

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 REPLY TO EXCEPTIONS
TO PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS:

The Executive Director (or ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files this reply to the parties' exceptions to the Proposal for Decision (PFD) regarding the application by the Port of Corpus Christi Authority of Nueces County (Port or Applicant) for Water Use Permit No. 13630.

I. Exceptions – Port.

The Executive Director generally supports the Port's exceptions to the PFD, though the Executive Director continues to recommend the special condition 5.B. language she provided in her exceptions as a basis for any modifications the Commission may determine appropriate for this special condition.¹

II. Exceptions – Protestants.

The Executive Director respectfully disagrees with the exceptions filed by Encarnacion Serna and Ingleside on the Bay Coastal Watch Association (collectively Protestants) regarding the following four issues, listed in the order they appear in the Protestants' exceptions and summarizing the Executive Director's position on each: one, desalination is a treatment process that may conserve non-saline state water; two, Mr. Serna does not have "vested water rights" under Tex. Water Code Chapter 11; three, the environmental review and recommendations by Executive Director program staff were appropriate under applicable requirements; four, "surplus water" is not relevant to this application.

¹ Executive Director's Exceptions to Proposal for Decision and Proposed Order, page 5.

III. Reply to Protestants' exceptions.

Issue II.B.4.: The ALJs err in characterizing desalination as “conservation.”

Desalination is a treatment process in which seawater is pumped through an intake structure into a treatment plant and processed to convert it to industrial water.² The Port proposes to use the industrial water produced through this treatment process in lieu of freshwater sources, which can be better utilized for potable water purposes.³

Executive Director program staff agreed that the Port, by creating more water to use by industrial customers through desalination, would save surface [service (sic)] water supplies.⁴

Issue E: POCCA has failed to demonstrate that the proposed appropriation will not impair Mr. Serna's vested water rights.

Mr. Serna does not have “vested water rights.” Littoral rights are distinguishable from riparian rights in the context of Tex. Water Code Chapter 11.⁵ Mr. Serna owns waterfront property on a bay of the Gulf of Mexico and he claims recreational interests – including a dock or pier⁶ – that he asserts warrant protection in this proceeding. The Executive Director notes that Texas' Open Beaches Act allows access to the waters of the Gulf and its bays for the general public via the “wet beach” – land from the mean high tide mark to the water. The State of Texas owns the wet beach. Therefore Mr. Serna does not have any greater right of access to state water than members of the general public. *See* Tex. Nat. Res. Code Chapter 61, specifically Tex. Nat. Res. Code § 11.012(c). *See also Severance v. Patterson*, 370 S.W.3d 705, 715 (Tex. 2012), citing *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 419 (Tex. 1943) and *Landry v. Robison*, 219 S.W. 819, 820 (Tex. 1920). The Executive Director does not recall any water rights application in which the Commission considered water availability in the context of potential impact on improvements built for recreational purposes by a non-water right holder.

Tex. Water Code § 11.001(a) indicates that Chapter 11 does not affect vested

² Ex. APP-SG-3 page 000044 introduction second paragraph.

³ Ex. APP-SG-3 page 000044 introduction first paragraph.

⁴ Tr. Vol. 4 page 768 lines 16-23.

⁵ PFD page 42 first sentence, second paragraph.

⁶ Ex. IOB-201 Photos 1 and 2.

private rights to the use of water except as affected by the adjudicative process under Tex. Water Code §§ 11.301 to 11.341. Vested private rights are riparian rights, and Tex. Water Code § 11.001(b) recognizes riparian rights in land to which the title passed out of the State of Texas prior to July 1, 1895. The record does not support Mr. Serna's claim of "vested water rights" because he has not asserted such rights in this proceeding and provided no evidence that the title to his property was acquired prior to July 1, 1895. He testified about his and his family's recreational activities in the area, his dock or pier, and the Port's proposed intake structure.⁷ He did not testify about title to his property or provide evidence of "vested water rights," nor did he demonstrate why his use of state water would be considered exempt from permitting requirements under Tex. Water Code § 11.142.

Issues F and G, specifically 2.: The ED failed to conduct or review any fish and wildlife habitat assessment in this case, and the Applicant's attempt at an assessment is no substitute for the assessment required by law.

The ALJs accurately described the Executive Director's position on interpretation of Tex. Water Code § 11.147(e-3)⁸, and the Executive Director supported her position in her closing arguments, which she re-iterates by reference.⁹

The evidentiary record shows that Executive Director program staff appropriately reviewed the application¹⁰ and incorporated recommendations regarding impingement and entrainment¹¹ in the proposed Draft Permit.¹²

The Executive Director notes that Permit No. 12378, issued to the Guadalupe-Blanco River Authority in 2020 as discussed in the PFD on pages 53-54, is the subject of litigation in Travis County District Court, *National Wildlife Federation v. TCEQ*, Cause No. D-1-GN-20-007096. Arguments in the case were heard in September 2023, and a court decision is pending.

Issue K: Other issues - failure to identify location of surplus water return.

The ALJs concluded that the wastewater generated by the desalination process

⁷Ex. IOB-200.

⁸ PFD page 51, last paragraph.

⁹ Executive Director's Closing Argument and Post-Hearing Brief pages 9-10, G. Issue 7, protection of environment/ environmental flow standards and assessments.

¹⁰ Ex. ED-GG-3 at page 0035.

¹¹ Ex. ED-GG-1 at page 0028.

¹² Ex. ED-JA-3 at page 0016.

is not “surplus water” but is more appropriately considered wastewater.¹³ The Executive Director agrees with the ALJs’ conclusions because surplus water is “Water taken from any source in excess of the initial or continued beneficial use of the appropriator for the purpose or purposes authorized by law” and is not water recirculated within a reservoir for cooling purposes.¹⁴

Water diverted for this permit will be piped to the desalination plant and treated.¹⁵ The water taken by the Port will not be “excess” because its initial diversion will lead to treatment steps resulting in water that will continue to be beneficially used by the Port for industrial purposes, which is an authorized beneficial use.¹⁶ The desalination treatment process will result in a waste stream that the Port is addressing through a separate TCEQ permit application because the discharge for the desalination would be return flows or return water, not surplus water, therefore requires a wastewater permit.¹⁷ Return water or return flow is “That portion of state water diverted from a water supply and beneficially used which is not consumed as a consequence of that use and returns to a watercourse. Return flow includes sewage effluent.”¹⁸

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 PFD page 74 last paragraph.

¹⁴ 30 Tex. Admin. Code § 297.1(55).

¹⁵ Ex. APP-SG-3 page 000044 introduction second paragraph.

¹⁶ Tex. Water Code 11.023(a)(2).

¹⁷ Tr. Vol. 1 page 229 lines 2-14.

¹⁸ 30 Tex. Admin. Code § 297.1(45).

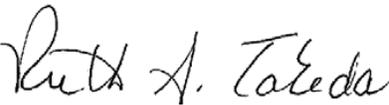
Respectfully Submitted,

TEXAS COMMISSION ON
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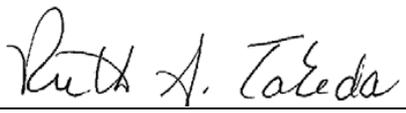
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CERTIFICATE OF SERVICE

I certify that on this 29th day of February 2024, this *Executive Director's Reply to Exceptions to Proposal for Decision* was delivered as indicated on the attached Service List.



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

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