

TCEQ AIR QUALITY PERMIT NUMBERS: 140763, PSDTX1500M1, GHGPSDTX46M1; 19871, PSDTX1236M1, GHGPSDTX221; 91780, PSDTX1240M1, GHGPSDTX223; 19200, PSDTX1237M1, GHGPSDTX218; 19168, PSDTX1226M1, GHGPSDTX224; 107518, PSDTX1383M2, GHGPSDTX48M1; 20203, PSDTX1224M1, GHGPSDTX222; 40157, PSDTX1222M1, GHGPSDTX225; 19201, PSDTX1232M1, GHGPSDTX219

TCEQ DOCKET NUMBER 2025-1160-AIR

APPLICATION BY FORMOSA	§	BEFORE THE
PLASTICS CORPORATION,	§	
TEXAS	§	TEXAS COMMISSION ON
POINT COMFORT PLANT	§	
POINT COMFORT, CALHOUN	§	ENVIRONMENTAL QUALITY
COUNTY	§	

BRIEF OF SAN ANTONIO BAY ESTUARINE WATERKEEPER

Pursuant to the Commission’s October 10, 2025 letter, San Antonio Bay Estuarine Waterkeeper (“Waterkeeper”) submits this brief concerning whether Diane Wilson, a Waterkeeper member, is an “affected person” for purposes of a contested case hearing (the “Hearing”) on the above-captioned application.

INTRODUCTION

On one hand, the Commission and the Texas Attorney General have repeatedly affirmed that Article III provides the standard for determining whether, under T.A.C. § 55.203, someone is an “affected person” such that they are eligible for a contested case hearing concerning a proposed Clean Air Act permit. On the other hand, the Executive Director avers that for Ms. Wilson to be an “affected person,” she must make demonstrations courts have flatly rejected for Article III standing. The Commission should likewise reject the

Executive Director's position, grant Ms. Wilson affected person status, and refer this matter to the State Office of Administrative Hearings.

FACTS

Having met all other criteria for the Hearing (Executive Director's Response to Hearing Request ("ED Response") at 7-9) Waterkeeper need only establish whether "one or more members [of Waterkeeper] would otherwise have standing to request a hearing in their own right." *Id.* at 6. In requests for the Hearing in 2022 (the "2022 Request") and 2025 (the "2025 Request") Waterkeeper identified Ms. Diane Wilson as its member who would have standing in her own right. 2022 Request at 3; 2025 Request at 4-5.

Ms. Wilson has visited the lands and waterways abutting Formosa's Point Comfort Plant ("the Plant") since at least 2016, when she began gathering information about Formosa's Clean Water Act violations. In 2017, Waterkeeper sued Formosa for those violations in the U.S. District Court for the Southern District of Texas and, following the court's determination of Formosa's liability for those violations, in 2019 the court entered a consent decree (the "Decree") between Formosa, Ms. Wilson, and Waterkeeper. Ms. Wilson has continued to visit the Plant since then to observe Formosa's compliance with the Decree.

Waterkeeper's 2021 comments on a proposed air permit for the Seahawk Terminal, located near the Plant (shown in attached Exhibit A), described Ms. Wilson's visits to the Formosa site:

Ms. Wilson visits the area at least once a week and as frequently as three times a week. During each of these trips, Ms. Wilson is outdoors in a kayak, a motorboat, or on foot between four and six hours. Ms. Wilson

began visiting many of these sites as early as 2016 and will continue to visit them to monitor Formosa's compliance with the Consent Decree . . .

Ms. Wilson visits Formosa's outfalls 006, 002, 004, 005 and the Tres Bahias property on the East side of Cox Creek once a week. . . . Multiple times a year, Ms. Wilson also visits other portions of Cox Creek including Formosa's outfall 003 and the Alcoa Dam, Formosa's fence line along highway 35, and a boom intended to catch plastics discharged from outfalls 002, 004, and 005.

Three times in the last four months, Ms. Wilson visited the site of Formosa's outfall number 013 Twice in the last year, Ms. Wilson visited Formosa's outfall number 011.

