

TCEQ DOCKET NO. 2023-1664-WR

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

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 the City of Corpus Christi (“the City” or “Applicant”), the Executive Director (“ED”), and the Office of Public Interest Counsel (“OPIC”). For the reasons described below, IOBCWA urges the Commission to grant its hearing request and refer this matter to the State Office of Administrative Hearings of a contested-case hearing on the merits.

I. Summary

By its initial hearing request, IOBCWA satisfied the associational standing test, 30 Tex. Admin. Code § 55.252(a). IOBCWA identified several members—*e.g.*, Encarnacion Serna and Kelley Burnett¹—who possess personal justiciable interests that will be impacted by the permit application that is the subject of this proceeding, thus demonstrating that the

¹ Although Ms. Burnett submitted an individual hearing request, she is also a member of IOBCWA. *See* Exhibit A to this Reply (Affidavit of Ms. Burnett, averring that she is a member of IOBCWA).

group includes members who have standing to request a hearing in their own right.² See Tex. Water Code § 5.115; 30 Tex. Admin. Code §§ 55.252(a)(1), 55.256(a).

In their respective responses, the ED and the City argue that IOBCWA's members cannot demonstrate standing because they do not possess sufficient property interests or other personal justiciable interests.³ See *Applicant's Responses to Hearing Requests*, pp. 4, 13; *ED's Response to Hearing Requests*, pp. 5, 7. The City further argues that the concerns expressed by IOBCWA's members are concerns that are either (1) common to members of the general public or (2) are not protected by the law under which the City's application will be considered. *Applicant's Responses*, pp. 4, 13.

Both the City's and the ED's arguments are flawed. As described in more detail below, and in the affidavits attached to this Reply, the interests—recreational, property, and economic interests—identified by Mr. Serna and by Ms. Burnett are personal justiciable interests, sufficient for purposes of demonstrating standing under the relevant legal standards. Their personal justiciable interests will be impacted by the proposed water right that is the subject of this proceeding. And their interests are protected by the law that applies to the City's water right permit application.

Accordingly, IOBCWA satisfies the associational standing test, and its hearing request should be granted.

² Neither the ED nor the City has challenged the other two elements under the associational standing test, 30 Tex. Admin. Code § 55.252(a)(2) & (3). Accordingly, this Reply addresses only the first element of the associational standing test—whether IOBCWA includes members who have standing to request a hearing in their own right.

³ The Office of Public Interest Counsel recognizes that IOBCWA has satisfied the associational standing test. OPIC explains that Mr. Serna and Ms. Burnett both demonstrated that they possess personal justiciable interests that will be impacted by the proposed water right, and that their interests are protected by the law that governs the City's water right permit application. See *OPIC's Response to Requests for Hearing*, pp. 5-9. IOBCWA concurs with the OPIC's assessment.

II. Discussion

A. The “affected person” standard is analogous to the constitutional standing test, and neither requires ownership of an appropriative water right.⁴

Chapter 5 of the Texas Water Code addresses the general standards that apply to hearing requestors seeking to show they are affected persons. Under section 5.115, 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 administrative hearing. Tex. Water Code § 5.115(a). An interest common to members of the general public is not sufficient to confer affected person status. Tex. Water Code § 5.115(a).

The determination of whether someone is an affected person is governed by the same standards that govern Article III standing in federal Court. *City of Waco v. Texas Comm’n on Env’t. Quality*, 346 S.W.3d 781, 801-03 (Tex. App.–Austin 2011), *rev’d on other grounds*, 413 S.W.3d 409 (Tex. 2013).⁵ The United States Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), 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. *Id.* at 561.

⁴ *But see Applicant’s Responses*, pp. 4, 13.

⁵ *See also* 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.

The Supreme Court applied the *Lujan* test to determine standing based on recreational interests, in the case of *Friends of the Earth, Inc. v. Laidlaw Environmental Services, (TOC) Inc.*, 528 U.S. 167 (2000). The case involved a Clean Water Act citizens suit, alleging that Laidlaw was operating its wastewater treatment facility in a manner that violated its NPDES permit. To demonstrate associational standing, Friends of the Earth (one of the organizational plaintiffs in the case) relied on a member who lived a half-mile from Laidlaw's facility and who averred that he occasionally drove over the receiving river, that it looked and smelled 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 teenager, but would not do so out of concern that the water was polluted by Laidlaw's discharges. *Id.* at 181-82.

In concluding that Friends of the Earth had established standing, 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.* at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972), and citing *Defenders of Wildlife*, 504 U.S. at 562-563). The *Lujan* Court, itself, had noted: "Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Defenders of Wildlife*, 504 U.S. at 562-563.

