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

Office of the Regional Administrator

September 2, 2022

Mr. Jon Niermann,
Chairman
Office of Commissioners
Texas Commission on
Environmental Quality
P.O. Box 13087
Austin, Texas 78711

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

Dear Commissioner Niermann:

The U.S. Environmental Protection Agency, Region 6 continues to anticipate working with the Texas Commission on Environmental Quality regarding the application of the Port of Corpus Christi Authority of Nueces County for a Texas Pollutant Elimination System Permit wastewater discharge permit, authorizing the discharge of treated effluent into the Corpus Christi Ship Channel from a proposed desalination facility. The Administrative Law Judge's Proposal for Decision and Order on Remand regarding the POCC's permit application is scheduled for your consideration at the September 7, 2022, Commission Agenda Meeting.

Accordingly, I would like to reiterate the EPA's request to review the proposed permit prior to final action by the TCEQ, pursuant to the Clean Water Act § 402, 40 C.F.R. § 123.44 and the Memorandum of Agreement signed by the EPA and the TCEQ upon authorization of the TPDES program, the Memorandum of Agreement. We have repeatedly requested the opportunity to review the draft proposed permit, as reflected in our letter to the TCEQ dated September 20, 2021, our Interim Objection -Request for Additional Information dated December 15, 2021, and our follow-up letter of March 1, 2022. These documents are enclosed for your convenience.

As noted in our March 1, 2022, letter, if the TCEQ issues TPDES Permit No. TX0138347 (WQ0005253000) to the POCC without responding to the EPA's Interim Objection or providing the EPA an opportunity to review the proposed permit in violation of the provisions of CWA Section 402, the implementing regulations at 40 C.F.R. Part § 123, and the Memorandum of Agreement, the EPA's position will be that it is not a validly issued final National Pollutant Discharge Elimination System permit.

Basis for EPA Review– Failure to submit the POCC draft permit for the EPA's review

The TCEQ did not initially submit the draft POCC permit to the EPA for review because the TCEQ classified the facility as a minor facility, and the EPA has waived review of minor facilities under Section IV.C.1of the Memorandum of Agreement[1]. However, the EPA notified the TCEQ on December 15, 2021, that the EPA believes the TCEQ's classification of the proposed desalination plant as a minor facility is incorrect. Pursuant to 40 C.F.R. § 122.2, classification of a facility as a Major facility is a decision to be made by the EPA Regional Administrator, or, in the case of an approved state, the Regional Administrator in conjunction with the State Director. The EPA maintains that the POCC facility was incorrectly classified by the TCEQ, without agreement from the EPA, as a minor facility on the Major/Minor classification worksheet used by the State. Because the facility proposes to discharge process wastewater as defined at 40 C.F.R. § 122.2, the facility should be classified as a Major facility[2] and, consequently, the draft permit for the facility should have been submitted to the EPA for review concurrent with public notice in accordance with Section IV.C.3 of the Memorandum of Agreement.

In addition, under Section IV.C.8. of the Memorandum of Agreement, the EPA specifically retains the right to petition the TCEQ for review of a permit action or inaction because of a possible violation of federal, state statutes or rules. As noted above, the EPA has on several occasions petitioned the TCEQ for review of the POCC permitting action. If the TCEQ does not respond to the EPA's Interim Objection and submit the proposed permit to the EPA for review, the EPA believes the procedures followed in connection with formation of the permit will have failed in a material respect to comply with the procedures required by the CWA, implementing regulations and the Memorandum of Agreement, which is cause for the EPA to object to issuance of the permit under 40 C.F.R § 123.44 (c) (3).

Completion of the contested case hearing proceedings

On June 27, 2022, the EPA received the Administrative Law Judge's June 20, 2022, proposal for decision following the contested case hearing proceedings on the POCC's permit application, as requested in our March 1, 2022, letter. The proposal for decision recommends approval of the proposed permit application with recommendations and revisions, including the addition of a salinity limit of 2 ppt above ambient, measured 100 meters from outfall, a monitoring plan, and a provision requiring, at all three mixing zones, limits expressed as percentage of effluent. However, as of the signing of this letter, we have not received the proposed permit for review as also requested in our March 1, 2022, letter.