Ms. Wilson also visits Formosa's outfall 001 in Lavaca Bay once every two months.

Waterkeeper's 2022 Request repeated that Ms. Wilson visited "areas near Formosa's stormwater and wastewater outfalls for several hours by kayak, motorboat, or on foot at least once a week and as frequently as three times a week." *Id.* at 2. Waterkeeper's 2025 Request noted, "Since 2016, Ms. Wilson has visited these waters to look for plastic pellets at Formosa's wastewater and stormwater outfalls—each around 0.15 miles from the Plant's boundaries—by kayak, motorboat, or on foot at least once every few weeks. When on foot she wades in the knee-deep parts of Cox Creek just outside Formosa's Fenceline."¹ *Id.* at 2.

¹Any perceived discrepancy between Ms. Wilson's accounts of the frequency of her visits is because Ms. Wilson's "often plans visits around rain events" to monitor Formosa's stormwater overflow. 2025 Request at 3. The 2022 Request was filed in November, and the average rainfall in Port Lavaca for August – September is 4.1 inches; the 2025 Request was filed in May, and the average rainfall in Port Lavaca for February – April is 2.6 inches. United States Climate Data, *Port Lavaca, Texas*, <https://www.usclimatedata.com/climate/port-lavaca/texas/united-states/ustx2612>.

Taking a conservative estimate of one visit per week to Formosa outfalls, since 2016 Ms. Wilson has been within 0.15 miles of the Plant more than 500 times. An extremely conservative estimate of only once a month means she has visited the Plant more than 100 times. Ms. Wilson intends to continue visiting those sites “for recreational visits [and] to enforce the Consent Decree.” 2025 Request at 2.

Nevertheless, the Executive Director has recommended Ms. Wilson is not an affected person because she “resides almost 20 miles” from the Plant and her “recreational and monitoring interests are intermittent and common to those of the general public.” ED Response at 6. At the Commission’s October 8, 2025 meeting, the Commission was unable to decide whether to grant Waterkeeper’s request for the Hearing; the October 8, 2025 letter followed, stating the Commission would take up “consideration of affectedness” at its November 5, 2025 meeting and “Parties may file briefs regarding affectedness in this matter.”

ARGUMENT

I. The Regulatory Definition of “Affected Person” Must Be Consistent with Article III of the United States Constitution.

If a contested case hearing is requested by an affected person, the TCEQ will consider the request at an open meeting. 30 Tex. Admin. Code § 55.209. **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).

Op. Texas Att’y Gen., *Statement of Legal Authority to Regulate Oil and Gas Discharges under the Texas Pollutant Discharge Elimination System Program* at 12 (Sept. 18, 2020) (emphasis added).

To repeat, “[t]he **criteria regarding determination of affected persons in the TCEQ’s rules comport with the standing requirements in Article III** of the United States Constitution.” This applies to all “federal permit programs being implemented by the TCEQ.” The Commission agrees with the Attorney General:

[A]ny provisions of State law that limit access to judicial review do not exceed the corresponding limits on judicial review imposed by the standing requirements of Article III . . . the Texas Attorney General statement regarding equivalence of judicial review based on THSC, §382.032 in accordance with Article III of the United States Constitution, is also applicable for every action of the commission subject to the [Texas Clean Air Act] including PSD permit decisions.

TCEQ, 35 Tex. Reg. 5198, 5201 (June 18, 2010) (citing Op. Tex. Att’y Gen., *Supplement to 1993, 1996, and 1998 Statements of Legal Authority for Texas’s Federal Clean Air Act Title V Operating Permit Program* at 34 (Section XIX) (Oct. 29, 2001)).

The Supreme Court outlined the requirements of Article III standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (cleaned up):

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical, Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before

the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Because, as the Texas Attorney General has repeatedly explained, Texas's rules do not establish a heightened threshold for participation in a contested case hearing beyond what Article III requires, the Commission must decide whether the factors listed in 30 T.A.C. § 55.203(c) and (d) show whether a hearing requestor has an interest or injury sufficient to satisfy Article III. Accordingly, 30 T.A.C. § 55.203(a)'s definition of "affected person" may not be read, as the Executive Director did here, to limit the availability of contested case hearings for permits the Commission issues under federal programs to people (1) who reside near a source of pollution; (2) are injured in places not open to the public; or (3) are injured continuously.

