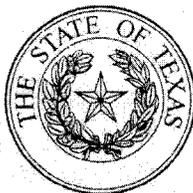


State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

April 5, 2016

Tucker Royall, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: **SOAH Docket No. 582-15-2214; TCEQ Docket No. 2015-0068-IWD; In Re: Application by Dos Republicas Coal Partnership for Amendment and Renewal of TPDES Permit No. WQ0003511000**

Dear Mr. Royall:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than 20 CALENDAR DAYS FROM ISSUANCE OF PFD. Any replies to exceptions or briefs must be filed in the same manner no later than 10 CALENDAR DAYS FROM EXCEPTIONS OR BRIEFS DEADLINE.

This matter has been designated **TCEQ Docket No. 2015-0068-IWD; SOAH Docket No. 582-15-2214**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink that reads "Rebecca S. Smith".

Rebecca S. Smith
Administrative Law Judge

Enclosures
cc: Mailing List

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STYLE/CASE: DOS REPUBLICAS COAL PARTNERSHIP

SOAH DOCKET NUMBER: 582-15-2214

REFERRING AGENCY CASE: 2015-0068-IWD

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

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

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

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

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

PROPOSAL FOR DECISION

I. INTRODUCTION

Dos Republicas Coal Partnership (“DRCP” or “Applicant”) has applied to the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) for amendment and renewal of Texas Pollution Discharge Elimination System (TPDES) Permit No. WQ0003511000. DRCP seeks the amended permit to discharge stormwater, mine pit water, and other wastewaters associated with its Eagle Pass Mine (Mine) in Maverick County, Texas. It also asks to add wastewater discharge outfalls. The wastewaters would be discharged into Hediondo Creek and Elm Creek, which eventually flow into the Rio Grande below Amistad Reservoir in Maverick County, Texas.

The Executive Director (ED) recommends granting the application,¹ as later supplemented and amended, and issuing the Draft Permit² that he prepared. The Environmental Defense Fund and parties aligned with it (collectively, “EDF Group”), Maverick County, and the Office of Public Interest Counsel (OPIC) recommend denial.

The Administrative Law Judges (ALJs) recommend granting the application and issuing the Draft Permit, with a few changes, namely, the addition of a boron limit and a requirement that aluminum be monitored, and a revision to Other Requirement No. 10.

¹ DRCP Ex. 107.

² ED Ex. 1, att. KLD-8.

II. PARTIES

The following are the parties in this case:

Parties	Representatives
DRCP	Ali Abazari and Breck Harrison
ED	Stefanie Skogen
OPIC	Eli Martinez
Environmental Defense Fund, Maverick County Environmental and Public Health Association, Walter Herring, Ernesto Ibarra, Gabriel de la Cerda, Mike Hernandez, Juan Esqueda, Boulware and Anson Family Ltd., Howard H.R.R. Holdings Ltd., and City of Eagle Pass (collectively, "EDF Group")	Adam Friedman and Paul Tough
Maverick County	David Frederick
Francisco Garcia	Self
Roberto Salinas	Self
Ricardo Ruiz	Self
Luis Martinez	Self
Ramon Castillo	Self
Jose Casares	Self

DRCP, the ED, OPIC, EDF Group, and Maverick County appeared at the hearing and filed post-hearing arguments. The other parties did not.

III. PROCEDURAL HISTORY

Below is a list of the major procedural events in this case:

Date	Activity
September 5, 2013	DRCP filed its application and application fee to amend its permit. ³
November 4, 2013	DRCP submitted additional information regarding the application. ⁴

³ DRCP Exs. 107, 112.

⁴ DRCP Ex. 108.

January 23, 2014	ED declared the application administratively complete. ⁵
March 17, 2014	DRCP requested that the application be processed as a renewal application in addition to an amendment application. ⁶
March 17, 2014	DRCP submitted additional information regarding the application. ⁷
May 22 and 23, 2014	Notice of Receipt of Application and Intent to Obtain a Water Quality Permit was mailed to interested persons and elected officials and published in English and Spanish. ⁸
June 13, 2014, and August 20, 2014	DRCP submitted additional information regarding the application. ⁹
December 4, 2014	ED completed his technical review. ¹⁰
December 16, 18, and 19, 2014	Notice of Application and Preliminary Decision, including information about a public meeting, was mailed to interested persons and elected officials and published in English and Spanish. ¹¹
January 15, 2015	Due to a location change, additional notice regarding the public meeting was published in English and Spanish. ¹²
January 15, 2015	DRCP requested direct referral of the application to the State Office of Administrative Hearings (SOAH).
January 22, 2015	A public meeting was held in Eagle Pass, Texas. ¹³
January 30, 2015	United States Environmental Protection Agency (EPA) issued a letter stating it had no objection to the Draft Permit. ¹⁴
February 2, 2015	TCEQ's Chief Clerk referred the application to SOAH.
February 24 and 26, 2015	Notice of the preliminary hearing was mailed and published. ¹⁵
March 30, 2015	SOAH ALJ convened the preliminary hearing in Eagle Pass, Texas, and admitted parties.
April 23, 2015	The ED issued a response to public comments. ¹⁶

⁵ DRCP Ex. A; DRCP Ex. 100 at 45–46; DRCP Ex. 114 at 3.

⁶ DRCP Ex. 100 at 15, 19, 46; DRCP Ex. 109.

⁷ DRCP Ex. 109.

⁸ DRCP Ex. C; DRCP Ex. 100 at 46; ED Ex. 1 at 30, att. KLD-16.

⁹ DRCP Exs. 110–111.

¹⁰ DRCP Ex. A; DRCP Ex. 100 at 45–47; DRCP Ex. 114 at 3.

¹¹ DRCP Ex. D; DRCP Ex. E; DRCP Ex. 100 at 48; ED Ex. 1 at 30–31, att. KLD-17.

¹² DRCP Exs. F, 100 at 48; ED Ex. 1 at 31, att. KLD-18.

¹³ DRCP Ex. 100 at 48; ED Ex. 1 at 31.

¹⁴ DRCP Ex. 800 at 27; DRCP Ex. 807.

¹⁵ DRCP Ex. G.

¹⁶ DRCP Ex. 100 at 49; DRCP Ex. 114; ED Ex. 1 at 31, att. KLD-19.

November 16–19, 2015	ALJs convened hearing on the merits in Austin, Texas.
January 15, 2016	Deadline for filing written closing statements.
February 5, 2016	Deadline for filing replies to written closing statements.

IV. BACKGROUND

DRCP is a Texas general partnership, and the Eagle Pass Coal Corporation and the Maverick County Coal Corporation, both Texas corporations, are its general partners.¹⁷ DRCP owns and operates the Mine, a subbituminous coal mine located approximately five to six miles north-northeast of the City of Eagle Pass, Texas, and within Maverick County, Texas.¹⁸ Elm Creek, including some of its unnamed tributaries, passes from the north to the south through the property that includes the Mine and empties into the Rio Grande approximately six miles southwest of the Mine.¹⁹ The water intake structure for the City of Eagle Pass is located approximately 1.6 miles farther downstream on the Rio Grande.²⁰

The Railroad Commission of Texas (RCT) first issued a surface coal mining permit for the Mine to DRCP's predecessor-in-interest on April 11, 2000.²¹ On January 29, 2013, the RCT approved an application for renewal and revision of the surface coal mining permit, including expansion of the Mine, and issued the permit to DRCP on May 7, 2013 (the "RCT Permit").²² The Mine boundary, as set forth in the RCT Permit, covers 6,346 acres on the northeast side of State Highway 1588, of which only about 2,364 acres will be mined for coal.²³ In the process of obtaining the RCT Permit, DRCP collected significant groundwater and surface water samples, and studied other geological and hydrogeological aspects of the Mine.²⁴ The RCT Permit

¹⁷ DRCP Ex. 200 at 3–5.

¹⁸ DRCP Ex. 100 at 26; DRCP Ex. 107 at 31; DRCP Ex. 202 at 5; DRCP Ex. 300 at 11.

¹⁹ DRCP Ex. 300 at 11; DRCP Ex. 100 at 39; DRCP Ex. 302.

²⁰ DRCP Ex. 100 at 39; DRCP Ex. 300 at 11; DRCP Ex. 302.

²¹ DRCP Ex. 202 at 5.

²² DRCP Ex. 200 at 5; DRCP Ex. 202; DRCP Ex. 203.

²³ DRCP Ex. 300 at 11; DRCP Ex. 300 at 13.

²⁴ DRCP Ex. 300 at 6–7, 15; DRCP Ex. 700 at 7, 8–12.

requires DRCP to plan, design, and ultimately construct, in accordance with specific RCT regulations, its stormwater and wastewater control structures, including:

- sedimentation ponds and retention ponds designed to contain any water that has come into contact with disturbed areas;
- diversion ditches designed to prevent surface water from outside the permit area from coming into contact with disturbed areas; and
- collection ditches designed to collect water within the permit area and direct it to the sedimentation ponds and retention ponds.²⁵

Coal was first exposed at the Mine in April 2015, and the removal of coal commenced on July 29, 2015, in Mine Block C1A. Mining will move to C1B, B, and then C2 within the five-year term of the RCT Permit.²⁶ Mining and reclamation occur contemporaneously.²⁷ Within each mine block, a pit is excavated and the overburden is stockpiled. As the next pit is mined out, the overburden from that pit is placed in the previously excavated pit and brought to appropriate grade. The size of an open pit is approximately 15 acres, and, on average, approximately 260 acres will be mined in a given year.²⁸

Without a TPDES permit, DRCP would not be able to operate the Mine.²⁹ Except as authorized by the TCEQ, no person may discharge waste into or adjacent to any water in the state.³⁰ A person may not commence construction of a treatment facility until the Commission has issued a permit to authorize the discharge of waste from the facility, except with the approval of the TCEQ.³¹ DRCP's predecessor-in-interest, Dos Republicas Resources Co., Inc., first

²⁵ DRCP Ex. 300 at 18–20, 22; DRCP Ex. 305.

²⁶ Tr. 222–23, 797; Tr. 190, 201, 202; DRCP Ex. 300 at 13, 20–21; DRCP Ex. 303.

²⁷ DRCP Ex. 300 at 13.

²⁸ DRCP Ex. 300 at 14.

²⁹ DRCP Ex. 100 at 13.

³⁰ Tex. Water Code § 26.121.

³¹ Tex. Water Code § 26.027(c).

obtained a wastewater discharge permit for the Mine in 1994.³² DRCP has held the permit since at least May 18, 2001, when the TCEQ's predecessor agency renewed it.³³ TCEQ, or its predecessor agencies, subsequently renewed the wastewater discharge permit in 2006, and most recently on November 7, 2011.³⁴ The current permit was set to expire on September 1, 2015.³⁵

V. APPLICATION

DRCP's current TPDES permit authorizes discharges of stormwater and mine-seepage water from active mining areas through Outfalls 001 through 013.³⁶ Effluent limitations are imposed for total suspended solids (TSS), total iron, total manganese, total selenium, and pH, and flow must be monitored and reported.³⁷ The current TPDES Permit includes additional reporting, notice, monitoring, testing, and record-keeping requirements.³⁸

DRCP's application seeks to renew its TPDES permit and amend it to authorize discharges from new outfalls and post-mining activity, to incorporate design changes, and to align the mining boundary authorized by the RCT with DRCP's wastewater discharge authorization.³⁹ More specifically, the application seeks:

- the addition of mining area and a mining boundary change to match the RCT Permit mining boundary;
- to maintain Outfalls 001M,⁴⁰ 003M, 004M, and 006M–008M to discharge stormwater and mine pit water from active mining areas;

³² DRCP Ex. 100 at 13; DRCP Ex. 103; DRCP Ex. 200 at 11.

³³ DRCP Ex. 104.

³⁴ DRCP Ex. 100 at 13; DRCP Exs. 105, 106.

³⁵ DRCP Ex. 106.

³⁶ DRCP Ex. 100 at 14; DRCP Ex. 106.

³⁷ DRCP Ex. 100 at 14; DRCP Ex. 106.

³⁸ DRCP Ex. 100 at 14; DRCP Ex. 106.

³⁹ DRCP Ex. 100 at 15, 22–24; DRCP Ex. 107; ED Ex. 1 at 2.

⁴⁰ In the Draft Permit, an "M" is added to an outfall number when discharge of stormwater and mine seepage from the active mining areas would be authorized at that location, an "R" is added when discharge of stormwater from post-mining areas would be authorized at that location, and "M/R" is added when both types of discharge would be

- the addition of new Outfalls 014M–020M to discharge stormwater and mine pit water from active mining areas;
- the addition of new Outfalls 001R, 003R, 004R, 006R–008R, and 014R–020R to discharge stormwater from post-mining areas;
- the removal of Outfalls 002, 005, 009, 010, 011, 012, and 013;
- the addition of new Outfall 021 to discharge wastewater from fueling areas, fuel storage areas, vehicle and equipment maintenance areas, truck washing stations, and coal handling and storage areas;
- the addition of new Outfall 022M to discharge stormwater and mine pit water from active mining areas and inside the rail loop; and
- the addition of features incorporated into more current permits, such as including an authorization to discharge from post-mining outfalls and the facilities areas, and applicable post-mining standards.⁴¹

VI. DRAFT PERMIT

In the Draft Permit, the effluent limitations for outfalls that were carried over from the current TPDES permit—Outfalls 001M, 003M, 004M, 006M–008M—remain the same, with effluent limits for TSS, total iron, total manganese, total selenium, and pH.⁴² The effluent limitations on new Outfalls 014M–020M and 022M are the same as the current TPDES permit limits on Outfalls 001M, 003M, 004M, 006M–008M, except that total selenium is not a limitation for the new outfalls.⁴³ The application also seeks permission to discharge from post-mining areas, which were not addressed in the current TPDES permit. For post-mining discharges from Outfalls 001R, 003R, 004R, 006R–008R, and 014R–020R, limitations are imposed for settleable solids and pH.⁴⁴ Finally, the Draft Permit includes effluent limitations for

authorized from the location. ED Ex. 1, att. KLD-8 at 1–2c. To simplify writing the PFD, the ALJs do not use these letters when referring to outfalls unless greater specificity is required.

⁴¹ DRCP Ex. 100 at 16; DRCP Ex. 800 at 57–58.

