

# State Office of Administrative Hearings

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Chief Administrative Law Judge

January 22, 2024

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**RE: SOAH Docket Number 582-23-01502; TCEQ Docket No. 2021-0421-WR; *Application of Port of Corpus Christi Authority of Nueces County for Water Right Permit No. 13630***

Dear Parties:

Please find attached a Proposal for Decision in this case.

Any party may, within 20 days after the date of issuance of the PFD, file exceptions or briefs. Any replies to exceptions, briefs, or proposed findings of fact shall be filed within 30 days after the date of issuance on the PFD. 30 Tex. Admin. Code § 80.257.

This matter has been designated SOAH Docket No. 582-23-01502; TCEQ

Docket 2021-0421-WR. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs, and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www14.tceq.texas.gov/epic/eFiling/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

CC: Service List

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# BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

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## APPLICATION OF PORT OF CORPUS CHRISTI AUTHORITY OF NUECES COUNTY FOR WATER RIGHT PERMIT NO. 13630

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## TABLE OF ABBREVIATIONS

Abbreviation	Term
ALJs	Administrative Law Judges
Applicant or Port Authority	Port of Corpus Christi Authority of Nueces County
Application	The application for a water right permit no. 13630 to appropriate and divert 101,334 acre-feet of water per year from the San Antonio-Nueces Coastal Basin in the Corpus Christi Bay
cfs	Cubic feet per second
CMP	Coastal Management Program
Commission or TCEQ	Texas Commission on Environmental Quality
COL	Conclusion of Law
DCP	Drought Contingency Plan
Draft Permit	The draft permit prepared by the Executive Director for this Application, which would authorize Applicant to divert and use the requested water for industrial purposes in San Patricio County with certain special conditions
ED	Executive Director
ED Staff	Technical staff for the Executive Director
Facility	Applicant's proposed desalination facility located near the La Quinta Shipping Channel in San Patricio County
GBRA	Guadalupe-Blanco River Authority
gpm	Gallons per minute
IOBCWA	Ingleside on the Bay Coastal Watch Association
MGD	Million gallons per day
OPIC	Office of Public Interest Counsel

<b>Abbreviation</b>	<b>Term</b>
PFD	Proposal for Decision
Protestants	Ingleside on the Bay Coastal Watch Association and Encarnacion Serna
SOAH	State Office of Administrative Hearings
TCEQ Rules	Rules found in Title 30 of the Texas Administrative Code
TPDES	Texas Pollutant Discharge Elimination System
USACE	United States Army Corps of Engineers
WCP	Water Conservation Plan
2021 Region N Water Plan	Coastal Bend Regional Water Planning Area, Region N, 2021 Regional Water Plan

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**BEFORE THE**  
**STATE OFFICE OF ADMINISTRATIVE**  
**HEARINGS**

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

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**PROPOSAL FOR DECISION**

The Port of Corpus Christi Authority of Nueces County (Applicant or Port Authority) applied for a permit to appropriate and divert 101,334 acre-feet of water per year at a maximum diversion rate of 140.12 cubic feet per second (cfs) or 62,890 gallons per minute (gpm) from the San Antonio-Nueces Coastal Basin in the Corpus Christi Bay (Application). Applicant asserts that it has met its burden to demonstrate that the permit should be granted. The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) agrees that the permit should be issued. The Office of Public Interest Counsel (OPIC) takes no position on the ultimate grant of the permit. Protestants Ingleside on the Bay Coastal

Watch Association (IOBCWA) and Encarnacion Serna (together, Protestants) argue that the permit should be denied.

For the reasons set out below, the Administrative Law Judges (ALJs) recommend that the Application be approved, and the Draft Permit be issued with the changes recommended below.

## **I. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY**

On September 3, 2019, Applicant filed its Application for water right permit no. 13630 with the Commission.<sup>1</sup> The Application was declared administratively complete on May 11, 2020, with the technical review completed on December 4, 2020.<sup>2</sup> Staff for the ED (ED Staff) prepared a draft permit, which if issued, would authorize Applicant to divert and use the requested water for industrial purposes in San Patricio County with certain special conditions (Draft Permit).<sup>3</sup>

Notice of the Application was mailed to water right holders in the San Antonio-Nueces Coastal Basin on February 5, 2021, and published in the following publications in San Patricio County: (a) the *Corpus Christi Caller Times* on February 26, 2021; the *Ingleside Index* on March 3, 2021; and the *News of San Patricio*

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<sup>1</sup> Ex. ED-JA-1 (Allis Dir.) at bates 0005.

<sup>2</sup> Administrative Record, Tab C, 001; Ex. ED-KA-3 (Response to Comments) at bates 0064; *see* Ex. ED-KA-4 (Hydrology Review Memorandum) at bates 0088.

<sup>3</sup> Ex. ED-JA-3 (Draft Permit).

on March 4, 2021.<sup>4</sup> The notice of the Application complied with Texas Water Code section 11.132.

The comment and hearing request period ended on March 29, 2021, but was re-opened due to significant public interest.<sup>5</sup> Notice of a public meeting was mailed on June 11, 2021.<sup>6</sup> A public meeting was held on July 13, 2021, at which time the re-opened public comment period closed.<sup>7</sup> The ED's Response to Comments was filed on June 27, 2022.<sup>8</sup>

On July 28, 2022, the Commission, after reviewing the requests for hearing and responses at a Commission meeting, issued an interim order referring the matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing.<sup>9</sup>

Notice of the preliminary hearing was mailed to interested parties on September 30, 2022.<sup>10</sup> The administrative record was filed with SOAH on October 19, 2022.

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<sup>4</sup> Administrative Record, Tab B, 00057, 63, 67, 75.

<sup>5</sup> Administrative Record, Tab B, 00055. The hearing request period was not re-opened.

<sup>6</sup> Administrative Record, Tab B, 00022.

<sup>7</sup> Ex. ED-KA-3 (Response to Comments) at bates 0064.

<sup>8</sup> Ex. ED-KA-3 (Response to Comments) at bates 0063.

<sup>9</sup> *See Interim Order Concerning the Application by Port of Corpus Christi Authority of Nueces County for Water Use Permit No. 13630*, TCEQ Docket No. 2021-0421-WR (July 25, 2022).

<sup>10</sup> Administrative Record, Tab B, 00001.

A preliminary hearing convened on November 1, 2022. At the hearing, ALJ Ross Henderson found that notice was sufficient and established jurisdiction.<sup>11</sup> The following were admitted as parties: Applicant, the ED, OPIC, and the Protestants.<sup>12</sup>

The hearing on the merits was held on September 18-21, 2023, via videoconference. The parties appeared through their respective counsel. The parties submitted written closings, and the record closed on November 21, 2023, the deadline for filing of reply briefs.

## **II. BACKGROUND**

Applicant is a political subdivision of the State of Texas and governed by seven commissioners.<sup>13</sup> Applicant is a multi-billion dollar enterprise affecting the entire state, having seen considerable economic and development growth in recent years due to ship channel expansion.<sup>14</sup> Applicant is located within Region N of the regional water planning groups.<sup>15</sup> The Coastal Bend Regional Water Planning Area, Region N, 2021 Regional Water Plan (2021 Region N Water Plan) identifies Applicant as a potential future wholesale water provider.<sup>16</sup>

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<sup>11</sup> Order Memorializing Preliminary Hearing (Nov. 4, 2022) at 1.

<sup>12</sup> Order Memorializing Preliminary Hearing at 1-2.

<sup>13</sup> Ex. APP-SG-14 (2021 Region N Water Plan) at 5D.10-40.

<sup>14</sup> Ex. APP-SG-14 (2021 Region N Water Plan) at 5D.10-40.

<sup>15</sup> Ex. APP-SG-3 (Application) at bates 000015; *see* Ex. APP-SG-14 (2021 Region N Water Plan) at 5, 1-10, 5D.10-40.

<sup>16</sup> Ex. APP-SG-14 (2021 Region N Water Plan) at 1-10.

This contested case revolves around a proposed desalination facility located near the La Quinta Ship Channel in the Corpus Christi Bay (Facility), and the application for a new appropriation of state seawater to process at this Facility.<sup>17</sup> The Facility is designed to intake 90.4 million gallons per day (MGD) of seawater for desalination and would produce approximately 30 MGD of desalinated water for industrial purposes in San Patricio County.<sup>18</sup> Applicant anticipates approximately 60.7% of the diverted water will be returned as brine resulting from the desalination process.<sup>19</sup> The proposed intake structure from which the appropriated water will be diverted is located within the Corpus Christi Bay at Latitude 27.873741° N, Longitude 97.294987° W.<sup>20</sup> The proposed intake structure consists of four large Wedgewire inlet screens through which seawater will be pumped and then carried through a set of buried intake pipes.<sup>21</sup> Because of the size of the inlet screen and shallow depth of the site (approximately 10 feet), the site for the intake requires approximately 10 feet of dredged seabed in a 200 foot by 200 foot area around the site.<sup>22</sup>

Applicant contends that this Facility and water appropriation will address a long-term need for a drought-resistant supply of water to be used in industrial

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<sup>17</sup> Ex. APP-SG-3 (Application) at bates 000001; APP-SG-14 (2021 Region N Water Plan) at 5D.10-40.

<sup>18</sup> Ex. APP-SG-3 (Application) at bates 000003, 15.

<sup>19</sup> Ex. APP-SG-3 (Application) at bates 000055.

<sup>20</sup> Ex. APP-SG-3 (Application) at bates 000025, 36.

<sup>21</sup> Ex. APP-SG-3 (Application) at bates 000044.

<sup>22</sup> Ex. APP-SG-3 (Application) at bates 000044.

purposes in San Patricio County; thus, freeing up municipal water for the people of the bay area.<sup>23</sup> Applicant contends that it has gone beyond the requirements for a permit to be issued in an attempt to address any concerns raised by the ED or Protestants.<sup>24</sup> As such, it seeks issuance of the Draft Permit.

In essence, the issues raised by Protestants stem largely from their belief that Applicant's plans for the Facility and the water it seeks to divert are speculative in nature and lacking any details sufficient to warrant a water rights permit.<sup>25</sup> Protestants believe that Applicant does not intend to construct, own, or operate the Facility, but will transfer the rights under the permit it receives to another entity.<sup>26</sup> They also take issue with the prospective nature of the use. Applicant states that the desalinated water will be provided to industrial users in San Patricio County but does not identify a potential user and has no contracts to provide water.<sup>27</sup> Protestants argue that the permitting of water rights is to authorize use of water for a specified demand and need and not for the hypothetical uses provided by Applicant.<sup>28</sup> As a result of this speculative request, Protestants assert that the Application fails on multiple grounds.<sup>29</sup>

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<sup>23</sup> Applicant's Closing Arg. at 3.

<sup>24</sup> Applicant's Closing Arg. at 4-5.

<sup>25</sup> Protestants' Closing Arg. at 4.

<sup>26</sup> Protestants' Closing Arg. at 4.

<sup>27</sup> Protestants' Closing Arg. at 4.

<sup>28</sup> Protestants' Closing Arg. at 4.

<sup>29</sup> Protestants' Closing Arg. at 4.

In its briefing, the ED concludes that her review was complete, Applicant has met its burden, and recommends issuance of the Draft Permit.<sup>30</sup> OPIC's briefing agrees with Applicant and the ED on several issues but takes no position on others.<sup>31</sup> Given its lack of position on several issues, OPIC makes no ultimate conclusion as to whether the Draft Permit should issue.<sup>32</sup>

### **III. APPLICABLE LAW**

To appropriate state water or construct any work designed to store, take, or divert water, a permit is required.<sup>33</sup> The Commission may grant a water right permit, after a hearing, only if:

- (1) the application conforms to the requirements prescribed by [Chapter 11 of the Texas Water Code] and is accompanied by the prescribed fee;
- (2) unappropriated water is available in the source of supply;
- (3) the proposed appropriation:
  - (A) is intended for a beneficial use;
  - (B) does not impair existing water rights or vested riparian rights;
  - (C) is not detrimental to the public welfare;

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<sup>30</sup> ED's Closing Arg. and Post-Hearing Br. at 2.

<sup>31</sup> OPIC's Closing Arg. at 2.

<sup>32</sup> OPIC's Closing Arg. at 2.

<sup>33</sup> Tex. Water Code § 11.121.

- (D) considers any applicable environmental flow standards established under Section 11.1471 and, if applicable, the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152; and
  - (E) addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located, unless the commission determines that conditions warrant waiver of this requirement; and
- (4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by Section 11.002(8)(B).<sup>34</sup>

The requirements of Chapter 11 of the Water Code are further supplemented by the rules of the Commission, located in title 30 of the Texas Administrative Code (TCEQ Rules)<sup>35</sup> The law specific to the issues discussed below will be referenced in the applicable sections.

The right to use state water may be appropriated only as expressly authorized by law.<sup>36</sup> The Applicant bears the burden of proof by a preponderance of the evidence.<sup>37</sup>

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<sup>34</sup> Tex. Water Code § 11.134(b); 30 Tex. Admin. Code § 297.41(a)(1)-4).

<sup>35</sup> See, e.g., 30 Tex. Admin. Code chs. 288, 295, 297.

<sup>36</sup> Tex. Water Code § 11.0235(a).

<sup>37</sup> 30 Tex. Admin. Code § 80.17; *see also* Tex. Gov't Code § 2003.047.

#### IV. TESTIMONY AND EXHIBITS

In support of the application, Applicant offered the testimony of six witnesses and their associated exhibits<sup>38</sup>:

Witness	Description
Sarah Garza <sup>39</sup>	Director of Environmental Planning & Compliance for Applicant, who is responsible for obtaining necessary permits and ensuring compliance for Applicant's operations, activities, and projects. <sup>40</sup>
Dr. Liel F. Tischler <sup>41</sup>	An environmental engineer who was retained to evaluate the Application regarding issues of availability of unappropriated water, intended beneficial use of the proposed appropriation, impairment to existing water or riparian rights, environmental flow standards, water quality impacts, and the public welfare effects. <sup>42</sup>
Dr. Kirk E. Dean <sup>43</sup>	A scientist, engineer, and senior project manager at Parsons Corporation. Dr. Dean was retained to evaluate the appropriation's impact on groundwater use; quality and recharge; water quality impacts; public welfare effects; and whether reasonable diligence to avoid waste and achieve water conservation was demonstrated. <sup>44</sup>

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<sup>38</sup> Also, at the hearing, Applicant offered six additional exhibits, five of which were admitted. *See* Ex. APP-2 to -6. Exhibit APP-1 was offered but not admitted.

<sup>39</sup> Ex. APP-SG-1 (Garza Dir.); *see* Exs. APP-SG-2 to -11, -11A, -12 to -15.

<sup>40</sup> Ex. APP-SG-1 (Garza Dir.) at 1.

<sup>41</sup> Exs. APP-LT-1 (Tischler Dir.), APP-LT-1-R (Tishler Reb.); *see* Exs. APP-LT-2 to -12.

<sup>42</sup> Ex. APP-LT-1 (Tischler Dir.) at 2, 7-8.

<sup>43</sup> Exs. APP-KD-1 (Dean Dir.), APP-KD-1-R (Dean Reb.); *see* Exs. APP-KD-2 to -12.

<sup>44</sup> Ex. APP-KD-1 (Dean Dir.) at 1, 4.

Kirk Kennedy <sup>45</sup>	A hydrologist and geoscientist for the Kennedy Resource Company, who performs surface water right analysis in Texas. Mr. Kennedy was retained to evaluate the availability of unappropriated water, the intended beneficial use of the proposed appropriation, impairment to existing water or riparian rights, environmental flow standards, and consistency with state and regional water plans. <sup>46</sup>
Dr. Lance Fontenot <sup>47</sup>	An environmental toxicologist employed with Integral Consulting, Inc. Dr. Fontenot was retained to evaluate the effects on fish and wildlife, public welfare effects, the measures Applicant has taken to reduce impacts to aquatic resources, and to rebut statements by Protestants' expert witness. <sup>48</sup>
Randy Palachek <sup>49</sup>	A scientist, regulatory permit specialist and aquatic toxicologist employed with KIT Professionals. Mr. Palachek was retained to evaluate the effects on fish and wildlife, consistency with state and regional water plans, water quality impacts, environmental flow standards, and public welfare effects if the permit is or is not granted. <sup>50</sup>

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<sup>45</sup> Exs. APP-KK-1 (Kennedy Dir.), APP-KK-1-R (Kennedy Reb.); *see* Exs. APP-KK-2 to -4.

<sup>46</sup> Ex. APP-KK-1 (Kennedy Dir.) at 1-2, 5.

<sup>47</sup> Exs. APP-LF-1 (Fontenot Dir.), APP-LF-1-R (Fontenot Reb.); *see* Exs. APP-LF-2 to -59, APP-LFR-01 to -14.

<sup>48</sup> Ex. APP-LF-1 (Fontenot Dir.) at 1, 6.

<sup>49</sup> Exs. APP-RP-1 (Palachek Dir.) (admitted as modified by the ALJs' evidentiary rulings), APP-RP-1-R (Palachek Reb.); *see* Exs. APP-RP-2 to -9, -11 to -27. Exhibit APP-RP-10 was also offered but not admitted.

<sup>50</sup> Ex. APP-RP-1 (Palachek Dir.) at 1, 3.

