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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

May 5, 2016

Bridget C. Bohac  
Texas Commission on Environmental Quality  
Office of the Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087

Re: Dos Republicas Coal Partnership, TPDES Permit No. WQ0003511000,  
TCEQ Docket No. 2015-0068-IWD, SOAH Docket No. 582-15-2214

Dear Ms. Bohac:

I have enclosed the Executive Director's Reply to Exceptions to the Proposal for Decision. Please let me know if you have any questions.

Sincerely,

  
Stefanie Skogen  
Staff Attorney  
Environmental Law Division

Enclosure

cc: Mailing list

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

<b>APPLICATION FROM DOS</b>	<b>§</b>	<b>BEFORE THE TEXAS</b>
<b>REPUBLICAS COAL PARTNERSHIP</b>	<b>§</b>	
<b>FOR A MAJOR AMENDMENT AND</b>	<b>§</b>	
<b>RENEWAL OF TEXAS POLLUTANT</b>	<b>§</b>	<b>COMMISSION ON</b>
<b>DISCHARGE ELIMINATION SYSTEM</b>	<b>§</b>	
<b>(TPDES) PERMIT NO.</b>	<b>§</b>	
<b>WQ0003511000</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

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

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The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ), by and through a representative of the TCEQ's Environmental Law Division, files the following reply to the other parties' exceptions to the administrative law judges' (ALJs') proposal for decision (PFD). The ED provides this information in an attempt to complete the record based on its review of those exceptions.

## I. ALUMINUM

In light of the extent to which aluminum regulation was discussed in some of the other parties' exceptions,<sup>1</sup> it may be helpful for the Commissioners to know the reasons why the ED did not include any total aluminum monitoring requirements or effluent limits in the proposed permit.

If the ED were to add total aluminum monitoring requirements or effluent limits to Dos Republicas' permit, it would be in protection of the Texas Surface Water Quality Standards. The ED provided the following explanation in its Closing Argument regarding how it calculates water quality-based effluent limits (WQBELs) in the context of screening Dos Republicas' effluent data provided under Other Requirement No. 10:

The way staff would determine if the permit needs to be amended is by calculating WQBELs and then screening the effluent data against them. Essentially, staff would be creating numeric representations of the Texas Surface Water Quality Standards and determining if monitoring or effluent limits are needed in the permit based on those numbers. ED staff who worked on this application have already laid the ground work for these screenings. The process began with Jeff Paull of the Standards Implementation Team, who analyzed the discharge routes.<sup>2</sup> To accomplish this, he first used the route descriptions and U.S. Geological Survey topographic maps in the application to identify the outfalls and their discharge routes down to the first classified segment, and he verified this information using aerial photography of the area.<sup>3</sup> Where part of the discharge route did not exist, i.e., would be a future unnamed ditch,<sup>4</sup> he used the applicant's information, aerial photography, and his best professional judgment to determine the most likely route for that ditch.<sup>5</sup> He ultimately identified the discharge routes for all the outfalls and determined that they all eventually flow into the Rio Grande Below Amistad Reservoir in Segment No. 2304 of the Rio Grande Basin.<sup>6</sup> Segment No. 2304 is a classified segment because it is listed in Appendix A of the Texas Surface Water Quality Standards along with its water uses and supporting numerical criteria.<sup>7</sup> The remaining receiving waters are

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<sup>1</sup> Dos Republicas Coal Partnership's Exceptions to the ALJs' PFD 2-11; Protestant EDF Group Exceptions to the PFD 6-7; Jose Casares and Luis F. Martinez's exceptions to the PFD 2.

<sup>2</sup> Ex. ED-2, at 3:11-4:4.

<sup>3</sup> *Id.* at 3:12-14, 9:8-10; *see* ED's Closing Argument section V(A) (Jan. 15, 2016) (information submitted in relation to section 305.45(a)(6)).

<sup>4</sup> Ex. ED-2, at 10:23-24 (definition of unnamed ditch).

<sup>5</sup> *Id.* at 3:14-16; Tr. 751:9-752:7.

<sup>6</sup> Ex. ED-2, at 9:15-21.

<sup>7</sup> 30 TEX. ADMIN. CODE § 307.10(1) (West 2014), Ex. ED-1 att. KLD-14, at 614.

unclassified because they are not listed in Appendix A. Mr. Paull's work is reflected in the discharge routes listed on page 1 of the proposed permit.<sup>8</sup>

Once Mr. Paull identified the discharge routes, including which receiving waters were classified versus unclassified, he identified or assigned the water uses.<sup>9</sup> Segment No. 2304's uses come from Appendix A and are primary contact recreation, high aquatic life use, and public water supply.<sup>10</sup> For the remaining receiving waters, he determined each receiving waters' flow status using the same information he used to identify the discharge route and then used that status and other available data to assign the uses.<sup>11</sup> All the water bodies were assigned a primary contact recreation use in accordance with sections 307.4(j)(2)(A) and 307.7(b)(1) of the TCEQ's rules.<sup>12</sup> The other uses assigned by Mr. Paull, along with each water body's flow status, are as follows:

