

TPDES Permit/Coal Mine: Texas Supreme Court Addresses Whether Contractor is an Operator



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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Co-Author: Evan Nelson

The Supreme Court of Texas (“Court”) addressed in a February 11th opinion what constitutes an operator for purposes of a wastewater permit. See *Texas Commission on Environmental Quality v. Maverick County*, 642 S.W.3d 537.

The question was whether a subcontractor with operational responsibilities for a mine is an operator for purposes of a Texas Pollutant Discharge Elimination System (“TPDES”) permit.

The questions considered included:

- Scope of the term “operator”
- Whether there was substantial evidence that coal mine owner Dos República Coal Partnership (“DRCP”) or its contractor was an operator for purposes of the TPDES permitting program

DRCP applied to the Texas Commission on Environmental Quality (“TCEQ”) for renewal of a TPDES wastewater discharge permit for its coal mine in Maverick County, Texas. It had contracted with Camino Real Fuels, LLC (“Camino”) to develop, construct, operate, and perform on-going mine reclamation at the mine along with coal transportation.

TCEQ issued a TPDES permit to DRCP in 2014.

Maverick County, the City of Eagle Pass, the Environmental Defense Fund, and other entities and individuals (collectively, “Permit Contestants”) opposed the TPDES permit. Their arguments in opposition included the contention that DCRP was not the mine’s “operator” in the context of a TPDES permit. Instead, they contended the TPDES permit should have been issued with Camino as the operator.

Two administrative law judges from the Texas State Office of Administrative Hearings addressed the administrative appeal. In addressing the operator question they determined that DRCP was both the owner and operator for purposes of the permit.

The Permit Contestants sued TCEQ in Travis County District Court after it issued a final order, challenging its decision.

The District Court held that DRCP was not the mine’s operator. It found TCEQ’s decision was not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole. Therefore, the District Court determined that the TCEQ decision finding DCRP to be an operator was arbitrary and capricious.

The Court of Appeals affirmed the District Court's conclusion that DRCP was not the "operator" of the mine. It concluded that the permit should not have been granted regardless of its substantive content.

The Court in addressing the operator issue on appeal stated that the term should be defined as the person responsible for the overall operation of a facility, noting it constitutes the:

. . . entity responsible for its personal performance of causing the facility to function.

The Texas Administrative Code was noted to utilize the same definition. Consequently, the Court of Appeals was determined to have applied the wrong definition of "operator":

The Court of Appeals was stated to have used judicial precedent instead of the direct legislative text. In applying this definition, the Court of Appeals erred by excluding from the term "operator" those entities who are responsible for overall operations even though they may not conduct daily operations.

TCEQ was held to be due deference. As a result, the burden was on the Permit Contestants to prove that there was not substantial evidence to support this conclusion.

The Court held there was a reasonable basis for TCEQ to conclude that DRCP was not merely a passive owner who gave responsibility for overall operations to someone else. Instead, it opined that substantial evidence supported TCEQ's conclusion that DRCP was the entity responsible for the overall operation of the facility.

The Court also determined there was substantial evidence that DRCP was the operator of the coal mine.

Facts cited in the record supporting this conclusion included that DCRP:

- Owns the mine and controls its operations
- Is integrally involved in the mine's operations
- Has financial responsibility for mine operations
- Approves budgets before costs are incurred
- Lists expectations
- Is solely responsible for acquisition and maintenance of property and resources
- Is responsible for permit compliance
- Visits mine on a daily basis for oversight

Therefore, DCRP was the correct permit applicant.

A copy of the opinion can be downloaded [here](#).