

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

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

**EXCEPTIONS OF MAVERICK COUNTY
TO THE PROPOSAL FOR DECISION**

TO THE COMMISSIONERS AND ADMINISTRATIVE LAW JUDGES:

Maverick County, here, takes exception to three of the conclusions reached in the Proposal for Decision (“PFD”). (1) The County excepts to the conclusion that Dos Republicas Coal Partnership (“DRCP”) is both the owner and operator of the mine and, thus, is the only permit applicant and, ultimately, permittee. (2) The County excepts to the conclusion that higher aquatic life use, i.e, higher than “limited,” is not “supported” for the tributary of Hediondo Creek and the tributary of Elm Creek to which Outfalls 004, 021, and 022 discharge; this conclusion justifies the absence in this case of a Tier 2 Antidegradation Review for discharges to these water bodies. (3) The County excepts to the failure of the PFD to address the need for biomonitoring, i.e., WET testing, for, at least, chronic toxicity; this is an issue separate from the issue of whether the permit should include limits derived from the results of WET testing.

(1) The “Operator” issue. The PFD correctly sets out the basic law. TCEQ regulation, at 30 TAC §305.43(a), provides in relevant part: “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.” This closely tracks federal law, 40 CFR § 122.21(b),

which provides: “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.”

The PFD lists a litany of actions for which Camino Real Fuels (“CRF”) has responsibility at the mine. Those are set out, shortly, for the benefits of the Commissioners. Despite this litany, the ALJs (p. 16) conclude “nevertheless ... DRCP retains responsibility for overall operation of the wastewater facilities.” This is where the PFD errs. As set out in some detail, below, the characteristics that define an “operator” are that the entity is responsible for day-to-day operations at the facility, the entity actively causes the facility to function by direct personal effort, or the entity has the power or capacity to (i) make timely discovery of discharges, (ii) direct the activities of persons who control the mechanisms causing the pollution, and (iii) prevent and abate damage.

For the benefits of the Commissioners, these are the functions the PFD acknowledges are functions performed by CRF:

1. CRF is the contract miner;
2. CRF was hired to develop, construct, operate, and perform ongoing reclamation at the mine and to remove and deliver coal from the mine to DRCP on the terms and conditions of the contract;
3. CRF provides all required personnel, administrative and supervisory services, construction, engineering, permitting loading, geological and operation services required to carry out the work in accordance with applicable legal requirements;
4. CRF may make emergency expenditures as necessary;
5. CRF is to cause the persons working at its direction to comply with the law;
6. CRF maintains the insurance policies for the site;

7. even as to permits issued to DRCP, CRF is irrevocably for the term of the contract granted the power to operate under those permits;
8. CRF has a veto power over litigation settlements under some conditions, including any settlement conditions that include injunctive or equitable relief;
9. CRF supplies the workforce and hires the contractors at the mine, while CRF's parent company supplies the administrative workers for the mine;
10. CRF makes the decisions about which sedimentation ponds get synthetic liners and about when to discharge wastewater from the mine's sedimentation ponds;
12. CRF employees conduct the water quality sampling and maintain the equipment at the mine; and
13. while DRCP has financial responsibility, i.e., liability, CRF has overall operational responsibility, to wit:

Q (BY MR. ABAZARI): Which party, Mr. Nielsen, DRCP or CRF, has overall responsibility over the operations?

A: CRF.¹

Additionally, the President of CRF testified, "As President of CRF, I hold overall responsibility for compliance for all permits issued for the operation of the mine."²

The PFD says, p. 16, that a DRCP representative visits the mine daily to "oversee all the functions for which it has responsibility," and it cites to some transcript testimony. This PFD statement was made initially in the Applicant's closing argument with the same citation, and it misrepresents the testimony. The testimony does not explain what, if anything, the representative does during his/her daily visit. It just says the representative visits the mine daily.

The PFD is lightly critical, p. 12, of the County for having raised a case, the *Chocolate Bayou* case,³ that is does not address "who is the operator" and, therefore, is

¹ Tr. 201, ll. 3-6. "CRF" is "Camino Real Fuels."

² Tr. 25, l. 12.

not seen as relevant to the current dispute. The *Chocolate Bayou* case was not raised to address the “who is the operator” issue. It was raised as the only guidance of which the County is aware as to whether the failures of the public notices of permit applications and draft permits create jurisdictional problems for the proceedings. In *Chocolate Bayou*, the court held that the information required by the regulations had been included in the notices, so there were no due process issues raised by factual errors regarding other pieces of information in the notices. The County, here, argues that there are such jurisdictional issues, in part, because the notices do not notice a necessary permit applicant, CRF.