Applied here, there is no question Diane Wilson has a particularized interest in the outcome of this matter sufficient to distinguish her from the general population, which is all that is required. She has inhaled, and thus been injured by, Formosa's emissions during her hundreds of visits to the edges of the Plant, and Formosa's proposed project will increase its existing annual emissions of VOCs by 522.34 tons per year (tpy), NO_x by 291.9 tpy, CO by 1,444 tpy, and SO₂ by 4.63 tpy.² These pollutants may damage the liver, kidney, and central nervous system; cause headaches, dizziness, nausea, and respiratory irritation; and be carcinogenic.³ In fact, Ms. Wilson has stated that Formosa's

² TCEQ, Amended Preliminary Determination Study at 5 (Oct. 13, 2022).

³ EPA, Criteria Air Pollutants, <https://www.epa.gov/criteria-air-pollutants>; EPA, Volatile Organic Compounds' Impact on Indoor Air Quality, <https://www.epa.gov/indoor-air-quality-iaq/volatile-organic-compounds-impact-indoor-air-quality>.

emissions have already made her sick. 2025 Request at 4. *See Port Arthur Community Action Network v. TCEQ*, 147 F.4th 560, 566 (5th Cir. 2025)

(concerns about carbon monoxide emissions satisfy Article III).

II. If Adopted, the Executive Director’s Recommendation to Deny Affected Party Status to Ms. Wilson Would Be Inconsistent with Article III and Violate State Law as Authoritatively Interpreted by the Texas Attorney General.

The Executive Director recommends that Ms. Wilson is not an affected person in her own right. As shown on the map, Ms. Wilson resides almost 20 miles from the Formosa facility. Additionally, Ms. Wilson’s recreational and monitoring interests are intermittent and common to those of the general public. Therefore Ms. Wilson cannot be considered an affected person.

ED Response at 6. The proffered reasonings violate long-settled Article III principles.

Restricting affected person status to people residing near Formosa, and saying if other people are (or could be) affected as Ms. Wilson has been, then her interest is “common to members of the general public,” are both inconsistent with Article III.⁴ Dozens, if not hundreds, of decisions have found Article III standing based on injuries common to large numbers of people, and dozens of environmental decisions have held plaintiffs met the injury in fact test when using lands or waters accessible to the entire public.

Courts have long rejected the idea that a plaintiff’s injury is insufficient for Article III standing just because other people are similarly injured. “[T]he fact that particular environmental interests are shared by the many rather than

⁴ Or, as Formosa succinctly puts it, “Where any member of the public has the right and ability to access and recreate and enjoy aesthetic beauty on publicly owned or open land, the requestor cannot reach affected person status.” Formosa Response at 19.

the few does not make them less deserving of legal protection through the judicial process.” *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); accord *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686–87 (1973) (“neither the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm, deprives them of standing”); *Spokeo v. Robbins*, 578 U.S. 330, 339 n.7 (2016) (“The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance. The victims’ injuries from a mass tort, for example, are widely shared, to be sure, but each individual suffers a particularized harm.”) The number of equally affected people can include entire cities. *E.g.*, *Utah Physicians for a Healthy Environment v. Diesel Power Gear LLC*, 21 F.4th 1229, 1246 (10th Cir. 2021) (“The EPA has determined that the Salt Lake City area . . . is a nonattainment area for 24-hour levels of fine particulate matter . . . Those who reside in that area can fairly trace injuries they suffer from the polluted air to any contributor of prohibited emissions in the area.”)

