

**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 §**

**RESPONSE OF MAVERICK COUNTY TO THE EXCEPTIONS
TO THE PROPOSAL FOR DECISION and
TO PROPOSED FINDINGS AND CONCLUSIONS**

TO THE COMMISSIONERS AND ADMINISTRATIVE LAW JUDGES:

Maverick County offers, here, some suggestions related to the exceptions filed by other parties and to findings and conclusions related to those exceptions.

The ED seems to have scrubbed well the findings of fact and conclusions of law. The County supports the changes supported by the ED for findings of fact numbered 14, 21, 24, 58, 66, 74, 76, 80, 88, 97, and 115.¹

As the County understands the facts, mine seepage water will be commingled with other wastes encountered in the mine pits. Ms. Denney testified that mine seep water will “have other wastewaters going into it” on the way to the sedimentation ponds.² So, the PFD’s formulation of finding number 37 is superior to that of the ED’s suggested change.

The ED has politely raised, in the context of finding number 40, the problem that the mining contract with CRF leaves permit compliance in CRF’s hands, not in DRCP’s hands. As the County’s Exceptions of 10 days ago re-iterated, the operator is the one to

¹ Though, why it should take 90 days to analyze and tabulate the last sampling-event data is not at all clear.

² Tr. 636, line 23.

whom permit compliance, as a practical matter, will fall, and the operator is CRF.

Finding number 40 and the subsequent findings that are associated with it should be amended to read as proposed by the County prior to the PFD, to wit:

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; it provides its requirements and expectations to CRF, which performs day-to-day activities in accordance with a budget DRCP approves; DRCP pays all costs during design and construction of the Eagle Pass Mine; it pays all operation costs during production at the Eagle Pass Mine, and is required to retain and maintain in its name all permits, except those that must be obtained in the name of the mine operator, CRF. (Exhibit DRCP-200 at 7:9-10:2; Exhibit DRCP-204 at p. 020686.) CRF hires mine workforce and contractors, maintains equipment and facilities at the mine, decides when to discharge waste water from the sedimentation ponds, and has overall responsibility for mine operations. (Exhibit DRCP-204 at p. 020647; Hearing Tr. 179:11-25 and 181-183 and 201:3-10 and Exhibit DRCP-300 at 25:12.) CFR may make any expenditure in reasonable response to an emergency, shall cause all persons acting at its direction to comply with all legal requirements, shall obtain and keep in effect comprehensive liability and other insurance for the mine, and holds veto power over any legal settlement that includes injunctive or equitable relief. (Exhibit DRCP-204 at 020657, 020659, 020684 and 020671.)
41. DRCP has an office in Eagle Pass, and a DRCP representative visits the site on a daily basis, but DRCP has no representative on site at all times. CRF has overall responsibility over the operations of the mine. (Hearing on the Merits Tr. at 180:3-4, 200:3-5, 201:3-6.)
42. DRCP has ownership of mine operations and has financial responsibility over the operations at the Eagle Pass Mine, but CRF operates the mine and holds overall responsibility for compliance for all permits issued for the operation of the mine. (Exhibit DRCP-200; Exhibit DRCP-204; Exhibit DRCP-300 at 10:22-25 and at 25:12-13).
43. Based on the compliance history review for the five year period prior to the submission of the Application conducted by TCEQ Staff, both the facility, the Eagle Pass Mine, and the applicant, DRCP, have a classification of "high" and a rating of 0.00. (Exhibit ED-1 at 29:5-7, 30:1-8; Exhibit ED-1, KLD-15.) The compliance history of CRF or of its parent company is unknown.

44. Although DRCP has held a TPDES since 2007, it had not discharged prior to the submission of the Application in September 2013. (Exhibit 200 at 4:18-19; Hearing on the Merits Tr. at 56:9- 14 (Testimony of Lisa Olson Murphy, P.E.); Exhibit ED-1 at 8:17-23, 14:11-15:23; Hearing on the Merits Tr. 632:1-3, 633:13-14, 637:21-638:7 (Testimony of Kara Denney).)
45. DRCP's application does not satisfy the requisites of 30 TEX. ADMIN. CODE § 305.45, in that it did not include CRF as an applicant or provide required information regarding CRF; and its supplemental technical report did not satisfy the requisites (paragraph (a)(8)) regarding waste discharge volumes, rates, patterns, chemical properties, and regarding compliance with the antidegradation provisions of the State's water quality standards (paragraph (a)(8)(C)).

