

SOAH DOCKET NO. 582-15-2214  
TCEQ DOCKET NO. 2015-0068-IWD

|                             |   |                         |
|-----------------------------|---|-------------------------|
| APPLICATION BY DOS          | § | BEFORE THE STATE OFFICE |
| REPUBLICAS COAL PARTNERSHIP | § |                         |
| FOR AMENDMENT AND RENEWAL   | § | OF                      |
| OF TPDES PERMIT NO.         | § |                         |
| WQ0003511000                | § | ADMINISTRATIVE HEARINGS |

**DOS REPUBLICAS COAL PARTNERSHIP'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGES' PROPOSAL FOR DECISION**

Respectfully Submitted,

Ali Abazari – State Bar No. 00796094  
Mallory Beck - State Bar No. 24073899

JACKSON WALKER L.L.P.

100 Congress Avenue, Suite 1100  
Austin, Texas 78701  
T: (512) 236 2000  
F: (512) 236-2002

ATTORNEYS FOR DOS REPUBLICAS COAL  
PARTNERSHIP

## TABLE OF CONTENTS

|      |   |    |
|------|---|----|
| I.   | Introduction.....                           | 1  |
| II.  | Exceptions to PFD .....                     | 2  |
|      | A. Aluminum Monitoring Requirement .....    | 2  |
|      | B. Boron Limitation.....                    | 11 |
|      | C. Other Requirement No. 10.....            | 14 |
| III. | Conclusion .....                            | 15 |
| IV.  | Recommended Changes to Proposed Order ..... | 15 |

**SOAH DOCKET NO. 582-15-2214  
TCEQ DOCKET NO. 2015-0068-IWD**

|                                    |          |                                |
|------------------------------------|----------|--------------------------------|
| <b>APPLICATION BY DOS</b>          | <b>§</b> | <b>BEFORE THE STATE OFFICE</b> |
| <b>REPUBLICAS COAL PARTNERSHIP</b> | <b>§</b> |                                |
| <b>FOR AMENDMENT AND RENEWAL</b>   | <b>§</b> | <b>OF</b>                      |
| <b>OF TPDES PERMIT NO.</b>         | <b>§</b> |                                |
| <b>WQ0003511000</b>                | <b>§</b> | <b>ADMINISTRATIVE HEARINGS</b> |

**DOS REPUBLICAS COAL PARTNERSHIP'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGES' PROPOSAL FOR DECISION**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Dos Republicas Coal Partnership ("DRCP"), pursuant to 30 Tex. Admin. Code § 80.257(a), hereby files its Exceptions to the Administrative Law Judges' ("ALJs") Proposal for Decision ("PFD") in the above-captioned matter, and in support states as follows:

**I. INTRODUCTION**

DRCP files these Exceptions to the PFD (1) to correct the underlying errors associated with the ALJs' recommendation of an aluminum monitoring requirement and a boron limit, or alternatively monitoring requirement, and (2) to clarify the recommended language relating to Other Requirement No. 10. The PFD contains several fundamental errors which permeate the reasoning behind the recommendation to include an aluminum monitoring requirement and a boron limit or monitoring requirement. In order to conclude that either are necessary, there must first be a finding that the concentrations of these pollutants in the discharge will exceed 70% and 85%, respectively, of the associated regulatory limit. But, this required piece of evidence is lacking. The PFD errs in concluding that (1) groundwater data is representative of effluent at the point of discharge from any outfall; and (2) groundwater data from a single well in an area that

will not be mined is representative of effluent discharged at each outfall. In addition, the PFD ignores the actual effluent data which was presented at the hearing on the merits demonstrating that neither an aluminum monitoring requirement nor a boron limit or monitoring requirement is necessary. Finally, the ALJs recommended revision to Other Requirement No. 10, to which DRCP does not object but merely seeks to clarify, eliminates any need for an aluminum monitoring requirement or boron limit or monitoring requirement by insuring that both aluminum and boron will be sampled four times from each outfall, averaged, and analyzed by the Executive Director to determine if a monitoring requirement or limit is appropriate.

## **II. EXCEPTIONS TO PFD**

### **A. Aluminum Monitoring Requirement**

In TPDES permits, TCEQ imposes a limit for a pollutant if the concentration of the pollutant in the effluent that is discharged (or proposed to be discharged) is greater than 85% of the regulatory limit. TCEQ imposes a monitoring requirement for a pollutant if the concentration of the pollutant in the discharge is between 70% and 85% of the regulatory limit.<sup>1</sup> The PFD concludes that the evidence does not support the imposition of an aluminum limit, but that it does support the addition of a monitoring requirement for all outfalls, except Outfall 21.<sup>2</sup> DRCP assumes that the ALJs intended that the recommended monitoring requirement for aluminum be applied only to the active mining outfalls and not to the post-mining, reclamation outfalls.<sup>3</sup> The imposition of a monitoring requirement for every active mining outfall at the mine

---

<sup>1</sup> See Exhibit DRCP-800 at 36:18-26 (Direct Testimony of James Miertschin, Ph.D., P.E.); *see also* Hearing on the Merits Tr. at 84:22-85:12 (Testimony of Lisa Olson Murphy, P.E.); Exhibit ED-1 at 15:10-23 (Direct Testimony of Kara Denney).