The Commission itself adopted this Article III-compliant reading of “affected person” in *Application by Port of Corpus Christi Nueces Authority for TPDES Permit No. WQ0005253000*; TCEQ Docket No. 2019-1156-IWD, where it granted numerous people affected person status based on injury from effluent that would “be discharged via pipe directly into Corpus Christi Bay.” ED Response at 2. People with a “personal justiciable interest . . . that is not

common to members of the general public” included (*id.* at 10–16) Cathy Harshman (“because she spends time on the water”); Margo Branscomb (“because she sails in the area”); Aldo Dyer (“because he swims, boats, paddles, and fishes in the area”); Morgan Faulkner (“because he fishes in the area”); Mark Grosse (“because he swims, paddles, fishes, and boats in the area”); Sally Marco (“because she regularly visits the beaches and fishes in the area”); Cameron Pratt (“because he surfs and fishes in the area”); and Diane Vondra (“because she swims, paddles, and fishes in the area”). Corpus Christi City alone has a population greater than 300,000,⁵ and it can safely be assumed thousands—more likely tens of thousands—of other people “spend time on the water” of Corpus Christi Bay or sail, swim, paddle, boat, fish, or surf in or on its waters. Nevertheless, the Commission found these individuals had an interest “not common to members of the general public.” If they satisfy the “affected person” test, Ms. Wilson surely does.

Given that widely sharing an injury does not affect Article III standing, it is unsurprising that Waterkeeper is unaware of any decision holding that someone cannot show Article III standing when using public lands or waters—like Cox Creek—and thus *might* be similarly injured.⁶ To the contrary, courts routinely find Article III standing based on use of public lands or waters. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 181–83 (2000) (citation omitted) (standing based on plaintiffs’ use of the North

⁵ U.S. Census Bureau, *Total Population in Corpus Christi City, Texas is 317,863*, <https://data.census.gov/all?q=Corpus+Christi+city,+Texas>.

⁶ In fact, Waterkeeper cannot find any cases where the argument was even raised.

Tyger River); *SCRAP*, 412 U.S. at 685 (standing established because “members used the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing”); *Sierra Club, Lone Star Ch. v. Cedar Point Oil Co.*, 73 F.3d 546, 556 (5th Cir. 1996) (“all [affiants] use [Galveston] bay for recreational activities. All of the affiants expressed fear that the discharge of produced water will impair their enjoyment of these activities because these activities are dependent upon good water quality”); *Tex. Comm. on Nat. Res. v. Bergland*, 573 F.2d 201, 204 n.1 (5th Cir. 1978) (finding standing because “[v]arious members of the organization make use of the National Forests of Texas for recreational purposes”); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013) (standing based on “members' aesthetic interests in the land surrounding the [BLM] tracts and specific plans to visit the area regularly for recreational purposes”); *In Re Public Employees for Environmental Responsibility*, 957 F.3d 267, 272 (D.C. Cir. 2020) (“Petitioners’ members include frequent hikers, whose enjoyment of the woods is marred by the intrusive noise of overflights” of seven National Parks, Monuments and Recreation Areas); *Ondrusek v. U.S. Army Corps of Engineers*, 123 F.4th 720, 734 (5th Cir. 2024) (emphasis added) (“These injuries are particularized to the plaintiffs, who own the land. [citation omitted.] *It would have been enough if the land in issue were merely open to the public and they sometimes used it.*”).

Moreover, Ms. Wilson has certainly visited Formosa enough times to establish standing:

[A] person who uses an area for recreational purposes does not have to show that he or she lives particularly nearby to establish an injury-in-fact due to possible or feared environmental degradation. Repeated recreational use itself, accompanied by a credible allegation of desired future use, can be sufficient, even if relatively infrequent, to demonstrate that environmental degradation of the area is injurious to that person. . . . An individual who visits Yosemite National Park once a year to hike or rock climb and regards that visit as the highlight of his year is not precluded from litigating to protect the environmental quality of Yosemite Valley simply because he cannot visit more often.