⁴² DRCP Ex. 800 at 57–58; *see also* DRCP Ex. 106; ED Ex. 1, att. KLD-8.

⁴³ DRCP Ex. 800 at 57–58; *see also* DRCP Ex. 106; ED Ex. 1, att. KLD-8.

⁴⁴ DRCP Ex. 800 at 57–58; *see also* DRCP Ex. 106; ED Ex. 1, att. KLD-8.

TSS, oil and grease, and pH on Outfall 21, the outfall related to the fuel-storage areas.⁴⁵ For all outfalls, the pH must be in the range of 6.0 to 9.0 standard units.⁴⁶ The Draft Permit contains the following effluent limits, for 30-day averages except as noted:

Outfall	TSS	Total Iron	Total Manganese	Total Selenium	Settleable Solids	Oil and Grease
001M, 003M-004M, and 006M-008M ⁴⁷	35 mg/L ⁴⁸	3 mg/L	2 mg/L	0.036 mg/L (daily max)	N/A	N/A
014M-020M ⁴⁹	35 mg/L	3 mg/L	2 mg/L	N/A	N/A	N/A
001R, 003R-004R, 006R-008R, and 014R-020R ⁵⁰	N/A	N/A	N/A	N/A	5 mg/L (daily max)	N/A
021 ⁵¹	50 mg/L (daily max)	N/A	N/A	N/A	N/A	15 mg/L

VII. SUMMARY OF DISPUTES

EDF Group makes five main arguments. First, DRCP's application was incomplete because it did not predict the concentration of constituents from a yet-to-occur discharge. Second, water-quality-based effluent limits for aluminum and boron should be imposed in the permit. Third, the ED failed to consider whether chronic effluent limits are needed at outfalls that are within three miles of perennial streams or perennial pools. Fourth, a proper antidegradation review was not performed by the ED. And fifth, by approving the Draft Permit,

⁴⁵ DRCP Ex. 800 at 57-58; *see also* DRCP Ex. 106; ED Ex. 1, att. KLD-8.

⁴⁶ ED Ex. 1, att. KLD-8 at 34-35, 37.

⁴⁷ ED Ex. 1, att. KLD-8 at 33.

⁴⁸ mg/L = milligrams per liter.

⁴⁹ ED Ex. 1, att. KLD-8 at 34.

⁵⁰ ED Ex. 1, att. KLD-8, at 35.

⁵¹ ED Ex. 1, att. KLD-8, at 37.

the TCEQ would be approving an “illegal” discharge route for Outfall 019. OPIC makes arguments that are similar to EDF Group’s second, third, and fourth arguments.

Maverick County makes additional arguments. First, DRCP’s contractor, Camino Real Fuels, LLC (CRF), should have applied as the permit operator. Second, the ED has improperly characterized certain receiving streams and consequently performed an incomplete antidegradation review. Third, the Draft Permit should require chronic toxicity testing. OPIC and EDF Group agree with these arguments.

VIII. JURISDICTION AND NOTICE

TCEQ has jurisdiction to regulate water quality in Texas and to issue a TPDES permit.⁵² No party disputes that the Commission generally has subject matter jurisdiction to issue a TPDES permit, although Maverick County disputes TCEQ’s authority to issue permit. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision (PFD) with findings of fact and conclusions of law.⁵³ No party disputes SOAH’s jurisdiction.

Notice of an application for a permit, permit amendment, or permit renewal must be given to persons who, in the judgment of the Commission, may be affected by the application.⁵⁴ The applicant must publish notice of the ED’s preliminary decision in a newspaper in accordance with Commission rules and make a copy of the preliminary decision available for review and copying in a public place in the county where the facility will be located.⁵⁵ Notice of the contested case hearing on the application must be given to persons who in the judgment of the Commission may be affected by the application and must be published at least once in a newspaper regularly published or circulated in each county where the Commission has reason to

⁵² Tex. Water Code §§ 5.013, 26.003, 26.011, 26.027, 26.028.

⁵³ Tex. Gov’t Code §§ 2001.058, 2003.047; Tex. Water Code § 5.557.

⁵⁴ Tex. Water Code § 26.028(a).

⁵⁵ Tex. Water Code § 5.553(a)–(e).

believe persons reside who may be affected by application.⁵⁶ At the preliminary hearing, exhibits were admitted that proved issuance of all the required notices showing DRCP as the only applicant.⁵⁷

Maverick County contends that the contractor CRF, along with DRCP, should have applied for the permit at issue in this case. This position leads Maverick County to also contend that the notices given for the application and hearing were defective and that the application should be dismissed for want of jurisdiction. OPIC and EDF Group agree with Maverick County.

As discussed later in the PFD, the ALJs conclude that CRF was not required to also apply for the permit. Accordingly, they do not agree with Maverick County's related arguments that the notices were defective and the Commission lacks jurisdiction to issue the permit. The ALJ conclude that the required notices were given and the Commission has jurisdiction to issue the permit.

IX. COMPLETENESS OF APPLICATION

A person desiring to obtain a permit or to amend a permit must submit an application to the Commission containing all information reasonably required by the Commission.⁵⁸ The Commission has adopted rules specifying the application requirements.⁵⁹

Mr. Andres Gonzalez-Saravia Coss signed the application. He is the president of both general partners of DRCP and is authorized to execute documents on behalf of DRCP.⁶⁰ Lisa Olson Murphy, P.E., is an expert consultant hired by DRCP to assist in preparing and

⁵⁶ Tex. Gov't Code §§ 2001.051–2001.052; Tex. Water Code §§ 26.022–26.028; 30 Tex. Admin. Code § 39.551(f).

⁵⁷ DRCP Exs. A–J.

⁵⁸ Tex. Water Code § 26.027(b).

⁵⁹ 30 Tex. Admin. Code §§ 281.5, 305.45, 305.48.

⁶⁰ DRCP Ex. 107 at 8, 24; DRCP Ex. 200 at 5.

submitting the application and to act as a liaison between DRCP and the TCEQ during the review of the application.⁶¹ The application was prepared by permitting professionals under the supervision of Ms. Murphy, who is a qualified, experienced permitting professional and licensed engineer.⁶² The application contains completed forms, signed and notarized as appropriate, payment of fees, verified legal status of the applicant, attachment of technical reports, outfall locations, discharge routes, a list of adjacent landowners, and other information requested by the ED and required to allow the ED to evaluate the permit application.⁶³

In her prefiled testimony, Ms. Murphy went through a section-by-section discussion of the application and testified that the regulatory requirements of 30 Texas Administrative Code §§ 281.5, 305.45, and 305.48, and chapter 307 were satisfied.⁶⁴ DRCP's and the ED's expert witnesses opine that DRCP's application was complete and contained the information required by 30 Texas Administrative Code § 305.45.⁶⁵

No party disputes that DRCP complied with most of the application requirements. However, there are some disputes, which are discussed below.

A. Operator Dispute

DRCP alone filed the current application to renew and amend the permit.⁶⁶ No party disputes DRCP's ownership of the existing and proposed wastewater facilities at the Mine; however, Maverick County contends that CRF, not DRCP, will operate the wastewater facility. According to Maverick County, that means CRF was required to also apply for the permit as the operator. Because CRF did not apply, Maverick County argues that the permit will be void if

⁶¹ DRCP Ex. 100 at 7.

⁶² DRCP Ex. 100 at 17; DRCP Ex. 101; Tr. 28.

⁶³ DRCP Exs. 107–13.

⁶⁴ DRCP Ex. 100 at 43–45.

⁶⁵ Tr. 49, 56, 58, 66, 632–33, 637–38, 853–54; DRCP Ex. 800 at 26, 28; ED Ex. 1 at 8, 14–15.

⁶⁶ DRCP Ex. 107 at 8.

issued only to DRCP, the public notices given for the application were defective, and the application should be dismissed for want of jurisdiction.

OPIC and the EDF Group agree with Maverick County that CRF was required to apply. DRCP and the ED respond that DRCP is both the owner and the operator of the wastewater facilities, and CRF was not required to apply for the permit because CRF is merely DRCP's contractor.

The ALJs conclude that DRCP is both the owner and operator of the wastewater treatment facilities for the Mine, and that CRF was not required to co-apply for the permit. If the owner and the operator are different entities, both are required to apply for a TPDES permit because 30 Texas Administrative Code § 305.43(a) provides:

It is the duty of the owner of a facility to submit an application for a permit However, if the facility is owned by one person and operated by another . . . for all Texas Pollutant Discharge Elimination System permits, it is the duty of the operator and the owner to submit an application for a permit.

For purposes of the TCEQ rule, “[o]wner” is defined as “[t]he person who owns a facility or part of a facility,”⁶⁷ and “[o]perator” is defined as “[t]he person responsible for the overall operation of a facility.”⁶⁸

Maverick County cites to only one court case⁶⁹ that it contends is relevant to the operator dispute. The case concerns a water-right permit and does not concern a dispute over who is the operator. Having reviewed that case, the ALJs do not see that it has any relevance to the current dispute.

⁶⁷ 30 Tex. Admin. Code § 305.2(26).

⁶⁸ 30 Tex. Admin. Code § 305.2(24).

⁶⁹ *Chocolate Bayou Water Co. & Sand Supply v. Texas Nat. Res. Conservation Comm'n*, 124 S.W.3d 844 (Tex. App.—Austin 2000, pet. denied).

TCEQ's predecessor agency entered into a still-binding memorandum of agreement (MOA) with EPA assuming implementation of the National Pollutant Discharge Elimination System (NPDES) program in Texas.⁷⁰ The Texas agency agreed to operate the TPDES program in accordance with the Clean Water Act, applicable federal regulations, and published EPA policy.⁷¹ A state program may be more stringent than the federal one.⁷²

TCEQ's rule requiring both the owner and the operator to apply is more stringent than EPA's rule, which requires only the operator to apply when ownership and operation are split. The EPA rule states, "When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit."⁷³ EPA's rules do not clearly define and distinguish the meanings of "owner" and "operator," as TCEQ's rules do. The EPA rule merely states: "*Owner or operator* means the owner or operator of any 'facility or activity' subject to regulation under the NPDES program."⁷⁴ When adopting the predecessor of its rule requiring the operator to apply when ownership and operation are divided,⁷⁵ EPA explained its rationale:

Some commenters sought clarification of what happens when the owner and operator are not the same, and expressed concern that requirements of the permit program might, by virtue of this definition, be imposed on landowners who have no involvement in operation of a permitted activity. To address this concern, we have amended [the] application for a permit [rule] to provide that the operator is responsible for obtaining a permit and complying with it when ownership and operation are split.⁷⁶

⁷⁰ *Memorandum of Agreement Between the Texas Natural Resource Conservation Commission and the U.S. Environmental Protection Agency, Region 6 Concerning the National Pollutant Discharge Elimination System*, (Sep. 14, 1998), <http://www.tceq.state.tx.us/assets/public/permitting/waterquality/attachments/municipal/c1.pdf>. The ALJs officially notice this agreement and any objection should be filed as an exception to the PFD.

⁷¹ MOA at 2.

⁷² 40 C.F.R. § 123.25(a).

⁷³ 40 C.F.R. § 122.21(b).

⁷⁴ 40 C.F.R. § 122.2.

⁷⁵ EPA initially adopted 40 C.F.R. § 122.4(b), 45 Fed. Reg. 33290, 33424 (May 19, 1980), which was later renumbered as 40 C.F.R. § 122.21(b) and changed to delete references to the Resource Conservation and Recovery Act Program, 48 Fed. Reg. 14146, 14149, 14159 (Apr. 1, 1983).

⁷⁶ 45 Fed. Reg. 33290, 33295 (May 19, 1980).

EPA's desire to avoid imposing permitting requirements on uninvolved landowners is not applicable in this case. DRCP is not an uninvolved landowner. To the contrary, based on the evidence discussed below, the ALJs conclude 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.

It is true that CRF, under a contract with DRCP⁷⁷ and under DRCP's direction, will perform much of the day-to-day work associated with operating the Mine and the associated wastewater facilities. CRF is a wholly-owned subsidiary of the North American Coal Corporation (NACC).⁷⁸ Under the contract with DRCP, CRF serves as the contract miner for the Mine.⁷⁹ The contract between DRCP and CRF refers to DRCP as the "Owner" and CRF as the "Contractor."⁸⁰ The contract provides that it was entered into, in part, because, "[DRCP] desires to engage [CRF] to develop, construct, operate, and perform on-going reclamation at the Mine and to remove and deliver coal from the Mine to [DRCP] on the terms and condition herein provided."⁸¹ The Scope of Work provides, in part, "[CRF] shall design, develop, operate and perform on-going reclamation of the Mine in accordance with the provisions of this Agreement."⁸² The same article provides, "[CRF] shall furnish all required personnel, administrative and supervisory services, construction, engineering, permitting, loading, geological and operation services required to carry out the Work in accordance with all applicable Legal Requirements."⁸³ Later, "[CRF] may make any necessary expenditure in

⁷⁷ DRCP Ex. 204.

⁷⁸ DRCP Ex. 204 at 0020640.

⁷⁹ DRCP Ex. 200 at 7; DRCP Ex. 204.

⁸⁰ DRCP Ex. 204 at 0020640.

⁸¹ DRCP Ex. 204 at 0020640.

⁸² DRCP Ex. 204 at 0020646.

⁸³ DRCP Ex. 204 at 0020647.

reasonable response to an Emergency.”⁸⁴ Later, still, “[CRF] shall, and shall cause all persons working at the direction of [CRF] to, comply with applicable Legal Requirements.”⁸⁵

Under the contract, it is the duty of CRF to “obtain and keep in effect” comprehensive liability and other insurance.⁸⁶ Article 26 of the agreement provides that permits will be maintained in DRCP’s name, “except for those that must be obtained in the name of [CRF].”⁸⁷ As to those permits issued to DRCP, this article provides: “Owner hereby irrevocably for the term of this Agreement grants to [CRF] the right to operate under the Surface Mining Permit and other permits now or hereafter issued to [DRCP] by any Governmental Authorities.”⁸⁸ The agreement grants CRF a role in any litigation settlement DRCP might wish to enter, if the settlement includes injunctive or equitable relief.⁸⁹

Peter A. Nielsen is the President of CRF.⁹⁰ At hearing, Mr. Nielsen testified that administrative staff members at the Mine are employees of NACC and the workforce members are employees of CRF.⁹¹ He testified that contractors at the Mine are hired by CRF.⁹² CRF would decide when to discharge wastewater from sedimentation ponds, its employees would conduct the water sampling efforts, and its employees would maintain the equipment and facilities at the Mine site.⁹³ CRF developed the reclamation plan, determined if the retention ponds required liners, and developed the plans for the diversion ditches and berms at the Mine.⁹⁴

⁸⁴ DRCP Ex. 204 at 0020657.

