proposed order on page 13 Finding of Fact No. 97 regarding special condition 5.B. and on page 19 paragraph 1 regarding special condition 5.B. The Executive Director excepts to these paragraphs because the cited paragraph in the PFD about 5.B. does not conform to 5.B. in the proposed Findings of Fact but is the same as the proposed amendments to 5.B. in the proposed order.

The Executive Director excepts to the PFD’s proposed revision of special

condition 5.B. because the revision is not consistent with the standard language program staff utilizes, will be difficult to enforce, and the best technology available to reduce impact to aquatic resources resulting from impingement or entrainment may change by the time a diversion structure is constructed.

The Executive Director does not recommend revising special condition 5.B. as proposed but instead recommends basing any revision to 5.B. on language in Guadalupe-Blanco River Authority Water Use Permit 12378.

II. Applicability of TCEQ Rule 288.5 or Rule 288.6

The Executive Director excepts to the PFD's premise that one rule or the other applies to this application. The Executive Director's position is that the more appropriate word is "and" not "or" when considering her analysis of this application. The Executive Director considered Chapter 288 as a whole in interpreting the rules governing water conservation plans in its review of this application, therefore the agency should be afforded deference in its interpretation because it is reasonable and does not conflict with the plain language of the rules.¹

The evidentiary record establishes that ED program staff analyzed the application under both provisions.² Further, ED program staff affirmed that applicable requirements of both provisions were met for this application.³ Why were both rules required? Because this application presented a situation the plain language of the rules did not contemplate. The Port plans to sell the water to other users, and the Port is not a wholesale public water supplier.⁴ The Executive Director position is that there is no specific rule for wholesale use for industrial purposes when an applicant is not a wholesale public water supplier.⁵ The Port plans to sell water to industrial users, not to retail customers who use the water for municipal purposes or for public water supplies.⁶ ED program staff was concerned that the industrial WCP the Port submitted would not ensure that its customers implement conservation measures.⁷ Section 288.5(1)(F) requires that any wholesale contracts entered will require that each

¹ *Texas Comm'n on Env'tl. Quality v. Maverick County*, 642 S.W.3d 537, 544 (Tex. 2022).

² Tr. Vol. 4 page 745 lines 12-22; page 752 lines 18-25, page 753 line 1; page 793 lines 6-15.

³ Tr. Vol. 4 page 793 lines 16-25, page 794 lines 1-7.

⁴ PFD page 21 first paragraph last sentence.

⁵ Ex. ED-JA-1 page 0006 lines 8-18.

⁶ Ex. ED-JA-1 page 0006 lines 19-27.

⁷ Ex. ED-JA-1 page 0006 lines 20-33.

successive wholesale customer develop and implement a WCP.

In order to ensure that water conservation measures will be developed and implemented by the Port's industrial wholesale customers, ED program staff relied upon Sec. 288.6 in to analyze the application under relevant provisions of Sec. 288.5, particularly 288.5(1)(F). After reviewing the Port's wholesale water supplier WCP, ED program staff concluded that the application met both Sec. 288.5 and 288.6.⁸

The Executive Director also excepts to Finding of Fact No. 37 on page 6 of the PFD's Proposed Order because "DCP" is incorrect. It should be "WCP."

The Executive Director excepts to Conclusions of Law Nos. 39 and 40 because they should reference 288.6.

The Executive Director recommends revising Conclusion of Law No. 39 to read: "30 Texas Administrative Code § 288.6 applies to this application because the Applicant is not a wholesale public water supplier. Sections 288.5 and 295.9 applies to wholesale water suppliers as it relates to a WCP."

The Executive Director recommends revising Conclusion of Law No. 40 to read: "30 Texas Administrative Code § 288.6 applies to this application and provides a basis for requiring Applicant to submit a WCP that complied with 30 Texas Administrative Code § 288.5."

III. Special condition 5.B.

The PFD on page 73 recommends amending the special condition as follows:

"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 the design criteria proposed in the Application for the diversion structure(s) and the installation of ¼ inch by ¼ inch wire mesh screens at the diversion structure(s).