Further, the Austin Court of Appeals recognized the validity of recreational interests for purposes of standing, especially when accompanied by a riparian interest, in the case of *Texas Rivers Protection Association v. Texas Natural Resource Conservation*

Commission, 910 S.W.2d 147 (Tex. App.—Austin 1995, writ denied). In that case, the Upper Guadalupe River Authority (the “Authority”) sought a permit to divert water from the Guadalupe River at a point near Kerrville. *Id.* at 150. Texas Rivers Protection Association (“TRPA”) sought a contested-case hearing with regard to the application. *Id.* To demonstrate standing, TRPA identified member Roy Vance, who owned property fronting the affected area of the river. *Id.* at 151. Another TRPA member, Thomas Goynes, conducted canoeing trips on the affected part of the river and testified that the proposed diversion would affect his business opportunities. *Id.* TRPA was admitted as a party to the contested-case hearing. *Id.* After the agency issued the water right to the Authority, despite TRPA’s opposition, TRPA sought judicial review of the permitting decision; the district court affirmed the agency’s decision; and TRPA appealed to the court of appeals. *Id.*

On appeal, the Authority challenged TRPA’s standing to appeal the agency’s decision, arguing that TRPA’s members lacked “vested” property rights in the river. But the appellate court rejected this argument. *Id.* at 151-52. The court held that riparian ownership alone sufficiently distinguished the interests of TRPA’s members from those of the general public. *Id.* at 151. The Court further noted that “[a]n injury need not affect vested property rights to confer standing; the harm may be economic, recreational or environmental.” *Id.* at 151-52.

Applying these standards here, to the hearing requests submitted by IOBCWA and its members, Mr. Serna and Ms. Burnett, it is apparent that IOBCWA’s members satisfy the constitutional standing test and the “affected person” standard, in Chapter 5 of the Water Code.

B. Mr. Serna possesses personal justiciable interests that will be impacted by the proposed permit.

Mr. Serna satisfies the requirements of standing based on his recreational and property interests, consistent with the standards set forth in *Lujan*, *Laidlaw*, and *Texas Rivers Protection Association*. As described in his hearing request, IOBCWA's hearing request, and in the attached Affidavit by Mr. Serna (Exhibit B), Mr. Serna owns waterfront property near the proposed intake. Mr. Serna's bayfront property at 105 Lost Creek Drive, Portland, Texas is in close proximity and just west of the City's proposed intake.

Further, he regularly recreates in the area of the proposed intake in Corpus Christi Bay—engaging in activities such as kayaking, fishing, and swimming. For over 20 years, Mr. Serna has regularly engaged in fishing, swimming, and kayaking in the Bay. Mr. Serna fishes near the western edge of the La Quinta Channel, approximately 2 miles from the proposed intakes and kayaks approximately 1 mile west of the proposed intakes. Mr. Serna and his family kayak in this area approximately twice a week from April through October each year.

These interests satisfy the definition of a personal justiciable interest; they are not common to members of the general public. And they satisfy the constitutional standing test.

C. Kelley Burnett possesses personal justiciable interests that will be impacted by the proposed permit.

Sharon Kelley Burnett, a member of IOBCWA, submitted her own individual comments and hearing request, and OPIC accurately recognized her as an affected person due to her repeated recreational connection to the particular areas from where water will

be appropriated. Ms. Burnett also has a property and an economic interest in the area via her ownership of her bottlenose dolphin touring company. *See* Exhibit A.

Ms. Burnett owns channel-front property at 410 N Sandpiper, Ingleside, Texas, 78362. Approximately once per year for the last four years, Ms. Burnett takes a dingy boat in Ingleside Cove and fishes off her dock for redfish, sheepshead, and trout. Ms. Burnett has also taken hundreds of customers on tours by boat to see bottlenose dolphins through her company Dolphin Connection Ingleside, located at 84 Bayshore Drive, Ingleside, Texas 78362, only .15 miles from the La Quinta Channel. Dolphin Connection Ingleside is primarily a dolphin tour operation, but the company also offers fishing charters as well as “ferry” transportation to businesses like Hanson Surveyors for survey teams. The company operates year-round, and its clientele includes local residents and tourists from across the country, as well as international travelers who come as far as the Netherlands to take tours because of its reputation as a 5-star enterprise.

Ms. Burnett’s dolphin tour route sometimes includes the southeastern portion of La Quinta Channel, approximately 2 miles from the proposed intake structures. On occasion, Ms. Burnett has clients who work in the industrial areas along the La Quinta Channel and would like to view the industrial areas from the water. On those occasions, they travel into the area within the La Quinta Channel up to Kiewett Corporation.

Ms. Burnett’s business depends on the quality of water and the health of the dolphin pods that are year-round residents in La Quinta Ship Channel and Corpus Christi Ship Channel. A reduction in fish population will likely have an impact on dolphin activity in the area, which would impair Ms. Burnett’s economic interests, as it will decrease her

customers and thus her revenue. A decrease in the dolphin population would also affect Ms. Burnett's personal aesthetic enjoyment of the area.

