

Jon Niermann, *Chairman*
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Toby Baker, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 4, 2022

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: Port of Corpus Christi Authority of Nueces County
SOAH Docket No. 582-20-1895
TCEQ Docket No. 2019-1156-IWD

Dear Ms. Gharis:

As required by the Memorandum of Agreement (Section IV.F) between the EPA and TCEQ relating to the TPDES permitting program, please find attached for filing the EPA's comments on the above referenced Application. For the Commission's convenience, Mr. Lott's responses to EPA are also included.

Best Regards,

A handwritten signature in cursive script, reading "Kathy J. Humphreys".

Kathy Humphreys
TCEQ Staff Attorney



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1201 ELM STREET, SUITE 500
DALLAS, TEXAS 75270

September 20, 2021

Mr. Earl Lott, Director
Office of Water (MC-158)
Texas Commission on Environmental Quality (TCEQ)
P.O. Box 13087
Austin, TX 78711-3087

Re: Notice of Termination – Permit Review Waiver
Permits for Desalination Facilities, including
Port of Corpus Christi Authority of Nueces County
TPDES Permit No. TX0138347 (WQ0005253000)

Dear Mr. Lott:

This letter regards EPA review of draft permits for desalination facilities, including the draft permit and application (TPDES No. TX0138347, WQ0005253000) for the Port of Corpus Christi Authority of Nueces County ("Port Authority") initially submitted to your office on March 2018. EPA hereby terminates its waiver of review of these draft permits in accordance with Section IV.C.8 of the 2020 Memorandum of Agreement (MOA) between the TCEQ and the EPA concerning the National Pollutant Discharge Elimination System. With regard to TPDES Permit No. TX0138347, the Port Authority proposes to operate a desalination plant to provide an additional water source (potable water) to the surrounding community during drought conditions. Because this facility is classified as a minor by TCEQ, it was not forwarded to EPA for review pursuant to EPA's waiver of review of permits for minor facilities under the MOA. However, the EPA Region 6, is aware of the concerns over TCEQ's permitting process with regard to this permit as well as the impacts of the proposed discharge to aquatic life, the water quality of the receiving waterbody Corpus Christi Bay, and the TCEQ's overall permit development and issuance process. We are aware that a State Office of Administrative Hearing (SOAH) contested case hearing was held July 9, 2020, on the draft permit and application, after which the Administrative Law Judges (ALJs) provided a recommendation for the TCEQ to deny the permit. The TCEQ Commissioners signed an Interim Order, May 26, 2021, filed by the SOAH June 1, 2021, remanding the proposed permit and application back to the SOAH for additional evidence. We also understand the applicant provided additional information, which resulted in a revised application/draft permit/statement of basis, and that a preliminary hearing is to be scheduled in the near future.

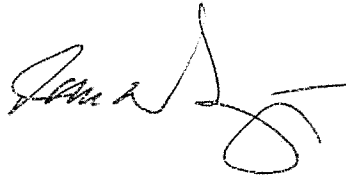
As part of our oversight role and responsibility, the EPA continues to be committed in partnering with our state counterparts to ensure the efficiency of the administration of the NPDES permitting program. More specifically, the EPA is to ensure that state issued permits are consistent with the requirements of the Clean Water Act (CWA) and protective of water quality and aquatic life. Therefore, in accordance with Section IV.C.8 of the MOA, which states that "EPA does not relinquish the right to petition the

TCEQ for review of a permit action or inaction because of a possible violation of federal or state statutes, rules, and policies. The EPA may terminate a waiver as to future permit actions, in whole or in part, at any time, by sending the TCEQ a written notice of termination,” the EPA rescinds its waiver of review of draft permits for desalination facilities, including draft TPDES permit No. TX0138347 (WQ0005253000) and requests the submittal of these draft permits to EPA for review in accordance with Section IV.C.8 of the MOA.

Because the State permitting process with regard to TPDES permit No. TX0138347 has been ongoing for some time, the EPA is requesting not only review of any revised draft permit with regard to this facility, but also documents in TCEQ’s files related to the Port Authority’s original March 2018 application and the proposed permit submitted to the Commissioners on May 19, 2021, including TCEQ’s response to public comments and the ALJs Proposal for Decision following the contested case hearing. See Section IV of the MOA related to EPA’s review of TCEQ’s permits on appeal and Section III.A.10 of the MOA, which provides that TCEQ files related to TPDES permits will be readily available to EPA. Pursuant to Section VIII.A.6. of the MOA, EPA requests TCEQ forward the above requested information within 10 days of receipt of this letter.

