

TCEQ DOCKET NO. 2020-1351-MIS

IN THE MATTER OF THE SECTION	§	
401 WATER QUALITY	§	BEFORE THE
CERTIFICATION ON U.S. ARMY	§	
CORPS OF ENGINEERS SECTION	§	TEXAS COMMISSION ON
404 PERMIT APPLICATION NO.	§	
SWG- 1995-02221 FOR MODA	§	ENVIRONMENTAL QUALITY
INGLESIDE OIL TERMINAL, LLC	§	

**INGLESIDE ON THE BAY COASTAL WATCH ASSOCIATION’S MOTION TO
OVERTURN THE EXECUTIVE DIRECTOR’S 401 CERTIFICATION**

TO THE HONORABLE COMMISSIONERS:

Pursuant to 30 Tex. Admin. Code § 50.139(b), Ingleside on the Bay Coastal Watch Association (“IOBCWA”) files this Motion to Overturn the Executive Director’s April 22, 2021 decision granting the 401 Water Quality Certification for the Moda Ingleside Oil Terminal, LLC project (the “401 Certification”). IOBCWA would show that the 401 Certification should be overturned. Alternatively, if the 401 Certification is not overturned, then it should be remanded to the Executive Director with instructions that the applicant provide sufficient information to allow a meaningful determination whether the proposed project violates State Water Quality Standards (“WQS”) and is consistent with the Texas Coastal Management Program (“CMP”).

In reviewing Corps permit applications, the ED (acting on behalf of the Commission) must ensure that the project does not violate WQS found in in Title 30, Texas Administrative Code, Chapters 279 and 307. The ED also must ensure the project is consistent with the Texas CMP, governed by Title 31, Texas Administrative Code, Chapter

501. In fulfilling these obligations, the ED must make several determinations, including, but not limited to:

- There will be “no overall net loss of the existing wetland resource base with respect to wetland functions and values” (30 Tex. Admin. Code § 279.2(b));
- There will be no discharge in violation of the water quality standards or other appropriate requirements (30 Tex. Admin. Code § 279.2(b)(3));
- Any discharges shall avoid unacceptable adverse impacts, including cumulative and secondary impacts (30 Tex. Admin. Code § 279.11(b));
- There is no practicable alternative to the proposed discharge that would have less adverse impacts on the aquatic ecosystem (30 Tex. Admin. Code § 279.11(c)(1));
- Appropriate and practicable steps have been taken to minimize the potential adverse impacts (30 Tex. Admin. Code § 279.11(c)(2));
- All unavoidable adverse impacts that remain after all practicable avoidance and minimization have been mitigated and impacted functions and values replaced (30 Tex. Admin. Code § 279.11(c)(3)); and
- No discharge will result in degradation of the water quality in the segment (30 Tex. Admin. Code § 307.5)).

Pursuant to 30 Tex. Admin. Code § 279.11(c)(3), all certifications shall require appropriate and practicable compensatory mitigation. If the impacts are so significant that the proposed discharge will violate state WQS or fail to achieve no overall net loss of the existing wetland resource base and wetland function, then certification may be denied even if a practicable alternative is not available.¹

I. The ED erred in finding the proposed dredge and fill activities consistent with the Tier II anti-degradation policy.

Sections 279.2(b) and 279.9(b)(3) clearly state that all activities under the authority of the TCEQ requiring a federal license or permit and which may result in any discharge will be reviewed by the ED for consistency with the Texas WQS. For 404 permits, the

¹ 30 Tex. Admin. Code § 279.11(c)(4).

antidegradation policy and public coordination is implemented through the evaluation of alternatives and mitigation under Section 404(b)(1).² Thus, the ED is charged with ensuring the proposed activity will protect water quality before granting state 401 certification pursuant to Chapter 279.

TCEQ's Tier II review applies to Moda's project because it is proposing a discharge into fishable/swimmable waters. In addition to those protections provided under Tier I review to all waters in the state that require the protection of existing and attainable uses,³ Tier II review seeks to maintain the water quality historically existing in that water unless the lowering of water quality can be affirmatively demonstrated as necessary for important economic or social development.⁴

Where a regulatory decision, such as a 401 certification, would lower water quality in waters that exceeded the minimum standards, the anti-degradation policy requires two separate and independent showings: (1) the lowering of water quality would not be harmful to any assigned or attainable use of the receiving waters; and (2) the lowering of water quality is justifiable as a result of necessary economic or social development.

The requirement for these two independent demonstrations is embodied in both EPA's minimum standards for state permitting programs. 40 CFR § 131.12(a)(2) provides:

Where the quality of the waters exceeds levels necessary to support the protection and propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important

² 30 Tex. Admin. Code § 307.5(c)(1)(B).

³ 40 CFR § 131.12(a)(1); 30 Tex. Admin. Code § 307.5(b)(1).

⁴ 40 CFR § 131.12(a)(2), 30 Tex. Admin. Code § 307.5(b)(2).

economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully.

The requirement for a demonstration that the lowering of water quality is necessary for important economic or social development has been incorporated into the TCEQ Water Quality Standards which in similar language provides:

No activities subject to regulatory action that would cause degradation of waters that exceed fishable/swimmable quality are allowed unless it can be shown to the commission's satisfaction that the lowering of water quality is necessary for important economic or social development. Degradation is defined as a lowering of water quality *by more than a de minimis extent*, but not to the extent that an existing use is impaired. Water quality sufficient to protect existing uses must be maintained.⁵

The sole difference between 30 Tex. Admin. Code § 307.5(b)(2), and 40 C.F.R. 131.12(a)(2), is TCEQ's addition of a *de minimis* exemption.

This published EPA guidance further notes that the showing of social and economic necessity under this regulation is intended to impose a significant burden on the applicant:

[40 CFR Section 131.12(a)(2)] is intended to provide relief only in a few extraordinary circumstances where the economic and social need for the activity clearly outweighs the benefit of maintaining water quality above that required for "fishable/swimmable" water, and both cannot be achieved. The burden of demonstration on the individual proposing such activity will be very high.⁶

Any state policy or provision that would allow this showing to be wholly avoided would be directly contrary to federal policy.

⁵ 30 Tex. Admin. Code § 307.5(b)(2)(emphasis added).

