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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 25, 2016

Bridget C. Bohac  
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, TPDES Permit No. WQ0003511000, TCEQ  
Docket No. 2015-0068-IWD, SOAH Docket No. 582-15-2214

Dear Ms. Bohac:

I have enclosed the Executive Director's Exceptions to the Proposal for Decision. Please let me know if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Stefanie Skogen".

Stefanie Skogen  
Staff Attorney  
Environmental Law Division

Enclosure

cc: Mailing list

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

<b>APPLICATION FROM DOS</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>REPUBLICAS COAL PARTNERSHIP</b>	<b>§</b>	
<b>FOR A MAJOR AMENDMENT AND</b>	<b>§</b>	
<b>RENEWAL OF TEXAS POLLUTANT</b>	<b>§</b>	<b>OF</b>
<b>DISCHARGE ELIMINATION SYSTEM</b>	<b>§</b>	
<b>(TPDES) PERMIT NO.</b>	<b>§</b>	
<b>WQ0003511000</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**EXECUTIVE DIRECTOR’S EXCEPTIONS TO THE PROPOSAL FOR DECISION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ), by and through a representative of the TCEQ’s Environmental Law Division, files the following exceptions to the administrative law judges’ (ALJs’) proposal for decision:

**I. OVERVIEW**

The ED supports the ALJs’ conclusion that Dos Republicas Coal Partnership’s application for renewal and amendment of TPDES Permit No. WQ0003511000 filed on September 5, 2013, should be granted and that the proposed permit drafted by the ED should be issued. However, the ED has a different view from that of the ALJs regarding some of the provisions in the ALJs’ proposed order and presents its position on those provisions below. The ED is also providing corrections to the proposed order. Because the ED sometimes had both corrections and exceptions for the same provision, the ED is providing all its corrections and exceptions together in the order in which the provisions appear in the proposed order.

**II. CORRECTIONS AND EXCEPTIONS**

**A. Finding of Fact No. 14**

The word “Pollution” should be “Pollutant.” The phrase “as the mine is currently designed” should also be added to the end of the provision. Even as Lisa Murphy, P.E., Dos Republicas’ technical consultant, stated in her testimony, other disposal options do exist.<sup>1</sup>

**B. Finding of Fact No. 21**

The ED declared the application administratively complete on January 13, 2014, not January 23, 2014.<sup>2</sup>

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<sup>1</sup> Ex. DRCP-100, at 13:3-5.

<sup>2</sup> Ex. ED-1 att. KLD-19, at 778.

### **C. Finding of Fact No. 24**

The ED believes the correct publication date for *La Pulguita* was January 16, 2015, not January 15, 2015. It is confusing because the notice cover letter, publisher's affidavit, and publication itself do not agree with each other.<sup>3</sup> The date in the publication actually appears to be a misprint.<sup>4</sup> However, all the other notices for this application that were published in *La Pulguita* were published on Fridays,<sup>5</sup> so the ED believes the cover letter is correct and that Friday, January 16, 2015, was the publication date.

### **D. Finding of Fact No. 37**

Some of the amendment requests in this provision are stated incorrectly. As they have been written into the proposed permit, Dos Republicas seeks to discharge

- mine seepage through Outfalls 001M, 003M, 004M, and 006M-008M, not mine pit water;<sup>6</sup>
- mine seepage through Outfalls 014M-020M, not mine pit water;<sup>7</sup> and
- mine pit water from the active mining areas and stormwater from inside the rail loop through Outfall 022M, not both wastewaters from both areas.<sup>8</sup>

The other items in the list appear to be accurate except for the last one, which should be deleted because it was not explicitly noticed and is part of the requested amendments that were noticed.<sup>9</sup> It should be replaced with Dos Republicas' request to use water in all ponds for dust suppression, which is missing from the list.<sup>10</sup>

### **E. Finding of Fact No. 40**

The ED is not sure that the word "comply" should appear in this provision. While a permitting authority would hold Dos Republicas, as the permit holder, responsible for complying with a permit, there does not appear to be any language in the contract between Dos Republicas and Camino Real Fuels, L.L.C., that requires Dos Republicas to comply with a permit. In fact, Leland Starks, North American Coal Corporation employee and Eagle Pass Mine's environmental specialist, is responsible for regulatory compliance at the mine.<sup>11</sup>

### **F. Finding of Fact No. 46**

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<sup>3</sup> *Id.* att. KLD-18, at 769-70, 775.

<sup>4</sup> *Id.* att. KLD-18, at 770.

<sup>5</sup> *Id.* atts. KLD-16, at 707, KLD-17, at 753, KLD-20, at 823.

