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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 25, 2016

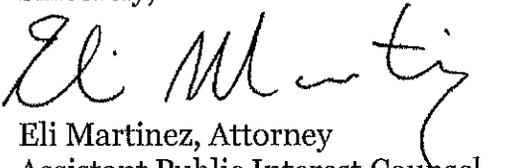
Bridget Bohac, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

**RE: DOS REPUBLICAS COAL PARTNERSHIP  
SOAH DOCKET NO. 582-15-2214  
TCEQ DOCKET NO. 2015-0068-IWD**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Exceptions to the Proposal for Decision in the above-entitled matter.

Sincerely,

  
Eli Martinez, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**SOAH DOCKET NO. 582-15-2214**

**TCEQ DOCKET NO. 2015-0068-IWD**

**APPLICATION BY DOS  
REPUBLICAS COAL  
PARTNERSHIP FOR  
AMENDMENT AND RENEWAL OF  
TPDES PERMIT NO.  
WQ0003511000**

**BEFORE THE STATE OFFICE  
OF  
ADMINISTRATIVE HEARINGS**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S EXCEPTIONS TO  
PROPOSAL FOR DECISION**

To the Honorable Administrative Law Judges WILLIAM G. NEWCHURCH and  
REBECCA S. SMITH:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on  
Environmental Quality (Commission or TCEQ) submits the following Exceptions to  
Proposal for Decision in the above-referenced matter and respectfully shows the  
following.

**I. Jurisdiction**

OPIC excepts to the conclusion reached in section IXA of the PFD that Dos  
Republicas Coal Partnership (DRCP) is the operator as well as owner of the mine, and  
the only entity required to apply for the permit.

The Texas Administrative Code (TAC) and Federal Regulations require that an  
operator be named in the application for TPDES permits. Specifically, 30 TAC  
§305.43(a) states that, "for all Texas Pollutant Discharge Elimination System Permits, it  
is the duty of the *operator and owner* to submit an application for a permit" (emphasis  
added). Federal regulations articulate a similar requirement at 40 CFR §123.25(a),

which provides “All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

...

(4) §122.21 (a)-(b), (c)(2), (e)-(k), (m)-(p), (q), and (r)—(Application for a permit);

...

40 CFR § 122.21(b), in turn, requires, “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” (emphasis added). As established in the Applicant’s pre-filed testimony<sup>1</sup> and during cross examination of Andres Gonzalez-Saravia Coss,<sup>2</sup> Camino Real Fuels, LLC will be the operator of the Eagle Pass Mine on behalf of DRCP. DRCP is a partnership consisting of Eagle Pass Coal Corporation and Maverick County Coal Corporation. The owner of each of these partners is Electrica Puerto Penasco—an entity owned by Altos Hornos de Mexico—which is in turn primarily owned by Grupo Acerero Del Norte (North American Coal Corporation).<sup>3</sup>

At the preliminary hearing on March 30, 2015, exhibits DRCP A-J were introduced in these proceedings to establish SOAH’s jurisdiction. Exhibits DRCP A-C were various iterations of the notice of receipt of application and intent to seek a permit (NORI), while Exhibits DRCP D-G consist of various iterations of the notice of preliminary decision (NAPD). 30 TAC § 39.411(b)(2) requires these notices to contain the name and contact information of the permit applicant—which, per 30 TAC §

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<sup>1</sup> Ex. DRCP 300 at 10:22.

<sup>2</sup> Tr. at 165: 19 – 166:11.

<sup>3</sup> MC Ex. 10.

305.43(a)—must include the operator. However, none of these exhibits identified Camino Real Fuels, LLC, or its parent company North American Coal Corporation.

Exhibit DRCP H was the draft permit and DRCP I was the TCEQ’s “fact sheet” and preliminary decision, but again, neither identifies Camino Real Fuels or its parent company. Exhibit J was the compliance history for DRCP, but there is no compliance history for Camino Real Fuels or of the parent company of Camino Real Fuels, LLC.

The failure to identify operator Camino Real Fuels as permittee and to have its compliance history, and the compliance history of its parent company, properly evaluated runs afoul of the requirements of both state and federal law. Without a permittee properly identified, the jurisdictional documents introduced in these proceedings could not establish jurisdiction.

## **II. Aquatic Life Use Designation**

OPIC excepts to the conclusion reached in section XI of the PFD that the antidegradation review conducted by the ED was sufficient, and that the ED appropriately assessed the aquatic life use of the unnamed tributaries of Hediondo Creek and Elm Creek.

