

TCEQ DOCKET NO. 2023-1567-IWD

APPLICATION BY CHENIERE LAND	§	BEFORE THE
HOLDINGS, LLC FOR MAJOR	§	TEXAS COMMISSION ON
AMENDMENT OF TPDES PERMIT	§	ENVIRONMENTAL QUALITY
NO. WQ0004646000	§	
	§	

INGLESIDE ON THE BAY COASTAL WATCH ASSOCIATION’S
REPLY TO RESPONSES TO HEARING REQUESTS

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

Ingleside on the Bay Coastal Watch Association (“IOBCWA”) hereby submits this Reply to the Responses to Hearing Requests filed by Cheniere Land Holdings, LLC (“Cheniere” or “Applicant”), the Executive Director (“ED”) and the Office of Public Interest Counsel (“OPIC”).

I. Summary

IOBCWA’s hearing request should be granted. The draft permit removes an effluent limitation on bacteria (Enterococci) found in the current permit. In this manner, the draft permit changes a substantive limiting parameter of the permit, and is properly considered a major amendment subject to a contested case hearing. IOBCWA is an affected person due to the particularized interests of its members, including Mr. Encarnacion (“Chon”) Serna, who regularly recreates in potentially impacted waters, and owns coastal property facilitating these recreational activities only approximately 1.5 miles from the point where wastewater from the facility enters Corpus Christi Bay.

II. Discussion

A. The draft permit constitutes a major amendment, creating a right to a contested case hearing on the Application.

The removal of the effluent limitation on the concentration of bacteria (Enterococci) in the draft permit creates a right to a contested case hearing with regard to the Application.

The responses to IOBCWA's hearing request rely upon Texas Water Code § 26.028(d) as a basis to claim that there is no right to a contested case hearing. But, the statute still requires a contested case hearing where the application seeks to "increase significantly the *quantity* of waste *authorized* to be discharged."¹ Regardless of any other consideration, where the application would authorize a significant increase in the quantity of waste authorized to be discharged, affected persons still possess a right to a contested case hearing.

By the Application, Cheniere seeks to significantly (infinitely, in fact) increase the quantity of Enterococci *authorized* to be discharged. The current permit contains a daily maximum limit of 89 CFU or MPN per 100 mL. The draft permit contains *no limit at all* on the concentration of Enterococci that may be discharged. Instead, under the draft permit, Cheniere is authorized to discharge *however much Enterococci it wants* – just so long as it reports what that (potentially tremendous) amount is.

The potential for the facility to discharge large quantities of Enterococci is hardly speculative. As noted in the Executive Director's Statement of Basis for the draft permit, the effluent limit for Enterococci in the current permit was violated in three months of

¹ Tex. Water Code § 26.028(d)(1)(A).

2020. In June of 2020, the reported concentration of Enterococci at Outfall 601 was at a concentration of 239 – well more than twice the allowed concentration under the current permit. In October of 2020, the reported concentration of Enterococci was 332 – well over three times the Enterococci concentration allowed by the current permit. Discharges of such concentrations of Enterococci that were violations of the current permit are now fully authorized under the draft permit. This constitutes the authorization of a significant increase in the quantity of waste authorized to be discharged, disqualifying the application from the exception set forth at Texas Water Code § 26.028(d).

B. IOBCWA’s member Chon Serna has a personal justiciable interest in the Application, rendering IOBCWA an affected person.

Mr. Chon Serna, a member of IOBCWA, possesses particularized recreational and property interests potentially impacted by the proposed permit (Affidavit of Encarnacion Serna, ¶ 2).

Mr. Serna owns property at 105 Lost Creek Drive, Portland, Texas 78374 (¶ 3). This property is less than two miles from the point at which wastewater discharges from Cheniere’s facility into Corpus Christi Bay (¶ 3). This coastal property comes with accompanying littoral rights, including the right to wharf. Mr. Serna has exercised that right by constructing a boardwalk into Corpus Christi Bay which he and his family use to facilitate their engagement in recreational activities within Corpus Christi Bay (¶ 4).



