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Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 4, 2024

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: IN THE MATTER OF THE APPLICATION BY THE CITY OF CORPUS
CHRISTI FOR WATER RIGHTS PERMIT NO. 13675
TCEQ DOCKET NO. 2023-1664-WR**

Dear Ms. Gharis:

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

Sincerely,

Handwritten signature of Eli Martinez in black ink.

Eli Martinez, Senior Attorney
Assistant Public Interest Counsel

Handwritten signature of Josiah Mercer in black ink.

Josiah T. Mercer, Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2023-1664-WR

APPLICATION BY THE CITY OF	§	BEFORE THE
CORPUS CHRISTI FOR WATER	§	TEXAS COMMISSION ON
RIGHTS PERMIT NO. 13675	§	ENVIRONMENTAL QUALITY

THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE TO REQUEST FOR RECONSIDERATION AND REQUESTS FOR HEARING

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the Commission) files this Response to Request for Reconsideration and Requests for Hearing in the above-entitled matter.

I. Introduction

A. Summary of Position

The TCEQ Chief Clerk’s office received numerous requests for a contested case hearing and one request for reconsideration in this matter from thirty-six individuals and one organization. For the reasons discussed herein, OPIC respectfully recommends that the Commission grant the hearing requests of: Ingleside on the Bay Coastal Watch Association, Kelley Burnett, and Encarnacion Serna, Jr.—and refer this matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing. OPIC recommends denial of the request for reconsideration and all other hearing requests.

B. Background

City of Corpus Christi (Applicant) seeks a water use permit (the Application) to authorize the diversion and use of not to exceed 186,295 acre-feet of water per year, at a maximum diversion rate of 257 cubic feet per second (115,349.31 gallons per minute), from a diversion reach on La Quinta Channel, San Antonio-Nueces Coastal Basin, for municipal and industrial purposes in San Patricio, Nueces, and Aransas counties. Applicant also seeks an exempt interbasin transfer to the portion of San Patricio County in the Nueces River Basin and the portion of Nueces County in the Nueces-Rio Grande Coastal Basin within the City's wholesale water service area.

The City's Application was received on January 22, 2020. The Application was declared administratively complete on May 5, 2020. On March 19, 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 April 6, 2021. The original comment period ended on May 6, 2021—thirty days after publication of the notice.¹ Two public meetings were held virtually on September 14, 2021, and

¹ 30 TEX. ADMIN. CODE ("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.

November 16, 2021. The comment period was extended until November 30, 2021. The deadline to request a contested case hearing was May 6, 2021.

II. 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.² 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.”³

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.⁴ Relevant factors considered in determining a person’s affected person status include:

² 30 TAC § 55.251 *et seq.* and 30 TAC § 295.171.

³ 30 TAC § 55.251(c)(2).

⁴ 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).

- (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 relevant to the application.⁵

According to 30 TAC § 55.252(a), a group or association may request a contested case hearing if:

- (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 member in the case.

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.⁶ 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.⁷

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

⁵ 30 TAC § 55.256(c).

⁶ 30 TAC § 55.255(b)(1).

⁷ 30 TAC § 55.255(c).

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:

- (1) the application conforms to the requirements prescribed by this chapter and is accompanied by the prescribed fee;
- (2) unappropriated water is available in the source of supply;
- (3) the proposed appropriation:
 - A. is intended for a beneficial use;
 - B. does not impair existing water rights or vested riparian rights;
 - C. is not detrimental to the public welfare;
 - 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; and
- (4) the applicant has provided evidence that reasonable diligence will be used to avoid waste and achieve water conservation as defined by Section 11.002 (Definitions)(8)(B).

C. Requests for Reconsideration

Any person may file a request for reconsideration of the ED’s decision under 30 TAC § 55.201(e). The request must be in writing and filed with the Chief Clerk no later than 30 days after the Chief Clerk mails the ED’s decision and RTC. The request must expressly state that the person is requesting reconsideration of the decision and give reasons why the decision should be reconsidered.

III. Discussion

A. Determination of Affected Persons

1. Ingleside on the Bay Coastal Watch Association

The Commission received a timely hearing request and several comments

from Ingleside on the Bay Coastal Watch Association (IOBCWA), a nonprofit corporation that works to promote the health, safety, and quality of life of the Ingleside on the Bay and Ingleside Cove communities. According to its hearing request, the purpose of the group includes representing its members by participating in the TCEQ decision-making process. IOBCWA raises concerns that include the lack of information in the application regarding the purpose and location of use, return and surplus flows, consistency with the State and Regional Water Plan, and protection of the public welfare. OPIC finds that the interests IOBCWA seeks to protect in this matter are germane to their purpose.⁸ Additionally—neither the claim asserted nor the relief requested requires participation of individual members of IOBCWA.⁹

IOBCWA identifies Encarnacion Serna, Jr., Uneeda Laitinen, Daniel Wilkerson, and Chip Harmon—by name and address—as members who would otherwise have standing to request a hearing in their own right. Mr. Serna possesses littoral rights conveyed through his ownership of bayfront property, and he and his family regularly fish, swim, and kayak near the area of the proposed intakes for the requested diversion. Mrs. Laitinen and her husband reside along the bay and enjoy bird-watching and fishing in the bay. Mr. Wilkerson is the owner and operator of Family Fishing Charters and is concerned that the fishing stock that he relies on for food and business could be affected by the proposed facility. Similarly, Mr. Harmon owns a convenience

⁸ 30 TAC § 55.252(a)(2).