- Unnamed tributaries<sup>13</sup> for Outfalls 001M/R, 004M/R, 008M/R, 017M/R, 018M/R, 021, and 022M - intermittent<sup>14</sup> - minimal aquatic life use
- Unnamed tributaries for Outfalls 007M/R and 015M/R - intermittent with pools<sup>15</sup> - limited aquatic life use and incidental fisheries use
- Hediondo Creek - intermittent with pools - limited aquatic life use and incidental fisheries use
- Unnamed ditches for Outfalls 003M/R, 006M/R, 014M/R, 015M/R, and 019M/R - intermittent - minimal aquatic life use
- Elm Creek - perennial - high aquatic life use and sustainable fisheries use<sup>16</sup>

Mr. Paull assigned the aquatic life uses based on the presumed uses for each flow status found in section 307.4(h)(3)-(4).<sup>17</sup> The fisheries uses are based on section 307.6(d)(5)-(6).<sup>18</sup>

Once Mr. Paull had finished analyzing the discharge routes, his

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<sup>8</sup> Ex. ED-1 att. KLD-8, at 32.

<sup>9</sup> Ex. ED-2, at 9:15-18, 21-22.

<sup>10</sup> 30 TEX. ADMIN. CODE § 307.10(1), Ex. ED-1 att. KLD-14, at 614. These uses are discussed in section 307.7(b)(1) (primary contact recreation), (2)(A)(i) (public water supply), and (3)(A)(i) (high aquatic life use). Ex. ED-1 att. KLD-14, at 553-54, 557, 559-60.

<sup>11</sup> 30 TEX. ADMIN. CODE § 307.4(l), Ex. ED-1 att. KLD-14, at 522; Ex. ED-2, at 3:18-23, 9:18-22, 11:22-12:1. Please note that Appendix D of the Texas Surface Water Quality Standards does list unclassified water bodies, but none of the water bodies in this case are listed there.

<sup>12</sup> Ex. ED-1 att. KLD-14, at 519, 553; *see also* 30 TEX. ADMIN. CODE § 307.3(47) (definition of primary contact recreation), Ex. ED-1 att. KLD-14, at 499.

<sup>13</sup> Ex. ED-2, at 10:18-21 (definition of unnamed tributary).

<sup>14</sup> 30 TEX. ADMIN. CODE § 307.3(31), Ex. ED-1 att. KLD-14, at 496.

<sup>15</sup> *Id.* § 307.3(32), Ex. ED-1 att. KLD-14, at 496.

<sup>16</sup> Ex. ED-2, at 11:1-19.

<sup>17</sup> Ex. ED-1 att. KLD-14, at 518.

<sup>18</sup> *Id.* att. KLD-14, at 545-46; *see also* 30 TEX. ADMIN. CODE § 307.3(30) (definition of incidental fishery), (70) (definition of sustainable fisheries), Ex. ED-1 att. KLD-14, at 495, 503.

results<sup>19</sup> went to Jeffrey Borski on the Water Quality Assessment Team. Mr. Borski used those results to conduct the critical conditions review for the application.<sup>20</sup> As described by Mr. Borski, “Critical mixing conditions are quantitative estimates of the amount of mixing that is appropriate at the edges of mixing zones.”<sup>21</sup> Another way to put it is that critical mixing conditions tell the permit writer how much a permittee’s effluent can be diluted once it enters the receiving water before they have to meet the Texas Surface Water Quality Standards. This is reflected in Mr. Borski’s description of mixing zones as “areas adjacent to a wastewater outfall within the receiving water body in which some mixing between the wastewater and ambient waters is allowed to occur prior to compliance with water quality standards.”<sup>22</sup> In fact, some water quality standards do not even apply within mixing zones.<sup>23</sup> Critical conditions are receiving-water specific and depend on characteristics like instream flow and water-body width.<sup>24</sup> The goal of the critical conditions review is to determine which effluent dilutions and menu in the Texas Toxicity Modeling Program (TEXTOX) the permit writer needs to use to calculate WQBELs for each outfall.<sup>25</sup> TEXTOX “is the screening criteria used by the TCEQ to maintain the surface water quality standards based upon the stream criteria for aquatic life and human health.”<sup>26</sup> In other words, it incorporates the Texas Surface Water Quality Standards to calculate the WQBELs needed to protect the receiving waters’ uses based on site-specific information from the application and gathered by ED staff.

One exception to the site-specific determination of critical conditions are mining discharges. Due to the intermittent and stormwater-driven nature of mining discharges, they are typically assigned TEXTOX Menu 1.<sup>27</sup> This means the discharges are not allowed a mixing zone, and only acute aquatic life criteria are applied to 100% of the effluent.<sup>28</sup> Because all of Dos Republicas’ outfalls, except for Outfall 021, will be discharging mining-related effluent, they were assigned TEXTOX Menu 1.<sup>29</sup>

Because Outfall 021 will not be discharging mining-related effluent, it was given a more extensive critical conditions review.<sup>30</sup> The discharge route for this outfall is to an intermittent unnamed tributary,

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<sup>19</sup> Ex. ED-1 att. KLD-2.

<sup>20</sup> Ex. ED-3, at 2:15-16.

<sup>21</sup> *Id.* at 2:23-24.