The record citations have been retained in the forgoing amended findings to facilitate the ALJs' or the Commissioners' efforts to confirm the accuracy of the facts set forth.

Presumably, the citations would be removed from the findings as they appear in the final order.

The ED's suggested amendments to findings numbered 46 and 82 seem to the County one click too picayunish. The County does not really care, but recommends leaving these as proposed in the PFD.

The ED's suggested amendment to finding 84 is too picayunish at one level and, as noted in by the County in its Exceptions, not sufficiently critical of the finding on its merits. That finding should read:

84. The uses of the receiving streams are as follows:
 - a. for Outfalls 001M/R, 008M/R, 017M/R, 018M/R, and 021, the unnamed tributaries were intermittent and identified as having minimal aquatic life use and presumed primary contact recreational use; for Outfalls 004M/R and 022M/R, the unnamed tributary was identified during a site-specific aquatic-life-use assessment as intermittent with perennial pools and identified as having, at least, intermediate aquatic life use, with presumed primary contact recreational use. (Exhibit MC-100 at 20:8-21:1.)

- b. for Outfall 007M/R , the unnamed tributary was intermittent with pools and identified as having limited aquatic life use, presumed primary contact recreational use, and incidental fisheries use; for Outfall 015M/R, the unnamed tributary was identified during a site-specific aquatic-life-use assessment as, at least, intermittent with perennial pools, having at least intermittent life uses, with presumed primary contact recreational use and incidental fisheries use. (Exhibit MC-100 at 17:9-18:7; Tr. 601:10-602:2.)
- c. for Outfalls 003M/R, 006M/R, 014M/R, 015M/R, and 019M/R, the unnamed ditches were (or will be) intermittent and were identified as having minimal aquatic life use and presumed primary contact recreational use;
- d. 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;
- e. for all Outfalls, the receiving streams flow into the Rio Grande Below Amistad Reservoir which is assigned Segment No. 2304 and 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. (Exhibit ED-2 at 11:1-19, 12:18-24; Exhibit ED-1, KLD-7.)
- f. The testimony introduced by Protestants demonstrating that the aquatic-life-use designations for the unnamed tributary of Hediondo Creek and the unnamed tributary of Elm Creek to which Outfalls 004 and 022 discharge are more credible than were the desk-top designations of the Executive Director. (1) The assessments resulted from “on the ground” site-specific data collection (2) during the “index period” recommended by TCEQ regulatory guidance (3) under stream-flow conditions that approached conditions expected to occur at times when mine discharges will actually occur, and (4) because the data were evaluated by application of TCEQ’s preferred assessment tool, the Index of Biotic Integrity. (Exhibit MC-100 [Mr. Flores’ direct testimony] at 14-21:1; Exhibit 12 [RG-416] at 2-2; Exhibit DRCP-100 [Murphy direct testimony] at 32:7-8; Exhibit ED-1, KLD 9 [i.e., the *IPs*] at 18 [00077], penultimate paragraph.)

As before, the record citations have been retained in the suggested language, above, so the ALJs and the Commissioners may more easily ascertain the accuracy of the findings presented.

Along these lines, EDF Group correctly notes that the PFD fails to make a finding regarding the deficiencies in the Tier 2 Antidegradation Analysis for the main tributaries of Elm Creek and Hediondo Creek. But, the EDF Group did not recommend any text for the needed findings language. A finding numbered “101a” should be added to read as follows:

TCEQ's *Procedures to Implement the Texas Surface Water Quality Standards* (2010) provide that Tier 2 antidegradation review generally applies to intermediate, high and exceptional aquatic-life-use waters. However, because TCEQ mistakenly determined the unnamed tributary of Hediondo Creek through which the discharge from Outfall 015 travels and unnamed tributary of Elm Creek through which the discharges from Outfalls 004 and 022 travel had minimal and limited, respectively, aquatic-life uses, it did not undertake a Tier 2 review of these at least intermediate-aquatic-life-use waters. (Exhibit ED-1, Exhibit KLD-9 (the *IPs*) at 61 [000120] and Exhibit ED-1, Exhibit KLD-7 (Fact Sheet) at 4-5 [00016-17] and Tr. 722:9-17.)