The ED offered the testimony of three staff witnesses and their associated exhibits:

Witness	Description
Jennifer Allis <sup>51</sup>	A senior water conservation specialist with the Commission. Ms. Allis reviewed the Application to ensure compliance with Chapter 288 of the TCEQ Rules and the consistency with State and Regional Water Plans. <sup>52</sup>
George Gable IV <sup>53</sup>	An aquatic scientist with the Resource Protection Team within the Commission. Mr. Gable performed the environmental technical review for the Application. <sup>54</sup>
Dr. Kathy Alexander <sup>55</sup>	A Senior Policy and Technical Analyst for the Water Availability Division of the Commission. Dr. Alexander oversaw the administrative and technical review of the Application; directed and approved the hydrology technical memorandum; provided input and oversight on the Draft Permit and was involved in the public meetings and preparation of Response to Public Comments. <sup>56</sup>

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<sup>51</sup> Ex. ED-JA-1 (Allis Dir.); *see* Exs. ED-JA-2 to -4.

<sup>52</sup> Ex. ED-JA-1 (Allis Dir.) at bates 0002, 04.

<sup>53</sup> Ex. ED-GG-1 (Gable Dir.); *see* Exs. ED-GG-2 to -3.

<sup>54</sup> Ex. ED-GG-1 (Gable Dir.) at bates 0025, 26.

<sup>55</sup> Ex. ED-KA-1 (Alexander Dir.); *see* Exs. ED-KA-2 to -4.

<sup>56</sup> Ex. ED-KA-1 (Alexander Dir.) at bates 0038, 44.

Protestants offered the testimony of three witnesses and their associated exhibits<sup>57</sup>:

Witness	Description
Stefan Schuster <sup>58</sup>	A director of operations for a private water delivery system operation and president of a consulting company providing geologic and hydrological consulting services. Mr. Schuster was retained to provide opinions on Applicant's compliance with regulatory requirements, intended beneficial use, and pollution or risk to aquatic life. <sup>59</sup>
Encarnacion Serna <sup>60</sup>	A protestant and owner of waterfront properties near the proposed location of the appropriation and Facility. His testimony relates to the deficiencies he sees in the Application and the permitting process and the effects of the appropriation on his family, property, and community. <sup>61</sup>
Dr. Kristin Nielsen <sup>62</sup>	An assistant professor at the University of Texas at Austin Marine Science Institute. Dr. Nielsen opined as to impacts of the intake structure on aquatic life and habitats. <sup>63</sup>

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<sup>57</sup> Additionally at the hearing, Protestants offered 15 exhibits, all of which were admitted. Exs. IOB-1 to -9, -11 to -16. Protestants referenced an Exhibit IOB-10 but it was neither offered nor admitted.

<sup>58</sup> Ex. IOB-100 (Schuster Dir.); *see* Exs. IOB-101 to -105, -106A, -106B -108 to -111. Exhibit IOB-107 was offered but not admitted.

<sup>59</sup> Ex. IOB-100 (Schuster Dir.) at 4, 7.

<sup>60</sup> Ex. IOB-200 (Serna Dir.) (admitted as modified by the ALJs' evidentiary rulings); *see* Exs. IOB-201 to -203.

<sup>61</sup> Ex. IOB-200 (Serna Dir.) at 1.

<sup>62</sup> Ex. IOB-300 (Nielsen Dir.); *see* Exs. IOB-301 to -313.

<sup>63</sup> Ex. IOB-300 (Nielsen Dir.) at 2, 11.

OPIC did not offer any evidence.

## V. DISCUSSION

At the close of the hearing, the parties were directed to submit a joint briefing outline to standardize how the closing arguments and briefs would address the issues raised at the hearing. For ease, this PFD will address the issues in the order identified in the parties' briefing outline.

### A. DROUGHT CONTINGENCY PLAN

A drought contingency plan (DCP) is “a strategy or combination of strategies for temporary supply and demand management responses to temporary and potentially recurring water supply shortages and other water supply emergencies.”<sup>64</sup> Texas Water Code section 11.1272 requires certain applicants, including wholesale public water suppliers, to submit a DCP with their application.<sup>65</sup> Chapter 288, subchapter B of the TCEQ Rules, provides what must be contained in a DCP submitted by various types of applicants. Rule 288.22 is titled “Drought Contingency Plans for Wholesale Water Suppliers”, and its first subsection begins, “A [DCP] for a *wholesale* water supplier must include the following . . .”<sup>66</sup>

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<sup>64</sup> 30 Tex. Admin. Code § 288.1(6).

<sup>65</sup> Tex. Water Code § 11.1272; 30 Tex. Admin. Code §§ 288.30, 295.9.

<sup>66</sup> 30 Tex. Admin. Code § 288.22 (emphasis added).

## 1. Evidence and Arguments

There is no factual dispute for this issue. The parties agree that no DCP was submitted, and that Applicant will be a wholesale water supplier but is not a wholesale public water supplier. Therefore, the question raised by this issue is whether the TCEQ Rules require a wholesale—but not public—water supplier to provide a DCP.

Protestants argue that Rule 288.22's language shows that DCP requirements apply to wholesale water suppliers, like Applicant, and consequently the Application is deficient because it does not contain a DCP. Protestants note that although “wholesale public water supplier” is used in Texas Water Code section 11.1272(a) and defined in TCEQ Rule 288.1(25) the heading and first line of TCEQ Rule 288.22 use the term “wholesale water supplier.” While TCEQ Rules define “wholesale public water supplier” as applying to water sold for human consumption, Protestants assert that the Commission's use of a different term — “wholesale water supplier” — in TCEQ Rule 288.22 demonstrates the Commission's intent to apply the rule to a broader category of wholesale suppliers.<sup>67</sup> Protestants also cite to the testimony of Jennifer Allis, the Senior Water Conservation Specialist for the Commission, that the omission of “public” from the wholesale water supplier was not an oversight.<sup>68</sup>

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<sup>67</sup> 30 Tex. Admin. Code § 288.1(25).

<sup>68</sup> Tr. Vol. 4 at 786-87.

Applicant responds that a DCP was not required because Rule 288.22 applies only to wholesale public water supplier when the context of the rule and its enactment is taken into account. In support, it cites to the legislative and regulatory histories of TCEQ Rule 288.22 and Texas Water Code section 11.1172(a)—the enabling statute for the rule.<sup>69</sup>

The ED and OPIC agree with the Applicant that a DCP was not required with Applicant's Application.<sup>70</sup>

## **2. ALJs' Analysis**

The ALJs conclude that the rules do not require Applicant to submit a DCP.

Courts construe administrative rules using statutory construction principles.<sup>71</sup> When a statute or rule is unambiguous, its interpretation must give effect to the plain meaning of the words, which are determinative of the Legislative or agency's intent.<sup>72</sup> The Legislature's words are "the surest guide to legislative intent," and courts must look to the "plain and common meaning of the statute's words."<sup>73</sup> It is

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<sup>69</sup> See e.g., 24 Tex. Reg. 949, 951, 956 (Feb. 12, 1999) (regulatory history relating to the enactment of TCEQ Rule 288.22).

<sup>70</sup> Additionally, OPIC felt that Applicant met its burden regarding the DCP because seawater availability was demonstrated to be effectively limitless and therefore unaffected by drought.

<sup>71</sup> *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438-39 (Tex. 2011).

<sup>72</sup> *TGS-NOPEC Geophysical*, 340 S.W.3d at 438-39.

<sup>73</sup> *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999); Tex. Gov't Code § 311.011(a).

presumed that every word or phrase in a statute had been intentionally used with a meaning and a purpose.”<sup>74</sup>

To start, TCEQ Rule 288.22(a) creates no requirement for an applicant to submit an DCP. Instead, it only details what a DCP must include when one is submitted: “A drought contingency plan for a wholesale water supplier must include the following minimum elements . . . .”<sup>75</sup> Rather, the requirements to submit a DCP are found in TCEQ Rules 295.9<sup>76</sup> and 288.30.<sup>77</sup> Protestants cite to TCEQ Rule 295.9 for the general statement that an application must include a DCP; however, the general statement is modified by the subsections detailing the requirements for different types of applications.<sup>78</sup> The subsection discussing applications by a wholesale water supplier does not mention a DCP.<sup>79</sup> Furthermore, TCEQ Rule 288.30 sets out an additional requirement to submit a DCP and explicitly limits

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<sup>74</sup> *In re Allen*, 366 S.W.3d 696, 706 (Tex. 2012) (orig. proceeding).

<sup>75</sup> Compare subsections (b) and (c), which dictate that a wholesale public water suppliers “shall notify” and “shall review and update.”

<sup>76</sup> 30 Tex. Admin. Code § 295.9 (1), (4) (setting out DCP requirements for applications for municipal use, industrial or mining use, or agricultural use and for applications to amend water rights); *but see* 30 Tex. Admin. Code § 295.9(2) (mentioning only a water conservation plan for an application by a wholesale water supplier).

<sup>77</sup> 30 Tex. Admin. Code § 288.30(5)-(7) (listing a requirement for DCPs as of May 1, 2005, for retail public water suppliers, wholesale public water suppliers, and irrigation districts).

<sup>78</sup> 30 Tex. Admin. Code § 295.9 (the plans must meet the applicable requirements “contained in this section.”).

<sup>79</sup> *Compare* 30 Tex. Admin. Code § 295.9(2) (not mentioning DCPs with regards to wholesale water supplier applications), *with* 30 Tex. Admin. Code § 295.9(1) (referencing DCP in the context of applications for municipal, industrial, mining, or agricultural uses).

that requirement to wholesale *public* water suppliers.<sup>80</sup> Reading Rule 288.22 as urged by Protestants ignores the context of Chapter 288 and TCEQ Rule 295.9.

Turning to the text of TCEQ Rule 288.22, Protestants only quote the rule’s heading<sup>81</sup> and the first line in subsection (a). However, the text—when it is read in its entirety—must be referring to a wholesale public water supplier. The references to the water supplier within TCEQ Rule 288.22 are as follows:

- “*a* wholesale water supplier” (subsection (a));
- “*the* wholesale public water supplier” (subsection (a)(2));
- “*the* water supplier” (subsection (a)(3));
- “*The* wholesale public water supplier” (subsection (b)); and
- “*The* wholesale public water supplier” (subsection (c)).<sup>82</sup>

Review of each of these references clarify that they refer to the same party—the applicant submitting a DCP. At no point in the rule is wholesale public water supplier introduced with an indefinite article to demonstrate the introduction of a separate class of applicant.<sup>83</sup> In subsection (a)(2), the rule first introduces the term wholesale public water supplier: “The drought contingency plan must document

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<sup>80</sup> 30 Tex. Admin. Code § 288.30(6).

<sup>81</sup> Protestant compare the headings between multiple sections to highlight the use of “wholesale water supplier” in Rule 288.22. However, the Code Construction Act makes clear that headings are non-limiting. Tex. Gov’t Code § 311.024 (“The heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute.”). Given this, the ALJs finds the comparison of section titles within TCEQ Rules to be of little value when determining regulatory intent within a plain meaning analysis.

<sup>82</sup> 30 Tex. Admin. Code § 288.22(a), (a)(2)-(3), (b)-(c) (emphasis added).

<sup>83</sup> *The*, The American Heritage Dictionary of the English Language (5th ed. 2020) (“Used before...nouns that denote particular, specified persons or things.”); see also *Total Energies E&P USA, Inc. v. MP Gulf of Mexico, LLC*, 667 S.W.3d 694, 709-10 & n.21 (Tex. 2023) (discussing use of “the” in arbitration rules; finding that “the” is limiting and denotes exclusivity).

coordination with the regional water planning groups for the service area of the wholesale public water supplier to ensure consistency with the appropriate approved regional water plans.” To read this subsection as Protestants read it would render the section untenable because no wholesale “non-public” water supplier could meet this provision because there would be no wholesale public water supplier to coordinate with the regional planning group.<sup>84</sup>

Therefore, when read in the context of the TCEQ Rules, the ALJs conclude that Rule 288.22 is limited to a DCP submitted by a wholesale public water supplier.<sup>85</sup> Because Applicant is not a wholesale public water supplier, a DCP was not required for this Application.

## **B. WATER CONSERVATION PLAN**

A water conservation plan (WCP) is a strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source; reducing the loss or waste of water; maintaining or improving the efficiency in the use of water; increasing the recycling and reuse of water; and preventing the pollution of water.<sup>86</sup>

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<sup>84</sup> Additionally, if subsections (b) and (c) are read as Protestants suggest, a wholesale nonpublic water supplier would neither be required to notify the ED if the DCP’s mandatory provisions were triggered or review and update its DCP as appropriate while wholesale public water suppliers would be. This is a likewise unwarranted distinction that results from Protestants’ reading.

<sup>85</sup> Because the ALJs find that the plain meaning of Rules 288.22 and 288.30 is limited to wholesale public water suppliers, they don’t reach the extrinsic aids cited by Applicant though they do note that the regulatory history of TCEQ Rule 288.22 supports Applicant’s position. Additionally, the ALJs need not reach whether Rule 288.22 would exceed the Commission’s rulemaking authority if it were expanded to include wholesale nonpublic water suppliers.

<sup>86</sup> 30 Tex. Admin. Code § 288.1(24).

A WCP is required for applications requesting a new water right.<sup>87</sup> The TCEQ Rules detail what must be provided in a WCP based on the purpose or use of the requested water: (1) municipal use; (2) industrial or mining use; (3) agricultural use, including irrigation use; (4) use of water by wholesale water suppliers; and (5) use of water for any other purpose or use.<sup>88</sup>

## **1. Background**

In this case, Applicant, when submitting its Application, submitted a WCP for industrial use.<sup>89</sup> During its review, ED Staff requested Applicant submit a second WCP because Applicant indicated that the water would be sold to end users who were industrial customers and, therefore, Applicant was required to complete TCEQ Wholesale Public Water Suppliers form.<sup>90</sup> During its review, ED Staff reasoned that Applicant did not fit into either the rule for a wholesale water supplier (TCEQ Rule 288.5) or for an industrial use (TCEQ Rule 288.3) and, therefore, analyzed the WCP under the catch-all rule (TCEQ Rule 288.6).<sup>91</sup> However, the Commission does not have a form for a WCP under TCEQ Rule 288.6. As a result, ED Staff provided Applicant with the wholesale public water supplier WCP form and noted that some portions of the form would not be applicable since Applicant was not a wholesale

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<sup>87</sup> Tex. Water Code § 11.1271(a); 30 Tex. Admin. Code § 295.9.

<sup>88</sup> 30 Tex. Admin. Code § 295.9(1)-(3); *see* 30 Tex. Admin. Code § 288.2-.6.

<sup>89</sup> Ex. APP-SG-3 (Application) at bates 00052-66.

<sup>90</sup> Exs. IOB-1 at bates 001968, -2 at bates 006247.

<sup>91</sup> Tr. Vol. 4 at 793; Ex. ED-JA-1 at bates 0007.

public water supplier.<sup>92</sup> Applicant returned the form to Staff, who concluded that the information provided was sufficient to conclude that Applicant had met its burden to provide a WCP.<sup>93</sup>

Protestants argue that Applicant's WCP fails to comply with the applicable rules because (1) the Applicant and ED failed to apply the appropriate rule to assess Applicant's WCP; (2) the WCP fails to meet the requirements of TCEQ Rule 288.5; and (3) Applicant failed to meet its burden under TCEQ Rule 288.7(b) to demonstrate there are no feasible alternatives or the appropriation is necessary and reasonable.

Applicant argues that (1) the ED correctly applied TCEQ Rule 288.6 in analyzing the WCP; (2) even if TCEQ Rule 288.5 applied, Applicant's WCP satisfies its burden; and (3) Applicant met the requirements of TCEQ Rule 288.7 as demonstrated by its WCP and the state and regional water plans.

The ED argues that ED Staff correctly interpreted the applicable rules when reviewing the Application and, therefore, the Applicant met its burden to provide a sufficient WCP. OPIC, likewise, contends that Applicant met its burden as the appropriate rule was applied and argues that the conditions in the Draft Permit sufficiently address Protestants' complaints about the WCP.

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<sup>92</sup> Ex. IOB-2 at bates 006247.

<sup>93</sup> Ex. ED-JA-1 at bates 0007; *see* Ex. APP-SG-9.

## **2. Should TCEQ Rule 288.5 or TCEQ Rule 288.6 Apply?**

The parties raise a corollary argument to the DCP issue: whether Applicant's WCP was required to comply with TCEQ Rule 288.5 governing "wholesale water suppliers." The parties agree that Applicant would be a wholesale water supplier but would not be a wholesale public water supplier.

### **a) Arguments**

The parties raise many of the same arguments as found above in the discussion regarding DCPs and TCEQ Rule 288.22. Protestants argue that TCEQ Rule 288.5 applies because the rule by its plain language applies to wholesale water suppliers. Applicant asserts that ED Staff was correct when it determined that the catch-all provisions of TCEQ Rule 288.6 applied and the interpretation warrants deference.

The ED argues that the WCP review is performed pursuant TCEQ policy and conservation of water resources is an explicit state policy.<sup>94</sup> The ED then points out that chapter 288, when adopted, was directed to all water-related regulatory programs—not just water appropriations.<sup>95</sup> Because of this, the enactment of Texas Water Code section 11.1272 and its implementing rules clarified and defined the phrase "wholesale public water supplier" in describing the submissions of DCPs. Therefore, the ED concludes that the definition used for wholesale public water

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<sup>94</sup> 18 Tex. Reg. 2733 (Apr. 23, 1993).

<sup>95</sup> 18 Tex. Reg. 2733, 2735 (Apr. 23, 1993).

supplier<sup>96</sup> was meant to apply even when “public” was omitted from the phrase. OPIC agrees with the ED that TCEQ Rule 288.5 should be interpreted to apply only to wholesale public water suppliers and, therefore, Applicant’s WCP falls under the catch-all of TCEQ Rule 288.6.