⁸⁵ DRCP Ex. 204 at 0020659.

⁸⁶ DRCP Ex. 204 at 0020684.

⁸⁷ DRCP Ex. 204 at 0020686.

⁸⁸ DRCP Ex. 204 at 0020686.

⁸⁹ DRCP Ex. 204 at 0020671.

⁹⁰ DRCP Ex. 300 at 3.

⁹¹ Tr. 179.

⁹² Tr. 181.

⁹³ Tr. 182–83.

⁹⁴ Tr. 188–89.

In summation, Mr. Nielsen testified that, while DRCP has financial responsibility, CRF has overall responsibility for operations.⁹⁵

Nevertheless, the ALJs conclude that DRCP retains responsibility for overall operation of the wastewater facilities. 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 Mine, pays all operation costs during production at the Mine, and is required to retain, maintain, and comply with all permits.⁹⁶ DRCP has an office in Eagle Pass, and a DRCP representative visits the site on a daily basis to oversee all the functions for which it has responsibility.⁹⁷

Moreover, the current TPDES permit was issued solely to DRCP and does not refer to its status.⁹⁸ Similarly, since at least 2001, prior versions of the permit were issued only to DRCP.⁹⁹ 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.

B. Properties of Wastewater

The EDF Group contends that DRCP failed to comply with a Commission rule requiring it to describe the physical and chemical properties of the wastewater it seeks to discharge. DRCP and the ED disagree, and other parties do not address the issue. TCEQ rule 30 Texas Administrative Code § 305.45(a)(8)(B)(ii) states:

⁹⁵ Tr. 201.

⁹⁶ DRCP Ex. 200 at 7; DRCP Ex. 204.

⁹⁷ Tr. 180, 200.

⁹⁸ DRCP Ex. 106 at 1.

⁹⁹ DRCP Exs. 104–105.

- (a) Forms for permit applications will be made available by the executive director. Each application for permit must include the following:

...

- (8) a supplementary technical report submitted in connection with an application. . . . The report must include the following:

...

- (B) for each outfall . . . or place of disposal:

...

- (ii) the physical [and] chemical . . . properties of the defined waste . . . ; the characteristics of the waste . . . ; the chemical, physical, thermal, organic, [or] bacteriological . . . properties or characteristics, as applicable, described in enough detail to allow evaluation of the water and environmental quality considerations involved

EDF Group believes the above rule mandated that DRCP complete Worksheet 2.0 of the Technical Report application form, which requires an applicant to provide sampling data for its facility.¹⁰⁰ DRCP responds that it was not required to fill out Worksheet 2.0 because wastewater had not yet been discharged from the facilities at the Mine; hence, it did not have any sampling data. The ED agrees with DRCP. EDF Group contends that DRCP's interpretation, and the ED's acquiescence, directly contradicts the plain language of 30 Texas Administrative Code § 305.45(a)(8)(B)(ii).

TCEQ's Instructions for Worksheet 2.0 state, "If the application is for a new discharge, results from similar facilities, treatability studies, design information, or literature sources may be submitted when real effluent analytical data is not available."¹⁰¹ EDF Group claims that DRCP could have complied with the instruction because it had easy access to the exact type of data identified by the TCEQ Instructions. It notes that DRCP's contractor, CRF, is a wholly-

¹⁰⁰ DRCP Ex. 107 at 45-54.

¹⁰¹ EDF Ex. 1104 at 62.

owned subsidiary of NACC, which owns and currently operates six coal mines in the United States,¹⁰² and also operates eight other coal mines in the United States.¹⁰³ In addition to the Mine whose wastewater facilities are at issue in this case, wholly owned subsidiaries of NACC operate three coal mines in Texas that were actively extracting coal before the application was filed.¹⁰⁴ These mines are required to sample their wastewater discharge.¹⁰⁵ Yet, NACC did not provide DRCP with data concerning those samples; and DRCP's consultant, Ms. Murphy, did not request that data from NACC.¹⁰⁶ Alternatively, EDF Group contends DRCP could have submitted groundwater data from the Mine as an alternative method of describing the proposed effluent.

DRCP claims it complied with 30 Texas Administrative Code § 305.45(a)(8)(B)(ii) by providing a thorough description of the effluent in enough detail to allow evaluation. The application stated that the Mine was a "subbituminous coal mining operation."¹⁰⁷ The application explained that stormwater runoff that comes into contact with disturbed areas of the mining and reclamation operations goes into sedimentation ponds for settling of the solids.¹⁰⁸ DRCP stated that seepage water may also accumulate and commingle with stormwater.¹⁰⁹

The application also notes that the Mine is regulated under 40 C.F.R. Part 434 and that authorization was sought for both active and post-mining discharges, thus subjecting it to Subparts C and E of Part 434.¹¹⁰ DRCP claims that disclosure gave TCEQ and the public a significant level of understanding of the effluent because EPA incorporated considerable research in developing the limits found in Part 434. The effluent limitations guidelines were

¹⁰² DRCP Ex. 500 at 8.

¹⁰³ DRCP Ex. 500 at 8.

¹⁰⁴ DRCP Ex. 500 at 8; Tr. 234.

¹⁰⁵ Tr. 236.

¹⁰⁶ Tr. 236.

¹⁰⁷ DRCP Ex. 107 at 31.

¹⁰⁸ DRCP Ex. 107 at 31.

¹⁰⁹ DRCP Ex. 107 at 31.

¹¹⁰ DRCP Ex. 107 at 43.

developed by EPA as part of the preparation of the Development Document for coal mining.¹¹¹ 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.¹¹² The data collection was authorized under 33 U.S.C. § 1318.¹¹³ EPA sampled for 129 priority pollutants from discharges from these mines, as well for TSS, pH, iron, and manganese.¹¹⁴ The collected data was analyzed by EPA, and used in the formulation of the Development Document, which met the standards of 33 U.S.C. § 1314(b).¹¹⁵

The application included groundwater data from DRCP's most recent sampling event.¹¹⁶ The application provided capacity information related to the surface impoundments.¹¹⁷ DRCP explained that the volume of wastewater was variable and dependent on rainfall.¹¹⁸ The application informed TCEQ that DRCP was subject to a mining permit issued by the RCT, thus subjecting it to a number of regulations related to pond sizing and construction requirements.¹¹⁹

DRCP claims the above information informed TCEQ of the physical, chemical, and overall characteristic of the effluent that will be generated at the Mine. Moreover, DRCP notes, there are currently a total of 18 TPDES permits issued by TCEQ for mining facilities,¹²⁰ so TCEQ has the ability to review data associated with those mines.

¹¹¹ DRCP Ex. 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* DRCP Ex. 800 at 22–23; EDF Ex. 1100 at 9–10.

¹¹² DRCP Ex. 800 at 22–23.

¹¹³ *See* EDF Group Ex. 1100 at 9.

¹¹⁴ DRCP Ex. 800 at 22–23.

¹¹⁵ EDF Group Ex. 1100 at 9.

¹¹⁶ DRCP Ex. 107 at 153–211.

¹¹⁷ DRCP Ex. 107 at 152; DRCP Ex. 108 at 113.

¹¹⁸ DRCP Ex. 107 at 44.

¹¹⁹ DRCP Ex. 108 at 4; *see also* ED Ex. 1, att. KLD-19 at 780.

¹²⁰ ED Ex. 1 at 12.

The ED agrees that DRCP provided sufficient information to comply with 30 Texas Administrative Code § 305.45(a)(8)(B)(ii). TCEQ permit writer Kara Denney holds a bachelor's degree in geography and water studies;¹²¹ has been a permit writer since September 2012;¹²² has reviewed approximately 80 permit applications;¹²³ and has reviewed the majority of coal mine permit applications filed during her tenure.¹²⁴ She has reviewed no application for a permit that included a completed Worksheet 2.0 for a facility that had not previously discharged.¹²⁵ She reviewed DRCP's application and testified that DRCP had provided the information that was required.¹²⁶

According to the ED, there are multiple locations where DRCP provided information regarding what would or would not be in its wastewaters.¹²⁷ Moreover, the ED notes that the type of effluents DRCP will be discharging—groundwater and stormwater—are not complex. Additionally, the technology-based effluent limits in EPA's rules¹²⁸ indicate effluent constituents that one would expect from the outfalls that will discharge both of these wastewaters from any coal mine with acid or ferruginous drainage.

The ALJs conclude that DRCP has complied with 30 Texas Administrative Code § 305.45(a)(8)(B)(ii). 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 considerations 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.

¹²¹ ED Ex. 1 at 1, att. KLD-1.

¹²² ED Ex. 1 at 1, att. KLD-1.

¹²³ Tr. 684–85.

¹²⁴ Tr. 647.

¹²⁵ Tr. 685.

¹²⁶ ED Ex. 1 at 8.

¹²⁷ DRCP Ex. 107 at 33, 39–40, 44, 60, 147, 155–90; DRCP Ex. 109 at 5; DRCP Ex. 110 at 3–6, 12–4.

¹²⁸ 40 C.F.R. pt. 434, subpts. C, E, F.

C. Discharge Route From Outfall 019

EDF Group contends that TCEQ cannot issue the Draft Permit because doing so would authorize an “illegal” discharge route beginning at Outfall 019. It contends that a portion of the route is not in a defined watercourse and crosses property that DRCP does not own or have a right to cross. EDF Group contends that TCEQ cannot issue a TPDES permit that includes a route that DRCP has not proven it has a reasonably satisfactory good-faith legal right to use. DRCP and the ED do not agree with EDF Group.

The ALJs conclude that, during the hearing, DRCP permissibly made a minor amendment to its application to change the discharge route from Outfall 019 and there is no legal impediment to the Commission approving the application with that route revision.

1. The Old Route and the New Route

The application shows a discharge route from Outfall 019 to Elm Creek¹²⁹ that crosses a tract of land owned by Boulware and Anson Family Ltd. and Howard H.R.R. Holdings, Ltd. (collectively, “Howard Property”).¹³⁰ EDF Group witness Prosser “Martin” Wall testified that he leases the Howard Property.¹³¹ Mr. Wall also testified, and confirmed with photographs, that there is no ditch or defined watercourse on the Howard Property where DRCP originally proposed a discharge route from Outfall 019.¹³² Ryland Howard is the managing partner of the two entities that own the Howard Property.¹³³ Mr. Howard testified that there is no means to convey water across the Howard Property and he had never authorized DRCP to discharge water on the Howard Property.¹³⁴

¹²⁹ DRCP Ex. 107 at 120; DRCP Ex. 110 at 7.

¹³⁰ DRCP Ex. 107 at 124–25.

¹³¹ EDF Ex. 300 at 3.

¹³² EDF Ex. 300 at 4–9; EDF Exs. 301–304.

¹³³ EDF Ex. 400 at 1.

¹³⁴ EDF Ex. 400 at 4.

DRCP witness James Miertschin, Ph.D., P.E., has extensive experience in water-quality studies, wastewater permitting, and the design and evaluation of wastewater conveyance and treatment facilities.¹³⁵ Mr. Miertschin agreed that the originally proposed route crossed the Howard Property at a location where there was no watercourse.¹³⁶ For that reason, he developed, and DRCP proposed at the hearing, a revision of the discharge route from Outfall 019 to Elm Creek.¹³⁷ Dr. Miertschin reviewed maps and county appraisal district information regarding property boundaries and testified the new route does not cross the property Mr. Wall leases.¹³⁸ Instead, Dr. Miertschin understood the property was owned by DRCP.¹³⁹

2. EDF Group's Position

EDF Group objects to the new route from Outfall 019 because DRCP has never filed an amendment to the application to reflect this change. Moreover, according to EDF Group, TCEQ cannot authorize DRCP to discharge because DRCP has not demonstrated it has the legal right to use the new route. EDF Group argues that TCEQ cannot issue a TPDES permit that includes a route that DRCP has not proven it has a reasonably satisfactory good-faith legal right to use.¹⁴⁰ EDF Group poorly identifies a sliver of land¹⁴¹ and claims that its ownership is unclear from the landowner map provided by DRCP.¹⁴²

¹³⁵ DRCP Ex. 800 at 1–12.

¹³⁶ Tr. 829.

¹³⁷ Tr. 823–25; DRCP Exs. 809, 902.

¹³⁸ Tr. 823–24.

¹³⁹ Tr. 833–35, 837–38.

¹⁴⁰ *Cf. Rosenthal v. Railroad Comm'n*, 03-09-00015-CV, 2009 WL 2567941, at *7 (Tex. App.—Austin Aug. 20, 2009, pet. denied) (holding an applicant must make “a reasonably satisfactory showing of a good-faith claim of ownership.”).

¹⁴¹ Tr. 834–39.

¹⁴² DRCP Ex. 107 at 124–25.

EDF Group claims that Dr. Miertschin admitted he drew the boundary incorrectly for the land Mr. Wall's leases, and testified that he did not know who owns the sliver.¹⁴³ EDF Group complains that that Dr. Miertschin relied entirely on a map he created,¹⁴⁴ is not a surveyor,¹⁴⁵ and did not pull title on the properties in question.¹⁴⁶

EDF Group also claims that, as the tenant on the property, Mr. Wall is in the best position to know whether the newly proposed route crosses his property. Mr. Wall testified he has spent decades on the property, is extremely familiar with it, and the property is his livelihood.¹⁴⁷ Mr. Wall testified that once the new discharge route heads north from the tank depicted on the Kincaid property, the proposed route reenters Mr. Wall's property.¹⁴⁸

3. The ED's Position

The ED does not object to the proposed new route from Outfall 019 to Elm Creek and would not agree with EDF Group even if the route had not been changed. The ED understands that DRCP will need to construct a ditch to convey wastewater from Outfall 019 to Elm Creek and will need permission from the landowner to construct that ditch. The ED also notes that the Draft Permit states, "The issuance of this permit does not grant to the permittee the right to use private or public property for conveyance of wastewater along the discharge route described in this permit."¹⁴⁹ The ED contends that DRCP will need to apply for an amendment to change the route if DRCP cannot obtain landowner consent. Even if the route change were a major amendment to the application, which the ED does not concede, the ED claims the route change would not require additional notice because it would not affect a landowner that did not

¹⁴³ Tr. 834-35.