We look forward to working with you and your staff, during this permit issuance process. Feel free to contact me at (214) 665-8138, if you have any questions or have your staff contact Mark Hayes at (214) 665-2705, or EMAIL:hayes.mark@epa.gov.

Sincerely,



Charles W. Maguire
Director
Water Division (WD)

cc (electronic): Robert Sadlier, Deputy Director
Water Quality Division (MC-145)
TCEQ

Matthew Udenenwu, Section Manager
Wastewater Permitting Section (MC-148)
TCEQ

Ms. Shannon Gibson
Industrial Permits Team
Wastewater Permitting Section (MC-148)
TCEQ



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1201 ELM STREET, SUITE 500
DALLAS, TEXAS 75270

December 15, 2021

Mr. Earl Lott, Director
Office of Water (MC-158)
Texas Commission on Environmental Quality (TCEQ)
P.O. Box 13087
Austin, TX 78711-3087

Re: Interim Objection – Request for Additional Information
TPDES Permit No. TX0138347 (WQ0005253000)
Port of Corpus Christi (POCC) Authority of Nueces County

Dear Mr. Lott:

Thank you for the submittal of the proposed TPDES permit and supporting documents for the Port of Corpus Christi (POCC) Authority in response to our letter dated September 20, 2021 (Notice of Termination of permit review waiver). We received access via FTP site on October 1, 2021. In addition, we were granted an extension for review that revised the deadline from November 15, 2021 to December 15, 2021. We are also in receipt of your letter dated November 12, 2021, which questions the EPA's authority to terminate permit review waiver for the proposed TPDES permit for POCC. You state in your letter that the EPA had ample time to engage with TCEQ on this permit and did not provide comments during the public comment period. Yet, as you also noted, the POCC proposed permit was not forwarded to the EPA at the draft permit stage for review because this facility was classified by TCEQ as a Minor facility, for which the EPA waived review under the Memorandum of Agreement (MOA) between the EPA and TCEQ. However, as explained in detail in Attachment A, Item A, the EPA has determined that the POCC facility was incorrectly classified as a Minor facility under federal regulations and the Major/Minor worksheet used by the State to classify the facility. Because the facility proposes to discharge process wastewater as defined at 40 C.F.R. 122.2, the EPA has determined that the facility should be classified as a Major facility.¹ The EPA has not waived review of Major facilities. Consequently, this proposed permit should have been forwarded to EPA for review at the draft permit stage as a Major permit in accordance with federal regulations and the MOA.

After being notified of concerns regarding the permit, and of the substantial public interest in this matter, EPA requested an opportunity to review the permit in accordance with our oversight role and responsibility in partnering with our state counterparts to ensure the efficiency of the administration of the NPDES permitting program, and that state-issued permits are consistent with the requirements of the Clean Water Act (CWA) and protective of water quality and aquatic life.

EPA appreciates the time and effort that has gone into the permitting process regarding the POCC permit by both TCEQ and third parties. Nonetheless, as TCEQ noted in its November 12, 2021, letter to EPA, following a hearing before the Commission on May 14, 2021, the Commission remanded POCC's permit application to the State Office of Administrative Law Judges (SOAH) to take additional evidence. Following the remand, POCC submitted a revised application on June 25,

¹ See 40 CFR 122.2 provides "**Major facility** means any NPDES "facility or activity" classified as such by the Regional Administrator, or, in the case of "approved State," the Regional Administrator in conjunction with the State Director."

2021, and additional information on July 28, 2021. Subsequently, based on the revised application, TCEQ prepared a new Statement of Basis and revised permit. It is EPA's understanding that proceedings regarding the revised permit are ongoing before the SOAH and that a contested case hearing before an Administrative Law Judge (ALJ) will not take place before March of 2022. Consequently, EPA does not believe allowing EPA to review the permit following receipt of the requested information and provide comments in any way disrupts or slows down the process.

Our permit review process has benefitted from the open communication and coordination regarding responses and clarification from your staff to our concerns and comments. As a result of our review of the proposed permit, statement of basis, and other supporting documents, we believe additional information is needed to determine whether the proposed permit meets the guidelines and requirements of the Clean Water Act. The EPA offers comments/recommendations as outlined in Attachment A, and requests submittal of additional information and responses as appropriate. This Interim Objection is being issued pursuant to 40 CFR 123.44(d)(2). Consistent with that provision, the full period of time for EPA's review of the proposed permit will recommence when the Regional Administrator has received the information requested in this Interim Objection. Under Section IV.C.3 of the MOA, EPA will have 30 days to make a general objection to the proposed permit. If EPA makes a general objection, it reserves the right to take 90 days to supply any specific objections, as specified in 40 CFR 123.44(a)(1). However, EPA will make every effort to convey any objections in an expedited manner given the status of the permit.