<sup>22</sup> *Id.* at 2:18-21; *see also* 30 TEX. ADMIN. CODE § 307.3(37) (definition of mixing zone), Ex. ED-1 att. KLD-14, at 497.

<sup>23</sup> 30 TEX. ADMIN. CODE § 307.8(b)(1), Ex. ED-1 att. KLD-14, at 569-70.

<sup>24</sup> Ex. ED-3, at 2:24-26, 3:1-3.

<sup>25</sup> Ex. ED-1, at 24:23-25:2; Ex. ED-3, at 1:28-29, 2:27-32.

<sup>26</sup> Ex. ED-1, at 24:15-18.

<sup>27</sup> Ex. ED-3, at 3:17-18, att. JB-2, at 17, 19.

<sup>28</sup> *Id.* at 3:14-21, att. JB-2, at 17; *see also* 30 TEX. ADMIN. CODE §§ 307.3(1) (definition of acute toxicity, which is based on an exposure duration of ninety-six hours or less), 307.6(b)(1) (prohibition on acute toxicity to aquatic life) (West 2014), Ex. ED-1 att. KLD-14, at 491, 528.

<sup>29</sup> Ex. ED-1, at 26:23-27:1, att. KLD-4, at 5.

<sup>30</sup> Ex. ED-3, at 3:30-32.

then to perennial Elm Creek.<sup>31</sup> Because Elm Creek is less than three miles from the discharge point, Mr. Borski assigned TEXTOX Menu 2 to this outfall.<sup>32</sup> Just as with the mining discharges, there is no mixing zone, and only acute aquatic life criteria apply at the discharge point.<sup>33</sup> However, Mr. Borski was required to provide the seven-day, two-year (7Q2) flow, i.e., critical low-flow, and harmonic mean flow for Elm Creek. The 7Q2 flow is the lowest seven-day average stream flow expected to occur at two-year intervals, and the harmonic mean flow is the average flow that takes extremely large values into account and, therefore, more accurately represents normal flow conditions than the arithmetic mean would represent.<sup>34</sup> Section 307.8(a) of the TCEQ's rules discusses when the water quality standards apply at which flows.<sup>35</sup> Mr. Borski did not have any flow data for Elm Creek, so due to the dry climate in the region and Elm Creek's small flow, which he observed in aerial photography, he assigned the minimal 7Q2 flow and harmonic mean flow allowed under the [*Procedures to Implement the Texas Surface Water Quality Standards* (June 2010) (IPs)] and the Standard Operating Procedures Manual for critical condition analyses, which are 0.1 cubic foot per second for the 7Q2 flow and 0.2 cubic foot per second for the harmonic mean flow.<sup>36</sup>

Once Mr. Borski completed his critical conditions review, his and Mr. Paull's results<sup>37</sup> went to Miss Denney. Because Dos Republicas had not started discharging prior to filing its application, Miss Denney did not have any effluent data to screen for compliance with the Texas Surface Water Quality Standards.<sup>38</sup> However, she could use the information provided by Mr. Paull and Mr. Borski to calculate the TEXTOX Menu 1 WQBELs for all the applicable outfalls. She provided information regarding what these calculations consist of in her prefiled testimony, and the IPs provide even more detailed information.<sup>39</sup> The end result is contained in Appendix B of the Fact Sheet and Executive Director's Preliminary Decision.<sup>40</sup> Using the freshwater acute criteria from Table 1 in section 307.6(c)(2) of the TCEQ's rules, TEXTOX Menu 1 calculated daily average and daily maximum effluent limits for the listed pollutants that would be needed to protect aquatic life from Dos Republicas' discharges.<sup>41</sup> It also provided 70% and 85% of the daily averages.<sup>42</sup> These are included because if the average of the effluent data for a pollutant exceeds 70% of the daily average WQBEL, the permit writer adds a

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<sup>31</sup> Ex. ED-2, at 11:4-5, 16-17; Ex. ED-3, at 4:5-7.

<sup>32</sup> Ex. ED-3, at 4:7-9, att. JB-2, at 19.

<sup>33</sup> *Id.* at 4:9-12, att. JB-2, at 24.

<sup>34</sup> *Id.* at 4:31-5:10; *see also* 30 TEX. ADMIN. CODE § 307.3(15) (definition of critical low-flow), (28) (definition of harmonic mean flow) (West 2014), Ex. ED-1 att. KLD-14, at 493, 495.

<sup>35</sup> Ex. ED-1 att. KLD-14, at 566-69.

<sup>36</sup> *Id.* att. KLD-9, at 145; Ex. ED-3, at 4:16-25, att. JB-2, at 22.

<sup>37</sup> Ex. ED-1 atts. KLD-2, KLD-4.

<sup>38</sup> *Id.* at 19:21-24. *See* Ex. DRCP-100, at 37:13-15; Ex. DRCP-111, at 3 (all outfalls listed as future outfalls); Ex. DRCP-400, at 8:1-5 (discharges did not begin until May 2015).

<sup>39</sup> Ex. ED-1, at 24:23-26:21, att. KLD-9, at 194-98.

<sup>40</sup> *Id.* att. KLD-7, at 28-30.

<sup>41</sup> *Id.* atts. KLD-7, at 29, KLD-14, at 529-33.

