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Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 19, 2022

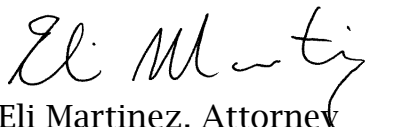
Laurie Gharis, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: **Dos Republicas Coal Partnership (Applicant)**
TCEQ Docket No. 2022-0978-IWD

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request for Reconsideration and Requests for Hearing in the above-entitled matter.

Sincerely,


Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2022-0978-IWD

APPLICATION BY DOS § BEFORE THE
REPUBLICAS COAL PARTNERSHIP §
FOR RENEWAL OF INDUSTRIAL § TEXAS COMMISSION ON
WASTEWATER DISCHARGE TPDES §
PERMIT NO. WQ0003511000 § ENVIRONMENTAL QUALITY

**OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE
TO REQUEST FOR RECONSIDERATION AND REQUESTS FOR HEARING**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this Response to Request for Reconsideration and Requests for Hearing in the above-referenced matter.

I. Introduction

A. Summary of Position

OPIC recommends the Commission deny the pending request for reconsideration and hearing requests of the Maverick County Environmental and Public Health Association (MCEPHA), Gabriel De La Cerda, Dulce Esqueda, Mike Hernandez, and Walter Herring because no sufficient basis for reconsideration was articulated, and no right to a hearing exists for the pending permit.

B. Background of Facility

Dos Republicas Coal Partnership (Applicant or DRCP) has applied to TCEQ for a renewal of its existing TPDES permit No. WQ0003511000. The draft permit authorizes the discharge of stormwater and mine seepage from the active mining areas on an intermittent and flow-variable basis via Outfalls 001M, 003M, 004M, 006M-008M, and 015M-020M; stormwater from the post-mining areas on an intermittent and flow-variable basis via Outfalls 001R, 003R, 004R, 006R-008R, and 015R-020R; stormwater

runoff from fueling areas, fuel storage areas, vehicle and equipment maintenance areas, truck washing stations, and coal handling and storage areas on an intermittent and flow-variable basis via Outfall 021; and mine pit water from the active mining areas and stormwater from inside the rail loop on an intermittent and flow-variable basis via Outfall 022M. Mining activities at the facility, Eagle Pass Mine, have ceased, and the mine is currently undergoing the reclamation process.

The facility site is located at 607 County Road 305, northeast of the City of Eagle Pass, in Maverick County, 77852. The treated effluent is discharged via Outfalls 001M/R, 004M/R, 007M/R, 008M/R, 017M/R, 018M/R, 021, and 022M to unnamed tributaries, then to Elm Creek, then to Rio Grande below Amistad Reservoir; via Outfalls 003M/R, 006M/R, and 019M/R to unnamed ditches, then to Elm Creek, then to Rio Grande below Amistad Reservoir; via Outfall 015M/R to an unnamed ditch, then to an unnamed tributary, then to Hediondo Creek, then to Elm Creek, then to Rio Grande below Amistad Reservoir; and via Outfalls 016M/R and 020M/R to Elm Creek, then to Rio Grande below Amistad Reservoir in Segment No. 2304 of the Rio Grande Basin.

The unclassified receiving water uses are minimal aquatic life use for the unnamed tributaries and ditches (Outfalls 001M/R, 003M/R, 004M/R, 006M/R, 008M/R, 014M/R, 015M/R, 017M/R, 018M/R, 019M/R, 21, and 022M); limited aquatic life use for Hediondo Creek and the unnamed tributaries (Outfalls 007M/R and 015M/R);³ and high aquatic life use for Elm Creek. The designated uses for Segment No. 2304 are high aquatic life use, public water supply, and primary contact recreation.

C. Procedural Background

The TCEQ received the application on February 24, 2020, and declared it administratively complete on November 24, 2020. The Notice of Receipt of Application and Intent to Obtain Water Quality Permit (NORI) was published in English and Spanish on December 10, 2020, in *The News Gram* and in English on December 12, 2020, in the *Eagle Pass Business Journal*. The ED completed the technical review of the application on June 3, 2021, and prepared a draft permit. The Notice of Application and Preliminary Decision for TPDES Permit for Industrial Wastewater (NAPD) was published in English and Spanish on June 16, 2021, in *The News Gram* and in English on June 19, 2021, in the *Eagle Pass Business Journal*. The public comment period ended on July 19, 2021. The Executive Director's Response to Comments (RTC) was mailed May 16, 2022. The deadline to submit contested case hearing requests and requests for reconsideration was June 15, 2022.