In addition, EPA requests that its comments on the proposed permit be included in the record before the ALJ in this proceeding and that the ALJ's revised Proposal for Decision be forwarded to EPA for review 30 days prior to the record being closed, in accordance with Section IV.F. of the MOA.² EPA also requests that the resulting proposed permit from the contested case hearing proceedings be forwarded to EPA for review in accordance with Section IV.C.3 of the MOA based on the fact that there has been significant public comment with regard to the proposed permit.

We appreciate your attention and cooperation during this permit review process, and look forward to your responses and input. Feel free to contact me at (214) 665-8138, if you have any questions or have your staff contact Mark Hayes at (214) 665-2705, or EMAIL:hayes.mark@epa.gov.

Sincerely yours,

Charles Maguire

Charles W. Maguire
Director
Water Division (WD)

Enclosures

² Section IV.F of the MOA provides that "EPA shall have thirty (30) days to comment on a revised PFD or permit before the record is closed on a proposed permit which contains provisions which differ from the draft or proposed permit reviewed by EPA, as specified in Section IV.C.3. of this MOA, relating to re-reviews. EPA may object in accordance with the grounds and procedures set out in Section IV.C.3 of this MOA. TCEQ staff will transmit to the Commissioners and place into the record of the contested case hearing, if any, all EPA comments and objections on a proposed permit prior to their decision."

cc (electronic): Robert Sadlier, Deputy Director
Water Quality Division (MC-145)
TCEQ

Matthew Udenenwu, Section Manager
Wastewater Permitting Section (MC-148)
TCEQ

Ms. Shannon Gibson
Industrial Permits Team
Wastewater Permitting Section (MC-148)
TCEQ

Mr. Sean C. Strawbridge
Chief of Executive Officer
Port Corpus Christi
400 Harbor Drive
Corpus Christi, TX 78401

ATTACHMENT A
COMMENTS/RECOMMENDATIONS

A. Definition of Process wastewater and Incorrect Rating of the facility as a Minor based on the TPDES Permit Major/Minor Rating Worksheet:

TCEQ classified this facility as a Minor facility based on TPDES Permit Major/Minor Rating Worksheets dated August 2018 and revised July 2019, in large part because "the discharge is recorded on the Worksheets as non-process wastewater. EPA has determined that this is incorrect. POCC is proposing to discharge the waste product resulting from the production of potable/drinking water, i.e., wastewater generated by a reverse osmosis process that contains high concentrations of salt and other impurities relative to the seawater feedstock, and supernatant from solids/sludge thickening and rewatering. EPA has determined that this meets the definition of process wastewater at 40 C.F.R 401.11(q). That section defines process wastewater as "any water which, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product."

Pursuant to 40 CFR 122.2, the decision to classify a facility as a Major is to be made by "the Regional Administrator, or, in the case of "approved State programs," the Regional Administrator in conjunction with the State Director." If POCC's discharge is properly classified as process wastewater on TPDES Permit Major/Minor Rating Worksheet, the rating of the facility changes from Minor to Major.³ EPA therefore requests the classification of the facility be changed from Minor to Major.

In addition, EPA requests that going forward desalination facilities in general be classified as Major facilities due to the facilities' discharge of process wastewater.

B. CWA Section 316(b) Rule and requirements:

A clarification request was submitted by EPA (email dated October 27, 2021) regarding the facility's operation in accordance with the requirements of the CWA Section 316(b) rule for new facilities. EPA's understanding from conversations with TCEQ staff is that the POCC does not use and/or proposes to use water for cooling purposes (this was also documented in the permit application submitted March 2018 and 2021). Thus, it appears the POCC facility is not subject to 316(b) requirements. It was also noted that POCC plans to locate the intake structure in the Gulf of Mexico (GOM) that will be covered under a water rights permit. We would suggest establishing an additional provision in OTHER REQUIREMENTS section

³ EPA has provided guidance on rating non-municipal facilities as either major or minor. (<https://www3.epa.gov/npdes/pubs/owm0116.pdf>). A discharge that contains only process wastewater is classified as a Type II discharge (see page 3 of the NPDES Permit Rating Work Sheet). The Type classification (Type I, II and III) for a discharge influences the score in the NPDES Permit Rating Work Sheet.

of the permit that reiterates the requirement cited in Permit Conditions nos. 1 and 4, that requires the permittee to notify the TCEQ of any modifications and/or alterations within the facility. For this proposed permit, we suggest the requirement for the POCC to notify the TCEQ of any modifications to the use of water withdrawals from the intake structure.