⁶ United States Environmental Protection Agency Office of Water, "Water Quality Standards Handbook", EPA-823-B-12-002, at section 4.5 (<https://www.epa.gov/sites/production/files/2014-10/documents/handbook-chapter4.pdf>)

Finally, when degradation of waters exceeding fishable/swimmable quality is anticipated, a statement that the antidegradation policy is pertinent to the permit action must be included in the public notice for the permit application or amendment.⁷ If no degradation is anticipated, the public notice must so state.⁸

The Executive Director erred in finding the proposed dredge and fill activities consistent with the Tier I anti-degradation policy set forth in 30 Tex. Admin. Code § 307.5(b)(1). Corpus Christi Bay has been acknowledged as characterized by attainable exceptional aquatic life uses and primary contact recreation uses.⁹ The contamination of Corpus Christi Bay as a result of the addition of dissolved solids and suspended solids, as well as the destruction of habitat, will interfere with these uses. The Executive Director's finding of compliance with the Tier I anti-degradation policy should be reversed.

Furthermore, the Executive Director erred in finding the proposed dredge and fill activities consistent with the Tier II anti-degradation policy set forth in 30 Tex. Admin. Code § 307.5(b)(2). It has not been shown that the proposed project will have a less than de minimis impact on water quality. To the contrary, the addition of silt, sediment, and the destruction of habitat will result in a significant lowering of water quality.

⁷ 30 Tex. Admin. Code § 307.5(c)(2)(D).

⁸ *Id.*

⁹ 30 Tex. Admin. Code § 307.10(1) Appendix A.



Photo showing a sediment plume from docking vessels at Moda's existing pier and the close proximity and impact of the sediment plume on the existing seagrasses and wetland areas. August 2020.

Furthermore, the required showing that the lowering of water quality is necessary for important economic or social development has not been made. There is no need for the proposed project, and certainly no need for implementation of the project in the environmentally-hazardous manner proposed. The Executive Director's finding of compliance with the Tier II anti-degradation policy should be reversed.

The notice for the permit application mentions TCEQ's certification review, but fails to include a statement that the antidegradation policy is pertinent to the permit or that no degradation is anticipated. For these reasons the Commission should overturn the ED's decision granting Moda's 401 Certification.

II. The ED failed to consider cumulative and secondary impacts.

The ED must ensure any discharges avoid unacceptable adverse impacts, including cumulative and secondary impacts.¹⁰ However, Moda's application fails to consider the impacts of the tankers and tugboats, which increase turbidity and spread sediment, effectively smothering and blocking light to nearby seagrasses. These are especially important considerations given the proximity of Moda's Preferred Alternative to the seagrasses. By not considering these cumulative and secondary impacts, the Alternatives Analysis was impermissibly skewed against consideration of Onsite Alternative 3 (in the East Basin) as well as offsite alternatives (discussed in the next section), which are located further from the identified seagrasses and wetlands.

Importantly, Moda's existing operation is already causing adverse cumulative and secondary impacts on the seagrasses, as is apparent in the image on the prior page. Vessels already make use of prop wash docking—sudden acceleration or changes from reverse to forwards sometimes used in tight docking situations—in order to access Moda's existing pier. Prop washing has the noticeable effect of disturbing sediment and shallow soils, adding dissolved solids and suspended solids, and destroying aquatic habitat, such as seagrasses. The photos below show the nearby seagrass habitat has diminished over time, with the severity increasing from west to east, the closer in proximity to Moda's existing pier.

¹⁰ See 30 Tex. Admin. Code § 279.11(b).



GLO image December 31, 2008



Same location, March 18, 2021

Moda's response to comments from USFWS, TPWD, and the USEPA are enlightening. Moda did not acknowledge or address cumulative and secondary impacts on the seagrass, wetlands, and water quality from its docking operations. For example, EPA Comment 2 states: "All potential direct, secondary, and cumulative impacts to the environment should be fully evaluated for each aquatic resource, particularly seagrasses and those resources that are impacted should be adequately replaced." Moda's Response read simply: "Comment Noted."

Similarly, in direct response to TCEQ's 401 Certification Questionnaire, Moda avoids consideration of cumulative and secondary impacts when asked to describe long-term measures to stabilize disturbed soil areas. Moda makes no mention of cumulative and

secondary impacts on areas immediately adjacent to its proposed project.¹¹ There is no evidence that the ED considered these cumulative and secondary impacts, as is required by 30 Tex. Admin. Code § 279.11(b). Thus, the Commission should overrule the 401 Certification.

III. The ED failed to consider practicable alternatives.

The ED failed to consider practicable alternatives to Moda's proposed discharge. Pursuant to Rule 279.11(c)(1), "[n]o discharge shall be certified if there is a practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem. . . ." Importantly, compensatory mitigation is not considered an alternative, and must be considered only after all practicable avoidance and minimization have been completed. 30 Tex. Admin. Code §§ 279.11(c)(1) and (3). The ED's obligation to review the alternatives analysis is inextricably linked with its obligation to ensure compliance with WQS and the antidegradation policy (discussed more below).¹²

In its Revised Alternatives Analysis, Moda claims to have considered six possible alternatives, including its preferred alternative: the no action alternative, offsite alternatives (generally), and four onsite alternatives.¹³ However, the "Offsite Alternative" is not an alternative at all—rather, it is a description of several hypothetical scenarios that Moda

¹¹ TCEQ Tier II Checklist, 2 (Jan. 10, 2020).

¹² See 40 CFR 131.12(a)(2)(ii) ("Before allowing any lowering of high water quality, pursuant to paragraph (a)(2) of this section, the State shall find, after an analysis of alternatives, that such a lowering is necessary to accommodate important economic or social development in the area in which the waters are located. The analysis of alternatives shall evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity. When the analysis of alternatives identifies one or more practicable alternatives, the State shall only find that a lowering is necessary if one such alternative is selected for implementation.")

¹³ Moda submitted a breakdown of additional offsite and onsite alternatives it claims to have considered in a revised Alternatives Analysis, dated September 11, 2020, after the Corps requested additional information. Initially, Moda's analysis consisted only of one general "Offsite Alternative" and two onsite alternatives, including its preferred alternative, in its Alternatives Analysis submitted with its 404 application, dated January 10, 2020.

claims would not meet its own narrowly defined purpose. In addition, Moda’s descriptions of the three other onsite alternatives—none of which incorporated any operational alternatives—demonstrate it selected the practicable alternative that would have less adverse impact on the aquatic ecosystem.

a. The Alternatives Analysis is improperly constrained by Moda’s overly narrow purpose and improper siting criteria.