## **b) ALJs’ Analysis**

While the DCP and WCP arguments are similar, a review of the text of the applicable rules and the regulatory history compels a different result.

First, TCEQ Rule 288.5 contains no textual references to a wholesale public water supplier.<sup>97</sup> As mentioned above, TCEQ Rule 288.22—discussing DCPs—references wholesale public water supplier interchangeably with the one reference to wholesale water supplier in the section<sup>98</sup>; however, in TCEQ Rule 288.5, there is nothing in the section to suggest the same interchangeable use is intended. The distinction between a wholesale water supplier and wholesale public water supplier is reinforced by TCEQ Rule 295.9.<sup>99</sup> This rule states that wholesale water suppliers are required to submit a WCP but is silent about the submission of a DCP. However, when the rule references applications for other purposes, it includes both a WCP and DCP requirement.<sup>100</sup> If the Commission intended to use wholesale water supplier

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<sup>96</sup> 30 Tex. Admin. Code § 288.1(25).

<sup>97</sup> See 30 Tex. Admin. Code § 288.5.

<sup>98</sup> See 30 Tex. Admin. Code 288.22(a)(2), (b)-(c).

<sup>99</sup> 30 Tex. Admin. Code § 295.9(2) (describing requirement to provide WCP for wholesale water supplier).

<sup>100</sup> Compare 30 Tex. Admin. Code § 295.9(2), with 30 Tex. Admin. Code § 295.9(1).

interchangeably with wholesale public water supplier in its water rights applications, it would be expected to reference the DCP in TCEQ Rule 295.9(2) as it did in subsection (1).<sup>101</sup>

Even if these provisions are ambiguous, the regulatory history also supports this interpretation. TCEQ Rules 288.5 and 295.9 both predate Texas Water Code section 11.1272 and the subsequent introduction of “wholesale public water supplier” as a defined term and the rule regarding DCPs in 288.22.<sup>102</sup> When enacting rules to implement section 11.1272, the Commission<sup>103</sup> made no changes to the term “wholesale water suppliers” in TCEQ Rules 288.5 and 295.9 despite amending both provisions at the same time.<sup>104</sup>

While it is expected that “wholesale water supplier” would mean the same in both the first line of TCEQ Rule 288.22 and throughout TCEQ Rules 288.5 and 295.9, the result would be the contortion of one or more rules beyond their reasonable application. The ALJs recognize the deference given to an agency’s

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<sup>101</sup> 30 Tex. Admin. Code § 295.9. TCEQ Rule 295.9 was amended contemporaneously with the enactment of the rules regarding DCPs in Chapter 288. 24 Tex. Reg. 969 (Feb. 12, 1999).

<sup>102</sup> 18 Tex. Reg. 2733 (Apr. 23, 1993) (adopting Rule 288.5 regarding WCPs for wholesale water suppliers).

<sup>103</sup> Commission, in this context, includes TCEQ’s predecessor agency the Texas Natural Resource Conservation Commission.

<sup>104</sup> 24 Tex. Reg. 949, 969 (Feb. 12, 1999).

interpretation of its own rules.<sup>105</sup> However, deference is not conclusive or unlimited if it departs from the clear, unambiguous language of its own regulations.<sup>106</sup>

To support her interpretation, the ED notes that Chapter 288 was adopted for all water-related regulatory programs but omits that “wholesale water supplier” is also used in TCEQ Rule 295.9, which is recognized to only apply to water rights by the Commission’s comments.<sup>107</sup> The ED also argues that the Commission intended to clarify its language when it enacted rules and amendments in response to Texas Water Code section 11.1172. However, as noted above, the contemporaneous amendments to chapter 288 and TCEQ Rule 295.9 belie the interpretation that the Commission intended that wholesale water supplier would be universally synonymous with wholesale public water supplier for the reasons specified above.

In its response to comments when amending TCEQ Rule 288.5 and adopting TCEQ Rule 288.22, the Commission noted that one commenter requested a definition of wholesale water supplier.<sup>108</sup> While the Commission agreed that a definition was necessary, it focused on providing an appropriately crafted definition

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<sup>105</sup> *TGS-NOPEC*, 340 S.W.3d at 438.

<sup>106</sup> *TGS-NOPEC*, 340 S.W.3d at 438. No party provided a citation of a court decision or Commission order that addresses this interpretation of “wholesale water supplier.” Instead, this appears to be a matter of first impression for the agency. Tr. Vol. 4 at 755-56 (testifying that this is first wholesale application to divert water solely to industrial customers).

<sup>107</sup> 18 Tex. Reg. 2734 (Apr. 23, 1993) (“Currently only §295.9 of the commission’s rules requires. . . the submission of a water conservation plan with a water right application.”).

<sup>108</sup> 24 Tex. Reg. 951 (Feb. 12, 1999) (“The adopted rules, in §288.30 regarding who must supply water conservation and drought contingency plans, have dropped the use of terms not used in the statute. The adopted rules now are crafted in terms of wholesale and retail public water suppliers.”)

of the statutory term “wholesale public water supplier” in the context of TCEQ Rule 288.30.<sup>109</sup> In that instance, the Commission identified a need to track the statutory language of “wholesale public water supplier,” but made no changes to the use of “wholesale water supplier” in either TCEQ Rule 288.5 or 295.9.

The Applicant, ED and OPIC’s proposed interpretation is inconsistent with the plain language and the regulatory history of TCEQ Rule 288.5. Therefore, the ALJs find that TCEQ Rules 295.9 and 288.5 apply to Applicant, who does not dispute that it would be a wholesale water supplier.

### **3. The Requirements of TCEQ Rule 288.5 and Specificity**

Having found that TCEQ Rule 288.5 applies, the analysis now turns to whether the WCP meets the requirements of the rule. TCEQ Rule 288.5 describes the minimum requirements for a WCP of a wholesale water supplier, which requires: (A) a description of the wholesaler’s service area; (B) specific, quantified five-year and ten-year targets for water savings; (C) a description as to which practice(s) and/or device(s) will be utilized to measure and account for the amount of water diverted; (D) a monitoring and record management program for determining water deliveries, sales, and losses; (E) a program of metering and leak detection and repair for the wholesaler’s water storage, delivery, and distribution system; (F) a requirement in every water supply contract that each successive wholesale customer develop and implement a WCP or water conservation measures; (G) a reservoir

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<sup>109</sup> 24 Tex. Reg. 951 (Feb. 12, 1999).

systems operations plan, if applicable; (H) a means for implementation and enforcement, evidenced by a copy of the ordinance, rule, resolution, or tariff; and (I) documentation of coordination with the regional water planning groups.<sup>110</sup> An applicant may explain why any of the rule’s specific requirements do not apply to its WCP.<sup>111</sup> A WCP should demonstrate that reasonable diligence will be used to avoid waste and achieve water conservation.<sup>112</sup>

### **a) Evidence and Arguments**

Protestants argue that Applicant’s WCP is insufficient because it is vague and lacks specificity or clarity as to certain elements of TCEQ Rule 288.5, including the service area, record management program, and the metering/leak repair program. Protestants assert that many elements in the WCP are insufficient because they simply restate the applicable rule, and thus amount to just a plan to have a plan. Protestants also note that the ED did not review the WCP to determine whether it met the requirements of TCEQ Rule 288.5.<sup>113</sup> To support their position that more is required, Protestants cite to *BFI Waste Systems of North America, Inc. v. Martinez Environmental Group*.<sup>114</sup> In *BFI*, the Third Court of Appeals found that an applicant for a landfill permit failed to submit a detailed site operating plan: “The exact level of detail required of each individual section of a plan is a matter of agency

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<sup>110</sup> 30 Tex. Admin. Code § 288.5(1).

<sup>111</sup> 30 Tex. Admin. Code § 288.5.

<sup>112</sup> 30 Tex. Admin. Code § 295.9.

<sup>113</sup> Tr. Vol. 4 at 745.

<sup>114</sup> 93 S.W.3d 570 (Tex. App.—Austin 2002, pet. denied).

discretion—but, at a minimum, a plan must set out enforceable procedures and be more detailed than the general rules that it implements.”<sup>115</sup>

Applicant argues that it met TCEQ Rule 288.5’s requirements and the WCP is sufficient to demonstrate that Applicant will exercise reasonable diligence to prevent waste. Applicant distinguishes *BFI* from the facts of this case by noting that the rule referenced in *BFI* required operating procedures in sufficient detail to enable the applicant to conduct the day-to-day landfill operations.<sup>116</sup> Meanwhile, the WCP in this case is a set of minimum requirements used to demonstrate reasonable diligence to avoid waste and achieve water conservation.<sup>117</sup> Also, Mr. Dean testified that “[b]ecause this is a request for a new diversion to supply wholesale water, the plan does not provide details which cannot be identified at this phase (e.g., customers, storage tank sizes, and operations).”<sup>118</sup>

The ED provides no argument on this issue. OPIC argues that the conditions in the Draft Permit sufficiently address Protestants’ complaints about the WCP.

ED witness, Ms. Allis, reviewed both Applicant’s WCP for industrial use and the WCP related to wholesale use.<sup>119</sup> While she testified that she reviewed the WCP

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<sup>115</sup> *BFI*, 93 S.W.3d at 579-80.

<sup>116</sup> *BFI*, 93 S.W.3d at 579.

<sup>117</sup> Compare 30 Tex. Admin. Code § 288.5, with 30 Tex. Admin. Code § 330.57; see also 30 Tex. Admin. Code § 259.9.

<sup>118</sup> Ex. APP-KD-1 at 15-16.

<sup>119</sup> Ex. ED-JA-1 (Allis Dir.) at bates 0007.

under TCEQ Rule 288.6, she reviewed aspects of TCEQ Rule 288.5 that she felt were applicable to the Application and its proposed use.<sup>120</sup> As a function of her review, she analyzed whether reasonable water conservation goals have been set; whether the proposed strategies can achieve the stated goals; whether there is a substantiated need for water and whether the appropriation is reasonable.<sup>121</sup> She added that if the criteria are met then staff considers it sufficient evidence to conclude Applicant will avoid waste and achieve water conservation.<sup>122</sup> Reviewing Applicant's WCP, she concludes that Applicant made reasonable, reasonable water conservation goals.<sup>123</sup>

## **b) ALJs' Analysis**

The ALJs find that Applicant's WCP is sufficient to satisfy TCEQ Rule 288.5 and demonstrate Applicant will use reasonable diligence to avoid waste and achieve water conservation.

Starting with *BFI*, Protestants' application of it is misplaced. Subsequent Third Court of Appeals cases illustrate that that not all plans are subject to the same

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<sup>120</sup> Tr. Vol. 4 at 750-55.

<sup>121</sup> Ex. ED-JA-4 (Water Conservation Review Memo.) at bates 0020.

<sup>122</sup> Ex. ED-JA-4 (Water Conservation Review Memo.) at bates 0020.

<sup>123</sup> Ex. ED-JA-4 (Water Conservation Review Memo.) at bates 0020-21.

scrutiny as *BFI*'s site operating plan.<sup>124</sup> Additionally, the WCPs in this case and site-operating plans in *BFI* differ in another salient way—the requirement to revise and update.<sup>125</sup> The *BFI* court recognizes that the “plan is crucial in light of the fact that permits are normally granted for the life of the landfill.”<sup>126</sup> While the water right permit is likewise not subject to renewal, the WCP is. Under TCEQ Rule 288.5, Applicant is required to review and update its WCP every five years or otherwise as appropriate based on an assessment of previous five-year and ten-year targets and any other new or updated information.<sup>127</sup> As noted in TCEQ Rule 295.5, the purpose of the WCP is to demonstrate that reasonable diligence will be used to avoid waste and achieve water conservation.<sup>128</sup> After the issuance of the permit, the applicant is still required to exercise reasonable diligence and prevent waste; it will be subject to an action by the Commission or an injured person or the cancellation or forfeiture of the right to appropriate water that is not beneficially used.<sup>129</sup> Because TCEQ Rule 288.5 is distinguishable from the rules in *BFI*, the ALJs find that *BFI* does not apply

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<sup>124</sup> *Maverick Cty. v. R.R. Comm’n of Tex.*, No. 03-14-00257-CV, 2015 WL 9583873, at \*14 & n.22 (Tex. App.—Austin Dec. 29, 2015, pet. denied) (finding that application of *BFI* would be misplaced where protestant complained that applicant’s air control plan did not present any real plan beyond assertions that it would comply with the rules); *Citizens Against Landfill Location v. Texas Comm’n on Env’t Quality*, 169 S.W.3d 258, 268-69 (Tex. App.—Austin 2005, pet. denied) (addressing complaint that applicant merely recited language of Commission rules, court held the detail for the site operating plan in *BFI* was necessary to ensure compliance with regulations and the Commission did not err by not applying *BFI* to its case).

<sup>125</sup> Protestants reference that this is their opportunity to meaningful comment regarding the WCP. Assuming they are right, the importance of meaningful comment is undercut by a permittee’s ability (and duty) to review and update its WCP without an additional contested case hearing or comment period. The review and update illustrate the focus of the WCP as not a stagnant document but one capable of change when new information is learned.

<sup>126</sup> *BFI*, 93 S.W.3d at 579.

<sup>127</sup> 30 Tex. Admin. Code § 288.5(3).

<sup>128</sup> 30 Tex. Admin. Code § 295.9.

<sup>129</sup> 30 Tex. Admin. Code § 297.48.

and will examine whether the WCPs and the evidence in this case meet the purposes of the WCP under TCEQ Rules 288.5 and 295.9.

Turning to the WCP, the ALJs find that it is sufficient to comply with the TCEQ Rules, including TCEQ Rules 288.5 and 295.9. The service area is identified by name and population as San Patricio County, which is reflected in the Draft Permit.<sup>130</sup> For other elements, Applicant has demonstrated that it will employ appropriate programs or plans for monitoring.<sup>131</sup> As for enforcement, Applicant has passed a resolution adopting the WCP, which is recognized by TCEQ Rule 288.5 as evidence of means of implementation and enforcement.<sup>132</sup> Additionally, Applicant has stated that it will require successive customer conservation in all water supply contracts in accordance with the requirements specified in the TCEQ Rules.<sup>133</sup>

Applicant has met its burden to provide a WCP that complies with TCEQ Rule 288.5 and has demonstrated that reasonable diligence will be used to avoid waste and achieve water conservation.

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<sup>130</sup> For other types of information in the service area, such as customer data, Applicant demonstrated that it currently has no customers. Ex. APP-SG-9 (Water Conservation Plan) at bates 000059.

<sup>131</sup> Ex. APP-SG-9 (Water Conservation Plan) at bates 000063-64; Tr. Vol. 4 at 770.

<sup>132</sup> Ex. APP-SG-10 (Resolution Adopting WCP) at \*15; *see* 30 Tex. Admin. Code § 288.5.

<sup>133</sup> Ex. APP-SG-9 (Water Conservation Plan) at bates 000064; *see Upper Trinity Regional Water Dist. v. Nat'l Wildlife Fed.*, 514 S.W.3d 855, 870-71 (Tex. App.—Houston [1st Dist.], no pet.).

#### **4. Requirements of TCEQ Rule 288.7**

TCEQ Rule 288.7(b) states that it is the burden of the applicant to demonstrate that no feasible alternative to the proposed appropriation exists and the requested amount of appropriation is necessary and reasonable for the proposed use.

##### **a) Evidence and Arguments**

Protestants argue that Applicant failed to meet this burden. To support this, Protestants assert that Applicant's expert witness offers only conclusory, unreliable opinions on these issues.<sup>134</sup> They also cite Applicant witness Ms. Garza's testimony that the Applicant did not consider whether other desalination facilities or other discharge and intake locations were feasible alternatives to the Facility.<sup>135</sup> In the prioritization of recommended water management strategy programs, the Facility is listed 31st among water management strategies,<sup>136</sup> and Protestants argue that Applicant did nothing to discount these other strategies as feasible options. Protestants' witness, Mr. Shuster, identified that water is available through other means like the Mary Rhodes Pipeline and groundwater sources are also available from well fields in San Patricio County and Jim Wells County.<sup>137</sup> Given these other

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<sup>134</sup> Ex. APP-KD-1 (Dean Dir.) at 14 ("The amount of requested appropriation is reasonable and necessary for the proposed use, and there are no other practicable alternatives that meet the projected water supply needs in San Patricio County.").

<sup>135</sup> Tr. Vol. 1 at 92.

<sup>136</sup> Ex. APP-KK-3 (Prioritization of Recommended Water Management Strategy Projects) at \*3.

<sup>137</sup> Ex. IOB-100 (Shuster Dir.) at 19.

potential sources and the other planned desalination projects in the area,<sup>138</sup> Protestants argue that Applicant failed to demonstrate that the appropriation amount is necessary.

Applicant argues that it met its burden in the WCP when it evaluated other alternatives, declaring that this appropriation is the best alternative based on the proposed building of a large-scale project (Gulf Coast Growth Ventures involving Exxon and Sabic) that will result in foreseeable industrial economic development and a need for an unlimited and reliable source water.<sup>139</sup> Also, the WCP identifies that desalination meets the goals of conservation by converting a water source of lower water quality to a form having greater usability and commercial value.<sup>140</sup> Additionally, the Facility is identified in the 2021 Region N Water Plan, and desalination is listed as a long term strategy for supplying water for manufacturing use in San Patricio County.<sup>141</sup>

The ED's conservation review also analyzed whether Applicant had met its burden and concluded that it had.<sup>142</sup> ED witness, Ms. Allis, detailed that, in the 2021 Region N Water Plan, desalination is the only recommended strategy of sufficient

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<sup>138</sup> Ex. APP-SG-14 (2021 Region N Water Plan) at 19 (table ES.7 identifying two projects by the City of Corpus Christi (Inner Harbor and La Quinta), the Poseidon Regional Project at Ingleside; and Applicant's project at Harbor Island).