These economic impacts should not be disregarded. Economic interests are a valid basis for being found an affected person and judicial standing. 30 Tex. Admin. Code § 55.256(a) (“an affected person is one who has a personal justiciable interest related to a[n] . . . economic interest affected by the application”); *see also Stop the Ordinances Please, v. City of New Braunfels*, 306 S.W.3d 919 (Tex. App.—Austin 2010, no pet.) (tubing outfitters had standing to challenge ordinances that potentially decreased customer base, and potentially impaired usefulness of equipment); *Lake Medina Conserv. Soc’y v. Texas Natural Res. Conserv. Comm’n*, 980 S.W.2d 511, 516 (Tex. App.—Austin 1998, pet. denied) (association comprised of lakeside property owners and waterfront businesses had standing to challenge water rights permit that would cause lake levels to drop); *Texas Rivers Prot. Ass’n v. Texas Natural Res. Conserv. Comm’n*, 910 S.W.2d 147, 151–52 (Tex. App.—Austin 1995, writ denied) (citing harm to canoe trip guides’ “business opportunities” as supporting individual guides’ standing to challenge issuance of water rights permit that would lower river levels).

Therefore, Ms. Burnett is particularly impacted by the proposed permit in a way distinct from the general public by virtue of her regular use of the waters, facilitated by her ownership of nearby property, and her economic interest in the area. Her concerns as to the potential impact of the proposed water right will be redressed by participation in a contested case hearing on the issuance of the permit.

D. The proposed permit will impact IOBCWA's members' personal justiciable interests.

The City argues that IOBCWA's members have expressed only general concerns, which the City claims are insufficient to confer standing. The argument is flawed. As OPIC explained in its Response, Chapter 11 of the Water Code addresses the very concerns raised by IOBCWA and its members. This is further demonstrated by the Affidavit of Dr. Kristin Nielsen (Exhibit C), and the facts described below.

The proposed permit has the potential to reduce the abundance and variety of fish available to be caught in the waters where Mr. Serna fishes, particularly due to the impacts of entrainment (i.e., when smaller organisms pass through intake screens) of larval fish and shellfish. This process is of particular importance in this instance, as the proposed intake site is proximal to seagrass beds that serve as important reproductive/nursery grounds for many species of shellfish and fish and therefore support an especially high concentration of their eggs and larvae (i.e., ichthyoplankton). Because ichthyoplankton are unable to actively swim, they are pulled into seawater intakes in massive numbers, which effectively leads to mortality for 100% of entrained animals. This subsequently impacts adult fish and shellfish populations via several mechanisms. The most obvious of these is by severely depressing the number of early life stage fish and shellfish that may develop into reproductive age adults that help maintain the population. Although entrainment acts on organisms at a much earlier/sensitive life stage, this process is nevertheless akin to severe overfishing pressure.

Another important impact of removing such large numbers of embryo-larval fish and shellfish relates to their importance as a food source for a wide-ranging number of organisms in the estuary. Many smaller fish and invertebrates rely on the availability of ichthyoplankton as an important food source, while larger predatory fish and waterfowl prey upon the organisms supported by the ichthyoplankton. Thus, there can be a cascade of impacts on the food web when immense numbers of eggs and larvae are suddenly removed from a highly productive ecosystem.

Mr. Serna is particularly impacted by the proposed permit in a way distinct from the general public by virtue of his regular use of the waters from which the diversion is proposed to occur, 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 of the permit.

Similarly, Over the years, Ms. Burnett has seen some deterioration of water quality and the ability to view dolphins just below the water's surface, and she is worried that the proposed facility will exacerbate the decline in the water quality of the Bay. The proposed intake also has the potential to impact early stage aquatic organisms in the area. Seagrass beds, such as those near the intake, serve as essential nursery grounds for early life stage aquatic organisms, including many managed and protected fish species. Ultimately, mortality of early stage aquatic organisms can have wide-ranging consequences for the ecosystem structure and adversely affect the presence of much larger animals (e.g., dolphins, sea turtles).

The concerns expressed by both Mr. Serna and Ms. Burnett are supported by Dr. Nielsen's Affidavit, attached as Exhibit C. And their concerns would be addressed via participation in the contested case hearing.

E. 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 application contains information on the purpose and location of use as required by 30 TAC § 295.5.
- (2) Whether the application contains the required information regarding return and surplus flows as required by 30 TAC § 295.8.
- (3) Whether the application demonstrates consistency with the State and Regional Water Plan.
- (4) Whether the proposed withdrawal is detrimental to the public welfare.
- (5) Whether the proposed withdrawal maintains existing uses of the area near the intake, and fails to maintain the ecology and productivity of Corpus Christi Bay near La Quinta Channel.
- (6) Whether the proposed withdrawal is consistent with the Coastal Management Program.

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.

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,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 18, 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
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