### **A. Legal Framework**

The regulations and guidance documents used to perform aquatic life use assessments and water quality evaluations consist generally of the Water Quality Standards set out at Ch. 307 of the Water Code, TCEQ’s “Implementation Procedures” for those standards, and TCEQ guidance documents RG-415 (regarding physical and

chemical water quality monitoring procedures) and RG-416 (methods for collecting and analyzing aquatic biological assemblage and habitat data).

Of particular relevance to these proceedings in the Chapter 307 rules is the Commission's antidegradation policy, set out at 30 TAC § 307.5. The antidegradation policy provides for a "Tier 1" review to determine if a proposed waste water discharge would so impair existing uses of a water body that those uses would not be maintained. "Tier 2" reviews determine if "fishable/swimmable" waters would be degraded more than a "*de minimis*" degree by the proposed discharge. Fishable/swimmable waters may be degraded by the proposed discharge by more than a *de minimis* degree, but not without making a showing that the degradation is necessary for important economic or social development. "Tier 3" reviews are conducted for "outstanding national resource waters" and certain other waters having a special designation; there are no waters at issue in this case to which Tier 3 reviews would be applicable to discharges.

"Fishable/swimmable" is a defined term: "Waters that have a quality sufficient to support propagation of indigenous fish, shellfish, terrestrial life and recreation in and on the water." The *Implementation Procedures*, page 61, provide the presumption that water bodies that are intermediate, high, or exceptional aquatic-life-use waters are fishable/swimmable.

**B. Maverick County Conducted a Reliable Aquatic Life Use Analysis**

David Flores, an aquatic biologist who testified on behalf of Maverick County, conducted site-specific assessments on both the unnamed tributary of Hediondo Creek through which Outfall 015 discharges are proposed to flow, and the unnamed tributary through which discharges from Outfalls 021, 022, and 004 are proposed to flow to Elm Creek. Mr. Flores' assessment reflects that the Hediondo Creek and its unnamed tributary should be classified—using Index of Biotic Integrity and Habitat Quality Index scores—as having high, or at least intermediate life uses.<sup>4</sup> This assessment was conducted by visiting the receiving waters at several points along the discharge route and collecting aquatic specimens for analysis. Mr. Flores' conclusion would warrant a Tier 2 review to determine whether the receiving waters would be degraded more than a “*de minimis*” degree by the proposed discharge. In contrast, Jeff Paull, on behalf of the Executive Director, concluded that Hediondo Creek and its unnamed tributary have limited aquatic life uses—requiring only a Tier 1 review.

Mr. Paull's testimony during cross examination revealed that the Executive Director's assessment of aquatic life use is less reliable than that of Mr. Flores. Rather than an on-site review, Mr. Paull conducted only a “chair review” using the presumption that the classification of segments of the discharge routes as intermittent with perennial pools so warranted.

Q: Did you make the decision that the unnamed tributary of Hediondo Creek was intermittent or was it intermittent with perennial pools?

A: It's intermittent with perennial pools.

Q: Okay. But you didn't think that that would qualify for an intermediate aquatic life use because the rule of thumb is that it would only be limited?

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<sup>4</sup> Ex. MC-100 at 7:19 – 8:5.

A: That's the presumption in -- the aquatic life use associated with that presumption<sup>5</sup>

Furthermore, Mr. Paull testified that he did not consider any alternatives beyond this presumption when evaluating the length of intermittent streams with perennial pools upstream from where the discharge joins Hediondo Creek.

Q: So you certainly did not entertain the possibility that it was, in fact, intermediate?

A: It was not something I considered at the time.<sup>6</sup>

Mr. Paull responded similarly in response to a question regarding the tributary on the DRCP mine property.

Q: And the same thing would be true there. You didn't ever really stop and ponder whether this might, instead of being limited life use, actually be intermediate?

A: I did not stop and ponder at the time of my review, yes.<sup>7</sup>

Mr. Paull testified that the methodology employed by Mr. Flores in his aquatic review was reliable, and disagreed with the results of his assessment only to the extent that the samples were collected outside of the 7Q2 flow period.<sup>8</sup> However, Mr. Flores credibly testified that the nature of aquatic systems and of the biological communities associated with these systems are highly variable and dependent on seasonal and unique climatic conditions. Organisms typically found in semi-arid to arid areas are usually hardy and tolerant to their variable environment. Increases in precipitation usually occur during the fall and spring and many organisms have adapted to this by

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<sup>5</sup> Tr. at 742: 11 – 16.

<sup>6</sup> Tr. at 757: 3 – 5.