C. CORMIX Model Results:

Below are our comments (dated December 6, 2021) submitted to you via email (on December 6, 2021) as a result of our review of the CORMIX modeling documented in the TCEQ's Interoffice Memo dated August 2021 and the analysis entitled, "Mixing Analysis for the Port of Corpus Christi Authority of Nueces County." We note that the CORMIX model was used to characterize the effluent discharge via a diffuser for the calculations of water quality limits and the reasonable potential (RP) analysis. We are resubmitting them to you to include these comments along with your responses (dated December 8, 2021) in this Interim Objection Letter for required follow-up as needed and for completeness of record.

EPA December 6, 2021 Comment 1:

The memo states that "if the effluent flowrate decreases by more than 10%, the diffuser ports can be blocked, or smaller diameter ports can be used to maintain the same port exit velocity" and that when the port velocity is maintained, the diffuser can achieve the same effluent dilutions at lower effluent flow rates. This would be true if two conditions exist: 1) The ports are (and will remain) close enough together that the jets from each port merge within a short distance after discharge, and 2) the overall length of the diffuser is unchanged. It would be easier to maintain those conditions if the ports are shrunk, rather than blocked. So, if it's likely that the flow rate will decrease from the current proposal, is it possible to clarify their plans for modifying the diffuser to account for that? That said, the scenarios for 50% recovery did use a lower flow rate (83.1 mgd instead of 95.6 mgd) and that didn't reduce the dilution achieved. If the plan is to block ports on the end(s) of the diffuser (so that the port size and spacing can remain the same), then it would be recommended that some additional scenarios be run reflecting the shortened diffuser length, just to verify that dilution isn't reduced.

TCEQ December 8, 2021 Response 1:

For new discharge applications where a diffuser is proposed, the TCEQ guidance document Mixing Analyses Using CORMIX specifies that the proposed permitted flowrate should be evaluated. The proposed permit authorizes one flow phase (95.6 MGD), which is the proposed flowrate associated with the facility operating at a 40% recovery rate. Additional cases were modeled using an effluent flowrate of 83.1 MGD because this is the proposed effluent flowrate when the facility operates at a 50% recovery rate. The same diffuser design was evaluated for both effluent flowrates, and no other diffuser design was submitted with the application.

Once the facility begins discharging, the permittee will be required to maintain the diffuser such that a maximum effluent percentage of 14.6% be achieved regardless of the actual effluent flowrate. This requirement is defined in the proposed permit under Other Requirement No. 4. Failure to operate the diffuser such that 14.6% effluent or less is achieved at the edge of the ZID would be a violation of this permit requirement.

Additionally, Permit Conditions Nos. 1 and 4 require the permittee to notify the Executive Director of relevant information related to a permit application or if any planned physical alterations or additions will be made to the permitted facility. Therefore, if the diffuser design is amended, the permittee is required to submit the relevant information to the Executive Director. At that time, the Executive Director will review the information and determine if a permit amendment is needed.

EPA December 6, 2021 Comment 2:

Also, the August 10, 2021 memo states on Page 8 that, because the receiving water is tidal, and because the mixing zones are centered on the diffuser barrel, the analyst evaluated the location at which the plume centerline intersects the regulatory mixing zones at one-half the downstream distance in the x-direction. This appears to be fine, however, it may not be "conservative," as stated in modeling documentation. This assumption adequately accounts for the fact that the ambient velocity is tidal and that the mixing zone is centered on the diffuser, so the plume would only need to travel half the total size of the mixing zone before it reaches the boundary. However, it doesn't take into account any re-entrainment or buildup that may occur due to the reversing flows. The CORMIX model does have some capability to model "unsteady" ambient environments, as described in Section 4.4.3 of the user manual.

TCEQ December 8, 2021 Response 2:

The location at which the plume intersects the mixing zone boundaries was described as "conservative" in the 8/10/2021 memo compared to the location the applicant used to assess where the plume intersects the mixing zone boundaries. Specifically, the applicant used the full downstream distance in the x-direction whereas I used one-half the downstream distance. Because the plume becomes more diluted the farther it travels from the diffuser ports, by assessing the model predictions at one-half the downstream distance, the centerline of the plume is more concentrated at this location than at the full downstream distance. Thus, the locations at which the model predictions were assessed are conservative compared to how they were assessed by the applicant.

The basic CORMIX methodology relies on an assumption of steady-state ambient conditions because the time scale for mixing processes is typically on the order of minutes up to approximately one hour. The TCEQ guidance document for reviewing diffusers does not address unsteady ambient flow conditions (i.e., tidal reversing) since tidal reversing is a phenomenon that typically occurs twice per day following each slack tide and represents conditions that only occur for a few minutes each day. Therefore, predictions of effluent concentrations are more representative under steady state ambient conditions rather than at unsteady ambient conditions which occur infrequently and for a short duration. Additionally, using the unsteady tidal velocity option for this permit application would be inconsistent with how the TCEQ reviews other diffuser discharges into tidal water bodies.

