

**RAILROAD COMMISSION OF TEXAS  
HEARINGS DIVISION**

**SURFACE MINING DOCKET NO. C19-0024-SC-11-F  
APPLICATION BY SAN MIGUEL ELECTRIC COOPERATIVE, INC.  
FOR RELEASE OF PHASE I RECLAMATION OBLIGATIONS FOR 369.6 ACRES  
PERMIT NO. 11G, SAN MIGUEL LIGNITE MINE, ATASCOSA AND MCMULLEN  
COUNTIES, TEXAS**

**ORDER APPROVING  
RELEASE OF PHASE I RECLAMATION OBLIGATIONS  
FOR 369.6 ACRES IN PERMIT NO. 11G**

Statement of the Case

The San Miguel Electric Cooperative, Inc. ("SMECI"), P.O. Box 280, Jourdanton, Texas 78026, applied to the Railroad Commission of Texas ("Commission"), Surface Mining and Reclamation Division ("SMRD" and/or "Staff"), for Release of Phase I Reclamation Obligations for 369.6 acres within Permit No. 11G, San Miguel Lignite Mine, located in Atascosa and McMullen Counties, Texas. The application is made pursuant to the Texas Surface Coal Mining and Reclamation Act, Tex. Nat. Res. Code Ann. Ch. 134 (Vernon Supp. 2020) (Act) and §§12.312-12.313 of the "Coal Mining Regulations," Tex. R.R. Comm'n, 16 Tex. Admin. Code Ch. 12 (Thomson West 2020) (Regulations).

SMECI requests release from Phase I reclamation obligations for backfilling, regrading, and drainage control for 369.6 acres. Permit No. 11G currently authorizes surface and coal mining operations at SMECI's San Miguel Lignite Mine, within its 16,000-acre permit area. No comments or requests for hearing were filed following public notice. The only parties to the proceeding are SMECI and Staff. Based on information provided by SMECI and the inspection of the area, Staff recommends release of Phase I reclamation obligations for the requested 369.6 acres.

SMECI disposed of noncoal wastes in the form of coal ash materials within the area requested for release. SMECI provided satisfactory information to demonstrate that its requirements under §12.375 have been met for reclamation of areas where noncoal waste disposal occurred. Staff does not concur that the ash materials disposed of within the permit area under an approved ash disposal plan contained in the permit constitutes disposal of noncoal wastes subject to the reclamation performance standards at §12.375, a position contrary to the requirements under the approved permit and the historical practice of the Commission.

After consideration of the application and the Findings of Fact and Conclusions of Law, the Commission approves the release of reclamation obligations as recommended by Staff. SMECI does not request adjustment to the approved reclamation bond at this time and no new

Docket No. C19-0024-SC-11-F  
San Miguel Electric Cooperative, Inc.  
Permit No. 11G, San Miguel Lignite Mine

2

bond has been submitted. The parties have filed waivers of preparation and circulation of a proposal for decision. The Commission approves the release as requested and finds that SMECI is eligible to reduce the amount of bond for the permit by 60% of the amount that is attributable to the subject acreage in future bond adjustments.

### **FINDINGS OF FACT**

Based on the evidence in the record, the following Findings of Fact are made:

1. By letter dated July 23, 2019, San Miguel Electric Cooperative, Inc. ("SMECI") filed an application ("Application") with the Railroad Commission of Texas ("Commission"), Surface Mining and Reclamation Division ("SMRD" and/or "Staff") for release of Phase I reclamation obligations for 369.6 acres, within Permit No. 11G, San Miguel Lignite Mine, located in Atascosa and McMullen Counties, Texas. The permit area encompasses approximately 16,000 acres. SMECI conducted mining operations on the proposed 369.6-acre release area from 1990 to 1996.
2. The Application is made pursuant to the Texas Surface Coal Mining and Reclamation Act, Tex. Nat. Res. Code Ann Ch. 134 (Vernon Supp. 2020) (Act), and the "Coal Mining Regulations," Tex. Railroad Comm'n, 16 Tex. Admin. Code Ch. 12 (Thomson West 2020) (Regulations). The Application was properly certified in accordance with §12.312(a)(3). No fee is required for this Application.
3. The currently accepted reclamation performance bond for SMECI's San Miguel Lignite Mine operations under Permit No. 11G in a total amount of \$70,000,000, is in the form of a self-bond with third-party guarantor, accepted by Commission Order dated March 22, 2011 [Docket No. C11-0016-SC-11-E]. Staff's reclamation cost estimate of \$64,750,435 (Revision No. 13) was calculated using the "worst-case pit" reclamation cost calculation method for Areas B and BX, and the area bond calculation method for Areas A and E. The proposed Phase I release area is located in Area E, which used the area bond method. SMECI does not request a reduction in the amount of the approved reclamation bond instrument in this application.
4. The Application was filed with the Hearings Division by letter dated July 23, 2019. Public notice newspaper clippings and a newspaper affidavit for Atascosa County sworn to and subscribed to before a notary public on November 7, 2019 were received by Staff by letter dated November 8, 2019. By letter dated March 12, 2020, the ALJ informed the parties that the record did not show that public notice had been effected in McMullen County. In response, by letter dated March 18, 2020, SMECI filed a newspaper affidavit from the publisher to *The Pleasanton Express*, a newspaper of general circulation and regularly

Docket No. C19-0024-SC-11-F  
 San Miguel Electric Cooperative, Inc.  
 Permit No. 11G, San Miguel Lignite Mine

published in McMullen County dated March 16, 2020 to show that public notice had occurred in McMullen County.