<sup>7</sup> Tr. at 757: 10 – 21.

<sup>8</sup> Tr. at 755: 23 – 756:6.

reproducing during these times. Mr. Flores acknowledges that increased precipitation will increase stream flow, which can cue spawning behavior for some aquatic species—a “wet Spring” could therefore increase the short term success of spawning activities for these species and increase biomass within the streams by increasing available habitat. However, it is unlikely that species diversity would increase as a result of an isolated event such as a wet season, year, or even period.<sup>9</sup>

### C. The Evidence Shows a Tier II Analysis Should Have Been Performed

Although OPIC contends that Mr. Flores’ assessment is more reliable than Mr. Paull’s, we note that the burden is not on the Executive Director to prove by a preponderance of the evidence that instream uses will be protected. Ultimately that burden falls squarely on the applicant. Here the evidence shows that the discharge route that is an unnamed tributary of Elm Creek has intermediate aquatic-life uses, and there needs to be for those discharges a determination as to whether they degrade the tributary water quality by more than a *de minimis* extent. The applicant and application failed to do this.

## **III. Chronic Toxicity Testing Should be Required to Avoid Excessive Levels of Aluminum and Boron**

Although OPIC agrees that the conclusion in the PFD relating to the addition of an aluminum monitoring requirement and a Boron limit of 2.0 mg/L for all outfalls that

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<sup>9</sup> Ex. MC-100 at 29: 13 – 30:2.

receive mine pit water is a step in the right direction, we disagree with the conclusion of Section VIIIID that chronic toxicity testing should not be required in the permit.

## I. Legal Framework

As stated *supra*, a TPDES application is subject to the Commission's antidegradation policy.<sup>10</sup> Tier 1 analysis is intended to protect "existing uses and water quality,"<sup>11</sup> while Tier 2 protection is intended to prevent lowering water quality of the receiving water bodies by more than a *de minimis* extent.<sup>12</sup> TCEQ rules require that water in the State must be maintained to preclude adverse toxic effects on aquatic life<sup>13</sup> as well as water bodies used for agricultural water supply.<sup>14</sup>

## II. EDF Performed Reliable Antidegradation Analyses

The TCEQ conducts an antidegradation review for renewal, amendment, or new permit applications for a TPDES permit based on Worksheet 2.0 supplied by the applicant in its application."<sup>15</sup> In this permitting action, Worksheet 2.0 was left blank. The EDF group, in an attempt to remedy this deficiency of information in the application, retained environmental engineer Dr. Lial Tischler to conduct Tier 1 and Tier 2 analyses based on groundwater samples at various locations around the mine property.

As to his Tier 1 analysis, Dr. Tischler used the groundwater sampling data to compare with baseline levels of aluminum and boron in Elm Creek to assess whether the

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<sup>10</sup>30 Tex. Admin. Code §307.5(a).

<sup>11</sup>30 Tex. Admin. Code §307.5(b)(1).

<sup>12</sup>30 Tex. Admin. Code §307.5(b)(2).

<sup>13</sup>30 Tex. Admin. Code §307.6(b)(4).

<sup>14</sup>30 Tex. Admin. Code §307.7(b)(5).

<sup>15</sup> Tr. at 42:3 - 5.

effluent would result in an exceedance of the Surface Water Quality Standards. Baseline conditions indicate Elm Creek has an aluminum concentration of .91 mg/L<sup>16</sup> and the aluminum water quality standard to protect aquatic life from acute toxicity is 0.991 milligrams per liter (“mg/L”).<sup>17</sup> Tier 1 antidegradation protection prohibits mining operations from causing Elm Creek to exceed this level. Dr. Tischler found that well DRRC 4R contained median concentrations of aluminum at 14 mg/L.<sup>18</sup> and maximum aluminum concentrations of 95.4 mg/L.<sup>19</sup>

Baseline conditions indicate Elm Creek has a boron concentration of 0.12 mg/L,<sup>20</sup> and the EPA acute standard for boron for agricultural uses<sup>21</sup> is 2.0 mg/L. Tier 1 antidegradation protection prohibits mining operations from causing Elm Creek to exceed this level. Dr. Tischler found that well DRRC 4R contained median concentrations of boron at 7.2 mg/L<sup>22</sup> and maximum boron concentrations of 12.5 mg/L.<sup>23</sup>

As stated *supra*, a Tier II antidegradation review requires TCEQ to ensure the proposed discharge will not lower water quality of receiving water bodies that exceed fishable/swimmable quality by more than a *de minimis* extent.<sup>24</sup> Elm Creek has a high aquatic life use, so it required a Tier 2 antidegradation review.<sup>25</sup> *De minimis* is defined by the TCEQ Procedures to Implement the Texas Surface Water Quality Standards (“TCEQ Procedures”). TCEQ Procedures have identified a 10% increase in the baseline concentration of a parameter in a receiving water body as a threshold for “*de minimis*”

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<sup>16</sup> Ex. EDF Group 1100 at 50:6 – 7 (Table).