¹⁴⁴ DRCP Ex. 902.

¹⁴⁵ Tr. 833.

¹⁴⁶ Tr. 833.

¹⁴⁷ EDF Group Ex. 300.

¹⁴⁸ EDF Group Ex. 300 at 10; *see* DRCP Ex. 902.

¹⁴⁹ ED Ex. 1, att. KLD-8 at 32.

previously receive notice. The ED argues that the new route would be better for downstream waters because the ditch would be longer and allow more pollutants to settle.

4. DRCP's Position

DRCP asks for approval of the revised discharge route from Outfall 019 that Dr. Miertschin prepared.¹⁵⁰ It contends that the law is clear that so long as a discharge is to a watercourse, it is in “water of the State” and approval of a private landowner is not required.¹⁵¹ DRCP contends that the portion of the revised route not in a watercourse is on property under DRCP control,¹⁵² no new landowners will be impacted by the new route,¹⁵³ and all interested parties received the required notice.¹⁵⁴ DRCP concedes that if the entire route were not in a watercourse or under its control and it could not obtain consent of the rightful landowner to construct a ditch, it may need to revise the discharge route for Outfall 019. However, DRCP claims that is not an issue currently before the ALJs or the TCEQ and all TCEQ needs to do is approve the new discharge route. It notes that the Commission would not be authorizing DRCP to use private or public property without a landowner's consent, if no watercourse is present. It argues that the route revision is not a major amendment to the application, but the Commission need not decide now whether it is.¹⁵⁵

5. ALJs' Analysis

No amendments to an application which would constitute a major amendment can be made by the applicant after TCEQ's chief clerk has issued notice of the application and Draft Permit, unless new notice is issued which includes a description of the proposed amendments to

¹⁵⁰ DRCP Exs. 809, 902.

¹⁵¹ See ED Ex. 1, att. KLD-19 at 14-16; see also Tex. Water Code §§ 5.012, 26.121, 26.027; *Domel v. City of Georgetown*, 6 S.W.3d 349 (Tex. App.—Austin 1999, pet. denied).

¹⁵² Tr. 837.

¹⁵³ Compare DRCP Ex. 902 with DRCP Ex. 107 at 7.

¹⁵⁴ Compare DRCP Ex. 108 at 105–06 with DRCP Ex. 809; see also DRCP Ex. 902; ED Ex. 1 at 11.

¹⁵⁵ DRCP Reply at 29–32.

the application.¹⁵⁶ A major amendment is one that changes a substantive term, provision, requirement, or a limiting parameter of a permit.¹⁵⁷ In contrast,

A minor amendment is an amendment to . . . maintain the permitted quality or method of disposal of waste . . . if there is neither a significant increase of the quantity of waste or fluid to be discharged . . . nor a material change in the pattern or place of discharge A minor amendment includes any other change to a permit issued under this chapter that will not cause or relax a standard or criterion which may result in a potential deterioration of quality of water in the state.¹⁵⁸

Given the specific evidence here, this change to the discharge route would not change a substantive term, provision, requirement, or limiting parameter of the Draft Permit. The Draft Permit includes one reference to the route from Outfall 019 to Elm Creek: “[DRCP] . . . is authorized to treat and discharge wastes from [Mine] . . . via Outfall[] . . . 019M/R to unnamed ditches, thence to Elm Creek”¹⁵⁹ That language would not need to be changed to account for DRCP’s revised route. Additionally, no additional notice to the public would be required. The notices that have been mailed and published describe the discharge route from “Outfall[] 19M/R to unnamed ditches, thence to Elm Creek”¹⁶⁰ That description would remain accurate. The only additional property that would be affected by the new route is that which DRCP claims it controls.¹⁶¹ It is true that Mr. Wall claims the revised route instead crosses the Howard Property that he leases. However, Mr. Wall and the entities that own the Howard Properties, through their managing partner Mr. Howard, have received actual notice of the revised route through their participation in this proceeding.

Under the circumstances, the ALJs find that the revision of the discharge route from Outfall 019 to Elm Creek is not a material change in the pattern or place of discharge or a major

¹⁵⁶ 30 Tex. Admin. Code § 281.23(a).

¹⁵⁷ 30 Tex. Admin. Code § 305.62(c)(1).

¹⁵⁸ 30 Tex. Admin. Code § 305.62(c)(2).

¹⁵⁹ ED Ex. 1, att. KLD-8 at 32.

¹⁶⁰ *E.g.* DRCP Ex. A at 4 (unmarked); *see also* DRCP Exs. B–G.

¹⁶¹ *Compare* DRCP Exs. 809, 902 *with* DRCP Ex. 108 at 106.

amendment to the application. Instead, the ALJs find the amendment is minor, does not require new notice, and is not prohibited during the hearing.

Yet EDF Group argues that TCEQ cannot issue a permit authorizing the revised route from Outfall 019 because there is no watercourse along the route from the outfall to Elm Creek and DRCP has not proven it has a reasonably satisfactory, good-faith legal right to use the property the route would cross. EDF Group does not cite a provision of the Texas Water Code or a TCEQ rule imposing that burden of proof. Instead, EDF Group cites *Rosenthal v. Railroad Commission of Texas*,¹⁶² which concerned a dispute over property rights to the subsurface where someone had applied to the RTC for a permit to inject saltwater underground for disposal. In that case, the court mentioned that no statute or rule required the applicant to prove its title or right to possess the property at issue in order to obtain the permit and also noted that it was well established that the RCT did not have jurisdiction to decide disputes over title or rights of possession in property that was the subject of a permit request.¹⁶³ Nevertheless, the court concluded the applicant must make “a reasonably satisfactory showing of a good-faith claim of ownership” in the property, because otherwise issuing the permit would be a useless thing.¹⁶⁴ The court upheld the RCT’s issuance of the permit after concluding that there was substantial evidence to support the RCT’s legal conclusion that the applicant had a good-faith claim to the right to use the tract for saltwater disposal by underground injection.¹⁶⁵

EDF Group cites no case in which a court has held that an applicant for a wastewater discharge permit had a similar obligation to prove a good-faith claim to the property along the discharge route. Nevertheless, the ALJs have considered EDF Group’s argument and find that DRCP has demonstrated it has a good-faith claim to a right to use the portion of the revised discharge route from Outfall 019 to Elm Creek. Dr. Miertschin testified that he drew property

¹⁶² *Rosenthal v. Railroad Comm’n of Texas*, 03-09-00015-CV, 2009 WL 2567941 (Tex. App.—Austin Aug. 20, 2009, pet. denied).

¹⁶³ *Rosenthal* at *5, citing *Magnolia Petroleum Co. v. Railroad Comm’n*, 170 S.W.2d 189, 191 (Tex. 1943).

¹⁶⁴ *Rosenthal* at *7 citing *Magnolia*, 170 S.W.2d at 191.

¹⁶⁵ *Rosenthal* at *10.

lines based on appraisal records¹⁶⁶ and believed the property the new route would cross was associated with Circle No. 1 on the landowner map,¹⁶⁷ which is used to designate property owned by Reserve Coal Properties Company.¹⁶⁸ Additionally, contractual documents¹⁶⁹ and landowner lists and maps prepared from appraisal records¹⁷⁰ are in evidence and indicate, at least superficially, that the revised route from Outfall 019 to Elm Creek¹⁷¹ crosses property owned by Reserve Coal Properties Company and James Kincaid, his family members, and related entities (collectively, “Kincaid Property”) that has been transferred, leased, or assigned to DRCP.

The ALJs do not suggest that DRCP’s claim to a right to use that property is irrefutable, but the Commission has no jurisdiction to decide the property dispute. However, the evidence is sufficient to show that DRCP has a good-faith claim to the property, which is all DRCP need show if the reasoning in *Rosenthal* injection well disposal case is also applicable to this wastewater-discharge case.

X. EFFLUENT LIMITS

The Commission may refuse to issue a permit when the Commission finds that issuance of the permit would violate the provisions of any state or federal law or rule or regulation promulgated thereunder, or when the Commission finds that issuance of the permit would interfere with the purpose of chapter 26 of the Texas Water Code.¹⁷² In each permit, the Commission shall prescribe the conditions on which it is issued, including:

- (1) the duration of the permit;

¹⁶⁶ Tr. 836.

¹⁶⁷ Tr. 834–35.

¹⁶⁸ DRCP Ex. 107 at 124–25.

¹⁶⁹ DRCP Ex. 107 at 106–17, 124–25; DRCP Ex. 108 at 5–8, 37–104, 106–08.

¹⁷⁰ Tr. 836, 838; DRCP Ex. 107 at 124–25; DRCP Ex. 809, 902.

¹⁷¹ DRCP Exs. 809, 902.

¹⁷² Tex. Water Code § 26.027(a).

- (2) the location of the point of discharge of the waste;
- (3) the maximum quantity of waste that may be discharged under the permit at any time and from time to time;
- (4) the character and quality of waste that may be discharged under the permit; and
- (5) any monitoring and reporting requirements prescribed by the Commission for the permittee.¹⁷³

A. Technology Based Limits

Two types of limits are applicable to the Mine and its proposed discharges: technology-based limits and water-quality based limits. Both have different sources, and both can be used to create permit limits. Technology based limits are based on EPA standards for a particular industry, which are then used to create technology based effluent limits (TBELs). The Draft Permit contains a few TBELs, specifically for iron and manganese.¹⁷⁴ All the parties agree that the TBELs in the Draft Permit are sufficient to protect the environment and are consistent with 40 C.F.R. part 434. There are no issues with the TBELs.

B. Water Quality Based Limits

In addition to technology-based limits, water-quality-based limits also apply. These limits come from the Texas Surface Water Quality Standards found in title 30, chapter 307 of the Texas Administrative Code. Section 307.6 (b) provides that water in the state must not be acutely toxic to aquatic life and that water in the state with limited or greater aquatic life uses must not be chronically toxic to aquatic life. The standards provide both narrative and numerical criteria for specific physical, chemical, and biological constituents of surface water.¹⁷⁵ These limits are often referred to as Water Quality Based Effluent Limits (WQBELs).

¹⁷³ Tex. Water Code § 26.029(a).

¹⁷⁴ ED Ex. 1, att. KLD-8 at 50.

¹⁷⁵ EDF Group Ex. 1100 at 13.

According to testimony, the ED will impose monitoring requirements when a concentration is at 70–85% of the WQBEL and will impose a permit limit at concentrations of greater than 85% of the WQBEL.¹⁷⁶ The freshwater acute criteria for dissolved aluminum are 991 micrograms per liter, or 0.991 mg/L.¹⁷⁷ There are no chronic criteria for aluminum, nor any criteria, either acute or chronic, for boron in the rules. The Draft Permit at issue here does not include any WQBELs.

C. Aluminum and Boron

It is worth addressing aluminum and boron in some detail. EDF Group, Maverick County, and OPIC raise concerns about the possibility of high levels of aluminum and boron in the discharge, largely based upon high levels of both in some of the groundwater samples from the Mine site, as well as the high levels of total aluminum in one of the recent discharge samples from, one of the sedimentation ponds, SP-2.

The Draft Permit contains no limit for aluminum or for boron, although Ms. Denney, when writing the Draft Permit, added boron to the list of parameters that must be tested at the initial discharge from each outfall under Other Requirement No. 10 of the Draft Permit.¹⁷⁸

1. Aluminum

EDF Group's expert witness Lial Tischler, Ph.D., testified about his concern with the levels of aluminum present in the groundwater at the Mine site. He analyzed DRCP's groundwater sampling results, dating back to 2000, and continuing through the second quarter of 2015, and concluded that the aluminum in the discharges from Outfalls 022 and 001, 003, 004, 006–008, and 014–020, would not comply with the acute aquatic life protection water quality standard in chapter 307.¹⁷⁹ Dr. Tischler primarily used the data from one of the monitoring

¹⁷⁶ DRCP Ex. 800 at 36.

¹⁷⁷ 30 Tex. Admin. Code § 307.6(c)(1).

¹⁷⁸ ED Ex. 1 at 21.

¹⁷⁹ EDF Group Ex. 1100 at 43.

wells, DRRC 4R, in making these calculations. He testified that the median concentration of aluminum in this well is 14 mg/L, which is significantly higher than the acute criterion in the surface water quality standards of 0.991 mg/L.¹⁸⁰ He also testified that the maximum aluminum concentration from this well is 95.4 mg/L.¹⁸¹

DRCP does not disagree that there are high levels of total aluminum in some of the samples, but argues that those samples are irrelevant for purposes of its permit application because groundwater is not representative of the water that will be discharged and because the tests were for total aluminum, not dissolved.¹⁸² Each of these issues will be addressed in turn.

a. The Use of Groundwater and the Use of a Monitoring Well With High Aluminum Results

DRCP raises two issues with the groundwater used by Dr. Tischler in his analysis. The first has to do with the amount of groundwater likely to be in the wastewater. From the evidence, including the application, the water to be discharged will be a combination of stormwater and mine pit water, which is a combination of stormwater collected in the mine pit and mine seepage. Mine seepage is groundwater that seeps into the mine pit from the pit's sides.¹⁸³

1. How Much Mine Pit Water Does the Application Anticipate?

DRCP's permit application led to some confusion about the percentage of groundwater versus stormwater in the retention ponds. In the application, DRCP indicated that the contributing waste streams for Outfall 102 (now 022), the discharge point from retention pond RP-3, would consist of excess mine pit water and stormwater from inside the rail loop.¹⁸⁴ The

¹⁸⁰ EDF Group Ex. 1100 at 45.

¹⁸¹ EDF Group Ex. 1100 at 45.

¹⁸² Although DRCP did not indicate in its application that its sampling of groundwater at the site included intermittently high levels of total aluminum, it did, at some point, provide this data to the TCEQ.

¹⁸³ DRCP Ex. 400 at 14.