<sup>6</sup> *Id.* att. KLD-8, at 33. Mine seepage is groundwater that seeps into the mine. Mine pit water is mine seepage plus stormwater that enters the mine pit. Ex. DRCP-100, at 27:22-24.

<sup>7</sup> Ex. ED-1 att. KLD-8, at 34.

<sup>8</sup> *Id.* att. KLD-8, at 38.

<sup>9</sup> *Id.* atts. KLD-7, at 13, KLD-18, at 760.

<sup>10</sup> *Id.* atts. KLD-7, at 13, KLD-18, at 760.

<sup>11</sup> Ex. DRCP-400, at 3:9-10, 14-15. As stated in Finding of Fact No. 10 of the proposed order, North American Coal is Camino Real Fuels' parent company.

In this provision, and in any other provision in which the term appears, “seep water” should be replaced with “mine seepage” to be consistent with the proposed permit.<sup>12</sup> Also, the list of areas defined as “Facilities Areas” is incomplete and should also include areas designated for fueling, equipment maintenance, and coal handling and storage.<sup>13</sup>

#### **G. Finding of Fact No. 58**

Retention ponds RP-1 and RP-2 should be excluded from this provision. Other Requirement No. 6 in the proposed permit authorizes Dos Republicas to use only “water contained in any active mining area or post-mining area sedimentation pond for dust suppression purposes.”<sup>14</sup> RP-1 and RP-2 will discharge through Outfall 021, i.e., the only outfall that will not be authorized to discharge wastewater from the active or post-mining areas.<sup>15</sup> Therefore, Dos Republicas cannot use those two ponds for dust suppression activities.

#### **H. Finding of Fact No. 66**

The list of active mining outfalls should include Outfall 022M.<sup>16</sup>

#### **I. Finding of Fact No. 74**

Milligrams per liter (“mg/L”) should be milliliters per liter (“mL/L”).<sup>17</sup>

#### **J. Finding of Fact No. 76**

The maximum pH should be 9.0 standard units, not 90 standard units.<sup>18</sup>

#### **K. Finding of Fact No. 80**

“Term” should be “Team.”<sup>19</sup>

#### **L. Finding of Fact No. 82**

“Outfall 015M/R” should be “Outfalls 015M/R.” While 015M and 015R are physically the same outfall, they are treated as two different outfalls for permitting purposes.<sup>20</sup>

#### **M. Finding of Fact No. 84**

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<sup>12</sup> Ex. ED-1 att. KLD-8, at 33-34.

<sup>13</sup> *Id.* att. KLD-8, at 37.

<sup>14</sup> *Id.* att. KLD-8, at 54.

<sup>15</sup> Ex. DRCP-100, at 16:14-20; Ex. ED-1 att. KLD-8, at 37.

<sup>16</sup> Ex. ED-1 att. KLD-8, at 38.

<sup>17</sup> *Id.* att. KLD-8, at 35.

<sup>18</sup> *Id.* att. KLD-8, at 37.

<sup>19</sup> *Id.* at 1:9.

<sup>20</sup> Ex. DRCP-809; Ex. ED-1 att. KLD-8, at 32-33, 35-36.

“022M/R” should be “022/M,” as Outfall 022 is only an active mining outfall.<sup>21</sup> As discussed in the previous subsection, “Outfall 015M/R” should be “Outfalls 015M/R.”<sup>22</sup>

#### **N. Finding of Fact No. 88**

The phrase “active mining area or post-mining area” should be inserted between “any” and “sedimentation.” Please see the ED’s discussion of Other Requirement No. 6 in section II(G) above for more information.

#### **O. Finding of Fact No. 97**

Unless the phrase “at this time” is added to the end of this provision, it should be deleted because it is premature. As stated in Finding of Fact No. 95 of the proposed order, the ED will screen Dos Republicas’ effluent data when it is submitted in accordance with Other Requirement No. 10 to determine if monitoring requirements or effluent limits are needed for any of the tested pollutants, including total dissolved solids, chloride, and sulfate.<sup>23</sup> Until Dos Republicas submits that data for all its outfalls, the ED cannot rule out the need for effluent limits for any particular pollutant.

