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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 27, 2022

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

**RE: Port of Corpus Christi Authority of Nueces County (Applicant)
Docket No. 2021-0421-WR**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Requests in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2021-0421-WR

APPLICATION BY THE PORT OF CORPUS CHRISTI AUTHORITY OF NUECES COUNTY FOR WATER RIGHTS PERMIT NO. 13630	§ § § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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**THE OFFICE OF PUBLIC INTEREST COUNSEL’S
RESPONSE TO HEARING REQUESTS**

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

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) and files this Response to Hearing Requests in the above-referenced matter. OPIC recommends granting the requests for a contested case hearing filed by: the Ingleside on the Bay Coastal Watch Association (IOBCWA), Adrian Clark, Thomas Mack, James Miday, Emily Christina Nye, Patrick Arnold Nye, Encarnacion Serna, Gary Strickland, Jim Tucker, Judy Tucker, Sheila Walton, Susan Wilder, Daniel Patrick Wilkerson, and Ira Wesley Williams. OPIC finds these requestors to be affected persons based on either their economic interests or their ownership in waterfront property and littoral interests.¹

In support of its recommendation, OPIC respectfully submits the following:

¹ See *Cummins v. Travis County Water Control and Improvement Dist.* No. 17, 175 S.W.3d 34 at 42 (Tex. App. — Austin 2005, pet. denied) “In Texas jurisprudence, riparian and littoral rights are treated similarly, and the terms are used interchangeably, but “riparian” refers to the waters of rivers and streams, while “littoral” refers to the waters of lakes, seas, and oceans. See Black’s Law Dictionary 945, 1328 (7th ed. 2001).” See also *Norrell v. Aransas County Navigation Dist. No. 1*, 1 S.W.3d 296, 298 n.1 (Tex. App.—Corpus Christi 1999, no pet.) (“Littoral property rights are appurtenant to land which borders a lake or sea.”); *Natland Corp. v. Baker’s Port, Inc.*, 865 S.W.2d 52, 57 (Tex. App.—Corpus Christi 1993, writ denied) (littoral rights defined as “[s]horeline property owners’ rights”); *City of Port Isabel v. Missouri Pac. R.R. Co.*, 729 S.W.2d 939, 942 (Tex. App.—Corpus Christi 1987, writ ref’d n.r.e.) (land adjacent to Laguna Madre was “littoral”); *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 646 (Tex. App.—Austin 1981, writ ref’d n.r.e.) (“Littoral rights are appurtenant to the land which borders a lake or sea.”); *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952 (Tex. 1976) (discussing rules about vesting of rights and their significance with equal application to riparian and littoral land).

I. INTRODUCTION

The Port of Corpus Christi Authority of Nueces County (PCCA) seeks a Water Use Permit to divert and use not to exceed 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 cfs (62,890 gpm) for industrial purposes in San Patricio County. The proposed diversion point is located on Corpus Christi Bay at Latitude 27.873741° N, Longitude 97.294987° W, in San Patricio County.

PCCA's application was received on September 3, 2019. Additional information and fees were received on December 3, 2019, January 28, 2020, February 4, 2020, and March 18, 2020. The application was declared administratively complete on May 11, 2020. Additional information was also received on July 22, 2020 and August 17, 2020. On February 5, 2021, the TCEQ Chief Clerk mailed notice to the water rights holders of record in the San Antonio-Nueces Coastal Basin. Applicant published notice of the application in the *Corpus Christi Caller Times* on February 26, 2021. The original comment period ended thirty days after publication of the notice on March 29, 2021.² A virtual public meeting was held on July 13, 2021, and the comment period was extended until the end of the meeting. The deadline to request a contested case hearing was March 29, 2021.

² 30 TAC Section 295.171: A request for contested case hearing on an application for a water use permit or amendment made by the applicant, the executive director, or an affected person who objects to the application must be made in writing, must comply with the requirements of Chapter 55, Subchapter G, of this title (relating to Requests for Reconsideration and Contested Case Hearings; Public Comment), and specifically §55.251 of this title (relating to Requests for Contested Case Hearing, Public Comment), and must be submitted to the commission within 30 days after the publication of the notice of application. The commission may extend the time allowed for submitting a request for contested case hearing.

II. REQUIREMENTS OF APPLICABLE LAW

A. Requirements to Obtain Affected Person Status

This application was declared administratively complete after September 1, 1999, and is subject to Chapter 55, Subchapter G, sections 55.250 - 55.256. According to these rules, an “affected person” must submit a timely contested case hearing request in writing and in compliance with Commission requirements for making a request.³ In addition, the request must identify the person’s personal justiciable interest affected by the application, including a brief, specific explanation regarding “the requestor’s location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to the members of the general public.”⁴

An “affected person” is one “who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application” in a manner not common to members of the general public.⁵ Relevant factors considered in determining a person’s affected person status include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of the property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues

³ 30 TEX. ADMIN. CODE (“TAC”) §§ 55.251 *et seq.* and 30 TAC § 295.171.

