

**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  
REPLY TO EXCEPTIONS**

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

NOW COMES, Applicant Dos Republicas Coal Partnership (“DRCP”) and submits this Reply to Exceptions in reply to the Exceptions to the Proposal for Decision (“PFD”) of EDF Group, Maverick County, OPIC, and the Executive Director, and in support thereof, respectfully shows as follows:

**I. INTRODUCTION**

EDF Group files exceptions on only one issue. It argues that the Executive Director did not perform an adequate antidegradation review, and asks the Commission to remand the case back to the Executive Director so that an antidegradation review, in the form prescribed by the EDF Group, can be performed. The record reveals, and the ALJs found that an antidegradation review in accordance with TCEQ rules, policies, standards and procedures was performed. The result of the review, it turns out, is not to the liking of the EDF Group.

Maverick County and OPIC argue that Camino Real Fuels (“CRF”) should have been a co-permittee. The ALJs properly defined the roles and responsibilities of CRF and DRCP, properly applied the law, and concluded that DRCP is both the owner and operator, and so CRF

need not be a co-permittee. Maverick County and OPIC further assert that the ALJs erred by not reassigning aquatic life uses to certain unnamed tributaries, and that biomonitoring requirements should be imposed. With the exception of Maverick County's own expert, every other expert that opined on these issues testified that the aquatic life use was properly assigned by the Executive Director, and that biomonitoring would not be required. The ALJs properly weighed all the evidence in the record and reached the conclusion that the unnamed tributaries to Hediondo Creek and Elm Creek have aquatic life uses of no higher than "limited"; and that neither chronic toxicity effluent limits nor biomonitoring is required. In this Reply, DRCP addresses each of these issues and incorporates its more detailed arguments from its Closing Argument and Reply Brief.

## **II. REPLY TO EDF GROUP'S EXCEPTIONS TO THE PROPOSAL FOR DECISION**

In its Exceptions to the PFD, EDF Group argues that the ALJs erred in finding that the TCEQ's antidegradation review complied with Title 30, Chapter 307 of the Texas Administrative Code ("Chapter 307"). EDF Group contends that DRCP's Application did not adequately describe the potential effluent, thus inhibiting TCEQ's ability to perform a proper antidegradation review. EDF Group further states that a proper Tier 2 antidegradation review would entail comparison of stream values to groundwater data, because it contends that the effluent will have the same characteristics of pure groundwater. Finally, they claim that the proposed monitoring requirement in the PFD for aluminum "may" be insufficient and the proposed effluent limit of 2.0 mg/L for boron "may" be insufficient.

As an initial matter, EDF Group states that DRCP's application was incomplete. Given that that Application was incomplete, they argue, the Executive Director could not have

performed a proper antidegradation review. The ALJs, however, flatly rejected EDF Group's underlying premise that the Application was incomplete.

The ALJs concluded, after a detailed discussion of the evidence, that the Application complies with 30 Texas Administrative Code § 305.45(a)(8)(B)(ii)<sup>1</sup> and stated as follows:

In the application, DRCP provided sufficient information about the properties and characteristics of its wastewater in sufficient detail to allow evaluation of the water and environmental quality consideration involved. As the instructions for Worksheet 2.0 direct when there has been no previous discharge, DRCP properly provided sufficient information from a variety of sources to describe the properties and characteristics of the wastewater. That fact that the information was not tabulated in Worksheet 2.0 was immaterial.<sup>2</sup>

As noted by the ALJs, DRCP's application explained that the Eagle Pass Mine is a sub-bituminous coal mining operation regulated under 40 C.F.R. Part 434.<sup>3</sup> By doing so, DRCP's application tapped into the knowledge and experience of the TCEQ in having issued 18 TPDES permits for mining facilities<sup>4</sup> and the extensive research performed by the EPA in developing the limits found in Part 434.<sup>5</sup> DRCP's application also explained that the wastewaters, consisting of

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<sup>1</sup> PFD at 16-20.

<sup>2</sup> *Id.* at 20.

<sup>3</sup> Exhibit DRCP-107 at 31, 43 (DRCP's Application).

<sup>4</sup> Exhibit ED-1 at 12 (Direct Testimony of Kara Denney); *see also* Hearing on the Merits Tr. at 647 (Testimony of Kara Denney).