<sup>2</sup> PFD at 34; PFD at Proposed Finding of Fact No. 114; PFD at Proposed Ordering Provision 1.c.

<sup>3</sup> Even Protestants' expert, Dr. Lial Tischler, only recommended adding an aluminum limit to the active mining outfalls – Outfalls 001M, 003M, 004M, 006M-008M, 014M-020M, and 022M. *See* Exhibit EDF Group-1100 at

site, as recommended by the ALJs, requires a finding that the concentrations of pollutants in the discharge will be high (between 70%-85% of the regulatory limit). Because the recommendation is to monitor all active mining outfalls, it follows that the above finding has to be made with respect to discharges from all active mining outfalls. There is no evidence in the record in support of a finding that aluminum concentrations in the discharge are between or will be between 70%-85% of the regulatory limit at each and every active mining outfall.

**1. Groundwater data is not representative of the effluent at the point of discharge.**

The ALJs rely on the testimony of the EDF Group's expert witness, Dr. Lial Tischler, to recommend a monitoring requirement for all active mining outfalls. Dr. Tischler testified that the aluminum concentration in the discharges from the active mining outfalls may exceed the acute aquatic life protection water quality standards in Chapter 307. Dr. Tischler's opinion is based exclusively on groundwater data. He notes that "some monitoring wells"<sup>4</sup> contain high levels of aluminum. He uses data from one well, DRRC-4R, to illuminate his point. DRRC-4R is located on the far north side of the Railroad Commission of Texas (RCT) permit boundary of Eagle Pass Mine, and outside of the area where coal will be mined.<sup>5</sup>

Dr. Tischler's analysis was rather simple. Using data from this one groundwater well, Dr. Tischler first calculated the mean value for total aluminum. He then compared the calculated mean value to the water quality standard for dissolved aluminum. For DRRC-4R, he calculated a mean value of 14 mg/L for total aluminum. The acute criterion for dissolved aluminum in the water quality standards of Chapter 307 is 0.991 mg/L. By comparing the mean value of 14 mg/L

---

42:29 (Direct Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.). He did not recommend adding a limit to the post-mining, reclamation outfalls – Outfalls 001R, 003R, 004R, 006R-008R, and 014R-020R– or to Outfall 021. *Id.*

<sup>4</sup> Exhibit EDF Group-1100 at 42:29 (Direct Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.).

<sup>5</sup> Exhibit DRCP-711 (Geologic Map with Sedimentation Ponds); Hearing on the Merits Tr. at 516:12-13 (Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.).

of total aluminum to the water quality standard of 0.991 mg/L of dissolved aluminum, Dr. Tischler concluded that a limit or at least a monitoring requirement should be imposed for aluminum for every active mining outfall at the Eagle Pass Mine.<sup>6</sup> That is the extent of Dr. Tischler's "analysis."<sup>7</sup>

To accept the proposition that a monitoring requirement for aluminum should be imposed at the Eagle Pass Mine, based entirely on groundwater data, there must be a finding that groundwater data is representative of the quality of the discharge. After all, it is the discharge that is being regulated by the Texas Water Code.<sup>8</sup> If groundwater is but one component of the ultimate discharge, one needs to know the impact of the groundwater on the overall quality of the discharge. By way of example, if the effluent at the point of discharge is comprised of 1% Wastewater X, and 99% Wastewater Y, then it cannot be said that Wastewater X data is representative of the quality of the discharge.

The question before the Commissioners is whether there is any evidence in the record in support of a finding that groundwater quality at DRRC-4R, or any other well for that matter, is representative of the quality of the discharge at Eagle Pass Mine. There is no such evidence.

---

<sup>6</sup> Exhibit EDF Group-1100 at 42-43 (Direct Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.); Hearing on the Merits at 508:18-509:6 (Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.). The PFD recognizes that total aluminum and dissolve aluminum are not equivalent. See PFD at 33 ("The parties agree that the amount of total aluminum in a sample will be greater than the amount of dissolved aluminum.").

<sup>7</sup> Q (Abazari) Did you do the same calculation for DRRC-3R?

A. (Dr. Tischler) No, I did not.

Q. 5R?

A. No.

Q. 6R?

A. No.

Q. We can go down the list?

A. Yes. I mean, the groundwater is variable at the site.

Q. But you didn't do an assessment of all of the wells?

A. No. That's not actually my job."

Hearing on the Merits Tr. 520:18-521:9 (Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.).

<sup>8</sup> See Tex. Water Code §26.027(a): "The commission may issue permits and amendments to permits for the discharge of waste or pollutants,..."; see also Tex. Water Code §26.121.