Moda’s Alternatives Analysis initially fails because the purpose and need, and the subsequent scoring criteria it relies on, are so narrowly tailored as to foreclose any other options but Moda’s preferred option. The “basic purpose” defines the project’s purpose in broad and simple terms, with the objective of determining whether the proposed activity is “water dependent.”¹⁴ Where a discharge is proposed for a special aquatic site (e.g. wetlands), all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.¹⁵

Moda’s stated purpose of and need for the propose project is “to provide the maritime infrastructure necessary to accommodate the increasing demand by existing and committed, future customers at the Moda Ingleside Oil Terminal in a logistically safe and efficient manner.”¹⁶ Yet in identifying criteria “essential” to meet this purpose and need, Moda specified the need for at least one new dock capable of berthing two Suezmax vessels. Moda has not demonstrated a need for two additional Suezmax docking berths. In

¹⁴*Town of Abita Springs v. U.S. Army Corps of Engineers*, 153 F. Supp. 3d 894, 919 (E.D. La. 2015).

¹⁵ 40 C.F.R. § 230.10.

¹⁶ Moda’s Revised Alternatives Analysis, at Sect. 3.2 (Sept. 11, 2020)(hereinafter, “Alt. Analysis”)

fact, the Revised Alternatives Analysis speaks only to general statements about U.S. production and supply.¹⁷ Though Moda plans for this project to accommodate additional and larger vessels, it makes no attempt to quantify this “need” or explain specifically why two additional Suezmax docking berths are “essential.”¹⁸ And while it may be fair to assume that Moda would prefer two large berths, that is not the inquiry before the ED and that does not address whether the existing East Basin is sufficiently large enough to accommodate the expansion project.¹⁹

The East Basin alternative is half-heartedly addressed in Moda’s Onsite Alternative 3. Ultimately, Moda rejected Onsite Alternative 3—even though it *did not require any additional dredging*—because Moda claims it would only create one additional Suezmax berth and would encroach on the Corpus Christi Ship Channel setback.²⁰ Despite the fact that, according to its own figure, the existing Dock 2-A can currently accommodate a Suezmax vessel, it is unclear why Onsite Alternative 3 could not be shifted to encompass the existing Dock 2-A area, thus avoiding the CCSC setback.²¹ The figure of Onsite Alternative 3 fails to include dimensions like the diagrams for other onsite alternatives, despite agency requests for those dimensions, making a meaningful review of Onsite Alternative 3 difficult, if not impossible.

¹⁷ *Id.* at Sect. 3.1.

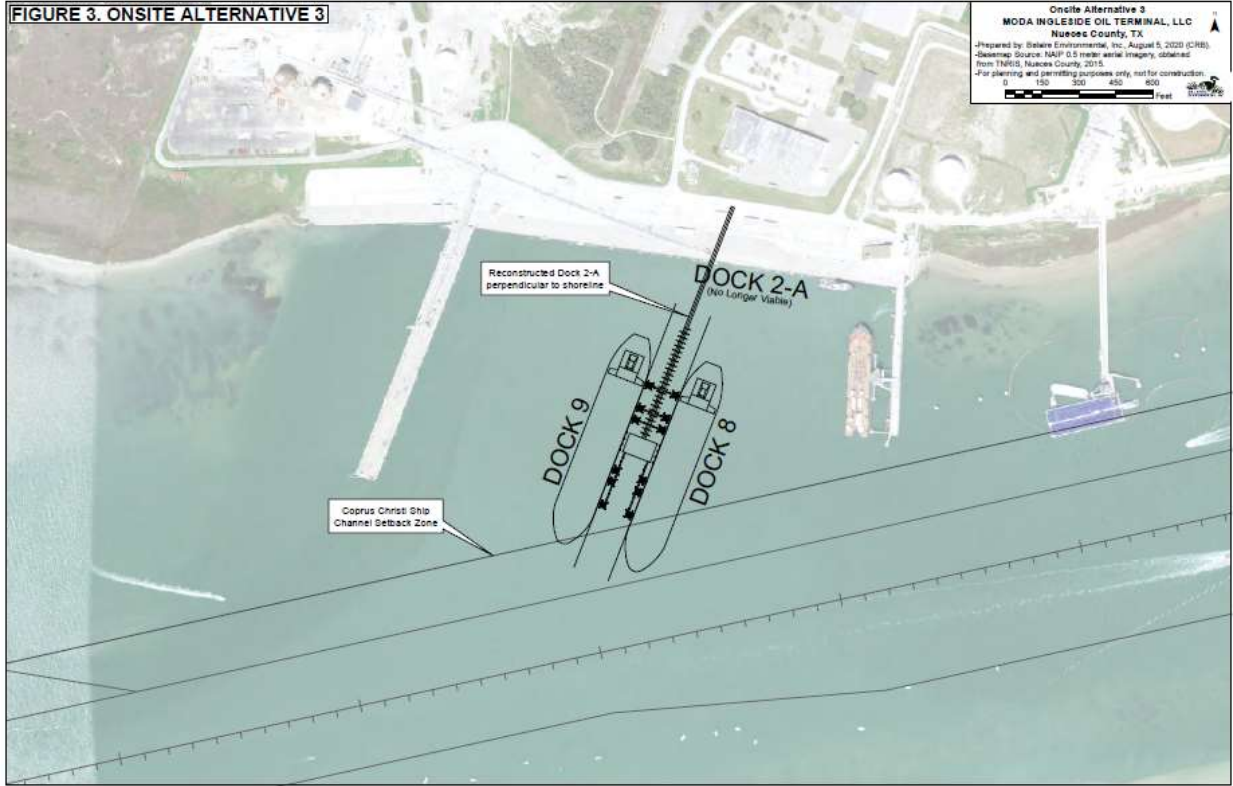
¹⁸ *Id.* at Sect. 3.3.

¹⁹ See Comment 1 raised by the U.S. Fish and Wildlife Service.

²⁰ Alt. Analysis, at Sect. 4.4.3.