<sup>42</sup> *Id.* att. KLD-7, at 30.

monitoring requirement for that pollutant to the permit.<sup>43</sup> If the average exceeds 85% of the daily average WQBEL, the permit writer adds WQBELs for that pollutant to the permit.<sup>44</sup> Once the TCEQ obtains effluent data for these outfalls from Dos Republicas, ED staff will be able to screen that data against Miss Denney's calculations and determine if any monitoring requirements or effluent limits need to be added to the permit.<sup>45</sup>

In its Reply to Closing Arguments, the ED discussed the significance of basing monitoring and reporting requirements and effluent limits on sample data from Eagle Pass Mine:

The proposed permit is designed to regulate Dos Republicas' discharges of pollutants into water in the state. This is why the proposed permit describes the effluent sampling points as each point at which the effluent passes through the outfall;<sup>46</sup> it is the final opportunity for Dos Republicas to test its effluent before it will enter water in the state. This is in line with 40 C.F.R. § 122.45(a), which requires all effluent limits to be established for each outfall of the permitted facility.<sup>47</sup> Another way to think about this is that Dos Republicas must comply with its permitted effluent limits based on pollutant levels contained in its effluent *as it exits the outfall*. This is why waiting until the TCEQ has actual sampling data from the facility before it determines whether a monitoring requirement or water quality-based effluent limit (WQBEL) is needed for a particular pollutant is so important, and why it is the standard procedure the TCEQ follows when sampling data is not available.<sup>48</sup> The TCEQ does not regulate Dos Republicas' effluent at the point where, for example, groundwater that will later become mine seepage is still in the ground or stormwater runoff is rolling off a coal pile but has yet to enter a sedimentation pond. Expounding on the groundwater example, that groundwater would seep into a mine pit, be pumped to a sedimentation pond, undergo treatment by settlement, and mix with stormwater runoff all before it would pass through an outfall. While groundwater sampling data from the mine may show that aluminum and boron have been present in at least some samples, it does not show if and how much of those pollutants will be present in the discharged effluent and whether those amounts will reach the 70% or 85% thresholds used by the TCEQ to determine whether a monitoring requirement or effluent limit is required for aluminum or surpass the U.S. Environmental Protection Agency's (EPA's) recommended boron levels for agricultural use.<sup>49</sup>

The need for effluent data is reflected in the application itself. For the portions of question 1 that apply to Eagle Pass Mine, which are Tables

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<sup>43</sup> *Id.* att. KLD-9, at 228.

<sup>44</sup> *Id.*

<sup>45</sup> ED's Closing Argument 19-23 (Jan. 15, 2016).

<sup>46</sup> Ex. ED-1 att. KLD-8, at 33-38.

<sup>47</sup> *See also* 40 C.F.R. § 122.45(h) (2015) (authorizing the imposition of effluent limits on an internal waste stream only when imposing the effluent limits at the outfall are impractical or infeasible).

<sup>48</sup> Tr. 637:21-638:7.

<sup>49</sup> Tr. 637:3-20; Ex. ED-1, at 21:21-22:12, atts. KLD-9, at 228, KLD-12, at 478, KLD-13, at 481.

1, 2, and 5, the application asks for *sample* results. For example, all three tables ask for the sample type (C for composite and G for grab) and provide a column for each sample or asks for the number of samples taken.<sup>50</sup> This is also reflected in the application instructions, which repeatedly tell the applicant to provide analytical results from samples.<sup>51</sup> The only mention of providing something other than sampling data is with respect to new discharges, when “results from similar facilities, treatability studies, design information, or literature sources *may* be submitted when real effluent analytical data is not available.”<sup>52</sup> The word “may” does not institute a requirement; it provides a choice. Dos Republicas could have provided this type of information, but it chose not to. Even if it had provided this information, there is nothing that requires the ED to determine that information is sufficient to institute effluent limits based on it. As Kara Denney from the Industrial Permits Team stated at the evidentiary hearing, information like the groundwater sampling data could have been helpful, but it would not have been representative of the effluent, and she would not have been comfortable adding effluent limits to the proposed permit based on it.<sup>53</sup> This is also supported by the testimony by Dr. Lial F. Tischler, Ph. D., P.E., B.C.E.E. Dr. Tischler testified that at least since 1995, he has never left Worksheet 2.0 blank.<sup>54</sup> However, when he was asked how often providing pollutant estimates has resulted in effluent limits in a permit, he could only recall one example, which was for a permit issued to Dupont’s Victoria facility in the 1990s that was given monitoring requirements based on estimated data.<sup>55</sup>

The ED also specifically discussed aluminum in the context of conducting a Tier 1 antidegradation review:

The standard of review for a Tier 1 review is whether “[e]xisting uses and water quality sufficient to protect those existing uses” will be maintained.<sup>56</sup> The ED conducts its Tier 1 reviews in accordance with the guidance provided in the *Procedures to Implement the Texas Surface*

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<sup>50</sup> Ex. DRCP-107, at 45-46, 50.