<sup>5</sup> The effluent limitations guidelines were developed by EPA as part of the preparation of the Development Document for coal mining. Exhibit DRCP-806 (Development Document for Effluent Limitation Guidelines and Standards for the Coal Mining Point Source Category). For an explanation of the process for the development of the regulations as well as the development document *see* Exhibit DRCP-800 at 22:9 – 23:17 (Direct Testimony of Dr. James Miertschin, Ph.D., P.E.); Exhibit EDF -1100 at 9:13 – 10:13 (Direct Testimony of Dr. Lial Tischler, Ph.D., P.E., B.C.E.E.). In formulating the Development Document, EPA first characterized the toxic compounds in the coal mining industry. In the development of effluent limitation guidelines, EPA selected numerous mines throughout the country to perform sampling, both screening and verification sampling. Exhibit DRCP-800 at 22:18 – 23:17 (Direct Testimony of Dr. James Miertschin, Ph.D., P.E.). The data collection is authorized under Clean Water Act § 308. *See* Exhibit EDF Group-1100 at 9:22 – 23 (Direct Testimony of Dr. Lial Tischler, Ph.D., P.E., B.C.E.E.). EPA sampled for 129 priority pollutants from discharges from these mines, as well for TSS, pH, iron, and manganese. Exhibit DRCP-800 at 22:18 – 23:17 (Direct Testimony of Dr. James Miertschin, Ph.D., P.E.). The collected data was analyzed by EPA, and used in the formulation of the Development Document, which met the standards of Clean Water Act § 304(b). Exhibit EDF Group-1100 at 9:24-26 (Direct Testimony of Dr. Lial Tischler, Ph.D., P.E., B.C.E.E.).

stormwater and potentially groundwater that may seep into mine pits and commingle with stormwater, would be treated in sedimentation ponds allowing solids to settle.<sup>6</sup> Finally, DRCP's application included information from its most recent groundwater samples and explained that the sedimentation ponds met regulations issued by the Railroad Commission of Texas related to capacity and that the volume of the wastewater would be dependent on rainfall.<sup>7</sup> Therefore, as the ALJs correctly concluded, DRCP submitted sufficient information regarding the properties and characteristics of the wastewater to meet the requirements of § 305.45(a)(8)(B)(ii) and to allow the TCEQ to perform the necessary evaluations to prepare and issue the Draft Permit.

Because EDF Group's argument that the application was incomplete fails, its next argument – that the TCEQ could not perform an antidegradation review and therefore only performed an insufficient, “preliminary” review – is untenable. Moreover, it is a misstatement of the TCEQ Staff's review.

Mr. Jeff Paull, the Executive Director's witness, performed an antidegradation review of DRCP's (complete) application in accordance with TCEQ policy, guidance, and procedures.<sup>8</sup> The evidence proves, as the ALJ's concluded, that the antidegradation review performed by TCEQ Staff was a complete review performed in compliance with TCEQ policies, guidance, and procedures.<sup>9</sup> Based on his review, Mr. Paull concluded that the discharges in compliance with the Draft Permit, as written, would not violate either the Tier 1 or Tier 2 antidegradation policies.<sup>10</sup> Dr. Miertschin supported Mr. Paull's conclusion by opining that discharges in

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<sup>6</sup> Exhibit DRCP-107 at 31, 33, 39-40, 44, 60, 147, 155-190 (DRCP's Application); Exhibit DRCP-109 at 5 (TCEQ's March 7, 2014 Request for Information and DRCP's March 17, 2014 Response); Exhibit DRCP-110 at 3-6, 12-14 (DRCP's June 13, 2014 Supplement).

<sup>7</sup> Exhibit DRCP-107 at 152-211 (DRCP's Application); Exhibit DRCP-108 at 3, 113 (TCEQ's October 4, 2013 Request for Information and DRCP's November 4, 2013 Response).

<sup>8</sup> Exhibit ED-2 at 7-8 (Direct Testimony of Jeff Paull).

<sup>9</sup> PFD at 40-41.

<sup>10</sup> Exhibit ED-2 at 14:8-19 (Direct Testimony of Jeff Paull).

compliance with the Draft Permit, as written, would not violate TCEQ's antidegradation policy.<sup>11</sup>

In the antidegradation review memorandum, Mr. Paull stated as follows:

In accordance with §307.5 and TCEQ implementation procedures (June 2010) for the Texas Surface Water Quality Standards, an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action. Numerical and narrative criteria to protect existing uses will be maintained. A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in Elm Creek, which has been identified as having high aquatic life use. Existing uses will be maintained and protected. The preliminary determination can be reexamined and may be modified if new information is received.<sup>12</sup>

EDF Group focuses on the phrase “preliminarily determined” to argue that a preliminarily determination is equivalent to no determination.<sup>13</sup> That argument has no merit. A determination has been made by the Executive Director. The determination is preliminary in the sense that it “can be reexamined and may be modified if new information is received.” The statement is not an indication that something less than a proper review was performed. That statement is customary, and serves as a reminder to the applicant and the public that antidegradation reviews are ongoing and do not cease once a permit application is submitted.