At the time, the County was unaware that anyone would question if CRF were the operator. The litany of responsibilities of CRF, above, seemed to take that argument off the table. The testimony of the Applicant and the discovery of both the Applicant and the ED’s staff had indicated their views to be that CRF was not a required applicant, because it did not have overall financial responsibility for the mine. The Applicant/ED theory was that an operator without overall financial responsibility, whatever that means, did not need to be an applicant and, later, a permittee.

There is a recent Austin Court of Appeals case that sheds light, in a similar context, on the definition of “operator” at the TCEQ. That case is *Heritage on San Gabriel Homeowners’ Association v. Texas Comm’n on Environmental Quality*, 339 S.W.3d 417 (Tex. App. – Austin 2012, pet. denied). That is a landfill case. In that case,

³ *Chocolate Bayou Water Co. and Sand Supply v. Texas Natural Resource Conservation Commission*, 124 S.W.3d 844 (Austin 2003), pet. denied.

the landowners argued that Williamson County, which was the landowner and the holder of the permit and the entity ultimately responsible for the landfill, should have been identified as the operator. Instead, the application and permit identified Waste Management of Texas, Inc., as the operator.

The Court of Appeals, at 427-428, turned to the dictionary for the definition of “operator,” which it found to be “a person that actively operates a business.” It found from the same source that “operate” means “to cause to function, usually by direct personal effort.” It found, at 429, that TCEQ interprets the term “operator” under the landfill regulations “to mean the entity responsible for managing day-to-day operations at the landfill.” The ED’s main witness in that case testified that the TCEQ sought operator information so the agency could contact, if contact became necessary, the entity in charge of day-to-day operations at the landfill. The Court found that information in the permit about the entity in charge of day-to-day operations promotes accountability and enforcement of TCEQ’s rules.

Later, at 430, the Court turned from the landfill regulations and analyzed the definition of “operator” in, specifically, 30 TAC 305.43(b), the regulation at issue in this docket, in light of the dictionary definitions. (Sec. 305.43(b) also applies to landfill applications.) The Court concluded, “Thus, the plain meaning of the TCEQ’s definition of ‘operator’ is the entity responsible for its personal performance of causing the landfill to function.” At note 5, the Court found that the only difference between the chapter 330 “operator” definition, i.e., the landfill-regulation definition, and the chapter 305

definition, i.e., the consolidated-permit-application definition, was that the chapter 330 definition encompassed, also, entities that only operated part of the landfill. The Court, there and in the associate text in the body of the opinion, found that Waste Management was the operator under either definition, because it was the entity that provides “day-to-day landfill management services.”

In this docket, CRF is the entity that “actively causes to function by direct personal effort” the business of the mine. It is the entity that is responsible for day-to-day operations at the mine. Camino Real Fuels is, legally, the “operator.”

As the PFD notes, § 305.43(a) is the companion state regulation to the EPA regulation on permit applicants, 40 CFR § 122.21(b). The PFD characterizes the federal rule as the more stringent of the two, but that really turns on how the TCEQ chooses to define “operator.” Federal case law has defined “operator” under the Clean Water Act thusly:

Although case law specifically defining “operator” under the CWA is sparse at best, the view often adopted is that expressed in *Apex Oil Co. v. United States*, 530 F.2d 1291, 1293 (8th Cir.1976), *cert. denied*, 429 U.S. 827, 97 S.Ct. 84, 50 L.Ed.2d 90 (1976). An entity is an operator of a facility where it has the power or capacity to (i) make timely discovery of discharges, (ii) direct the activities of persons who control the mechanisms causing the pollution, and (iii) prevent and abate damage. *Id.* at 1293 (quoting *United States v. Mobil Oil Corp.*, 464 F.2d 1124, 1127 (5th Cir.1972)); *State of Idaho v. Bunker Hill*, 635 F.Supp. 665, 672 (D.Idaho 1986).⁴

This case involved mining waste water discharges under the supervision of non-owner contract miners.

⁴ *Beartooth Alliance. v. Crown Butte Mines*, 904 F. Supp. 1168, 1175 (D. Mont. 1995).

This “operator” definition, above, has recently been characterized the federal Fifth Circuit Court of Appeals as “in accord” with the definition used by the court in the BP-Deep Water Horizon litigation. The court has adopted for Clean Water Act litigation an “operator” definition originally put forth by the U.S. Supreme Court in a CERCLA case. The Fifth Circuit explained its position thusly:⁵

As to Transocean [the drilling platform owner and operator], even though the discharge was not from the vessel, a question remains as to whether it would be an “operator” of the offshore facility. The CWA's definition of “operator” provides little guidance: “ ‘owner or operator’ means ... any person owning or operating such ... offshore facility....” 33 U.S.C. § 1321(a)(6). However, the Supreme Court described an “operator” under the Comprehensive Environmental Response, Compensation and Liability Act [“CERCLA”], 42 U.S.C. § 9601(20)(a), as one who:

must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

United States v. Bestfoods, 524 U.S. 51, 66–67, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998).