#### **P. Finding of Fact No. 109**

In its Reply to Closing Arguments, the ED discussed its position regarding the need for a boron limit in the proposed permit at this time:

The ED discussed both aquatic life and agricultural/irrigation uses with regard to boron in its prefiled testimony.<sup>24</sup> Miss Denney noted that the appropriate effluent limits for boron are 0.75 mg/L for long-term irrigation use and 2.0 mg/L for short-term irrigation use.<sup>25</sup> As stated above [in section III(A) of the Reply], the ED has included total boron as a pollutant that Dos Republicas must test for at all outfalls.<sup>26</sup> Once Dos Republicas submits the effluent sampling data for a particular outfall, the ED will be able to determine if boron effluent limits are needed for that outfall. Effluent sample results for Outfall 003 have shown that no boron limit is needed for that outfall.<sup>27</sup>

The ED does not know exactly what led the Railroad Commission of Texas to decide to prohibit Dos Republicas from discharging wastewater with a dissolved boron

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<sup>21</sup> *Id.* att. KLD-8, at 32, 35-36, 38.

<sup>22</sup> Ex. DRCP-809; Ex. ED-1 att. KLD-8, at 32-33, 35-36.

<sup>23</sup> Ex. ED-1 att. KLD-8, at 55-56.

<sup>24</sup> *Id.* at 21:21-22:12

<sup>25</sup> *Id.* at 22:5-7, 11-12.

<sup>26</sup> *See supra* text accompanying note 11 (in the ED’s Reply to Closing Arguments [Feb. 5, 2016]).

<sup>27</sup> Ex. ED-1, at 23:1-5; ED’s Reply to Closing Arguments 6-7 (Feb. 5, 2016).

level that exceeds 2 mg/L.<sup>28</sup> The TCEQ regulates discharges as they enter water in the state, i.e., after they leave the outfall.<sup>29</sup> Until the ED possesses effluent data that shows that an outfall's effluent at the Eagle Pass Mine could, in fact, be harmful to irrigation due to its boron levels, the ED does not believe a boron limit is necessary.

#### **Q. Finding of Fact No. 115**

If the Commission decides to increase the testing frequency from one time to four times, the ED requests that all samples be submitted within ninety days of the final sampling event for each outfall. When a TPDES permit requires the permittee to submit four sample results, the ED averages the four results together for each pollutant to determine if additional monitoring requirements or effluent limits are needed. Therefore, it is more efficient for the permittee to submit all the sample results at once.

#### **R. Finding of Fact No. 119**

This provision should only apply to the active- and post-mining-area outfalls, i.e., all outfalls except Outfall 021. As stated in the Fact Sheet, chronic criteria are applied to Outfall 021 in the perennial freshwater stream, i.e., Elm Creek.<sup>30</sup>

#### **S. Conclusion of Law No. 6**

The phrase "or amendment" should be deleted. Under title 30, section 305.65 of the Texas Administrative Code, the 180-day requirement only applies to permit renewals.

#### **T. Conclusion of Law No. 12**

There appears to be a number missing from the reference to section 5.75 of the Texas Water Code, as that section does not exist. Perhaps it should be section 5.754?

#### **U. Conclusion of Law No. 15**

The ED is unsure why iron and manganese are listed in this provision, as all the active mining-area outfalls have total iron and total manganese effluent limits.<sup>31</sup> Also, as discussed in section II(R) above, chronic criteria do apply to Outfall 021. Once the ED receives effluent sampling data for that outfall, it can determine if any chronic effluent limits are required. If the chronic limit language stays in the proposed order, the phrase "at this time" should be added at the end of the provision.

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<sup>28</sup> The only evidence of the Railroad Commission's reasoning is section 48(g)(2) of the mining permit, which states that "boron may occur in pit water" and "[c]rops considered semi-tolerant or tolerant . . . tolerate 2.0 mg/L or less." Ex. DRCP-202, at 42.

<sup>29</sup> The ED discussed this subject in more detail in relation to water quality-based effluent limits in section III(A) of its Reply to Closing Arguments. ED's Reply to Closing Arguments 3-5 (Feb. 5, 2016).

<sup>30</sup> Ex. ED-1 att. KLD-7, at 19-20.

<sup>31</sup> *Id.* att. KLD-8, at 33-34, 38.

## V. Ordering Provision No. 1

### 1. (a)

If the Commission decides to include a boron daily maximum limit of 2.0 mg/L in the proposed permit, it should only apply to the active mining outfalls (Outfalls 001M, 003M, 004M, 006M-008M, 014M-020M, and 022M), as those are the only outfalls that will be discharging groundwater, i.e., mine seepage.<sup>32</sup> The ED recommends that the limit apply to total boron because it is the ED's standard practice to list elemental limits as total, not dissolved. It is also in line with the other elemental limits in the permit, Other Requirement No. 10 testing requirements, and TPDES industrial permit application sampling requirements.<sup>33</sup> The ED also recommends a measurement frequency of once per week and a sample type of grab. These are the same measurement frequencies and sample types for the other technology-based effluent limits in the proposed permit.<sup>34</sup>

### 2. (b)

If the Commission decides to add boron to the list of pollutants in Other Requirement No. 1, the ED recommends that it be added as total boron because it is the ED's standard practice to list elemental limits as total, not dissolved. It is also in line with other elemental limits in the permit, Other Requirement No. 10 testing requirements, and TPDES industrial permit application sampling requirements.<sup>35</sup> The ED does not have a minimum analytical level for total boron, so it should be listed as not applicable.