¹⁸⁴ DRCP Ex. 107 at 37.

application described excess mine pit water as being 80% of total flow and stormwater from inside the rail loop as being 20%.¹⁸⁵ DRCP expert witness Lisa Murphy, who oversaw the application, testified this statement did not mean that DRCP anticipated the discharge would consist of 80% excess mine pit water. She testified that, instead, this language meant that there was capacity for RP-3 to hold 80% excess pit water.¹⁸⁶ From Dr. Tischler's testimony, it is clear that he interpreted this language as meaning what it seems to say—that the water would consist of 80% excess mine pit water. The ALJs credit Ms. Murphy's testimony that the percentages refer to RP-3's capacity, although they understand the confusion.

2. Groundwater at the Mine Site

DRCP's expert witness Eric Matzner, who did much of the geological work for the RCT permit, testified that the amount of groundwater at the site was variable, but not large:

[T]here are no TWDB-recognized major or minor aquifers encountered in the vicinity of the Mine Area. Groundwater-bearing zones have been encountered within the alluvium sands near Elm Creek and in thin, saturated portions of the Uvalde Gravel.¹⁸⁷ These saturated sands and gravels are thin and do not appear to be widespread across the Mine Area. Specifically, monitoring wells completed in the Uvalde Gravel along the northern boundary of the permit area suggest that the Uvalde Gravel is generally unsaturated or has little saturation east of N-4 on the northern portion of the Permit Boundary. Most of the alluvial sands within the Elm Creek Alluvium have variable saturation and are not a useable or reliable source of water. Saturated sands within the Elm Creek Alluvium are also thin and discontinuous. In addition, the water quality in the alluvium sands is variable. . . .¹⁸⁸

He also testified that some water is found in fractures in the coal seam, but that the coal itself is not very porous.¹⁸⁹

¹⁸⁵ DRCP Ex. 107 at 37.

¹⁸⁶ Tr. 70.

¹⁸⁷ The Elm Creek Alluvium and Uvalde Gravel are both parts of the overburden, the material that lies over the coal deposit. DRCP Ex. 700 at 10–11.

¹⁸⁸ DRCP Ex. 700 at 26–27.

¹⁸⁹ DRCP Ex. 700 at 15–16.

In general, Mr. Matzner testified that he expected the volume of water entering the pits to be “insignificant” and that no active pumping at the Mine site is anticipated.¹⁹⁰ He testified that the amount of groundwater found at the wells varies depending on the site, with the wells closer to Elm Creek containing more water than those farther away. Five wells close to Elm Creek have typically had groundwater in them.¹⁹¹ Mr. Matzner developed a model and concluded that groundwater will have minimal impact on the water quality in the sedimentation ponds and that the sedimentation ponds will allow suspended solids to settle.¹⁹²

In contrast, the EDF Group’s expert, Dr. Tischler, testified that, at this point, it would be impossible to determine whether the groundwater was significant or insignificant, noting that “[i]f it has considerable-enough pollutants in it, it’s significant.”¹⁹³ This is because, if the concentration of a particular constituent is high enough, a relatively small amount of groundwater can have a significant effect. The EDF Group contends that this is exactly the case, particularly as it concerns some of the extremely elevated levels of aluminum.

The ALJs also note that Ms. Denney testified that although DRCP was not required to provide information on groundwater, it would have been helpful for it to have done so.¹⁹⁴

The ALJs conclude that it was appropriate to use groundwater in analyzing the proposed discharge, while 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.

3. The Use of Monitoring Well DRCC 4R

DRCP also contended it was inappropriate for Dr. Tischler to use DRCC 4R, the monitoring well with some of the worst-quality groundwater at the Mine site, in his analysis for

¹⁹⁰ DRCP Ex. 700 at 18–19.

¹⁹¹ DRCP Ex. 700 at 20.

¹⁹² DRCP Ex. 700 at 27.

¹⁹³ Tr. 481.

¹⁹⁴ Tr. 634.

aluminum. Dr. Tischler testified that he selected DRRC 4R because of its high boron levels, which was a parameter of concern to the RCT.¹⁹⁵ The ALJs have kept this in mind when considering Dr. Tischler's testimony, but also think it would be unrepresentative to use, say, the best quality water. The use of DRCC 4R is not fatal to Dr. Tischler's analysis.

b. Dissolved Aluminum Versus Total Aluminum

The second aluminum issue raised by DRCP is that sampling reviewed by Dr. Tischler provided results for total aluminum, but the WQBELs address dissolved aluminum. An expert DRCP presented as part of its rebuttal case, Peggy Glass, Ph.D., testified that aluminum is not problematic when it is in a compound, such as when it is in silt, loam, or clay.¹⁹⁶ It only becomes an issue when it is a stand-alone ion.¹⁹⁷ Based on this, DRCP contends it was inappropriate for Dr. Tischler to have used the total aluminum numbers in his analysis. DRCP argues that the groundwater samples were all tested for total aluminum, not dissolved aluminum, which will be a significantly smaller number.

The parties agree that the amount of total aluminum in a sample will be greater than the amount of dissolved aluminum. The question is by how much. Dr. Tischler testified that under state policy, 30 samples must be taken to determine the ratio of dissolved aluminum to total aluminum.¹⁹⁸ He also testified that TCEQ assumes that 100% of the total aluminum in a sample is dissolved, unless shown otherwise.¹⁹⁹

It is clear from the Draft Permit that total aluminum is important to the ED's evaluation. The list of the parameters that DRCP must sample for following the initial discharge at each outfall includes total aluminum, not dissolved. According to the ED, the information he will use

¹⁹⁵ Tr. 517-18.

¹⁹⁶ Tr. 848-49.

¹⁹⁷ Tr. 848.

¹⁹⁸ Tr. 513-14.

¹⁹⁹ Tr. 514-15.

to determine if a limit is necessary is expressed in terms of total aluminum. It does not appear erroneous, therefore, for Dr. Tischler to have used total aluminum in his analysis.

DRCP argues that the amount of dissolved aluminum in the wastewater will be an extremely small percentage of the total aluminum in its wastewater by pointing to four samples taken of the groundwater at Elm Creek and Hediondo Creek. In those samples, taken by EDF Group's expert Bruce Wiland, P.E., the percentage of dissolved aluminum is an order of magnitude smaller than the amount of total aluminum.²⁰⁰ These few samples do not establish what percentage of the total aluminum is dissolved throughout all the discharge. DRCP had the capability to test for dissolved aluminum, but did not. That Dr. Tischler used the results available to him does not invalidate his testimony. The ALJs find his concern about aluminum levels to be credible. Although the evidence does not support the imposition of an aluminum limit, it does indicate that a monitoring requirement would be appropriate because some of the levels of aluminum are very high. If the Commissioners decide not to adopt a monitoring requirement, the ALJs still recommend a revision to Other Requirement No. 10, as discussed below.

2. Boron

The parties agree that boron naturally occurs at the site, sometimes at high levels. DRCP disclosed potentially high levels of boron in its application by noting that it was seeking to add Outfall 102, which would discharge "excess mine pit water, mine pit water high in boron and stormwater runoff."²⁰¹ The parties also agree that boron can create problems for agriculture. And again, neither acute nor chronic criteria for boron are included in the water quality standards.

²⁰⁰ EDF Group Ex. 100 at 4-5, 6-7; Ex. 103 at 5-13.

²⁰¹ DRCP Ex. 107 at 41.

DRCP's RCT Permit for operating the Mine only authorizes it to discharge wastewater that has boron concentrations of 2.0 mg/L or lower.²⁰² DRCP plans that wastewater with elevated boron concentrations will be routed to retention pond RP-3.²⁰³ Mr. Nielsen testified that discharge from RP-3 is only permitted under the RCT Permit when an extremely large rain event, a 120-year event, causes an overflow.²⁰⁴ He testified that DRCP does not anticipate actually discharging from RP-3.

Nevertheless, DRCP applied to the TCEQ for a permit to discharge, via Outfall 022, from RP-3. And although the parties disputed why the RCT imposed such a requirement, it is undisputed that this requirement exists.

The EPA recommends that boron levels in water used for irrigation not exceed 2.0 mg/L for short term.²⁰⁵ One of the members of the EDF Group, Prosser Martin Wall, testified that he uses Elm Creek for irrigation.²⁰⁶ It can be deduced from the RCT Permit and from the plans to construct RP-3, that DRCP anticipates at least some of the wastewater some of the time will have levels that exceed 2.0 mg/L. Several of the monitoring wells have consistently had boron concentrations over 2.0 mg/L.²⁰⁷ Given all this, it seems protective to require, at the bare minimum, monitoring for boron for any discharges with any mine water. What is more, it also seems protective, and consistent with the RCT Permit, to impose the same boron limit as the RCT Permit contains. It is inconsistent for the requirements of the RCT Permit not to align with those in the TPDES permit, when both address discharge of wastewater that contains boron and when there is evidence of a legitimate concern about boron. Therefore, the ALJs recommend adding a boron limit of 2.0 mg/L, the same limit in the RCT Permit, for all outfalls that receive mine pit water.

²⁰² DRCP Ex. 202 at 42. The parties disagreed about why this restriction was included in the RCT Permit, but the permit states that "[c]rops considered semi-tolerant or tolerant . . . tolerate 2.0 mg/L or less." *Id.*

²⁰³ Tr. 195.

²⁰⁴ Tr. 195.

²⁰⁵ EDF Group Ex. 103 at 11.

²⁰⁶ EDF Group Ex. 300 at 5.

²⁰⁷ EDF Group Ex. 1108 at 18-32.

3. Does Other Requirement No. 10 Provide Adequate Protection?

Both the ED and DRCP point to the Draft Permit's Other Requirement No. 10 as the primary method of ensuring that the permit is protective when it comes to boron, aluminum, and any other potentially toxic substance. Other Requirement No. 10 requires that the first discharge from each of Outfalls 001, 003, 004, 006–008, 014–020, and 022 be sampled and analyzed for certain parameters. These parameters include both total aluminum and total boron.²⁰⁸ The first discharge from Outfall 021, which will not discharge any mine pit water, must be sampled and analyzed for a smaller list of parameters. The testing of these samples must be completed within 60 days of the initial discharge, and the results of that testing must be submitted to the TCEQ within 90 days of the initial discharge. DRCP could chose to submit results for these parameters for discharges after the initial discharge from each of these outfalls, but it is not required to do so.

EDF Group argues that Other Requirement No. 10 is not sufficient to protect water quality—both because it operates after-the-fact and because it only requires a single test per outfall, particularly given the variability in the discharge. Ms. Denney testified that normally four tests within a certain period of time after the initial discharge are required, but that given the intermittent nature of the discharge, she did not want to be “setting them up for failure” if there were not four discharges within the sampling period.²⁰⁹

DRCP and the ED both argue that this single collection is standard procedure. And perhaps it is. Yet Ms. Denney was unable to point to specific guidance for it. She testified that “[t]he one sample is by [best professional judgment], pretty much.” She later added, “[t]here is not a specific rule or guidance document; it's just our general policy that when it comes to intermittent discharges we can—if they request for it, we can allow for them to have one

²⁰⁸ ED Ex. 1, att. KLD-8 at 56.

²⁰⁹ Tr. 672–73.

sampling event.”²¹⁰ She also testified that it would be possible to change the sampling period, to require submission of the first four samples, but that “[y]ou’d have to vet it through management before you did that.”²¹¹

The ED’s briefing similarly focuses on the time period when explaining the smaller number of samples than would normally be required:

The reason the ED has only required one sampling event for each outfall in Other Requirement No. 10 is because of the sixty-day sampling deadline. For a facility like Eagle Pass Mine with intermittent discharges, if it were required to submit more samples, it may not be able to meet the requirement because it may not have multiple discharges within the sixty-day period.²¹²

Apparently, neither DRCP nor the ED considered changing the sampling period or requiring DRCP to provide samples for the first four discharges if they happen to occur within the first 60-day period. The ALJs certainly have no interest in setting DRCP up for failure, but requiring fewer samples where the discharges may have highly variable levels of pollutant seems insufficient to protect water quality.

The ALJs do not find persuasive the fact that DRCP could voluntarily choose to provide additional samples. It seems clear that it would be in DRCP’s interest to provide additional samples only if those samples had lower concentrations of the parameters and not to submit any that might have higher readings. In fact, the ALJs see no incentive for DRCP to continue sampling past the initial sample unless it is worried about its initial results. In short, as it stands now, Other Provision No. 10 does not appear to ensure protection of water quality.

The ALJs accordingly recommend that Other Requirement No. 10 be amended to require DRCP to sample the first four discharges from each outfall, regardless of when they occur, to

²¹⁰ Tr. 696–97.

²¹¹ Tr. 673.

²¹² ED Reply Brief at 9–10.

complete the test of each sample within 60 days of each discharge, and to report each result within 90 days of each discharge.

D. Need For Chronic Effluent Limits and Toxicity Testing

The Texas Surface Water Quality Standards include both acute and chronic criteria. The chronic criteria are based on a seven-day exposure period.²¹³ The Draft Permit does not include any limits based on chronic criteria, except for Outfall 021. Normally, the TCEQ imposes chronic criteria effluent limits for discharges into intermittent streams within three miles of a perennial water body.²¹⁴ The parties agree that most of the outfalls discharge into intermittent streams within three miles of a perennial water body.

The EDF Group, Maverick County, and OPIC contend that the Draft Permit should include chronic limits for certain parameters. In his testimony, Dr. Tischler pointed out that nothing in the permit prohibited continuous discharge for seven days, the period for chronic exposure.²¹⁵ Although there is no chronic criteria for aluminum, Dr. Tischler expressed concern about the amount of lead and selenium when measured against chronic limits.²¹⁶

At hearing, the ED justified the lack of chronic limits by pointing to its Standard Operating Procedures Manual, which provides that mining outfalls that discharge on an intermittent and variable basis are typically only assessed for acute criteria.²¹⁷ Nothing in the evidence suggests that DRCP will be atypical in terms of intermittently discharging. Given that the Mine is in a semi-arid region, and that as of the date of the hearing, no mine seepage had been encountered, the ALJs accept the position that it is highly unlikely that discharge will occur for seven consecutive days. There appears to be no reason to deviate from the ED's standard

²¹³ EDF Group Ex. 1100 at 45.

