

**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

PROTESTANT EDF GROUP EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND THE ADMINISTRATIVE LAW JUDGES:

COMES NOW Protestant EDF Group and files these Exceptions to the Proposal for Decision (“PFD”) submitted in the above referenced dockets.

I. INTRODUCTION

The EDF Group is comprised of the City of Eagle Pass, the Environmental Defense Fund and six property owners directly adjacent and downstream of the coal mine (“EDF Group”). These parties banded together over significant concern for the water quality of Elm Creek and Hediondo Creek, which are the proposed receiving water bodies for the wastewater discharge resulting from Applicant Dos Republicas Coal Partnership’s (“DRCP” or “Applicant”) nearby Eagle Pass Coal Mine. Maverick County shares concern for Elm Creek and Hediondo Creek and, together with the EDF Group, believes that even with the recommended changes to the Draft Permit by the ALJ the application to renew and amend TPDES Permit No. WQ0003511000 (“Application”) does not comply with all statutory and regulatory requirements.

EDF Group landowners rely heavily on the receiving waters including Elm Creek, Hediondo Creek and respective tributaries for fishing, watering livestock and agriculture water

supply. These landowners are representative of the thousands of citizens that have publicly expressed opposition to the mine. Elected officials heard the overwhelming concerns for these creeks and now seek to protect the community.

The PFD recommends that the Commissioners of the Texas Commission on Environmental Quality (“TCEQ”) grant the application and issue the Draft Permit with three important changes: (1) a monitoring requirement for aluminum; (2) a boron effluent limit of 2.0 milligrams per liter (“mg/L”); and (3) a requirement for DRCP to sample the first four discharges from each outfall to satisfy Other Requirement No. 10. The EDF Group agrees with the ALJs that without the recommended changes, the Draft Permit affords far less protection to the receiving water bodies than the current version. However, even with these recommendations the Draft Permit does not protect Elm and Hediondo Creeks.¹

TCEQ rules require that waters of the State be maintained to preclude adverse toxic effects on aquatic life from wastewater discharge.² Water bodies used for agricultural water supply, like Elm Creek, must also be maintained and protected to ensure continued agricultural use.³ The antidegradation review is at the core of ensuring water quality protection that is required by Title 30, Chapter 307 of the Texas Administrative Code (“Chapter 307”).⁴ An antidegradation review of DRCP’s application was never conducted, and, consequently, there is no evidence that Elm and Hediondo Creeks will not be degraded by the proposed discharge. The PFD incorrectly finds that TCEQ conducted a review that complies with Chapter 307.

¹ In the interest of brevity, EDF Group focuses only on certain exceptions to the PFD, which in no way should be construed as a limit on or a waiver of issues that may be raised in a future motion for rehearing. Additionally, EDF Group hereby incorporates by reference the Exceptions filed by other Protestants and the arguments set forth in EDF Group’s Closing Brief and Reply Closing Brief previously filed in these dockets.

² 30 Tex. Admin. Code §307.6(b)(4).

³ 30 Tex. Admin. Code §307.7(b)(5).

⁴ 30 Tex. Admin. Code §307.5(a); *see also* Ex. ED-1, KLD-9 at 55.

TCEQ instructions establish that conducting an antidegradation review requires comparing the constituents in the proposed discharge to the baseline water quality conditions of receiving waters to assess potential for degradation.⁵ DRCP did not provide TCEQ with an adequate description of the proposed discharge or baseline water quality conditions, preventing the TCEQ from conducting the mandatory comparison contemplated by the antidegradation review. Instead, the TCEQ conducted a “preliminary” antidegradation review. The ALJs concluded that even though only a “preliminary” antidegradation review had been conducted, DRCP had satisfied its burden of proof because of the “**possibility of reevaluation in the future**, once flow data is provided” (i.e. sampling data from actual wastewater discharge events).⁶ EDF Group disagrees that DRCP has satisfied Chapter 307 simply because a future evaluation can occur **after** discharges commence. Elm and Hediondo Creeks are only protected if TCEQ conducts its antidegradation review **prior to issuing the permit and prior to discharging wastewater**. A future analysis may determine that degradation will occur based on the composition of the wastewater, and while that will allow TCEQ to act to prevent future degradation, every discharge and any associated degradation that occurs until that future evaluation cannot be reversed. Any degrading discharge will have occurred before the ED conducts the required pre-discharge review.

II. ANTIDEGRADATION REVIEW

The antidegradation review affords three tiers of protection.⁷ Only Tier 1 and Tier 2 are relevant to this Application. Tier 1 protection requires that “existing uses and water quality sufficient to protect those existing uses must be maintained.”⁸ Tier 2 protection requires, in

⁵ ED-1, KLD-1 at p. 63 (Procedures to Implement the Texas Surface Water Quality Standards).

⁶ Proposal for Decision (“PFD”) at pp. 40 – 41 (emphasis added).

⁷ Ex. ED-1, KLD-9 at 55.