### 3. (c)

If the Commission decides to include an aluminum monitoring requirement in the proposed permit, it should only apply to the active mining outfalls (Outfalls 001M, 003M, 004M, 006M-008M, 014M-020M, and 022M), as those are the only outfalls that will be discharging groundwater, i.e., mine seepage.<sup>36</sup> The ED recommends that the monitoring requirement apply to total aluminum because it is the ED's standard practice to list elemental limits as total, not dissolved. It is also in line with the other elemental limits in the permit, Other Requirement No. 10 testing requirements, and TPDES industrial permit application sampling requirements.<sup>37</sup> To obtain the most thorough results, total aluminum should be monitored for all three types of discharge limits (daily average, daily maximum, and single grab). The ED also recommends a measurement frequency of once per month and a sample type of grab. These are the same measurement frequency and sample type for the pollutant that currently has water quality-based effluent limits in the proposed permit.<sup>38</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* att. KLD-8, at 33-34, 38, 56, 59; Ex. DRCP-102, at 33, 38.

<sup>34</sup> Ex. ED-1 att. KLD-8, at 33-35, 37-38 (total suspended solids, total iron, total manganese, settleable solids, and oil and grease).

<sup>35</sup> *Id.* att. KLD-8, at 33-34, 38, 56, 59; Ex. DRCP-102, at 33, 38.

<sup>36</sup> Ex. ED-1 att. KLD-8, at 33-34, 38.

<sup>37</sup> *Id.* att. KLD-8, at 33-34, 38, 56, 59; Ex. DRCP-102, at 33, 38.

<sup>38</sup> Ex. ED-1 att. KLD-8, at 33 (total selenium).

4. (d)

If the Commission decides to require four sampling events in Other Requirement No. 10, the ED recommends the language below for that requirement. It is a marriage between the language the ED typically uses when it requires four sampling events and the language proposed in the order:

Wastewater discharged via Outfalls 001M/R, 003M/R, 004M/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 discharge 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, 003M/R, 004M/R, 006M/R-008M/R, 014M/R-020M/R, 021, and 022M must be completed within 60 days of each sampling event. Results of the analytical testing must be submitted within 90 days of the final sampling event for each outfall 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 in Table 1. Wastewater must be sampled and analyzed for those parameters listed in Table 1 for a minimum of four sampling events that each occur at least one week apart.
- Table 2: Analysis is required for those pollutants in Table 2 that are used at the facility that could in any way contribute to contamination in the discharges from Outfalls 001M/R, 003M/R, 004M/R, 006M/R-008M/R, 014M/R-020M/R, and 022M. Sampling and analysis must be conducted for a minimum of four sampling events that each occur at least one week apart.
- Table 3: For all pollutants listed in Table 3, 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 that each occur at least one week apart.

The permittee shall report the flow at Outfalls 001M/R, 003M/R, 004M/R, 006M/R-008M/R, 014M/R-020M/R, 021, and 022M in 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.

#### **W. Ordering Provision Nos. 2 and 4**

The ED believes one of these can be deleted, as they appear to essentially say the same thing.

### **III. CONCLUSION**

While the ED appreciates and fully supports the ALJs' recommendation to grant Dos Republicas' application and issue the ED's proposed permit, the ED has concerns



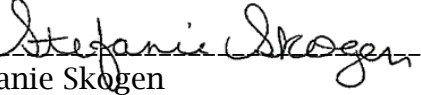
regarding some of the provisions in the proposed order. Therefore, the ED respectfully requests that the Commission adopt the ALJs' proposed order with the ED's recommended changes presented herein and issue the proposed permit.

Respectfully submitted,

TEXAS COMMISSION ON ENVIRONMENTAL  
QUALITY

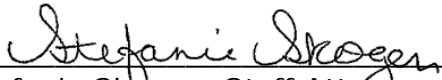
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**CERTIFICATE OF SERVICE**

I certify that on April 25, 2016, a copy of the enclosed document was sent by electronic mail or first class mail to the persons on the attached mailing list.

  
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**SOAH Docket No. 582-15-2214**  
**TCEQ Docket No. 2015-0068-IWD**

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