<sup>139</sup> Ex. APP-SG-9 (Water Conservation Plan) at bates 000066.

<sup>140</sup> Ex. APP-SG-9 (Water Conservation Plan) at bates 000065.

<sup>141</sup> Ex. APP-SG-14 (2021 Region N Water Plan) at 19 (table ES.7 also listed this Facility in its list of potential water management strategies to meet long-term needs).

<sup>142</sup> Ex. ED-JA-4 (Water Conservation Review Memo.) at bates 21-22.

quantity to meet projected need in Nueces and San Patricio Counties.<sup>143</sup> Addressing the element of need, Ms. Allis detailed that the regional water plan found that the region will have water supply shortages from 2020 to 2070 due to large manufacturing demands in Nueces and San Patricio Counties. The regional plan identified Applicant as a potential future wholesale water provider, primarily serving San Patricio and Nueces County manufacturing users, under the recommended seawater desalination strategy.<sup>144</sup>

## **b) ALJs' Analysis**

The ALJs find that no feasible alternative exists, and Applicant has met its burden to demonstrate that the appropriation is reasonable and necessary.

To begin, 2021 Region N Water Plan recognizes desalination as a recommended water management strategy and this Facility as a part of that strategy.<sup>145</sup> The San Patricio Municipal Water District recommended desalination as the area's primary long term water supply solution.<sup>146</sup> The Texas Water Development Board in its 2022 State Water Plan recommended a supply of 179,000 acre-feet per year of desalinated seawater by 2030 for the three regions that

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<sup>143</sup> Ex. ED-JA-4 (Water Conservation Review Memo.) at bates 22.

<sup>144</sup> Ex. APP-SG-14 (2021 Region N Water Plan) at 13; *see also* Ex. ED-JA-4 (Water Conservation Review Memo.) at bates 21.

<sup>145</sup> Ex. APP-SG-14 (2021 Region N Water Plan) at 28.

<sup>146</sup> Ex. IOB-108 (San Patricio Municipal Water Tech. Memo. 1) at bates 019150.

recommended seawater desalination.<sup>147</sup> The State Water Plan identifies that Region N was one of two regions that were able to identify recommended strategies—which include desalination at the Facility—that would meet their projected needs for their water user groups.<sup>148</sup> Also, desalination and the proposed appropriation are designed to be an alternative to freshwater appropriation: “The purpose of the proposed facility is to conserve scarce fresh water . . . and instead creating an alternative to existing sources of fresh water.”<sup>149</sup> In the WCP, Applicant identifies that desalination meets conservation goals by converting lower quality water to higher valuable form.<sup>150</sup>

Therefore, the ALJs find that Applicant has met its burden.

### **C. AVAILABILITY OF UNAPPROPRIATED WATER**

To obtain a water right, the Applicant must demonstrate that unappropriated water is available in the source of supply.<sup>151</sup> Applicant requested to divert 101,334 acre-feet of water per year from a point on Corpus Christi Bay, San Antonio-Nueces Coastal Basin, at a maximum diversion rate of 140.12 cfs (62,890 gpm).<sup>152</sup>

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<sup>147</sup> Ex. APP-SG-15 (2022 State Water Plan) at 107.

<sup>148</sup> Ex. APP-SG-15 (2022 State Water Plan) at 114.

<sup>149</sup> Ex. APP-KD-1 (Dean Dir.) at 16.

<sup>150</sup> Ex. APP-SG-9 (Water Conservation Plan) at bates 000065.

<sup>151</sup> Tex. Water Code § 11.134(b)(2).

<sup>152</sup> Ex. ED-KA-4 (Hydrology Review Memo.) at bates 0088.

## 1. Evidence and Arguments

Staff reviewed the requested appropriation and found that no water availability analysis was needed because the application is located in Corpus Christi Bay where the water is saline.<sup>153</sup> ED witness, Dr. Alexander, testified that a TCEQ policy was adopted in 2015 after stakeholder meetings with modeling stakeholders, which states that saline water diversions such as this should be excluded from the water availability modeling typically used for freshwater diversions.<sup>154</sup> She elaborated that:

TCEQ has permitted saline diversions from bays and estuaries in Texas for many years. In permitting diversions from bays, estuaries, and tidally influenced locations, ED staff assumes that the available supply is greater than a requested diversion amount because the available supply is continually replenished.<sup>155</sup>

Staff's hydrology review also noted that the proposed appropriation would be subject to the requirements and orders of the South Texas Watermaster, who actively manages water rights daily and protects senior water rights in times of shortage.<sup>156</sup>

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<sup>153</sup> Ex. ED-KA-4 (Hydrology Review Memo.) at bates 0089.

<sup>154</sup> Ex. ED-KA-1 (Alexander Dir.) at bates 0050.

<sup>155</sup> Ex. ED-KA-1 (Alexander Dir.) at bates 0050.

<sup>156</sup> Ex. ED-KA-4 (Hydrology Review Memo.) at bates 0089.

Applicant's witnesses similarly testified that availability of water for the appropriation is not tied to the freshwater flows of the Nueces River, but instead will be replenished unlimitedly from the hydraulic connection to the Gulf of Mexico.<sup>157</sup> OPIC agreed in briefing that the proposed appropriation is available for the same reasons.

Protestants argue that existing sources of industrial contamination and the proposed discharges of saline wastewater in the proximity of Applicant's proposed diversion intakes has the potential to make the quality of the water unusable for the proposed purposes. Protestants argue it follows that Applicant has not demonstrated that unappropriated water is available in the source of supply.

## **2. ALJs' Analysis**

The evidence demonstrates that there is an unlimited supply of saline water for the proposed diversions due to the hydraulic connection to the Gulf of Mexico. Protestant's argument that the proposed diversion of water at the intakes will be unusable for the stated purposes is speculative and unsupported. Therefore, the ALJs find that Applicant has met its burden on this issue.

## **D. BENEFICIAL USE**

Applicant requested the proposed diversion to "provide the Coastal Bend Region with approximately 30 MGD of water for industrial supply use that will

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<sup>157</sup> Exs. APP-KK-1 (Kennedy Dir.) at 8, APP-LT-1 (Tischler Dir.) at 9-10.

support future industrial needs.”<sup>158</sup> A proposed appropriation of water shall be granted only if it is intended for a beneficial use.<sup>159</sup> Texas Water Code section 11.023 lists the purposes for which water may be appropriated—it includes “agricultural uses and industrial uses, meaning processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including the development of power by means other than hydroelectric . . .”<sup>160</sup> ED Staff reviewed the Application and found that Applicant’s proposed use—industrial purposes—is a beneficial use of water under section 11.023 and 30 Texas Administrative Code section 297.43.<sup>161</sup>

## **1. Evidence and Arguments**

Protestants do not dispute that Applicant’s proposed use for industrial purposes may be a legitimate beneficial use. Nevertheless, they argue that Applicant has failed to meet its burden on this issue for two reasons. First, they allege that Applicant has not demonstrated that it will be able to beneficially use the quantity of water it is seeking. They state that Applicant’s request is supported only by a speculative need to supply industrial growth and that a need for the requested amount has not been demonstrated. They argue that even if there is a need identified in the state and regional water plans, Applicant has not demonstrated that other providers noted in the plans will not address that need. Second, Protestants allege

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<sup>158</sup> Ex. APP-SG-3 (Application) at bates 00002.

<sup>159</sup> Tex. Water Code § 11.134(b)(3)(A).

<sup>160</sup> Tex. Water Code § 11.023(a)(2).

<sup>161</sup> Ex. ED-KA-1 (Alexander Dir.) at bates 0047.

that Applicant cannot demonstrate that it will beneficially use the water without wasting it. Protestants' note that Applicant has not identified the specific location of the discharge of its high-salinity waste brine, which Protestants have labelled as "surplus water." They point to 30 Texas Administrative Code section 297.48(a) and (b), which defines waste to include "the diversion or use of water in any manner that causes or threatens to cause pollution of water in violation of applicable rules and standards." Protestants' state that Applicant cannot rely on a Texas Pollutant Discharge Elimination System (TPDES) permit for return flows to demonstrate that they will not damage the environment because Applicant has not yet obtained the TPDES permit.

Regarding the need for water, Applicant relies on the proposed diversion's inclusion in the state and regional water plans, which identify it as a strategy to meet future manufacturing and power needs. In response to Protestants' second argument relating to waste, Applicant states that the waste-brine is more properly categorized as wastewater "return flows" subject to a separate permitting process for discharge.

OPIC and the ED agree that Applicant has met its burden with respect to this issue by its identification of industrial use as a purpose of use and by the proposed project's inclusion in the state and regional water plans as a strategy to address future industrial needs.

## **2. ALJs' Analysis**

The ALJs find that the Applicant has met its burden on the issue of beneficial use. Applicant identified industrial use as its proposed purpose of use (which is a purpose of use specifically enumerated in law), and its proposed project is a strategy identified to meet a projected need in the state and regional water plans. The ALJs are not persuaded by Protestants' arguments relating to return flows and waste due to potential pollution of water in violation of applicable rules and standards. Protestants cite to no examples where the water quality impacts of return flows were considered in an analysis of beneficial use for a new appropriation of water. Protestants' water quality concerns are outside the scope of this proceeding. Applicant must obtain, and has applied for, a permit to discharge any wastewater return flows—and the impacts of pollution will be more appropriately addressed there.

### **E. WATER RIGHTS AND VESTED RIPARIAN RIGHTS**

The Commission cannot grant a new appropriation of state water if it would impair existing water rights or vested riparian rights.<sup>162</sup> ED Staff reviewed the Application and found that the proposed diversion would not impair existing freshwater rights or vested riparian rights. Water rights applications are typically analyzed by modeling availability when all permitted water rights are fully authorized. In this case, ED Staff did not model the water rights because the appropriation is saline water, which is continuously replenished by its hydraulic

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<sup>162</sup> Tex. Water Code § 11.134(b)(3)(B).

connection to the Gulf of Mexico.<sup>163</sup> ED Staff further determined that the Application would not affect other water rights (1) due to its relative junior priority date of May 11, 2020; (2) because the proposed diversion is downstream of all senior water right holders in the basin; and (3) because the South Texas Watermaster actively manages water rights in the basin.<sup>164</sup>

## **1. Evidence and Arguments**

Applicant's witnesses agreed with the ED Staff's determination that the proposed diversion would not impair existing freshwater rights or vested riparian rights.<sup>165</sup> OPIC argued that the evidence supported a finding that Applicant met its burden with respect to this issue.

Protestants disagree. They argue that Mr. Serna is vested with littoral rights which they contend are synonymous with riparian rights.<sup>166</sup> They opine that Applicant failed to show that its proposed "surplus water return" will not impact the integrity of Mr. Serna's dock nor the stability of the shoreline at his property. They also contend that the evidence demonstrates that the quality of the water at Mr. Serna's property will be detrimentally impacted by the "proposed facility" due to the quality of the return water.

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<sup>163</sup> Ex. ED-KA-1 (Alexander Dir.) at bates 0049-51; Ex. ED-KA-4 (Hydrology Memo) at bates 0088-89.

<sup>164</sup> Ex. ED-KA-1 (Alexander Dir.) at bates 0050-51.

<sup>165</sup> Ex. APP-LT-1 (Tischler Dir.) at 11; Ex. APP-KK-1 (Kennedy Dir.) at 6-8.

<sup>166</sup> Citing *Cummins v. Travis Cnty. Water Control and Improvement Dist. No. 17*, 175 S.W.3d 34, 42 (Tex. App.—Austin 2005, pet. denied).

Applicant responds that there is no basis in law to treat littoral right holders the same as riparian right holders. Applicant and ED Staff also argue that there is no evidence that Mr. Serna has a vested riparian right or that there are any other vested riparian rights in Corpus Christi Bay to protect. Regarding Protestant's arguments about potential detrimental impacts to Mr. Serna's dock and shoreline, Applicant counters that even if Mr. Serna could show a vested riparian right, and that its protections extend to his littoral rights in this case, the evidence shows his property will not be impacted because the water intake is more than 1,000 feet from the shoreline at its closest point, it is submerged, and the intake velocity will be indistinguishable from the ambient current.<sup>167</sup> Regarding the alleged impacts to water quality, Applicant argues the impacts are outside the scope of this proceeding, and even so, the effluent discharge will be in the La Quinta Ship Channel, far from Mr. Serna's dock.<sup>168</sup>

## **2. ALJs' Analysis**

Regarding water quantity, the ALJs find that Applicant met its burden to prove that the proposed diversions of saline water will not impact senior water rights or vested riparian rights because the record shows that (1) the diversions of saline water from Corpus Christi Bay cannot impact any senior water right holders or vested riparian rights' access to fresh water diversions upstream from Applicant's

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<sup>167</sup> Ex. APP-LT-1 (Tischler Dir.) at 1.

<sup>168</sup> Ex. APP-SG-3 (Application) at bates 000097.

proposed diversions, (2) there is an unlimited supply of saline water for the proposed diversions due to the hydraulic connection to the Gulf of Mexico such that any other diverters have access to saline water regardless how much Applicant diverts, and (3) the South Texas Watermaster actively manages water rights in the basin.

With respect to Protestant's arguments relating to Mr. Serna's littoral rights, the ALJs agree with Applicant that Protestants have provided no citation to law or precedent suggesting that littoral rights should be construed as vested riparian rights in this context. Even so, although the ALJs note that it is Applicant's burden to prove that its proposed diversions will not impact vested riparian rights (not Protestants' burden to prove that it has rights that will be impaired), the ALJs need not determine whether Mr. Serna has vested riparian rights to consider this issue. The ALJs agree that the record demonstrates that the proposed water intake cannot impact the integrity of docks or shoreline because it is more than 1000 feet from the shoreline at its closest point, it is submerged, and the intake velocity will be indistinguishable from the ambient current.

Regarding the alleged impacts on water quality due to future return of wastewater, the ALJs find that Protestants' concerns regarding water quality are outside the scope of this proceeding. Although the "no-injury rule" provides that adverse impact to another appropriator may include "the possibility of depriving an appropriator of the equivalent quantity *or quality* of water that was available . . . before the change," the ALJs find that the impacts of future discharges (as opposed

to the impacts diversions) are governed by water quality permitting.<sup>169</sup> No party cited any law or precedent which suggests that future water quality discharges, subject to a separate permitting action, have been considered in a water right permit application, particularly where, as here, the record demonstrates that Applicant must obtain, and has applied for, a permit to discharge any wastewater return flows. The impacts of pollution will be more appropriately addressed there.

## **F. PUBLIC WELFARE**

The Commission may grant the Application only if the proposed appropriation “is not detrimental to the public welfare.”<sup>170</sup> “In determining whether an appropriation is detrimental to the public welfare . . . , the commission may consider only the factors that are within the jurisdiction and expertise of the commission as established by [Chapter 11 of the Texas Water Code].”<sup>171</sup> After reviewing the Application, ED Staff determined it met all of the requirements in Chapter 11 of the Texas Water Code and the Commission’s rules.<sup>172</sup> ED Staff did not perform an additional (separate) review of public welfare.

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<sup>169</sup> 30 Tex. Admin. Code § 297.45(a).

<sup>170</sup> Tex. Water Code § 11.134(b)(3)(C).

<sup>171</sup> Tex. Water Code § 11.134(b-1).

<sup>172</sup> Ex. ED-KA-1 (Alexander Dir.) at bates 0048.

## 1. Evidence and Arguments

On this issue, Applicant urges its testimony from Doctors Dean and Tischler show that the proposed appropriation will not be detrimental to public welfare. Dr. Dean testified that the proposed diversion structure will not interfere with navigation or recreational uses of the bay because it will be constructed at a similar depth of the surrounding bay floor and all pipes between the intake structure and the facility will be buried below the bay bottom and outside the navigation channels.<sup>173</sup> Doctors Dean and Tischler opine that the proposed project will enhance public welfare, as opposed to being a detriment, because the proposed desalination of saltwater for industrial purposes will provide a drought-proof alternative that will reduce the need for freshwater from rivers, streams and groundwater thus increasing the availability of freshwater for municipal use.<sup>174</sup>

Protestants contend that the location of the intakes will pose risks to persons and wildlife in the vicinity of the structures. Protestants also argue that the intake structures would cause meaningful mortality to recreationally important species.<sup>175</sup> Protestants witness, Dr. Nielsen, opines that the dredging required to construct the intakes will have detrimental impacts to wildlife due to disturbance and dispersal of contaminants in marine sediments and that the dredging will particularly impact

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<sup>173</sup> Ex. APP-KD-1 (Dean Dir.) at 18-19.

<sup>174</sup> Ex. APP-KD-1 (Dean Dir.) at 18-19; Ex. APP-LT-1 (Tischler Dir.) at 16.

<sup>175</sup> Ex. IOB-300 (Nielsen Dir.) at 12.

sediment-associated organisms important to the food chain.<sup>176</sup> Finally, Protestants argue that discharges will impact aquatic-dependent birds.<sup>177</sup>

Regarding currents near the intake, Applicant responds that Protestants have no credible evidence to support claims that currents at the intake structures will pose a threat to persons or wildlife. Rather, Applicant contends the evidence shows intake velocity across the wire-mesh screens will be less than or equal to 0.5 feet per second and will not create turbulence or re-suspend sediment near them and since the intakes will be 5 feet from the bottom, benthic organisms (located on the seabed) will not be entrained.<sup>178</sup> Further, the hydraulic zone of influence will be less than 50 feet.<sup>179</sup>

In response to Protestants' issue of mortality to recreationally important species, Applicant points out that Protestants' witness did not testify that the alleged impacts would occur at the proposed location, but rather if the intake was located in seagrasses 1400 feet away there would be impacts.<sup>180</sup>

Additionally, Applicant argues that issues relating to dredging and discharge are outside the jurisdiction and expertise of the Commission as established by

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<sup>176</sup> Ex. IOB-300 (Nielson Dir.) at 15-20.

