

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Toby Baker, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 16, 2022

TO: All interested persons.

RE: Dos Republicas Coal Partnership
TPDES Permit No. WQ0003511000

The executive director has made a decision that the above-referenced permit application meets the requirements of applicable law. **This decision does not authorize construction or operation of any proposed facilities.** This decision will be considered by the commissioners at a regularly scheduled public meeting before any action is taken on this application unless all requests for contested case hearing or reconsideration have been withdrawn before that meeting.

Enclosed with this letter are instructions to view the Executive Director's Response to Comments (RTC) on the Internet. Individuals who would prefer a mailed copy of the RTC or are having trouble accessing the RTC on the website, should contact the Office of the Chief Clerk, by phone at (512) 239-3300 or by email at chiefclk@tceq.texas.gov. A complete copy of the RTC (including the mailing list), complete application, draft permit and related documents, including public comments, are available for review at the TCEQ Central Office. Additionally, a copy of the complete application, the draft permit, and executive director's preliminary decision are available for viewing and copying at the Maverick County Courthouse, 500 Quarry Street, Suite 2, Eagle Pass, Texas.

If you disagree with the executive director's decision, and you believe you are an "affected person" as defined below, you may request a contested case hearing. In addition, anyone may request reconsideration of the executive director's decision. The procedures for the Commission's evaluation of hearing requests/requests for reconsideration are located in 30 Texas Administrative Code Chapter 55, Subchapter F. A brief description of the procedures for these two types of requests follows.

How to Request a Contested Case Hearing.

It is important that your request include all the information that supports your right to a contested case hearing. You must demonstrate that you meet the applicable legal requirements to have your hearing request granted. The Commission's consideration of your request will be based on the information you provide.

The request must include the following:

- (1) Your name, address, daytime telephone number, and, if possible, a fax number.
- (2) If the request is made by a group or association, the request must identify:
 - (A) one person by name, address, daytime telephone number, and, if possible, the fax number, of the person who will be responsible for receiving all communications and documents for the group;
 - (B) the comments on the application submitted by the group that are the basis of the hearing request; and
 - (C) by name and physical address one or more members of the group that would otherwise have standing to request a hearing in their own right. The interests the group seeks to protect must relate to the organization's purpose. Neither the claim asserted nor the relief requested must require the participation of the individual members in the case.
- (3) The name of the applicant, the permit number and other numbers listed above so that your request may be processed properly.
- (4) A statement clearly expressing that you are requesting a contested case hearing. For example, the following statement would be sufficient: "I request a contested case hearing."

Your request must demonstrate that you are an "**affected person.**" An affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. Your request must describe how and why you would be adversely affected by the proposed facility or activity in a manner not common to the general public. For example, to the extent your request is based on these concerns, you should describe the likely impact on your health, safety, or uses of your property which may be adversely affected by the proposed facility or activities. To demonstrate that you have a personal justiciable interest, you must state, as specifically as you are able, your location and the distance between your location and the proposed facility or activities. A person who may be affected by emissions of air contaminants from the facility is entitled to request a contested case hearing.

Your request must raise disputed issues of fact that are relevant and material to the Commission's decision on this application that were raised **by you** during the public comment period. The request cannot be based solely on issues raised in comments that you have withdrawn.

To facilitate the Commission's determination of the number and scope of issues to be referred to hearing, you should: 1) specify any of the executive director's responses to **your** comments that you dispute; 2) the factual basis of the dispute; and 3) list any disputed issues of law.

How to Request Reconsideration of the Executive Director's Decision.

Unlike a request for a contested case hearing, anyone may request reconsideration of the executive director's decision. A request for reconsideration should contain your name, address, daytime phone number, and, if possible, your fax number. The request must state that you are requesting reconsideration of the executive director's decision, and must explain why you believe the decision should be reconsidered.

Deadline for Submitting Requests.

A request for a contested case hearing or reconsideration of the executive director's decision must be **received by** the Chief Clerk's office no later than **30 calendar days** after the date of this letter. You may submit your request electronically at www.tceq.texas.gov/agency/decisions/cc/comments.html or by mail to the following address:

Laurie Gharis, Chief Clerk
TCEQ, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

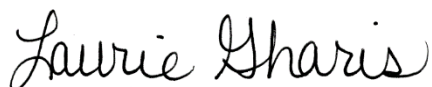
Processing of Requests.

