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

APPLICATION BY THE PORT OF CORPUS CHRISTI AUTHORITY OF NUECES COUNTY FOR WATER USE PERMIT NO. 13630	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

PROTESTANTS INGLESIDE ON THE BAY COASTAL WATCH ASSOCIATION AND ENCARNACION SERNA'S EXCEPTIONS TO THE PROPOSAL FOR DECISION

February 20, 2024

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TO THE HONORABLE CHAIRMAN NIERMANN AND COMMISSIONERS OF THE TEXAS COMMISSION ENVIRONMENTAL QUALITY:

Protestants Ingleside on the Bay Coastal Watch Association and Encarnacion Serna (collectively, "Protestants") file these Exceptions to the Proposal for Decision and urge the Commission to deny the Port of Corpus Christi Authority of Nueces County's ("the Port," "POCCA," or "Applicant") Application for Water Use Permit No. 13630 (the "Application"). For support, Protestants respectfully offer the following:

I. INTRODUCTION

Importantly, the permit that the Port seeks in this case is entirely speculative. The Port has no intent to own, construct, or operate the desalination facility.[1] The Port has identified no particular users the water is for, and the Port has no contracts with any person to provide water.[2]

[1] Ex. IOB-106 (a copy of the video of the Port Commissioners' board meeting where the permit was considered) (Port Commissioner Engel asked Sarah Garza, "When I look at what we filed there with the Texas Commission on Environmental Quality, what are we saying we are as the Port? Are we saying that we're a wholesale Water Supplier, are we a utility?" Ms. Garza responded that seeking a water rights permit for a desalination plant automatically makes the Port a wholesale water supplier but that the Application does not commit the Port to anything.); Ex. IOB-100 (Prefiled Direct Testimony of Stefan Schuster) at 16:1-20 ("Port representatives have been clear that their intent is to first obtain the permit, and then transfer the permit to another entity . . . These comments [from the Port Commissioners' board meeting] are consistent with those made by Charlie Zahn, chairman of the Port Commission, when in 2018 he said, "What we're going to do is permit [a desalination plant], and if (for example) the City of Corpus Christi decides that they're going to need that alternate source of water, or they contract with a third-party to build a desalination plant, we're going to assign that permit to them.").

[2] Tr. Vol. 1 at 66:14-19 (Cross Examination of Sarah Garza) ("[W]e don't currently have any contracts or agreements in place, one way or the other, how that water -- what will happen with the desal plant, how that water will -- who that water will go to.").

This is precisely the opposite of what the water rights permitting scheme is intended to address, where permits are intended to be obtained as necessary to respond to specific demands and needs.[3]

The Port has failed to meet its burden of proof on multiple issues, and the Application should be denied. The ALJs' recommendation of permit issuance suffers from several errors. For one, the ALJs improperly depart from the explicit regulatory requirement that a wholesale water supplier provide a drought contingency plan. Additionally, the ALJs accept vague parroting of the rule as demonstrating compliance with key water conservation plan requirements. Mr. Serna's water rights associated with his coastal property are potentially threatened by the surplus water return from the appropriation in a manner that the ALJs improperly treat as beyond the scope of this hearing, when, in fact, this hearing is Mr. Serna's sole opportunity to have these issues.

The Port's proposed appropriation will have significant relevant impacts upon public welfare which warrant denial of the Application. Dredging associated with the proposed appropriation will cause significant damage to the environment, while the intakes themselves will cause significant loss of valuable commercial and recreational fishing resources.

The Water Code requires a greater level of protection for aquatic life than the ALJs have provided. The ALJs have improperly concluded that the Port was not required to provide an evaluation of the impact of the proposed appropriation upon fish and wildlife habitat, and have improperly concluded that the information provided sufficed for such an evaluation. The applicable statutes *do* require an assessment of the impact that the appropriation will have upon fish and wildlife habitat. The massive appropriation proposed by the Port within a sensitive estuary will have cascading environmental impacts that go far beyond those acknowledged in the information compiled by the Port.

[3] *See* Tex. Water Code § 11.121.

A valid evaluation of many issues raised by the Application has been prevented by the Port's refusal to comply with the requirement of the TCEQ rules that an applicant identify the location of any surplus water return. The absence of this information warrants denial of the Application, and fundamentally prevents a full consideration of the Application. The ALJs depart from the requirements of the TCEQ rules in sparing the Port from providing any meaningful information relating to the location, design and operation of the surplus water return associated with the proposed appropriation.

For these reasons, the Proposal for Decision should be reversed, and the Application should be denied.

II. COMPLIANCE WITH APPLICABLE RULES, LAWS, AND REQUIREMENTS

Issue A: By seeking authorization to be a wholesale water supplier, POCCA is required to submit a Drought Contingency Plan, which it has failed to do.