The County disagrees with the ED's suggestion to delete finding number 109, which suggestion is consistent with DRCP's prayer to delete findings 105, 109, 111, 12, and 114. The Railroad Commission apparently believes the 2 mg/L boron is justified. Ms. Denney acknowledged in her prefiled testimony other authoritative analysis indicating that short-term boron exposure in excess of 2 mg/L is potentially harmful.³ As the EDF Group demonstrated at trial, there are certainly groundwater sources at the mine with high boron concentrations⁴ and, while this does not establish that there will be high boron concentrations in groundwater that seeps to the mine pits and, thereafter, to the sedimentation ponds. The ALJs' recommendations for findings numbered 109, 105, 111, and 114 should be retained, as written.

Regarding the dueling languages for Other Requirement No. 10: The ED's suggestion that the sampling events be at least a week apart is sound. We would not gain much by having four sampling events in a day, for example. Furthermore, the County does not believe a single set of four sampling events in any short period of time will accomplish what the PFD seeks to accomplish. In the initial years of the permit, mine

³ Exh. ED-1, p. 22, line 12.

⁴ Dr. Tischler's testimony regarding Exh. DRCP 710 (July 6, 2015, groundwater sampling results), at 31.

operations will not be in a steady-state condition. There are, apparently, peculiarities associated with mine startup. Note, for example, even though the testimony was that discharges would be rare events, water near Eagle Pass being scarce and so forth, nonetheless, discharges occurred at least seven (7) times in the six months preceding the hearing on the merits. (Exhibit DRCP-400 at p. 8:1-5 and p. 16:24-17:5 and Tr. 808:14-21 and Exhibit KLD-11:000372 [samp. 4].) So, the County recommends Other Requirement No. 10 require that there be four sampling events per year in years 1, 3, and 5, if there are sufficient discharge events to support that level of sampling. If there are not sufficient sampling events, then, the County recommends a second round of sampling be required beginning in year 5 of the permit. The concept is to capture profiles of the discharges that are reflective of the likely long-term profiles.

The County, of course, in agreement with OPIC and the EDF Group, disagrees with a number (not always the same number) of proposed conclusions of law. The County believes the jurisdictional conclusions should be re-drafted along the lines of:

1. TCEQ has jurisdiction over water quality and has jurisdiction to issue a TPDES permit under the Texas Water Code. TEX. WATER CODE ANN. §§ 5.013, 26.003, 26.011, 26.027, and 26.028 (West 2015).
2. EPA NPDES regulation 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.” 40 CFR § 122.21(b). TCEQ regulation 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.” 30 TAC §305.43(a). When TCEQ adopted this regulation, it acknowledged, “[T]he Commission must satisfy the EPA’s equivalency requirement.” 15 *Tex. Reg.* 5492 (Sept. 21, 1990).
3. Camino Real Fuels, LLC, is as a matter of law the operator of the Eagle Pass Mine. It is not one of the applicants for the TPDES permit, and the

notices of the application, the draft permit and the SOAH hearing do not identify Camino Real Fuels, LLC, as an applicant.

4. These notices are routinely referenced by SOAH ALJs and by the ED as “jurisdictional documents,” and the identity of the permit applicant or applicants is one of the most, if not the most, important elements of the application and public comment process, so the failure of the Application and of the public notices to identify Camino Real Fuels, LLC, as a permit applicant is a defect depriving TCEQ of jurisdiction.
5. SOAH’s jurisdiction over all matters relating to this proceeding is derivative of the jurisdiction of TCEQ, so the defects in the Application and public notices regarding the permit applicants, likewise, deprive SOAH of jurisdiction over this proceeding.
6. At the preliminary hearing, DRCP's jurisdictional exhibits A-J were admitted, but, as noted, these did not identify Camino Real Fuels, LLC, as a permit applicant and did not, in law, vest jurisdiction over this proceeding in TCEQ or SOAH.