<sup>17</sup> 30 Tex. Admin. Code Figure: §307.6(c)(1)

<sup>18</sup> Ex. DRCP 710 at 31.

<sup>19</sup> *Id.*

<sup>20</sup> Ex. EDF 1100 at 50:6 – 7 (Table).

<sup>21</sup> Ex. DRCP 710 at 31.

<sup>22</sup> Ex. DRCP 710 at 31.

<sup>23</sup> *Id.*

<sup>24</sup> Ex. ED-2 at 6:8 – 10.

<sup>25</sup> Ex. ED-2 at 14:12 – 14.

degradation. Using the monitoring well data collected from DRRC 4R, the proposed effluent could easily exceed the 10% increase threshold and increase baseline concentrations beyond legal limits.

### III. Chronic Effluent Limits

The Texas Surface Water Quality Standards mandate that “surface waters must not be toxic ... to terrestrial or aquatic life.”<sup>26</sup> TCEQ complies with this requirement by implementing water quality-based effluent limitations for constituents with potential to exceed water quality numerical limits. Permit limitations are required when analytical data reported in the application exceeds 85 percent of the calculated daily average water quality-based effluent limitation. Monitoring and reporting is required when analytical data reported in the application exceeds 70 percent of the calculated daily average water quality-based effluent limitation.”<sup>27</sup>

The chronic aquatic life standard is applied as a 7-day exposure period. TCEQ policy requires chronic criteria effluent limits for discharges into intermittent streams that reach a perennial water body within three miles.<sup>28</sup> TCEQ conducted its own “Permit Review for Unclassified Waters” to assess whether chronic criteria apply to discharges into Elm Creek<sup>29</sup> and TCEQ staff concluded that numerous outfalls require chronic criteria.<sup>30</sup> However only acute daily average effluent limitations were considered when considering limits for the Draft Permit due to the “intermittent” nature of mine discharges as a general principle.<sup>31</sup>

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<sup>26</sup> 30 Tex. Admin. Code §307.4(d).

<sup>27</sup> Ex. ED-1, KLD-3 at 8 - 9 (TCEQ Fact Sheet).

<sup>28</sup> Tr. at 318:13 - 21; Tr. at 779:9 - 780:20.

<sup>29</sup> Ex. EDF Group 1204 (Permit Review for Unclassified Waters).

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

<sup>31</sup> *Id.*

However, the record fails to firmly establish the potential duration or frequency of proposed discharge events while dewatering mine ponds. Further, due to the lack of information on Worksheet 2.0, the concentrations of constituents in the proposed discharge are largely unknown. Dr. Tischler testified that, “the mine can discharge seven days or more which may result in chronic aquatic life effects in the perennial sections of Elm Creek due to the presence of lead in the discharges.”<sup>32</sup> Chronic criteria should therefore have been evaluated to ensure protection of Elm Creek and Hediondo Creek.

#### **IV. Conclusion**

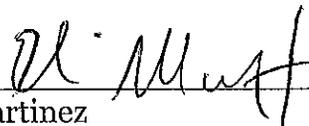
OPIC agrees with the PFD’s conclusions that Other Requirement 10 be amended to require DRCP to sample the first four discharges from each outfall, regardless of when they occur, within 60 days of the discharge, and to report each result within 90 days. OPIC also agrees that the addition of an aluminum monitoring requirement and a Boron limit of 2.0 mg/L for all outfalls that receive mine pit water is appropriate. However, OPIC excepts to the conclusions in the PFD relating to jurisdiction, aquatic life designation, and chronic toxicity testing as discussed above.

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<sup>32</sup> Ex. EDF Group 1100 at 46:2 – 4.

Respectfully submitted,

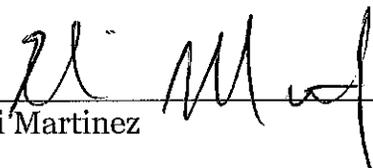
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### Certificate of Service

I hereby certify that on April 25, 2016 the Office of Public Interest Counsel's Exceptions to Proposal for Decision was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

 \_\_\_\_\_  
Eli Martinez

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