- a. The newspaper affidavits indicate that the Notice of application was published once a week for four consecutive weeks in *The Pleasanton Express*, a newspaper of general circulation in Atascosa and McMullen Counties on September 11, 18 and 25, and October 2, 2019, for the area of the proposed release, as indicated in the affidavits dated November 7, 2019 for Atascosa County, and March 16, 2020, for McMullen County.
  - b. The notice of application contains all information required by the Act and Regulations for notice of an application requesting release. The published notice is adequate notification of the request for release. The notice includes the elements required by §134.129 of the Act and §12.312(a)(2) of the Regulations: the name of the permittee, the precise location of the land affected, the number of acres, permit number at the time of application and date approved, the amount of bond approved, the type and appropriate dates reclamation work was performed, and a description of the results achieved as they relate to the approved reclamation plan. The notice contains information on the applicant, location and boundaries of the permit area, the Application's availability for inspection, and the address to which comments should be sent.
5. Copies of letters sent to landowners and governmental entities were received by Staff by letter dated November 11, 2019. Staff determined the Application to be administratively complete by letter dated November 20, 2019 and transferred the Application to the Hearings Division for completion of processing. By letter dated December 2, 2019, Staff filed its Technical Analysis (TA) and the Field Inspection Report (Inspection Report) dated October 21, 2019, recommending approval of the release application.
  6. Copies of the Application were filed for public review, in compliance with notice requirements, at the main office of the Railroad Commission of Texas at 1701 North Congress, William B. Travis Building, Austin, Texas 78711, and at the office of the Atascosa County Clerk, 115 North Main Street, Suite 206, Henderson, Texas 75653.
  7. SMECI sent notice by letters dated October 1, 2019, to owners of interests in the areas requested for release and adjacent lands, and to local governmental bodies, planning agencies, sewage and water treatment authorities and water companies in the locality, as required by §12.312(a)(2) of the Regulations. SMECI mailed notice to the County Judges/Commissioners' Court of Atascosa and McMullen Counties, the Texas General Land Office, the Natural Resources Conservation Service (Pleasanton, Texas and Tilden, Texas), the U.S. Environmental Protection Agency, the Texas Commission on

Docket No. C19-0024-SC-11-F  
San Miguel Electric Cooperative, Inc.  
Permit No. 11G, San Miguel Lignite Mine

4

Environmental Quality, the Nueces River Authority, Atascosa County Soil and Water Conservation District, McMullen County Soil and Water Conservation District, Evergreen Underground Water Conservation District, McMullen County Water, Atascosa Rural Water Supply, and the U.S. Army Corp of Engineers. The areas requested for release are not located within the territorial boundaries of any municipality that would be notified pursuant to §12.313(c) of the Regulations. Copies of the notification letters were filed with Staff by letter dated November 11, 2019, and with Docket Services on November 20, 2019.

8. No adverse comments or written objections were received regarding the request for release pursuant to the notification. No requests for hearing or informal conference were filed pursuant to §12.313(d).
9. The Staff provided notification of the Application by certified letters dated October 18, 2019, to the County Judges of Atascosa and McMullen Counties. Mailing of notification was provided at least 31 days prior to the date of consideration of the docket by the Commission in accordance with §134.133 of the Act. Pursuant to §12.312(b) of the Regulations, Staff notified owners of interests in lands and lessees of the application for release and the Office of Surface Mining Reclamation and Enforcement, Tulsa Field Office (OSM) by letters dated July 31, 2019, of the date and time of Staff's field inspection scheduled for August 22, 2019. The notification stated that a release had been requested and, pursuant to §12.312(b)(1), advised them of the opportunity to participate in the on-site inspection. Staff provided copies of the letters sent pursuant to §12.312(b) in Appendix II of Attachment III (Inspection Report) of the TA.
10. The inspection occurred on August 22, 2019. Three Commission inspectors and two representatives of SMECI attended the pre-inspection meeting and participated in the inspection of the property. No landowners were present for the pre-inspection meeting or accompanied the inspectors during the inspection of the property. A sign-in sheet of the meeting participants is included in Staff's TA, Appendix III.
11. The 16,000-acre permit area is located 16 miles south of Jourdanton, Texas, and 6 miles south of Christine, Texas, on FM 3387. A general location map of the permit area, with those areas proposed for release distinguished, is provided in the published public notice and in Staff's TA, Appendix I to Attachment III. In response to the ALJ's inquiry letter dated March 12, 2020, Staff provided clarification by letter dated March 20, 2020, that the map in Attachment I of the TA is incorrect, and provided a corrected map included as an attachment to its letter. [Attachment III, Staff's TA].
12. The Application includes ownership and tract information for owners of interests in the areas proposed for release and adjacent lands. There are 12 affected tracts within and 12 tracts adjoining the area requested for Phase I release of reclamation obligations. A

Docket No. C19-0024-SC-11-F  
San Miguel Electric Cooperative, Inc.  
Permit No. 11G, San Miguel Lignite Mine

5

list of the tract owners within and adjoining the subject acreage is found in the Application (Section 2.0, *Landowners Information*).