Figure 1: Photograph of Chon Serna’s Dock, extending into Corpus Christi Bay

Mr. Serna raised his family on this property, including four children (§ 5). He also has 10 grandchildren (§ 5). In 2021, after 30 years in their home at 105 Lost Creek, Mr. Serna and his wife purchased a second property in Three Rivers, Texas, and now split their time between Portland and Three Rivers (§§ 3, 7).

Mr. Serna’s entire family enjoys spending time together out on the boardwalk and in the water (§§ 5, 9, 14). He and his family fish, kayak, and swim in the Bay on an almost daily basis (§§ 6, 7). He and his family fish in the Bay near this boardwalk, and eat the fish

that they catch (§ 14). They use kayaks and sail that water from his home to surrounding areas (§ 8). Mr. Serna's grandchildren come over to swim and kayak as often as they can – and they stay for as long as they can (§ 9). Their activities all center around the water.

Children from the neighborhood also come over and enjoy his boardwalk (§ 10). He believes that it's a beautiful thing to enjoy the Bay together as a community, and these activities provide an important connection to his culture (§ 10).

While kayaking in the Bay, Mr. Serna has been impacted by flares from the Cheniere facility (§ 12). There have been a number of occasions while Mr. Serna has been kayaking in the Bay during which a flare has come on, forcing him inside and sometimes out of Portland altogether, if the flare lasts longer than an hour (§ 12). Mr. Serna also finds it increasingly difficult to kayak, fish, and swim as he gets closer to the Cheniere facility and discharge area (§ 11).

The types of fish Mr. Serna catches, depending on the season, include flounder, black drum, trout, red fish, and red drum (§ 14). Mr. Serna used to observe a variety of aquatic life, including hammerhead sharks, dolphins, and turtles, and large flounder, but his observations of those have dwindled in recent years (§ 15).

Even though Mr. Serna and his wife bought property in Three Rivers in 2021, which reduces their time in Portland, his wife will never let him sell the Portland property because of all the fun the family has in Corpus Christi Bay from their Lost Creek property.

Mr. Serna is concerned that the discharges authorized by the draft permit – including the unlimited amount of Enterococci now authorized to be discharged – will impair the ability of his family, friends, and himself to continue to safely engage in the recreational

activities within Corpus Christi Bay which he has regularly engaged in for decades now (§ 13). He is also concerned as to how the contaminants in the discharge will impact his health and his ability to consume the fish which he catches (§ 16).

These circumstances demonstrate that Mr. Serna has personal justiciable interests related to a legal right affected by the Application. The Bill of Rights of the Texas Constitution, by amendment in 2015, guarantees the right of each citizen to fish. Tex. Const. Art. I, § 34. In the case of *Texas Department of State Health Services v. Crown Distributing LLC*, 647 S.W.3d 648 (Tex. 2022), Justice Young, joined by Chief Justice Hecht, Justice Devine and Justice Blacklock wrote that this is one of the interests that Texas courts must enforce under the Due Course of Law provision of the Texas Constitution. *TDSHS* at 677. Mr. Serna also has the legal right to engage in such fishing activities within Corpus Christi Bay since that Bay is a navigable water. *See Diversion Lake Club v. Heath*, 58 S.W.2d 566, 570 (Tex. App. – Austin 1933), *aff'd*, 126 Tex. 129, 86 S.W.2d 441 (1935).

Mr. Serna's ability to exercise his right to fish will potentially be adversely impacted by the proposed discharge. The discharge will be authorized to contain harmful bacteria, as well as oil and grease which will potentially impair the aesthetic beauty of the waters he has come to enjoy, and also oxygen-demanding substances, which will potentially harm the fish which he enjoys catching and eating.