The evidence in the record is clear that groundwater is hardly present and in isolated areas where it is present, it is encountered in insignificant amounts.<sup>9</sup> At the point of discharge, groundwater, if at all encountered, will be significantly diluted with stormwater.<sup>10</sup> In fact, the sedimentation ponds will be comprised mostly of stormwater. Dr. Tischler knows this:

- Q Okay. And you told me that these other ponds other than RP-3, they're mostly stormwater. Correct?
- A. That is correct.
- Q. What do you mean by "mostly stormwater."
- A. 90, 90 percent.<sup>11</sup>

It is unclear what data Dr. Tischler is relying upon to conclude that there is enough groundwater to fill some 10% capacity of any given sedimentation pond (especially in light of the fact that he did not review the testimony offered on groundwater quantity).<sup>12</sup> The evidence in the record establishes that, even with highly conservative assumptions, only about 2% of a sedimentation pond associated with the area expected to encounter groundwater will be filled.<sup>13</sup> Nevertheless, the point here is that the discharge will not have the characteristics of pure groundwater. Indeed, the ALJs recognize this fact. In the PFD they state as follows: "The ALJs conclude that it was appropriate to use groundwater in analyzing the proposed discharge, while

---

<sup>9</sup> Exhibit DRCP-700 at 12-25 (Direct Testimony of Eric Matzner); Exhibit DRCP-400 at 14:20-15:15 (Direct Testimony of Leland Starks); Exhibit DRCP-202 (Final Order RCT Permit); Hearing on the Merits Tr. at 201:25-202:3 (Testimony of Peter A. Nielsen: "There isn't any groundwater to dewater.").

<sup>10</sup> Exhibit DRCP-700 at 33:15-34:13 (Direct Testimony of Eric Matzner).

<sup>11</sup> Hearing on the Merits Tr. at 509:17-21 (Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.). While Dr. Tischler carved out RP-3, he carved RP-3 out from the 90 percent category and did not suggest that RP-3 would be comprised of mostly groundwater. In fact, Dr. Tischler had no dispute with the fact that there is a small amount of groundwater present and even acknowledged that with respect to the contents of RP-3. See Hearing on the Merits Tr. at 495:16-19 (Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.) (this discussion was in relation to Dr. Tischler's recommendation that RP-3 should be lined because it contains groundwater, but he recognized that "it was a small volume of groundwater.").

<sup>12</sup> Hearing on the Merits Tr. at 482:18-483:14 (Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.).

<sup>13</sup> Exhibit DRCP-700 at 21-25 (Direct Testimony of Eric Matzner); Hearing on the Merits Tr. at 482:18-483:14 (Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.). The evidence in the record does not support the contention that 10% of the capacity of any pond will be groundwater. The evidence in the record suggests that in the area where the most groundwater is expected to be encountered, provided highly conservative assumptions, only 2% of the pond would be comprised of groundwater. See DRCP Closing Argument at 29-31.

noting that the record is clear that DRCP does not anticipate discharging only groundwater, and that groundwater will be a relatively small percentage of the total discharge.”<sup>14</sup>

If the record is clear that DRCP does not anticipate discharging only groundwater, and the record is also clear that groundwater will be a relatively small percentage of the total discharge, then how can testimony regarding the high levels of aluminum in groundwater be taken to mean that the effluent at the point of discharge will have the exact same characteristics? It cannot, and the ALJs erred by equating the two.

While it may be appropriate to use groundwater data in “analyzing the quality of the proposed discharge,” as the ALJs suggest, Dr. Tischler performed no such analysis. That type of analysis would entail consideration of the groundwater quality and quantity in relation to the overall makeup of the discharge at each and every outfall at the Eagle Pass Mine. The PFD did not point to any such evidence because Dr. Tischler did not perform that analysis and provided no testimony in that regard. In fact, the only evidence in the record related to the groundwater quality and quantity in relation to a discharge was presented by Eric Matzner and was uncontested by Dr. Tischler.<sup>15</sup> Mr. Matzner’s modeling demonstrated that the small quantity of groundwater – even if it was of an extremely bad quality – would have a negligible impact on the quality of the discharge.<sup>16</sup> Dr. Tischler merely testified that the mean value of aluminum in groundwater at one location was above the water quality standards. Groundwater quality is one thing, the quality of the effluent at the point of discharge, however, is something altogether

---

<sup>14</sup> PFD at 32 (emphasis added).

<sup>15</sup> Exhibit DRCP-700 at 12-27 (Testimony of Eric Matzner); Hearing on the Merits Tr. at 482:18-483:14 (Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.).

<sup>16</sup> Exhibit DRCP-700 at 12-27 (Testimony of Eric Matzner).

different. In this case, the characteristic of the groundwater does not represent the characteristic of the wastewater at the point of discharge, a fact that is recognized by the ALJs.