13. The subject acreage requested for release was mined or otherwise disturbed between 1990 to 1996, and final grading was completed between 1997 and 1998. Staff conducted routine monthly inspections of the proposed release area from 1990 to present.
14. Based upon the Application and Staff's review, Phase I release of reclamation obligations have been met for 369.6 acres in accordance with Phase I requirements for backfilling, regrading, and drainage control as required by §12.313(a)(1) of the Regulations.
  - a. In response to the ALJ's inquiry letter dated March 12, 2020 regarding postmine land use, Staff provided clarification by letter dated March 20, 2020, that postmine land use for the 369.6-acres Phase I release comprises 298.9 acres of pastureland and 70.7 acres of Industrial/Commercial (I/C).
  - b. The soil-testing grids within the 369.6 acres proposed for Phase I release of reclamation obligations have met the soil suitability requirements. All soil grids located within the release area are represented in various initial postmine soil monitoring reports as described in letters dated August 10, 2006, December 12, 2008, and November 16, 2018, wherein the Commission notified SMECI that the data for sampled areas do not indicate the presence of acid-forming or toxic-forming materials in the top four feet of postmine soil. Copies of the approval letters are contained in Staff's TA within Appendix V of Attachment III.
  - c. In response to the ALJ's inquiry letter dated March 12, 2020, Staff provided clarification by letter dated March 20, 2020, on postmine initial soil approvals. In that letter Staff clarifies that:
    - i. For the selective overburden substitute method, the banking system of acreage accounting were used to assess postmine-soil quality (SMECI refers the areas with this method as Areas Banked). Success of postmine quality was based on a comparison of the values of the premine and post-mine parameter frequency distributions. Since bank acreage balance tables (bank accounts) for each parameter analyzed at each depth interval are calculated based on acres reported to date, the latest banking balances for each parameter before the bond release application supersedes any previous findings. In this case, the latest postmine soil report was submitted by letter dated January 14, 2019, supplemented by letter dated February 22, 2019, and approved by letter dated April 24, 2019 (the copy of the approval letter and the grids sampled in this report along with the grids sampled to date are provided in the Attachment I). As indicated in the memorandum dated



San Miguel Electric Cooperative, Inc.  
Permit No. 11G, San Miguel Lignite Mine

7

clarification of a minor drainage, Staff indicated by letter dated April 9, 2020, that it (including Inspector Scott Engelmann) concluded that the drainage in question is merely a feature of the postmine landscape, a shallow channel with gently sloping sides. The feature is fully vegetated even though this is not a requirement for Phase I release of reclamation liability. There are no manmade, erosion-control features in this ephemeral drainage, through which water flows only in direct response to precipitation. It does not rise to the level of a diversion [§12.150] for which engineer-certified detailed design plans are required [§12.341(b)(4)]. In that letter, Staff explained that SMRD considers ephemeral drainages in reclamation area to be permanent miscellaneous flow diversions (MFDs) only in certain circumstances<sup>1</sup>, and that criteria of §12.341 of the Regulations does not apply in this situation. In that letter, Staff indicated that when an ephemeral drainage is considered a permanent MFD, the operator must demonstrate that the MFD is sized to pass the runoff from a 10-year/6-hour precipitation event [§12.341(c)(3)]. The demonstration does not require certification by an engineer.

- e. As indicated by SMECI and Staff, there is one permanent structure located within the proposed Phase I release area, Ditch 5E, which was approved as permanent by Staff by letter dated December 5, 1996.
- f. Disposal of noncoal waste within the subject area is completed and the area surface has been reclaimed as required for Phase I release. [§12.375]. Staff's Inspection Report dated October 21, 2019 indicates no areas within Permit No. 11G are approved for disposal of noncoal waste; however, Permit No. 11 G as approved and issued on October 22, 2013, indicates that the approved permit includes a plan for placement of fly ash, bottom ash, and scrubber sludge for expanded disposal in Areas B and E under Solid Waste Registration No. 31434 issued by the TCEQ and includes ash disposal activities in its reclamation timetable. Altogether, the ALJ issued four letters to the parties requesting clarification, in part, on the issue of noncoal waste disposal, pursuant to §12.375(a)-(d) (ALJ's letters dated March 12, April 3, April 15, and April 28, 2020). Both SMECI and Staff responded to the requests for clarification and provided documentation as requested. By letter dated April 16, 2020, SMECI