Texas has represented to the Environmental Protection Agency that a determination of whether someone is an affected person is governed by the same standards as govern Article III standing in federal Court, with the Texas Attorney General stating:

The criteria regarding determination of affected persons in the TCEQ's rules comport with the standing requirements in Article III of the United States Constitution for judicial review under the state statutes applicable to federal permit programs being implemented by the TCEQ, including the TPDES program. There is no material difference between the TCEQ's standards and the standards the federal courts apply when deciding judicial standing, which are based on the United States Supreme Court decision in *Lujan v. Defenders of Wildlife, et al.*, 504 U.S. 555 (1992).²

Mr. Serna's recreational interests, in combination with his property interests, meet the test outlined in *Lujan v. Defenders of Wildlife, et al.* (*Lujan*).

The United States Supreme Court in *Lujan* established that standing involves three elements: (1) An injury in fact, which is a concrete and particularized invasion of a legally protected interest that is actual or imminent, not conjectural or hypothetical; (2) A fairly traceable causal connection between the injury and the conduct complained of; and, (3) It must be likely as opposed to speculative that the asserted injury will be redressed by a favorable decision.³

The United States Supreme Court applied the *Lujan* test to recreational standing in the case of *Friends of the Earth, Inc. v. Laidlaw Environmental Services, (TOC) Inc.*, 528 U.S. 167, 182 (2000). *Laidlaw* involved standing with respect to a National Pollutant Discharge Elimination System ("NPDES") permit, much like the immediate case, involves the question of whether Mr. Serna has standing with respect to the amended permit sought by Cheniere. In *Laidlaw*, the Plaintiffs alleged that a member lived half a mile from the facility, that he occasionally drove to the receiving river, that it looked and smelled

² Statement of Legal Authority to Regulate Oil and Gas Discharges under the Texas Pollutant Discharge Elimination System Program, Texas Attorney General Ken Paxton, September 18, 2020.

³ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

polluted, and that he would like to fish, camp, swim and picnic in the area of the receiving river between 3 to 15 miles downstream from the facility as he had as a child, but would not do so out of concern for the discharges at issue in the case.⁴ Mr. Serna utilizes downstream waters in an area closer to the discharge than was the case in *Laidlaw*.

In *Laidlaw*, the Court explained that “plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” *Id.* (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972), and citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-563 (1992)). The *Lujan* Court, itself, had noted that, “[o]f course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.”⁵

Mr. Serna satisfies the requirements of standing based on his recreational and property interests, consistent with the standards set forth in *Lujan* and *Laidlaw*. His use of the downstream waters for fishing constitutes the use of an animal species, which *Lujan* recognizes as legally protected. This also constitutes the use of an impacted natural resource, as relevant to the consideration of a hearing request pursuant to 30 Tex. Admin. Code § 55.203(c)(5). He is particularly impacted by the discharge in a way distinct from the general public by virtue of his regular use of the receiving waters, facilitated by his ownership of nearby property. His concerns as to the potential impact of the proposed discharge will be redressed by his participation in a contested case hearing on the issuance

⁴ *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 181 – 182 (2000).

⁵ *Lujan* at 562 – 563.

of the permit, as such a proceeding will allow a determination of whether the draft permit is sufficiently protective of the recreational and aquatic life uses of the downstream waters.

Arguments have previously been forwarded that a recreational interest cannot be particularized because many people have the right to engage in a recreational activity. It is true that any person has the right to fish in Corpus Christi Bay. However, as the Texas Supreme Court has noted, in approvingly quoting the United States Supreme Court, “[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody . . . where a harm is concrete, though widely shared, the Court has found injury in fact.”⁶ Would no judicial review be available if the Texas Legislature were to pass a statute imposing a state income tax in violation of the Texas Constitution merely because many people would be required to pay the tax? The answer, of course, is no. The fact that many others can also fish in the downstream waters is entirely irrelevant to the “affected person” determination. The government cannot evade judicial review by choosing to injure many, instead of only a few.⁷

IOBCWA will note that the federal context alters the applicable considerations relevant to IOBCWA’s hearing request. In obtaining delegated authority to issue TPDES permits for discharges associated with oil and gas activities, the Texas Attorney General

⁶ *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 7-8 (Tex. 2011) quoting approvingly *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686-688 (1973) and *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 24 (1998).