In an effort to bolster their position that Mr. Paull's Tier 2 review was insufficient, EDF Group next contends that their expert, Dr. Lial Tischler, performed a Tier 2 review and that his review demonstrated violations of water quality standards. Dr. Tischler, however, did not conduct an antidegradation review. He did not make a determination of the impact of the

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<sup>11</sup> Exhibit DRCP-800 at 54:12-15 (Direct Testimony of James Miertschin, Ph.D., P.E.); *see also* Hearing on the Merits Tr. at 375:24-376:1 (Testimony of James Miertschin, Ph.D., P.E.).

<sup>12</sup> Exhibit ED-1, KLD-2 at 3 (TCEQ Interoffice Memorandum from Jeff Paull).

<sup>13</sup> EDF Group's Exceptions to PFD at 6.

effluent on receiving streams.<sup>14</sup> Dr. Tischler reviewed groundwater data. Dr. Tischler's "example," which merely compared groundwater samples from one well with water samples from Elm Creek, suffered from many flaws.<sup>15</sup> As explained in detail in DRCP's Closing Brief, Reply Brief, and Exceptions to the PFD, the groundwater data relied upon by Dr. Tischler for his "example" is not indicative of the discharge.<sup>16</sup> As explained by DRCP's expert witness, Dr. Peggy Glass, the example provided by Dr. Tischler "does not provide any evidence regarding whether the requirements are met or not. It's not in a form that you can use it to determine whether there would be degradation."<sup>17</sup> Dr. Glass summed up her reasons for this opinion:

[I]t's based on groundwater, and the discharges will be a combination of stormwater and groundwater, which means the concentrations discharged will be different . . . There will be dilution when it hits Elm Creek. That's not taken into consideration. And the conversion from dissolved [aluminum] and total [aluminum] is not taken into consideration. So you can't draw conclusions about whether there will be degradation from his table.<sup>18</sup>

The overwhelming evidence in the record suggests that a discharge from Eagle Pass Mine will not result in any degradation to receiving streams and that the Executive Director's review was consistent with Commission standards, policies and regulations. EDF Group's arguments in this regard were reviewed by the ALJs and were properly rejected.

Finally, EDF Group argues that, based on the results of Dr. Tischler's "example," the proposed limit of 2.0 mg/L for boron recommended in the PFD is insufficient. This appears to

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<sup>14</sup> In his own words, he created an "example of a preliminary antidegradation analysis." Exhibit EDF-1100 at 49:28 (Direct Testimony of Dr. Lial Tischler, Ph.D., P.E., B.C.E.E.) (emphasis added).

<sup>15</sup> EDF Group's own Exceptions recognize one of those flaws by noting that because Dr. Tischler did not have data from other coal mines, he used what he considered to be the next best thing – DRCP's groundwater data. DRCP disputes that the groundwater data is representative of discharges, but, as recognized by EDF Group, the ED did not need groundwater data because it does have data from other coal mines from its reviews of 18 other TPDES permits.

<sup>16</sup> DRCP's Closing Brief at 22-35; DRCP's Reply Brief at 11-24; DRCP's Exceptions to the Proposal for Decision at 3-7; Hearing on the Merits Tr. at 853:4-20, 864:3-18 (Testimony of Peggy Glass, Ph.D.).

<sup>17</sup> Hearing on the Merits Tr. at 853:4-7 (Testimony of Peggy Glass, Ph.D.).

<sup>18</sup> *Id.* at 853:10-20. While DRCP continues to dispute that it is appropriate to compare dissolved and total aluminum, even setting aside that dispute, Dr. Tischler's example remains useless in analyzing whether water quality will be degraded because it fails to consider actual effluent quality and dilution when the water enters Elm Creek.

be a new argument conjured up by EDF Group, as nothing in the record suggests that a boron limit of less than 2.0 mg/L is more appropriate in this case. Indeed, Dr. Tischler provided no testimony regarding the appropriateness of any boron levels. This argument is raised for the first time in this briefing, and is without any evidentiary support.

The record reveals, and the ALJs properly found, that an antidegradation review in accordance with TCEQ rules, policies, standards and procedures was performed.

### **III. REPLY TO EXCEPTIONS OF MAVERICK COUNTY AND OPIC TO THE PROPOSAL FOR DECISION**

Maverick County and OPIC file exceptions to the PFD's conclusion that DRCP is the proper permittee. Maverick County and OPIC also insist that the ALJs erred in concluding that an unnamed tributary of Hediondo Creek and an unnamed tributary of Elm Creek did not support an aquatic life use higher than "limited" and therefore did not trigger a Tier 2 antidegradation review for those receiving streams. Finally, Maverick County and OPIC contend that the ALJs improperly concluded that there was no need for chronic toxicity-based limits, and Maverick County argues that the ALJs improperly failed to require biomonitoring. Each of these arguments lacks evidentiary support and each argument was properly rejected by the ALJs.