⁸ 30 Tex. Admin. Code §307.5(b)(1) (emphasis added).

pertinent part, that no discharge can occur if it will cause degradation of water quality of the receiving water bodies by more than a de minimis extent.⁹ It is undisputed DRCP did not conduct either a Tier 1 or Tier 2 antidegradation analysis of its proposed discharge.¹⁰ DRCP relied entirely on the TCEQ staff to conduct an antidegradation review, but failed to provide the necessary information about the chemical composition of the discharge to enable TCEQ to conduct that review.

A. TCEQ Instructions require a comparison of the proposed effluent to baseline water quality of receiving water bodies.

TCEQ rules specifically require TPDES applications to include a Technical Report that describes the wastewater in enough detail to evaluate water quality considerations.¹¹ Describing the characteristics of the wastewater is critical because TCEQ Procedures to Implement the Texas Surface Water Quality Standards (“TCEQ Procedures”) establish that to conduct an antidegradation review the “proposed discharge is compared to baseline water quality conditions in order to assess the potential for degradation of water quality.”¹² The incomplete Application failed to include an adequate description of the wastewater, resulting in a failure to conduct an Antidegradation Review.

Worksheet 2.0 of the Application, “POLLUTANT ANALYSIS REQUIREMENTS,” requires the applicant to provide concentrations of constituents contained in the proposed discharge. TCEQ instructions state that “Worksheet 2.0 is required.”¹³ The ALJs concluded that despite leaving Worksheet 2.0 completely blank, DRCP provided sufficient information to allow evaluation by the TCEQ. The ALJs base their conclusion on various narrative descriptions

⁹ 30 Tex. Admin. Code §307.5(b)(2).

¹⁰ Tr. at 41:21 – 24.

¹¹ 30 Tex. Admin. Code §305.45(a)(8)(B)(ii).

¹² Ex. ED-1, KLD-9 at 63 (emphasis added).

¹³ EDF Group Ex. 1104 at 60 (emphasis in original).

throughout the application.¹⁴ The ALJs explain that the “fact that the information was not tabulated in Worksheet 2.0 was immaterial.”¹⁵ EDF Group did not intend to quibble over the technicality that Worksheet 2.0 must be where the discharge description must be located (although that appears to be the suggestion by the instructions). Rather, the position of the EDF Group is that nowhere in the Application does DRCP provide TCEQ a description of the constituents to enable TCEQ to conduct the comparison required for an antidegradation review.

TCEQ Instructions for Worksheet 2.0 expressly provide how DRCP should have filled out Worksheet 2.0—“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.”¹⁶ DRCP could have easily completed Worksheet 2.0 by referring to wastewater discharges from other coal mines it operates in Texas.¹⁷ That data would have enabled TCEQ to conduct an antidegradation review to determine whether Elm and Hediondo Creeks are truly protected.

Mr. Paull, TCEQ staff responsible for the Antidegradation Review, conceded that DRCP left blank the portion of the Application that would contain the information about constituents present in the discharge.¹⁸ Acknowledging this lack of information, TCEQ claimed it only conducted a “preliminary” antidegradation review.¹⁹ In fact, the “antidegradation review” was completed well before the application was even complete. Mr. Paull did not look at the groundwater data when doing his antidegradation review.²⁰ TCEQ did not provide any details for what the preliminary review actually included. Much of the alleged antidegradation review

¹⁴ PFD at 18 – 19.

¹⁵ PFD at 20.

¹⁶ Ex. EDF 1104 at 62 (emphasis added).

¹⁷ Ex. DRCP 500 at 8:12 – 18; Tr. at 234:15 – 23.

¹⁸ Tr. at 732:17 – 25 (referring to Worksheet 2.0).

¹⁹ Ex. ED-1, KLD-2 at 3

²⁰ Tr. at 732:17 – 25.

was focused on dissolved oxygen.²¹ TCEQ staff never claimed to have made comparisons of the proposed discharge to baseline water quality. TCEQ's Tier 2 review consisted of a conclusory determination "that existing uses will not be degraded by this permit action so long as the applicant complies with the effluent limits in the proposed permit."²²

The PFD does not directly conclude whether the preliminary Tier 2 review satisfies the TCEQ regulatory requirements. The PFD merely concludes that the "preliminary" Tier 2 review appears to be the Executive Director's standard procedure.²³ Neither the TCEQ nor DRCP offered into evidence any examples of previous TCEQ Tier 2 reviews for coal mining wastewater applications. Regardless of whether Mr. Paull's Tier 2 review is standard procedure, the "preliminary" review does not satisfy 30 Tex. Admin. Code §307.5(b).

B. Tier 2 Antidegradation Review requires effluent limits for aluminum and boron to ensure protection of existing uses and water quality.

A Tier 2 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.²⁴ Elm Creek has a high aquatic life use, so it required a Tier 2 antidegradation review.²⁵ De minimis is defined by the TCEQ Procedures, which provide that a 10% increase in the baseline concentration of a parameter in a receiving water body as a threshold for "de minimis" degradation. Specifically, TCEQ Procedures state, "new discharges that use 10% or greater of the existing assimilative capacity ... will receive further evaluation."²⁶

The Tier 2 review is a **comparison of concentrations of pollutants in the proposed effluent to the baseline concentrations in the receiving water bodies**. The ample groundwater data from

²¹ Ex. ED-2 at 9:3 – 14:5.