<sup>177</sup> Ex. IOB-300 (Nielson Dir.) at 12.

<sup>178</sup> Ex. APP-LF-1 (Fontenot Dir.) at 8; Tr. Vol. 2 at 478.

<sup>179</sup> Ex. APP-SG-3 (Application) at bates 000045.

<sup>180</sup> Applicant's Reply Br. at 16-17.

Chapter 11 of the Texas Water Code. In particular, Applicant argues discharges are governed by Chapter 26 of the water code and permitting for dredging is under the exclusive jurisdiction of the U.S. Army Corps of Engineers (USACE).<sup>181</sup> The ED agrees.<sup>182</sup> Nevertheless, Applicant addressed Protestants' concerns relating to dredging in Section G, relating to environmental impacts.

OPIC did not take a position on this issue.

## **2. ALJs' Analysis**

The ALJs agree with Applicant and ED Staff that an application meets the burden regarding public welfare if it meets all the requirements of Chapter 11 of the Texas Water Code and no detriment can be shown within the confines of the Commission's jurisdiction and expertise under that chapter.<sup>183</sup> The ALJs find there is no credible evidence to support Protestants' claims that currents at the intake structures will pose a threat to persons or wildlife. The record evidence indicates the intake structures will be located over 1,000 feet from shore, will be about 10 feet below the water surface and 5 feet above the ground level, and that the velocity will not be unsafe for persons or aquatic species. Further, as will be discussed in more detail in Subsection J, Permit Conditions, the evidence does not show that the intakes will pose a threat to recreationally important species.

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<sup>181</sup> See Applicant's Closing Arg. at 33-35 (for a more detailed description of Applicant's arguments relating to TCEQ's and USACE's respective authority over dredging activity).

<sup>182</sup> Exs. ED-GG-1 (Gable Dir.) at bates 0029, ED-KA-1 (Alexander Dir.) at bates 0048, 53, 57.

<sup>183</sup> Tex. Water Code § 11.134(b)(3)(C), (b-1).

The ALJs agree that any impacts of discharges are outside the scope of this proceeding, and more importantly for this issue, outside the Commission’s jurisdiction and expertise as established by Chapter 11 of the Texas Water Code. Discharges are addressed instead in Chapter 26 of the water code, and as noted, Applicant must obtain, and has applied for, a permit to discharge any wastewater return flows—and the impacts of pollution will be more appropriately addressed there.

Similarly, regarding any jurisdiction or expertise the Commission may have regarding dredging, such authority is not enumerated in Chapter 11 of the water code, and therefore is not appropriate for consideration in “determining whether an appropriation is detrimental to the public welfare.”<sup>184</sup>

#### **G. PROTECTION OF ENVIRONMENT/ENVIRONMENTAL FLOW STANDARDS AND ASSESSMENTS**

“The commission shall grant the application only if . . . the proposed appropriation . . . considers any applicable environmental flow standards established under Section 11.1471 and, if applicable, the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152.”<sup>185</sup> Regarding the first part, there does not appear to be any dispute that the permit appropriately considered

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<sup>184</sup> Tex. Water Code § 11.134(b)(3)(C), (b-1).

<sup>185</sup> Tex. Water Code § 11.134(b)(3)(D).

“applicable environmental flow standards established under Section 11.1471.”<sup>186</sup> However the parties differ on whether “the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152” were additionally applicable to the permit.

## **1. Environmental Flow Standards and Assessments**

Under Section 11.147, the Commission is required to assess the effects of the proposed appropriation on bays and estuaries (including beneficial inflows) and on instream uses,<sup>187</sup> and under Section 11.1471, the Commission was required to adopt environmental flow standards for each river basin and bay system in the state.<sup>188</sup> Pursuant to Section 11.1471, the Commission adopted environmental flow standards applicable to the Nueces River and its associated tributaries, tributaries in the Nueces-Rio Grande Coastal Basin, and Corpus Christi and Baffin Bays.<sup>189</sup> Section 11.147(e-3) states: “[n]otwithstanding Subsections (b)-(e), for the purpose of determining the environmental flow conditions necessary to maintain freshwater inflows to an affected bay and estuary system, existing instream uses and water quality of a stream or river, or fish and aquatic wildlife habitats, the commission shall apply any applicable environmental flow standard, including any environmental flow

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<sup>186</sup> Tex. Water Code § 11.134(b)(3)(D).

<sup>187</sup> Tex. Water Code § 11.147.

<sup>188</sup> Tex. Water Code §§ 11.147, .1471.

<sup>189</sup> Tex. Water Code § 11.1471; 30 Tex. Admin. Code ch. 298, subch. F.

set-aside, adopted under Section 11.1471 instead of considering the factors specified by those subsections.”<sup>190</sup>

**a) Evidence and Arguments**

Regarding environmental flows, ED Staff performed a hydrology review of the Application and determined:

The adopted rules include freshwater inflow standards for the Nueces Bay and Delta. This application is located in Corpus Christi Bay which is downstream of the location where the freshwater inflow standards apply. Therefore, this application does not impair freshwater inflows to Nueces Bay and Delta. Because staff found that the application did not impair the freshwater inflow regime, which by rule is adequate to support a sound ecological environment, and because one of the purposes of the adopted rules is to protect coastal natural resources the application is consistent with any applicable Coastal Management Program (CMP) goals and policies.<sup>191</sup>

ED Staff’s environmental review similarly determined that:

The diversion point is located in Corpus Christi Bay, which is downstream of the measurement points for instream flow standards in Subchapter F of Chapter 298. The instream flow standards apply to diversions from rivers and streams. Therefore, the instream flow standards do not apply to diversions from Corpus Christi Bay.<sup>192</sup>

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<sup>190</sup> Tex. Water Code § 11.147.

<sup>191</sup> Ex. ED-KA-4 (Hydrology Memo) at bates 0088.

<sup>192</sup> Exs. ED-GG-1 (Gable Dir.) at bates 0028, ED-GG-3 (Environmental Memo) at bates 0035.

In support on the issue of environmental flows, Applicant provided additional argument and evidence that was unrebutted by any party.<sup>193</sup> No party appears to argue that Applicant failed to meet its burden regarding environmental flows.

## **b) ALJs' Analysis**

The ALJs find that Applicant has met its burden to prove that the proposed appropriation appropriately considered all applicable environmental flow requirements, including instream flows and freshwater inflows.

## **2. Protection of the Environment**

The ALJs' finding that the appropriation properly considered any applicable environmental flow standards established under Section 11.1471 leaves a substantial dispute among the parties as to whether additional assessments are required by Texas Water Code § 11.134(b)(3)(D)—namely whether “the assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152” are applicable to this appropriation.<sup>194</sup> As will be discussed, the parties disagree on whether Texas Water Code Section 11.147(e-3) wholly supplants the applicability of those provisions.

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<sup>193</sup> Exs. APP-KK-1 (Kennedy Dir.) at 6, 9; APP-LT-1 (Tischler Dir.) at 13; APP-RP-1 (Palechek Dir.) at 19, 21-22.

<sup>194</sup> To summarize these disputed assessments, Texas Water Code § 11.147(d) and (e) require the Commission to include conditions necessary to maintain existing instream uses and water quality, and conditions necessary to maintain fish and wildlife habitats (“and in making such determinations, must consider any assessment performed pursuant to Texas Water Code § 11.152”). Section 11.150 requires the Commission to “assess the effects, if any, of the issuance of the permit on water quality.” For an application for a permit to store, take, or divert water in excess of 5,000 acre feet per year, Section 11.152 requires the Commission to “assess the effects, if any, on the issuance of the permit on fish and wildlife habitats and may require the applicant to take reasonable actions to mitigate adverse impacts on such habitat . . .”

**a) Commission Interpretation of Texas Water Code Section  
11.147(e-3)**

Because environmental flow standards have been adopted for the San Antonio-Nueces Coastal basin pursuant to Texas Water Code section 11.1471, Applicant and the ED each argue that Section 11.147(e-3) unambiguously supplants any requirement for additional “assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152.”<sup>195</sup>

Section 11.147(e-3) states:

Notwithstanding Subsections (b)-(e), for the purpose of determining the environmental flow conditions necessary to maintain freshwater inflows to an affected bay and estuary system, existing instream uses and water quality of a stream or river, or fish and aquatic wildlife habitats, *the commission shall apply any applicable environmental flow standard, including any environmental flow set-aside, adopted under Section 11.1471 instead of considering the factors specified by those subsections.*<sup>196</sup>

Applicant and the ED argue that the Section 11.150, 11.151, and 11.152 assessments are specifically addressed in Subsections (d) and (e) of Section 11.147, which are in turn supplanted by Section 11.147(e-3)’s dictate to apply applicable environmental flow standards adopted under section 11.1471 instead of the provisions in Texas Water Code § 11.147(b)-(e). Applicant argues this issue was resolved, in its favor, in a somewhat recent Commission decision on an application

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<sup>195</sup> Tex. Water Code §§ 11.134(b)(3)(D), .147(e-3).

<sup>196</sup> Tex. Water Code § 11.147(e-3) (emphasis added).

by the Guadalupe-Blanco River Authority (GBRA).<sup>197</sup> Applicant states that the only residual environmental review found by the Commission in that case involved special conditions relating to entrainment and impingement.<sup>198</sup>

Protestants counter that because the requested appropriation exceeds 5,000 acre-feet, habitat assessments are mandated by Texas Water Code section 11.152 and 30 Texas Administrative Code section 297.53. Protestants contend that section 11.147(e-3) supplants only the requirement to determine the environmental flow conditions and does not address or supplant broader “non-flow” effects on fish and wildlife habitats which are required under Texas Water Code sections 11.147(e) and .152.

Regarding the GBRA matter, Protestants opine that the factual differences between this application and the permit issued there warrant different consideration. Primarily, they argue that diversions from a river are different from diversions “from a location with a sensitive estuary within an enclosed Bay.”<sup>199</sup> Next, Protestants argue that the Commission can be afforded no deference where the statutory language is unambiguous, as it is in Texas Water Code Sections 11.147(e) and .152. Finally, Protestants contend that the Commission’s decision actually supports their

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<sup>197</sup> *Citing Order Approving the Application of Guadalupe-Blanco River Authority for New Water Use Permit No. 12378*, TCEQ Docket No. 2014-1658-WR; SOAH Docket Number 582-15-2477 (Sept. 1, 2020). Because multiple parties argued about the precedential value of this matter, the ALJs take official notice of the Proposal for Decision, the Commission’s Final Order, and the Commission’s discussion about the matter at an August 12, 2020 Open Meeting.

<sup>198</sup> Applicant’s Reply Br. at 18-19.

<sup>199</sup> Protestants’ Reply Br. at 23.

position that the environmental flows did not wholly supplant the assessments required by Texas Water Code Sections 11.147(e) and .152.

OPIC took no position on the question.

The ALJs agree that the precise dispute here (whether Section 11.147(e-3) unambiguously supplants any requirement for additional “assessments performed under Sections 11.147(d) and (e) and Sections 11.150, 11.151, and 11.152”) was squarely before the Commission in the GBRA matter. In that case, the Commission specifically acknowledged there was a question as to whether Section 11.147(e-3) left any “residual obligation to assess the impacts of diversion structures.” However, the Commission did not specifically answer the question and instead focused on the evidence in the record. The Commissioners’ discussion regarding the issue stated that reasonable minds could differ on the interpretation of Section 11.147(e-3), and that it need not decide the issue in that matter because the record supported findings that the permit adequately protected fish and wildlife habitats.<sup>200</sup> Indeed, the Commission’s Final Order in the matter leaves both possibilities intact. The PFD in the GBRA matter included the following Conclusion of Law (COL):

28. The Commission must assess impacts to fish and wildlife habitat resulting from the diversion facilities. Tex. Water Code § 11.152; 30 Tex. Admin. Code§ 297.53.

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<sup>200</sup> *In re App. of Guadalupe-Blanco River Auth. for New Water Use Permit No. 12378*, TCEQ Docket No. 2014-1658-WR; SOAH Docket Number 582-15-2477 (Commission Discussion at Open Meeting, Aug. 12, 2020).

But the Commission added two additional COLs to effectuate its intent:

28.A. 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.

28.B Regarding any further review of fish and wildlife concerns that may be required under the amended statutory scheme for the on-stream diversion facilities, Special Conditions 6.L. of the NDP adequately complies with applicable provisions of the Texas Water Code and TCEQ rules.<sup>201</sup>

The ALJs conclude that reasonable minds could find either of the interpretations advocated by Applicant and the ED or by Protestants valid and, because it is a pure question of law, the ALJs defer to the Commission on this question. The ALJs will follow the Commission’s template from the GBRA matter and examine the record evidence “[r]egarding any further review of fish and wildlife concerns that *may be required* under the amended statutory scheme for the on-stream diversion facilities.”<sup>202</sup>

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<sup>201</sup> *Order Approving the Application of Guadalupe-Blanco River Authority for New Water Use Permit No. 12378*, TCEQ Docket No. 2014-1658-WR; SOAH Docket Number 582-15-2477 (Sept. 1, 2020).

<sup>202</sup> *Order Approving the Application of Guadalupe-Blanco River Authority for New Water Use Permit No. 12378*, TCEQ Docket No. 2014-1658-WR; SOAH Docket Number 582-15-2477 (Sept. 1, 2020) (*see* COL 28.B.).

**b) Extent of “assessments performed under Texas Water Code sections 11.147(d) and (e) and sections 11.150, 11.151, and 11.152.”**

As noted previously, ED Staff’s environmental review consisted solely of examining the environmental flow standards for the Nueces River and its tributaries, tributaries in the Nueces-Rio Grande Coastal Basin, and Corpus Christi and Baffin Bays.<sup>203</sup> Mr. Gable testified for the ED that his review did not include recommended provisions related to impingement and entrainment of aquatic organisms because the ED Staff’s procedure at the time of his review was to incorporate recommendations directly into the Draft Permit.<sup>204</sup> As noted above, Draft Permit Special Condition 5.B requires the implementation of “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(s).”<sup>205</sup>

**(i) Evidence and Arguments**

Although Applicant also takes the position that Section 11.147(e-3) requires applying the adopted environmental flows to the proposed diversions, thereby supplanting any requirement of additional assessments, Dr. Fontenot offered

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<sup>203</sup> Ex. ED-GG-3 (Environmental Memo) at bates 0035.

<sup>204</sup> Ex. ED-GG-1 (Environmental Memo) at bates 0028.

<sup>205</sup> Ex. ED-JA-3 (Draft Permit) at bates 0016.

evidence relating to these assessments on behalf of Applicant.<sup>206</sup> Dr. Fontenot testified:

I acquired and reviewed the Draft Permit (No. 13630) issued in 2022 for the proposed Facility. I reviewed the location, physical layout, and characteristics of the proposed intake structure. I obtained and read dozens of papers and reports to evaluate the ecology and biological diversity of Corpus Christi Bay. I queried numerous online databases to identify all the types of habitats that exist in Corpus Christi Bay, the presence and densities of common and uncommon fish and invertebrate species, and the presence of threatened and endangered species, essential fish habitat, highly migratory species, and managed fish species. I also located the sediment and surface water quality data referenced in Dr. Nielsen's declaration and used this information to expand on her initial analysis.<sup>207</sup>

He further testified that he and a team of scientists under his direction assessed the physical, chemical, and biological characteristics of Corpus Christi Bay, including:

- Assessing and quantifying major habitats;
- Describing major source water characteristics;
- Obtaining and evaluating fisheries data;
- Preparing a comprehensive list of aquatic species;
- Identifying threatened and endangered species and other managed fish species;
- Assessing the range of swimming speeds for fish larvae;

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<sup>206</sup> Exs. APP-LF-1 to -59; APP-LF-R; APP-LFR-1; PP-LFR-14.

<sup>207</sup> Ex. APP-LF-1 (Fontenot Dir.) at 6.

- Identifying target invertebrate and fish species to assess their impingement and entrainment potential; and
- Obtaining and evaluating sediment and surface water quality data for Corpus Christi Bay.<sup>208</sup>

Regarding ED Staff's review, Protestants argue ED Staff's failure to conduct further assessments renders the review of the Application deficient and argues that the Draft Permit cannot be granted as a matter of law.

Protestants state Applicant's "meager attempt to conduct an environmental analysis is no substitute for the assessments required by under Texas Water Code Sections 11.147(e) and 11.152."<sup>209</sup> They argue that Dr. Fontenot's review consisted of an assessment that "there would be no significant impacts of concern to fish and wildlife habitat because the proposed volume of intake is so small when compared to the entire Bay," and "this is essentially no analysis at all."<sup>210</sup> Dr. Nielsen testified for Protestants that Dr. Fontenot "fails to acknowledge the impacts of [impingement and entrainment] on periphyton, phytoplankton, and zooplankton, including meroplankton (e.g., passively floating larval fish, shrimp, crabs, bivalves) and holoplankton," which "form the base of the food web in Corpus Christi Bay."<sup>211</sup>

Applicant responds that the volume of intake is relevant and is a proper consideration in this analysis. Dr. Fontenot testified that the overall number of

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<sup>208</sup> Ex. APP-LF-1 (Fontenot Dir.) at 7.