D. Permit Conditions for Total Dissolved Solids (TDS), Sulfates, and Chlorides:

The proposed permit establishes reporting and monitoring requirements for parameters TDS, sulfates, and chlorides. It is cited in the statement of basis that there's no national effluent

limitation guidelines for this type of operation and therefore, reporting and monitoring requirements were based on best professional judgement (BPJ). It was also stated that there are no numeric water quality criteria for TDS, sulfates, and chlorides for this waterbody segment, and that “ the applicant performed extensive analyses and modeling to conclude . . . the discharge would not impact salinity gradients in the surrounding waters and that survival, growth, and reproduction of aquatic life would not be significantly impacted . . . ” We request additional information and rationale on how based on BPJ, reporting and monitoring requirements were established (i.e., requirements and conditions of similar permitted operations and waste streams).

E. Tier 2 Antidegradation Review:

The statement of basis documents that “A Tier 2 review has preliminary determined that no significant degradation of water quality is expected in Corpus Christi Bay . . . ” In response to the TCEQ Executive Director’s request for clarification and the Interim Order of May 26, 2021, POCC submitted additional updated information (relocation of the outfall and design of the diffuser) for a revised Tier 2 Antidegradation review. However, the TCEQ should include in the statement of basis, the acknowledgement of this additional information provided by the POCC and confirm and/or address how this complies with the TCEQ’s Tier 2 antidegradation review policy.

F. Whole Effluent Toxicity

Whole Effluent Toxicity (WET) requirements were revised from the first version of the proposed permit. The most current version of the permit includes chronic testing requirements, using approved marine chronic methods with the most sensitive vertebrate and invertebrate marine species available. The critical dilution calculated is a result of the CORMIX model (see comments above). EPA would like to note that WET testing is a part of EPA’s integrated strategy in the assessment of water quality, which includes the use of three control approaches (the other two being chemical-specific limits and biological criteria). As such, EPA reminds TCEQ that WET is not intended to take the place of any other biological assessment that is appropriate for water quality assessment of this receiving stream.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1201 ELM STREET, SUITE 500
DALLAS, TEXAS 75270

March 1, 2022

Earl Lott, Director
Office of Water (MC-158)
Texas Commission on Environmental Quality (TCEQ)
P.O. Box 13087
Austin, TX 78711-3087

Re: TPDES Permit No. TX0138347 (WQ0005253000)
Port of Corpus Christi (POCC) Authority of Nueces County

Dear Mr. Lott:

The Environmental Protection Agency, Region 6 (EPA) is in receipt of your letter dated January 31, 2022, acknowledging receipt of the EPA's December 15, 2021, Interim Objection -- Request for Additional Information, regarding the above-referenced permit ("Interim Objection letter"). We appreciate your inclusion of the Interim Objection letter in the administrative record for this permit, as we requested in that letter, which is enclosed and incorporated herein for reference. The revised POCC permit currently scheduled for contested case hearing before the State Office of Administrative Law Judges is referred to as the "draft permit" in your letter and hereafter in this letter.

As discussed in detail in the enclosed Interim Objection letter, because the POCC facility is a Major facility¹, the TCEQ was required to forward the draft POCC permit to the EPA for review in accordance with 40 C.F.R. §§ 123.24(d)(6) and 123.44 and Section IV.C of the EPA/TCEQ Memorandum of Agreement (MOA). Following the EPA's September 20, 2021, request for review of this permit, we received electronic access to the permit files via the TCEQ's FTP website on October 1, 2021. By email dated October 27, 2021, the TCEQ granted the EPA a 30-day extension of the deadline to complete our permit review from November 15, 2021, to December 15, 2021.

In our Interim Objection letter, the EPA requested additional information regarding the draft permit to determine whether the permit meets the guidelines and requirements of the Clean Water Act (CWA), specifically information and the rationale to support the best professional judgment (BPJ) reporting and monitoring requirements included in the permit for total dissolved solids, sulfates, and chlorides. This letter is a reminder that, pursuant to 40 CFR § 123.44(d)(2), the full period of time for the EPA's review of the permit will recommence when the EPA receives the information requested.