#### **A. DRCP IS THE OWNER AND OPERATOR OF THE EAGLE PASS MINE**

Maverick County contends that Camino Real Fuels ("CRF") was the "operator" for permitting purposes and, therefore, should have been a co-permittee. As a result, they argue, this matter should start all over, as the initial notice was inappropriate. As if their hand was not tipped already, Maverick County then warns the Commission of the "mountain of enforcement burdens" that would ensue if CRF is not the permittee, because DRCP, they claim, is "just a financing vehicle." And not just any financing vehicle, they warn, but one made up of companies chartered in

the foreign land of Mexico. They end with this omen to the Commission: “Nothing about litigating with those Sociedades will be straight-forward.”<sup>19</sup>

DRCP is a Texas general partnership. The Eagle Pass Coal Corporation and the Maverick County Coal Corporation, both Texas corporations, are its general partners.<sup>20</sup> DRCP has numerous state and federal permits issued to its name.<sup>21</sup> The mining permit issued by the Railroad Commission of Texas is issued exclusively to DRCP.<sup>22</sup> As part of the Railroad Commission of Texas permit, DRCP has posted a performance bond in the amount of \$20,478,632.<sup>23</sup> Significantly, the current TPDES permit for the Eagle Pass Mine is issued to DRCP. Indeed, throughout its numerous renewals and amendments, TCEQ has always issued TPDES permits exclusively to DRCP.<sup>24</sup> This is not a new issue, and DRCP is hardly the fly-by-night entity warranting the cautionary tales told by Maverick County.

Putting aside the theatrics, the evidence in the record demonstrates that DRCP is the owner of, has complete operational control at, and financial responsibility for, the Eagle Pass Mine. CRF, as the contractor, is contractually obligated to perform certain activities, but those activities are performed under DRCP’s control.<sup>25</sup> DRCP dictates CRF’s operational goals, approves mine plans and budgets, pays all costs, and obtains, maintains, and complies with the necessary permits.<sup>26</sup> DRCP also has an office in Eagle Pass, and a DRCP representative visits the site on a

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<sup>19</sup> Exceptions of Maverick County to PFD at 8.

<sup>20</sup> Exhibit DRCP-200 at 3-5 (Direct Testimony of Andres Gonzalez-Saravia Coss). In OPIC’s Exceptions to the PFD, OPIC indicates that the North American Coal Corporation has an ownership interest in DRCP by equating Gupo Acerero Del Norte with the North American Coal Corporation. This is simply not true. The mere fact that both entities have the word “North” in their names does not make them related in any way.

<sup>21</sup> Exhibit DRCP-200 at 6:10-15 (Direct Testimony of Andres Gonzalez-Saravia Coss).

<sup>22</sup> *Id.* at 5.

<sup>23</sup> *Id.* at 6; Exhibit DRCP-203 (Railroad Commission of Texas May 2013 Order).

<sup>24</sup> Exhibit DRCP-103 – Exhibit DRCP-106 (DRCP’s TPDES Permits).

<sup>25</sup> Exhibit DRCP-204 (Eagle Pass Contract Mining Agreement)

<sup>26</sup> Exhibit DRCP-200 at 8:9-10:2, 11:2-15 (Direct Testimony of Andres Gonzalez-Saravia Coss); Exhibit DRCP-204 (Eagle Pass Contract Mining Agreement).

daily basis to oversee the activities at the Eagle Pass Mine.<sup>27</sup> This arrangement is not new – not to DRCP who has been the sole permittee on its TPDES permit for over 20 years<sup>28</sup> and not to the Commission in the TPDES permitting context where contractors who perform operations under the direction of the entity with operational control are not considered “operators” for permitting purposes. This fact pattern exists in various industries, including coal mines, as well as wastewater treatment plants permitted to local governments, wherein contract operators perform operational functions.

The ALJs reviewed all the evidence and concluded that:

DRCP is and will be responsible for the overall operation of the wastewater treatment facilities at the Mine. Thus, DRCP is the “operator,” as well as the “owner,” and the only entity that was required to apply for the permit.<sup>29</sup>

The ALJs also recited the permitting history of this case and stated as follows:

...the current TPDES permit was issued solely to DRCP and does not refer to its status. Similarly, since at least 2001, prior versions of the permit were issued only to DRCP. From that permitting history, the ALJs find that TCEQ has concluded previously that DRCP was both the owner and the operator. The ALJs see no basis for concluding otherwise now. They find that DRCP is both the owner and operator and the only entity that was required to file the application that is the subject of this case.<sup>30</sup>

Maverick County and OPIC argue that responsibility for overall operations and control, including financial responsibility is irrelevant, and that the term “operator” in 30 Texas Administrative Code § 305.43 encompasses a contractor working under the entity with overall and complete control over the operations. To support their assertion they cite to a hodge-podge

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<sup>27</sup> Hearing on the Merits Tr. at 180:3-4, 200:3-5 (Testimony of Peter A. Nielsen).