²¹⁴ Tr. 582.

²¹⁵ EDF Group Ex. 1100 at 46.

²¹⁶ EDF Group Ex. 1000 at 30.

²¹⁷ ED Ex. 3, att. JB-2 at 17.

practice in this case. The Draft Permit's imposition of only acute limits, except for Outfall 021, appears appropriate under the circumstances.

XI. ANTIDEGRADATION REVIEW

EDF Group, Maverick County, and OPIC raise issues involving the ED's antidegradation review of DRCP's application. Two different tiers of antidegradation review are relevant here. The first, Tier 1, ensures that existing uses, and the water quality sufficient to protect those existing uses, be maintained.²¹⁸ A Tier 2 antidegradation evaluation applies to waterbodies that exceed fishable/swimmable quality, in other words, water bodies with intermediate, high, or exceptional aquatic life uses.²¹⁹ A Tier 2 evaluation ensures that there will not be more than a *de minimis* decrease in water quality of these waterbodies. ED witness Jeff Paull testified that he performed a Tier 2 review for Elm Creek and a Tier 1 review for the other waterbodies.²²⁰

A. Were Meaningful Antidegradation Reviews Actually Performed?

EDF Group, in particular, argues that an actual antidegradation review could not have been performed because DRCP provided too little information in its application for the ED's staff to perform a meaningful review for either tier of the antidegradation review. Mr. Paull testified about how he generally performs a Tier 1 antidegradation review, which primarily consists of looking up the receiving waters' uses and supporting numerical criteria:

First, I determine the appropriate uses and criteria of the receiving waters. The permit will be drafted to protect those uses and meet the criteria established for the receiving waters. I also use other available information, such as the Texas Integrated Report of Surface Water Quality, to preliminarily determine if existing uses would be maintained and protected. If a water body is not attaining water quality standards for a particular constituent, I evaluate the potential for the discharge to increase the loading of that constituent. The dissolved oxygen modeler's review will determine what, if any, effluent limits are necessary to

²¹⁸ 30 Tex. Admin. Code § 307.5(b)(1).

²¹⁹ 30 Tex. Admin. Code § 307.5(b)(2).

²²⁰ ED Ex. 2 at 14.

protect the dissolved oxygen levels in the receiving water. The Tier 1 review is detailed in the Water Quality Standards Team Interoffice Memorandum.²²¹

A Tier 2 antidegradation review addresses a broader range of water quality issues by prohibiting more than a *de minimis* decrease in water quality. The parties disagree about what constitutes a *de minimis* decrease in water quality. Dr. Tischler testified that under TCEQ policy, 10% or less use of existing assimilative capacity would not be degradation of more than a *de minimis* amount.²²²

According to Mr. Paull, a *de minimis* amount is “less than a noticeable decrease in water quality.”²²³ Mr. Paull described how he performs Tier 2 antidegradation reviews:

I use available information, such as the Texas Integrated Report of Surface Water Quality, when conducting a Tier 2 review. I also evaluate potential parameters of concern typically associated with the type of proposed effluent. I follow the guidance in the IPs for Tier 2 antidegradation; this includes a list of examples where degradation is unlikely to occur and where it is likely to occur. The Tier 2 review is provided in the Water Quality Standards Team Interoffice Memorandum.²²⁴

Dr. Tischler, in particular, contends that the lack of information provided by DRCP makes an antidegradation analysis meaningless in this case. The antidegradation review assumes that there is a permit that will meet the TBELs and WQBELs, and so long as that is in place, then there will not be a degradation of water quality.²²⁵

That said, it appears to the ALJs that this is, indeed, the ED’s standard procedure for completing the antidegradation review and that it is viewed as preliminary and subject to further

²²¹ ED Ex. 2 at 7.

²²² EDF Group Ex. 1100 at 48.

²²³ ED Ex. 2 at 6.

²²⁴ ED Ex. 2 at 7–8.

²²⁵ The circular nature is included in the ED’s briefing, where it is noted that Mr. Paull “did not discover anything that led him to believe Elm Creek’s water quality will be degraded, and he determined that a permit drafted to protect those uses and meet the receiving water’s criteria, and compliance with that permit, would satisfy the Tier 2 requirements.”

evaluation. In light of the possibility of reevaluation in the future, once flow data is provided, the ALJs conclude that the antidegradation review was sufficient.

B. Should a Tier 2 Review Have Been Performed for the Unnamed Tributaries of Hediondo and Elm Creeks?

Maverick County, in particular, argues that Tier 2 evaluations should have been performed on the unnamed tributary of Hediondo Creek that receives the discharges from Outfall 015, on Hediondo Creek, as well as the unnamed tributary of Elm Creek into which Outfalls 021, 022, and 004 discharge. The County argues that the ED improperly determined that the tributary had minimal aquatic life use and that Hediondo Creek only had limited aquatic life use. Therefore, the ED did not consider either waterbody to exceed fishable/swimmable standards. Because of this, the ED did not perform a Tier 2 evaluation of either waterbody.

Maverick County's expert David Flores collected data from both tributaries and concluded that the unnamed tributary of Hediondo Creek had, at the least, intermediate aquatic life use, and probably had high aquatic life use. He concluded that the tributary to Elm Creek had intermediate life uses. Both conclusions are based on site visits in June and July 2015.

DRCP contends that Mr. Flores's analysis is invalid based on the timing of his site visits—on June 18–19, 2015, for the tributary of Hediondo Creek and on July 5, 2015, for the tributary of Elm Creek.²²⁶ In making its argument, DRCP relies on a TCEQ document entitled “Surface Water Quality Monitoring Procedures, Volume 2: Methods for Collecting and Analyzing Biological Assemblage and Habitat Data” (Monitoring Procedures).²²⁷ This document sets out an index period from March 15 to October 15 of each year when most bioassessments in freshwater streams and rivers should be conducted.²²⁸ The Monitoring Procedures also set out a “critical period,” from July 1 through September 30, which is the time

²²⁶ DRCP's expert Dr. Miertschin testified that he believed Mr. Flores correctly counted and that the results of his assessment, based on the fish he found, would be appropriately characterized as intermediate life use. Tr. 367.

²²⁷ Mav. Co. Ex. 12.

²²⁸ Mav. Co. Ex. 12 at 2-1.

of the year when minimum streamflows, maximum temperatures, and minimum dissolved oxygen are likely to occur.

Mr. Flores's first site visit (to the Hediondo Creek tributary) occurred during the index period, but not during the critical period. There was some conflicting evidence about the extent to which testing during the critical period is mandatory, as opposed to preferred. The procedures themselves state, "[w]hen collecting only one sample, schedule the event during the critical period. If that is not possible, submit a written justification of why that objective was not met."²²⁹ Mr. Flores interprets this language as meaning that sampling during the critical period is preferred, but not required, and that there is best professional judgment involved.²³⁰

But what DRCP really finds objectionable is that the stream conditions were caused by rain. From the evidence, both April and May 2015 saw extremely heavy rain in Eagle Pass. The idea behind the sampling rules is to approximate the 7Q2 of a stream—the seven day, two-year low flow.²³¹ Thus, for example, the Monitoring Procedures state that after extreme weather conditions, such as significant drought or heavy rains, at least one month of normal flow should occur before collecting biological samples. Mr. Paull testified that TCEQ staff usually waits one week after heavy rains to sample.²³² DRCP points out that, in contrast, Mr. Flores waited two-and-a-half weeks after the end of May to test the Hediondo tributary.²³³ Mr. Flores also testified he was unfamiliar with the baseline conditions of the tributary.²³⁴

The testimony about the extremely heavy rainfall over the course of two months established that the conditions Mr. Flores observed were not the usual conditions. The ED's Monitoring Procedures suggest that some deviation from the requirement that sampling be done

²²⁹ Mav. Co. Ex. 12 at 2-2.

²³⁰ Tr. 609.

²³¹ Mav. Co. Ex. 12 at 2-3.

²³² Tr. 747. ("We try to go out during low flow—summer low flow conditions, and we make sure that there hasn't been a significant rain event within a week . . . of sampling.")

²³³ Dr. Glass testified that the really heavy rains in June were really in May, and Mr. Flores did his testing on June 18–19, 2015. Dr. Glass testified, "There was some rain in June, but it wasn't extraordinary." Tr. 862.

²³⁴ Tr. 611.

in the critical period could be permitted, but from the evidence, the stream conditions were far from usual. The ALJs do not believe that a higher aquatic life use is supported in this case.

C. Antidegradation Conclusion

In summary, the ALJs conclude that because the antidegradation review is subject to re-evaluation, the ED's review was sufficient. The ALJs also find that the ED appropriately assessed the aquatic life use of the unnamed tributaries of Hediondo Creek and Elm Creek.

XII. COMPLIANCE HISTORY

The Commission must consider the compliance history for an applicant and a facility for the five-year period prior to the date the permit application was received by the Commission when making decisions regarding a permit application.²³⁵ Although DRCP has held a TPDES permit for many years, it had not discharged prior to the submission of the application in September 2013.²³⁶ Based on the compliance history review conducted by the ED for the five-year period prior to the submission of the application, both the facility and DRCP have a classification of "high" and a rating of 0.00;²³⁷ and no party disputes that. The ALJs conclude that there is no reason to reject the application based on compliance history.

EDF Group complains that there is no information about the compliance of DRCP's contractor CRF. However, as discussed above, CRF is not the applicant or the operator and need not apply for the permit. EDF Group points to no law requiring the Commission to consider a contractor's compliance history. The ALJs conclude that CRF's compliance history is not relevant.

²³⁵ 30 Tex. Admin. Code § 60.1.

²³⁶ Tr. 56, 632–33, 637–38; ED Ex. 1 at 8, 14.

²³⁷ ED Ex. 1 at 29–30, att. KLD-15.

XIII. TRANSCRIPTION COSTS

Commission rule 30 Texas Administrative Code § 80.23(d) provides that the Commission will not assess transcript costs against the ED or the OPIC and that it will consider the following relevant factors in allocating reporting and transcription costs among the other parties:

- The party who requested the transcript;
- The financial ability of the party to pay the costs;
- The extent to which the party participated in the hearing;
- The relative benefits to the various parties of having a transcript;
- The budgetary constraints of a state or federal administrative agency participating in the proceeding;
- In rate proceedings, the extent to which the expense of the rate proceeding is included in the utility's allowable expenses; and
- Any other factor which is relevant to a just and reasonable assessment of costs.

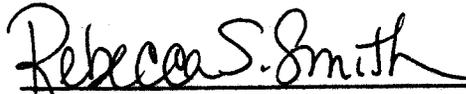
The ALJ who presided over the preliminary hearing ordered DRCP to arrange and pay for a transcript of the hearing on the merits and stated that the cost would be allocated among the parties in accordance with the above rule when the Commission makes a final decision.²³⁸ Court reporters attended the hearing on the merits and timely delivered the transcript to the ALJs; however, DRCP has offered no evidence concerning the cost of the transcript. Additionally, no party has offered evidence or argument concerning how the transcript costs, whatever they are, should be allocated among the parties. Under these circumstances, the ALJs conclude that it would be just and reasonable to allocate all of the cost of the transcript to DRCP.

²³⁸ Order No. 1.

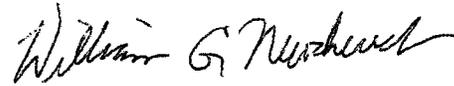
XIV. CONCLUSION

In summary, the ALJs recommend the Commission grant DRCP's application, but make changes to the Draft Permit. These changes are the addition of a boron limit on all outfalls except Outfall 021 and a requirement that aluminum be monitored, and a revision to Other Requirement No. 10.

SIGNED April 5, 2016.



REBECCA S. SMITH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS



WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER GRANTING THE APPLICATION BY DOS REPUBLICAS COAL PARTNERSHIP FOR AMENDMENT AND RENEWAL OF TPDES PERMIT NO. WQ0003511000; TCEQ Docket No. 2015-0068-IWD; SOAH Docket No. 582-15-2214

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered an application by Dos Republicas Coal Partnership (DRCP) for amendment and renewal of TPDES Permit No. WQ0003511000. A proposal for decision (PFD) was presented by Rebecca S. Smith and William G. Newchurch, Administrative Law Judges (ALJs) with the State Office of Administrative Hearings (SOAH), who conducted an evidentiary hearing concerning the application on November 16–19, 2015, in Austin, Texas.

After considering the ALJs' PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

Introduction

1. DRCP is a Texas general partnership, and the Eagle Pass Coal Corporation and the Maverick County Coal Corporation, both Texas corporations, are the two general partners of DRCP.
2. DRCP owns and operates the Eagle Pass Mine, a subbituminous coal mine located approximately five to six miles north-northeast of the City of Eagle Pass, Texas, and within Maverick County, Texas.
3. Elm Creek, including some of its unnamed tributaries, passes through the property that includes the Eagle Pass Mine from the north to the south and flows into the Rio Grande River approximately six miles southwest of the Eagle Pass Mine.
4. The City of Eagle Pass's water intake structure is located approximately 1.6 miles farther downstream on the Rio Grande.
5. The Railroad Commission of Texas (RCT) first issued a surface coal mining permit for the Eagle Pass Mine to the predecessor-in-interest of DRCP on April 11, 2000.