---

<sup>1</sup> By letter dated April 9, 2020, SMRD states that it considers ephemeral drainages in reclamation areas to be permanent miscellaneous flow diversions (MFDs) only in certain circumstances:

- 1) when the MFD defines a surface-water control boundary (because if the diversion were undersized, untreated mine-area drainage might leave the permit area without treatment) [§12.341(a)(2)(C)];
- 2) when MFDs must be lined with asphalt, concrete or other similar lining [§12.341(a)(4)(A)];
- 3) when MFDs discharge into a natural stream [§12.341(a)(4)(C)]; and
- 4) when MFDs are purposely constructed to divert ephemeral flows to a location where they would not naturally flow - diverting drainage around the edge of pond toward a concrete inlet, for instance - when failure might cause damage to other approved permanent structures [§12.341(a)(2)(B)].

San Miguel Electric Cooperative, Inc.  
Permit No. 11G, San Miguel Lignite Mine

8

responded, in part, that the notification of ash disposal in Area E was sent to the Commission on January 19, 1993 and included with the notification were various reports, approval letters, and copies of deed recordation (dated December 9, 1991) in both Atascosa and McMullen Counties. By letter dated April 22, 2020, Staff responded that compliance with §12.375 is not required for the coal ash subject to Phase I review, that “coal ash placed in the portions of the 369.6-acre area proposed for Phase I release is not considered a solid waste,” and moreover, “the subject coal ash is not considered a noncoal waste.” In that letter, Staff concludes that it “therefore, did not review SMECI’s placement of the noncoal waste for compliance with [§12.375].” In its subsequent letter dated May 1, 2020, Staff states that “coal ash is not considered a noncoal waste” and cites to §12.375(a) as defining noncoal waste. In that letter Staff indicated that coal ash is not a noncoal waste states, but rather coal ash is a solid waste, and compliance with §12.375 is not required. In that letter, Staff indicated that the Commission does not have jurisdiction over the disposal of solid wastes, other than those wastes specifically identified by rule and Staff reiterated that it did not review SMECI’s placement of the noncoal waste for compliance with §12.375. The ALJ’s inquiry letters, and parties’ responses regarding §12.375, are discussed as follows in Finding of Fact No. 14 (f)(i)-(viii), *infra*:

- i. The ALJ issued an inquiry letter dated March 12, 2020, to the parties. In response to the ALJ’s inquiry letter dated March 12, 2020 regarding the issue of noncoal waste disposal, Staff provided clarification by letter dated March 20, 2020, indicating that there are currently no waste disposal areas in the 369.6-acres proposed for Phase I release, and there are currently 0.57 acres of active ash placement area in Area E which is the total acreage of ash disposal conducted in Permit No. 11G in 2019.
- ii. The ALJ issued a second inquiry letter dated April 3, 2020, to the parties. In response, SMECI provided clarification by letter dated April 7, 2020, indicating that in accordance with its permit, coal ash placement occurred under portions of the 369.6-acre proposed release area from 1994-2002; of the 369.6 acres proposed for release 127.17 acres received ash placement; and, coal ash placement continues within Permit No. 11G in the end pits. By letter dated April 9, 2020, Staff indicated that coal ash was placed in portions of the 369.6-acre proposed for Phase I release from 1996 to 2004. Based on documentation provided by SMECI in its subsequent letter dated April 16, 2020, SMECI’s description of the time frame for disposal activities between 1994 to 2002 is correct.
- iii. The ALJ issued a third inquiry letter dated April 15, 2020, to the parties requesting further clarification on noncoal waste disposal in the proposed release area. In response, SMECI provided clarification and documentation by letter dated April 16,

San Miguel Electric Cooperative, Inc.  
Permit No. 11G, San Miguel Lignite Mine

9

2020, to show compliance in accordance with §12.375(a)-(d) and applicable TCEQ regulations. SMECI provided copies of approval letters from coordinating State agencies, various reports and copies of two deeds, "Industrial Solid Waste Disposal Site Deed Recordation" dated December 9, 1991, for Atascosa and McMullen Counties, which included Exhibit "A" showing wastes disposed of and a description of the waste disposal facility) and Exhibit "B" (which shows wastes to be disposed on the described property). At the time of disposal, these wastes were classified by the Texas Water Commission [now Texas Commission on Environmental Quality] as Class II and III wastes for disposal in three areas of Permit No. 11G: Area 1 (approximately 1,057.5 acres), Area 2 (approximately 137.9 acres), and Area 3 (approximately 2,135.3 acres). Staff filed by letter dated April 22, 2020, statements that, pursuant to the TCEQ Rules definition of "solid waste" at 30 Tex. Admin. Code §335.1(146)(H), it did not consider the ash materials placed within the proposed area of release to be a solid waste or noncoal waste and that it therefore "did not review the application for compliance with 16 Texas Administrative Code §12.375."