Timely requests for a contested case hearing or for reconsideration of the executive director's decision will be referred to the TCEQ's Alternative Dispute Resolution Program and set on the agenda of one of the Commission's regularly scheduled meetings. Additional instructions explaining these procedures will be sent to the attached mailing list when this meeting has been scheduled.

How to Obtain Additional Information.

If you have any questions or need additional information about the procedures described in this letter, please call the Public Participation and Education Program, toll free, at 1-800-687-4040.

Sincerely,



Laurie Gharis
Chief Clerk

LG/mo

Enclosure

EXECUTIVE DIRECTOR'S RESPONSE TO COMMENTS
for
Dos Republicas Coal Partnership
TPDES Permit No. WQ0003511000

The Executive Director has made the Response to Comments (RTC) for the application by the Dos Republicas Coal Partnership for TPDES Permit No. WQ0003511000 available for viewing on the Internet. You may view and print the document by visiting the TCEQ Commissioners' Integrated Database at the following link:

<https://www.tceq.texas.gov/goto/cid>

In order to view the RTC at the link above, enter the TCEQ ID Number for this application (WQ0003511000) and click the "Search" button. The search results will display a link to the RTC. When viewing the RTC, it will be an attachment to the cover letter and may need to be downloaded depending on the browser.

Individuals who would prefer a mailed copy of the RTC or are having trouble accessing the RTC on the website, should contact the Office of the Chief Clerk, by phone at (512) 239-3300 or by email at chiefclk@tceq.texas.gov.

Additional Information

For more information on the public participation process, you may contact the Office of the Public Interest Counsel at (512) 239-6363 or call the Public Education Program, toll free, at (800) 687-4040.

You may also view a copy of the Executive Director's Response to Comments, the complete application, the draft permit, and related documents, including comments, at the TCEQ Central Office in Austin, Texas. Additionally, a copy of the complete application, the draft permit, and executive director's preliminary decision are available for viewing and copying at the Maverick County Courthouse, 500 Quarry Street, Suite 2, Eagle Pass, Texas.

MAILING LIST
for
Dos Republicas Coal Partnership
TPDES Permit No. WQ0003511000

FOR THE APPLICANT:

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INTERESTED PERSONS:

See attached list.

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DE HOYOS , JULIA
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EAGLE PASS TX 78852-3760

DE LA CERDA , GABRIEL & LETICIA
307 COUNTY ROAD 307
EAGLE PASS TX 78852-4994

DE LA CERDA , GABRIEL
307 COUNTY ROAD 307
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ESPINOZA , SANTIAGO
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GARZA , JESSICA A
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TPDES Permit No. WQ0003511000

Application from Dos Republicas § Before the Texas Commission
Coal Partnership to renew Texas §
Pollutant Discharge Elimination §
System Permit No. WQ0003511000 § on Environmental Quality

Executive Director’s Response to Public Comment

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) files this Response to Public Comment on Dos Republicas Coal Partnership’s (DRCP’s) application to renew Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0003511000 and the ED’s preliminary decision. As required by title 30, section 55.156 of the Texas Administrative Code (30 Tex. Admin. Code § 55.156), before a permit is issued, the ED prepares a response to all timely, relevant, and material, or significant comments. The Office of the Chief Clerk received timely comments from Gabriel De La Cerda, Dulce Esqueda, Mike Hernandez, Walter Herring, Maverick County, and Maverick County Environmental and Public Health Association (MCEPHA). This response addresses all such timely public comments received, whether or not withdrawn. For more information about this permit application or the wastewater permitting process, please call the TCEQ Public Education Program at 1-800-687-4040. General information about TCEQ can be found on TCEQ’s website at <http://www.tceq.texas.gov>.

I. Background

(A) Facility Description

DRCP has applied to TCEQ for a renewal of its existing TPDES permit. 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.

Effluent limits in the draft permit, based on a thirty-day average except as noted, are as follows:

Outfall	Total Suspended Solids	Total Iron	Total Manganese	Total Selenium	Settleable Solids	Oil and Grease
001M, 003M, 004M, & 006M-008M	35 mg/L ¹	3 mg/L	1 mg/L	0.036 mg/L (daily max)	N/A	N/A
015M-020M, 022M	35 mg/L	3 mg/L	1 mg/L	N/A	N/A	N/A
001R, 003R, 004R, 006R-008R, & 015R-020R	N/A	N/A	N/A	N/A	0.5 mL/L ² (daily max)	N/A
021	50 mg/L (daily max)	N/A	N/A	N/A	N/A	15 mg/L

For all outfalls, the pH must be in the range of 6.0 to 9.0 standard units.