Finally, it is worth noting the TCEQ’s definition of “primary operator” in its Construction General TPDES Permit for storm water discharges. TCEQ has defined the primary operator as: “the person or persons ... that meets either of the following two criteria: (a) [on-site operational control of plans and specs] and (b) ... have day-to-day operational control of those activities at a construction site that are necessary to ensure compliance with a Storm Water Pollution Prevention Plan (SWP3) for the site or other

⁵ *In re: Oil Spill by the Oil Rig DEEPWATER HORIZON in Gulf of Mexico, on April 20, 2010*, 844 F. Supp. 2d 746, 761 (E.D. La. 2012), *aff'd in part sub nom. In re Deepwater Horizon*, 753 F.3d 570 (5th Cir. 2014), *adhered to*, 772 F.3d 350 (5th Cir. 2014) and *rev'd in part sub nom. In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on April 20, 2010*, 21 F. Supp. 3d 657 (E.D. La. 2014).

permit conditions (for example, they are authorized to direct workers at a site to carry out activities required by the SWP3 or comply with other permit conditions).”⁶

Under state and federal case law and by analogy to the TCEQ’s understanding, as expressed in its storm water construction general permit, of the primary operator, CRF is the “operator” at the Eagle Pass Mine. Please just look back at the litany of functions and authorities the PFD recognizes for CRF. DRCP’s almost-ultimate financial responsibility for financial matters at the mine is not the controlling factor; in fact, it is a minor factor or not a relevant factor, at all (given § 305.43(a)’s silence on the relevance of financial responsibility).

Failing to require CRF to be an applicant and permittee deprives the public of notice of one of the entities being benefited by State action. It deprives the public of knowledge of that entity’s compliance history.⁷ And it lays the groundwork for a mountain of enforcement burdens, should enforcement be necessary and resisted. DRCP is a non-miner owner that is really just a financing vehicle of a complicated stack of Sociedades Anónima de Capital Variable chartered in Mexico. Nothing about litigating with those Sociedades will be straight-forward.

(2) The aquatic life uses of the two tributaries. The PFD determines that the tributary of Hediondo Creek to which Outfall 015 discharges and the tributary of Elm Creek to which Outfalls 004, 021 and 022 discharge have no higher than “limited” aquatic life uses. This conclusion was reached, despite the fact that Mr. Flores’s site-

⁶ TPDES General Permit TXR150000 (2013), Part I, Section B (Definitions).

⁷ The PFD, p. 43, specifically rejected EDF Group’s claim that the compliance history of CRF is relevant.

specific receiving water assessments, the only site-specific work on this topic any party conducted, determined those tributaries to have either intermediate or high aquatic life uses. The distinction is important, because the TCEQ's *Procedures to Implement the Texas Water Quality Standards* (RG-194, 2010) generally limits Tier 2 Antidegradation Review to water bodies with aquatic life uses of intermediate or higher.⁸ The PFD appears to have rejected Mr. Flores's work, because it occurred in June and July, and the area of the mine had had heavy rains in April and May.

As Dr. Miertschin, the Applicant's witness, conceded and the PFD acknowledges, that Mr. Flores's techniques for collecting the data and calculations for analyzing it were sound, given the dates on which the data were collected; on those days, the tributaries exhibited at least "intermediate" aquatic life uses.⁹

The PFD characterizes the conditions of the tributaries as "far from usual" on the days of Mr. Flores's data collection. The County believes this characterization is not correct. More importantly, however, Mr. Flores explained why collection of data during a "wet spring" in a semi-arid or arid region, like the mine area, does not overstate the life uses of the water bodies from which the data are collected. No one contradicted this analysis, which is excerpted, here:¹⁰

The very natures of these 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

⁸ Exh. KLD-9 (the *Implementation Procedures*), p. 000120 (internal p.61).

⁹ PFD, p. 41, and Tr. 367.

¹⁰ Exh. MC-100, p. 29, l. 13, through p. 30, l. 8.

variable environment. Increases in precipitation usually occur during the fall and spring and, as such, many organisms have adapted to this by reproducing during these times. Increasing precipitation will increase stream flow, which can cue spawning behavior for some aquatic species. A “wet spring” could increase the short-term success of spawning activities for these species and increase biomass within the streams by increasing available habitat. It is unlikely that species diversity would increase as a result of an isolated event such as a wet season, year, or even period.

... These ecosystems are highly variable and experience both short and long dry periods as well. During these dry periods, stream flow may cease and perennial pools serve as a refuge for the biological organisms. ...