- iv. The ALJ issued a fourth inquiry letter dated April 28, 2020, providing Staff the opportunity to submit further clarification on SMECI's submittal of April 16, 2020, given that the coal ash placement occurred prior to 2014. In the April 28, 2020 letter, the ALJ stated that Staff's response dated April 22, 2020, indicates that it "did not review SMECI's placement of the noncoal waste for compliance with [§12.375]" although Staff was given the opportunity to assess SMECI's submittal. In that letter, the ALJ further explained the disagreement with Staff regarding the classification of the ash materials placed within the area proposed for release. The information in the record for this proceeding shows that the materials placed within the subsurface of the proposed release area were classified as a solid waste, and continued to be classified as such at the time of conduct of those activities under the plan contained in and approved by the Commission in the issued permit. Although Staff referenced 30 Tex. Admin. Code §335.1(146)(H) (30 TAC §335.1(146)(H)), which provides, in part, with the exception of contaminated soils which are being relocated for use under 30 TAC §350.36 and other contaminated media, that materials that would otherwise be identified as nonhazardous solid wastes if disposed of are not considered solid wastes when recycled by being applied to the land or used as ingredients in products that are applied to the land, provided these materials can be shown to meet all of the criteria described in 30 TAC §335.1(146)(H)(i)-(viii). Staff did not, however, indicate how SMECI's placement of these materials in the subject release area meets these criteria. Regardless of whether the ash materials currently being placed within the approved permit area have been determined by TCEQ not to be a solid waste, such determination was not made by TCEQ until 2014, well after ash disposal

Docket No. C19-0024-SC-11-F  
San Miguel Electric Cooperative, Inc.  
Permit No. 11G, San Miguel Lignite Mine

10

activities were completed in the areas proposed for Phase I release in this application. In response to the ALJ's April 15, 2020, letter, SMECI replied by letter dated April 16, 2020, providing a detailed cover letter to describe its compliance with §12.375(d). Specifically for purpose of demonstrating that the disposed ash materials were not a hazardous waste subject to additional requirements under the federal Resource Conservation and Recovery Act (RCRA), SMECI indicated that "[a]dditionally, San Miguel submitted characterization data of the Fly Ash, Scrubber Sludge and Bottom Ash to the Texas Commission on Environmental Quality (TCEQ) in 2014, and based on its review of the submitted data, TCEQ concluded that the material met the numerical criteria to be excluded as a solid waste for certain land application activities in accordance with 30 TAC 335.1(138)(H). TCEQ letters dated July 10<sup>th</sup> and 16<sup>th</sup>, 2014 are included as attachments to this letter." SMECI included copies of these two letters from TCEQ, which were applicable to ash material to be placed within the "South Lease" area. The South Lease area was subsequently approved and issued by the Commission as Permit No. 60 on April 24, 2018 [Docket No. C14-0020-SC-00-A]. Of particular relevance is Footnote No. 5 of the TCEQ's July 10, 2014, letter, which states as follows: "The Plan was prepared as part of SMECI's obligation to the Railroad Commission of Texas. We understand that the placement of [coal combustion products (CCP)] back into the South Lease area is regulated under Chapter 134 of the Texas Surface Coal Mining and Reclamation Act. That Act requires that all toxic materials be treated, buried, and compacted or otherwise disposed of, in a manner designed to prevent contamination of the ground or surface water; insuring that the proposed land use does not present any actual or probable threat of water pollution; and ensuring that the surface mining permit and reclamation permit application contains detailed descriptions of the measures to be taken during mining and reclamation to assure the protection of the quality of groundwater and surface water."

- v. Prior to 2014, ash materials were classified as solid-waste materials that were disposed of within the permit area under a deed-recorded TCEQ waste registration, itself incorporated as a part of an operation plan approved by the Commission and made a part of the approved permit, and remains so for all areas conducted in that manner. In addition, no information had been provided in the record to indicate that the approved permit did not contain at the time of disposal or has even subsequently (since the 2014 TCEQ determination) been revised to no longer contain a plan for disposal of ash materials as a noncoal solid waste. Again, in that letter, the ALJ provided Staff the opportunity to indicate if it intended to provide further clarification on whether SMECI's submittal complies with §12.375 by April 30, 2020, and if Staff intended to submit a response with further clarification, that it provide a clarification response no later than May 6, 2020.

Docket No. C19-0024-SC-11-F  
San Miguel Electric Cooperative, Inc.  
Permit No. 11G, San Miguel Lignite Mine