The County believes the “draft permit” conclusions should be re-written along the

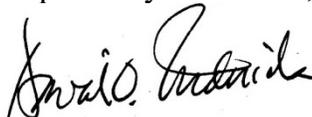
lines of:

14. Because of the deficiencies in the compliance-history assessment, antidegradation-analyses and biomonitoring requirements, it is not possible to find that the Draft Permit includes the terms and conditions that meet all of the requirements of TEX. WATER CODE ANN. § 26.029.
15. The evidence, exclusive of evidence that might be developed during the antidegradation analyses, indicates the Commission would not be 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 Camino Real Fuels, LLC, or DRCP, to include a monitoring requirement or a reporting requirement on aluminum, boron, 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 under 40 C.F.R. PART 434 and 30 TEX. ADMIN. CODE § 305.541.
17. Because of the previously-noted jurisdictional, antidegradation-analysis and biomonitoring deficiencies, it is not possible to find that the terms and conditions of the Draft Permit are protective of the waters of the State and comply with the Commission's policies, and regulations, including 30 TEX. ADMIN. CODE Chapter 307.
18. Because of the previously-noted jurisdictional, antidegradation-analysis

and biomonitoring deficiencies, it is not possible to find that the discharges from the Eagle Pass Mine in compliance with the Draft Permit will not result in any adverse effects on human health, aquatic life, or the receiving streams.

19. Because of the previously-noted jurisdictional, antidegradation-analysis and biomonitoring deficiencies, it is not possible to find that the monitoring and reporting requirements found in the Draft Permit are reasonable.
20. Because of the previously-noted jurisdictional, antidegradation-analysis and biomonitoring deficiencies, it is not possible to find that discharges from the Eagle Pass Mine in compliance with the Draft Permit will maintain a quality of water consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, and the operation of existing industries.

Respectfully submitted,



Frederick, Perales,
Allmon & Rockwell, P.C. by:

David Frederick, SBT# 07412300
707 Rio Grande, Suite 200
Austin, Texas 78701
(512) 469-6000 / (512) 482-9346 facsimile
COUNSEL for MAVERICK COUNTY

CERTIFICATE OF SERVICE

By my signature below, I certify that on this 5th day of May, 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

FOR THE APPLICANT:

LEONARD H. DOUGAL
JACKSON WALKER, L.L.P.
100 CONGRESS AVENUE, SUITE 1100
AUSTIN, TX 78701
(512) 236-2000 (PH)
(512) 391-2112 (FAX)
ldougal@jw.com

**FOR THE OFFICE OF PUBLIC
INTEREST COUNSEL:**

ELI MARTINEZ
PUBLIC INTEREST COUNSEL
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
12100 PARK 35 CIRCLE, MC-103,
BUILDING F
AUSTIN, TX 78753
(512) 239-3974 (PH)
(512) 239-6377 (FAX)
eli.martinez@tceq.texas.gov

FOR JOSE CASARES:

JOSE CASARES
542 LEHMANN RANCH RD.
EAGLE PASS, TX 78852
(830) 773-5700 (PH)
chacho34@gmail.com

**FOR ROBERTO & SIBONEY
SALINAS:**

ROBERTO & SIBONEY SALINAS
381 GENNIERDR.
EAGLE PASS, TX 78852
(830) 513-7612 (PH)
lilthorn30@yahoo.com

FOR LUIS F. MARTINEZ:

LUIS F. MARTINEZ
P O. BOX 3511
EAGLE PASS, TX 78853
(830) 773-6508 (PH)

FOR THE EXECUTIVE DIRECTOR:

STEFANIE SKOGEN
STAFF ATTORNEY
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
ENVIRONMENTAL LAW DIVISION
MC-173 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-0575 (PH)
(512) 239-0606 (FAX)
stefanie.skogen@tceq.texas.gov

FOR THE EDF GROUP

ADAM FRIEDMAN
MCELROY, SULLIVAN, MILLER,
WEBER & OLMSTEAD, L.L.P.
1201 SPYGLASS DRIVE, SUITE 200
AUSTIN, TX 78746
(512) 327-8111 (PH)
(512) 327-6566 (FAX)
afriedman@msmtx.com

FOR FRANCISCO GARCIA:

FRANCISCO GARCIA
311 GENNTERRD.
EAGLE PASS, TX 78852
(830) 352-5325 (PH)
franciscog47@gmail.com

FOR RICARDO RUIZ:

RICARDO RUIZ
1212 GLENHAVEN
EAGLE PASS, TX 78852
(830) 773-1743 (PH)
ricardo-ruiz@sbcglobal.net

FOR RAMON CASTILLO:

RAMON CASTILLO
3700 HWY. 277 NORTE LABOR
EAGLE PASS, TX 78852
(830) 352-4637 (PH)