⁴ 30 TAC § 55.251(c)(2).

⁵ 30 TAC § 55.256(a). “This standard does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will potentially suffer harm or have a justiciable interest that will be affected.” *United Copper v. TNRCC*, 17 S.W.3d 797, 803 (Tex.App. - Austin 2000).

relevant to the application.⁶

A contested case hearing should be granted if an affected person's hearing request meets all requirements of applicable law. A request for hearing shall be granted if the request is made by the applicant or the executive director.⁷ The Commission may also refer an application to the State Office of Administrative Hearings if the Commission determines that a hearing would be in the public interest.⁸

A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.⁹

B. Requirements for a Water Use Permit

Section 11.022 of the Texas Water Code (TWC) provides that “the right to the use of state water may be acquired by appropriation in the manner and for the purposes provided in this chapter.” Section 11.134(b) provides in pertinent part that the Commission shall grant an application to use state water only if:

- (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;

⁶ 30 TAC § 55.256(c).

⁷ 30 TAC § 55.255(b)1

⁸ 30 TAC § 55.255(c).

⁹ 30 TAC § 55.252(a).

- (C) is not detrimental to the public welfare;
- (D) considers 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.

III. DISCUSSION

A. Determination of Affected Persons

1. Untimely Requests

Untimely requests for a contested case hearing were submitted by Isabel Araiza Ortiz; Deena Henderson; Donna Hoffman; Jeffrey Douglas Jacoby on behalf of Texas Campaign for the Environment; Susan Lippman; and Wendy Lynn Hughes after the March 29, 2021 contested case hearing request period had expired. OPIC therefore recommends that these requests be denied.

2. Groups or Associations

a. Ingleside on the Bay Coastal Watch Association (IOBCWA)

On March 29, 2021, Eric Allmon, submitted a timely hearing request in this matter on behalf of IOBCWA. Mr. Allmon states that IOBCWA is a non-profit organization whose mission is to “promote the health, safety, and quality of life for residents, property owners, business operators, volunteers for, or employees of Ingleside on the Bay or in Ingleside Cove, located at the convergence of the Corpus Christi and La Quinta Ship Channels, on Corpus Christi Bay.” IOBCWA raises concerns related to purpose and location of use, return and surplus flows, consistency with State and Regional Water Plan, detriment to the public welfare, and impacts to existing uses and local ecology. OPIC finds that the interests IOBCWA seeks to protect are

germane to the organization's purpose.

IOBCWA claims that several members of the group have standing to request a hearing in their own right as required by 30 TAC §55.252(a)(1). As discussed below in analyzing individual hearing requests, OPIC finds that Patrick Nye, Encarnacion Serna, and Daniel Wilkerson are affected persons who have a personal justiciable interest not common to members of the general public. The IOBCWA request also states that Chip Harmon—who did not otherwise submit an individual hearing request and is therefore not addressed below—has a specific economic interest as a fishing guide near the proposed intake that may be impacted by the proposed permit. Therefore, OPIC finds that Mr. Harmon is also an affected group member. For these reasons, OPIC recommends granting the hearing request of IOBCWA.

b. Coastal Conservation Association (CCA)

On March 28, 2021, Shane Bonnot, submitted a timely hearing request in this matter on behalf of CCA. The requestor states that the purpose of CCA is to “advise and educate the public on conservation of marine resources... (and) conserve, promote and enhance the present and future availability of those coastal resources for the benefit and enjoyment of the general public.”

CCA raises concerns related to environmental flows, ecology of the bay, and potential for salinity buildup. While OPIC finds that the interests CCA seeks to protect are germane to the organization's purpose, their hearing request did not identify one or more members of the group or association who would otherwise have standing to request a hearing in their own right as required by 30 TAC §55.252(a)(1). OPIC therefore cannot recommend that the Commission grant CCA’s hearing request.

3. Requestors Whose Locations Could not be Determined

Timely requests for a contested case hearings were received from Tom McIver, Mary

Judith Orr, and Lynne Porter. Each of these requestors provided only a Post Office Box address that could not be mapped by the executive director. Additionally, these requestors did not provide information showing ownership of a water right or littoral right that may be impacted by the proposed diversion. Accordingly, OPIC cannot determine that they would be impacted in a manner not common to members of the general public. We must therefore recommend these requests be denied.

4. Requestor Whose Location is Too Distant from the Diversion Point

A timely request for a contested case hearings was received from Dr. William Norman Milner, Jr. This requestor could not be plotted in the map created by the executive director because he is too distant from the facility and diversion point. Additionally, Dr. Milner did not provide information showing ownership of a water right or littoral right that may be impacted by the proposed diversion. For these reasons, OPIC cannot determine that Dr. Milner would be impacted in a manner not common to members of the general public. We must therefore recommend his request be denied.