<sup>51</sup> *E.g.*, Ex. DRCP-102, at 137 (“For pollutants currently regulated in your permit, report the analytical results from the four (4) most recent samples . . . .” “For pollutants not currently regulated in your permit, provide the analytical results from at least four (4) separate grab or composite samples . . . .” “For pollutants not currently regulated in your permit, average and maximum concentrations may be calculated from at least one (1) analytical result obtained from a grab or composite sample.”).

<sup>52</sup> Ex. DRCP-102, at 138.

<sup>53</sup> Tr. 634:10-22, 636:1-637:20.

<sup>54</sup> Tr. 563:6-13.

<sup>55</sup> Tr. 476:13-477:11. The ED believes the application Dr. Tischler was referring to was for TPDES Permit No. WQ0000476000. According to the order for E. I. DuPont de Nemours and Company’s major amendment application, DuPont wished to stop disposing of about three million gallons per day of wastewater by deep well injection and discharge the effluent instead. Order 3-4, TCEQ Docket No. 1996-0604-IWD, SOAH Docket No. 582-96-1338 (Sept. 9, 1997), *available at* [www14.tceq.texas.gov/epic/CIO/](http://www14.tceq.texas.gov/epic/CIO/). ED’s Reply to Closing Arguments 3-4 (Feb. 5, 2016).

<sup>56</sup> 30 TEX. ADMIN. CODE § 307.5(b)(1) (West 2014), Ex. ED-1 att. KLD-14, at 523.

*Water Quality Standards* (IPs).<sup>57</sup> As the ED discussed in its closing argument, the Texas Surface Water Quality Standards are designed to protect those uses and do so, in part, by incorporating the standards into calculations of WQBELs.<sup>58</sup> For example, the ED does not take the freshwater acute criteria value for aluminum found in Table 1 of title 30, section 307.6 of the Texas Administrative Code and do a side-by-side comparison of that number versus the amount found in an applicant's effluent. The value from Table 1 is incorporated into the WQBEL equations to determine what WQBEL is needed to protect the receiving water's uses with regard to aluminum based on the particular effluent being discharged at the applicant's facility.<sup>59</sup> The ED has already laid the groundwork for calculating limits for the Eagle Pass Mine and has even already calculated limits for the mining outfalls.<sup>60</sup> As can be seen in Appendix B of the fact sheet for Dos Republicas' application, the daily average effluent limit is actually lower than the value listed in Table 1 of section 307.6, but the daily maximum is much higher, almost twice as high in fact.<sup>61</sup> Once Dos Republicas submits effluent sampling data for a particular outfall, the ED will be able to determine if a total aluminum effluent limit is needed for that outfall to protect the receiving water's uses. Effluent sample results for Outfall 003 have shown that no aluminum effluent limit is needed for that outfall.<sup>62</sup>

Dos Republicas has actually provided four effluent data sets for Outfall 003 under its existing permit, and all four included measurements for total aluminum.<sup>63</sup> The average of those four samples, 0.355 milligrams per liter (mg/L), did not exceed 70% of the total aluminum water quality-based effluent limit Miss Denney calculated for this application (0.835 mg/L, 70% is 0.584 mg/L).<sup>64</sup> Therefore, the ED did not recommend any changes to the proposed permit for Outfall 003M based on this data.

## II. BORON

As the ED already discussed boron in its exceptions, and a bit in the previous section, it will just note that out of the four effluent data sets that Dos Republicas provided for Outfall 003 under its existing permit, three of those sets included measurements for total boron.<sup>65</sup> The average of those three samples, 0.154 mg/L, did not exceed EPA's recommended chronic effluent limit of 0.75 mg/L for total boron.<sup>66</sup> Therefore, the ED did not recommend any changes to the proposed permit for Outfall

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<sup>57</sup> *Id.* § 307.5(c)(1)(A), Ex. ED-1 att. KLD-14, at 525; Ex. ED-1 att. KLD-9. As none of the receiving waters for Dos Republicas' discharges are listed as impaired on the 2012 Texas Integrated Report - Texas 303(d) List, pages 56-57 of the IPs apply. Ex. ED-1 att. KLD-9, at 115-16.

<sup>58</sup> ED's Closing Argument 8 (Jan. 15, 2016).

<sup>59</sup> Ex. ED-1 att. KLD-9, at 194; ED's Closing Argument 22.

<sup>60</sup> ED's Closing Argument 19-23; Ex. ED-1 att. KLD-7, at 28-30.

<sup>61</sup> Ex. ED-1 att. KLD-7, at 29.

<sup>62</sup> ED's Closing Argument 23. ED's Reply to Closing Arguments 6 (Feb. 5, 2016).

<sup>63</sup> Ex. ED-1 att. KLD-11, at 372-73, 404, 431, 454.

<sup>64</sup> Ex. ED-1 atts. KLD-7, at 29-30, KLD-11, at 372.

<sup>65</sup> Ex. ED-1 att. KLD-11, at 373, 431, 454.

<sup>66</sup> Ex. ED-1, at 21:21-22:12, atts. KLD-12, at 478, KLD-13, at 481.

003M based on this data.

