

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

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 this Reply to the Exceptions to the Proposal for Decision filed by the Port of Corpus Christi Authority of Nueces County’s (“the Port,” “POCCA,” or “Applicant”) and the Executive Director (“ED”). Protestants urge the Commission to deny the Application for Water Use Permit No. 13630 (the “Application”). For support, Protestants respectfully offer the following:

I. INTRODUCTION

The Port Commissioners have clearly expressed that the Port has no intent of using the permit that the TCEQ Commissioners are called upon to consider, with the Port Commission’s Chairman declaring:

[W]e’ve said consistently on both of these permits [for La Quinta and Harbor Island] that we’re not going to own, operate or build a desalination plant.¹

There was a time, not so long ago, when the TCEQ prioritized the efficient use of state resources in such a manner that this attempt at speculative permitting would have, itself, led to denial of the

¹ Ex. IOB-106B.

Port's Application based on the applicant's failure to show a need for the permit. Yet, after the expenditure of tremendous state and private resources to evaluate an application for a permit the applicant has no intent of using, here we are.

Even so, the Port's Application remains deficient for the reasons identified in Protestants' Exceptions. The Exceptions filed by the Port and the Executive Director make no demonstration otherwise.

The Port's failure to establish compliance with the applicable requirements for a Water Conservation Plan ("WCP") remains. As with many aspects of the Application, the deficiencies on this issue derive from the speculative nature of the permit – it is unsurprising that the Port seeks to avoid any detailed plans, since the Port has no intent to operate the facility. For example, the information contained in the Port's Application as to the anticipated service area is about as consistent as Texas weather. The Port's Exceptions cite to numerous places within the Application where the service area is indicated, which could be a valid point if those places said the same thing. But each of these places in the Application provides a different characterization – ranging from the boundaries of the facility to the 11 counties in Region N.

With regard to the environmental protectiveness of the permit, the Port and Executive Director ask the Commission to conclude that the permit is protective of the environment without considering the full scope of the permit's environmental impacts required to be addressed under Chapter 11 of the Water Code, and without an adequate analysis of the environmental consequences of the permit.

Special Condition 5.B proposed by the ALJs justifiably seeks to hold the Port to the basis on which the Port claims that the permit is protective of the environment. This requirement is well-justified by the record, and the Exceptions to that special provision should be rejected.

For these reasons, Protestants maintain that the Port's Application should be denied.

II. REPLY TO EXCEPTIONS OF THE PORT AND EXECUTIVE DIRECTOR

Issue B: TCEQ Rule 288.5 applies to the Port's Water Conservation Plan, but has not been complied with.

The Executive Director's Exceptions assert a broader scope of staff review of the Water Conservation Plan than actually occurred. The Executive Director's staff member Jennifer Allis testified as to her limited review:

Q: So, is it true that you reviewed this water conservation plan under [TCEQ Rule] 288.6 and not under [TCEQ Rule] 288.5?

A: Yes.

Q: So, did you review the water conservation plan for compliance with 30 TAC section 288.5?

A: Not in whole, but in part.²

Quite simply, the Executive Director's staff did not make a determination that the Water Conservation Plan submitted by the Port met all applicable requirements of TCEQ Rules 288.5 and 288.6.

The ED asserts that this is because "there is no specific rule for wholesale use for industrial purposes when an applicant is not a wholesale water supplier."³ This ignores the plain language of TCEQ Rule 288.5, which commences with the words, "A water conservation plan for a wholesale water supplier must provide information in response to each of the following paragraphs."⁴ The plain language of this rule does not exclude wholesale water suppliers of industrial water, and the Port is applying to be a wholesale water supplier. Thus, this situation does fall within the plain language of the applicable regulations. It is the plain language of the regulations that the ED seeks to evade.

² Tr. Vol. 4 at 745.

³ ED's Closing Arguments at 2.

⁴ 30 Tex. Admin. Code § 288.5.

The Port invites the Commission to adopt a standard for compliance with the requirements of Section 288.5 which renders those requirements meaningless. From the fact that a water conservation plan can be updated after issuance of the permit, the Port essentially concludes that the original water conservation plan need contain no detail at all, thereby seeking to justify the vague and meaningless parroting of the regulations set forth in the Port's water conservation plan.