In addition to our procedural concerns, the EPA continues to have questions and concerns related to the substantive requirements in the draft permit. These questions and concerns, some of which were noted in our December 15, 2021, Interim Objection - Request for Additional Information, include the items discussed below. We reserve the right to provide additional comments/and or objections once we have had an opportunity to review the proposed permit.

Monitoring and reporting requirement for TDS, Chlorides and Sulfates

The EPA continues to have concerns regarding reporting and monitoring requirements for total dissolved solids, chlorides, and sulfates in the permit. We requested additional information from the TCEQ on this issue in our interim objection letter, but we have not yet received the requested information. We

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[1] By letter dated September 20, 2021, the EPA rescinded its prior waiver of permit review for all desalination facilities in Texas, and specifically requested review of the POCC permit application and draft permit.

[2] The EPA believes, that going forward, all desalination facilities should be classified as Major facilities due to the facilities' discharge of process wastewater and submitted to the EPA for review.

understand that because the facility has yet to be constructed, there is no available effluent data to determine limits for these parameters. However, we believe reasonable potential exists based on the nature of the reverse osmosis reject water and that appropriate limits can be determined based on best professional judgment.

The TCEQ's Tier II Antidegradation Review and analysis with regard to this Permit

We have concerns regarding the TCEQ's Tier II anti-degradation review process for the permit, including the documentation of TCEQ's no significant degradation determination and the availability of the documentation/analysis during the public comment period.

Requirements to Protect Water Quality and Aquatic Life

The EPA understands that the draft permit was revised to include a chronic Whole Effluent Toxicity testing requirement, but that it does not contain a water quality based effluent limitation. It is unclear to the EPA how this reporting requirement alone will be protective of water quality during this permitting cycle. Also, although the EPA agrees that a Whole Effluent Toxicity testing requirement will be valuable in the collection of toxicity data, we have several questions and concerns regarding the specifics of the testing requirement – e.g., whether a frequency reduction in Whole Effluent Toxicity testing is appropriate, how the salinity of the synthetic dilution water used for testing will be determined, and the endpoints that will be measured. Further, although Whole Effluent Toxicity testing is a part of the EPA's integrated strategy for the assessment of water quality, which also includes chemical-specific limits and biological-criteria, Whole Effluent Toxicity testing is not intended to take the place of other biological assessments that may be appropriate for the assessment of water quality in this receiving water body.

The Applicability of Section 316 (b) of the CWA

As you may be aware, Section 316(b) of the CWA and its implementing regulations establish requirements and conditions for cooling water intake structures where water is withdrawn from a water of the United States for cooling purposes. These requirements address the design, construction, and location of intake structures and technology used to minimize adverse environmental impacts to aquatic life. It is the EPA's understanding that the TCEQ concluded that the facility does not propose to use water for cooling purposes and therefore is not subject to the requirements of CWA § 316(b). However, the EPA has questions/concerns regarding the current and/or future use of water withdrawals from the facility's intake structure and its continued compliance with CWA § 316(b).

Community Concerns

The EPA is also aware of concerns raised by several stakeholders concerning disproportionate impacts that this facility may have on underserved segments of the surrounding community. Consequently, we would like information regarding any outreach performed by the TCEQ attempting to understand and possibly address these stakeholders' concerns.

Again, the EPA thanks you for your commitment to issuing TPDES permits that comply with the CWA's requirements for the protection of aquatic life, human health, and the environment. We look forward to coordinating with your office to ensure that any permit issued to the POCC in this instance complies with those requirements. If you have any questions or concerns, or would like to discuss this matter further, please feel free to contact Charles Maguire at (214) 665-7100, or at maguire.charles@epa.gov.

Sincerely,

EARTHEA NANCE

Digitally signed by EARTHEA NANCE
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Earthea Nance, PhD, PE
Regional Administrator

cc: Emily Lindley, TCEQ Commissioner
Bobby Janecka, TCEQ Commissioner
Toby Baker, TCEQ Executive Director
Mary Smith, TCEQ General Counsel
Vic McWherter, TCEQ Public Interest Counsel

Sean Strawbridge, Chief Executive Officer
Port of Corpus Christi Authority

Eric Allmon
Perales, Allmon & Ice, P.C., representing
Port Aransas Conservancy