<sup>209</sup> Protestants' Closing Arg. at 42.

<sup>210</sup> Protestants' Closing Arg. at 42.

<sup>211</sup> Protestants' Closing Arg. at 42; *quoting* Ex. IOB-300 (Nielsen Dir.) at 32-33.

organisms in the habitat and its life-cycle compared with the relatively small number that will be harmed are basic ecological principals and important considerations.<sup>212</sup> Regarding impacts to phytoplankton and other plankton, Applicant counters that Dr. Fontenot calculated the amount that will be impacted by the proposed intake per day and compared it with the species' regeneration rate.<sup>213</sup>

The ED argues no additional assessments were required and did not perform any. OPIC did not take a position on this issue.

## **(ii) ALJs' Analysis**

Again, without deciding whether additional assessments were required, the ALJs find that the assessments performed by Applicant were thorough and sufficient. Pursuant to Texas Water Code sections 11.147(d) and (e), 11.150, and 11.152, the Commission is to assess the effects on water quality and on fish and wildlife habitats; but none of those sections, nor the Commission's rules, specify the extent of such a review. The ALJs find that the scope of Applicant's review was sufficient to evaluate any potential impacts. Further, the ALJs do not construe the applicable law in the manner that Protestants urge. Specifically, the applicable law does not specify that the ED is to perform an assessment, only that the Commission evaluate any assessments made. Accordingly, the ED's decision to not perform a

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<sup>212</sup> Applicant's Closing Arg. at 21; *citing* Ex. APP-LF-1-R (Fontenot Reb.) at 8.

<sup>213</sup> Ex. APP-LF-1-R (Fontenot Reb.) at 29-32.

review should not hinder the Commission’s ability to make its own reasoned assessments on these issues based on the record before it.<sup>214</sup>

## **H. CONSISTENCY WITH STATE WATER PLAN AND 2021 REGION N WATER PLAN**

To be granted, an application must demonstrate that it “addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located. . . .”<sup>215</sup>

### **1. Evidence and Arguments**

The Coastal Bend Regional Water Planning Group listed the proposed Facility in the 2016 Region N Water Plan and indicated that the Facility would be included in the 2021 Region N Water Plan as a part of its seawater desalination strategy—one of the recommended water management strategies in the plan.<sup>216</sup> Also, in 2020, the regional water group stated that this Application is consistent with 2016 regional water plan.<sup>217</sup> Because of this, ED Staff, during technical review, determined that the Application and proposed project addressed a water supply need in a manner

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<sup>214</sup> No party addressed whether an assessment of groundwater and groundwater recharge was required for this Application pursuant to Texas Water Code section 11.151. However, Applicant noted that desalination of water could lessen the need for using additional freshwater sources—including groundwater.

<sup>215</sup> Tex. Water Code § 11.134(b)(3)(E).

<sup>216</sup> Exs. ED-JA-4 (Water Conservation Review Memo) at bates 0022, APP-SG-14 (2021 Region N Water Plan) at 28-29.

<sup>217</sup> Ex. APP-SG-12 (Ltr. from Coastal Bend Regional Water Planning Group to Ms. Garza) at bates 000073.

consistent with the state and region water plans.<sup>218</sup> Additionally, the Facility was listed in the 2021 Region N Water Plan, and the 2022 State Water Plan incorporates the approved regional water plans and recommends that a supply of 179,000 acre-feet per year of desalinated seawater be achieved by 2030.<sup>219</sup>

Protestants acknowledge that the proposed Facility is listed in the state and regional water plans but argues that listing alone is insufficient for Applicant to carry its burden. It argues that the evidence does not demonstrate that the Application meets this requirement. Applicant responds that the seawater desalination was a recommended water management strategy, and the Facility for which the appropriation is sought is listed in both the state and region water plans. The ED and OPIC contend that Applicant has met its burden under Texas Water Code section 11.134(b)(3)(E).

## **2. ALJs' Analysis**

The ALJs find that Applicant has met its burden on this issue. The evidence demonstrates that there is a water supply need identified by the state and region water plans. The planning groups identified seawater desalination as a strategy to address this need, included Applicant's proposed Facility as a part of that strategy, and wrote that the Application was consistent with the regional plan in effect at the

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<sup>218</sup> Ex. ED-JA-4 (Water Conservation Review Memo) at bates 0023.

<sup>219</sup> Exs. APP-SG-14 (2021 Region N Water Plan) at 19, 5D.10-40; APP-SG-15 (2022 State Water Plan) at 107.

time. Thus, the ALJs find that Applicant has met its burden with respect to the requirement of Texas Water Code section 11.134(b)(3)(E).

## **I. AVOID WASTE AND ACHIEVE WATER CONSERVATION**

An applicant is required to demonstrate that it will use reasonable diligence to avoid waste and achieve water conservation.<sup>220</sup>

### **1. Evidence and Arguments**

Protestant argues that Applicant has failed to make this demonstration because an engineering report identified that five million gallons per day of reject brine could be used beneficially to treat contaminants in nearby bauxite residual beds.<sup>221</sup> However, Applicant does not intend to pursue this use of reject brine. According to Mr. Schuster, these bauxite residual beds were contaminated from past industrial operations, and the brine resulting from the desalination procedure could be used moderate the pH levels within the beds to be less hazardous to the environment.<sup>222</sup> The engineering report concludes that incorporating this use would be feasible.<sup>223</sup>

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<sup>220</sup> Tex. Water Code § 11.134(b)(4); 30 Tex. Admin. Code § 297.48(a) (“A water right holder using state water shall use those measures necessary to ensure the beneficial use of water . . .”); *see also* Tex. Water Code § 11.002(8) (defining conservation).

<sup>221</sup> Ex. IOB-109 (Alternative Brine Disposal Evaluation Report) at bates 021802-03.

<sup>222</sup> Ex. IOB-100 (Schuster Dir.) at 21.

<sup>223</sup> Ex. IOB-109 (Alternative Brine Disposal Evaluation Report) at bates 021773 (“Bauxite residual treatment was only feasible in combination with disposal alternatives . . . Alternatives that incorporate this feature are feasible . . .”).

Applicant responds that Protestants are incorrectly injecting a discharge analysis into the requirement. Applicant asserts that any discharge from the desalination process would need to meet the Texas Surface Water Quality Standards and is properly addressed in the context of a TPDES permit, which Applicant is currently seeking. According to Applicant, the discharge brine is not a use of water in excess of what is economically reasonable and will not cause or threaten to cause pollution of water in violation of rules and standard, because it will be addressed and approved through the TPDES permitting process. The ED and OPIC agree that Applicant has met its burden on this issue.

## **2. ALJs' Analysis**

The ALJs find that the Applicant has met its burden with regard to this issue. At its core, Protestants' arguments stem from the idea that Applicant must demonstrate that it utilizes procedures to maximize the beneficial use or efficiency to not only the diverted water but also the resulting discharge after the water has been used. As discussed above, the ALJs find that the desalination process results in a beneficial use of the seawater to bolster the supply of water for industrial purposes. The discharge from this process is then to be returned to the Bay pursuant to a TPDES permit. The record does not indicate that failure to use a portion of the discharge brine on the bauxite residual beds constitutes waste by failing to (1) reduce the consumption of water by Applicant or its customers; (2) improve the efficiency in the use of water by Applicant or its customers; or (3) increase the recycling and reuse of water as the discharge brine is already intended to be returned to the water

supply and made available as part of the TPDES permitting process.<sup>224</sup> Also, the failure to use a portion of the discharge brine for treatment of the bauxite residual beds does not constitute (1) a use of water in excess of that which is economically reasonable for an authorized purpose or (2) use of water that causes or threatens to cause pollution of water as the discharge will need to meet the requirements under the TPDES permitting framework.<sup>225</sup>

While laudable to seek or encourage additional beneficial uses of the discharge following the desalination process, Applicant's intention to not use a portion of the reject brine to treat bauxite residual beds is not waste as contemplated by either Texas Water Code section 11.134 or TCEQ Rule 297.48. Applicant has met its burden as to this issue.

## **J. PERMIT CONDITIONS**

Above, the ALJs found that the scope of Applicant's review was sufficient to evaluate any potential impacts regarding effects on water quality and on fish and wildlife habitats pursuant to Texas Water Code section 11.147(d) and (e) and sections 11.150 and 11.152, should the Commission decide that Texas Water Code sections 11.134(b)(3)(D) and .147(e-3) leave some residual requirement to perform such assessments beyond the imposition of the adopted environmental flows. Assuming, without deciding, there is a residual requirement under those provisions,

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<sup>224</sup> Tex. Water Code § 11.002(8)(B) (discussing conservation practices, techniques, and technologies).

<sup>225</sup> 30 Tex. Admin. Code § 297.48(b).

those provisions specify that “the [C]ommission shall include in the permit, to the extent practicable when considering all public interests, those conditions considered by the [C]ommission necessary to maintain existing instream uses and water quality of the stream or river”<sup>226</sup> and “necessary to maintain fish and wildlife habitats.”<sup>227</sup> Further, 30 Texas Administrative Code section 297.53(b) states, “the [C]ommission may require the applicant to take reasonable actions to mitigate adverse impacts, if any, on fish and wildlife habitat.”

The Draft Permit would authorize Applicant to divert from a point on Corpus Christi Bay, located at Latitude 27.873741° N, Longitude 97.294987° W, at a maximum diversion rate of 140.12 cfs (62,890 gpm) in San Patricio County.<sup>228</sup> The Application describes the proposed diversion facilities as being in open water near area owned by Applicant. It further states:

[T]he plant intake will consist of seawater pumped through Wedgewire Screen intake structures, then through a pair of buried intake pipes using large pumps set in an on shore subsurface vault. Primary screening will utilize the Wedgewire Screens at the intake structure. Secondary screening will remove smaller debris, then the seawater will be pumped to the desalination plant.<sup>229</sup>

Applicant proposes to dredge a 40,000 square-foot area to provide a uniform 20-foot depth of water.<sup>230</sup> Two approximately 4-foot-diameter pipelines will be

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<sup>226</sup> Tex. Water Code §§ 11.147(d), .150.

<sup>227</sup> Tex. Water Code §§ 11.147(e), .152.

<sup>228</sup> Ex. ED-JA-3 (Draft Permit) at bates 0016.

<sup>229</sup> Ex. APP-SG-3 (Application) at bates 000043.

<sup>230</sup> Ex. APP-SG-3 (Application) at bates 000046.

placed underground from the desalination plant to the intake area, the route for which will be finalized as part of the design process.<sup>231</sup>

The Draft Permit includes five special conditions:

- Special Condition 5.A includes a re-opener clause, should new environmental flow standards for the basin be adopted.
- Special Condition 5.B requires the implementation of “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(s).”
- Special Condition 5.C requires the installation and maintenance of a measuring device, to account for the quantity of water diverted.
- Special Condition 5.D requires access to the South Texas Watermaster for inspection of the measuring device and records.
- Special Condition 5.E requires Applicant to contact the South Texas Watermaster prior to diversions of water.<sup>232</sup>

Regarding Special Condition 5.B, the Application states the current intake design has a through screen velocity of less than 0.5 feet per second and a proposed screen mesh size of 1/4 inch by 1/4 inch square.<sup>233</sup> The Application represents this design is considered by the Environmental Protection Agency as the best technology available for impingement protection for cooling water intake structures.<sup>234</sup>

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<sup>231</sup> Ex. APP-SG-3 (Application) at bates 000046.

<sup>232</sup> Ex. ED-JA-3 (Draft Permit) at bates 0016-17.

<sup>233</sup> Ex. APP-SG-3 (Application) at bates 000046.

<sup>234</sup> Ex. APP-SG-3 (Application) at bates 000046.

## **1. Water Quality Considerations**

As noted, Section 11.147(d) relates to “conditions considered by the [C]ommission necessary to maintain existing instream uses and water quality of the stream or river,” and includes consideration of any water quality assessment performed under Section 11.150<sup>235</sup>

### **a) Evidence and Arguments**

Protestants request a special condition limiting the location of wastewater brine discharges. Protestants also have concerns relating to water quality impacts that may occur relating to dredging. Applicant counters that the impacts of water quality from wastewater brine discharges are outside the scope of this proceeding. Regarding the potential water quality impacts of diversions, Applicant states the “evidence . . . demonstrates that the intake velocity across the wire-mesh screens will be less than or equal to 0.5 feet/sec which is so low that it will not even create turbulence or resuspend sediment on the bottom only about 5 feet away.”<sup>236</sup>

OPIC and the ED did not take a position on these issues.

### **b) ALJs’ Analysis**

Protestants’ concerns relating to water quality impacts that may occur relating to discharges and dredging were addressed in Subsection F, Public Welfare. The

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<sup>235</sup> Tex. Water Code § 11.147(d); see also Tex. Water Code §11.150.

<sup>236</sup> Applicant’s Reply Br. at 15; *citing* Ex. APP-LF-1 (Fontenot Dir.) at 8.

ALJs found both were outside the scope of this proceeding and do not recommend any special conditions relating to these issues.

Regarding water quality impacts from diversions, there is no record evidence, and no reason to believe, that diversions will have any adverse impacts on water quality in the Bay. Accordingly, the ALJs do not find that any additional conditions are “necessary to maintain existing instream uses and water quality of the stream or river.”<sup>237</sup>

## **2. Maintaining Fish and Wildlife Habitats**

Section 11.147(e) of the Texas Water Code relates to “conditions considered by the [C]ommission necessary to maintain fish and wildlife habitats.” and includes any assessments performed under Section 11.152.<sup>238</sup> 30 Texas Administrative Code § 297.53 states that the Commission “may require the applicant to take *reasonable actions* to mitigate adverse impacts, if any, on fish and wildlife habitat.”<sup>239</sup> An assessment “shall include the project site as well as potentially impacted habitat upstream, adjoining, and downstream of the project site.”<sup>240</sup>

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<sup>237</sup> Tex. Water Code § 11.147(d).

<sup>238</sup> Tex. Water Code § 11.147(e); see also Tex. Water Code § 11.152.

<sup>239</sup> 30 Tex. Admin. Code § 297.53(b).

<sup>240</sup> 30 Tex. Admin. Code § 297.53(c).

### **a) Evidence and Arguments**

Regarding the proposed diversion location, Protestants contend the site of the proposed intake is unsuitable for a desalination plant. They argue that the diversions will have an adverse impact on fish and wildlife or their habitats.<sup>241</sup> Specifically, they say the site of the proposed intake is a sensitive one, and as such was excluded from a 2018 Texas Parks and Wildlife and Texas General Land Office report on the evaluation of environmentally protective zones for discharges from desalination operations.<sup>242</sup> They complain that the nearby seagrass beds attract early life stage larvae, which will necessarily float by the intake structure and be subject to fatal entrainment and impingement. They are concerned that site is proposed to be located in an estuary designated as an estuary of national significance. They warn that “desalination within an enclosed bay system, particularly at this scale, has a very real potential to cause severe degradation of aquatic resources and ecosystem services provided to humans by the estuary” and “the scientific community has repeatedly and explicitly warned against construction and operation of desalination facilities within closed bay systems, like Corpus Christi Bay.”<sup>243</sup>

Regarding special conditions, Protestants argue that the Draft Permit should include a provision requiring that Applicant’s proposed through-screen intake

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<sup>241</sup> Protestants’ Reply Br. at 28.

<sup>242</sup> Protestants’ Closing Arg. at 41; *citing* Ex. IOB-300 (Nielson Dir.) at 13; The ALJs note that Protestants did not argue that the report was determinative as to the siting of a desalination facility for this proceeding.

<sup>243</sup> Protestants’ Closing Arg. at 42; *citing* Ex. IOB-300 (Nielson Dir.) at 11, 31.

velocity of less than 0.5 feet per second be measured at each intake screen instantaneously during all times when the screens are in operation.

Applicant contends that Protestants demand a demonstration that no impacts to fish and wildlife will occur, and that Protestants' standard goes beyond reasonable actions contemplated by the rule. Applicant argues that the location and design of the proposed intake structure ensure that reasonable measures have or will be taken to maintain fish and wildlife habitats. Applicant claims that the record assures that it is committed to taking measures (that go beyond reasonable) to reduce impacts to fish and wildlife. Regarding the site of the diversion structure, Dr. Fontenot testified that:

- the proposed intake structure is in an area which is by far the most common habitat throughout Corpus Christi Bay—a benthic habitat (E1UBL; estuarine, subtidal, unconsolidated bottom)<sup>244</sup>
- the 0.9-acre area that Applicant plans to dredge represents less than 0.00001% of the total surface area of that type of habitat for the entire bay<sup>245</sup>;
- the proposed intakes are sited more than 1,000 feet away from any seagrass beds, which avoids entrainment and impingement of early life stage larvae that have successfully journeyed to the important seagrasses/nursery grounds<sup>246</sup>;
- placing the top of the proposed intake structure 10-12 feet below the surface (as proposed in the Application) will avoid diversion of water from the more densely populated upper water column of the Bay, allowing most

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<sup>244</sup> Ex. APP-LF-1 (Fontenot Dir.) at 8.

<sup>245</sup> Ex. APP-LF-1 (Fontenot Dir.) at 8.