The ALJs' determination that POCCA is not required to submit a drought contingency plan departs from the plain language of the TCEQ Rules. TCEQ Rule 295.9(1) explicitly requires that, "an application to appropriate . . . . state water for . . . . industrial or mining use . . . . must be submitted in accordance with the guidelines set forth in Chapter 288 of this title (relating to Water Conservation Plans, Drought Contingency Plans, Guidelines and Requirements)."

Guidelines for the contents of a drought contingency plan for a wholesale water supplier are then explicitly set forth at 30 Tex. Admin. Code § 288.22, with § 288.22 introducing the elements of the rule with the statement that, "[a] drought contingency plan for *a* wholesale water supplier must include the following minimum elements" (emphasis of indefinite article added).

In asserting that POCCA is not required to submit a drought contingency plan, the ALJs hang their hat on the use of definite articles for *some* of the requirements listed in § 288.22. While 30 Tex. Admin. Code § 288.2(a)(2), (b) and (c) make reference to "the public water supplier," this

language solely is limiting of the applicability of these sub-paragraphs of the rule. Other sub-paragraphs identifying the requirements applicable to "a wholesale water supplier" contain no limiting reference to "the public" water supplier. Provision 30 Tex. Admin. Code § 288.22(a)(1), requiring preparation of the plan with public input, by the language of the rule, applies to all wholesale public water suppliers. The same is true for § 288.22(a)(3), regarding the information to be monitored as part of the drought contingency plan; (a)(4), requiring a minimum of three drought or emergency response stages; (a)(5), regarding procedures to be followed for the initiation or termination of drought response stages; (a)(6), regarding specific, quantified targets for water use reductions to be achieved during periods of water shortage and drought; and (a)(7), regarding specific water supply or water demand management measures to be implemented during each stage of the plan. The rule sets forth the responsibility of "a wholesale water supplier" to provide these elements of a drought contingency plan in plain and unambiguous language.

As an applicant to appropriate water for industrial use, the Port is thus required to submit a water conservation plan and drought contingency plan consistent with the applicable requirements of Chapter 288. Chapter 288 of the TCEQ rules set forth guidelines for the contents of a drought contingency plan for a wholesale water supplier which apply to POCCA's Application.

An agency regulation is construed in the same manner as statutes, with courts and agencies required to follow the plain language of the rule unless it is ambiguous.[4] Furthermore, when a statute's language is clear and unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids to construe the language.[5] Thus, the ALJs resort to "context" in order to give the language of the rules a meaning outside of its plain language which is unjustified and improper.

[4] *BFI Waste Systems of North America, Inc. v. Martinez Environmental Group,* 93 S.W.3d 570, 575 (Tex. App. – Austin 2002, pet. denied).
[5] *Id.*

For these reasons, the ALJs' Proposed Conclusions of Law Nos. 36, 37, and 38, 44 and 45 are contrary to the plain language of the TCEQ rules.

Issue B: Water Conservation Plan

The ALJs properly interpret the TCEQ rules as requiring that POCCA comply with the requirements for a Water Conservation Plan set forth at 30 Tex. Admin. Code § 288.5. However, the ALJs err in concluding that the Water Conservation Plan requirements of this rule have been met.

1. The Water Conservation Plan lacks required detail for multiple elements.

Several elements of the water conservation plan submitted by the Port lack the required specificity. The Austin Court of Appeals has noted that, particularly where an authorization has no requirement for renewal, it is crucially important that a TCEQ application provide a detailed identification of how applicable requirements will be met.[6] The water right sought by the Port will never require renewal. Under these circumstances, the initial permit issuance is the sole opportunity for the public to comment upon, and present evidence regarding, the sufficiency of the Application. Merely conclusory responses within a permit application that simply parrot the applicable requirements are inadequate to meet a permit applicant's burden of proof.[7]

Yet, the Port's Application addresses several requirements with empty language that merely parrots the applicable rule. As one example, the Port's WCP merely identifies the intended record management program by saying, "An appropriate monitoring and record management program will be employed to track water deliveries, sales, and losses."[8] This language constitutes nothing more than a plan to have a plan. Approval of the Application based on such vague language would

[6] *BFI* at 579.
[7] *BFI* at 580.
[8] Ex. APP-SG-3 (Permit Application) at 63.

wholly deprive the public of the opportunity to meaningfully comment on this legal requirement, while also depriving the public of any opportunity to meaningfully present evidence and argument as to whether the Port has complied with this required element of the WCP.