TCEQ received timely comments, a request for reconsideration, and requests for hearing from MCEPHA, Gabriel De La Cerda, Dulce Esqueda, Mike Hernandez, and Walter Herring. For the reasons stated herein, OPIC respectfully recommends denying the request for reconsideration and all hearing requests.

II. Request for Reconsideration

A. Applicable Law

Any person may file a request for reconsideration of the ED's decision under Title 30, Texas Administrative Code ("TAC") § 55.201(e). The request must be in writing and filed with the Chief Clerk no later than 30 days after the Chief Clerk mails the ED's

decision and RTC. The request must expressly state that the person is requesting reconsideration of the decision and give reasons why the decision should be reconsidered.

B. Discussion

The Commission received a timely-filed request for reconsideration submitted by MCEPH, Gabriel De La Cerda, Dulce Esqueda, Mike Hernandez, and Walter Herring. The concerns raised in this request include whether TPDES Permit No. WQ000351100 should be renewed while it is the subject of pending litigation, whether the draft permit is consistent with DRCP's Railroad Commission of Texas permit, whether SP-3 and Sp-3 South are in violation of existing TPDES Permit provisions, whether SP-2 conforms with TPDES permit requirements, whether DRCP's compliance history warrants denial of the renewal application, and whether the Commission's antidegradation review was adequately performed.

The issue of whether TPDES Permit No. WQ000351100 should be renewed while it is the subject of pending litigation is based on the appeal of the issuance of DRCP's TPDES permit renewal in 2016 to state district court in Travis County. This case subsequently moved from the Third Court of Appeals to the Texas Supreme Court, where it is now pending. Because DRCP's existing permit was remanded to TCEQ by the Third Court of Appeals, requestors argue renewal of its permit would allow DRCP to circumvent the legal process by granting the current renewal while its predecessor remains in litigation before the highest court in the State. Further, they argue that an agency may not act on a matter that is currently under the court's jurisdiction, the application shields the existing permit from expiration, and there is no need for renewal at this time due to the continued effect—for the time being—of the 2016 permit renewal.

Under Texas Rule of Appellate Procedure 25.1, filing a notice of appeal suspends the appealed judgment where the appellant is entitled to supersede the judgment without security by filing a notice of appeal—a concept known as *supersedeas*. TCEQ’s appeal of the decision from the Third Court of Appeals suspended the court’s judgment and left DRCP’s existing permit valid and enforceable for now. That permit is subject to the permit renewal requirements of 30 TAC § 305.65. The 2016 permit expired on September 1, 2020, and the renewal application was filed February 24, 2020. Because renewal applications must be submitted at least 180 days before the expiration date of the effective permit, OPIC cannot recommend the permit be reconsidered on this basis.

As to the issue of whether the draft permit is consistent with DRCP’s Railroad Commission of Texas permit because that permit is now a reclamation-only permit and many of the outfalls in the draft permit will never be constructed, OPIC notes the ED’s response to comments indicating that reclamation activities have not started in all areas of the mine and some ponds and their associated outfalls are still in the active mining phase even though mining activities no longer occur at the mine. Outfalls will therefore remain in the discharge permit until reclamation activities at the mine in relation to those outfalls are complete. OPIC therefore does not find this issue to be a sufficient basis for recommending reconsideration of the permit.

As to the issue of whether SP-3 and Sp-3 South are in violation of existing TPDES permit provisions because they are not located where DRCP’s existing permit and application indicate they are located, OPIC notes that Other Requirement No. 4.c in DRCP’s existing permit allows DRCP to relocate ponds or change one pond to a series of ponds as long as the outfall remains the same. According to its filing dated August 24,

2021, DRCP did have to redesign Pond SP-3 to meet its operational needs, which resulted in the construction of two ponds, SP-3 and SP-3 South. Outfall 008M discharges from Pond SP-3 to Pond SP-3 South, which then discharges to water in the state through Outfall 008R.