⁷ Texas courts require that a person obtain a contested case hearing prior to pursuing judicial review of a TCEQ permitting decision. *Sierra Club and Pub. Citizen v. Texas Comm’n on Env’tl. Quality*, No. 03-14-00130-CV, 2016 WL 1304928 (Tex. App. Mar. 31, 2016) (not designated for publication). Thus, the scope of the affected person standard applied by TCEQ necessarily implicates whether Texas provides a sufficient opportunity for judicial review of TCEQ’s TPDES permitting decisions.

stated that, “the TCEQ does not consider discretionary factors in 30 Tex. Admin. Code § 55.203(d) that may not be consistent with the determination of Article III standing, such as the merits of the underlying TPDES permit application, in evaluating whether a hearing requester is an affected person.”⁸ Thus, TCEQ may not deny IOBCWA’s request based upon a finding that the conditions of the permit will be adequately protective of downstream waters so as to prevent the potential impacts of concern to Mr. Serna and IOBCWA. To the degree that Senate Bill 709, or *Texas Commission on Environmental Quality v. Sierra Club*, 455 S.W.3d 228 (Tex. App. – Austin 2014) indicate otherwise, they have no applicability to this hearing request by virtue of the distinct federal context.⁹

Notably, finding that Mr. Serna is an affected person is consistent with the Commission’s prior finding that Mr. Richard Martin is an affected person with respect to the Application of Corix Utilities (Texas) Inc. for Major Amendment to TPDES Permit No. WQ0013977001.¹⁰ In that case, Environmental Stewardship requested a contested case hearing, and identified Mr. Richard Martin as a member. For more than 50 years, Mr. Martin had regularly fished and recreated in an area of the Colorado River slightly more than a mile downstream of the proposed 0.51 MGD domestic wastewater discharge. Mr. Martin also owned property along the Colorado River approximately 10 miles downstream of the discharge. Upon considering this hearing request, the Commission found that Mr.

⁸ Statement of Legal Authority to Regulate Oil and Gas Discharges under the Texas Pollutant Discharge Elimination System Program, Texas Attorney General Ken Paxton, September 18, 2020, at p. 22.

⁹ Notably, this federal context also limits the Commission’s ability to find that the total removal of an effluent limitation does not constitute a substantial increase in the quantity of waste authorized to be discharged.

¹⁰ *Application by Corix Utilities (Texas) Inc. for Major Amendment to TPDES Permit No. WQ0013977001*, TCEQ Docket No. 2023-1591-MWD.

Martin qualified as an “affected person,” and granted Environmental Stewardship’s hearing request. Mr. Serna’s interests are comparable to those of Mr. Martin. Much like Mr. Martin, Mr. Serna engages in fishing and other aquatic recreation slightly more than a mile from the point where wastewater is discharged into Waters of the United States. Much like Mr. Martin, Mr. Serna has an established pattern of regularly and frequently engaging in these recreational activities. Much like Mr. Martin, Mr. Serna owns property adjacent to the receiving waterbody that facilitates his ability to engage in these recreational activities. Just as the Commission found that Mr. Martin was an affected person, the Commission should also find that Mr. Serna is an affected person.