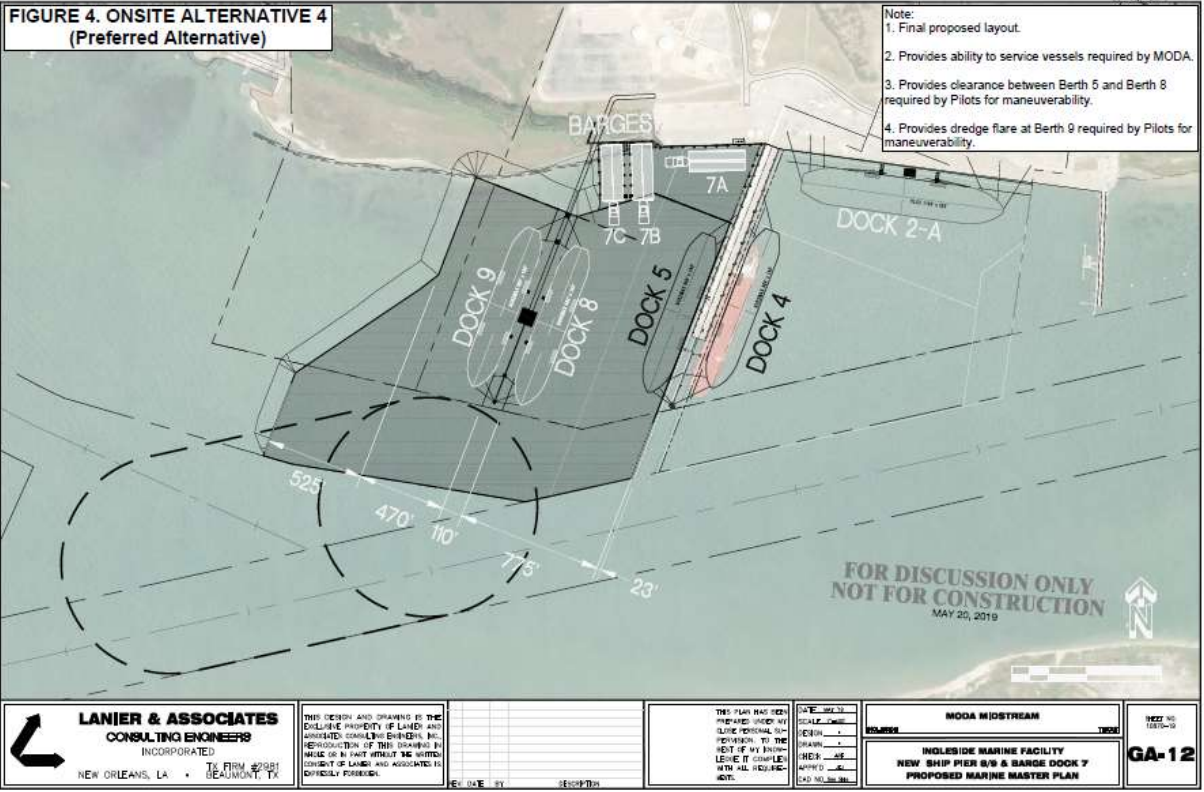
²¹ Figure 3, the schematic for Onsite Alternative 3 was prepared in August 5, 2020, well after the other alternative schematics in December 2018 and the alternatives analysis was said to have taken place further calling into question whether this was considered.

FIGURE 3. ONSITE ALTERNATIVE 3



Onsite Alternative 3
 MODA IN-SHELL OIL TERMINAL, LLC
 NUECES COUNTY, TX
 Prepared by: Stearns Environmental, Inc. August 5, 2020 (CRB)
 Source: NOAA 0.5 meter aerial imagery, obtained from TMRS, Nueces County, 2015.
 For planning and permitting purposes only, not for construction.
 0 150 300 450 Feet

FIGURE 4. ONSITE ALTERNATIVE 4 (Preferred Alternative)



Note:
 1. Final proposed layout.
 2. Provides ability to service vessels required by MODA.
 3. Provides clearance between Berth 5 and Berth 8 required by Pilots for maneuverability.
 4. Provides dredge flare at Berth 9 required by Pilots for maneuverability.

A:\00000\0870 MODA - Coprus Christi\Drawings\19-08-20 MODA - Dock 9 - 19-08-20 - 19-08-20.dwg

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NO.	DESCRIPTION	DATE

THIS PLAN HAS BEEN PREPARED USING ALL REASONABLE CARE AND SKILL AND TO THE BEST OF MY KNOWLEDGE IT COMPLES WITH ALL REQUIREMENTS.

DATE: 05/20/19
 SCALE: AS SHOWN
 DESIGN: [Signature]
 DRAWN: [Signature]
 CHECKED: [Signature]
 EXP. NO. 19-08-20

MODA MIDSTREAM
 IN-SHELL MARINE FACILITY
 NEW SHIP PIER 8/S & BARGE DOCK 7
 PROPOSED MARINE MASTER PLAN

HEET NO. 1870-19
GA-12

Thus, the basis for Criteria E (two Suezmax berths) is wholly unsupported, and yet, it is being used improperly constrain the practicable alternatives considered.

Siting Criteria C has also been used to manipulate the Alternatives Analysis. Siting Criteria C awards points for minimizing required new dredging; however, the 404 Guidelines and TCEQ regulations prioritize alternatives that do not discharge into wetlands, i.e. avoid, minimize, mitigate. The weight of the points on a scale of 1-3 simply do not reflect that the 404 Guidelines create the presumption that a no-discharge alternative is the preferred alternative (discussed more below), absent a clear showing by the applicant otherwise.

Finally, the Alternatives Analysis also uses the siting criteria to essentially double-count points awarded to Onsite Alternative 4 (Preferred Alternative). By awarding points to “Meets Project Purpose and Need,” the matrix awards more points to the Preferred Alternative, even though the siting criteria were ostensibly created to ensure the final alternative will “meet the applicant’s purpose and need for the project.”²² Together, these manipulations could easily account for the difference in Onsite Alternative 3, Onsite Alternative 4 (Preferred Alternative), and other alternatives.

b. The Alternatives Analysis fails to demonstrate that any alternative does not have less of an adverse impact than the Preferred Alternative.