Ecological Rights Found. v. Pacific Lumber Co., 230 F.3d 1141, 1149–50 (9th Cir. 2000); *accord Bensman v. U.S. Forest Service*, 408 F.3d 945, 963 (7th Cir. 2005) (standing based on “statement that he visited the Chadwick Trails area ‘about a half-dozen times’”); *Sierra Club v. Franklin Co. Power*, 546 F.3d 918, 925 (7th Cir. 2008) (visits “every other year” sufficient to confer standing); *Wis. Res. Prot. Council v. Flambeau Mining Co.*, 903 F.Supp.2d 690, 705 (W.D. Wisc. 2012) (standing because “Andresen has visited the area three times, Gauger has visited at least a dozen times; they both live within a few hours drive; and they have plans to visit in the spring or summer of 2012”); *Ca. Coastkeeper All. v. Cosumnes Corp.*, No. 2:20-cv-1703 DB, 2023 WL 5280260 at *4 (E.D. Cal. Aug. 16, 2023) (three previous visits sufficient to establish standing). The ED’s position that Ms. Wilson is not an affected party because other people *might* suffer the same injuries as Ms. Wilson is all the more remarkable because there is no evidence in the record stating anyone else has *ever* accessed the areas she has over the last nine years.

III. The Commission Has Found that Frequent Use of a Public Resource Makes Someone an Affected Person.

Ironically, the Commission has held that a person's frequent use of a public resource can satisfy the "not common to the general public" criterion. In *Application by Corix Utilities Texas, Inc. For Major Amendment to TPDES Permit No. WQ0013977001*, Docket No. 2023-1591-MWD, the Executive Director stated:

One of the mandatory factors that TCEQ considers in evaluating whether a hearing requester is an affected person under 30 TAC 55.203(c)(5) is the likely impact of the regulated activity on the impacted natural resource by the person. Thus, a recreational interest that can be distinguished from an interest common to the general public and [sic] may establish that the Requester is an affected person.

ED Response at 6. The Executive Director concluded Mr. Martin's frequent use of waters downstream from the facility at issue made him an affected person "in a manner not common to the general public":

Mr. Martin has habitually fished approximately 1 mile downstream from the discharge for 50 years and has concerns about the proposed discharge's effect on his use of downstream waters for fishing. Further, ES has shown that Mr. Martin uses the area, and the recreational value of the area might be lessened by the permitted activity. ES has demonstrated that Mr. Martin is impacted in a manner not common to the general public by his frequent use of the receiving waters, dating back 50 years. *Thus, he is affected in a manner not common to members of the general public and is an affected person.*

Id. (emphasis added). As discussed above, even if this "frequency of use" criterion did not offend Article III, Ms. Wilson has visited areas abutting the Plant hundreds of times since 2016, qualifying her as an "affected person."⁷

⁷ The Executive Director also determined Mr. Martin satisfied the *Lujan* test (*id.* at 6) but did not discuss how the "not common to members of the general public" criterion fits within it.

CONCLUSION

The Texas Attorney General and the Commission have stated that determinations of “affected person” status conform to Article III, and Ms. Wilson easily satisfies the Article III criteria for injury in fact. Moreover, the Commission has found “affected person” status in places open to countless members of the public where use of the area is frequent. The Commission should determine that Ms. Wilson is an “affected person” and, having met all other criteria, grant Waterkeeper’s request for a contested case hearing and refer this matter to the State Office of Administrative Hearings.