5. Requestors Not Impacted in a Manner Distinguishable from General Public

Requests for a contested case hearing were received from Payton Gray Campbell, Patt & Yves Coeckelenbergh, Tom Daley, Larry Ferell, Frank Glenn Green, Catherine Hatch, Bruce Harry Henkhaus, Jennifer Hilliard, Jeff Howard, Max Paul Keller, Uneeda Laitinen, Charlotte Lawrence, Kathryn Masten, Ann Nyberg, Jacob Oster, Blanca Parkinson, Kristopher Parkinson, Lisa Riley, Roy Riley, Debra Rowe, Errol Alvie Summerlin, and Brent Winborne. Based on the location of each of these requestors as mapped by the executive director, none of these requestors own waterfront property indicative of a littoral water right that may be impacted by the proposed diversion. OPIC cannot find these requestors to be affected persons based on interests common

to members of the general public. OPIC must therefore recommend these requests be denied.

6. Requestors with Waterfront Properties Who do not State Justiciable Interests

Requests for a contested case hearings were received from Kellen Chiddix, Sheila Nagy, and Clayton Poenisch. Each of these requestors is identified in the map created by the executive director as owning waterfront property indicative of a littoral water right. However, these requestors state only general opposition to the proposed water right and do not otherwise identify a personal justiciable interest that is protected by the law under which the application will be considered. OPIC must therefore recommend these requests be denied.

7. Affected Individual Requestors

Timely hearing requests were submitted by Adrian Clark, Daniel Patrick Wilkerson, and Susan Wilder. While these requestors have not shown ownership of waterfront property or corresponding littoral rights, they have identified specific economic interests related to their activities near the proposed intake that may be impacted by the proposed permit. Adrian Clark has a fishing business and is concerned about "loss of income that will happen when aquatic life in La Quinta Channel and Corpus Christi Bay is harmed/destroyed by this desal plant." Daniel Patrick Wilkerson states he is "the owner and operator of Family Fishing Charters in Ingleside...(and) the impacts on my business could be overwhelming." Susan Wilder states she has a business that owns a pier in Corpus Christi Bay next to the La Quinta Channel.

These requests raise concerns about the proposed diversion that relates to purpose and location of use, consistency with State and Regional Water Plans, detriment to the public welfare, and impacts to existing uses and local ecology. OPIC finds that the businesses of Adrian Clark and Daniel Patrick constitute a personal justiciable interest related to an economic interest potentially affected by the application, and ownership of the pier by Susan Wilder supports a

finding of a potential impact on use of the property of the requestor. The Commission must consider issues regarding water availability,¹⁰ the protection of in stream uses,¹¹ and the protection of public welfare¹² in its determination of whether to grant the application. For these reasons, OPIC recommends their hearing requests be granted.

Timely hearing requests were also submitted by Thomas Mack, James Miday, Emily Christina Nye, Patrick Arnold Nye, Encarnacion Serna, Gary Strickland, Jim Tucker, Judy Tucker, Sheila Walton, and Ira Wesley Williams. These requestors are identified on the map created by the executive director as owning waterfront property and, accordingly, each requestor would have littoral interests and water rights. These requests raise concerns about the proposed diversion related to purpose and location of use, consistency with State and Regional Water Plan, detriment to the public welfare, and impacts to existing uses and local ecology. The Commission must consider issues regarding water availability,¹³ the protection of in stream uses,¹⁴ and the protection of public welfare¹⁵ in its determination of whether to grant the application. For these reasons, OPIC recommends their hearing requests be granted.

¹⁰ See TWC § 11.134(b); 30 TAC §297.42.

¹¹ TWC § 11.147(d).

¹² TWC 11.134(b)(3)(C)

¹³ See TWC § 11.134(b); 30 TAC §297.42.

¹⁴ TWC § 11.147(d).

¹⁵ TWC 11.134(b)(3)(C)

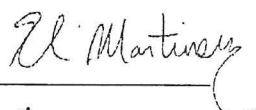
IV. CONCLUSION

OPIC respectfully recommends that the Commission grant the hearing requests of the following requesters and refer this matter to SOAH for a contested case hearing: the Ingleside on the Bay Coastal Watch Association (IOBCWA), Adrian Clark, Thomas Mack, James Miday, Emily Christina Nye, Patrick Arnold Nye, Encarnacion Serna, Gary Strickland, Jim Tucker, Judy Tucker, Sheila Walton, Susan Wilder, Daniel Patrick Wilkerson, and Ira Wesley Williams.

OPIC additionally recommends that the Commission deny the remaining requests.

Respectfully submitted,

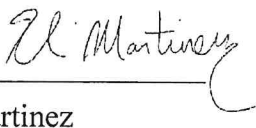
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By: 

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2022, the original of the Office of the Public Counsel's Response to Hearing Requests was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via electronic mail and/or by deposit in the U.S. Mail.

By: 
Eli Martinez

MAILING LIST
PORT OF CORPUS CHRISTI AUTHORITY OF NUECES COUNTY
DOCKET NO. 2021-0421-WR
WATER RIGHTS PERMIT NO. WRPERM 13630

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