11

- vi. In response to the ALJ's fourth inquiry letter dated April 28, 2020, Staff responded by email dated April 29, 2020, that due to scheduling conflicts and lack of opportunity to meet and discuss any intended clarification, Staff would provide such further clarification as soon as practicably possible, and, most likely, be able to submit its statement of intent no later than April 30, 2020.
- vii. By letter dated April 30, 2020, the ALJ stated that Staff's email response was construed as a request for an extension of time for Staff to indicate if it intends to provide further clarification on whether SMECI's submittal complies with §12.375(a)-(d). The ALJ granted Staff's request for an extension and requested that Staff provide a statement of intent on or before noon May 1, 2020. Consequently, no response was provided by Staff with regard to the ALJ's April 30, 2020 letter as the deadline for a response was extended to May 1, 2020.
- viii. By letter dated May 1, 2020, Staff responded as a follow-up to its April 29, 2020, email response, providing further clarification of its position regarding the treatment of the ash materials placed within the requested release area. Staff's May 1, 2020, response and the ALJ's assessment follow:
  - A. Staff stated that §12.375 defines "noncoal wastes" as "grease, lubricants, paints, flammable liquids, garbage, abandoned mining machinery, lumber, and other combustibles generated during surface mining activities" and indicates that coal ash is not a noncoal waste, it is a solid waste.<sup>2</sup> Staff further indicated that coal ash, also referred to "coal combustion residue" or "CCR", is a residue produced from the combustion of coal.<sup>3</sup> Consistent with historical practice of the Commission in allowing disposal of ash material, the record demonstrates,

---

<sup>2</sup> Section 12.375(a) provides that "noncoal wastes **including, but not limited to**, grease, lubricants, paints, flammable liquids, garbage, abandoned mining machinery, lumber, and other combustibles generated during surface mining activities shall be placed and stored in a controlled manner in a designated portion of the permit area. Placement and storage shall ensure that leachate and surface runoff do not degrade surface or ground water, fires are prevented, and that the area remains stable and suitable for reclamation and revegetation compatible with the natural surroundings." (Emphasis added). The ALJ notes that the phrase "including, but not limited to" indicates that the list of "noncoal wastes" is not exhaustive, nor that it only applies to the waste items listed; rather it means, that those waste items are included, but other waste items not listed could be included as well. This follows the Commission's long-standing practice of honoring a determination that is made by the appropriate agency regarding materials that qualify as "waste" and that such wastes are treated as noncoal wastes for which the requirements at §12.375 are applicable, when those materials are disposed of in the permit area pursuant to the terms of the approved permit.

<sup>3</sup> Staff's cites as reference: "Glossary, Office of Surface Mining Reclamation and Enforcement, U.S. Dept. of the Interior, (April 30, 2020) <https://www.osmre.gov/resources/glossary.shtm#c>. Coal ash is primarily produced from the burning of coal in coal-fired power plants. *Coal Ash Basics*, U.S. Environ. Protection Agency, (April 30, 2020) <https://www.epa.gov/coalash/coal-ash-basics>."

Docket No. C19-0024-SC-11-F  
San Miguel Electric Cooperative, Inc.  
Permit No. 11G, San Miguel Lignite Mine

12

as supported by SMECI's April 16, 2020, submittal in this proceeding, that material disposed of within the reclamation area meets the characteristics of a "noncoal waste", if it is not mine waste produced within the permit area (or is combustible waste material produced by the permitted operation). The Commission has appropriately and historically deferred to the proper jurisdictional agency's determination on whether a material qualifies as "waste" when that material is disposed of in the permit area during the course of operations. The record therefore does not support Staff's assertion that the CCP disposed of in the proposed release area is not a noncoal waste.

- B. Staff indicates that it has reviewed the administrative record of this proceeding, that nothing submitted by Staff shows materials placed within the subsurface of the proposed release area classified as "noncoal solid waste", the Inspection Report, dated October 1, 2019, states that there are "...no areas within Permit No. 11G approved for disposal of non-coal waste." Staff indicates that coal ash is not a noncoal waste as listed in §12.375(a) (grease, lubricant, paint, flammable liquid, garbage, abandoned mining machinery, or lumber).<sup>4</sup> Staff indicates that coal ash is not a combustible generated during surface mining activities", and thus does not meet the regulatory definition. Furthermore, Staff indicates that coal ash is a solid waste, for which the Commission does not have jurisdiction for regulation and that such lies with TCEQ. Staff did not change its earlier position stated in its April 22, 2020, letter, with the exception of now identifying the ash material placed within the proposed area of release as a solid waste. In its understanding that the Commission does not have such jurisdiction, Staff indicated again its position that it "did not review SMECI's placement of noncoal waste for compliance with [16 TAC §12.375]." Staff contends that the Commission does not have jurisdiction over the disposal of solid waste materials. The ALJ concurs with this statement; nevertheless, the Commission **does** have jurisdiction to regulate the effects of such disposal activities to ensure that they meet the permit requirements and the regulatory performance standards of the Commission's regulations. This is the very reason for the regulations at §12.375. This is also the reason that, in the practice of the Commission, permittees historically have always been required to include an ash disposal plan as a part of the permit if such activities are proposed under a TCEQ-issued waste disposal registration, so that it can ensure that the activities are conducted in an environmentally safe manner that, for Phase I release,

---

<sup>4</sup> The phrase in Section 12.375(a) that states "noncoal wastes including, but not limited to" is not necessarily an exhaustive list of waste that can be considered noncoal wastes.

Docket No. C19-0024-SC-11-F  
 San Miguel Electric Cooperative, Inc.  
 Permit No. 11G, San Miguel Lignite Mine

achieves the required approximate original contour with the required covering of suitable material.