<sup>246</sup> Applicant's Closing Arg. at 44; *citing* Ex. APP-LF-1 (Fontenot Dir.) at 8, 10, 11, 18, 20, 25, 31, 35, 36.

larvae and small organisms to simply float over the top of the structures<sup>247</sup>; and

- by dredging below grade and placing the structures five feet above the dredged bottom, the structures will avoid direct impact to benthic communities.<sup>248</sup>

Applicant contends that using a 1/4 inch by 1/4 inch wire-mesh screen will preclude entrainment of all marine life larger than 1/4 inch. Applicant argues that most fish, and even some larval fish, can simply swim away from the intake due to its proposed low water intake velocity of 0.5 feet per second and because the hydraulic zone of influence of the proposed intake structure is limited to 50 feet.<sup>249</sup> Even with these measures, Applicant acknowledges that some entrainment and impingement of planktonic life stages of fish and invertebrates by the proposed water intake structures is possible. However, “[b]ased on considerations of the high intrinsic natural mortalities of the early life stages of most estuarine species, the tremendous fertility rates of these species, and the quick reproductive cycle of phytoplankton in the water column, . . . removal of a relatively small amount of biomass . . . will have no measurable impacts on the proper functioning of local biological populations or communities.”<sup>250</sup>

Regarding Protestants’ requested permit condition requiring that Applicant’s proposed through-screen intake velocity of less than 0.5 feet per second be measured

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<sup>247</sup> Ex. APP-LF-1 (Fontenot Dir.) at 8-9, 35.

<sup>248</sup> Ex. APP-LF-1 (Fontenot Dir.) at 11.

<sup>249</sup> Exs. APP-KD-11 (velocity calculations); APP-KD-1 (Dean Dir.) at 19; APP-LF-1 (Fontenot Dir.) at 11, 12, 23, 25, 26, 35, 37; Tr. Vol. 2 at 447 (Fontenot).

<sup>250</sup> Ex. APP-LF-1-R (Fontenot Reb.) at 8.

at each intake screen instantaneously during all times when the screens are in operation, Applicant argues that the provision is unnecessary because the design of the structure ensures the intake velocity, that TCEQ rules do not require such a condition, and that there is no evidence that such technology exists.

Applicant notes that ED Staff witness George Gable testified the use of 1/4 inch by 1/4 inch mesh screens is reasonable and consistent with the type of measures ED Staff have recommended in previous permitting actions.<sup>251</sup>

The ED argues the Draft Permit is adequately protective of the environment, meets all applicable regulatory requirements, and is enforceable. The ED opposes the Protestants' recommended permit conditions as unnecessary, impermissibly broad, and likely unenforceable.

OPIC did not provide additional argument on this issue.

## **b) ALJs' Analysis**

The ALJs agree with Applicant that the applicable law does not demand a showing that no adverse impacts to fish and wildlife will occur. If the Commission finds a residual requirement remains despite the applicability of Section 11.147(e-3), the most the Commission may require is for "the applicant to take *reasonable actions* to mitigate adverse impacts, if any, on fish and wildlife

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<sup>251</sup> Applicant's Closing Brief at 48; *citing* Ex. ED-GG-1 (Gable Dir.) at 0029; Tr. Vo. 4 at 806-07 (Gable).

habitat.<sup>252</sup> The ALJs find that the record demonstrates by a preponderance of the evidence that the operation of the proposed permit at the proposed location, is reasonable, and as it is designed, takes significant measures to mitigate adverse impacts, if any, on fish and wildlife habitat.<sup>253</sup> The record demonstrates that, as proposed, relatively few organisms will be affected by the diversion and the impacts are negligible to the overall health of the affected species.

However, although the ALJs have found that Applicant’s proposed diversion structure design and location are reasonable, the actual Draft Permit does very little to require any of the measures proposed by Applicant short of specifying the location of the structures and requiring mesh screens of an unspecified size. The only provision in the permit that potentially addresses Applicant’s proposed mitigation strategies is Special Condition 5.B, which requires Applicant to “implement reasonable measures in order to reduce impacts to aquatic resources due to entrainment or impingement and includes, but is not limited to, “the installation of screens at the diversion structure(s).”<sup>254</sup> It may be that the Applicant’s proposed mitigation strategies go well beyond what is reasonable, as was argued by Applicant. But the only expert testimony that specifically addressed whether the Draft Permit standing alone was reasonable enough was from the ED—who pointedly did not consider or conduct the additional “residual” assessments this section specifically addresses. In sum, the Draft Permit does very little to require or enforce Applicant’s

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<sup>252</sup> 30 Tex. Admin. Code § 297.53(b).

<sup>253</sup> 30 Tex. Admin. Code § 297.53(b).

<sup>254</sup> Ex. ED-JA-3 (Draft Permit) at bates 0016.

“reasonable” mitigation strategies. As such, Protestants’ proposed condition to monitor flow-through velocity raises a legitimate question. If the Draft Permit were to simply require Applicant to implement the design criteria proposed in the Application, then Applicant’s “reasonable” mitigation strategies would be included as part of the permit.

Therefore, the ALJs recommend<sup>255</sup> the following amendments to Special Condition 5.B to implement Applicant’s reasonable mitigation strategies:

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 1/4 inch by 1/4 inch wire mesh screens at the diversion structure(s).

The ALJs do not recommend Protestants’ proposed flow-through velocity condition because they agree with Applicant that the record demonstrates that the intake structures will achieve that velocity as designed, and because the record does not demonstrate that Protestants’ proposal is feasible or practicable. The ALJs included the specific screen size of 1/4 inch by 1/4 inch, because it was proposed by the Applicant, and because the evidence offered by the Applicant and the ED indicate it is reasonable and consistent with the type of measures ED Staff have recommended in previous permitting actions.

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<sup>255</sup> Again, the ALJs assume, without deciding, that the Commission evaluates the residual assessments of Sections 11.147(e) and 11.152, notwithstanding Section 11.147(e-3).

Finally, Protestants request a special condition to require Applicant to implement all feasible beneficial uses of the reject brine produced by the desalination facility. This condition is not recommended as further addressed in Subsection I.

## **K. OTHER ISSUES**

### **1. Protestants' Issues**

Protestants argue that the reject brine from the desalination process is “surplus water” under 30 Texas Administrative Code section 297.1(55). Protestants contend that the Application is deficient because it failed to sufficiently identify the location at which this water will be returned or to provide a map of the specified location.<sup>256</sup> The Application states that the reject brine is wastewater that will be returned to the water source—Corpus Christi Bay.

OPIC, the ED, and Applicant all agree that the disposal of wastewater brine is outside the scope of this proceeding.

In addition to the ALJs' related findings in Subsection D. Beneficial Use, that Protestants' water quality concerns are outside the scope of this proceeding, the ALJs agree that the wastewater generated by the desalination process is not “surplus water” but is more appropriately considered wastewater.

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<sup>256</sup> 30 Tex. Admin. Code § 295.8

## **2. Applicant's Issues**

In anticipation of Protestants' arguments, Applicant addressed several issues in its Closing Brief that Protestants ultimately did not address in briefing. Applicant argued: (1) that Federal cooling water intake regulations are inapplicable to this Application, but the Draft Permit would comply nonetheless; (2) that the impacts of dredging in this project and re-mobilization of pollutants will not impact wildlife habitats; and (3) that the Facility's energy use is outside the scope of this proceeding. Regarding Federal cooling water intake regulations, Protestants did not argue this in briefing, so the issue is waived. Nevertheless, the ALJs agree the issue is outside the scope of this proceeding. As addressed elsewhere the PFD, the ALJs agree that the impacts of dredging are outside the scope of this proceeding. The Facility's energy use is also waived because it was not briefed and is outside the scope.

## **VI. TRANSCRIPTION COSTS**

The Commission may assess reporting and transcription costs to one or more of the parties participating in the proceeding, except the ED or OPIC.<sup>257</sup> When doing so, the Commission must consider the following factors:

- (A) The party who requested the transcript;
- (B) The financial ability of the party to pay the costs;
- (C) The extent to which the party participated in the hearing;
- (D) The relative benefits of the various parties of having a transcript; . . .

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<sup>257</sup> 30 Tex. Admin. Code § 80.23(d)(2).

and

- (G) Any other factor which is relevant to a just and reasonable assessment of costs.<sup>258</sup>

Here, the total costs for the transcription and reporting services amounted to \$11,342.50.<sup>259</sup> Applicant argues that this cost should be assessed against Protestants because they have demonstrated a financial ability to pay; participated fully in the hearing; benefit from the transcript in the preparation of briefing; and the costs were triggered by Protestants seeking a contested case hearing.

Protestants argue that Applicant should bear the transcription costs because Applicant presented more witnesses and testimony while Protestants participated jointly and efficiently; Applicant benefits the most from the transcript as it is necessary to establish its needed proof; and Applicant—as a large governmental entity—has more financial ability to pay for the transcript costs. Protestants also argue that the speculative nature of the Application weigh toward assessing costs against Applicant.

The ED and OPIC make no recommendation regarding allocation.

In this case, both Applicant and Protestants, by having secured counsel and expert witnesses, have demonstrated an ability to pay the costs with Applicant

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<sup>258</sup> 30 Tex. Admin. Code § 80.23(d)(1). Subsections (E) and (F) address factors not applicable in this case.

<sup>259</sup> Applicant's Closing Arg., Ex. A.

having demonstrated a superior ability to pay, through its prosecution of this Application with the assistance of counsel and consultants. All parties participated extensively in the hearing and post-hearing briefing, making extensive use of the transcript. However, Applicant is the party seeking affirmative relief, producing the majority of exhibits and testimony. Based on the factors, the ALJs recommend the transcript costs be apportioned as follows: Applicant – 60% or \$6,805.50; Protestants – 40% or \$4,537.00.

## VII. CONCLUSION

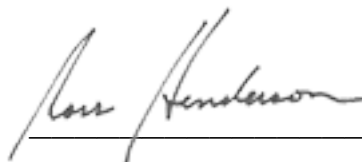
The ALJs find that Applicant has met its burden of proof on all issues presented. Therefore, the ALJs recommend that the Application be approved and issue the Draft Permit with the changes recommended in the proposed order below. The ALJs also recommend that all findings of fact proposed by the parties that are not contained in the Proposed Order be denied.

### Signed



Brent McCabe

Administrative Law Judge



Ross Henderson

Administrative Law Judge



**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

**AN ORDER GRANTING APPLICATION OF PORT OF  
CORPUS CHRISTI AUTHORITY OF NUECES  
COUNTY FOR WATER RIGHT PERMIT NO. 13630  
TCEQ DOCKET NO. 2021-0421-WR  
SOAH DOCKET NO. 582-23-01502**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Application of Port of Corpus Christi Authority of Nueces County for Water Right Permit No. 13630. A Proposal for Decision (PFD) was issued by State Office of Administrative Hearings (SOAH) Administrative Law Judges (ALJs) Ross Henderson and Brent McCabe following an evidentiary hearing by videoconference on September 18-21, 2023.

After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

## **I. FINDINGS OF FACT**

### ***Background***

1. The Port of Corpus Christi Authority of Nueces County (Applicant) is a political subdivision of the State of Texas created under Article III, section 52 of the Texas Constitution and later converted to a navigation district operating under Article XVI, section 59 of the Texas Constitution.
2. Nueces and San Patricio Counties need a reliable source of water to support existing and future industrial uses.
3. Applicant is seeking to desalinate water from the Corpus Christi Bay and produce up to 30 million gallons per day (MGD) for industrial use, thereby ensuring that long-term needs are met while reducing strain on existing municipal water resources.
4. Applicant seeks authorization to divert and use 101,334 acre-feet of water per year from a diversion point on Corpus Christi Bay, San Antonio-Nueces Coastal Basin, at a maximum diversion rate of 140.12 cubic feet per second (62,890 gallons per minute) for industrial purposes in San Patricio County.
5. The proposed diversion point is located on Corpus Christi Bay at Latitude 27.873741° N, Longitude 97.294987° W, in San Patricio County.

### ***Procedural History***

6. TCEQ received Applicant's application for Water Use Permit No. 13630 (Application) on September 3, 2019. Additional information and fees were received on December 3, 2019, January 28, 2020, February 4, 2020, and March 18, 2020.
7. The Application was filed pursuant to Texas Water Code section 11.121.
8. The Application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on May 11, 2020.

9. Additional information was also received on July 22, 2020, and August 17, 2020.
10. The Executive Director (ED) of the Commission completed technical review of the Application when her program staff concluded its hydrology review on December 4, 2020.
11. Notice of the Application was mailed by the Commission's Chief Clerk on February 5, 2021, to water right holders of record in the San Antonio-Nueces Coastal Basin. The notice summarized the Application and stated the ED had completed technical review of the Application and prepared a Draft Permit.
12. Notice of the Application was published in the *Corpus Christi Caller Times* on February 26, 2021; the *Ingleside Index* on March 3, 2021; and the *News of San Patricio* on March 4, 2021. These newspapers are published in San Patricio County—the county of the proposed diversion point.
13. The comment period and hearing request period for this application closed on March 29, 2021. However, the comment period was re-opened given public interest.
14. Notice of a virtual public meeting was mailed on June 11, 2021. A virtual public meeting was held as noticed on July 13, 2021, and the re-opened comment period closed the same day.
15. The ED's Response to Comments was filed with TCEQ's Chief Clerk on June 27, 2022.
16. Requests for hearing and responses to those requests were reviewed at Commission agenda on July 20, 2022, and the Commission determined that Ingleside on the Bay Coastal Watch Association (IOBCWA) and Encarnacion Serna (together, Protestants) are affected persons, and their hearing requests should be granted. The remaining hearing requests were denied.
17. The Commission mailed an interim order on July 28, 2022, referring this matter to SOAH.

18. Notice of the preliminary hearing was mailed to interested parties by the TCEQ Chief Clerk on September 30, 2022.
19. SOAH took jurisdiction of the matter at a virtual preliminary hearing held by SOAH on November 1, 2022. At the preliminary hearing, the administrative law judge admitted as parties to the proceeding: Applicant; the ED; the Office of Public Interest Counsel (OPIC); and Protestants.
20. SOAH ALJs Ross Henderson and Brent McCabe conducted a hearing on the merits via Zoom videoconference from September 18, 2023, to September 21, 2023. The record closed on November 21, 2023, after the deadline for filing of reply briefs.

### ***The ED's Review of the Application***

21. During the technical review process, ED technical staff (ED Staff) conducted reviews of different aspects of the Application.
22. ED Staff conducted a water conservation review. The water conservation review found that Applicant's water conservation plans (WCPs) meet the requirements of 30 Texas Administrative Code chapter 288.
23. ED Staff conducted a review of the Application's compliance with the Region N Water Plan and found that the Application is consistent with the 2016 Region N Water Plan, the 2017 State Water Plan, and the draft 2021 Region N Water Plan.
24. ED Staff conducted a Hydrology Review and found that no water availability analysis is needed because the Application is located in Corpus Christi Bay where the water is saline.
25. The Hydrology Review also found that the Application does not impair freshwater inflows to Nueces Bay and Delta and is consistent with any applicable Coastal Management Program goals and policies.
26. ED Staff conducted an Environmental Analysis, pursuant to Texas Water Code section 11.147(e-3), finding that the adopted environmental flow

standards were adequate to support a sound ecological environment, and had no recommendations regarding the proposed permit, if granted.

27. ED Staff did not require Applicant to submit a Drought Contingency Plan (DCP) on the basis that Applicant would not be a wholesale public water supplier.

### ***Drought Contingency Plan***

28. The Application provides that the water diverted will be used for the desalination facility with the product of the facility to be sold to industrial users.
29. The Draft Permit allows for the water diverted to be used for industrial purposes in San Patricio County but does not allow the water to be used for human consumption.
30. The Application would make the Applicant a wholesale water supplier, but not a wholesale public water supplier.
31. Applicant did not submit a DCP with the Application.

### ***Water Conservation Plan - Avoid Waste and Achieve Water Conservation***

32. Applicant originally submitted a WCP form for Industrial or Mining use then provided an updated Industrial Use Water Conservation Plan form.
33. During technical review, ED Staff requested Applicant submit a WCP on the Wholesale Public Water Supplier form.
34. Applicant submitted the Wholesale Public Water Supplier form with the information available to it at the time.
35. ED Staff evaluated Applicant's WCPs pursuant to 30 Texas Administrative Code section 288.6, which covers water conservation plans for purposes or uses for which there is not a specific rule and concluded that the WCP requirements had been met.

36. The wholesale public water supplier form filled out by Applicant includes requests for information which are the same as in 30 Texas Administrative Code § 288.5(1)(A) –(I).
37. Applicant provided information to the requests in the wholesale public water supplier DCP form which are the same as in 30 Texas Administrative Code § 288.5(1)(A) – (I).
38. Applicant’s WCPs adequately describe the extent of the service area.
39. Applicant’s WCPs describe specific, quantified five-year and ten-year targets for water savings.
40. Applicant’s WCPs provide a description as to which practice(s) and/or device(s) will be utilized to measure and account for the amount of water diverted from the source(s) of supply.
41. Applicant’s WCPs address a monitoring and record management program for determining water deliveries, sales, and losses.
42. Applicant’s WCPs provide a program for metering and leak detection and repair for the wholesaler’s water storage, delivery, and distribution system.
43. Applicant’s WCPs address contract requirements for successive customer conservation.
44. Applicant’s WCPs have a means for implementation and enforcement, evidenced by a copy of the ordinance, rule, resolution, or tariff, indicating official adoption of the water conservation plan by the water supplier.
45. Applicant provided documentation of coordination with regional water planning groups.
46. No feasible alternative to the proposed appropriation exists.
47. The requested amount of appropriation is necessary and reasonable for the proposed use stated in the Application.