The WCP is also impermissibly vague as to the metering/leak repair program for the wholesaler's storage, delivery, and distribution system. The Port's response addressing this requirement merely states that, six months after startup and yearly thereafter, data will be reviewed regarding intake versus return water, and daily visual inspections will be made with work orders prepared for a deficient item.[9] The Port's response on this requirement includes no metering program and apparently solely addresses the desalination facility without programmatically addressing the storage, delivery, and distribution system. The WCP similarly merely parrots the applicable requirements with regard to the requirement that all customers must develop and implement a compliant water conservation plan.[10]

2. The Water Conservation Plan fails to include the required description of the water distribution system.

Consistent with the requirement of 30 Tex. Admin. Code § 288.5(1)(A) that an applicant to serve as a wholesale water supplier submit a water conservation plan to provide "water supply system data," TCEQ's application form requires that the WCP include a description of the entire water system, including the number of treatment plans, wells and storage tanks.[11] However, the Port only provided a flow-chart describing the water treatment process that occurs within the proposed desalination facility.[12] Protestants' expert Stefan Schuster observed that the information provided by POCCA "does not accurately describe the full system that would be used to supply

[9] Ex. APP-SG-3 at 63.
[10] Ex. APP-SG-3 at 63-64.
[11] Ex. APP-SG-3 (Permit Application) at 000062.
[12] *Id.* at 000070.

water to industry, as the Port claims will be the purpose of the diversion."[13] The Executive Director's staff did not review whether the information included a proper description of the distribution system.[14] Consequently, required elements of the water supply system description are simply missing—such as the conveyance to be used to carry the water from the desalination facility to the customer(s) for the water.

3. Applicant has failed to demonstrate that no feasible alternative exists.

TCEQ Rule 288.7(b) and the WCP form state that it is "the burden of proof of the applicant to demonstrate that no feasible alternative to the proposed appropriation exists."[15] The Port simply left the feasible alternative section of the WCP form blank[16] and has not otherwise demonstrated that there is no feasible alternative to the proposed facility.[17]

In his prefiled testimony, the Port's expert Dr. Kirk Dean states a conclusory opinion that "there are no other practicable alternatives that meet the projected water supply needs in San Patricio County" but provides no basis for this opinion.[18] During cross examination, Ms. Garza stated that the Port did not consider other desalination facilities or other discharge and intake locations under the Texas Parks & Wildlife Department and General Land Office study ("GLO Study") as feasible alternatives to the current proposed facility.[19]

Under the Region N 2021 Water Plan, the La Quinta desalination facility is ranked *31st* under water management strategies, indicating that there are 30 other strategies ranked above the proposed diversion.[20] Yet, no analysis is provided to meet the Port's burden of proof that these

[13] Ex. IOB-110 at 14:5-9.
[14] Tr. Vol. 4 at 763:22-764:2 (Cross Examination of Jennifer Allis).
[15] 30 Tex. Admin. Code § 288.7(b); Ex. APP-SG-9 at 000066.
[16] *Id.*
[17] Ex. IOB-100 (Prefiled Direct Testimony of Stefan Schuster) at 18:13-17.
[18] Ex. APP-KD-1 at 14:9-10.
[19] Tr. Vol. 1 at 92:1-15.
[20] Ex. APP-KK-3.

other options are not feasible alternatives to the requested appropriation. To the contrary, the Port's witness Kirk Kennedy testified that many of these options are feasible, including options that would cumulatively supply an equal amount of water, such as expansion of the O.N. Stevens plant.[21] Ms. Garza was unable to explain during cross examination why any of these 30 water management strategies are not feasible alternatives to the proposed facility.[22]

On the other hand, Mr. Schuster has identified that water from nearby reservoirs is available through the Mary Rhodes Pipeline, and groundwater sources are also available from well fields in San Patricio County and Jim Wells County.[23]

The Port has simply not met its burden of proof under TCEQ Rule 288.7(b) to demonstrate that no feasible alternatives to the proposed appropriation exist. The ALJs err in finding otherwise.

4. The ALJs err in characterizing desalination as "conservation."

The ALJs erroneously propose a finding of fact that the practice of utilizing desalination technology to establish an alternate water supply source is supported under the definition of "conservation" set forth in the TCEQ rules at 30 Tex. Admin. Code § 288.1(4).[24] This finding is in error. TCEQ rules define "conservation" as:

> Those practices, techniques, and technologies that reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

The proposed desalination facility will not reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, nor increase the recycling and reuse of water. To the contrary, desalination as proposed by POCCA is clearly designed to encourage

[21] Tr. Vol. 2 at 344–345.
[22] Tr. Vol. 1 at 146:8-147:11.
[23] Ex. IOB-100 at 19:9-11.
[24] Proposed Finding of Fact No. 42.

increased consumption of water by industry. Thus, the utilization of desalination technology does not constitute "conservation" as that term is defined in the TCEQ Rules. Proposed Finding of Fact No. 42 is not supported by the facts and evidence in the record.

5. The ALJs' Findings of Fact and Conclusions of Law related to the Water Conservation Plan are in error.

For these reasons, Proposed Findings of Fact Nos. 38, 39, 40, 41, 42, 44, 45, 46, and 47 are in error, and Proposed Conclusions of Law Nos. 9, 29, 41, and 45 are in error.