### III. OTHER REQUIREMENT NO. 10

Dos Republicas has recommended alternative language for Other Requirement No. 10 in its exceptions based on the testing requirement in its existing permit.<sup>67</sup> The ED has updated its testing requirement language since the existing permit was issued and based its recommendation in its exceptions regarding the wording of Other Requirement No. 10 on that updated language. Therefore, the ED continues to recommend that the Commission adopt the ED's proposed language presented in its exceptions.<sup>68</sup>

### IV. ANTIDEGRADATION REVIEW

As stated in the PFD, the ED did conduct Tier 1 and Tier 2 antidegradation reviews for this application, which the ALJs summarized in their analysis of this issue.<sup>69</sup> If the Commission wishes to examine the ED's arguments in further detail, the ED's Closing Argument contains an explanation of how it conducted the antidegradation reviews.<sup>70</sup> For more information regarding the preliminary nature of the ED's antidegradation review, please see the ED's Reply to Closing Arguments.<sup>71</sup> As the ED discussed in its Reply, the ED's antidegradation review is *always* preliminary, as "the results of that review have the potential to change based on information received or discovered after the review is conducted."<sup>72</sup>

Regarding whether certain tributaries should be reclassified with regard to flow or aquatic life use, the ED stated the following in its Reply to Closing Arguments:

In his analysis of the discharge route for Outfalls 015M/R, Mr. Paull identified the unnamed tributary to Hediondo Creek as intermittent with perennial pools, which is the same identification Mr. Flores gave it.<sup>73</sup> In his analysis of the discharge routes for Outfalls 004M/R, 021, and 022M, Mr. Paull identified the unnamed tributary to Elm Creek as intermittent, whereas Mr. Flores identified it as intermittent with perennial pools.<sup>74</sup> By definition, an intermittent stream is a stream that has no flow for at least one week during most years.<sup>75</sup> Using information supplied by Dos Republicas, U.S. Geological Survey maps, and aerial imagery from geographic information systems, Mr. Paull saw evidence that the unnamed tributary to Elm Creek meets this definition, which led him to identify it as intermittent.<sup>76</sup>

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<sup>67</sup> Dos Republicas' Exceptions to the PFD 14, 16-17.

<sup>68</sup> ED's Exceptions to the PFD 7.

<sup>69</sup> PFD 39-41.

<sup>70</sup> ED's Closing Argument 23-24 (Jan. 15, 2016).

<sup>71</sup> ED's Reply to Closing Arguments 5-6 (Feb. 5, 2016).

<sup>72</sup> *Id.* at 5.

<sup>73</sup> Ex. ED-2, at 11:7-11; Ex. MC-100, at 15:9-10.

<sup>74</sup> Ex. ED-2, at 11:3-5; Ex. MC-100, at 18:13-14.

<sup>75</sup> 30 TEX. ADMIN. CODE § 307.3(31) (West 2014), Ex. ED-1 att. KLD-14, at 496.

<sup>76</sup> Ex. ED-2, at 11:3-5, 11:22-12:1.

The ED is concerned about raising the aquatic life uses for these two tributaries based on a single sampling event for each tributary. The reason is due to the intermittent nature of their flows, which results in a dynamic system with differing variables depending on when the tributary is sampled. Even assuming both tributaries are intermittent with perennial pools, the changing levels of flows throughout the year will affect aquatic life's ability to survive under the changing conditions and the test conditions that exist. For example, when water levels are high and water is flowing, fish are more easily able to migrate through and between the connected water bodies, and fish could be introduced from nearby stock tanks if flooding occurs.<sup>77</sup> A different ecosystem will exist as the water dries up. Flowing water can become large pools, which then can become potholes.<sup>78</sup> As the pool sizes decrease over time, dissolved oxygen levels and amounts of available food and space will decrease.<sup>79</sup> If a water body completely dries up, habitat would be eliminated entirely. Under these various stresses, the aquatic life that is present during the high flows will not be the same aquatic life that is present during the drier conditions.<sup>80</sup> Mr. Flores' samplings are only one snapshot of each tributary's varying environment. Therefore, the ED believes additional sampling would provide a better understanding of the average conditions that exist in these two tributaries and the corresponding aquatic life uses for those conditions.

Even if these water bodies were given a higher aquatic life use, the record does not suggest this would change the conclusions contained in the antidegradation review for this application. The ED would look for the same types of situations in analyzing the unnamed tributaries as it did for Elm Creek. Based on the application and under the terms of the proposed permit, the ED does not have any reason to believe that degradation would occur in any water body the effluent will pass through before it enters Elm Creek if that same effluent will not degrade Elm Creek, especially considering that aquatic life's exposure to that effluent will be stormwater-driven and, therefore, short term. As all the discharge routes eventually include Elm Creek, this applies to the two unnamed tributaries. While the unnamed tributaries, and even Hediondo Creek, could be added to the antidegradation statement, the ED does not believe that conducting an additional review based on the changes in aquatic life use would be necessary.<sup>81</sup>

## V. CAMINO REAL FUELS

Regarding the state and federal cases and TCEQ permit Maverick County cited to in its exceptions in support of its argument that Camino Real Fuels should be a co-

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<sup>77</sup> Tr. 856:4-10.

<sup>78</sup> Tr. 855:24-26.

<sup>79</sup> Tr. 856:11-14.

<sup>80</sup> Tr. 855:17-19, 856:14-16.