The facility site is located at 607 County Road 305, northeast of the City of Eagle Pass, in Maverick County, Texas 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, thence to Elm Creek, thence to Rio Grande Below Amistad Reservoir; via Outfalls 003M/R, 006M/R, and 019M/R to unnamed ditches, thence to Elm Creek, thence to Rio Grande Below Amistad Reservoir; via Outfall 015M/R to an unnamed ditch, thence to an unnamed tributary, thence to Hediondo Creek, thence to Elm Creek, thence to Rio Grande Below Amistad Reservoir; and via Outfalls 016M/R and 020M/R to Elm Creek, thence 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.

(B) Procedural Background

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 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*. ED staff completed the technical review of the application on May 3, 2021 and prepared a draft permit. The Notice of Application and Preliminary Decision for TPDES Permit for Industrial Wastewater 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. This application was administratively complete on or after September 1, 2015. Therefore, it

¹ mg/L = milligrams per liter.

² mL/L = milliliters per liter.

³ Please note that for the discharge route for Outfall 015M/R, the unnamed ditch has minimal aquatic life use, and the unnamed tributary has limited aquatic life use.

is subject to the procedural requirements adopted pursuant to House Bill 801, 76th Legislature, 1999, and Senate Bill 709, 84th Legislature, 2015.

(C) Access to Rules, Statutes, and Records

- Secretary of State website for all Texas administrative rules: <http://www.sos.state.tx.us/texreg/index.shtml>
- TCEQ rules in title 30 of the Texas Administrative Code: <http://www.sos.state.tx.us/tac/index.shtml> (select “View the current *Texas Administrative Code*,” then “Title 30 Environmental Quality”)
- Texas statutes: <http://www.statutes.capitol.texas.gov/>
- TCEQ website: <http://www.tceq.texas.gov>
- Federal rules in title 40 of the Code of Federal Regulations: <http://www.ecfr.gov>
- Federal environmental laws: <http://www2.epa.gov/laws-regulations>

TCEQ records for this application are available for viewing and copying at TCEQ’s main office in Austin, 12100 Park 35 Circle, Building F, First Floor (Office of the Chief Clerk), until TCEQ takes final action on the application. Some documents located at the Office of the Chief Clerk may also be located in the Commissioners’ Integrated Database at <https://www14.tceq.texas.gov/epic/eCID/>. The application, draft permit, and Fact Sheet and ED’s Preliminary Decision are also available for viewing and copying at the Maverick County Courthouse, 500 Quarry Street, Eagle Pass, Texas.

If you would like to file a complaint about the facility concerning its compliance with provisions of its permit or TCEQ rules, you may call the TCEQ Environmental Complaints Hot Line at 1-888-777-3186 or the TCEQ Region 16 Office directly at 1-956-791-6611. Citizen complaints may also be filed by sending an email to complaint@tceq.texas.gov or online at the TCEQ website (select “Reporting,” then “Make an Environmental Complaint”). If the facility is found to be out of compliance, it may be subject to an enforcement action.

II. Comments and Responses

Comment 1

Gabriel De La Cerda, Dulce Esqueda, Mike Hernandez, Walter Herring, and MCEPHA commented that because DRCP’s existing permit was remanded to TCEQ by the Third Court of Appeals and is still pending before the Texas Supreme Court, TCEQ should not allow DRCP to circumvent the legal process by renewing its permit. Maverick County commented 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 the permit issued in 2011 is the one that maintains the status quo following TCEQ’s appeal to the Texas Supreme Court.

Response 1

Under Texas Rule of Appellate Procedure 25.1, filing a notice of appeal does not suspend the appealed judgment unless the judgment has been superseded under Rule 24, i.e., a bond has been paid, or “the appellant is entitled to supersede the judgment without security by filing a notice of appeal.” State agencies fall under the latter

category because they have been exempted from paying a bond by state statute.⁴ In other words, when a state agency files a notice of appeal, the lower court's judgment is automatically suspended. This concept, known as supersedeas, is well established in Texas case law.⁵ Here, because TCEQ appealed the decision from the Third Court of Appeals, that court's judgment was suspended, leaving DRCP's existing permit valid and enforceable for now, as well as subject to the permit renewal requirements of 30 Tex. Admin. Code § 305.65. TCEQ is carrying out those requirements by processing DRCP's renewal application.