The PFD's recommendation cannot stand without credible evidence tying the quality of the groundwater to the characteristic of the effluent at the point of discharge. The evidence in the record establishes the exact opposite – that there is no tie and that groundwater quality in no way represents the quality of the effluent at the point of discharge. The Commissioners must overturn the recommendation because there is no evidence in support of the notion that groundwater quality represents the quality of the discharge.

**2. There is no evidence in the record in support of a finding that monitoring for aluminum should occur at every mining outfall.**

The failure of the PFD to identify facts supporting its conclusion that the quality of the groundwater is equivalent to the quality of the discharge is not the only evidentiary gap in this recommendation. The PFD also concludes, again without supporting evidence, that the groundwater at one well location is representative of the discharge at each and every outfall.

The record reflects that the only “analysis” performed by Dr. Tischler related to one well, DRRC-4R, located on the far north side of the permit boundary and outside of an area dedicated to coal mining.<sup>17</sup> As noted by the ALJs, the Eagle Pass Mine boundary covers 6,346 acres.<sup>18</sup> Although Dr. Tischler states that he used data from DRRC-4R as an “example,” the record is clear that he stopped his “analysis” at that one “example.” Data from one well is hardly a representation of groundwater conditions at the entire mine, a fact the ALJs recognized.<sup>19</sup>

---

<sup>17</sup> Exhibit DRCP-711 (Geologic Map with Sedimentation Ponds); Hearing on the Merits Tr. at 516:12-13 (Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.).

<sup>18</sup> PFD at 14; Exhibit DRCP-300 at 11, 13 (Direct Testimony of Peter Nielsen).

<sup>19</sup> PFD at 33 (The ALJs have kept [the fact that Dr. Tischler used only one well in his “analysis”] in mind when considering Dr. Tischler's testimony, but also think it would be unrepresentative to use, say, the best quality water.”)

Indeed, Dr. Tischler was asked at the hearing whether he performed an analysis of the overall groundwater data at the mine, and he responded, in no uncertain terms, that he did not.<sup>20</sup> Dr. Tischler does not purport to opine about groundwater quality conditions at the mine site. Rather, his “analysis” is, as he put it, a “snapshot at that one location.”<sup>21</sup> A review of the data reveals that there are numerous areas of the mine where aluminum concentrations are far below the surface water quality standards.<sup>22</sup> Some of these wells are, unlike DRRC-4R, located proximal to mine blocks. At the hearing, for example, Dr. Tischler was asked to perform the same calculation for DRRC-5. Based on Dr. Tischler’s calculation at the hearing, the median aluminum concentration for that well is 0.19 mg/L, which is well below the water quality standards of 0.991 mg/L.<sup>23</sup>

The question, therefore, is this: does data that is a snapshot at one location of a mine trigger a monitoring requirement for all outfalls throughout the mine? The answer is “no.” In order for there to be a requirement that discharges from all outfalls must be monitored for a pollutant, there must be evidence that the pollutant will be present in discharges from all of the outfalls. Assuming that the groundwater data can somehow be shown to be representative of a discharge, which in this case it cannot, then, at best, that snapshot triggers a monitoring requirement for the outfall proximal to the data point. It does not, however, trigger a monitoring requirement for every outfall. There is no evidence in the record that suggests that high aluminum concentrations in any one well is representative of groundwater conditions at the

---

(emphasis added). If it would be unrepresentative to use the best water quality data, then it would also be unrepresentative to use the worst.

<sup>20</sup> Hearing on the Merits Tr. at 525:9-12 (Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.).

<sup>21</sup> Hearing on the Merits Tr. 521:22-522:3 (Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.).

<sup>22</sup> Exhibit DRCP-710, Table 2 (Groundwater and Surface Water Sample Results).

<sup>23</sup> Hearing on the Merits Tr. at 524:14 (Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.).

entire mine. Accordingly, there is nothing in the record that supports a finding for the monitoring of aluminum at all outfalls.

**3. Actual data obtained from Outfall 003 does not trigger a monitoring requirement for Aluminum.**

As noted, the PFD erroneously concludes that groundwater data from one well at one location is representative of the quality of the discharge at each outfall. In addition to lacking supporting evidence in the record, this conclusion also conflicts with the only data available for an actual discharge from the Eagle Pass Mine. Since actual discharge data is unquestionably more representative of an actual discharge than pure groundwater data, the fact that the actual discharge data does not trigger a monitoring requirement outweighs any “concerns” about groundwater.

After submitting its TPDES permit application, DRCP obtained actual discharge data from Outfall 003M.<sup>24</sup> This data was submitted to TCEQ in accordance with requirements in DRCP’s current TPDES Permit (TPDES Permit No. WQ0003511000) issued on November 7, 2011.<sup>25</sup> This data was also introduced in the evidentiary record of this proceeding.<sup>26</sup> Aluminum was analyzed for discharges that occurred on May 27, 2015, and June 18, 2015.<sup>27</sup> The analytical results for aluminum were as follows for the respective discharge dates: 0.365 mg/L and 0.656 mg/L. In determining whether a monitoring requirement is needed, the Executive Director determines whether the average of the analytical results (usually 4 analytical results) for a

---

<sup>24</sup> Exhibit DRCP-400 at 8:3 (“...discharges from Sedimentation Pond 2 (SP-2), Outfall 003, occurred on May 27, May 29, 2015, and June 18, 2015. These discharges occurred after the TPDES permit application that is the subject of this proceeding was submitted to TCEQ”) (Direct Testimony of Leland Starks).