The Alternatives Analysis also fails because it does not rebut the presumption that a practicable alternative that does not discharge into a special aquatic site (e.g. wetlands)

²² Alt. Analysis at Sect. 3.3; *see id.* at Sect. 5, Table 1.

is presumed to have less adverse impact on the aquatic ecosystem.²³ Unless Moda is able to rebut this presumption, the ED must determine that there is a practicable alternative to the proposed discharge that would have less adverse impacts on the aquatic ecosystem, as required by 30 Tex. Admin. Code § 279.11(c)(1), and deny Certification. In the Tier II Alternatives Analysis Checklist, Moda provides only conclusory statements that foreclose the possibility of alternative sites. Neither does the Revised Alternatives Analysis provide a basis for Criteria E (two Suezmax berths) or a real explanation as to why Onsite Alternative 3, which would not require dredging, is not a practicable alternative. Without, at the very least, taking a hard look at these issues, the ED's determination fails.

c. The Alternative Analysis fails because it does not consider offshore terminal alternatives.

Moda's analysis of the Offsite Alternatives was also improperly limited because the alternatives do not consider the use or construction of an offshore terminal. Neither the Revised Alternatives Analysis nor the response to comments addresses this alternative, despite many commenters suggesting it as a practicable alternative.²⁴

Moda did not, in good conscience, consider alternatives to its preferred project. The goal of an alternatives analysis is to avoid adverse impacts first, but Moda intentionally sidestepped consideration of the very alternatives that do not involve the dredging of wetlands and seagrasses by limiting its review to only those onsite alternatives with capacity for two additional Suezmax vessels. This Alternatives Analysis fails to

²³ See 40 C.F.R. § 230.10.

²⁴ See Comments of Jennifer Hilliard (Dec. 1, 2020).

demonstrate that there is no practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem.

Because the ED failed to consider practicable alternatives to Moda's proposed discharge, as required by Rule 279.11(c)(1), the Commission should overturn the ED's decision granting Moda's 401 Certification. Even if the Commission determines that the scope of alternatives considered was adequate, once avoiding adverse impacts, the ED is still charged with ensuring appropriate and practicable steps have been taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem. Many of the same questions regarding the need for two additional Suezmax berths would still need to be considered.

IV. The ED failed to require appropriate and practicable compensatory mitigation for all unavoidable adverse impacts that remain.

After all practical avoidance and minimization measures have been completed, pursuant to Rule 279.11(c)(3), “[c]ertification shall require appropriate and practicable compensatory mitigation for all unavoidable adverse impacts that remain.” “The compensatory mitigation requirements will provide for a replacement of impacted functions and values.”²⁵ The ED is authorized to deny a certification where no alternative exists, if compensatory mitigation will not maintain the chemical, physical, and biological integrity of the state's waters or achieve no overall net loss of the existing wetlands, suggesting the compensatory mitigation requirement is a serious one.²⁶

²⁵ 30 Tex. Admin. Code § 279.11(c)(3); 33 CFR 332.3(b)(1) (“When compensating for impacts to marine resources, the location of the compensatory mitigation site should be chosen to replace lost functions and services within the same marine ecological system.”)

²⁶ 30 Tex. Admin. Code § 279.11(c).

As previously explained, adverse impacts on the seagrasses and estuarine wetlands could be avoided and minimized, and yet, even if they are not, the 401 Certification fails to demonstrate that the proper compensatory mitigation is required. Moda relies too heavily on preserving dissimilar habitat, and the direct mitigation proposed is minimal and has not been confirmed as appropriate by the ED. In addition, the proposed mitigation neither restores nor replaces the area adjacent or contiguous to the affected critical area.²⁷

To compensate for the impacts to 8.86 acres of seagrasses and 0.95 acres of estuarine wetland, Moda proposes to construct a rock breakwater to decrease wind and wave action, and plant 20 acres of seagrass landward of the structure within the bay bottom. Further, Moda will preserve 70 acres of forested land. Both mitigation measures will occur some 11 miles away. Though Moda claims 70-acre Live Oak-Redbay Woodland includes a mosaic of pothole wetlands, this claim has been called into question by a simple review of aerial images, which show no wetland potholes.

²⁷ See 31 Tex. Admin. Code § 501.23.



Moda’s 12-Step Mitigation Plan, dated September 11, 2020, provides an overview of the preservation area. The following Google earth images of the 70-acre area—ordered north to south—reveal no obvious pothole wetlands. Pothole wetlands describe freshwater depression, common and identifiable in the Ingleside area sand.



NORTH END OF 70 ACRES – ZERO POTHOLE WETLANDS



SECOND IMAGE SOUTH – ZERO POTHOLE WETLANDS



THIRD IMAGE AT TURN – ZERO POTHOLE WETLANDS



FOURTH IMAGE – ZERO POTHOLE WETLANDS



FIFTH & FINAL IMAGE SOUTH END– ZERO POTHOLE WETLANDS.

Regardless, as both USFWS and TPWD pointed out, the seagrass mitigation proposed by Moda is out-of-kind and does not provide similar habitat as that which would be lost.²⁸ Meaning, the mitigation will not result in a direct replacement of aquatic resource functions. The mitigation will provide preservation of other existing habitat, but whether it is an aquatic habitat capable of replacing the existing functions and values is highly questionable.

Considering Moda's reliance on preservation, both USFWS and TPWD suggest that the ratio should be higher to compensate for the net loss and should be done in conjunction with restoration, establishment, or enhancement projects.²⁹ Further, the NOAA and TPWD Seagrass Viewer indicate that there is already seagrass in the proposed aquatic mitigation area, which would demand additional acreage for creation of submerged seagrass vegetation totaling 38.0 acres.³⁰ Though a site biological survey completed by Texas A&M University-Corpus Christi was referenced, there is no evidence that the ED considered this survey or conducted its own independent review to ensure that the proposed mitigation would be appropriate.

V. The ED erred in determining that the Moda Project is consistent with the Texas Coastal Management Act.

The Coastal Zone Management Act established a framework under which states, with approved programs, receive federal funds for and can control development in their coastal areas. An approved state program must have enforced standards or policies for

²⁸ USFWS Comment 4; TPWD Comment 5.

²⁹ See USFWS Comment 5 ("The Applicant should use the established mitigation rate of 3:1 for the seagrass creation site."); TPWD Comment 7.

