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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 17, 2014

Ms. Kathryn Tronsberg Macciocca
Director
Duff & Phelps, LLC
2000 Market Street, Ste 2700
Philadelphia, PA 19103

Re: Notice of Negative Use Determination
Borger Energy Associates, LP
Blackhawk Station
Borger (Hutchinson County)
Application Number: 11971

Dear Ms. Macciocca:

This letter responds to Borger Energy Associates, LP's Application for Use Determination for the Blackhawk Station, originally submitted on March 31, 2008 and remanded to the executive director (ED) on December 5, 2012 by the Texas Commission on Environmental Quality (TCEQ) commissioners. Your application seeks a use determination for two Heat Recovery Steam Generators (HRSGs) and requested a Tier IV partial use determination.

The ED has completed the review for application #07-11971 and the associated notice of deficiency (NOD) responses and has issued a Negative Use Determination for the property in accordance with Title 30 Texas Administrative Code (TAC) Chapter 17. The Negative Use Determination is issued for the following reasons: 1) the ED cannot find that the property is used, constructed, acquired, or installed wholly or partly to meet or exceed any cited laws, rules, or regulations adopted by any environmental protection agency of the United States, Texas, or a political subdivision of Texas for the prevention, monitoring, control, or reduction of air, water, or land pollution; and 2) even if there were an applicable law cited in the application for the subject property, the ED does not find your methods for determining the use determination percentage to be reasonable.

Commission rule at 30 TAC §17.10(d) requires an applicant to cite to a specific law, rule, or regulation that is being met or exceeded by the use, construction, acquisition, or installation of the pollution control property. As specified in 30 TAC §17.4(a) and authorized by Article VIII, § 1-l, of the Texas Constitution, for a property to be eligible for an exemption from ad valorem taxation, all or part of property must be used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, Texas, or a political subdivision for the prevention, monitoring, control, or reduction of

air, water, or land pollution. Commission rules do not allow an applicant to omit the requirement to cite a specific environmental law even for property that is specified on the list of property in Texas Tax Code §11.31(k).

The ED does not require a citation to a law or rule that mandates the installation of a specific type of equipment. However, the ED does not find that the HRSG is used to meet or exceed any of the environmental laws that were cited in your application. While the application and responses provided numerous rule citations, none were to rules that the HRSGs were required to meet. Therefore, the HRSGs do not meet the applicability requirements of 30 TAC §17.4(a) to be eligible for exemption from ad valorem taxation.

The Tier IV application process, in place in commission rules between February 2008 and December 2010, allowed an applicant to propose a method for calculating a partial use determination. The commission rules allow for determinations that distinguish the proportion of property that is used to control, monitor, prevent, or reduce pollution from the proportion of property that is used to produce goods or services. If the property is not used wholly for the control of air, water, or land pollution, the applicant must present information in the application for the determination of the proportion of the property that is pollution control. It is the responsibility of the applicant to propose a reasonable method for determining the use determination percentage. It is the responsibility of the ED to review the proposed method and make the final determination.

After careful review of the three methods for calculating a partial positive use determination included in the applicant's submittals, the ED has determined that all but one of the methods are unacceptable. The two methods proposed by the applicant do not reasonably distinguish the proportion of the HRSG that provides a purported pollution control benefit from the proportion of the HRSG that produces steam that is used in a process or to produce electricity for use or sale. The one method that the ED does find acceptable, the Cost Analysis Procedure (CAP) adopted by the commission, produces a negative number. Therefore, the property is not eligible for a positive use determination.

The following is an explanation of the ED's review of the methodologies presented in your application:

- Avoided Emissions Approach (91%): This approach is not reasonable because it does not distinguish the proportion of property used to control or prevent pollution from the proportion used to produce a product. Furthermore, the avoided emission approach does not attribute any value to production. By attributing the entire avoided emissions to the HRSGs, this approach ignores nitrogen oxides (NOx) reductions related to other property for which a positive use determination has been issued.

- Executive Director's December 3, 2008 Brief (61%): Subsequent to filing the brief where this methodology is presented, the ED determined that the proposed calculation did not accurately calculate an appropriate use determination because

the less efficient the equipment, the higher the positive use determination percentage it yielded. This produces an unreasonable result and should not provide the basis for a final determination.

- CAP as proposed by the executive director (-2602%): The CAP formula was adopted by the commission to provide a methodology for determinations that distinguishes the proportion of property that is used to control, monitor, prevent, or reduce pollution from the proportion of property that is used to produce goods or services. The fact that the CAP calculated results in a negative number shows that the HRSGs pollution prevention benefit is negated by its ability to produce a product.

Please be advised that a Negative Use Determination may be appealed. The appeal must be filed with the TCEQ Chief Clerk within 20 days after the receipt of this letter in accordance with 30 TAC §17.25.

If you have questions regarding this letter or need further assistance, please contact Ronald Hatlett of the Tax Relief for Pollution Control Property Program by telephone at (512) 239-6348, by e-mail at ronald.hatlett@tceq.texas.gov, or write to the Texas Commission on Environmental Quality, Tax Relief for Pollution Control Property Program, MC-110, P.O. Box 13087, Austin, Texas 78711-3087.

Sincerely,

David Brymer, Director
Air Quality Division

DB/rh

cc: Chief Appraiser, Hutchinson County Appraisal District, P.O. Box 989, Stinnett, Texas, 79083-0989