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

The ALJs err in concluding that the Port has demonstrated that the proposed appropriation will not impair existing water rights. The ALJs go so far as to assert that TCEQ has no responsibility to protect littoral rights in the TCEQ water rights permitting process. The Austin Court of Appeals has observed that in Texas jurisprudence, riparian and littoral rights are treated similarly, and the terms are used interchangeably.[25] The term "littoral" references the waters of lakes, seas, and oceans.[26] Thus, adoption of the ALJs' position would have the TCEQ step back from all protection of water rights associated with any lake, sea, or ocean. Chapter 11 of the Texas Water Code solely uses the term "riparian" without at any point distinguishing between riparian rights and littoral rights. A proposed water appropriation may not "impair existing water rights or vested riparian rights." Tex. Water Code § 11.134(b)(3)(B); 30 Tex. Admin. Code § 297.41(a)(3)(B). Properly applied, this protection for riparian rights would include the protection of rights associated with the ownership of shoreline property along Corpus Christi Bay, such as Mr. Serna's.

[25] *See Cummins v. Travis Cnty. Water Control and Improvement Dist. No. 17*, 175 S.W.3d 34, 42 (Tex. App. – Austin 2005, pet. denied).
[26] *Id.*

The ALJs go so far as to propose a finding of fact that "[n]o party claiming to have water rights impacted by the appropriation sought party status in this contested case hearing."[27] This proposed finding of fact is directly contrary to facts and evidence in the case, considering that Mr. Serna sought, and was granted, party status in consideration of the impact of POCCA's proposed water right upon Mr. Serna's own littoral water rights.[28]

The Port has not demonstrated that Mr. Serna's littoral rights will not be adversely impacted. Mr. Serna's littoral rights include the right to build a dock.[29] The Port's witness Dr. Lial Tischler argued in his prefiled direct testimony that the facility will not affect existing rights because the "intake structure will be located more than 1,000 feet from the shoreline at its closest point, will be submerged, and will have a maximum intake velocity that will be indistinguishable from the ambient current a few feet away from the structure."[30] This evaluation does not address the impact of the *surplus water return* upon Mr. Serna's property. The return of surplus water is a key element of the permit at issue, and the permit under consideration places no restriction on the location or design of the surplus water return in relationship to Mr. Serna's dock, or Mr. Serna's shoreline property. Thus, no demonstration has been made that the surplus water return will not impact the integrity of Mr. Serna's dock, nor the stability of the shoreline at Mr. Serna's property.

The ALJs err in attempting to treat all issues regarding the surplus water return as irrelevant to this proceeding. The ALJs fail to apply the plain language of the TCEQ rules' definition of "surplus water." Within TCEQ Chapter 295 (Governing Water Rights Applications), the term "surplus water" is defined to mean:

> Water taken from any source in excess of the initial or continued beneficial use of the appropriator for the purpose or purposes authorized by law. Water that is

[27] Proposed Finding of Fact No. 62.
[28] *See* Ex. IOB-200 at 1.
[29] *In re Occidental Chem. Corp.,* 561 S.W.3d 146, 164 (Tex. 2018).
[30] Ex. APP-LT-1 at 11:11-14.

> recirculated within a reservoir for cooling purposes shall not be considered to be surplus water.

Under this definition, the water returned to Corpus Christi Bay as reject brine from the reverse osmosis treatment process will be "surplus water." The Application proposes to withdraw 90.0 MGD as feedstock for the desalination facility, while the facility will only produce approximately 30 MGD of treated water.[31] According to the Application, the 30 MGD of treated water is proposed to then be sold for ultimate industrial use in the Corpus Christi area. The Port's water conservation plan states as a water conservation goal (a water use efficiency measure) that "60.7% of water will not be consumed and therefore returned."[32]

The ALJs attempt to create a false distinction between "wastewater" and "surplus water."[33] Through this distinction, the ALJs then dismiss all issues related to the surplus water return as irrelevant to this water rights proceeding.[34] This is contrary to the testimony of the Port's own witnesses, such as Kirk Kennedy, who testified:

> Q. Let me pull up -- do you have before you now 295.8?
> A. Yes, sir.
> Q. And does this govern return and surplus water?
> A. That's what it says, yes, sir.
> Q. And this says, "The application shall describe the location at which return water or surplus water will be returned to the stream"?
> A. Yes.
> Q. "And if practicable, this must also be shown on an application map"?
> A. Yes.
> Q. So the distinction between the return water versus surplus water in terms of the requirement to show a location, both of them are required to be shown; is that correct?
> A. Yes. Yes, sir.

[31] Ex. APP-SG-3 (Permit Application) at 44.
[32] Ex. APP-SG-9 (Water Conservation Plan) at 55 (emphasis in original).
[33] PFD at 74.
[34] PFD at 75.

Q. Could this water be viewed as both surplus water, return water, and wastewater?
A. I suppose it could, yes.
Q. So it's your understanding those terms are not mutually exclusive? And when I say, "Those terms," perhaps to be clear, I'm talking about the term surplus water, return water, and wastewater?
A. I think you could use all three of those terms.
Q. Okay. Could potentially all three of those apply to this reject brine when it was returned to the bay?
A. It potentially could, yeah.[35]

The brine returned to the bay is surplus water, and the location and method of that return are key aspects of the water right being sought – as reflected by the regulatory requirement that the location of the surplus water return be identified (which requirement the Port has not met).