²² Ex. ED-2 at 14:17 – 19.

²³ PFD at 40.

²⁴ Ex. ED-2 at 6:8 – 10.

²⁵ Ex. ED-2 at 14:12 – 14.

²⁶ Ex. DRCP 802 at 64.

the mine site or wastewater discharge data from other coal mines operated by a DRCP affiliate could have been and should have been utilized for a proper Tier 2 review.

i. Aluminum

Dr. Tischler conducted a Tier 2 review that represents the type of review the TCEQ should have conducted. Not having data from other coal mine discharges in Texas, Dr. Tischler used the most representative data of the proposed discharge at the EDF Group’s disposal–DRCP groundwater data.²⁷ Groundwater is a primary component of the proposed discharge. Dr. Tischler used this data to compare with baseline levels of aluminum in Elm Creek. Dr. Tischler compared the median concentration for aluminum at monitoring well DRRC 4R (14 mg/L) to the baseline concentration of aluminum in Elm Creek (0.91 mg/L). The proposed discharge represents more than a **1500% increase** in the baseline concentration.²⁸

It is the TCEQ’s default policy to assume that 100 percent of the aluminum is dissolved unless the applicant demonstrates otherwise.²⁹ This approach is reasonable and protective. DRCP testified that it could conduct a site-specific study to demonstrate to the TCEQ that 100 percent of the aluminum will not dissolve, but DRCP never conducted any such study.³⁰ Even assuming some fraction of aluminum not being dissolved, the significant percent increase in concentration warrants further evaluation by the TCEQ to determine whether an effluent limit is needed **before discharge is authorized**.

²⁷ EDF Group has continuously maintained that the groundwater data is representative of the proposed effluent from the Eagle Pass Mine. The proposed effluent will be comprised of mine seepage and mine pit water, **which is groundwater**. The Application states that the capacity for mine pit water in RP-3 will always be **80%**. The total storage capacity of RP-3 is 26.6 million gallons, which translates into as much as 21.28 million gallons of mine pit water (i.e. groundwater). The capacity or flow percentage for mine pit water in the other ponds that will discharge wastewater is unknown, but the Application confirms all ponds will have some “variable” amount of mine pit water.²⁷ The Draft Permit does not prohibit or limit manual discharging of pure mine seepage and mine pit water (i.e. without any dilution from stormwater). The presence of mine seepage and mine pit water in the effluent underscores the representative nature and value of the groundwater samples.

²⁸ Ex. EDF 1100 at 50:6 – 7 (Table).

²⁹ Tr. at 392:20 – 24.

³⁰ Tr. at 392:25 – 10.

ii. Boron

The median concentration for boron at monitoring well DRRC 4R represents a more than **6000% increase** in the baseline concentration of Elm Creek.³¹ The significant increase in concentration warrants further evaluation by TCEQ to ensure Elm Creek will not be degraded by an increase in boron concentrations. Based on Dr. Tischler's review, an effluent limit is likely needed to ensure Elm Creek is protected. This is particularly important because Elm Creek is used for agricultural water supply.

iii. Extremely elevated aluminum and boron levels may warrant more restrictive effluent limits

The extremely elevated levels of aluminum and boron in the groundwater at the mine underscores the importance of a complete and thorough Tier 2 review prior to authorizing discharge. Comparing the elevated levels to the baseline water quality of Elm Creek, degradation by more than 10% of the assimilative capacity is a very real possibility. The recommended 2.0 mg/L effluent limit for boron and aluminum monitoring requirement do not ensure protection of Elm Creek from degradation by more than a de minimis amount. A more restrictive limit of boron, and an aluminum effluent limit may be necessary to ensure protection from degradation.

III. CONCLUSION

The EDF Group respectfully requests that the Application be remanded to the Executive Director and DRCP be ordered to complete its Application with necessary data representative of its proposed discharge. For the reasons argued in its Closing Brief, the EDF Group maintains its position that the most representative data available for the Tier 2 review is the groundwater data at the site. In the alternative, the amended PFD should require submission of wastewater

³¹ Ex. EDF 1100 at 50:6 – 7 (Table).

sampling data from other operating coal mines in Texas. This will enable the TCEQ to finally conduct the requisite Tier 2 evaluation and properly determine the appropriate effluent limits for boron and aluminum to ensure degradation does not occur beyond a de minimis amount. Submission of data representative of the proposed discharge will also enable the TCEQ to conduct the proper Tier 1 review with regard to aluminum by comparing the data to the 85% value of the calculated Daily Average Effluent limitation. This will determine whether an aluminum effluent limit is necessary to ensure protection as opposed to only a monitoring requirement. Until this occurs, the Application has not complied with 30 Tex. Admin. Code §307.5(b)(2) and Elm and Hediondo Creeks are not protected from the coal mine wastewater.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of April, 2016, a true and correct copy of the foregoing document was served on the individuals listed below by email or First Class Mail.

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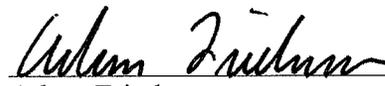
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