In addition, it is the EPA's understanding that the contested case hearing regarding the draft permit is scheduled to begin on March 14, 2022 (Docket No. 582-20-1895). The EPA reiterates its request, as discussed in our Interim Objection letter, that the Proposal for Decision (PFD) prepared by the Administrative Law Judge (ALJ) following those proceedings be forwarded to the EPA for review 30

¹ 40 C.F.R. § 122.2 rests the authority for classification of Major facilities under approved state NPDES programs with the EPA Regional Administrator "in conjunction with the State Director."

days prior to the record being closed and that the TCEQ forward the proposed permit prepared at the close of the contested case hearing to the EPA for review before the proposed permit is forwarded to the Commission for action. See Sections IV.C.3 and IV.F. of the MOA and 40 C.F.R. § 123.44(j) (providing that a proposed permit must be forwarded to EPA for review if the proposed permit “differs from the draft permit reviewed by the Regional Administrator, the Regional Administrator has objected to the draft permit, or there is significant public comment”).

We note that 40 C.F.R. §123.44(c)(3) provides that the EPA may object to a state-issued NPDES permit whenever the procedures followed in connection with formation of the permit fail in a material respect to comply with the procedures required by the CWA, the regulations thereunder, or the MOA. It would be a material failure to comply with the required permitting procedures if the TCEQ does not submit: (1) the additional information requested in the Interim Objection letter, (2) the PFD prepared by the ALJ following the upcoming contested case hearing, or (3) the proposed permit prepared by TCEQ after the contested case hearing but before it is forwarded to the Commission for action. Additionally, the EPA reserves the right to object to the POCC permit pursuant to any other procedural or nonprocedural grounds established under 40 C.F.R. §123.44(c).

Finally, if the TCEQ were to issue TPDES Permit No. TX0138347 (WQ0005253000) to the POCC without responding to the EPA’s Interim Objection in violation of the provisions of CWA Section 402, the implementing regulations at 40 C.F.R. Part §123, and the MOA, then it would not be a validly issued final NPDES permit.

Again, thank you for the inclusion of the Interim Objection letter in the permit’s administrative record and for your continued attention to this matter. If you have any questions or concerns, feel free to contact me at 214-665-8138, or have your staff contact Mark Hayes at (214) 665-2705, or EMAIL: hayes.mark@epa.gov.

Sincerely,



Charles W. Maguire
Director
Water Division (WD)

Enclosure

cc: (electronic) Robert Sadlier, Deputy Director
Water Quality Division (MC-145)
TCEQ

Matthew Udenenwu, Section Manager
Wastewater Permitting Section (MC-148)
TCEQ

Ms. Shannon Gibson
Industrial Permits Team
Wastewater Permitting Section (MC-148)
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Mr. Sean C. Strawbridge
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Port Corpus Christi
400 Harbor Drive
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Jon Niemann, *Chairman*
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Bobby Janecka, *Commissioner*
Toby Baker, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 30, 2021

Mr. Charles Maguire
Environmental Protection Agency
1201 Elm Street, Suite 500
Dallas, Texas 75270

Dear Mr. Maguire:

The Texas Commission on Environmental Quality (TCEQ) is in receipt of the U.S. Environmental Protection Agency's (EPA) letter rescinding its permit review waiver of desalination facilities and request for review of Texas Pollutant Discharge Elimination System (TPDES) Permit No. TX0138347 (WQ0005253000) for the Port of Corpus Christi of Nueces County (POCC). TCEQ is complying with the 10-day deadline by providing documents and requesting a clarification on EPA's request. Because TCEQ is providing all documents for Permit WQ0005253000 required by Section IV.C.3.a of the Memorandum of Agreement (MOA) between EPA, our understanding is that EPA's 45-day review period begins today. As for the other issues discussed in the letter, TCEQ will respond in full as soon as possible.

Documents Provided via File Transfer Protocol (FTP) Site

The following documents, if applicable, have been uploaded to TCEQ's FTP Site (see attached instructions):

2018 Application

1. Draft Permit,
2. Fact Sheet or Statement of Basis,
3. New Source determination, if applicable (not applicable; the POCC application is not a new source as defined by Title 40, Code of Federal Regulations (40 CFR) § 122.2),
4. Water quality standards variance request/response, if applicable (not applicable because the POCC did not request a variance to the water quality standards),
5. "Major" classification if applicable and the rationale for "Majors" which detail permit limit calculations,
6. Interoffice Memoranda, and
7. Communication between the Executive Director's Staff and the POCC.

2021 Amended Application

1. Draft Permit,
2. Fact Sheet or Statement of Basis,
3. New Source determination, if applicable (not applicable; the POCC application is not a new source as defined by 40 CFR § 122.2),
4. Water quality standards variance request/response, if applicable,
5. "Major" classification if applicable and the rationale for "Majors" which detail permit limit calculations,
6. Interoffice Memoranda, and
7. Communication between the Executive Director's Staff and the POCC (not applicable).