As to the scope of the service area, the Port's Closing Arguments imply a level of clarity that is lacking within the Application. In fact, the various portions of the Application cited by the Port dramatically contradict each other. While the Port's Utility Profile contained within the Application stated that water would serve industrial development in San Patricio and Nueces Counties,⁵ the map accompanying that statement (labeled "Project Service Area Map: PCCA Owned Property Limits") only depicted the Port's limited property as the service area.⁶ The data for the population of the service area was taken from the *entirety* of the 11 counties in Region N.⁷ The water system map managed to be inconsistent with all of these representations – showing only the processes planned for within the desalination plant itself.⁸ Is the service area the boundaries of the facility, PCCA Property, the entirety of Nueces and San Patricio Counties, or all 11 counties of Region N? Based on the information provided by the Port (and cited in the Port's Closing Arguments), all of these are possibilities.

As for the requirement of TCEQ Rule 288.5(1)(D) that the water conservation plan contain a monitoring and record management program for determining water deliveries, sales and losses, the Port continues to rely on the language of the application simply parroting this rule, while claiming that San Patricio Municipal Water District will participate in the monitoring and record

⁵ Ex. APP-SG-9 at 59.

⁶ Ex. APP-SG-9 at 68.

⁷ Compare Ex. APP-SG-9 at 59 and Ex. APP-SG-14 at 4-38.

⁸ Ex. APP-SG-9 at 70.

management program.⁹ Yet, according to the General Manager of SPMWD, the Port has no agreement with SPMWD for the Port to provide water to SPMWD, and no integration plan exists for SPMWD to accept water from the proposed facility.¹⁰ If SPMWD is to play a role in the distribution of water, the Port would still need to deliver the water to SPMWD. Yet, no plan is provided for the monitoring and record management program associated with this delivery. In short, the Port's claim that SPMWD will participate in the record management program is neither supported by the record, nor an adequate substitute for the provision of a substantive plan.

The other provisions of TCEQ Rule 288.5 are similarly lacking for those reasons addressed in Protestants' Closing Arguments.

Of course, given that the Port's often publicly-stated goal is to not own or operate the desalination facility at all, but, instead, flip the permit to another entity, it is not surprising that the Port has put such effort into dodging any substantive commitments in the Water Conservation Plan. The Port has little to no idea as to how the actual owner and operator will wish to operate the facility and distribution system, assuming the Port is able to find a taker for the permit.

Issue G: Protection of Environment/Environmental Flow Standards and Assessments

1. No deference is owed to arguments presented in a legal brief in another legal proceeding regarding an unambiguous statute.

The Port argues that deference should be given to arguments presented in a legal brief filed by the TCEQ in another matter—the GBRA matter. *Nat'l Wildlife Fed'n v. Tex. Comm'n on Env'tl. Quality*, No. D-1-GN-20-007096 (98th Dist. Ct., Travis County, Tex. argued Sept. 27, 2023). That case is an administrative appeal of the Commission's decision to issue a water right to GBRA. It remains pending.

⁹ Port Closing Arguments at 7.

¹⁰ Ex. IOB-104 at 9.

The Commission’s written arguments in the GBRA proceeding have no relevance here, and should be accorded no deference here. Protestants have already provided ample legal authority—in their Closing Arguments, Reply to Closing Arguments, and Exceptions—that directly contradicts the Port’s arguments here. As explained in those briefs, no deference to an agency interpretation of an unambiguous statute is warranted when that interpretation is inconsistent with the plain language of the statute. *See e.g., Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 406 (Tex. 2016) (citing *Firestone Tire & Rubber Co. v. Bullock*, 573 S.W.2d 498, 500 n.3 (Tex. 1978)).¹¹ “[C]ourts sometimes defer to agencies’ statutory interpretations, but only when a statute is ambiguous. ... Agency deference has no place when statutes are unambiguous.” *TracFone Wireless, Inc. v. Comm’n on State Emergency Communications*, 397 S.W.3d 173, 182 (Tex. 2013). This legal proposition applies equally to agency interpretations expressed in legal briefs. *Feiss v. State Farm Lloyds*, 202 S.W.3d 744, 747-48 (Tex. 2006). The Port’s references to TCEQ’s legal briefs in another legal proceeding are irrelevant and should be disregarded.

2. The Port’s arguments in their Exceptions reveal that they indeed conducted no assessment, as required by the relevant statutes in Chapter 11 of the Water Code.

The Port’s objections to proposed Conclusions of Law 26 and 27, and their proposed modifications to the minor (and inadequate) permit provisions that are intended to offer some environmental protection here, reveal that the Port not only failed to conduct a true assessment of the expected impacts on surrounding habitats from its proposed desalination facility, but also, that it never intended for its purported assessment to be used to add enforceable protective permit conditions to its permit. That’s because despite the various literature and data cited by the Port’s

¹¹ An agency’s disagreement regarding the scope of a statute or regarding its applicability is not the same as ambiguity regarding specific statutory terms, and an agency cannot interpret the scope of a statute to limit or expand its applicability. *Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 406 (Tex. 2016).

main witness on this issue—Dr. Fontenot—no true assessment of the site-specific impacts was conducted by the Port. A few examples illustrate this point.