- C. In its May 1, 2020, letter, Staff notes that the dates provided by SMECI regarding the coal ash placement are correct. Staff further indicated that the coal ash was placed within the 369.6-acre proposed release area from “1994 to 2004.” SMECI indicated, however, that ash was placed in the requested release area from 1994 to 2002 [See Finding of Fact No. 14(f)(ii), *supra*]. Staff appears to agree with SMECI’s consistent statements that ash placement occurred from 1994 to 2002.
  
- D. Also, in its May 1, 2020 letter, Staff restated its earlier position that it “...did not review SMECI’s placement of the noncoal waste for compliance with 16 Texas Administrative Code § 12.375.” Staff nevertheless indicates that believes it has reviewed SMECI’s application for compliance with all statutes, rules, and regulations applicable to Phase I performance bond release, and has found that SMECI’s application is compliant with all applicable statutory and regulatory provisions. Staff further indicates its belief that it has complied with all statutory mandates in its review of the current application for Phase I bond release. The ALJ concurs with these statements with the exception of Staff’s failure to review the Application in meeting requirements of §12.375.
  
- g. Staff and SMECI agree that the ash material was placed within the proposed release area, and the record demonstrates that the ash material was placed prior to 2014. The record indicates that since even prior to 1992 the Commission has considered all waste materials disposed of within the mine permit area under a deed-recorded TCEQ (or predecessor agency) waste disposal registration to be noncoal waste, has required such activities to be included as a part of the approved operation plan, and that such activities are subject to the performance standard requirements of §12.375.<sup>5</sup> The ALJ

---

<sup>5</sup> In response to the ALJ’s second inquiry letter dated April 3, 2020, by letter dated April 16, 2020 SMECI responded by providing documentation including a letter dated January 19, 1993, with the subject title “San Miguel Lignite Mine, Permit 11B, Ash Disposal Area Expansion Notification” and addressed to the former Director of SMRD. In that letter, SMECI notified SMRD of the expansion of the ash disposal activities into mine Area E. In that letter, SMECI explained it “has been working with the Texas Water Commission, Industrial and Hazardous Waste Division [now TCEQ] on approval for an expanded Ash Disposal Area in the Permit 11B at the San Miguel Lignite Mine,” amended the area to “TWC Registration No. 31434” and (TCEQ) has given SMECI approval to dispose of ash from the lignite burning process in the expanded area. Further, SMECI explains the disposal method, including fillings pits with cover material to allow SMECI “to return the surface to approximate original contour in an environmentally satisfactory way.” Moreover, in that letter SMECI states previous permits which have been consolidated into Permit No. 11B have addressed additional ash disposal area which would be permitted through TCEQ, and that this letter is notification to the Commission that the proper channels have been negotiated with TCEQ and “approval for additional ash disposal area has been received.”

Docket No. C19-0024-SC-11-F  
San Miguel Electric Cooperative, Inc.  
Permit No. 11G, San Miguel Lignite Mine

14

notes that based on the long-standing Commission practice and TCEQ's determination for the ash placed in Permit No. 11G, that Staff's contention that the materials are not noncoal waste materials, and, that the placement of these materials is not a noncoal waste activity, is not persuasive. The placement of ash materials under the approved permit was a noncoal waste disposal activity and is subject to the requirements of §12.375.

- h. Even though Staff did not conduct a specific assessment of satisfaction of the performance standard requirements under §12.375(a)-(d), Staff has provided an assessment that a satisfactory demonstration of postmine soils testing has been made and that there are no identified issues with thickness or quality of suitable materials in the top four feet of the reclaimed surface, the evidence in the record demonstrates that SMECI has met the requirements of §12.375(a)-(d) for Phase I release.
  15. Pursuant to §12.313(a)(1), the Commission may release 60% of the bond or collateral attributable to the subject 369.6 acres upon a determination that reclamation has been successfully completed in accordance with the terms of the approved permit and the requirements of the Act and the Regulations. The approved reclamation performance bond totals \$70,000,000, in the form of a self-bond with third-party guarantor, accepted by Commission Order dated March 22, 2011. As a result of being granted Phase I release, SMECI is eligible to reduce the bond amount for Permit No. 11G. In its TA, Staff calculated an eligible bond reduction amount based on the most recently approved reclamation cost estimate for the permit. The proposed Phase I release area is located in Area E, for which the area bond method was used to calculate reclamation costs (Finding of Fact No. 3, *supra*). The amount of the eligible bond reduction specified in Staff's TA is \$2,253,459.90; however, as stated in Staff's TA, the specified reduction amount is only an estimate provided for illustration purposes. The actual amount of any reduction would be calculated based on the costs for reclamation at the time a bond reduction is requested by SMECI; therefore, ensuring the proposed bond amount is sufficient to cover the cost of outstanding reclamation work. In that SMECI does not request an adjustment to the approved bond in the Application (Finding of Fact No. 3, *supra*), any eligible reduction amount based on the current reclamation cost estimate would be superseded once the costs for reclamation are calculated at a future date when SMECI requests a reduction of the bond. Additionally, since the Commission is not required under the Act or the Regulations to determine an eligible bond reduction amount when approving an application for release, this Order states SMECI is eligible to reduce the amount of bond by 60% that is attributable to the 369.6 acres granted Phase I release, but does not specify the amount of the reduction.
  16. The area requested for release was marked in the field with white PVC poles at the corners
-

Docket No. C19-0024-SC-11-F  
San Miguel Electric Cooperative, Inc.  
Permit No. 11G, San Miguel Lignite Mine

15

and along the proposed boundaries. (Photographs of marked area are contained in Staff's TA in Appendix IV of Attachment III).