6. The RCT approved a renewal, revision, and expansion application of Surface Coal Mine Permit No. 42B for the Eagle Pass Mine on January 29, 2013, and issued the permit to DRCP on May 7, 2013 (the RCT Permit).
7. In the process of obtaining the RCT Permit, DRCP collected significant groundwater samples, surface water samples, and studied other geological and hydrogeological aspects of the Eagle Pass Mine.
8. The RCT Permit requires DRCP to plan, design, and ultimately construct in accordance with specific RCT regulations, its stormwater and wastewater control structures, including: (1) sedimentation ponds and retention ponds designed to contain any water that has come into contact with disturbed areas; (2) diversion ditches designed to prevent surface water from outside the permit area from coming into contact with disturbed areas; and (3) collection ditches designed to collect water within the permit area and direct it to sedimentation ponds or retention ponds.
9. The Eagle Pass Mine boundary, as set forth in the RCT Permit, covers 6,346 acres on the northeast side of State Highway 1588, of which only about 2,364 acres will be mined for coal.
10. DRCP contracts with Camino Real Fuels, LLC (CRF), a wholly-owned subsidiary of The North American Coal Corporation (NACC), to serve as the contract miner.
11. Coal was first exposed in April 2015 and the removal of coal commenced on July 29, 2015, in Mine Block C1A and will move to C1B, B, and then C2 within the five-year term of the RCT Permit.
12. Mining and reclamation occur contemporaneously. Within each mine block, a pit is excavated and the overburden is stockpiled, and, as the next pit is mined out, the overburden from that pit will be placed in the previously excavated pit and brought to appropriate grade.
13. At the Eagle Pass Mine, the size of an open pit is approximately 15 acres, and, on average, approximately 260 acres will be mined in a given year.
14. Without a Texas Pollution Discharge Elimination System (TPDES) permit, DRCP would not be able to operate the Eagle Pass Mine.
15. DRCP's predecessor-in-interest first obtained a wastewater discharge permit for the Eagle Pass Mine in 1994.
16. TCEQ (or its predecessor agencies) subsequently renewed the wastewater discharge permit in 2001, 2006, and most recently on November 7, 2011 (the Current TPDES Permit).
17. The Current TPDES Permit was set to expire on September 1, 2015.

Procedural History

18. On September 5, 2013, DRCP filed its application (Application) and application fee to amend the Current TPDES Permit.
19. DRCP submitted additional information regarding the Application via submissions dated November 4, 2013, March 17, 2014, June 13, 2014, and August 20, 2014.
20. On March 17, 2014, in addition to supplying information requested by the Executive Director (ED), DRCP requested that the Application be processed as a renewal application in addition to an amendment application.
21. The ED declared the application administratively complete on January 23, 2014, and completed his technical review on December 4, 2014.
22. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit for the amendment and renewal application was mailed by TCEQ to interested persons and elected officials and was published by DRCP in English in the *Eagle Pass Business Journal* on May 22, 2014, in English and Spanish in *The News Gram* on May 22, 2014, and in Spanish in *La Pulguita* on May 23, 2014.
23. Notice of Application and Preliminary Decision (NAPD), including information about the upcoming public meeting, was mailed by TCEQ to interested persons and elected officials and was published by DRCP in English in the *Eagle Pass Business Journal* on December 18, 2014, in English and Spanish in *The News Gram* on December 16, 2014, and in Spanish in *La Pulguita* on December 19, 2014.
24. Due to a location change, additional notice regarding the public meeting was published on January 15, 2015, in English in the *Eagle Pass Business Journal*, in English and Spanish in *The News Gram*, and in Spanish in *La Pulguita*.
25. Prior to the public meeting, a copy of the application and all submittals was placed in the Maverick County courthouse in Eagle Pass, Texas, along with the Fact Sheet.
26. A public meeting was held on January 22, 2015, in Eagle Pass, Texas.
27. Public comments were accepted during the public meeting and were also received by TCEQ in writing.
28. The Executive Director issued a Response to Public Comment on April 23, 2015, in which the Executive Director did not recommend any changes to the Draft Permit.
29. On January 30, 2015, the Environmental Protection Agency (EPA) issued a letter stating that the EPA has no objection to the Draft Permit.

30. DRCP requested direct referral of the Application to the SOAH on January 15, 2015.
31. This matter was referred to SOAH, and a preliminary hearing was held on March 30, 2015, in Eagle Pass, Texas.
32. Notice of the preliminary hearing was mailed by TCEQ and published by DRCP in English in the *Eagle Pass Business Journal* on February 26, 2015, in English and Spanish in *The News Gram* on February 24, 2015, and in Spanish in *La Pulguita* on February 27, 2015.
33. The following persons and entities were admitted as parties: DRCP; the ED; the Office of Public Interest Counsel; the Environmental Defense Fund Group consisting of the Environmental Defense Fund, Maverick County Environmental and Public Health Association, Walter Herring, Ernesto Ibarra, Gabriel de la Cerda, Mike Hernandez, Juan Esqueda, Boulware and Anson Family, Ltd., Howard H.R.R. Holdings, Ltd., and the City of Eagle Pass; Maverick County; Francisco Garcia; Roberto Salina; Ricardo Ruiz; Luis Martinez; Ramon Castillo; and Jose Cesares.
34. SOAH Administrative Law Judges Rebecca S. Smith and William Newchurch conducted an evidentiary hearing on the merits on November 16-19, 2015, in Austin, Texas.
35. At the hearing, DRCP, the Executive Director, the Office of Public Interest Counsel, the Environmental Defense Fund Group, and Maverick County were present; the other individual parties did not appear or otherwise participate in the proceeding.
36. On January 15, 2016, the parties filed written closing statements, and on February 5, 2016, the parties filed replies to written closing statements, at which time the record closed.

Permit Application

37. DRCP's application to amend and renew Permit No. WQ0003511000 seeks:
 - to renew DRCP's TPDES permit;
 - to add mining area and a mining boundary change to match the RCT Permit mining boundary;
 - to maintain Outfalls 001M, 003M, 004M, 006M–008M to discharge stormwater and mine pit water from active mining areas;
 - to add new Outfalls 014M–020M to discharge stormwater and mine pit water from active mining areas;

- to add new Outfalls 001R, 003R, 004R, 006R–008R, and 014R–020R to discharge stormwater from post-mining areas;
 - to remove Outfalls 002, 005, 009, 010, 011, 012, and 013;
 - to add new Outfall 021 to discharge wastewater from fueling areas, fuel storage areas, vehicle and equipment maintenance areas, truck washing stations, and coal handling and storage areas;
 - to add new Outfall 022M to discharge stormwater and mine pit water from active mining areas and inside the rail loop; and
 - to add provisions incorporated into more current permits, such as including an authorization to discharge from post-mining outfalls and the facilities areas, and applicable post-mining standards.
38. The Application was prepared by permitting professionals under the supervision of a qualified, experienced permitting professional and licensed engineer and contained completed forms, signed and notarized as appropriate, payment of fees, verified legal status of the applicant, attachment of technical reports, outfall locations, discharge routes, a list of adjacent landowners, and other information requested by the Executive Director and required to allow the Executive Director to evaluate the permit application.
39. The president of both general partners of DRCP, Andres Gonzalez-Saravia Coss, is authorized to execute documents on behalf of DRCP and signed the Application.
40. 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 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.
41. DRCP has an office in Eagle Pass, and a DRCP representative visits the site on a daily basis to oversee all the functions for which it has responsibility.
42. DRCP has ownership and control of mine operations, including activities subject to the TPDES permit; has responsibility over permit compliance, including the TPDES permit; is integrally involved in the activities at the Eagle Pass Mine; and has financial responsibility over the operations at the Eagle Pass Mine.

43. Based on the compliance history review conducted by the ED, for the five year period before the submission of the Application both the facility, the Eagle Pass Mine, and the applicant, DRCP, have a classification of “high” and a rating of 0.00.
44. Although DRCP has held a TPDES permit for many years, it had not discharged prior to the submission of the Application in September 2013.
45. DRCP’s Application was complete and contained the necessary information.

Groundwater, Management of Wastewaters, and Discharges

46. Wastewater needing management at the Eagle Pass Mine is stormwater that comes into contact with active areas, post mining areas (areas going through the reclamation process), or areas designated for fuel storage, vehicle maintenance and truck washing (Facilities Areas), and seep water, which is the groundwater that seeps into the mine pit from the sides of the pit.
47. Mine pit water is the water that accumulates at the bottom of the pit and may be comprised of stormwater, seep water, or both.
48. The Eagle Pass Mine permit area is made up of the Elm Creek Alluvium, the Uvalde Gravel formation, the Olmos formation, and the San Miguel formation; none of these geologic units contains significant sources of groundwater.
49. The groundwater within the Eagle Pass Mine permit area is not suitable for domestic supply and lacks sufficient quantity to be considered a resource.
50. The RCT found that “none of the geologic units within or near the permit area have been found to contain significant sources of groundwater.”
51. Groundwater will be managed in the mine pits. If sufficient groundwater accumulates in a mine pit to the extent that it interferes with coal extraction, groundwater will be pumped to sedimentation ponds or retention ponds.
52. Each mine block has an associated sedimentation pond which is designed to manage at least a 10-year/24-hour rainfall event, and each sedimentation pond has an associated outfall.
53. There are two retention ponds with associated outfalls at the Eagle Pass Mine which are sized to contain events in excess of the 100-year/24-hour rainfall event: RP-2 receives stormwater associated with the Facilities Area and is associated with Outfall 21, and RP-3 receives mine pit water and stormwater from inside the rail loop and is associated with Outfall 22.
54. The Eagle Pass Mine is located in a hot and semi-arid climate.

55. DRCP monitors the amount of water within the sedimentation ponds and retention ponds and may move water between and among the ponds in order to reduce the volume of a discharge or avoid a discharge altogether.
56. Discharges at the Eagle Pass Mine from all outfalls are intermittent and stormwater-driven.
57. The Commission's policy states that "mining outfalls that discharge on an intermittent and variable basis are typically assessed as a Menu 1 [acute aquatic life toxicity only]. This assessment was based on the discharge being intermittent and variable flow and not based on the classification of the receiving stream. This applies the most stringent assessment, 100% acute criteria, at the point of discharge."

Commercial Dust Suppressants and Flocculants

58. DRCP plans to use water collected in the sedimentation and retention ponds for dust suppression activities at the Eagle Pass Mine in accordance with Other Requirement No. 6 of the Draft Permit, but may also use commercial dust suppressants.
59. DRCP anticipates that it may use commercial dust suppressants, including RoadMaster and DustGard, in amounts recommended by the manufacturer.
60. There is not any adverse impact on human health or aquatic life from the use of the dust suppressants at the Eagle Pass Mine.
61. DRCP may use flocculants, which cause solids to aggregate and settle, to treat the waters within the sedimentation ponds and retention ponds.

Draft Permit

62. The Draft Permit was prepared in accordance with governing law and the Commission's practices, policies, guidance documents, and regulations.
63. The Current TPDES Permit authorizes discharges of stormwater and mine seepage water from active mining areas of the Eagle Pass Mine through Outfalls 001 through 013, imposes effluent limitations for total suspended solids (TSS), total iron, total manganese, total selenium, and pH, requires flow to be monitored and reported, and includes additional reporting, notice, monitoring, testing, and record-keeping requirements.
64. Technology based effluent limitations for the coal mining industry are included in 40 C.F.R. Part 434.
65. The Eagle Pass Mine is a "new source" as that term is defined in 40 C.F.R. § 122.2, and therefore, the New Source Performance Standards (NSPS) are applicable.
66. The Draft Permit includes NSPS standards for active mining outfalls (40 C.F.R. Part 434, Subpart C) on Outfalls 001M, 003M, 004M, 006M-008M, and 014M-020M, and for

post-mining outfalls (40 CFR Part 434, Subpart E) on Outfalls 001R, 003R, 004R, 006R–008R, and 014R–020R.

67. Consistent with the effluent guidelines found in 40 C.F.R. Part 434, alternative limits for discharges from the outfalls caused by certain storm events are imposed as set out in Other Requirement No. 3 of the Draft Permit.
68. At the Eagle Pass Mine, Outfall 021 is not a discharge for an active or post-mining area, and the ED used best professional judgment to develop effluent limitations for that outfall.
69. The Draft Permit imposes the same effluent limitations for the outfalls which were carried over from the Current TPDES Permit – Outfalls 001M, 003M, 004M, 006M–008M:
 - TSS – 35 milligrams per liter (mg/L) daily average and 70 mg/L daily maximum and single grab sample;
 - Total Iron – 3.0 mg/L daily average and 6.0 mg/L daily maximum and single grab sample;
 - Total Manganese – 2.0 mg/L daily average and 4.0 mg/L daily maximum and single grab sample;
 - Total Selenium – 0.036 mg/L daily maximum and single grab sample; and
 - pH not less than 6.0 standard units or greater than 9.0 standard units.
70. For Outfalls 001M, 003M, 004M, 006M–008M, DRCP is required to monitor flow, TSS, total Iron, and total Manganese on a weekly basis when discharges occur and to monitor for total Selenium on a monthly basis when discharges occur.
71. The effluent limitations in the Draft Permit on new Outfalls 014M–020M and 022M are the same as the Current TPDES Permit limits on Outfalls 001M, 003M, 004M, 006M–008M, except that total selenium is not a limitation for the new outfalls.
72. Total Selenium is included as an effluent limitation on the outfalls which were carried over from the Current TPDES Permit to comply with the Clean Water Act’s anti-backsliding provision, but total Selenium is not a required effluent limitation on the new outfalls based on the Executive Director’s best professional judgment.
73. For Outfalls 014M–020M and 022M, DRCP is required to monitor flow, TSS, total Iron, and total Manganese on a weekly basis when discharges occur.
74. For post-mining discharges from Outfalls 001R, 003R, 004R, 006R–008R, and 014R–020R, the Draft Permit imposes limitations for settleable solids – 0.5 mg/L daily maximum and single grab sample and pH not less than 6.0 standard units nor greater than 9.0 standard units.