48. Reasonable diligence will be used to avoid waste and achieve water conservation.

### ***Availability of Unappropriated Water***

49. The source of supply for the water requested is the Corpus Christi Bay, where the water available is functionally unlimited because any water diverted is constantly replenished by water from the Gulf of Mexico.
50. Because of the hydraulic connection between the Corpus Christi Bay and the Gulf of Mexico, the quantity of water available is not tied to how much water is flowing in the Nueces River.
51. For diversions from the Corpus Christi Bay, the available supply exceeds the requested diversion because the available supply is continually replenished.

### ***Beneficial Use***

52. The appropriation under the Application and Draft Permit is for industrial purposes.
53. The purposes for which water may be appropriated includes industrial uses, meaning processes designed to convert materials of a lower value into forms having a greater usability and commercial value, including the development of power by means other than hydroelectric.
54. Applicant proposes to provide up to 30 million gallons per day of water for industrial use through the process of desalination.
55. Beneficial use is demonstrated when the amount of the proposed use of water is deemed to be economically necessary for a purpose, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose, including conservation.
56. The maximum amount of water that can be diverted by Applicant under the Draft Permit is the amount necessary to produce 30 million gallons of fresh water per day.

57. Through the desalination process, an effluent will be produced which will be returned to Corpus Christi Bay under the terms of a Texas Pollutant Discharge Elimination System (TPDES) permit.
58. The designation of the location of the discharge of the effluent provided in the Application materials is sufficient under 30 Texas Administrative Code section 295.8. The exact location of the discharge will be determined in the TPDES permitting process.

### ***Water Rights and Vested Riparian Rights***

59. The evidence provided by Applicant demonstrates that no existing water rights would be impaired because, with the diversion in the bay, the water is continuously replenished and therefore it can have no adverse effect on existing water rights holders.
60. The requested diversion location is in the Corpus Christi Bay downstream of all water rights in the Nueces River Basin.
61. Applicant's diversion cannot reduce water availability for water rights holders in the Nueces River Basin.
62. No party claiming to have water rights impacted by the proposed appropriation sought party status in this contested case hearing.
63. The proposed water intake structure is more than 1400 feet from the shoreline at its closest point, it is submerged, and the intake velocity will be indistinguishable from the ambient current.
64. Any existing uses by the owners of shoreline property, including Mr. Serna, will be unaffected by the intake and the diversion.

### ***Public Welfare***

65. The proposed intake structures will be fully encased with 1/4 inch by 1/4 inch mesh wire screens, which will prevent the intake of all but the smallest marine life forms.

66. The intake structures are designed to limit intake velocity to less than or equal to 0.5 foot per second (ft/s).
67. The proposed water intake structures will be placed in open water over a benthic habitat more than 1,000 feet from the closest seagrass beds.
68. A benthic habitat is the most common habitat in the Corpus Christi Bay.
69. An intake velocity of less than or equal to 0.5 ft/s is a proven and effective engineering solution to drastically reduce impingement and entrainment.
70. The intake structures will be located in a 200-foot x 200-foot dredged area, with the top of the intake structures at about the same depth as the surrounding unexcavated substrate.
71. The area that Applicant plans to dredge for its intake structures represents less than 0.00001% of the total surface area of that type of habitat for the entire bay.
72. The hydraulic zone of influence of the intake structures is less than 50 ft and will therefore not reach beyond the immediate vicinity of each proposed water intake structure.
73. The intake structures are designed to be about 10 feet below the water surface and five feet off the dredged bay floor.
74. A permit for dredging will be required by the U.S. Army Corps of Engineers.
75. Any water quality issues related to dredging are outside the scope of this proceeding.
76. The location and physical characteristics of the intake structures result in a reduction of the impact on fish and wildlife habitats from impingement and entrainment.
77. The location and physical characteristics of the intake structures ensure that there will not be adverse impacts on shipping or recreational activities.

78. With the implementation of reasonable measures, including implementation of the proposed design criteria for the intake structures (with a designed intake velocity of less than or equal to 0.5 ft/s) and 1/4 inch by 1/4 inch wire mesh screens, there will be no measurable adverse impact to fish and wildlife habitats from the granting of the Draft Permit.

***Protection of Environment/Environmental Flow Standards and Assessments***

79. The Commission adopted environmental flow standards for the Nueces River and its associated tributaries, tributaries in the Nueces-Rio Grande Coastal Basin, and Corpus Christi and Baffin Bays. 30 Tex. Admin. Code ch. 298, subch. F.
80. 30 Texas Administrative Code Chapter 298, Subchapter F sets the environmental flow standards 19 described measurement points, including subsistence flows by season, base flows, large seasonal pulse, and annual pulse for each of these points.
81. All 19 of the measurement points for which the Commission has set required flows are upstream of the Corpus Christi Bay where the diversion point is located for Applicant's appropriation under the Application and Draft Permit.
82. The environmental flow requirements support the sound ecological environment of the Nueces Rio Grande Coastal Basin and Corpus Christi and Baffin Bays.
83. The diversion of water under the Draft Permit cannot impact the environmental flow requirements of the environmental flow standards, including instream flows and freshwater inflows.
84. ED staff did not perform any additional assessments as to the effect of the issuance the Draft Permit on fish and wildlife habitats beyond the implementation of environmental flows.
85. Applicant provided detailed assessments as to the effect of the issuance the Draft Permit on fish and wildlife habitats.

86. The scope of assessments performed by Applicant were sufficient to allow the Commission to evaluate impacts to water quality and fish and wildlife habitats.

***Consistency with State Water Plan and 2021 Region N Water Plan***

87. Applicant's proposed appropriation is for the diversion of seawater to convert to fresh water for use by industrial customers in San Patricio County.
88. The Coastal Bend Regional Water Planning Group found that the proposed desalination facility was consistent with the 2016 Region N Plan and agreed to include Applicant's La Quinta desalination facility in the 2021 Region N Plan.
89. The 2021 Region N Plan identifies seawater desalination as the only Recommended Water Management Strategy for meeting the need for water for manufacturing purposes in San Patricio County and Nueces County, and specifically lists Applicant's La Quinta Desalination facility as part of that strategy.
90. The 2022 State Water Plan, which incorporates the approved regional water plans, recommends a new seawater desalination supply of 179,000 acre-feet per year by 2030.
91. Applicant's proposed appropriation addresses a water supply need in a manner consistent with the 2020 State Water Plan and 2021 Region N, Coastal Bend, Regional Water Plan.

***Permit Conditions***

92. The Draft Permit would authorize Applicant to divert and use not to exceed 101,334 acre-feet of water per year from Corpus Christi Bay, San Antonio-Nueces Coastal Basin, for industrial purposes in San Patricio County.
93. The Draft Permit would authorize Applicant to divert from a point on Corpus Christi Bay, located at Latitude 27.873741° N, Longitude 97.294987° W, at a maximum diversion rate of 140.12 cfs (62,890 gpm) in San Patricio County.
94. The Draft Permit would require Applicant to implement water conservation plans that provide for the utilization of those practices, techniques, and

technologies that reduce or maintain the consumption of water, prevent or reduce the loss or waste of water, maintain or improve the efficiency in the use of water, increase the recycling and reuse of water, and prevent the pollution of water, so that a water supply is made available for future or alternative uses. Such plans shall include a requirement that every water supply contract entered into on or after the effective date of this permit, including any contract extension or renewal, that each successive wholesale customer develop and implement conservation measures. If the customer intends to resell the water, then the contract for resale of the water shall have water conservation requirements so that each successive customer in the resale of the water will be required to implement water conservation measures.

95. The Draft Permit contains five Special Conditions, as follows:

5.A The special conditions in this permit are subject to adjustment by the Commission if the Commission determines, through an expedited public review process, that such adjustment is appropriate to achieve compliance with applicable environmental flow standards adopted pursuant to Texas Water Code § 11.1471. Any adjustments shall be made in accordance with the provisions of Texas Water Code § 11.147(e-1).

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, the installation of screens at the diversion structure(s).

5.C Permittee shall install and maintain a measuring device, which accounts for, within 5% accuracy, the quantity of water diverted from the point authorized by Paragraph 2, “DIVERSION in the Draft Permit and maintain measurement records.”

5.D Permittee shall allow representatives of the South Texas Watermaster reasonable access to the property to inspect the measuring device and records.

5.E Permittee shall contact the South Texas Watermaster prior to diversion of water authorized by this permit.

96. The Draft Permit contains all conditions necessary to maintain existing instream uses and water quality and is protective of senior water rights holders.
97. The proposed location and proposed design of the proposed intake structure ensure that reasonable measures have or will be taken to maintain fish and wildlife habitats. Special Condition 5.B should be amended to capture Applicant's reasonable mitigation strategies proposed in the Application 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, 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 1/4 inch by 1/4 inch at the diversion structure(s).

With this change, the Draft Permit contains all conditions needed to be protective of senior water rights holders and fish and wildlife habitats.

### ***Transcription Costs***

98. Reporting and transcription of the hearing on the merits was warranted because the hearing was scheduled for more than one day.
99. SOAH ordered the parties to provide a transcription of the hearing.
100. The total cost of the transcript for the hearing was \$11,342.50.
101. Neither the ED nor OPIC may be assessed transcription costs.
102. In this case, both Applicant and Protestants, by having secured counsel and expert witnesses, have demonstrated an ability to pay the costs with Applicant having demonstrated a superior ability to pay, through its prosecution of this Application with the assistance of counsel and consultants.

103. All parties participated extensively in the hearing and post-hearing briefing, making extensive use of the transcript.
104. Applicant is the party seeking affirmative relief, producing the majority of exhibits and testimony.
105. The transcript costs should be apportioned as follows: Applicant – 60% or \$6,805.50; Protestants – 40% or \$4,537.00.

### ***Conclusion***

106. Applicant has met its burden of proof with regard to all applicable requirements of Texas Water Code Chapter 11 and the TCEQ Rules for the granting of the Draft Permit.
107. The Application conformed to the requirements prescribed by chapter 11 of the Texas Water Code.
108. The Application was accompanied by the prescribed fee.

## **II. CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over permits to use state water and to issue Water Right Permit No. 13630 under Texas Water Code §§ 5.013(a) and 11.134.
2. SOAH has jurisdiction over all matters relating to the conduct of the hearing in this proceeding. Tex. Water Code § 5.311; Tex. Gov't Code chs. 2001, 2003.
3. The State of Texas owns the water of every bay or arm of the Gulf of Mexico including Corpus Christi Bay. Tex. Water Code § 11.021(a).
4. With limited exception, no person may appropriate any state water or begin construction of any work designed for the storage, taking, or diversion of water

without first obtaining a permit from the Commission to make the appropriation. Tex. Water Code § 11.121.

5. This Application was filed pursuant to Texas Water Code §§ 11.121 and 11.124 and seeks issuance of a water right permit under the Commission's general permitting authority in Texas Water Code § 11.135.
6. The Application does not seek a permit issued under Texas Water Code § 11.1405 or chapter 18. As such, Texas Water Code § 11.1405 and chapter 18 do not apply to this Application.
7. Applicant has the burden of proof in this case by a preponderance of the evidence. 30 Tex. Admin. Code § 80.17.
8. Notice of the application, the opportunity for a hearing, and the hearing were provided as required by Texas Water Code § 11.132; Texas Government Code §§ 2001.051 and 2001.052; and 30 Texas Administrative Code chapter 295.
9. The Application is administratively complete, includes all of the required information, was accompanied by all required fees, and was properly noticed, and therefore complies with Texas Water Code §§ 11.128 and 11.134(b)(1) and 30 Texas Administrative Code chapter 295.
10. The Application sufficiently identifies the total amount of water to be used in accordance with 30 Texas Administrative Code §295.5.
11. The Application sufficiently identifies diversion points in compliance with 30 Texas Administrative Code §295.7.
12. Applicant has established that unappropriated water is available in the source of supply. Tex. Water Code §11.134(b)(2).
13. Under Texas Water Code § 11.002(4), "beneficial use" means use of the amount of water which is economically necessary for a purpose authorized by chapter 11 of the Texas Water Code when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water.

14. Texas Water Code § 11.023(a)(2) and 30 Texas Administrative Code § 297.43(a)(2) provide that industrial uses are beneficial uses for which state water may be appropriated.
15. Applicant has demonstrated that the proposed appropriation is intended for a beneficial use. Tex. Water Code §11.134 (b)(3)(A).
16. Permit No. 13630 will not impair existing water rights or vested riparian rights. Tex. Water Code §11.134(b)(3)(B).
17. Permit No. 13630 will not be detrimental to the public welfare. Tex. Water Code §11.134(b)(3)(C).
18. In determining whether an appropriation is detrimental to the public welfare, the Commission may only consider the factors that are within the jurisdiction and expertise of the Commission as established by Chapter 11 of the Texas Water Code. Tex. Water Code § 11.134(b-1).
19. The potential impacts of the effluent discharge from the proposed desalination facility are outside the jurisdiction and expertise of the Commission as established by Chapter 11 of the Texas Water Code.
20. The potential impacts of any dredging required for the permit are outside the jurisdiction and expertise of the Commission under Texas Water Code Chapter 11.
21. Texas Water Code § 11.134(b)(3)(D) requires consideration of any applicable environmental flow standards established under section 11.1471 and, if applicable, the assessments performed under sections 11.147(d) and (e) and sections 11.150, 151, and 152.
22. Texas Water Code § 11.1471(a)(1) required the Commission to adopt appropriate environmental flow standards for each river basin and bay system in the state that are adequate to support a sound ecological environment.
23. In making a determination regarding the effects of the permit on bays and estuaries after environmental flow standards have been adopted under Texas Water Code § 11.1471, the Commission is instructed to apply the

environmental flow standards and set asides in Texas Water Code § 11.1471, “instead of considering the factors specified by [§ 11.147(b) – 11.147(e)].” Tex. Water Code § 11.147(e-3).

24. The Draft Permit properly considers all applicable environmental flow requirements. Tex. Water Code § 11.1471; 30 Tex. Admin. Code ch. 298, subch. F.
25. For permits to divert water in excess of 5,000 acre feet per year, the Commission must assess impacts to fish and wildlife habitat resulting from diversion facilities. Tex. Water Code § 11.152; 30 Tex. Admin. Code § 297.53.
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 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 applicable provisions of the Texas Water Code and TCEQ rules.
28. Applicant has demonstrated that the proposed appropriation addresses a water supply need in a manner that is consistent with the state water plan and the relevant approved regional water plan for any area in which the proposed appropriation is located. Tex. Water Code §11.134(b)(3)(E).
29. Applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by Texas Water Code Section 11.002(8)(B). Tex. Water Code §11.134(b)(4).
30. The effluent discharge must be permitted under the TPDES permitting system.
31. Because the effluent discharge must be permitted under the TPDES permitting system, the discharge will not constitute waste.

32. The designation of the location of the discharge of the effluent provided in the Application materials is sufficient under 30 Texas Administrative Code § 295.8.
33. DCPs are required for certain applicants and water rights holders, namely wholesale public water suppliers, retail public water suppliers and irrigation districts. Tex. Water Code § 11.1272; 30 Tex. Admin. Code §§ 288.30, 295.9.
34. Texas Water Code § 11.1272 applies only to wholesale public water suppliers, retail public water suppliers, and irrigation districts.
35. A wholesale public water supplier is an individual or entity that “for compensation supplies water to another for resale to the public for human consumption.” 30 Tex. Admin. Code § 288.1(25).
36. 30 Texas Administrative Code § 288.30 and 295.9 do not require a wholesale water supplier who is not a wholesale public water supplier to submit a DCP.
37. 30 Texas Administrative Code § 288.22 applies only to wholesale public water suppliers and as such would not apply to Applicant’s Application.
38. Applicant was not required to submit a DCP.
39. 30 Texas Administrative Code §§ 288.5 and 295.9 applies to wholesale water suppliers as it relates to a WCP.
40. Applicant was required to submit a WCP that complied with 30 Texas Administrative Code § 288.5.
41. Applicant submitted a WCP that met the requirements of 30 Texas Administrative Code § 288.5 and demonstrated that reasonable diligence will be used to avoid waste and achieve water conservation. 30 Tex. Admin. Code §§ 288.5, 295.9.
42. The practice of utilizing desalination technology to establish an alternate water supply source is supported under the definition of “conservation.” 30 Tex. Admin. Code § 288.1(4).

43. The permitting of dredging operations is outside the scope of this proceeding. Dredging is instead governed by Rivers and Harbors Act of 1899 (section 10), along with Clean Water Act (section 404).
44. The Application conforms to all substantive requirements for a water right prescribed by the Texas Water Code and 30 Texas Administrative Code Chapter 297.
45. The evidence admitted in this case shows that Application should be granted, and that Permit No. 13630 should be issued.
46. Applicant should be responsible for 60% of transcription costs, and Protestants should pay for 40%. 30 Tex. Admin Code § 80.23(d).

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. The Application is approved in accordance with the attached Draft Permit, with the following changes:

Special Condition 5.B of the Draft Permit should read:

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 1/4 inch by 1/4 inch wire mesh screens at the diversion structure(s).

2. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted, are denied.
3. The TCEQ's Chief Clerk shall forward a copy of this Order and attached Draft Permit, with the changes noted above, to all parties and, subject to the filing of motions for rehearing, issue the attached Draft Permit with the changes noted above.

4. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.
5. The Port Authority shall pay \$6,805.50 in reporting and transcription costs.
6. Ingleside on the Bay Coastal Watch Association and Encarnacion Serna shall pay \$4,537.00 in reporting and transcription costs.
7. The effective date of this Order is the date the Order is final as provided by 30 Texas Administrative Code section 80.273 and Texas Government Code section 2001.144.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL  
QUALITY**

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**Jon Niermann, Chairman for the Commission**