³⁰ See USFWS Comment 7.

protecting the natural resources in the state's coastal zone. The coastal zone program is not mandatory; that is, a state does not have to join. But should a state's coastal program be approved by the National Oceanic and Atmospheric Administration, Office of Coastal Zone Management, the federal government must conduct its actions and issue its licenses and permits in a manner that is consistent with the state's approved coastal program.

The state process for review of federal actions and permits is referred to as the "coastal consistency determination" or "consistency review." The person proposing the applicable project must obtain a determination that the project is consistent with the state's comprehensive coastal management program. Thus, if a state determines that a federal project or a private project that must obtain a federal permit would not be consistent with the state coastal program, it can, with some limitations, veto the project or force limits on the project to protect the state's coastal natural resources.³¹

Texas obtained initial approval of its coastal management program in the early 1990s. Though the Texas Legislature revised the statute to place the responsibility for implementing the coastal plan with the School Land Board ("SLB") and the Commissioner of the General Land Office, with the advice of the Coastal Coordination Advisory Committee ("CCAC"),³² to avoid duplication and delays, the Texas program provides that Texas agencies must review their decisions related to federal actions or permits to

³¹ Under § 307(c) of the Coastal Zone Management Act and the related rules at 15 C.F.R. § 930.81, a consistency objection can preclude a Federal agency from issuing any permit or license necessary for a proposed activity or require conditions in the permit to limit the impacts on coastal resources unless the Secretary of Commerce overrides the state decision based on a finding that the activity may be approved because it is consistent with the objectives of the federal Act or necessary in the interests of national security.

³² Chapter 33, Tex. Nat. Res. Code.

determine if the result of the state action would be consistent with the coastal program. Thus, for a 404 project, TCEQ must first determine that its action approving the Section 401 certification is consistent with the policies and requirements of the Texas coastal program. That is, TCEQ must determine that the proposed project for which a permit is required by the USACE would not violate water quality standards (WQS) and would be consistent with the enforceable policies and goals of the state coastal management program (CMP).

If the Project would violate WQS or be inconsistent with the CMP, TCEQ is authorized to find the project inconsistent or consistent only with certain changes to the project. The Corps is, however, generally prohibited under federal law from issuing a permit for the Project if Texas determines that the proposed Project would violate WQS or be inconsistent with the CMP.

The CMP applies within the coastal zone boundary. The boundary of the coastal zone is established by rule at 31 Tex. Admin. Code § 503.1. The entire Moda Project site is within the coastal zone boundary.

Since the policies and goals of the CMP program include but extend beyond those of the CMP, the TCEQ 401 certification process has to address both the WQS and the CMP. Thus, a determination that WQS will not be violated does not necessarily ensure that coastal standards and polices will not be violated.

a. The ED failed to perform the analyses required for its determination of coastal consistency.

TCEQ's determination of consistency with the CMP is governed by the applicable Texas statutes, agency rules and state coastal plan.³³ The determinations that must be made by TCEQ in order to find an activity to be consistent with the Texas Coastal Program include, but are not limited to:

- Cumulative and secondary adverse impacts have been evaluated to the greatest extent possible (31 Tex. Admin. Code § 501.15(b));
- Cumulative adverse impacts have been avoided and otherwise minimized (31 Tex. Admin. Code § 501.15(c));
- No net loss of critical area (including wetland) functions and values (31 Tex. Admin. Code § 501.23(a)(1));
- No significant degradation of critical areas (31 Tex. Admin. Code §§ 501.23(a)(7), 501.25(a)(3)(C));
- No practicable alternative is available that has fewer adverse effects (31 Tex. Admin. Code §§ 501.23(a)(2), 501.25(a)(3)(A));
- To the greatest extent possible, design and location of the facilities will aid in flushing of the site (31 Tex. Admin. Code § 501.25(b)(8)(A)).
- All practicable steps have been taken to minimize adverse effects on coastal waters, submerged lands, critical areas, coastal shore areas, and Gulf beaches of disposal of dredged materials (31 Tex. Admin. Code § 501.25(a)(3)(B)); and
- The proposed actions are consistent with the goals and policies of the Coastal Program (31 Tex. Admin. Code § 501.15(c)).

As should be apparent, this list is similar to the list of determinations necessary for the ED to grant a 401 certification; however, they are not the same. In the interest of avoiding repetition, this section will incorporate by reference information from prior sections, and will otherwise focus on those determinations that are different.

³³ Chapter 33, Subchapter F, Tex. Nat. Res. Code; 31 Tex. Admin. Code Chapter 501; and 30 Tex. Admin. Code Chapter 281, Subchapter B.

In summary, the Executive Director erred by failing to follow proper procedures for and by not properly applying the substantive requirements to both the coastal consistency determination and the water quality certification.

i. The ED failed to follow proper procedures.

Specifically, the ED erred as follows:

1. The ED failed to perform the required evaluations on the revised permit application, alternatives, and the mitigation plans.

In January 2020, TCEQ performed its evaluation of the consistency of the Moda Project and the CMP. That evaluation was before:

- 1) The February 6, 2020 notice of Moda application for a 404 permit, and the opportunity for the public to comment on the 401 certification and evaluation of consistency with the CMP,
- 2) Any comments were filed by the USFWS, the USEPA, TPWD, and Protestants,
- 3) The ED's March 9, 2020 letter to USACE requesting that USACE obtain additional information from Moda on the alternatives, on limiting impacts and Moda's mitigation plans, and
- 4) Moda's September 2020 letter informing the agencies and commenters that it had submitted its revised Alternatives Analysis, a 12-Step Mitigation Plan and addressed the issue of an agreement with the Port of Corpus Christi Authority for use of Port-owned land for mitigation.

First, the CMP clearly directs TCEQ to obtain all of the information it needs to perform the evaluation of consistency. The CMP states:

(a) Agency and subdivision rules and ordinances subject to § 501.10 of this title (relating to Compliance with Goals and Policies) shall:

- (1) require applicants to provide information necessary for an agency or subdivision to make an informed decision on a proposed action

listed in § 505.11 of this title (relating to Actions and Rules Subject to the Coastal Management Program) . . .

The ED did not wait until it obtained the information it requested that the USACE obtain before completing the CMP evaluation and determination.

In fact, while a second opportunity for comment followed, to Protestants' knowledge, there was no reevaluation of the consistency of the Moda Project with the CMP despite the changes made by Moda that needed to be evaluated for consistency. Thus, no new evaluation was available for comment.