The matter currently before the courts is DRCP's 2013 application, whereas the matter currently before TCEQ is DRCP's 2020 application. By issuing the draft permit, TCEQ would not be modifying its findings or decision issued in response to the 2013 application, as would be prohibited by section 2001.1775 of the Texas Government Code. Rather, it would be issuing a permit in response to the 2020 application. In other words, these are two separate matters, and the 2020 application is not currently before any Texas court. With regard to the status quo issue, the ED reviewed the *Universal Health Services, Inc.* and *Transport Co.* cases cited by Maverick County, and the issue in those cases was maintaining the status quo because a temporary injunction had been issued, which is not the same as the suspension of a lower court's opinion because an appeal has been filed with a higher court. If Maverick County were correct, DRCP would have been violating its permit since the district court issued its order in 2017. As discussed above, one of the effects of filing an appeal was the suspension, or stay, of the Third Court of Appeals' remand, meaning TCEQ's order and the existing permit remain in force for now.

The ED notes that DRCP will have to continue meeting the same requirements it is meeting now even if the draft permit is issued, as the application is for a renewal. The ED also notes that the Texas Supreme Court ruled in the 2013 application case on February 11, 2022, upholding TCEQ's finding that DRCP is the facility's owner and operator and remanding the remaining water quality-related issues to the Third Court of Appeals.⁶

Comment 2

Gabriel De La Cerda, Dulce Esqueda, Mike Hernandez, Walter Herring, and MCEPHA commented that the draft permit is inconsistent with DRCP's Railroad Commission of Texas permit because that permit is now a reclamation-only permit, meaning many of the outfalls in the draft permit will never be constructed. Maverick County commented that, because of changes at the mine, there should only be seven outfalls in the draft permit.

⁴ TEX. CIV. PRAC. & REM. CODE § 6.001(a), (b)(2), <https://statutes.capitol.texas.gov/Docs/CP/htm/CP.6.htm#6.001> (2021); TEX. GOV'T CODE § 22.004(i), <https://statutes.capitol.texas.gov/Docs/GV/htm/GV.22.htm#22.004> (2021).

⁵ *E.g.*, *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 485 (Tex. 1964) (“[T]he State’s notice of appeal operates as a supersedeas.”); *In re Long*, 984 S.W.2d 623, 625 (Tex. 1999) (district clerk’s appeal automatically superseded the trial court’s judgment); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 754 (Tex. 2005) (district court’s injunction was stayed when state parties appealed).

⁶ *TCEQ v. Maverick County*, 642 S.W.3d 537, 547–48, 551 (Tex. 2022).

Response 2

Because reclamation activities have not started in all areas of the mine, some ponds and their associated outfalls are still in the active mining phase even though mining activities no longer occur at the mine. Furthermore, TCEQ does not handle the listing of ponds and outfalls in its discharge permits the same way the Railroad Commission does in its mining permits. All outfalls will remain in the discharge permit until reclamation activities at the mine in relation to those outfalls are complete. For example, Outfall 014M/R has been removed from the draft permit because reclamation activities associated with that outfall are complete. The Railroad Commission has also asked TCEQ to continue requiring monitoring activities until the mine's bond release is complete.

On August 24, 2021, DRCP submitted updated information to TCEQ regarding which ponds have been moved to the post-mining, i.e., reclamation, phase. Those ponds are the ones associated with Outfalls 004, 008, and 015. Other Requirement No. 4 in the draft permit has been updated to reflect the outfalls' operational phases. However, because of the TCEQ practice discussed above, both the active- and post-mining phases of the outfalls will remain in the draft permit until DRCP completes the reclamation activities.

Comment 3

Gabriel De La Cerda, Dulce Esqueda, Mike Hernandez, Walter Herring, and MCEPHA commented that Ponds SP-3 and SP-3 South are not located where DRCP's existing permit and application say they are located, meaning DRCP is violating Other Requirement No. 4.c of its permit, and it submitted an inaccurate application.

Response 3

Under Other Requirement No. 4.c in DRCP's existing permit, DRCP can 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. Based on that information, Outfall 008R is 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.