The ALJs place the cart before the horse in attempting to defer consideration of impacts of the surplus water return to the TPDES permitting context. POCCA's own internal memoranda noted that due to the nature of information needed, it is necessary to pursue a TPDES permit prior to the pursuit of a water rights permit.[36] The Port's inability to address the impact of its surplus water return is a result of the Port's attempt to seek the water rights authorization prior to the TPDES authorization – directly contrary to the advice from the Port's own technical consultants – not any attempt by Protestants to raise issues irrelevant to a consideration of the Port's water rights application.

Thus, the impact of the surplus water return upon Mr. Serna's littoral rights, including his right to wharf, are relevant to the consideration of the Port's water right application. Nothing whatsoever is known about the location, design, or operation of the surplus water return. Beyond being located somewhere within Corpus Christi Bay, POCCA's expert witness Kirk Dean admitted

[35] Tr. Vol. 2 at 339-340.
[36] Ex. IOB-4 at 15417.

that the water rights application contains no limit on the location, operation or design of the surplus water return in relationship to Mr. Serna's dock.[37] Yet, in determining that the proposed water right would have not impair senior water rights, Mr. Dean did not consider any rights associated with Mr. Serna's littoral water rights.[38]

Notably, the potential impacts of the surplus water return extend to impacts that would be beyond the scope of what the TCEQ has previously considered relevant to a TPDES wastewater discharge. For example, the means by which a discharge could have adverse effects upon the structural integrity of nearby appurtenances as a result of alterations in the pressure and velocity of water would fall outside the scope of issues previously considered within the scope of a TPDES permit application. Yet, such impacts are of key concern to Mr. Serna. This is precisely why the applicable rules governing water rights require that an applicant identify the location of the surplus water return. 30 Tex. Admin. Code § 295.8

Without information on the location, design, and operation of the surplus water return, it is impossible to determine that Mr. Serna's littoral rights will be protected. If the full scope of the potential impacts is not considered in this proceeding, then there is no other proceeding in which the full scope of potential impacts upon Mr. Serna's water rights will ever be addressed. The ALJs err in summarily dismissing any issues related to the surplus water return – including impacts of that return upon Mr. Serna's water rights – as outside the scope of this proceeding. Thus, Proposed Findings of Fact Nos. 59, 62, 64 are in error, and Proposed Conclusions of Law Nos. 16, 32, 44 and 45 are in error.

[37] Tr. Vol. 1 at 249-251.
[38] Tr. Vol. 1 at 252.

Issues F and G: Public Welfare and Protection of Environment/Environmental Flow Standards and Assessments

Protestants will address issues F (Public Welfare) and G (Protection of Environment and Environmental Assessments) together,[39] here, because the issues are related; both address the expected adverse impacts that are likely to occur if the Draft Permit is granted.

In addressing the dispute presented by the parties to this case, the ALJs have essentially determined that: (1) no habitat assessment is required here because of the adoption of SB3 environmental flow standards; (2) even if an assessment were required, that assessment need not be conducted or reviewed by the ED or her staff; and (3) the Applicant presented sufficient evidence demonstrating that an assessment was performed. Notably, the Applicant's evidence acknowledged that there would be impacts on fish and wildlife and their habitats, and yet, neither the PFD nor the Proposed Order include conditions to address those expected impacts (beyond the use of mesh screens).[40] This fails to satisfy the requirements of Texas Water Code Section 11.147(e), which requires the Commission to include in the permit those "conditions considered by the commission necessary to maintain fish and wildlife habitats," based on the assessment required by Water Code Section 11.152.

Protestants maintain that the PFD and Proposed Order fail to properly apply and enforce the requirements found in Water Code Sections 11.152 and 11.147(e) and the Commission's

[39] Protestants except to Findings of Fact 26, 65 through 78, 85, 86 and 97, as well as Conclusions of Law 20, 23, 26, 27, and 43. To the extent Conclusion of Law 25 limits the statutorily required habitat assessment, under Section 11.152 of the Water Code, to only those impacts to fish and wildlife habitat resulting from diversion facilities, Protestants except and object to this limited interpretation of the applicable law. Section 11.152 of the Water Code requires an assessment of impacts to fish and wildlife habitat resulting from issuance of the permit, not simply impacts resulting from diversion facilities. Because this draft permit would authorize a water intake structure for a desalination facility, the impacts of permit issuance include impacts from constructing the intake structure—including the dredging involved in constructing the structure. Because the PFD and Proposed Order, including COL 25, limit the application of Section 11.152 in a manner that is not supported by the plain language of the statute, Protestants maintain that the PFD and Proposed Order are based on a misapplication of the law.