⁹ 30 TAC § 55.252(a)(3).

and fishing tackle store, often consumes fish from the bay, and regularly serves as a fishing guide.

As discussed in the next section, OPIC finds that Encarnacion Serna, Jr. is an affected person who has a personal justiciable interest not common to members of the general public. Therefore, Mr. Serna has standing to request a hearing in his own right, and IOBCWA has consequently met all the requirements of 30 TAC § 55.252(a) for group standing. Consequently, OPIC recommends that the Commission find that IOBCWA is an affected person.

2. Individuals Who Have Demonstrated a Personal Justiciable Interest

The Commission received timely comments and hearing requests from Kelley Burnett and Encarnacion Serna, Jr. Mr. Serna owns waterfront property near the proposed intake and represents in his hearing request that he and his family regularly engage in specific recreational activities in the particular area near the proposed position of the intake in the Application. Similarly, Mr. Serna and his family fish, swim, and boat in the particular area of the proposed intake, and they are concerned about the Application's effect on the quantity and quality of fish in this area. Mrs. Burnett owns waterfront property near the proposed intake and represents in her hearing requests that she relies on the fish and dolphin populations for her business—Dolphin Connection Ingleside. While fish populations near the area of the intake may be potentially negatively impacted by an improperly designed or calibrated intake due to the resulting entrainment of juvenile fish, the potential impacts on dolphin populations—

and dolphin-related tourism—are too attenuated to establish a personal justiciable interest on this basis alone. However, Mrs. Burnett and her family also regularly engage in specific recreational activities in the particular area near the proposed position of the intake in the Application, including fishing, boating, and swimming in the particular waters near the proposed intake.

In addition to their littoral rights, both requestors have therefore described a specific, repeated recreational connection to the particular areas from where water will be appropriated. These requestors also clearly express concerns that the intake of water could affect the wildlife necessary for their recreation in that specific area. They have therefore successfully demonstrated recreational interests that go beyond those of the general public.

When deciding on a petition for water use rights, TWC § 11.134(b)(3)(C) requires the Commission to consider whether the appropriation of water is not detrimental to public welfare. Under § 11.134(b)(3)(D), the Commission must also consider the ecology and productivity of the affected bay and estuary system and must include provisions to protect fish habitats.¹⁰ These requestors recreational interests are therefore interests which are protected by the law under which this Application is considered.¹¹ Further, because these requestors have demonstrated recreational interests specifically related to the waters close to the facility intake, a reasonable relationship exists between the interests expressed in their comments and the Applicant's regulated activity—a relevant

¹⁰ See TWC § 11.147(c)(2). See also TWC § 11.147(e).

¹¹ See 30 TAC § 55.256(c)(1).

factor under 30 TAC § 55.256(c)(3).

Therefore, OPIC concludes that Kelley Burnett and Encarnacion Serna, Jr. have demonstrated that they possess a personal justiciable interest in this matter and qualify as affected persons.

3. Individuals with no Personal Justiciable Interest

Timely comments and requests for a contested case hearing were also submitted by Lara Breeding, Scott Breeding, Marsha Bromley, Deborah & Larry Ferrel, Matthew Freeze, Briana Gutierrez, Steve Hagens, Donna Hoffman, Ellen Honey, Cody Janssen, Uneeda Laitinen, Kathryn Masten-Cain, Elizabeth Mayorga, Alissa Mejia, James Miday, Randy Miller, Emily Christina Nye, Chelsea Oestrick, Theron Oestrick, Blanca Parkinson, Lynne Porter, Alexis Rodriguez, Leslie Rozzell, Karen Jo Thorwaldson Florence Tissot, Luhannah Wusterhausen, and Misty Kay Wyatt.

While these requests raise concerns with desalination activities on the environment generally and potential impacts on aquatic life and recreational activities they engage in near the Bay, they do not establish a connection to the area of the proposed intake with sufficient regularity, specificity, and particularity to the area of the proposed intake to distinguish their interests from those of the general public. Likewise, any articulated economic impacts neither sufficiently establish a reasonable nexus with the area of the proposed intake, nor demonstrate how the permitted activity—the taking of seawater—would create a detrimental impact on their economic interests. Further, any

concerns related to wastewater products resulting from the desalination process proposed by the Applicant, including heavily-salinated waste streams potentially discharged into or near the Bay, are not relevant to the proposed appropriation. These concerns may be relevant to any associated wastewater permit sought by Applicant. For these reasons OPIC finds that this group of requestors does not establish a personal justiciable interest conveying standing, and OPIC cannot find that they qualify as affected persons.

4. Untimely Requests

Untimely requests for a contested case hearing were submitted by Elida Castillo, Margaret Ann Duran, Margaret Russo, Annie Spade, Arnold Gary Strickland, and Mark Williams after the May 6, 2021, contested case hearing request period had expired. An untimely request for reconsideration was submitted by Jessika McFarland on November 30, 2021. OPIC recommends that these requests be denied.

IV. Conclusion

For the reasons set forth above, OPIC respectfully recommends that the Commission grant the hearing requests of IOBCWA, Kelley Burnett, and Encarnacion Serna, Jr., and refer this matter to SOAH for a contested case hearing. OPIC recommends denial of the request for reconsideration and all other hearing requests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2024, the original of the Office of Public Counsel's Response to Request for Reconsideration and Requests for Hearing 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
Eli Martinez

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TCEQ DOCKET NO. 2023-1664-WR**

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