Frankly, there is no direct evidence that tributary conditions were “far from usual” on the days Mr. Flores collected his data. That is a surmise derived from the observation that there had been heavy rains in April and May. There is no evidence in the record tying the conditions in the tributaries to “normal” flows or other characteristics of those tributaries.

Mr. Walter Herring presented the most-informed testimony of all the witnesses regarding the stretch of the tributary of Hediondo Creek on which Mr. Flores conducted his receiving water assessment.¹¹ Mr. Herring’s family has owned the property through which the tributary flows since 1958.¹² There have been only a couple of years since then when, because he was living out-of-state, he has not walked along or seen the tributary.¹³ He testified that the tributary never goes dry, that it always has pools (“potholes”) of water. He accompanied Mr. Flores during some of the time when Mr.

¹¹ Mr. Starks, the Applicant’s environmental specialist for the mine, testified live that he has seen the tributary of Hediondo Creek only once in the past two years, and it had water flowing in it, then. Tr. 206, ll.4-9.

¹² Exh. EDF-200, p. 3.

¹³ Tr. 418-419.

Flores conducted his receiving water assessment on the tributary. When asked if the tributary were noticeably different that day from the way it had been on numerous other days, he responded, “No, not really.”¹⁴

Regarding the Elm Creek tributary to which Outfalls 004, 021 and 022 discharge, he testified that tributary was on land he and his dad has leased for cattle from 1983 until about 5 years ago. He had seen the tributary “not daily, but quite frequently.”¹⁵ That tributary has flowing water, not constantly, but several times a year. It has perennial pools that do not go dry.¹⁶ He has caught catfish and bass and other types of fish in the tributary near, but above, its confluence with Elm Creek.¹⁷

So, neither of these water bodies is ever wholly dry. Both have perennial pools. The TCEQ’s guidance on, among other procedures, receiving water assessments, explicitly states that, for water bodies with perennial pools, “the 7Q2 rules do not apply.”¹⁸ (The guidance explains that the “7Q2” flow of a stream is at or just above the 7-day, 2-year low flow of the stream). So, as the PFD acknowledges and as Mr. Paull

¹⁴ . Tr. 419:

Q Was the condition of the creek that day noticeably different from you what remember its being in the -- at least a large number of times that you have seen it?

A No, not really.

¹⁵ Tr. 422, ll. 7-8.

¹⁶ Tr. 423, l. 2, and Tr. 425, ll. 17-18.

¹⁷ Tr. 427, l. 24, through 428, l. 5.

¹⁸ Exh. MC-12 (RG-416, *Methods for Collecting and Analyzing Biological Assemblage and Habitat Data*), p. 2-3.

testified for the ED (regarding assessments following rain events),¹⁹ there is room for deviation from any set protocol, when it comes to receiving water assessments.

Mr. Starks, the CRF environmental specialist for the mine, testified that waste water discharges from every outfall at the mine will be stormwater driven.²⁰ So, the conditions when there are likely to be discharges from the mine will be the conditions that exist following heavy rains, such as occurred in the Spring of 2015. Given all the other variables that weigh on an aquatic life assessment, it is unreasonable to treat as not credible the only site-specific aquatic-life-use data in the record, because it was collected under conditions that resemble those that are most likely to exist when the mine is discharging. The TCEQ's rule of thumb that only "intermediate" and higher aquatic-life-use water bodies merit a Tier 2 Antidegradation analysis compromises the antidegradation commitment; we should not further weaken it by so readily elevating the agency's desk-top presumptions of life use over site-specific data collections of life use.

(3) The biomonitoring issue. The PFD, pp. 38-39, declines to recommend any chronic-toxicity-based limits for outfalls other than Outfall 021. The County supports the EDF Group's argument for such limits. BUT, even if no limits are added to the permit, it makes sense to require biomonitoring, so that the need for such limits in future permits may be evaluated.

Mr. Flores also testified that he believed a permit term requiring chronic toxicity testing of outfall discharges should be added. As he pointed out, coal mine discharges

¹⁹ Tr. 773, ll. 13-16.

²⁰ Exh. DRCP-400, p. 16, ll. 16-23.

have a potential for containing elevated concentrations of heavy metals. Inasmuch as aquatic organisms are extremely sensitive to this type of water pollution, because of limited mobility, biological uptake, and the use of gills, a chronic toxicity testing requirement would help ensure the intermittent discharges were not toxic to aquatic organisms and would, at least, identify when and where a toxic discharge was made to the water body.²¹

Respectfully submitted,



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CERTIFICATE OF SERVICE

By my signature below, I certify that on this 25th day of April, 2016, copies of the foregoing document were served upon the parties identified below via electronic mail or deposit in the U.S. Postal Mail.



David Frederick

²¹ Exh. MC-100, p. 32, ll. 1-14.

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