As discussed below, the failure of the ED to perform its evaluation after receiving comments from others and changes in Moda's plans and application, resulted in the failure by the ED to perform an adequate evaluation, consistent with Texas and Federal law.

2. The ED failed to evaluate the project on all of the relevant CMP policies.

As the ED's January 10, 2020 CMP evaluation demonstrated, the ED only evaluated consistency of the Moda Project with the CMP policies 501.23 (development in critical areas), 501.24 (development on state submerged lands) and 501.25 (dredging and filling). The ED did not evaluate consistency with policies under 501.27 (Coastal Hazard Areas), 501.30 (Coastal Historic Areas), or 510.31 (transportation projects).

As discussed below, the failure of the ED to perform an evaluation of all relevant policies resulted in the failure by the ED to perform an adequate substantive evaluation, consistent with Texas and Federal law.

3. The ED failed to issue a sufficiently detailed written determination of consistency with the CMP goals and policies.

Again, as the ED's January 10, 2020 CMP evaluation demonstrated, the ED did not provide the type of detailed written evaluation needed to demonstrate it performed the required evaluation. For actions that exceed the thresholds for referral, the GLO or the SLB, as appropriate, shall provide a written explanation supporting the determination made.³⁴ The explanation shall describe the basis for the agency's determination, include a description of the action and its probable impacts on coastal natural resource areas (CNRAs), identify the CMP goals and policies applied to the action, and explain how the action is consistent with the applicable goals and policies or why the action does not adversely affect any CNRAs.³⁵ Here, the written document uses boiler plate language for most of the evaluation, not providing details. When details are provided, they demonstrate that the evaluation was based on the initial application and mitigation plans, not the ones as revised by Moda.

As discussed below, the failure of the ED to prepare the required detailed determination explaining the evaluation resulted in the failure by the ED to perform an adequate evaluation, consistent with Texas and Federal law.

³⁴ 31 Tex. Admin. Code § 16.2(e).

³⁵ *Id.*

4. The ED failed to provide proper public notice of the opportunity to submit comments on the consistency with the CMP in the October 30, 2020 notice for the additional opportunity for the public to submit comments on the Section 401 certification process.

The notice of hearing of October 30, 2020 did not provide notice that the public has the opportunity to comment on CMP consistency evaluation/determination for the revised application and mitigation plans. This despite a clear and specific in the goal of the CMP that TCEQ must:

make coastal management processes visible, coherent, accessible, and accountable to the people of Texas by providing for public participation in the *implementation* of the Texas CMP.³⁶

That failure meant that Protestants and other commenters were not aware that they would be required to file comments on that evaluation/determination at that time, until a few days before the deadline for comments and the public hearing. Protestants were denied an opportunity to prepare and file a complete set of comments on the ED's evaluation/determination.

TCEQ rules for the Section 401 certification states that the executive director to the greatest extent practicable shall use a joint mailed notice issued by the licensing or permitting agency.³⁷ If that is not done, a separate notice is required for any other related approval.³⁸

Thus, the ED's failure to provide proper notice on its CMP evaluation reflects the failure of the ED to perform the proper evaluation on the revised application and mitigation

³⁶ 31 Tex. Admin. Code § 501.12(9)(emphasis added)

³⁷ 30 Tex. Admin. Code § 279.5.

³⁸ 30 Tex. Admin. Code § 279.5(b).

plan. As the Moda September 11, 2020 response to comments indicates,³⁹ that, despite the fact that Moda was told to withdraw its application and filed a new one, Moda did not. Instead, it amended its application and mitigation plans and asked to reinstate its application as revised. This process is, under Federal law, simply a substitute for withdrawal and refiling. It is not authorized under Texas law and should have been treated for public notice purposes as a new application, or a major amendment requiring new notice.

5. The ED failed to refer the determination of consistency to the Commission for a final evaluation of the factual disputes and legal contests raised in comments of federal and state agencies, Protestants, and other commenters.

Section 5.122(a), Texas Water Code authorizes the Commission to delegate some uncontested permits and “authorizations.” As the legislative history of that section makes clear:

[T]his is really aimed at the uncontested matters for which there is not a controversy and no controverting side. So, based on the conditions that, that are contained in the bill, and if there is opposition, of course, then, the ED cannot make a ruling.⁴⁰

As discussed below, the failure of the ED to refer the matter to the Commission for the Commission’s evaluation of the factual and legal disputes demonstrates the failure of Texas to perform the required evaluation, consistent with Texas and Federal law.

³⁹ Moda’ response states: Due to the need to obtain Port of Corpus Christi Authority (PCCA) approval and other data, the applicant was advised to withdraw the above referenced permit application to allow time for appropriate data collection.

⁴⁰ Senator Buster explained the limits on the law in response to a question from Senator Truan at the April 4, 1995 Senate Committee Hearing on the Senate Bill 741 by Senator Brown that resulted in the addition of Section 5.122 to the Water Code in 1995. (74th Regular Legislative Session). This bill was sponsored by Senator Brown and Senator Sims.

ii. The ED failed to apply the appropriate substantive requirements to the coastal consistency determination and the water quality certification.

The ED erred by not making the evaluations of the substantive facts on the issues identified above, specifically, the CMP policies 501.23 (development in critical areas), 501.24 (development on state submerged lands) and 501.25 (dredging and filling). The ED did not evaluate consistency with policies under 501.27 (Coastal Hazard Areas), 501.30 (Coastal Historic Areas), or 510.31 (transportation projects).

1. 501.23 – Development in Critical Areas.

The ED failed to apply the requirements of 501.23(a), requiring that cumulative and secondary adverse effects of these activities be considered. As explained extensively in Section II, the ED failed to consider the cumulative and secondary impacts related to existing activities and operations, including adverse impacts on seagrass and wetlands due to Moda's current operations and sediment shading.

Further, the ED failed to ensure no net loss of critical area functions and values, pursuant to 501(a)(1). As explained in Section II, loss of seagrass and wetlands will continue because there was no consideration of cumulative and secondary adverse impacts, and as explained in Section IV, Moda's mitigation plan will not adequately replace the functions and values of the destroyed critical areas.