[40] The Proposed Order is confusing in this regard. Finding of Fact 97 proposes an amendment to Special Condition 5.B to limit intake velocity, but Ordering Provision No. 1 does not include this language in the proposed amendment to Special Condition 5.B; it only includes additional details regarding the required mesh screens.

implementing regulations, *see* 30 Tex. Admin. Code § 297.53. Those statutes require consideration of the impacts on fish and wildlife and their habitats resulting from permit issuance. In this case, permit issuance would result in dredging, to allow for construction of the intake structures authorized by the draft permit, and thus, the impacts of dredging should have been considered by the ALJ, and if a permit were still proposed for issuance, it should have included mitigation measures or special conditions to address the expected impacts caused by the dredging that is contemplated by the draft permit. Further, the evidence in the record demonstrates, indisputably, that the proposed intake will impact some fish and wildlife habitat. Yet, the mesh screens proposed by the draft permit will not address those expected impacts, and no other measures have been proposed based on a site-specific habitat assessment, as required by Section 11.152 and 11.147(e) of the Water Code.[41]

1. Texas Water Code Sections 11.147(e) and 11.152, and related Commission rules, require an assessment of impacts on fish and wildlife habitat and mitigation.

Protestants have provided extensive legal briefing regarding the applicability of Water Code Sections 11.147(e) and 11.152 to this permit proceeding, irrespective of the Commission's adoption of SB3 environmental flow standards. Those legal arguments will not be repeated here. Instead, a summary of the arguments is presented below.

In short, the plain language of the two statutes requires an assessment of permit issuance on fish and wildlife habitat and requires the Commission to include permit conditions as necessary to maintain fish and wildlife habitats. Tex. Water Code §§ 11.147(e), 11.152.

Water Code Section 11.147(e-3) explains that once the Commission has developed and adopted environmental *flow* (e-flows) standards, those standards will determine the environmental

[41] Even if an intake velocity limit is proposed to be added to the special conditions in the draft permit—as suggested by FOF 97—this would not address the expected impacts on larvae and eggs.

flow conditions necessary to maintain freshwater inflows to bays and estuaries, instream uses and water quality, or fish and aquatic life habitats. *Id*. § 11.147(e-3). To be clear, subsection (e-3) only concerns environmental *flow* conditions—conditions defining the *level or amount* of flow that must be protected; it does not address broader effects on fish and wildlife habitats. So, it does not supplant the requirements found in Sections 11.147(e) and 11.152 of the Water Code. Because the environmental flow conditions do not address the non-flow effects on fish and wildlife habitats of issuance of the permit, that assessment must still be performed.

The ED and the Port argued that the Commission has determined that habitat assessments are not required when e-flow standards have been adopted for a particular river basin, and they point to the Commission's decision in the matter of the *Application of Guadalupe-Blanco River Authority for New Water Use Permit No. 12378* (the "GBRA" matter) for support. The PFD mostly adopts this argument (though it also includes an alternative interpretation of the relevant law, which is discussed in more detail below). Thus, in this case, because e-flow standards have been adopted, the ED, the Port, and the PFD maintain that no fish and wildlife assessment was required here.

All are mistaken. No deference is owed to the Commission's interpretation and application of the relevant statutes, as reflected in the GBRA decision. That's because where, as here, the relevant statutory language is unambiguous, the Commission's interpretation of the statutory language warrants no deference. The Commission has no discretion to interpret unambiguous statutory language in a manner that limits its applicability or scope or in a manner that is inconsistent with the plain meaning of the statute. Agency deference does not displace strict construction of a statute, particularly when the dispute is not about how to interpret an ambiguous term in the statute, but rather, about whether the statutory requirement applies at all. *TracFone Wireless, Inc. v. Comm'n on State Emergency Commc'ns*, 397 S.W.3d 173, 182-83 (Tex. 2013);

see also Gabriel Investment Group, Inc. v. Tex. Alcoholic Beverage Comm'n, 646 S.W.3d 790, 797 (Tex. 2022) (attempts to limit scope of statute does not create ambiguity warranting deference to agency interpretation); *Sw. Royalties, Inc. v. Hegar,* 500 S.W.3d 400, 406 (Tex. 2016) (holding that agency's interpretation of a statute is valid only insofar as it is consistent with the statute and agency cannot interpret the scope of a statute to limit or expand its applicability); *Railroad Comm'n of Tex. v. Tex. Citizens for a Safe Future and Clean Water,* 336 S.W.3d 619, 625 (Tex. 2011) (holding that deference to agency interpretation is appropriate only when statutory language is ambiguous).

Because the PFD and Proposed Order fail to apply and enforce the plain language of Sections 11.147(e) and 11.152 of the Water Code, along with the Commission's own implementing rules, the Commission should not adopt the Proposed Order. Instead, the Commission should deny the permit, or in the alternative, remand the application to the ED to require the ED to review and/or perform the habitat assessment required by Chapter 11 of the Water Code and to propose special conditions as necessary to address the expected impacts on those habitats resulting from issuance of the permit.