C. IOBCWA has raised issues appropriate for referral.

The timely hearing requests submitted by IOBCWA raise issues appropriate for referral to the State Office of Administrative Hearings (SOAH). These issues include:

- (1) Whether the discharges from the facility will maintain the designated uses of Corpus Christi Bay;¹¹
- (2) Whether the discharges from the facility will protect aquatic life;¹²
- (3) Whether the discharges from the facility will protect human health;¹³
- (4) Whether Applicant’s compliance history warrants modification of the Permit or denial of the Application;¹⁴
- (5) Whether public notice complied with all applicable requirements;¹⁵
- (6) Whether the permit is adequately protective of groundwater;¹⁶ and,

¹¹ Executive Director’s Response to Comments, Issue 1.

¹² Executive Director’s Response to Comments, Issue 1.

¹³ Executive Director’s Response to Comments, Issue 1.

¹⁴ Executive Director’s Response to Comments, Issue 2.

¹⁵ Executive Director’s Response to Comments, Issue 3.

¹⁶ Executive Director’s Response to Comments, Issue 5.

(7) Whether the permit contains adequate monitoring requirements.¹⁷

Each of these issues raised by IOBCWA during the comment period is relevant and material to the Commission's consideration of the Application, and is a disputed issue of fact. Thus, each of these issues is appropriate for referral to SOAH.¹⁸

III. Prayer

For the reasons stated above, IOBCWA respectfully prays that the Commission grant its hearing request, and refer all issues raised by IOBCWA to the State Office of Administrative Hearings.

Respectfully submitted,

/s/ Eric Allmon

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¹⁷ Executive Director's Response to Comments, Issue 7.

¹⁸ 30 Tex. Admin. Code § 55.211(c)(2)(A)(ii).

CERTIFICATE OF SERVICE

I hereby certify that, on February 26, 2024, a true and correct copy of the foregoing Reply to Responses to Hearing Requests was electronically filed with the Chief Clerk of TCEQ, and that copies were served upon the following parties via e-mail.

/s/ Eric Allmon
Eric Allmon

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STATE OF TEXAS §
COUNTY OF SAN PATRICIO §

1. My name is Encarnacion Serna. I am over eighteen (18) years of age and of sound mind and am otherwise competent and capable of making this affidavit. The facts testified to in this affidavit are within my personal knowledge and are true and correct.
2. I am a member of Ingleside on the Bay Coastal Watch Association, a Texas nonprofit organization.
3. I own property located at 105 Lost Creek Drive, Portland, Texas 78374, approximately 1.5 miles from the Cheniere facility's discharge point in Corpus Christi Bay. I bought this property with my wife in 1990. Attached as **Exhibit 1** is a copy of a survey of our property.
4. I constructed a boardwalk that extends into Corpus Christi Bay. Attached as **Exhibit 2** are photos of the pier extending from my property into the Bay.
5. I have four children, all of whom were raised in our Portland home, and 10 grandchildren. My family and I frequently use the pier to go swimming, kayaking, and fishing in the Bay. Attached as **Exhibit 3** are several photos of my family engaging in these activities in the Bay and on my property.
6. Between 1980 and 1990, I resided at 1809 Marlin in Portland, and I fished every day in Corpus Christi Bay. In 1990, I purchased our property on Lost Creek. Between 1990 and 2021, I would fish, swim, or kayak every other day to leave time for chores and indoor family time. Starting in 2013 when I retired, I was able to do this year-round.
7. In 2021, my wife and I bought a second property in Three Rivers, Texas. We split our time between our properties in Three Rivers and Portland. When we are in Portland, I continue to fish, swim, or kayak every other day, weather permitting. On average, I spend about two hours kayaking on the Bay each time. I have found that this consistent activity helps with my Bell's Palsy. My wife swims in the Bay every day in the summer.
8. I kayak from my boardwalk to the beginning of the La Quinta Channel, just before the spoil island in front of the Cheniere facility. When going in the other direction, I kayak to Indian Point. I stay relatively close to the shoreline in no deeper than six feet of water, which can vary with the tides. I estimate that I have come within 500 feet of Cheniere's facility – so close that I have looked up at the ships.