<sup>25</sup> Exhibit DRCP-106 (Certified copy of November 7, 2011, permit renewal).

<sup>26</sup> Exhibit DRCP-403 (San Antonio Testing Laboratory results from May 27, 2015); Exhibit DRCP-404 (San Antonio Testing Laboratory results from May 29, 2015); Exhibit DRCP-405 ((AnalySys Laboratories results from June 18, 2015).

<sup>27</sup> Exhibit DRCP-403 (San Antonio Testing Laboratory results from May 27, 2015); Exhibit DRCP-405 (AnalySys Laboratories results from June 18, 2015).

pollutant is between 70% and 85% of the limit.<sup>28</sup> The average of these sample results is below the 70% threshold, and so, in accordance with TCEQ's standard practices, a monitoring requirement would not be imposed. Indeed, the Executive Director has not imposed a monitoring requirement.

Protestants assert that this data is not representative of discharges because groundwater was not present in the effluent. Protestants miss the point, however. First, this actual data is representative of actual conditions precisely because there is no groundwater in the effluent. Second, the lack of presence of groundwater in a discharge, such as discharges from Outfall 003, invalidates the conclusion that groundwater data is representative of discharges throughout the site.

Since this actual discharge data does not trigger a monitoring requirement, there is no basis for the PFD to recommend such a requirement, particularly on Outfall 003M. And, even for all of the other active mining outfalls, this data is more representative of the quality of the discharge than pure groundwater from one well. Therefore, it was improper for the PFD to conclude that any "concerns" about groundwater quality outweighed the evidence of this actual discharge data.

**4. Other Requirement No. 10, as modified by the PFD renders the recommendation to impose an Aluminum monitoring requirement unnecessary and duplicative.**

The PFD recommends that Other Requirement No. 10 of the Draft Permit be amended to require DRCP to obtain analytical results for a suite of constituents, including aluminum, for the

---

<sup>28</sup> See Exhibit DRCP-800 at 36:18-26 (Direct Testimony of James Miertschin, Ph.D., P.E.); see also Hearing on the Merits Tr. at 84:22-85:12 (Testimony of Lisa Olson Murphy, P.E.); Exhibit ED-1 at 15:10-23 (Direct Testimony of Kara Denney).

first four discharges from each outfall.<sup>29</sup> The purpose of Other Requirement No. 10 is for the Executive Director to determine whether a monitoring requirement or limit is required for the analyzed pollutants whenever a new outfall is used. Accordingly, DRCP will be obligated to obtain samples and analyze for aluminum at all outfalls for the first four discharges. Based on the submitted data, the Executive Director can then determine whether to impose a monitoring requirement or limitation in the TPDES permit. If the average of the aluminum levels are high then an aluminum monitoring requirement or limit would then be imposed in DRCP's TPDES permit. If, however, the average results do not exceed the threshold, then no requirement would be imposed in the permit. Other Requirement No. 10, therefore, already addresses any aluminum concerns that may exist, which the ALJs recognized in the PFD.<sup>30</sup>

## **B. Boron Limitation**

The PFD recommends adding a boron limit of 2.0 mg/L for all outfalls, except for Outfall 021, or "at the bare minimum," a monitoring requirement for boron.<sup>31</sup> As justification for this recommendation, the ALJs point to groundwater data and state that several of the wells have consistently had boron concentrations above 2.0 mg/L.<sup>32</sup> As further justification, the ALJs point to the fact that the RCT permit contains language that prohibits the discharge of boron in excess of 2.0 mg/L.

---

<sup>29</sup> PFD at 37; PFD at Proposed Finding of Fact 115; PFD at Proposed Ordering Provision 1.d.

<sup>30</sup> PFD at 34 ("If the Commissioners decide not to adopt a monitoring requirement, the ALJs still recommend a revision to Other Requirement No. 10, as discussed below.").

<sup>31</sup> PFD at 36; Proposed FOF 109; Proposed Ordering Provision 1.a. Again, DRCP assumes that the ALJs intended to recommend a boron limit, or alternatively a monitoring requirement, on the active mining outfalls – Outfalls 001M, 003M, 004M, 006M-008M, 014M-020M and 022M – and not on the post-mining, reclamation outfalls – Outfalls 001R, 003R, 004R, 006R-008R, and 014R-020R. Once again, Protestants' expert, Dr. Tischler, only raised concern with the active mining outfalls. *See* Exhibit EDF Group-1100 at 46:25-31 (Direct Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.).

<sup>32</sup> PFD at 35.