Comment 4

Gabriel De La Cerda, Dulce Esqueda, Mike Hernandez, Walter Herring, and MCEPHA commented that effluent has discharged from Pond SP-2 through the inlet to the pond rather than through the outfall because the outfall is at a higher elevation than the inlet, resulting in effluent discharging onto the ground out the other end of the ditch that leads to the pond; this issue needs to be resolved before the permit is renewed.

Response 4

Under the draft permit, DRCP will only be authorized to discharge effluent from Pond SP-2 through Outfall 003M/R. Those discharges are regulated in part by the requirements on pages 2 and 2b of the permit. Any discharge from the pond other than through the outfall in compliance with those effluent requirements would violate Permit Condition No. 2.g and require DRCP to report the violation to TCEQ within twenty-four hours under Monitoring and Reporting Requirement No. 7 if the unauthorized discharge threatens human health or the environment. Other types of violations must be reported as promptly as possible.

If someone observes any unauthorized discharge or other permit violation related to Pond SP-2, or any other part of the mine, the violation can be reported to the TCEQ Region 16 Office using the contact information listed in section I(C) above. Region staff will then investigate the reported violation. Citizens may also gather data to show that DRCP is not in compliance with TCEQ rules or its permit. For more information regarding citizen-collected evidence, please visit TCEQ's webpage on the subject at <https://www.tceq.texas.gov/compliance/complaints/protocols>. Furthermore, the draft permit does not limit the ability of an individual to seek legal remedies against the applicant regarding any potential trespass, nuisance, or other cause of action in response to activities that may result in injury to human health or property or interfere with the normal use and enjoyment of property.

Comment 5

Gabriel De La Cerda, Dulce Esqueda, Mike Hernandez, Walter Herring, and MCEPHA questioned whether TCEQ should continue to allow DRCP to hold its TPDES permit when DRCP has been negligent with regard to allowing dust to leave the mine, contaminating local water sources and nearby properties, and failing to maintain its air quality monitors in good working order.

Response 5

The ED recognizes that DRCP had some issues with maintaining satisfactory air quality and air quality monitoring at Eagle Pass Mine in the past. However, those infractions were air pollution violations that were addressed for Eagle Pass Mine, regulated entity number RN102170693, through either notices of violation or the agreed order issued on December 17, 2019 in TCEQ Docket No. 2019-0637-AIR-E. According to TCEQ records, all violations have been resolved.

For this TPDES permit application, ED staff reviewed the compliance history for Eagle Pass Mine, regulated entity number RN101529493, as required by 30 Tex. Admin. Code ch. 60. With a rating of 1.2 and classification of Satisfactory for DRCP and a rating of 0.0 and classification of High for Eagle Pass Mine, the applicant's compliance history does not prevent TCEQ from renewing the TPDES permit.

Comment 6

Gabriel De La Cerda, Dulce Esqueda, Mike Hernandez, Walter Herring, and MCEPHA commented that the antidegradation review was done incorrectly for the last

permit action by mischaracterizing some aquatic life uses and not taking uses and habitat during wet weather conditions into account.

Response 6

ED staff completed an antidegradation review for DRCP's existing permit that was consistent with TCEQ procedures and supported by the information staff reviewed before making their conclusions. This included assigning uses, such as aquatic life use, to the receiving waters. In accordance with TCEQ's *Procedures to Implement the Texas Surface Water Quality Standards*, aquatic life uses were assigned and wastewater discharge impacts were analyzed based on critical hydrological conditions, i.e., low stream flows and high temperatures.⁷ The use assignments were supported by information supplied by DRCP, United States Geological Survey maps, and aerial imagery from geographic information systems. ED staff reviewed the information provided by the other parties during the contested case hearing process and continued to support their analyses following those reviews. The ED also notes that the water quality-related issues in the 2013 application case are currently pending before the Third Court of Appeals.

III. Changes Made to the Draft Permit in Response to Comment

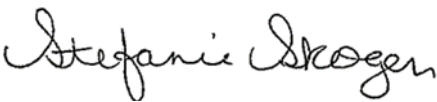
The location information for Ponds SP-3 and SP-3 South and operational phases for Outfalls 004, 008, and 015 were updated in Other Requirement No. 4.

Respectfully submitted,

TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY

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⁷ TCEQ, PROCEDURES TO IMPLEMENT THE TEXAS SURFACE WATER QUALITY STANDARDS 18 (2010).