<sup>81</sup> ED's Reply to Closing Arguments 13-14 (Feb. 5, 2016).

permittee, the state case involved a municipal solid waste landfill. Municipal landfills and wastewater discharge facilities are not subject to the same applicant requirements under title 30, section 305.43 of the Texas Administrative Code.<sup>82</sup> Municipal landfills are also subject to terminology and definitions related to owners and operators under title 30, section 330.3 of the Texas Administrative Code that do not apply to wastewater discharge facilities. For example, they are subject to the term “site operator,” which is defined as “[t]he holder of, or the applicant for, a permit (or license) for a municipal solid waste site.”<sup>83</sup> Furthermore, the state case, federal cases, and TCEQ’s construction general permit all contain operator descriptions listing various activities that could fall within the TCEQ’s definition of “operator” in title 30, section 305.2(26) of the Texas Administrative Code and the industrial wastewater permit application instructions, i.e., the person responsible for the overall operation of a facility.<sup>84</sup> Even without considering the issue of whether those descriptions apply to Dos Republicas’ application, the ED does not believe the cases and permit are informative regarding whether Camino Real Fuels should be a co-permittee.

The ED provided the following analysis of the issue of whether Camino Real Fuels should be a co-permittee in its Reply to Closing Arguments:

The ED acknowledges that the TCEQ adopted the requirement in title 30, section 305.43(a) of the Texas Administrative Code for an operator to submit an application when a facility is owned by one person and operated by another so the TCEQ rule would be consistent with 40 C.F.R. § 122.21(b). However, the ED does not believe that this requirement applies to contract operators and has consistently interpreted the requirement in this manner. This is reflected by the application instruction that an operator does not have to be a co-permittee if it does not have “overall financial responsibility of the facility operations.”<sup>85</sup> An operator is a contract operator when a person wants to own and operate a facility but wants to contract with an operator to run the day-to-day operations at the facility rather than directly hire employees to operate the facility themselves.<sup>86</sup> A contract operator may be entrusted by a facility owner to run the day-to-day operations of its facility, but it is not the ultimate decision maker, and it is not financially responsible for ensuring those day-to-day operations take place. A contract operator is beholden to the facility owner’s instructions, and its activities at the facility are financed by the owner. This is the type of business relationship that Dos Republicas and Camino Real Fuels have. Eagle Pass

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<sup>82</sup> 30 TEX. ADMIN. CODE § 305.43(a) (West 2015) (TPDES applicant requirements), (c) (municipal solid waste applicant requirements). At the time the application that is the subject of the *Heritage on San Gabriel Homeowners Association* case was filed, municipal landfills were subject to section 305.43(b), which is why the opinion cites to that provision. The rule amendment took effect in May 2008. 33 Tex. Reg. 4157, 4176 (May 23, 2008).

<sup>83</sup> 30 TEX. ADMIN. CODE § 330.3(142).

<sup>84</sup> *Heritage on San Gabriel Homeowners Association v. TCEQ*, 393 S.W.3d 417, 430 (Tex. Ct. App.—Austin 2012); *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 1175 (D. Mont. 1995); *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico on April 20, 2010*, 844 F. Supp. 2d 746, 761 (E.D. La. Feb. 22, 2012); TPDES General Permit No. TXR150000, at 9 (Mar. 5, 2013); Ex. DRCP-102, at 94.

<sup>85</sup> Ex. DRCP-102, at 101.

<sup>86</sup> *See, e.g.*, 30 TEX. ADMIN. CODE § 30.337(11) (defining a wastewater system operations company as an entity that provides operations services on a contract basis).

Mine belongs to Dos Republicas.<sup>87</sup> As the owner, Dos Republicas sets the standards and gives final approval for decisions made regarding the mine, and it is responsible for the mine's expenses, including those expenses incurred by Camino Real Fuels.<sup>88</sup> Dos Republicas has entrusted Camino Real Fuels to operate the mine and compensates Camino Real Fuels accordingly,<sup>89</sup> but the mine and the business conducted there belong to Dos Republicas. Camino Real Fuels is essentially serving the role of an employee.

By example, the ED encounters the owner-contract operator relationship more in the world of municipal permitting. This is reflected in the occupational licensing and registration rules for wastewater operators and operations companies, which are found in title 30, chapter 30, subchapter J of the Texas Administrative Code. In the rule regarding the subchapter's purpose and applicability, it distinguishes between an operator and a contract operator when discussing the subchapter's purpose and when listing the persons who must be licensed or registered.<sup>90</sup> There is also a rule regarding the registration requirements for contract operators, section 30.355.<sup>91</sup> As part of that rule's requirements, a contract operator must submit a report as part of its registration application that contains the contract operator's name and address and the names and addresses *of the permittees it serves*.<sup>92</sup> In other words, the contract operator provides a permittee with a service; it is not a co-permittee. This is consistent with how the ED has interpreted section 305.43(a).