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • tceq.texas.gov

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Please note that many of the requested documents are publicly available by searching TCEQ's Commissioners' Integrated Database for TCEQ Docket No. 2019-1156-IWD.¹ Additionally, documents for TPDES Permit No. TX0138347 can also be retrieved by accessing the Commissioners' Marked Agendas website.² This matter is Item 2 on the May 19, 2021 Marked Agenda.

Clarification Needed

EPA's letter requests TCEQ provide:

- The revised draft permit,
- *TCEQ's files related to POCC's original application filed in March 2018* (emphasis added),
- The proposed permit submitted to the Commissioners on May 19, 2021,
- TCEQ's response to public comments and
- The Administrative Law Judges' Proposal for Decision.

The documents TCEQ believes are responsive are included as attachments to this response, however, we request clarification regarding EPA's expectations regarding "documents in TCEQ's files related to the Port Authority's original March 2018 application . . ." Because the draft permit based on the March 2018 application was subject to a Contested Case Hearing (CCH), TCEQ's files include everything that was filed by all parties during the CCH process. These files are voluminous and may not be able to be sent electronically. Although we are providing documents from the 2018 application as noted above, TCEQ requests clarification from EPA regarding the specific documents requested from the CCH process. Additionally, because TCEQ is still in the CCH process, all information that is sent to EPA must also be disclosed to all parties to the CCH. While TCEQ is willing to provide the information, TCEQ notes that it will take a substantial amount of time to gather all the information in a format that can be transmitted, and if the response must be submitted as hard copies due to the voluminous nature, the mailing expenses incurred by TCEQ will be substantial.

If you need additional information or have any questions, please contact Ms. Shannon Gibson of my staff e-mail at Shannon.Gibson@tceq.texas.gov, by telephone at (512) 239-4284, or, if by correspondence, include "MC 148" following the permit writer's name in the letterhead address.

Sincerely,

Earl Lott

Earl Lott, Director
Office of Water
Texas Commission on Environmental Quality

¹ Visit <https://www14.tceq.texas.gov/epic/eCID/>; type "2019-1156-IWD" (without quotation marks) into the "TCEQ Docket Number:" search box; select "Search;" select "Display all Activity Actions" to access the available documents.

² https://www.tceq.texas.gov/agency/decisions/agendas/comm/markcomm_agendas.html

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Toby Baker, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 12, 2021

Mr. Charles Maguire, Director
1201 Elm St
Dallas, Texas 75270

Dear Mr. Maguire:

The Texas Commission on Environmental Quality (TCEQ or Commission) is in receipt of the U.S. Environmental Protection Agency's (EPA) letter rescinding its permit review waiver for desalination facilities, including Port of Corpus Christi Authority of Nueces County (POCC) - TPDES Permit No. WQ005253000, TX0138347 (POCC Permit). Respectfully, the Memorandum of Agreement (MOA) does not allow EPA to revoke the waiver with respect to the POCC Permit.

First, under the clear terms of the MOA, EPA may only terminate its waiver of *future* TCEQ permit actions¹ (emphasis added). Because the POCC permitting action is not a *future* permit action, EPA does not have authority to terminate its waiver of the POCC application. As noted below, the Executive Director prepared a draft permit based on the application submitted by POCC in March 2018, and a revised draft permit based on the additional information submitted by POCC in June 2021. Since the Executive Director has drafted a permit, EPA cannot rescind the waiver of its review of POCC's application.

For the POCC Permit specifically, EPA had ample opportunity to engage with TCEQ on this matter, as the permit application was filed in March of 2018. During that three-and-a-half year period, EPA did not provide comments to TCEQ throughout the lengthy public comment period on the application, did not seek to participate in a Contested Case Hearing (CCH) before the State Office of Administrative Hearings (SOAH), and did not participate in any discussions regarding the POCC Permit in a timely manner.

Over the past three-and-a-half years, the Executive Director performed a thorough administrative and technical review of the POCC Permit application, prepared a draft permit, held a public meeting in Port Aransas on April 8, 2019, prepared a Response to Comments (filed July 3, 2019), and participated in a CCH before SOAH from July 9, 2020 through November 10, 2020. The Administrative Law Judges' (ALJ) Proposal for Decision was considered by the Commission on May 19, 2021.