The arguments discussed in Section II.A. equally apply here. To summarize, in order to impose a limit for boron there must be a finding that boron concentrations in the discharge are, or will be, in excess of 85% of the regulatory limit. To impose a monitoring requirement there must be a finding that boron concentrations in the discharge are, or will be, between 70%-85% of the regulatory limit. The Texas Water Quality Standards do not establish an acute or chronic criteria for boron.<sup>33</sup> DRCP's expert witness, Dr. James Miertschin, determined a toxicity level for boron for both chronic and acute criterion as follows: acute criterion 21.18 mg/L, and chronic criterion 3.53 mg/L.<sup>34</sup> As the ALJs state, EPA recommends that boron levels in water used for irrigation not exceed 2.0 mg/L.

The statement that boron levels are above 2.0 mg/L in some groundwater does not equate to boron levels being high in the effluent at the point of discharge. The evidence in the record is clear that groundwater is present in certain isolated areas, and only in insignificant quantities.<sup>35</sup> The record further establishes that at the point of discharge the effluent will be comprised of mostly stormwater, not groundwater. Indeed, stormwater will comprise some 98% to 100% of a given sedimentation pond, and therefore, the effluent.<sup>36</sup> The ALJs recommendation cannot stand without evidence linking the quality of the groundwater to the characteristic of the effluent at the point of discharge. Evidence in support of that proposition does not exist in the record. The Commissioners must overturn the ALJs recommendation because groundwater quality does not represent the quality of the discharge. To be sure, there is no evidence in the record, and the

---

<sup>33</sup> See 30 TAC §307.6; Exhibit DRCP-800 at 41:19 (Direct Testimony of James Miertschin, Ph.D., P.E.).

<sup>34</sup> Exhibit DRCP-800 at 42:2-7 (Direct Testimony of James Miertschin, Ph.D., P.E.). Dr. Miertschin also developed a human health criterion, but that standard does not apply to this case, as there are no human health receptors for the receiving waters.

<sup>35</sup> Exhibit DRCP-700 at 12-25 (Direct Testimony of Eric Matzner); Exhibit DRCP-400 at 14:20-15:15 (Direct Testimony of Leland Starks); Exhibit DRCP-202 (Final Order RCT Permit); Hearing on the Merits Tr. at 201:25-202:3 (Testimony of Peter A. Nielsen: "There isn't any groundwater to dewater.").

<sup>36</sup> Exhibit DRCP-700 at 33:15-34:13 (Direct Testimony of Eric Matzner).

ALJs do not point to any such evidence, in support of a finding that the effluent at the point of discharge for every outfall at the Eagle Pass Mine exceeds 85% of the regulatory limit for boron – a finding that is necessary to support the ALJs’ recommendation to include a boron limitation for every outfall at the mine.

Moreover, the record contains analytical data for boron from an actual discharge at the Eagle Pass Mine. On June 18, 2015, a discharge occurred at Outfall 003 and analytical results were obtained from a suite of pollutants, including boron.<sup>37</sup> The boron level from this outfall was 0.174 mg/L, which is less than 9% of the 2.0 mg/L limitation proposed by the ALJs. If DRCP were to be treated like every other TPDES permittee, neither a monitoring requirement nor a limitation would be imposed for boron.

Additionally, pursuant to the ALJs’ revision to Other Requirement No. 10, DRCP will be obligated to obtain samples and analyze for boron for the first four discharges from each outfall. Based on the submitted data, the Executive Director can then determine whether to impose a monitoring requirement or limitation in the TPDES permit. Just like with aluminum, Other Requirement No. 10, therefore, addresses any boron concerns that may exist.

Finally, the ALJs point to consistency with the RCT permit as a factor in their decision to impose a boron limit in the TPDES permit. The RCT permit was issued under the authority of the Texas Surface Coal Mining and Reclamation Act.<sup>38</sup> TCEQ, through the TPDES program has federal regulatory authority over discharges of pollutants to waters of the state. The TPDES program generally covers all discharges, with some exceptions that are not relevant here. The discharge of wastewaters that is the subject of this proceeding is under the jurisdiction of TCEQ,

---

<sup>37</sup> Exhibit DRCP-400 at 8:1-5 (Direct Testimony of Leland Starks).

<sup>38</sup> Tex. Nat. Res. Code Ch. 134.

not RCT. TCEQ's reliance on RCT with respect to a TPDES permitting matter would be misplaced.