The ED's interpretation of the section 305.43(a) requirement is further supported by the preamble to EPA's original adoption of the requirement. In that preamble, EPA stated that it was adopting the requirement for the operator to obtain a permit "when ownership and operation *are split*" to address the concern that "requirements of the permit program might, by virtue of [the owner or operator] definition, be imposed on landowners *who have no involvement in operation of a permittee activity*."<sup>93</sup> The type of situation this describes is demonstrated by the following example. Kenobi Oil Refinery owned and operated an oil refinery but ceased conducting its oil refinery business. Organa Petroleum Products would like to use Kenobi's facility to operate its own oil refinery. The two enter into an agreement for Organa to use the facility, but they do not enter into a long-term lease, which would have given Organa the right to use and occupy the property on a long-term basis in place of the owner. In this situation, ownership and operation

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<sup>87</sup> Ex. DRCP-200, at 4:14-15.

<sup>88</sup> *Id.* at 7:15-17, 8:11-10:2, Ex. DRCP-204, at 29-34.

<sup>89</sup> Ex. DRCP-200, at 7:13-14, 8:21-23, 9:3-4.

<sup>90</sup> 30 TEX. ADMIN. CODE § 30.331(a) ("domestic wastewater treatment facility operators; wastewater collection system operators; and companies that operate these facilities on a contract basis"), (b) ("[p]ersons that operate, assist in the operation, or contract to operate").

<sup>91</sup> By definition in section 30.337(11), a wastewater system operations company is a contract operator.

<sup>92</sup> 30 TEX. ADMIN. CODE § 30.355(a)(1)-(2).

<sup>93</sup> 45 Fed. Reg. 33,290, 33,295 (May 19, 1980).

would be split in that Kenobi would have no involvement in the operation of Organa's oil refinery business. That is the type of situation in which the TCEQ would require the owner and operator to be co-permittees, and it is not the type of situation that exists in this case. Dos Republicas is clearly involved in the operation of Eagle Pass Mine, including maintaining an office in Eagle Pass and having a Dos Republicas employee visit the mine daily.<sup>94</sup> The fact is that the TCEQ rarely issues a TPDES permit with an owner and operator as co-permittees. To require Camino Real Fuels to be a co-permittee would go against the TCEQ's standard procedure and its reasonable interpretation of the section 305.43(a) requirement.<sup>95</sup>

## VI. BIOMONITORING

The addition of biomonitoring requirements to discharge permits is based on the TCEQ guidance document *Procedures to Implement the Texas Surface Water Quality Standards* (January 2003). Biomonitoring, also known as whole effluent toxicity testing, is required in any permit where the potential exists for the effluent to cause toxicity in the receiving water.<sup>96</sup> For industrial facilities, the TCEQ requires biomonitoring if the facility is an EPA-classified major industrial discharger with continuous-flow outfalls or an industrial discharger with continuous-flow outfalls with the potential to cause toxicity.<sup>97</sup> The Eagle Pass Mine is an EPA-classified major industrial discharger, but all the outfalls are stormwater-driven, and discharges will occur on an intermittent and flow-variable basis.<sup>98</sup> Due to the intermittent nature of the discharges, biomonitoring requirements were not included in the proposed permit.

## VII. CHRONIC CRITERIA

The ALJs provided the basics of the ED's position regarding imposing chronic criteria to the mining-area outfalls in the PFD.<sup>99</sup> If the Commission wishes to review the ED's arguments regarding this issue in more detail, please see the ED's Reply to Closing Arguments.<sup>100</sup>

## VIII. CONCLUSION

In its review of Dos Republicas' application, the ED followed its standard procedures for processing an industrial wastewater discharge permit application for a surface coal mine and drafting a permit based on that application and applicable federal and state law. After examining the other parties' exceptions to the PFD, the ED

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<sup>94</sup> Tr. 180:1-8, 200:3-5.

<sup>95</sup> ED's Reply to Closing Arguments 12-13 (Feb. 5, 2016).

<sup>96</sup> 30 TEX. ADMIN. CODE § 307.6(e)(2)(A); 40 C.F.R. § 122.44(d)(1)(v) (2015).

<sup>97</sup> *Procedures to Implement the Texas Surface Water Quality Standards* 101 (January 2003), available at [https://www.tceq.texas.gov/waterquality/standards/WQ\\_stds](https://www.tceq.texas.gov/waterquality/standards/WQ_stds).

<sup>98</sup> Ex. DRCP-107, at 10; Tr. 196:17-197:8; Ex. DRCP-700, at 12:19-13:2.

<sup>99</sup> PFD 38-39.

<sup>100</sup> ED's Reply to Closing Arguments 10-11 (Feb. 5, 2016).

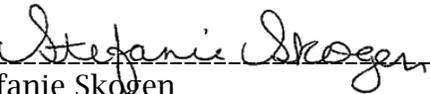
continues to support its review and the ALJs' recommendation to grant Dos Republicas' application. Therefore, the ED again requests that the Commission adopt the ALJs' proposed order with the ED's recommended changes presented its Exceptions to the PFD and issue the proposed permit.

Respectfully submitted,

TEXAS COMMISSION ON ENVIRONMENTAL  
QUALITY

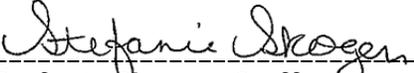
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**CERTIFICATE OF SERVICE**

I certify that on May 5, 2016, a copy of the enclosed document was sent by electronic mail or first class mail to the persons on the attached mailing list.

  
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