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

It is undisputed that the ED's staff failed to conduct the assessment required by Water Code Sections 11.152 and 11.147(e) and by the Commission's own rules. Mr. Gable, the environmental reviewer on behalf of the ED,[42] plainly stated that he "didn't conduct an assessment of fish and wildlife habitats under [his] review."[43] And he testified that no one from the ED's staff conducted

[42] Tr. Vol. 4 at 799:4-8 (Gable testifying that he was responsible for conducting the environmental review of the Port's Application).
[43] Tr. Vol. 4 at 809:10-11.

an assessment of the effects of the requested permit on fish and wildlife habitats.[44] In fact, Mr. Gable admitted that the special condition in the Draft Permit requiring installation of screens at the diversion structure(s)—this special condition was not based on any sort of site-specific assessment of impacts on fish and wildlife or their habitats.[45]

The PFD excuses the ED's failure to perform or review any habitat assessment, as required by statute, because the relevant statutes do not specify that the ED is to perform the required assessments, only that the Commission must evaluate any assessments made.[46] But the relevant statutes and TCEQ rules require more than an evaluation of whatever is presented by the Applicant during the hearing process. They require proposed permit conditions to address the expected impacts on fish and wildlife habitats—something that the ED did not do in this case. The PFD also does not propose special conditions based on the expected impacts on fish and wildlife habitats.[47]

Even in the GBRA permitting matter, the Commission acknowledged that the ED evaluated the expected impacts on habitats, to the extent additional review was necessary. No similar evaluation was conducted in this case. Yet, the whole point of a technical review is to allow the ED's staff to perform a technical evaluation of the application and to determine whether the application includes all the information required by the relevant statutes and rules. And then, based on that evaluation, the ED is to present a draft permit that includes the conditions necessary, based on the ED's review, to address all relevant requirements. This simply did not occur here.

In short, the Applicant did not submit to the ED, as part of its application, any habitat assessment as required by Sections 11.147(e) and 11.152 of the Water Code. The ED did not

[44] Tr. Vol. 4 at 800:15-25 through 801:1-13 & 802:2-8.
[45] Tr. Vol. 4 at 803:14-21 & 806:4-9 (Mr. Gable testifying that he did not review any site-specific information regarding the occurrence of plankton and ELS organisms in the area of the proposed water right).
[46] PFD at 58.
[47] Again, even if an intake velocity limit is proposed to be added to the special conditions in the draft permit—as suggested by FOF 97—this would not address the expected impacts on larvae and eggs.

perform or review any habitat assessment. No special conditions were proposed in the draft permit *based on* any habitat assessment, as required by Section 11.147(e) of the Water Code. Yet, the ED declared the application technically complete, issued a draft permit, and the application and draft permit were referred to SOAH for a hearing, despite this failure to comply with the statutory requirements. In fact, the application was not technically complete, the ED's technical review was incomplete, and no draft permit should have been issued.

In the PFD, the ALJs conclude that the Applicant submitted evidence of a habitat assessment during the hearing, and no ED review of that assessment is required.[48] But the Applicant's own evidence acknowledged expected impacts to the habitat in the vicinity of the proposed intake structure—at least to eggs and larvae. And yet, no meaningful evaluation of those expected impacts has occurred, and no special conditions have been proposed to address those expected impacts.

The draft permit should thus be denied for failure to comply with all statutory and regulatory requirements. Or in the alternative, the application should be remanded to allow the ED to evaluate the Applicant's habitat assessment and propose necessary special conditions based on the assessment.

3. The evidence in the record does not support a finding or conclusion that the requirements of Water Code Sections 11.152 and 11.147(e) have been satisfied; to the contrary, the PFD includes no meaningful analysis of the expected impacts to fish and wildlife habitats resulting from permit issuance.

The PFD claims that the Applicant conducted the required assessments—even if they are not required here—and outlines the evidence presented by the Applicant in support of this finding

[48] PFD at 58.

and conclusion. But no meaningful analysis is included in the PFD, and no special conditions addressing the acknowledged impacts on fish and wildlife habitats is proposed.

For instance, the PFD maintains that impacts from dredging are not within TCEQ's jurisdiction and will be addressed by the Corps of Engineers. But Section 11.152 of the Water Code requires an assessment of impacts resulting from permit issuance. The issuance of the draft permit contemplates that dredging will occur to site and construct the water intake structure authorized by the permit. While Applicant presented a witness who claimed no impacts on water quality or on habitats would occur as a result of the dredging, his opinion was not based on any site-specific data. It was conjecture, based on data from an area that had undergone regular maintenance dredging. The area of the proposed intake structure, in this case, has not undergone regular maintenance dredging, and so, any contaminants that exist remain in the undisturbed sediments.

An example of a special permit condition that might address the expected impacts that are likely to occur as a result of the dredging contemplated by the proposed intake structure would be a condition requiring the Port to collect site-specific data and report it to the TCEQ before commencing with dredging. But no condition was proposed, at all.