17. SMECI and Staff, the only parties to the proceeding, filed waivers of the preparation and circulation of a proposal for decision. The proposed order was circulated to the parties with opportunity for comment.
18. Open meeting notice has been posted for Commission consideration of this application in accordance with Tex. Gov't Code Ann. Ch. 551 (Vernon Supp. 2020).

### **CONCLUSIONS OF LAW**

Based on the above Findings of Fact, the following Conclusions of Law are made:

1. Proper notice of SMECI's Application and proper notice of consideration by the Commission has been provided.
2. No public hearing was requested, and none is warranted.
3. SMECI has complied with all applicable provisions of the Act and the Regulations regarding notice for Commission jurisdiction to allow consideration of the matter.
4. Coal ash materials disposed of within the area of Permit No. 11G under a deed-recorded waste registration appropriately issued by the Texas Commission on Environmental Quality, are noncoal wastes as set forth at 16 Tex. Admin. Code §12.375, and are subject to the performance standards contained therein.
5. SMECI has complied with all applicable provisions of the Act and the Regulations for the acreage requested for release as set out in the Findings of Fact, including compliance with 16 Texas Admin. Code §12.375.
6. The Commission may approve a release of Phase I reclamation obligations for the 369.6 acres as set out in the above Findings of Fact and Conclusions of Law.
6. Pursuant to the Commission's authority for inspections and evaluation of release applications, the Commission may order that SMECI continue marking the area approved for release so that Staff mapping, and tracking will be efficient.
7. SMECI is eligible to reduce the amount of bond for Permit No. 11G by 60% of the amount that is attributable to the subject 369.6 acres in future bond adjustments.

Docket No. C19-0024-SC-11-F  
San Miguel Electric Cooperative, Inc.  
Permit No. 11G, San Miguel Lignite Mine

16

**IT IS THEREFORE ORDERED BY THE RAILROAD COMMISSION OF TEXAS** that the above Findings of Fact and Conclusions of Law are adopted;

**IT IS FURTHER ORDERED** that a release of Phase I reclamation obligations for 369.6 acres is hereby approved;

**IT IS FURTHER ORDERED** that all areas released from reclamation obligations shall remain clearly marked in the field with permanent boundary markers maintained to distinguish these areas at all corners and angle points from active mining and reclamation areas in accordance with this Order;

**IT IS FURTHER ORDERED** that the current bond remains in effect in accordance with its terms until a replacement bond is approved by the Commission;

**IT IS FURTHER ORDERED** SMECI is eligible to reduce the amount of bond by 60% of the amount that is attributable to the subject 369.6 acres granted Phase I release in this Order;

**IT IS FURTHER ORDERED** that the Commission may vary the total amount of bond required from time to time as affected land acreage is increased or decreased or where the cost of reclamation changes; and

Docket No. C19-0024-SC-11-F  
San Miguel Electric Cooperative, Inc.  
Permit No. 11G, San Miguel Lignite Mine

**IT IS FURTHER ORDERED** by the Commission that this order shall not be final and effective until 25 days after the Commission's Order is signed, unless the time for filing a motion for rehearing has been extended under Tex. Gov't Code §2001.142, by agreement under Tex. Gov't Code §2001.147, or by written Commission Order issued pursuant to Tex. Gov't Code §2001.146(e). If a timely motion for rehearing is filed by any party at interest, this order shall not become final and effective until such motion is overruled, or if such motion is granted, this order shall be subject to further action by the Commission. Pursuant to Tex. Gov't Code §2001.146(e), the time allotted for Commission action on a motion for rehearing in this case is 100 days from the date the Commission Order is signed.

**SIGNED** on June 16, 2020.

**RAILROAD COMMISSION OF TEXAS**

DocuSigned by:  
*Wayne Christian*  
C1C746B4F446422  
\_\_\_\_\_  
**CHAIRMAN WAYNE CHRISTIAN**

DocuSigned by:  
*Christi Craddick*  
15494B7DF4CC424  
\_\_\_\_\_  
**COMMISSIONER CHRISTI CRADDICK**

DocuSigned by:  
*Ryan Sitton*  
7B4B8C36A37443C  
\_\_\_\_\_  
**COMMISSIONER RYAN SITTON**

**ATTEST:**  
DocuSigned by:  
*Callie Farrar*  
3581C80DEDE0476  
\_\_\_\_\_  
**Secretary, Railroad Commission of Texas**