Finding of Fact No. 97 on page 13 of the proposed order recommends amending the special condition as follows:

"5.B. Permittee shall implement reasonable measures in order to reduce impacts to aquatic resources due to

⁸ Tr. Vol. 4 page 793 lines 16-25, page 794 lines 1-7.

entrainment or impingement. Such measures shall include, but shall not be limited to, using a diversion structure(s) designed to limit intake velocity to less than or equal to 0.5 foot per second (ft/s) and the installation of wire mesh screens at a maximum size of ¼ inch by ¼ inch at the diversion structure(s).”

The language does not match. Paragraph 1 on page 19 of the proposed order is identical to the recommended amendment on page 73 of the PFD. Since the ALJs indicate on page 73 that they do not recommend including a flow-through velocity as a special condition, the Executive Director believes that Finding of Fact 97 on page 13 of the proposed order is incorrect.

The Executive Director excepts to amending special condition 5.B. as recommended for three reasons.

First, though the Port may have gone beyond the requirements for a permit to be issued under Tex. Water Code Sec. 11.121,⁹ the decision of one applicant should not result in burdening future water rights permittees because including a specific screen size in this permit will signal that this information will be required for all diversion structures contemplated by applicants across the State of Texas.

Second, determining screen size on a submerged intake structure¹⁰ will be difficult for purposes of determining compliance for enforcement purposes because measuring wire mesh screens to ensure the ¼ inch size is not something that the South Texas Watermaster routinely does.

Third, the Port’s application presented an intake design with ¼ inch screen mesh size because it is considered by the U.S. Environmental Protection Agency to be the best technology available for cooling water intake structures.¹¹ The Port’s diversion structures are not cooling water intake structures¹² and the best technology available to reduce impacts on aquatic resources due to impingement or entrainment may change by the time the diversion structures are constructed. The Executive Director therefore does not believe that locking the Port into a specific mesh size in this permit is appropriate or necessary.

⁹ PFD page 6 first paragraph.

¹⁰ PFD page 41 first paragraph, page 42 second paragraph.

¹¹ PFD page 65 last paragraph.

¹² PFD page 75 first paragraph.

Though the Executive Director believes her draft permit is sufficient as written, she recommends that any Commission revision to special condition 5.B. be based on the language addressing the issue of impingement and entrainment in Water Use Permit No. 12378, issued to the Guadalupe-Blanco River Authority after a contested case hearing:

“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.”¹³

The Executive Director recommends revising Finding of Fact 97 on page 13 of the proposed order to reflect the revision, if any, that the Commission adopts for special condition 5.B.

IV. Conclusion.

WHEREFORE, the Executive Director respectfully requests that the Commission grant the Port’s application through an order revised as recommended by the Executive Director and issue the Executive Director’s Draft Permit, either without revision or with the revisions recommended by the Executive Director, because the Applicant met all applicable requirements, and for such other relief as deemed proper and just.

¹³ See in TCEQ Docket No. 2014-1658-WR, SOAH Docket No. 582-15-2477, Order Approving the Application of Guadalupe-Blanco River Authority for New Water Use Permit No. 12378, permit page 7 special condition provision 6.K.

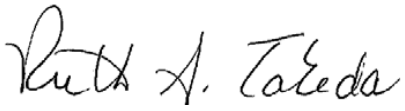
Respectfully Submitted,

TEXAS COMMISSION ON
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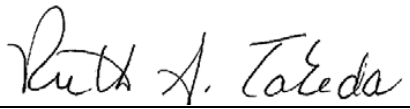
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CERTIFICATE OF SERVICE

I certify that on this 20th day of February 2024, this *Executive Director's Exceptions to Proposal for Decision and Proposed Order* was delivered as indicated on the attached Service List.



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Environmental Law Division

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SOAH Docket No. 582-23-01502
TCEQ Docket No. 2021-0421-WR

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