<sup>28</sup> Exhibit DRCP-103 – Exhibit DRCP-106 (DRCP’s TPDES Permits).

<sup>29</sup> PFD at 14.

<sup>30</sup> *Id.* at 16.

of cases that lends no support to their claim.<sup>31</sup> Indeed, no case law, regulation or even agency action (whether EPA or TCEQ) supports Maverick County and OPIC's contention. Maverick County and OPIC misunderstand the applicable law. EPA's NPDES regulations require an "operator" to obtain a permit, but do not define "operator" in any meaningful way.<sup>32</sup> EPA has explained that its intent is to require the person with "operational control" over the facility to submit the permit application in order to avoid situations where uninvolved landowners are the only ones responsible for complying with the permit.<sup>33</sup> Consistent with this intent, TCEQ's rules implementing the NPDES program require both the owner and the operator to submit the application and define operator as the "person responsible for the overall operation of a facility."<sup>34</sup> In TCEQ's instructions for the Application, it further explained responsibility for overall operation of a facility by stating that the entity that does not have "overall financial responsibility of the facility operations" need not apply as the co-permittee.<sup>35</sup>

As the evidence shows, DRCP is anything but an uninvolved landowner. Moreover, DRCP is the entity with complete "operational control" over the Eagle Pass Mine, the entity responsible for the "overall operation" at the Eagle Pass Mine, and the entity with "overall financial responsibility" for the operations at the Eagle Pass Mine. DRCP is the operator for permitting purposes. Contrary to Maverick County's and OPIC's argument, the law does not

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<sup>31</sup> The case law cited by Maverick County is inapplicable. *Heritage on San Gabriel Homeowners' Association v. Texas Comm'n on Environmental Quality*, 393 S.W.3d 417 (Tex.App.—Austin 2012, pet. denied), involves the definition of an "operator" for a municipal landfill as defined in a different chapter of the Texas Administrative Code and is factually distinguishable from this case. Here, DRCP has significant control and responsibility over the operations that were not demonstrated by the owner in that case. *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 1175 (D. Mont. 1995), and *In re: Oil Spill by the Oil Rig DEEPWATER HORIZON in Gulf of Mexico, on April 20, 2010*, 844 F. Supp. 2d 746, 761 (E.D. La. 2010), involve an inapplicable definition of "operator" under the Clean Water Act relating to oil and hazardous substance liability, not TPDES permitting. See 33 U.S.C. § 1321(a). Similarly, the TCEQ's description of a "primary operator" in its Construction General TPDES Permit is inapplicable to this industrial wastewater permit.

<sup>32</sup> 40 C.F.R. §§ 122.2, 122.21(b).

<sup>33</sup> 45 Fed. Reg. 33290, 33295, 33299 (May 19, 1980).

<sup>34</sup> 30 Tex. Admin. Code §§ 305.2, 305.43.

<sup>35</sup> Exhibit DRCP-102 at 101 (TCEQ Permit Application Forms and Instructions).

require a contractor that works under the direction of an entity with overall responsibility and operational control to be a permittee for TPDES permits. The Commission has never interpreted the term “operator” to encompass such contractors. Indeed, if that were the case, then the Commission would have to bring many contractors to the table for permitting purposes. The ALJs considered all the evidence, properly applied the law, and correctly concluded that DRCP was the owner and operator.

**B. THE AQUATIC LIFE USES HAVE BEEN PROPERLY DETERMINED**

Maverick County and OPIC next complain that the ALJs incorrectly determined that the unnamed tributary to Hediondo Creek and the unnamed tributary to Elm Creek have no higher than “limited” aquatic life uses. In reaching this conclusion, the ALJs found that the evidence in the record supported the Executive Director’s determination that the aquatic life use in these streams was only “limited.” An aquatic life use of “limited” means that a Tier 2 antidegradation review is not required.

The Executive Director’s witness, Jeff Paull, assessed these unnamed tributaries and concluded, based on USGS topographic maps, aerial photos, DRCP’s application, and prior reviews of the water bodies, that the aquatic life uses were only “limited.”<sup>36</sup> Because there was no evidence in the record to the contrary and no reason to doubt the credibility of Mr. Paull, the ALJs properly concluded that the aquatic life use of these tributaries was “limited.”