**C. Other Requirement No. 10**

DRCP believes that the Draft Permit's Other Requirement No. 10 is appropriate and consistent with other similar permits, as well as the Executive Director's standard procedures and protocols. DRCP, however, does not object to the ALJs recommendation that four samples, rather than one sample, be obtained from each outfall, particularly because it believes that the modification of this requirement eliminates any conceivable need to impose an aluminum monitoring requirement or a boron limit. Under the revised Other Requirement No. 10, upon receiving the four sample results, the Executive Director can then determine, based on the average of those results, whether a monitoring requirement or permit limitation is necessary. In an effort to provide clarification, DRCP recommends that the language be modified to read as follows:

Wastewater discharged via Outfalls 001 M/R, 003 M/R, 004 M/R, 006 M/R-008 M/R, 014 M/R – 020 M/R, and 022 M must be sampled and analyzed as directed below for those parameters listed in Tables 1, 2, and 3 of Attachment A of this permit. Wastewater discharged via Outfall 021 must be sampled and analyzed as directed below for those parameters listed in Table 1 of Attachment A of this permit. The relevant tables shall be completed with the analytical results for each outfall, when discharge occurs, and sent to the TCEQ Industrial Permits Team (MC-148), within 90 days following the completion of the fourth discharge sampling event for any of the applicable outfalls. Based on a technical review of the submitted analytical results, an amendment may be initiated by TCEQ staff to include additional effluent limitations, monitoring requirements, or both.

This language would also be consistent with DRCP's current TPDES permit.<sup>39</sup>

---

<sup>39</sup> Exhibit DRCP 106 at 15, Other Requirement No. 12 (Certified copy of November 7, 2011, permit renewal).

### **III. CONCLUSION**

As demonstrated herein, the PFD's recommended revision to Other Requirement No. 10 actually cures any concerns the ALJs had relating to aluminum and boron. And, because the facts in the record and found by the PFD do not support the recommendations to add an aluminum monitoring requirement or a boron limit or monitoring requirement, those recommendations should be overruled. There is no evidence the groundwater, which may or may not be high in these pollutants, is representative of the discharges from the outfalls. Further, there is no evidence that the groundwater data from a single well in an area that will not even be mined is representative of the limited amount of groundwater, if any, that may be discharged (after being heavily diluted by stormwater) through each of the outfalls. The actual discharge data demonstrates that the effluent does not require a monitoring requirement or limit for either aluminum or boron. Therefore, based on the evidence presented at the hearing on the merits, and the facts found in the PFD, there is no support for the recommendation to add an aluminum monitoring requirement or a boron limit or monitoring requirement to the Draft Permit. Rather, the sampling requirements in Other Requirement No. 10, as amended by the PFD and clarified herein, will insure that, if the effluent from the Eagle Pass Mine requires it, the Executive Director will add the appropriate monitoring requirements or effluent limits.

### **IV. RECOMMENDED CHANGES TO PROPOSED ORDER**

For the reasons set forth above, DRCP recommends that the Commission modify the ALJs' Proposed Order as follows:

**Findings of Fact:**

Delete Proposed Finding of Fact No. 105 and replace with:

“The discharge samples provided by DRCP do not indicate that any monitoring requirement or effluent limitation should be added to the Draft Permit.”

Delete Proposed Findings of Fact Nos. 109, 111, 112, and 114.

Add a Proposed Finding of Fact that states as follows:

“Neither a monitoring requirement nor an effluent limitation for boron or for aluminum should be added to the Draft Permit.”

**Conclusions of Law:**

Revise Proposed Conclusion of Law No. 15 by adding the terms “boron, aluminum, or” to read in its entirety as follows:

“The Commission is not required to include in this TPDES permit a monitoring requirement or effluent limitation associated with boron, aluminum, or any commercial dust suppressants or flocculants that may be used by DRCP, to include a monitoring requirement or a reporting requirement on iron, lead, or manganese, or to include chronic toxicity limitations.”

**Ordering Paragraphs:**

Delete Proposed Ordering Paragraphs 1.a., 1.b., and 1. c.

Revise Proposed Ordering Paragraph 1.d. to read in its entirety as follows:

“Wastewater discharged via Outfalls 001 M/R, 003 M/R, 004 M/R, 006 M/R-008 M/R, 014 M/R – 020 M/R, and 022 M must be sampled and analyzed as directed below for those parameters listed in Tables 1, 2, and 3 of Attachment A of this permit. Wastewater discharged via Outfall 021 must be sampled and analyzed as directed below for those parameters listed in Table 1 of Attachment A of this permit. The relevant tables shall be completed with the analytical results for each outfall, when discharge occurs, and sent to the TCEQ Industrial Permits Team (MC-148), within 90 days following the completion of the fourth discharge sampling event for any of the applicable outfalls. Based

on a technical review of the submitted analytical results, an amendment may be initiated by TCEQ staff to include additional effluent limitations, monitoring requirements, or both.

Table 1: Analysis is required for all pollutants. Wastewater must be sampled and analyzed for those parameters listed in Table 1 for a minimum of four sampling events.

Table 2: Analysis is required for those pollutants listed in Table 2 that are used at the facility that could in any way contribute to contamination in the Outfalls 001M/R, 003 M/R, 004 M/R, 006M/R–008M/R, 014M/R–020M/R, and 022M discharge. Sampling and analysis must be conducted for a minimum of four sampling events.