Dr. Fontenot maintained that the distance of the proposed intake structure from the seagrass beds (about 1000 feet) was one of the measures taken to protect fish and wildlife habitat. But the location of the proposed intake was selected before Dr. Fontenot was ever retained to conduct an assessment by the Port. There is no reliable evidence in the record to support the proposition that an intake facility in an enclosed Bay, in a sensitive estuary of national significance, and in close proximity to sensitive seagrasses is protective of surrounding habitats. That the intake structure may be 1000 feet from the seagrass beds does not change this fact.

Even Dr. Fontenot admitted that eggs and larvae floating towards the seagrasses, and past the intake structure, would be impacted by the intake structure. But ultimately, he concluded that when compared to the population in the entire Bay system, the impacts would be insignificant, in his opinion. His “assessment” was not a scientific one (notwithstanding his references to scientific literature). His opinion boiled down to: a few dead eggs and larvae will not matter, because there are plenty more out in the Bay. But there was no “assessment” of how this would affect the sensitive ecological system in the area of the intake structure, or even a credible assessment of the extent of the impacts on the fish and wildlife habitat. When compared to the extensive comprehensive analysis by Dr. Nielsen of the impacts of siting, constructing, and operating one of the largest desalination facilities in the country—as proposed by the Port—it is apparent that Dr. Fontenot did not fully assess how the facility would impact this sensitive enclosed environment.

The fact that the Port refuses to commit to the few provisions recommended by the ALJs in this matter—provisions that the Port’s witnesses represented that the Port was willing to implement—is evidence that the Port’s objective was only to pad the record with citations to

scientific literature and data.¹² Its objective was not to seriously assess impacts of its proposed facility on the specific habitats within this sensitive environment. And it never intended for any assessment to result in any sort of permit provisions that might present an inconvenience or an additional expense for the Port.

This is yet another reason that the permit should be denied, or alternatively, it should be remanded to allow the ED to conduct an independent assessment of environmental impacts resulting from the Port's facility and either (1) draft a permit with adequate provisions to address those expected impacts, or (2) return the application with instructions to find a suitable site, instead of this sensitive, enclosed estuary.

Issue J: Permit Conditions – Special Condition 5.B is justified by the record.

Both the Port and ED object to the inclusion of a special condition that seeks to bind the Port to measures it has identified as protective of the environment, particularly the use of ¼ inch by ¼ inch wire mesh screens. The Port's Application specifically states that the screens at the intake will use ¼ inch by ¼ inch wire mesh.¹³ The Port's oral opening statement and written closing arguments both identify wire mesh as a measure to ensure that the permit is protective of the environment, with the Port's Closing Arguments specifically identifying that the mesh will be ¼ by ¼.¹⁴ Given the explicit reliance of the Port on this specific design parameter in justifying the asserted protectiveness of the permit, the ALJs were well-justified in recommending compliance with this representation as a condition of the permit.

The Port's Exceptions propose a revision of Special Condition 5.B to require measures, "following design criteria that achieves a maximum intake structure velocity of 0.5 feet per

¹² It's worth noting that the Port could have, but chose not to, conduct site-specific sampling before selecting this site for its large desalination facility.

¹³ Ex. APP-SG-3 at 46.

¹⁴ Tr. Vol. 1 at 13; Port's Closing Arguments at 44.

second[.]”¹⁵ While such a condition, itself, is insufficient to ensure protection of the environment, Protestants support the inclusion of such a condition if it is clearly applicable at the screens. Monitoring of intake structure through-screen velocity at the screens is necessary to ensure that this maximum velocity is maintained.

III. 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. The Port has wasted tremendous state and private resources with the pursuit of this permit, and should not be rewarded for that effort. Alternatively, the Port’s Application should be remanded to allow the ED to conduct an independent assessment of environmental impacts resulting from the Port’s facility and either (1) draft a permit with adequate provisions to address those expected impacts, or (2) return the application with instructions to find a suitable site, instead of this sensitive, enclosed estuary. Protestants further request such other and further relieve to which they may be justly entitled.

Respectfully submitted,

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¹⁵ Port’s Exceptions at 17.

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 29, 2024.

/s/ Eric Allmon
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