Maverick County and OPIC insist that this finding was improper in light of the testimony of Maverick County’s expert witness, David Flores. Mr. Flores conducted a site-specific assessment at an inopportune time, immediately following two months of unusually heavy

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<sup>36</sup> Exhibit ED-1 at 9:18-22, 11:20-12:2 (Direct Testimony of Jeff Paull); Hearing on the Merits Tr. at 724:25-729:2 (Testimony of Jeff Paull).

rainfall.<sup>37</sup> The ALJs did not find rely on Mr. Flores’ testimony because the conditions observed by Mr. Flores “were not usual conditions.”<sup>38</sup> Maverick County asserts that the ALJs erred and that there was no evidence that the conditions were unusual. Maverick County somehow overlooks the abundance of evidence suggesting that the conditions were quite unusual.<sup>39</sup>

Maverick County next argues that it was not problematic that Mr. Flores conducted the samples during such high water conditions because the TCEQ guidance document allows for deviation from the protocol. The guidance document recommends that stream conditions be stable and representative of baseline conditions.<sup>40</sup> The guidance document suggests that the ideal time is when the flow is at or just above the seven-day, two-year low flow (“7Q2”).<sup>41</sup> For an intermittent stream with perennial pools, the guidance document recognizes that the 7Q2 is not necessary since the stream should be sampled in the pools.<sup>42</sup> However, to sample immediately after extremely heavy rainfall events misses the point and serves to ignore the recommendation that the stream be “stable” and “reflect baseline conditions.” Even though the Eagle Pass Mine will only discharge during rainfall events, the purpose of the site assessment is to identify “what biology is present under the most stressful conditions to which the [water quality] standards

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<sup>37</sup> Hearing on the Merits Tr. at 610:17-611:1 (Testimony of David Flores).

<sup>38</sup> PFD at 42.

<sup>39</sup> Dr. Peggy Glass testified that the rainfall in April and May 2015 was almost three times the 30-year average for this area in those months. Hearing on the Merits Tr. at 860:4-16, 862:11-22 (Testimony of Peggy Glass, Ph.D.). Mr. Flores admitted that there were heavy rains in the month prior to his sampling of the unnamed tributary to Hediondo Creek. Hearing on the Merits Tr. at 610:17-611:1 (Testimony of David Flores). Dr. Miertschin accompanied Mr. Flores when he sampled the unnamed tributary to Elm Creek and opined that it was “anything but critical low flow conditions. It was a very high flow condition.” Hearing on the Merits Tr. at 367:5-11 (Testimony of James Miertschin, Ph.D., P.E.). *See also* Hearing on the Merits Tr. at 429:13-21 (Testimony of Walter Herring: “I don’t remember whether it was May or June . . . we had eight inches and the next month we had 12 inches.”); Hearing on the Merits Tr. at 800:23-801:7 (Testimony of Leland Starks) (noting 14.5 inches of rain between May 6 2015 and June 24, 2015).

<sup>40</sup> Exhibit MC-12 at 2-3 (Excerpt of RG-416 Surface Water Quality Monitoring Manual).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

apply.”<sup>43</sup> Hence, the guidance document recommends “stable” streams during “baseline conditions” and suggests 7Q2, when applicable. The evidence in the record demonstrates that Mr. Flores’ assessment was not conducted at or just above the 7Q2 flow, that the streams were not “stable,” and that they were not at “baseline conditions.” The evidence in record demonstrates that the timing, following the rainfall events, undermined Mr. Flores’ results.<sup>44</sup> Maverick County incorrectly asserts that no one contradicted Mr. Flores’ opinion that collecting data in a “wet spring” was not problematic. Indeed, every expert witness that testified on this issue disagreed with Maverick County’s witness. Dr. Peggy Glass, for example, contradicted this opinion as stated as follows:

The streams that would be intermittent are now flowing into the perennial waters that support fish, and the fish migrate throughout the length of the stream, so they’re up in places they would not normally be. And heavy rains like we had here will flood stock tanks and wash fish from stock tanks into the stream. And as those streams and those pools dry up, you get a very different condition. . . . So what would exist out there in the middle of the summer is not what exists there after we’ve had a month of heavy rain.<sup>45</sup>

The ALJs properly concluded that the aquatic life use of the unnamed tributary to Hediondo Creek and the unnamed tributary to Elm Creek was “limited.” Because of this finding, no additional antidegradation review was required.

**C. CHRONIC TOXICITY EFFLUENT LIMITS OR BIOMONITORING IS NOT REQUIRED**

Maverick County and OPIC’s last argument is that chronic toxicity testing limits should have been added and, alternatively, that biomonitoring should have been required in order to

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<sup>43</sup> Hearing on the Merits Tr. at 855:8-856:1 (Testimony of Peggy Glass, Ph.D.).

<sup>44</sup> Hearing on the Merits Tr. at 366:12-367:11 (Testimony of James Miertschin, Ph.D., P.E.) (noting that “the timing was – was very poor” and that it is “very important to say what the aquatic life use is under critical low flow conditions. And at the time Mr. Flores was out there, it was anything but critical low flow conditions.”); Hearing on the Merits Tr. at 606:14-23, 610:4-10, 613:7-11 (Testimony of David Flores); Exhibit MC-12 (Excerpt of RG-416 Surface Water Quality Monitoring Manual) (recommends sampling to occur between July and September at a time representative of baseline conditions).