Respectfully submitted,

/s/ Mariah Harrod

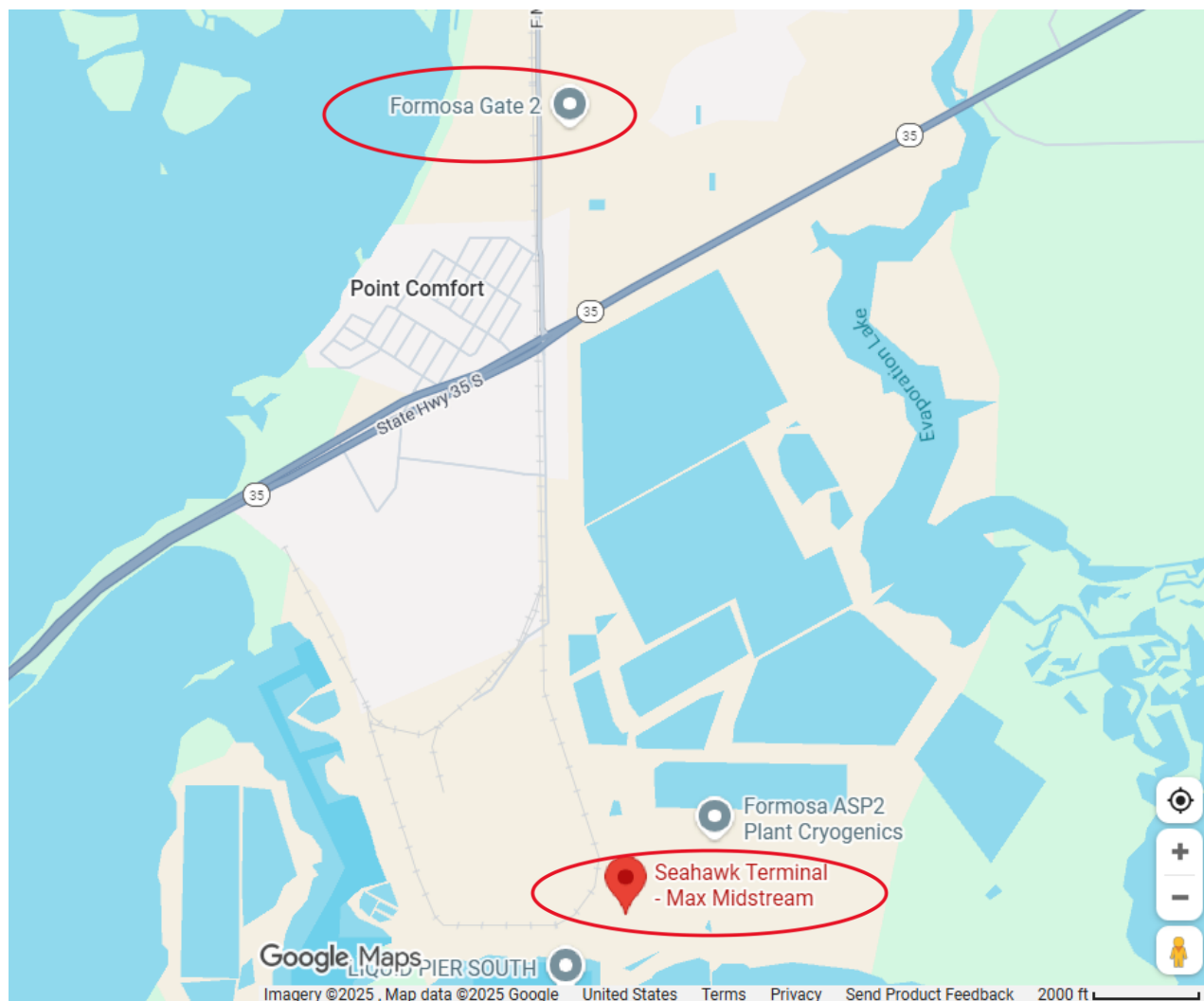
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EXHIBIT A



Seahawk Terminal - Max Midstream,
https://www.google.com/maps/place/Seahawk+Terminal+-+Max+Midstream/@28.6715452,-96.5873837,13.86z/data=!4m6!3m5!1s0x864205a83a3b2c6d:0x57048cf09f8ab798!8m2!3d28.6478726!4d-96.5479009!16s%2Fg%2F11j8svqp03?entry=ttu&g_ep=EgoyMDI1MTAxNS4wIKXMDS0ASAFAQAw%3D%3D (last accessed Oct. 17, 2025) (edited to indicate the two facilities).

CERTIFICATE OF SERVICE

I certify that on October 17, 2025, I served a true and correct copy of the foregoing “Brief of San Antonio Bay Estuarine Waterkeeper” via electronic mail or eFilings to all persons on the attached service list.

By: /s/ Mariah Harrod

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