As you know, the Commission remanded the application to SOAH to take additional evidence on six issues. The POCC provided an amended application on June 25, 2021, and additional information on July 28, 2021. As a result of the amended application, the Executive Director

¹ MOA Between TCEQ and EPA, Item IV.C.8.

performed another full administrative and technical review and prepared a revised draft permit. The revised draft POCC Permit complies with or exceeds all applicable federal and state statutes, rules, and policies to protect water quality and the environment. For example:

- The draft permit was developed consistent with the EPA-approved Procedures to Implement the Texas Surface Water Quality Standards that outlines the process by which discharges are evaluated and ensures compliance with the water quality criteria contained within the Texas Surface Water Quality Standards at Title 30, Texas Administrative Code, Chapter 307.
- TCEQ used salinity data collected at TCEQ's Surface Water Quality Monitoring stations and other information to calculate salinities associated with the proposed discharge at the edge of the mixing zone, as well as calculations of salinity levels beyond the mixing zone.
- The calculations of the salinity levels beyond the mixing zone indicate the proposed discharge will not detrimentally affect salinity gradients in the receiving water.
- The draft permit includes biomonitoring requirements that are above and beyond state and federal requirements.

The MOA only allows prospective withdrawal of waivers for good reason: to preserve public resources and ensure that comments are made at a point in the process where they can reasonably be incorporated. As a result of the complexity of the POCC application, TCEQ has already spent considerable time and public resources on its review, including the review of the additional information provided by the POCC in June and July 2021. The Executive Director estimates that, to date, technical staff has spent 660 hours preparing for the SOAH hearing, 500 hours participating in the SOAH hearing, and 260 hours post-hearing. We also estimate legal staff spent 210 hours preparing for the SOAH hearing, 130 hours participating in the SOAH hearing, and 160 hours post-hearing. Currently, TCEQ staff have spent over 1,500 hours working on this specific permitting matter. It is worth noting this does not include the additional time our technical and legal staff will be required to spend preparing for the upcoming SOAH hearing. The parties are currently conducting depositions and have submitted an Agreed Proposed Procedural Schedule to the SOAH ALJ. Once the CCH before SOAH concludes, the matter will be set for additional argument and final disposition before the Commission.

Adding more delays to an already lengthy permitting process will cause all parties to unnecessarily spend additional resources, including public resources. As you know, without considering additional time for EPA review, the permit review process already often takes several years.

Furthermore, the MOA clearly waives EPA review of the POCC Permit application. The proposed POCC facility is a Minor facility, and thus not subject to EPA review under the MOA. TCEQ staff used EPA's own Major/Minor worksheet to determine a numeric rating for the potential toxicity of the effluent generated by the POCC.² The Major/Minor determination, which is EPA's document, takes into account the toxic pollutant potential of the industrial activity, the effluent flow volume, discharge of conventional pollutants (including oxygen-demanding pollutants, total suspended solids, and nitrogen pollutants), public health impacts, water quality factors, and proximity to coastal waters. If the facility numeric rating is over a certain threshold (i.e., 80), the facility is classified as a Major. If a facility's Major/Minor classification is changed, the new classification takes effect upon permit issuance. Attached is the EPA worksheet used to

² See Attachment, Major/Minor Worksheet.

Mr. Charles Maguire, Director
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determine whether the permit is a major or minor. In this case the summation was 44.5, thus classified as Minor facility.

Finally, even if the POCC application were subject to EPA review, EPA did not specify any applicable provision of federal or state statutes or rules with which the POCC Permit does not comply. Thus, EPA still does not meet its obligations under the terms of the MOA, and the MOA does not allow EPA to revoke the waiver with respect to the POCC Permit.

Historically, TCEQ and EPA have enjoyed a mutually beneficial state-federal relationship regarding TCEQ's delegated programs and have had open and clear communication. We hope that, in the future, EPA engages with Texas in a meaningful, timely way.

Please contact Earl Lott, Director of Office of Water by phone at (512) 239-2047 or by email at Earl.Lott@tceq.texas.gov

with any questions.

Sincerely,

Earl Lott

Earl Lott, Director
Office of Water
Texas Commission on Environmental Quality

Enclosure: Major/Minor Worksheet

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Toby Baker, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 31, 2022

Mr. Charles W. Maguire, Director
Water Division, USEPA
1201 Elm Street, Suite 500 Avenue
Dallas, Texas 75270

Re: Response to "*Interim Objection - Request for Additional Information*"
Port of Corpus Christi Authority of Nueces County, NPDES Permit No.
TX0138347, TPDES Permit No. WQ0005253000

Dear Mr. Maguire:

The Texas Commission on Environmental Quality (TCEQ) acknowledges the receipt of your December 15, 2021 letter on the subject permit. We have included the letter in the permit's administrative record. We thank you for your comments and understand and appreciate your points of view.

We have not revised the draft permit or the Statement of Basis in response to your letter. If you have any questions, please feel free to contact me at (512) 239-2047 or earl.lott@tceq.texas.gov.

Sincerely,

Earl Lott

Earl Lott, Director
Office of Water (MC-158)
Texas Commission on Environmental Quality