Table 3: For all pollutants listed, the permittee shall indicate whether each pollutant is believed to be present or absent in the discharge. Sampling and analysis must be conducted for each pollutant believed present for a minimum of four sampling events.

The permittee shall report the flow at Outfalls 001M/R, 003 M/R, 004 M/R, 006M/R–008M/R, 014M/R–020M/R, 021, and 022M in million gallons per day (MGD) in the attachment. The permittee shall indicate on each table whether the samples are composite (C) or grab (G) by checking the appropriate box.”

In addition, DRCP recommends that the Commission modify the ALJs’ Proposed Order to correct minor typographical errors in the findings of fact as follows:

Revise Proposed Finding of Fact No. 24 by adding the words “and Spanish” to show that notice regarding the public meeting was published on January 15, 2015, in English and Spanish in the *Eagle Pass Business Journal* as demonstrated by Jurisdictional Exhibit “F” admitted into the record at the Preliminary Hearing.

Revise Proposed Finding of Fact No. 74 by changing the referenced limitation for settleable solids from “0.5 mg/L” to “0.5 ml/L” as reflected in the Draft Permit, attached as KLD-8 to Exhibit ED-1.

Revise Proposed Finding of Fact No. 76 by changing the reference to the pH limit from “nor greater than 90 standard units” to “nor greater than 9.0 standard units” as reflected in the Draft Permit, attached as KLD-8 to Exhibit ED-1.

Respectfully Submitted,



---

Ali Abazari – State Bar No. 00796094  
Mallory Beck - State Bar No. 24073899

JACKSON WALKER L.L.P.

100 Congress Avenue, Suite 1100  
Austin, Texas 78701  
T: (512) 236 2000  
F: (512) 236-2002

ATTORNEYS FOR DOS REPUBLICAS COAL  
PARTNERSHIP

**CERTIFICATE OF SERVICE**

I hereby certify that on the 25th day of April 2016, a true and correct copy of the foregoing document was served on the individuals listed below via first class mail and/or email:

Adam Friedman  
McElroy, Sullivan, Miller, Weber & Olmstead,  
L.L.P.  
1201 Spyglass Drive, Suite 200  
Austin, Texas 78746  
(512) 327-8111 (PH)  
(512) 327-6566 (FAX)  
afriedman@msmtx.com  
EDF GROUP

David O. Frederick  
Frederick, Perales, Allmon & Rockwell  
707 Rio Grande, Suite 200  
Austin, Texas 78701  
(512) 469-6000 (PH)  
(512) 482-9346 (FAX)  
dof@lf-lawfirm.com  
MAVERICK COUNTY

Stephanie Skogen (MC-173)  
Staff Attorney  
Environmental Law Division  
Texas Commission on Environmental Quality  
P. O. Box 13087  
Austin, Texas 78711-3087  
(512) 239-0575 (PH)  
(512) 239-0606 (FAX)  
Stefanie.skogen@tceq.texas.gov  
TCEQ EXECUTIVE DIRECTOR

Eli Martinez (MC-103)  
Public Interest Counsel  
Texas Commission on Environmental Quality  
P. O. Box 13087  
Austin, Texas 78711-3087  
(512) 239-3974 (PH)  
(512) 239-6377 (FAX)  
eli.martinez@tceq.texas.gov  
TCEQ PUBLIC INTEREST COUNSEL

Jose Casares  
542 Lehmann Ranch Road  
Eagle Pass, Texas 78852  
(830) 773-5700 (PH)  
chacho34@gmail.com  
JOSE CASARES

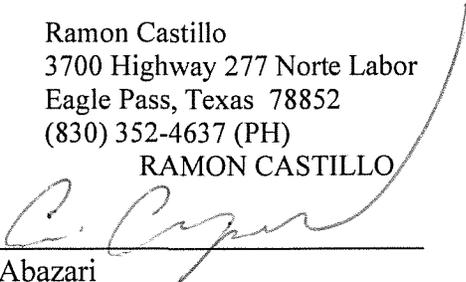
Francisco Garcia  
311 Gennter Road  
Eagle Pass, Texas 78852  
(830) 352-5325 (PH)  
franciscog47@gmail.com  
FRANCISCO GARCIA

Roberto & Siboney Salinas  
381 Gennter Drive  
Eagle Pass, Texas 78852  
(830) 513-7612 (PH)  
lilthorn30@yahoo.com  
ROBERTO & SIBONEY SALINAS

Ricardo Ruiz  
1212 Glen Haven  
Eagle Pass, Texas 78852  
(830) 773-1743 (PH)  
ricardo-ruiz@sbcglobal.net  
RICARDO RUIZ

Luis F. Martinez  
P. O. Box 3511  
Eagle Pass, Texas 78853  
(830) 773-6508 (PH)  
LUIS F. MARTINEZ

Ramon Castillo  
3700 Highway 277 Norte Labor  
Eagle Pass, Texas 78852  
(830) 352-4637 (PH)  
RAMON CASTILLO

  
\_\_\_\_\_  
Ali Abazari