9. All of my grandchildren enjoy swimming and kayaking in the Bay when they visit and stay with me and my wife. One of my grandsons frequently kayaks with his dog and is sometimes joined by my only granddaughter. When my grandchildren finish a kayaking trip, their tradition is to flip the kayak over and swim back to our boardwalk.
10. Not only does my family enjoy our boardwalk, but children from the neighborhood also come over to spend time on the boardwalk and in the Bay. I believe our boardwalk has provided an incredible opportunity for community and for us to engage with the beauty of the Bay. Our activities on the boardwalk and in the Bay also provide an important personal connection for me to my culture. I cherish the time I get to spend at our Lost Creek property.
11. While kayaking, I have noticed that it becomes more difficult as I move closer to the Cheniere facility. From my personal experience, I believe this is because the currents moving from the Cheniere discharge area flow in the direction of my property. As a result of this increased difficulty and out of concern for my health and safety, I try to avoid getting closer than within approximately 500 feet of the Cheniere facility and discharge area.
12. On about 10 occasions, the Cheniere flare has come on while I have been out kayaking in the Bay. When that happens, I immediately head back and go inside our Lost Creek property. If the flare continues after an hour or so, I leave for our Three Rivers property.
13. I am concerned about further adverse impacts of the Cheniere discharge on my family's recreational activities in the Bay, specifically impacts from the amount of Enterococci now authorized to be discharged from the Cheniere facility. I am also concerned about the impacts that the discharge could have upon the aesthetic enjoyment of this area of the Bay by my family and myself.
14. My family and I fish in the Bay from our boardwalk, and we frequently eat the fish that we catch. During the fall and winter months (October to February), I gig for flounder. This involves wading with waders in water no deeper than 2 feet. I go no more than 0.5 miles – to the other side of North Shore. In February and March, I fish for black drum and trout. Red fish is available year-round.
15. We used to see many large flounder – I estimate 25 to 27 inches long – but we have seen less and less of them in the last five years. We also used to see hammerhead sharks, dolphins, and turtles.
16. I am concerned about adverse impacts to my family's and my health from Cheniere's facility and discharge. If not for Cheniere's facility, I would explore more of the Bay while kayaking, swimming, and fishing. I do not do so out of concern for the adverse impacts that exposure to the facility and discharge would have on my family's and my health. My family and I frequently eat the fish we catch, and I am concerned that contaminants

from Cheniere's discharge may negatively impact the fish and thus our health from eating those fish.

Further the Affiant sayeth not.

Encarnacion Serna
Encarnacion Serna, Affiant

SWORN TO AND SUBSCRIBED before me this 25th day of February, 2024.

Cynthia Valdes
Notary Public, State of Texas

2/3/2025
My Commission Expires:

Cynthia Valdes
Notary Public's Printed Name



EXHIBIT 1

EXHIBIT 2



Photo 1: Pier extending from Mr. Encarnacion Serna's property into the Corpus Christi Bay.



Photo 2: Pier extending from Mr. Encarnacion Serna's property into the Corpus Christi Bay.



Photo 3: End of the pier extending from Mr. Encarnacion Serna's property into the Corpus Christi Bay.



Photo 4: End of the pier extending from Mr. Encarnacion Serna's property into the Corpus Christi Bay.