On September 14, 2021, DRCP provided additional updated pond and outfall information, which has been incorporated into Other Requirement No. 4 of the draft permit. As indicated in the ED's Response to Comments, Outfall 008R remains in essentially the same location designated for Outfall 008M/R in the existing permit. Because the location of the outfall that discharges to water in the state remained unchanged, the reconfiguration of the ponds complies with Other Requirement No. 4.c. OPIC therefore does not find this issue to be a sufficient basis for recommending reconsideration of the permit.

As to the issue of whether SP-2 conforms with TPDES permit requirements due to observations by the requestors of effluent discharging from Pond SP-2 through the inlet to the pond rather than through the outfall, OPIC notes that draft permit requirements on pages 2 and 2b of the permit authorize discharge effluent from Pond SP-2 only through Outfall 003M/R. Any discharge from the pond other than through the outfall would violate Permit Condition No. 2.g of the draft permit and is not authorized. OPIC therefore does not find this issue to be a sufficient basis for recommending reconsideration of the permit.

The issue of insufficiency of the antidegradation review is based upon the assertion that the review performed for the 2016 TPDES Permit mischaracterized aquatic life uses in several of the receiving water bodies. Requestors argue that the TPDES permit should not be renewed until these deficiencies are corrected. While OPIC is sensitive to this

concern, without further evidence we cannot find that this assertion alone is a sufficient basis for recommending reconsideration of the permit.

Finally, as to the issue of whether DRCP's compliance history should preclude granting of the permit, OPIC notes that the compliance history for Eagle Pass Mine generated a rating of 0.0 and a classification of High, while DRCP's compliance history generated a rating of 1.2 and a classification of Satisfactory. OPIC therefore does not find this issue to be a sufficient basis for recommending reconsideration of the permit.

For the foregoing reasons, OPIC recommends denial of the pending request for reconsideration.

III. Requests for Hearing

A. Right to a Contested Case Hearing

Texas Water Code §26.028(d) and 30 TAC §55.201(h)(i)(5) provide that no right to a hearing exists for certain water quality discharge applications to renew or amend a permit if:

- (A) the applicant is not applying to:
 - (i) increase significantly the quantity of waste authorized to be discharged; or
 - (ii) change materially the pattern or place of discharge;
- (B) the activity to be authorized by the renewal or amended permit will maintain or improve the quality of waste authorized to be discharged;
- (C) any required opportunity for public meeting has been given;
- (D) consultation and response to all timely received and significant public comment has been given; and

(E) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of the permit.

Under the current application, Applicant would not increase the quantity of waste to be discharged from its existing permit and effluent limitations and monitoring requirements would remain the same as the existing permit requirements. As stated above, DRCP's compliance history generated a rating of 1.2 and a classification of Satisfactory. OPIC therefore finds that no right to a hearing exists on the proposed renewal.

B. Public Interest Hearing

The Commission has plenary authority to call and hold hearings for reasons related to the public interest or other reasons necessary and convenient to its express or implied statutory duties and powers. Tex. Water Code §§5.101, 5.102, & 5.556(f). Requestors invoke the Commission to exercise this authority due to opposition from public officials and the general public over DRCP's operations, and inferentially, from the other issues raised in their comments, request for reconsideration, and requests for hearing. Due to the reasons discussed above, OPIC does not find that a sufficient basis for a public interest hearing under Tex. Water Code § 5.556(f) has been articulated by virtue of these concerns.

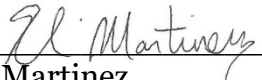
IV. Conclusion

OPIC recommends the Commission deny the pending request for reconsideration and hearing requests of MCEPHA, Gabriel De La Cerda, Dulce Esqueda, Mike

Hernandez, and Walter Herring because no sufficient basis for reconsideration was articulated, and no right to a hearing exists for the pending permit.

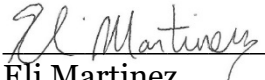
Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2022, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.


Eli Martinez

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TCEQ DOCKET NO. 2022-0978-IWD

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See attached list.

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