Similarly, the Port claimed that the proposed location of the intake structure was a measure that would mitigate against any expected fish and wildlife impacts. But the proposed intake is in close proximity to a sensitive seagrass bed. As Dr. Nielsen explained, in such a highly productive nursery habitat, massive quantities of larvae and eggs will be impacted as they move towards the seagrass bed, past the intake structure.[49] The mesh screens will not mitigate against these impacts.

Applicant's witness dismissed the impacts on larvae and eggs, claiming that when compared to the entire population in the Corpus Christi Bay system, these impacts are minor and

[49] Ex. IOB-300 at 40.

regeneration elsewhere in the Bay would quickly replace them. But this is not the equivalent of an assessment of impacts to habitats resulting from permit issuance. This is an excuse for disregarding the expected impacts to larvae and eggs. No measures have been proposed in the draft permit to address the expected impacts of permit issuance on larvae and eggs.[50]

An example of a special condition that might address the expected impacts on larvae and eggs would be to require the Applicant to find another location that is not near sensitive seagrass beds—consistent with the recommendations in the TPWD and GLO Report.[51]

In short, no meaningful habitat assessment was performed here, as contemplated by the applicable statutes and rules, and no special conditions addressing the expected impacts are included in the draft permit. The draft permit should therefore be denied, or the application should be remanded to allow the ED to conduct a meaningful assessment and propose appropriate special conditions.

Issue J: Permit Conditions

If the Commission finds that the requested permit should be issued, then conditions are warranted limiting the location of the surplus water return, and ensuring that representations relating to the intake screens will be met. The ALJs err in not proposing including these conditions.

The Port's claim that the proposed diversion is adequately protective of the environment turns largely on the Port's claim that the through-screen intake velocity will be less than 0.5 fps.[52] Yet, the permit does not require any monitoring of the through-screen velocity at the location of the screens themselves. Measurement of fluid velocity at other points, and extrapolating to screen velocity, is inadequate. For example, clogs could occur on the screens which reduce the surface

[50] Ex. IOB-300 at 40 (explaining that neither the proposed screens nor the velocity limits would mitigate the expected impacts on larvae and eggs).
[51] Ex. IOB-310.
[52] Ex. APP-SG-3 (Application) at 46.

area, causing an increase in screen velocity that would not be reflected by water velocities elsewhere in the intake system. The permit should include a term requiring that the through-screen velocity be measured at each intake screen instantaneously during all times when the screens are in operation. Additionally, Ordering Provision No. 1 should be amended to include the 0.5 fps intake velocity limit proposed by the ALJs in Finding of Fact No. 97.

Furthermore, the Port has made inconsistent representations that the surplus water return will not be located in sensitive areas, but the surplus water return could be located anywhere within Corpus Christi Bay. In order to ensure protection of the environment and private property rights, the permit should include a term prohibiting the location of the return water discharge within 1,000 feet of any of the following:

- Seagrass beds, including those at Beneficial Use Site No. 6;
- Any intake for an authorized surface water diversion, including Water Rights Permit Nos. 4235, 4237, 13077, 13605, 13610, and 13640;
- The shoreline of Corpus Christi Bay and any docks extending into Corpus Christi Bay from littoral property along the Bay.

Issue K: Other Issues – Failure to identify location of surplus water return

In addition to the deficiencies identified above, the Port's failure to sufficiently identify the location at which return water or surplus water will be returned is a substantive deficiency independently warranting denial of the Application. TCEQ Rule 295.8 provides that, "[t]he application shall describe the location at which return water or surplus water will be returned to the stream." The same rule goes on to say that, "if practicable, this [location] must also be shown on the application map."

As discussed above, the reject brine from the desalination facility will constitute "return water" or "surplus water" as those terms are used in the TCEQ rules. The Application fails to comply with the requirement of TCEQ Rule 295.8 by failing to provide a location of this surplus water return.

The ALJs dismiss this requirement as something that can be fully addressed later in the TPDES permitting process. Nothing in TCEQ Rule 295.8 indicates that compliance with the requirements of the TCEQ water rights application may be waived based on a future wastewater permit.

Without the identification of a location of the surplus water return, it is impossible to evaluate the impact of the proposed diversion upon the environment and other water rights. Accordingly, the permit should be denied in light of the Port's failure to identify the location at which return water or surplus water will be returned to the Bay.

Proposed Finding of Fact No. 58, and Conclusion of Law Nos. 9, 19, 32, 44, and 45 are in error.

III. TRANSCRIPTION COSTS

Protestants maintain that all transcript costs should be allocated to POCCA, given POCCA's superior ability to pay, the significant benefit POCCA gains from the transcript in being able to attempt to meet its burden of proof, and the significant financial gain accruing to POCCA if the permit is issued.

IV. CONCLUSION

For all these reasons, Protestants respectfully request that the Commission deny the Port's Application, because the Port has not met its burden and has not demonstrated that its Application meets the applicable statutory and regulatory requirements. Protestants further request such other and further relieve to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing document was served by electronic service to the following parties, February 20, 2024.

/s/ Marisa Perales
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