<sup>45</sup> Hearing on the Merits Tr. at 856:4-16 (Testimony of Peggy Glass, Ph.D.). Maverick County’s contention that no

determine the need, if any, for chronic-toxicity based limits. Once again, the evidence in the record does not support these positions.

TCEQ policy does not require chronic toxicity limitations for intermittent discharges, like those from the Eagle Pass Mine.<sup>46</sup> The Executive Director explained this policy,<sup>47</sup> as did DRCP's expert witness, Dr. Peggy Glass:

Discharges that are intermittent of the nature of this one where they are stormwater-driven are not likely to create a condition that will adversely affect the aquatic life in receiving streams. This is not a highly detrimental discharge.<sup>48</sup>

The policy recognizes that chronic toxicity effects are associated with exposures over a prolonged period of time and thus not applicable to mining outfalls which are highly intermittent and stormwater-driven.<sup>49</sup>

OPIC argues, without any evidentiary support, that the discharges from the Eagle Pass Mine may not be intermittent. OPIC relies on a statement by Dr. Tischler indicating his unfounded belief that DRCP could choose to discharge its ponds slowly, so that the discharges would be continuous rather than intermittent. This argument is pure fantasy. The evidence in the record demonstrates that the discharges from the Eagle Pass Mine will be intermittent.<sup>50</sup>

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<sup>46</sup> Exhibit ED-2 att. JB-2 at 17 (Standard Operating Procedures Manual).

<sup>47</sup> Exhibit ED-3 at 3:14-21 (Direct Testimony of Jeffrey Borski: "All mining-runoff discharges are assessed under acute aquatic life criteria only. Chronic aquatic life and human health criteria are not assessed because of the highly intermittent nature of these discharges. No mixing zones are allowed for mining discharges regardless of the characteristics of the initial receiving waters, and effluent is assessed at 100%. In other words, mining discharges are assessed as 100% effluent at the end of pipe."); Hearing on the Merits Tr. at 659:2-7 (Testimony of Kara Denney); Hearing on the Merits Tr. at 784:25-785:14, 786:13-21, 789:2-9 (Testimony of Jeffrey Borski).

<sup>48</sup> Hearing on the Merits Tr. at 847:19-23 (Testimony of Peggy Glass, Ph.D.).

<sup>49</sup> See Exhibit DRCP-800 at 34:15-19 (Direct Testimony of James Miertschin, Ph.D., P.E.); see also Hearing on the Merits Tr. at 847:19-23 (Testimony of Peggy Glass, Ph.D.: "Discharges that are intermittent of the nature of this one where they are stormwater-driven are not likely to create a condition that will adversely affect the aquatic life in receiving streams. This is not a highly detrimental discharge."). Even if chronic toxicity limitations were to apply, Dr. Miertschin evaluated chronic toxicity criteria for aquatic life. Exhibit DRCP-800 at 34:24-35:2 (Direct Testimony of James Miertschin, Ph.D. P.E.). He concluded that no additional permit monitoring requirements or effluent limitations would be warranted. *Id.* at 45:25-46:2.

<sup>50</sup> Exhibit DRCP-400 at 16:24-17:5 (Direct Testimony of Leland Starks); DRCP-800 at 34:8-19 (Direct Testimony of James Miertschin, Ph.D., P.E.); Hearing on the Merits Tr. at 784:25-785:14 (Testimony of Jeffrey Borski).

Even Dr. Tischler admitted that the discharges would be stormwater-driven and intermittent.<sup>51</sup> There is no credible evidence in the record indicating DRCP would intentionally discharge its ponds to create continuous discharges. TCEQ's policy is reasonable and applies to the Eagle Pass Mine, just as it does to every other mine in Texas. The ALJs correctly concluded that chronic toxicity effluent limits did not need to be added to the Draft Permit.

As a last-ditch effort, Maverick County argues that it "makes sense" to include biomonitoring in the Draft Permit. There are conditions under which biomonitoring is required. The Commission has guidance documents setting forth those conditions.<sup>52</sup> Those conditions do not exist in this case and so, the Executive Director determined that biomonitoring was not necessary.<sup>53</sup> Having seen no credible evidence to the contrary, the ALJs correctly did not recommend the addition of biomonitoring.