The ED failed to ensure no practicable alternative with fewer adverse effects is available, as required by 501(a)(1). As previously explained in Section III, the Alternatives Analysis was impermissibly narrow and did not consider use of East Basin through design or operational changes, offsite alternatives. Neither did the Alternatives Analysis prioritize

avoiding adverse effects on critical areas or minimizing those effects to the greatest extent practicable. As explained in Subsection III.a, Onsite Alternative 3 did not involve dredging, but was impermissibly dismissed based on arbitrary siting criteria.

The ED also failed to ensure that the compensatory mitigation attempted to replace the affected critical area with critical areas having characteristics identical to or closely approximating those of the affected critical areas, as is required by 501(a)(4). As previously explain in Section IV, not only is the 70-acre preservation property not on-site or in-kind, it also fails to contain the valuable pothole wetlands.

The ED failed to ensure that the development will not cause significant degradation of critical areas. Degradation occurs when the activity will, individually or collectively, cause or contribute to significant adverse effects on the life stages of aquatic life and other aquatic dependent wildlife or the ecosystem diversity, productivity, or the stability, including loss of fish and wildlife habitat or loss of the capacity of a coastal wetland to assimilate nutrients, purify water, or reduce wave energy. The ED did not require and did not obtain the data or studies needed to evaluate the impacts on life stages of aquatic life or ecosystem diversity.

2. 501.24 – Development on State Submerged Lands.

The ED failed to ensure that the activities comply with the requirements of 501.24, requiring that piers, docks, wharves, bulkheads, jetties, groins, fishing cabins, and artificial reefs (including artificial reefs for compensatory mitigation) be limited to the minimum necessary to serve the project purpose; be constructed in a manner that does not significantly interfere with the natural coastal processes which supply sediments to shore

areas; not otherwise exacerbate erosion of shore areas; and avoids and otherwise minimizes shading of critical areas and other adverse effects.

As previously discussed in Section II, Moda has not shown and the ED could not find that the Project is consistent with the policies of this section, as there has been no showing of how Moda can operate to avoid the shading of seagrasses, already an ongoing problem with Moda's current operations and not considered in any cumulative or secondary impacts analysis. The ED did not require and did not obtain the data or studies needed to evaluate the impacts on the natural coastal processes and how ongoing operations at Moda's site is interfering with them.

3. 501.25 – Dredging and Filling.

The ED failed to ensure the proposed activities would comply with the requirements of section 501.25, including the requirements that:

- Dredging and the disposal and placement of dredged material must avoid and otherwise minimize adverse effects to coastal waters, submerged lands, critical areas, coastal shore areas . . . to the greatest extent practicable; and
- Dredging and dredged material disposal and placement not cause or contribute to violation of any applicable surface water quality standards.

Further, the ED failed to consider alternatives that would have fewer adverse effects on coastal waters, submerged lands, critical areas, coastal shore areas, and Gulf beaches. As previously described in Section III, the ED did not evaluate the alternatives to dredging a new boat slip and dock areas, including no dredging or less areas for dredging that would be possible by offsite or offshore alternatives involving pipelines to move crude oil to the large crude carriers in the Gulf. Nor did Moda's Alternatives Analysis provide an adequate consideration of Onsite Alternative 3, which would involve no dredging.

4. 501.27 – Coastal Hazard Areas.

Pursuant to the standards and procedures under the Texas Natural Resources Code, Chapter 33, Subchapter H, the GLO shall adopt or issue rules, recommendations, standards, and guidelines for erosion avoidance and remediation and for prioritizing critical erosion areas. The ED did not evaluate the Project in relationship to the impacts on the Moda properties or lands to those properties in the designated floodplain and high hazard areas which will be eroded and otherwise affected in ways that will limit the protection of those lands on other properties in the floodplain and adjacent to the floodplain, including properties or members of Protestants affected of and adjacent to Moda. The ED did not, for example, evaluate consistency with the goals and policies in GLO's Texas Coastal Resiliency Master Plan including the goal of Goal 2: Develop an adaptable Resiliency Plan that accommodates changing coastal conditions. The Resiliency Plan will provide long-term, multiple lines of defense solutions to restore, enhance and protect coastal habitats, infrastructure and communities and related policies and recommendations.

5. 501.30 – Coastal Historic Areas.

Development affecting a coastal historic area⁴¹ shall avoid and otherwise minimize alteration or disturbance of the site unless the site's excavation will promote historical, archaeological, educational, or scientific understanding. The ED did not consider the

⁴¹ While state law limits this policy issue to sites designated by the Texas Historical Commission, federal law does not. Moreover, the USACE is not limited to its consideration or historic areas to those with such designation. TCEQ can and clearly should consult with the THC when an action subject to the CMP policies has significant importance to indigenous groups as the affected sites do does here. THC can then consult with the affected parties to determine the best way to protect such areas.

impacts on or consult with THC on such impacts for the historic areas identified by Protestants and others.

6. 510.31 – Transportation Project.

Pursuant to Section 510.31, Pollution prevention procedures shall be incorporated into the construction and maintenance of transportation projects to minimize pollutant loading to coastal waters from erosion and sedimentation, . . . and other pollutants from stormwater runoff. Where practicable, transportation projects shall be located at sites at which future expansion will not require development in coastal wetlands except where such construction is determined to be essential for evacuation in the case of a natural disaster.

The Moda Project clearly falls within the scope of this set of policies; however, the ED did not consider the impacts from stormwater runoff or future expansions and construction projects. The lack of need for expansion to new docks was not considered, as previously explained in Section III. There was no consideration of alternatives, such as using existing docks and using different loading and unloading procedures to meet the protected needs of Moda. Moreover, the history of Moda developing its docks without consideration of future expansion, simply means the current proposal will likely lead to a future expansion and additional docks.

These and other factors were not considered by the ED in making its coastal consistency determination.

VI. Conclusion.

For the reasons described above, IOBCWA requests that the Commission grant this Motion and overturn the Executive Director's April 22, 2021 decision granting Moda's

401 Certification. In the alternative, IOBCWA requests the 401 Certification be remanded to the Executive Director with instructions for further review as to whether the project is consistent is consistent with WQS and the CMP.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By my signature below, I, Lauren Ice, certify that on May 14, 2021, a true and correct copy of the foregoing document was electronically served on the Chief Clerk in accordance with the Texas Administrative Code.

/s/ Lauren Ice
Lauren Ice

For the Chief Clerk:

Via E-Filing

Office of the Chief Clerk, MC 105

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