EXHIBIT 3

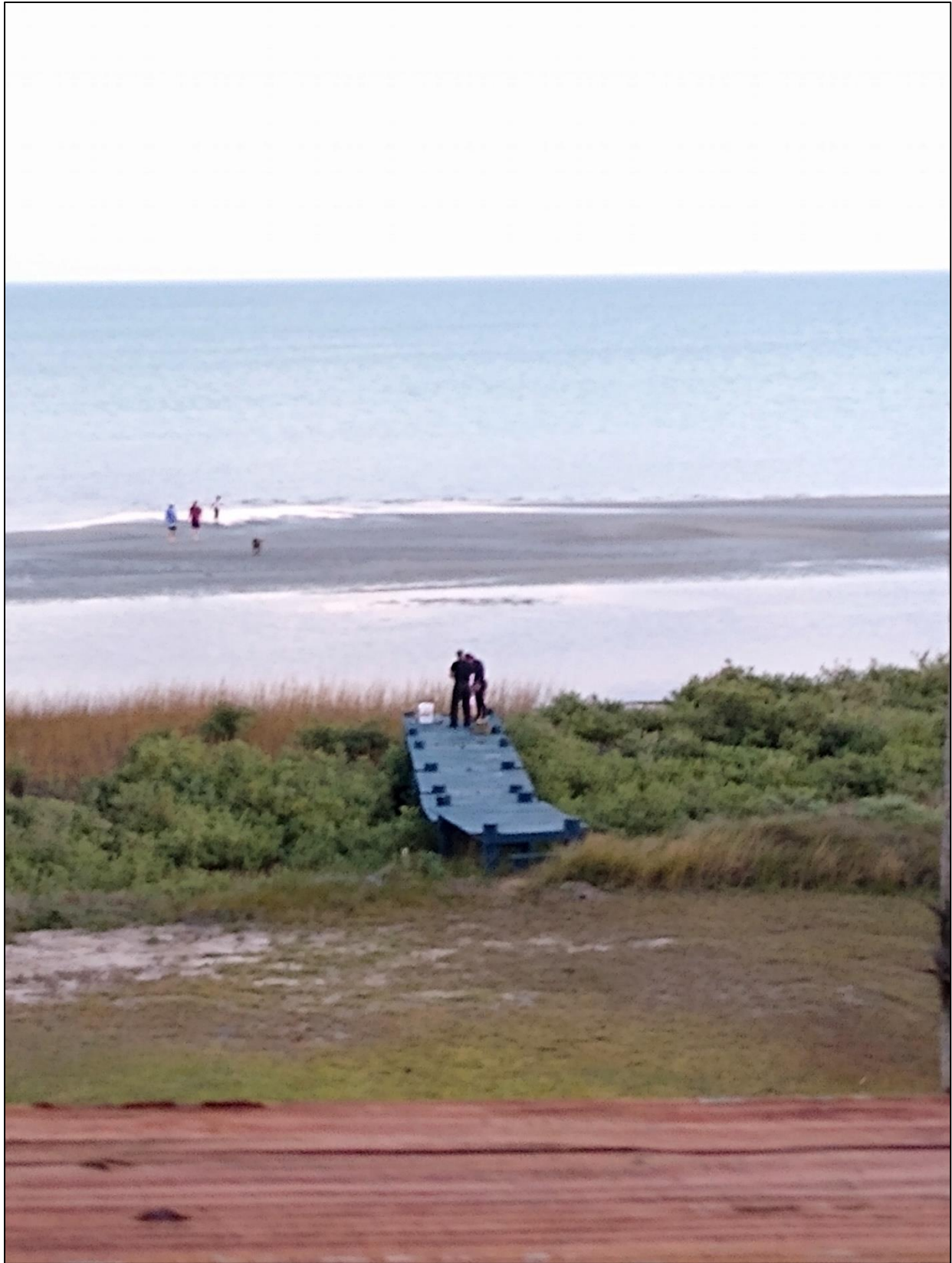


Photo 1: Mr. Serna's family members recreating on his property and in the Corpus Christi Bay.



Photo 2: Mr. Serna's family member kayaking and fishing in the Corpus Christi Bay.



Photo 3: Mr. Serna's family member with fish caught offshore from Mr. Serna's property.



Photo 4: Mr. Serna's family members recreating on his property and in the Corpus Christi Bay.



Photo 5: Photo taken by Mr. Serna's family member kayaking and birdwatching in the Corpus Christi Bay.



Photo 6: Mr. Serna's family member recreating in the Corpus Christi Bay offshore of his property.