75. For Outfalls 001R, 003R, 004R, 006R–008R, and 014R–020R, DRCP is required to monitor flow and settleable solids on a weekly basis when discharges occur.
76. For new Outfall 021, the Draft Permit includes effluent limitations for TSS – 50 mg/L daily maximum and single grab sample, oil and grease – 15 mg/L daily average and 20 mg/L daily maximum and single grab sample, and pH of not less than 6.0 standard units nor greater than 90 standard units.
77. For Outfall 21, DRCP is required to monitor flow, TSS, and oil and grease on a weekly basis when discharges occur.
78. The TSS limitation for Outfall 021 was developed using best professional judgment and based on the steam electric power-generating effluent limitation guidelines for coal pile runoff found in 40 C.F.R. § 423.15(k), and the oil and grease effluent limitation was developed using best professional judgment.
79. Other Requirement No. 10 of the Draft Permit requires DRCP to submit effluent data for all parameters listed in Tables 1, 2, and 3 of Attachment A after the initial discharge from all outfalls except Outfall 021 and to submit effluent data for all parameters listed in Table 1 of Attachment A for Outfall 021.
80. Under Other Requirement No. 10, analytical testing for the outfalls must be completed within 60 days of initial discharge and results of the testing must be submitted to the TCEQ Industrial Permits Term within 90 days of the initial discharge; the Commission may reopen the permit and impose monitoring and/or effluent limitations, if appropriate.
81. In preparing the Draft Permit, the Executive Director defined each discharge route, identified classified and unclassified water bodies, and assigned uses to unclassified water bodies based on descriptions of them obtained from DRCP, USGS topographic maps, aerial photos, and other available information.
82. The discharge routes and receiving streams for the outfalls are as follows:
 - Outfalls 001M/R, 004 M/R, 007M/R, 008M/R, 017M/R, 018M/R, 021, and 022M to unnamed tributaries, thence to Elm Creek, thence to Rio Grande Below Amistad Reservoir in Segment No. 2304 of the Rio Grande Basin;
 - Outfalls 003M/R, 006M/R, 014M/R, and 019M/R to unnamed ditches, thence to Elm Creek, thence to Rio Grande Below Amistad Reservoir in Segment No. 2304 of the Rio Grande Basin;
 - Outfall 015M/R to an unnamed ditch, thence to an unnamed tributary, thence to Hediondo Creek, thence to Elm Creek, thence to Rio Grande Below Amistad Reservoir in Segment No. 2304 of the Rio Grande Basin;

- Outfalls 016M/R and 020M/R to Elm Creek, thence to Rio Grande Below Amistad Reservoir in Segment No. 2304 of the Rio Grande Basin.
83. The discharge routes pass through ditches that DRCP has or will build on property to which DRCP has a good-faith claim, in defined watercourses, or both.
84. The uses of the receiving streams are as follows:
- for Outfalls 001M/R, 004M/R, 008M/R, 017M/R, 018M/R, 021, and 022M/R, the unnamed tributaries are intermittent and identified as having minimal aquatic life use and presumed primary contact recreational use;
 - for Outfalls 007M/R and 015M/R, the unnamed tributaries are intermittent with pools and identified as having limited aquatic life use, presumed primary contact recreational use, and incidental fisheries use;
 - for Outfall 015M/R, Hediondo Creek is intermittent with pools and identified as having limited aquatic life use, presumed primary contact recreational use, and incidental fisheries use;
 - for Outfalls 003M/R, 006M/R, 014M/R, 015M/R, and 019M/R, the unnamed ditches will be intermittent and were identified as having minimal aquatic life use and presumed primary contact recreational use;
 - for all Outfalls, including Outfalls 16M/R and 20M/R, Elm Creek was perennial and identified as having high aquatic life use, presumed primary contact recreational use, and sustainable fisheries use; and
 - for all Outfalls, the receiving streams flow into the Rio Grande Below Amistad Reservoir which is assigned Segment No. 2304, has high aquatic life use with corresponding dissolved oxygen criterion of 5.0 milligrams per liter, primary contact recreational use, and a public water supply designation.
85. Pursuant to the RCT Permit, DRCP is required to collect, on a quarterly basis surface water quality data including total dissolved solids (TDS), TSS, acidity and alkalinity information, pH, total and dissolved Iron, and total Manganese.
86. DRCP's operation under the Draft Permit will not have an effect on any current or proposed federal endangered or threatened aquatic or aquatic-dependent species or their critical habitat.

87. None of the wastewaters that will be authorized for discharge from the Eagle Pass Mine have sources of bacteria; therefore, the discharges from the Eagle Pass Mine will not contribute further to the bacteria impairment of the Segment No. 2304.
88. The Draft Permit authorizes DRCP to use water contained in any sedimentation pond or retention pond for dust suppression purposes but prohibits runoff or pooling of water from dust suppression activities.
89. Discharges from the Eagle Pass Mine are not expected to:
 - a. contain concentrations of taste or odor producing substances that would interfere with the reasonable use of the receiving waters;
 - b. contain floating debris or suspended solids that are conducive to producing adverse response in aquatic organisms;
 - c. contain putrescible sludge deposits or sediment layers that adversely affect benthic biota or any lawful uses;
 - d. contain settleable solids conducive to altering flow characteristics of stream channels or the untimely filling of surface water in the state;
 - e. cause substantial and persistent changes from ambient conditions of turbidity or color; or
 - f. cause foaming or frothing of a persistent nature.
90. Discharges consistent with the draft permit will not interfere with the maintenance of aesthetic parameters in the unclassified receiving streams or subsequent classified streams.
91. Discharges from the Eagle Pass Mine will not release radiological material in excess of the limits in 30 Texas Administrative Code chapter 336.
92. Discharges from the Eagle Pass Mine will not release toxicants that violate water quality based limitations.
93. Discharges from the Eagle Pass Mine are not expected to have high nutrient concentrations or cause excessive growth of aquatic vegetation and will comply with the nutrient general criteria in 30 Texas Administrative Code § 307.4(e).
94. Discharges from the Eagle Pass Mine will not contain heated effluent streams, and, therefore, discharges from the Eagle Pass Mine are not expected to substantially or materially alter the temperature of the receiving waters.

95. TDS, chloride, and sulfate will be screened once DRCP has fulfilled the requirements found in Other Requirement No. 10, and, if the average concentration of TDS, chloride, or sulfate is greater than the segment criterion, screening procedures and effluent limitations will be calculated in accordance with the Commission's policies and the Texas Surface Water Quality Standards.
96. Existing, designated, and attainable uses will not be impaired by the salinity of the discharges from the Eagle Pass Mine.
97. TDS, chloride, or sulfate discharge limits are not necessary to protect water quality.
98. None of the wastewater that will be authorized for discharge from the Eagle Pass Mine contains appreciable concentrations of oxygen demanding substances; therefore, no significant dissolved oxygen depletion is anticipated in the receiving waters as a result of the discharges from the Eagle Pass Mine.
99. As required by 30 Texas Administrative Code § 307.5 and the TCEQ implementation procedures, TCEQ performed antidegradation reviews of the receiving waters under the terms of the Draft Permit.
100. A Tier 1 review of all the receiving streams was performed and preliminarily concluded that, with the existing limitations in the Draft Permit, the uses of the receiving waters will be maintained.
101. A Tier 2 review of Elm Creek was performed and preliminarily concluded that, with the existing limitations in the Draft Permit, existing uses in Elm Creek will not be degraded.

Aluminum and Boron

102. Any groundwater, including any groundwater that may contain aluminum or boron, that is ultimately discharged from the Eagle Pass Mine will be diluted by stormwater.
103. EPA recommends that boron levels in water used for irrigation not exceed 2.0 mg/L.
104. Water from Elm Creek is used for irrigation.
105. Much of the groundwater at the Eagle Pass Mine site has consistently shown levels of boron above 2.0 mg/L.
106. The RCT permit forbids DRCP from discharging waters that have boron concentrations over 2.0 mg/L.
107. DRCP plans to route waters with elevated boron concentrations to RP-3.
108. Although DRCP does not plan to discharge from RP-3, its application requests permission to do that via Outfall 022.

109. A limit of 2.0 mg/L for boron should be added to the Draft Permit.
110. The acute criterion in the water quality based effluent limits for dissolved aluminum is 0.991 mg/L. 30 Tex. Admin. Code § 307.6(c)(1).
111. One of the monitoring wells at the Eagle Pass Mine site, DRRC 4R, had a median concentration of 14 mg/L of total aluminum, which is significantly higher than 0.991 mg/L. The maximum total aluminum concentration from this well is 95.4 mg/L.
112. DRCP did not establish the concentration of dissolved aluminum in its wastewater.
113. The ED included a testing requirement for total aluminum, not dissolved, in Other Requirement No. 10 of the Draft Permit. The reason for Other Requirement No. 10 is to determine if additional permit limits need to be imposed in the future.
114. A monitoring requirement for aluminum should be added to the Draft Permit.
115. The Draft Permit's Other Requirement No. 10 should be amended to require DRCP to sample the first four discharges from each outfall, to complete the testing of each sample within 60 days of each discharge, and to report each result within 90 days of each discharge.
116. The Draft Permit terms and conditions, as amended, are consistent with the Commission's antidegradation policy, maintain and protect existing uses in the receiving streams, do not interfere with the maintenance of uses in the downstream segment, will not degrade waters that exceed fishable/swimmable quality, and will not lower the water quality below water quality standards, including with respect to iron, lead, and manganese.
117. Discharges from the Eagle Pass Mine in accordance with the Draft Permit, as amended, will not result in adverse toxic effects on aquatic life, terrestrial life, livestock, or domestic animals, resulting from contact, consumption of aquatic organisms, consumption of water, or any combination of the three.
118. The terms and conditions of the Draft Permit are consistent with the RCT Permit No. 42B.
119. Consistent with the Commission's standard policy, chronic toxicity criteria do not need to be imposed for discharges from the Eagle Pass Mine, which are expected to be intermittent. The Draft Permit, therefore, does not need to include chronic toxicity limitations.
120. Waters in the sedimentation ponds or retention ponds will not negatively impact the groundwater at the Eagle Pass Mine.

121. Pursuant to the RCT Permit, DRCP is required to monitor groundwater and currently monitors groundwater through 28 existing wells by analyzing trace metals on an annual basis and field parameters, general chemical parameters, and major ions on a quarterly basis.
122. Sedimentation ponds and retention ponds do not need to be lined.
123. Biomonitoring is not required for discharges from the Eagle Pass Mine.

II. CONCLUSIONS OF LAW

Jurisdiction

1. TCEQ has jurisdiction over water quality and has jurisdiction to issue a TPDES permit under the Texas Water Code. Tex. Water Code §§ 5.013, 26.003, 26.011, 26.027, and 26.028.
2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law under the Texas Government Code and the Texas Water Code. Tex. Gov't Code §§ 2001.058, 2003.047; Tex. Water Code § 5.557.

Procedural History

3. At the request of DRCP, the Commission properly directly referred DRCP's Application to SOAH. Tex. Water Code § 5.557; 30 Tex. Admin. Code § 55.210.
4. Proper notice of DRCP's Application and the preliminary hearing were provided. Tex. Gov't Code §§ 2001.051, 2001.052; Tex. Water Code §§ 5.552, 26.022, 26.028; 30 Tex. Admin. Code §§ 39.418, 39.419, 39.551(f).
5. The public hearing on DRCP's Application was held in compliance with Texas Water Code Chapters 5 and 26, Texas Government Code section 2003.047, the Commission's rules, and SOAH's procedural rules.

Application

6. In order to be considered timely, a renewal application or amendment must be filed at least 180 days prior to the expiration of the effective permit. 30 Tex. Admin. Code § 305.65.
7. DRCP's Application was timely filed, and that filing extended the term of the Current TPDES Permit.

8. DRCP's Application was complete and complied with Texas Water Code § 26.027(b) and 30 Texas Administrative Code §§ 281.5, and 305.48.
9. DRCP is the proper permittee as both the owner and operator of the Eagle Pass Mine. 30 Tex. Admin. Code §§ 305.2(24), 305.2(26), 305.43(a); 40 C.F.R. §§ 122.21(a), 122.21(b).
10. The Commission must consider the compliance history for an applicant and a facility for the five-year period prior to the date the permit application as received by the Commission when making decisions regarding a permit application pursuant to 30 Texas Administrative Code § 60.1.
11. DRCP is the proper permit applicant, and therefore it was proper for the Commission to review the compliance history for DRCP and the Eagle Pass Mine.
12. The compliance history of DRCP and the Eagle Pass Mine support approval of DRCP's Application. Tex. Water Code § 5.75; 30 Tex. Admin. Code §§ 60.1, 305.66(g).
13. DRCP's Application was filed and processed in accordance with Texas Water Code §§ 5.553 and 5.557 and with the Commission's rules and policies.

Draft Permit

14. The Draft Permit includes the terms and conditions that meet all of the requirements of Texas Water Code § 26.029.
15. The Commission is not required to include in this TPDES permit a monitoring requirement or effluent limitation associated with 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.
16. The terms and conditions of the Draft Permit comply with all effluent guidelines limitations for acid or ferruginous mines. 30 Tex. Admin. Code § 305.541; 40 C.F.R. Part 434.
17. The terms and conditions of the Draft Permit, as amended, are protective of the waters of the State and comply with the Commission's policies, and regulations, including 30 Texas Administrative Code chapter 307.
18. Discharges from the Eagle Pass Mine in compliance with the Draft Permit, as amended, will not result in any adverse effects on human health, aquatic life, or the receiving streams.
19. The monitoring and reporting requirements found in the Draft Permit, as amended, are reasonable.

20. Discharges from the Eagle Pass Mine in compliance with the Draft Permit, as amended, will maintain quality of water consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, and the operation of existing industries.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY THAT:

1. DRCP's application is granted in part. TPDES Permit No. WQ0003511000 for industrial wastewater is hereby issued to Dos Republicas Coal Partnership, as set out in the attached Draft Permit with the following modifications:

- a. for all outfalls other than Outfall 021, a daily maximum discharge limitation of 2.0 mg/L for boron is added;
- b. boron is added to the list of pollutants for which a violation of the daily maximum limitation must be reported to the Commission under Other Requirement No. 1;
- c. for all outfalls other than Outfall 021, DRCP is required to monitor for aluminum;
- d. Other Requirement No. 10 will read:

Wastewater discharged via Outfalls 001M/R, 003 M/R, 004 M/R, 006M/R–008M/R, 014M/R–020M/R, and 022M 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. Analytical testing for Outfalls 001M/R, 003 M/R, 004 M/R, 006M/R–008M/R, 014M/R–020M/R, 021, and 022M must be completed within 60 days of each of the four initial discharges from each outfall. Results of the analytical testing must be submitted within 90 days of each of the four initial discharges to the TCEQ Industrial Permits Team (MC-148). 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.

2. All other motions, requests for specific findings of fact or conclusions of law, and other requests for general and specific relief, if not expressly granted herein, are hereby denied for want of merit.
3. The effective date of this Order is the date the Order is final.
4. All other motions, requests for entry of specific findings of fact or conclusions of law, and any other requests for general or specific relief not expressly granted herein, are hereby denied for want of merit.
5. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.
6. The Chief Clerk of the Texas Commission on Environmental Quality shall forward a copy of this Order to the parties.

Issue Date:

**TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**Bryan W. Shaw, Ph.D., P.E., Chairman
For the Commission**