#### **IV. REPLY TO EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE PROPOSAL FOR DECISION**

DRCP largely agrees with the Executive Director's corrections and exceptions to the PFD, with one exception. DRCP disagrees with the Executive Director's proposed revision of Finding of Fact No. 40. Finding of Fact No. 40 states:

Based on the Contract Mining Agreement signed by Mr. Gonzalez-Saravia Coss, DRCP is solely responsible for the acquisition and maintenance of all interests and rights in real property and the reserves, provides its requirements and expectations to CRF, approves every plan and budget prior to the incurrence of any costs by CRF, pays all actual costs during design and construction of the

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<sup>51</sup> Hearing on the Merits Tr. at 506:11-16 (Testimony of Lial Tischler, Ph.D., P.E., B.C.E.E.: "Q (Abazari) And you would agree with me that those – the term they're stormwater-driven is an accurate statement? A (Tischler) Yes. Q (Abazari) And you and I agree that the intent is that the discharges will be on an intermittent bases? A (Tischler) Yes, that's what the Applicant states. Yes.").

<sup>52</sup> Exhibit ED-1 att. KLD-9 at 161-62 (Procedures to Implement the Texas Surface Water Quality Standards, June 2010).

<sup>53</sup> Exhibit ED-1 att. KLD-7 at 21 (Fact Sheet). As explained in greater detail in DRCP's Closing Argument and Reply Brief, chronic toxicity effects are not relevant to intermittent stormwater-driven discharges rendering a biomonitoring requirement unnecessary. DRCP's Closing Argument at 31-34, 55-56; DRCP's Reply Brief at 24-27, 46-48.

Eagle Pass Mine, pays all operation costs during production at the Eagle Pass Mine, and is required to retain, maintain, and comply with all permits.

The Executive Director states that he “is not sure” that the word “comply” should appear in the finding because the contract does not use the word “comply” – the contract states that DRCP will “retain and maintain in its name the Surface Mining Permit and all other permits . . .”<sup>54</sup> The Executive Director acknowledges, however, that TCEQ would hold DRCP, as the permit holder, responsible for complying with the permit. DRCP believes that the latter point – that DRCP, as the permittee, is responsible for compliance – is at issue, and therefore, believes that Finding of Fact No. 40 is appropriately worded. Moreover, Mr. Starks’ testimony, which is cited to by the Executive Director, that the contractor has an obligation to comply with permits does not serve to shift DRCP’s obligations and responsibilities to the permitting authority. Mr. Starks’ statement merely states the obvious – that the contractor has an obligation to ensure compliance with permits that are applicable to the operations. Mr. Starks’ statement is also consistent with CRF’s contractual obligations to DRCP.<sup>55</sup> DRCP believes that Finding of Fact No. 40 is appropriately worded.

DRCP further wishes to underscore the Executive Director’s conditional statements relating to Ordering Paragraph No. 1(a), (b), and (c). The Executive Director starts each of those provisions with the sentence “If the Commission decides to . . .” It should be understood that the Executive Director does not believe that a boron limit or an aluminum monitoring requirement is required in this case, and no such provision has been included in the Draft Permit. The Executive Director’s basis for not recommending such limits or monitoring provisions is due to

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<sup>54</sup> Exhibit DRCP-204 at 51, § 26.1 (Eagle Pass Contract Mining Agreement).

<sup>55</sup> *Id.* at 12, § 3.1.

the fact that the evidence in the record does not suggest that either boron or aluminum will be present in the effluent in concentrations that would warrant either a monitoring or limitation.<sup>56</sup>

## V. CONCLUSION

Maverick County, EDF Group, and OPIC continue to raise the same baseless arguments they have asserted throughout this proceeding. The Commissioners should adopt the PFD, with the recommended revisions included in DRCP's Exceptions to the PFD and with certain revisions identified by the Executive Director, as described above.

The ALJs correctly concluded that the TCEQ's antidegradation review complied with TCEQ policy. The evidence shows that the Executive Director performed an appropriate antidegradation review on the receiving streams.

The ALJs also correctly concluded that DRCP is the only required permittee. DRCP is the entity with overall responsibility for, and control over, the operations of the Eagle Pass Mine and therefore is the operator for permitting purposes. Moreover, the ALJs reviewed all the evidence, and correctly concluded that the aquatic life uses of the unnamed tributaries of Hediondo Creek and Elm Creek are no higher than "limited" and thus do not trigger a Tier 2 antidegradation review. Finally, the ALJs correctly found that neither chronic toxicity effluent limits nor biomonitoring are required for the Eagle Pass Mine.

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<sup>56</sup> Exhibit DRCP-700 at 19:14-20:22 (Direct Testimony of Eric Matzner); Hearing on the Merits Tr.at 848:7-849:25 (Testimony of Peggy Glass, Ph.D.); *see also* DRCP's Closing Argument at 52-55; DRCP's Reply Brief at 9-24; Executive Director's Exceptions to PFD at 4-5.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 5th day of May 2016, a true and correct copy of the foregoing document was served on the individuals listed below via first class mail and/or email:

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