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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 8, 2014

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

RE: **TCEQ DOCKET NOS. 2008-0832-MIS-U, 2008-0849-MIS-U, 2008-0851-MIS-U, 2008-0850-MIS-U, 2008-0831-MIS-U, 2008-0830-MIS-U, 2012-1635-MIS-U, 2012-1648-MIS-U, 2012-1683-MIS-U, 2012-1562-MIS-U, 2012-1662-MIS-U, 2012-1682-MIS-U, 2012-1650-MIS-U, 2012-1587-MIS-U, 2012-1559-MIS-U, 2012-1660-MIS-U, 2012-1586-MIS-U**

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Appeals of the Executive Director's Negative Use Determinations in the above-entitled matters.

Sincerely,

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

DOCKET NOS.
2008-0832-MIS-U, 2008-0849-MIS-U, 2008-0851-MIS-U, 2008-0850-MIS-U, 2008-0831-MIS-U, 2008-0830-MIS-U, 2012-1635-MIS-U, 2012-1648-MIS-U, 2012-1683-MIS-U, 2012-1562-MIS-U, 2012-1662-MIS-U, 2012-1682-MIS-U, 2012-1650-MIS-U, 2012-1587-MIS-U, 2012-1559-MIS-U, 2012-1660-MIS-U, 2012-1586-MIS-U

APPEAL OF NEGATIVE USE	§	BEFORE THE
DETERMINATIONS BY	§	
BORGER ENERGY	§	
ASSOCIATES LP, BRAZOS	§	
VALLEY ENERGY LLC,	§	
CER-COLORADO BEND	§	
ENERGY LLC, FREEPORT	§	
ENERGY CENTER LLC,	§	
FREESTONE POWER	§	
GENERATION LLC, TENASKA	§	
GATEWAY PARTNERS LTD,	§	
BRAZOS ELECTRIC POWER	§	
COOPERATIVE INC (13544),	§	
BRAZOS ELECTRIC POWER	§	TEXAS COMMISSION ON
COOPERATIVE INC (16413),	§	
EIF CHANNELVIEW	§	
COGENERATION LLC,	§	
COTTONWOOD ENERGY	§	
COMPANY LP, ENNIS POWER	§	
COMPANY LLC, HAYS ENERGY	§	
LLC, MIDLOTHIAN ENERGY LLC,	§	
SOUTH TEXAS ELECTRIC	§	
COOPERATIVE INC, TOPAZ	§	
POWER GROUP LLC, WISE	§	
COUNTY POWER COMPANY LLC,	§	
WOLF HOLLOW I LP	§	ENVIRONMENTAL QUALITY

OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO APPEALS OF EXECUTIVE DIRECTOR'S NEGATIVE USE DETERMINATIONS

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 the appeals submitted by the above-named Appellants of the Executive Director's (ED) negative use determinations.

I. Background

On May 1, 2008, the ED issued 100% positive use determinations for 25 heat recovery steam generators (HRSG). Of those 25 positive use determinations, six were appealed on May 16, 2008 by the affected tax appraisal districts. In August 2008, the ED convened a stakeholder workgroup to seek a uniform method of addressing HRSG's, but the efforts of the stakeholder group did not result in consensus. On June 18, 2012, the ED requested the six appealed applications be remanded to the ED, and the TCEQ General Counsel granted the remand on June 29, 2012. Those six applications were consolidated with numerous subsequent HRSG applications from other entities, and on July 10, 2012, the ED issued negative use determinations for all of the consolidated HRSG applications.

TCEQ received numerous timely appeals in August 2012, and the TCEQ Commissioners considered the appeals at the December 5, 2012 Agenda. The Commission set aside all of the ED's HRSG use determinations and remanded the matters to the ED for new use determinations. In 2013 and early 2014, the ED engaged the Appellants in a notice of deficiency process

to allow Appellants to supplement their applications. On June 5 and 17, 2014, the ED issued negative use determinations to the 17 Appellants named above, and all of the use determinations were timely appealed.

For the reasons stated herein, OPIC respectfully recommends the Commission deny all appeals and affirm the ED's negative use determinations.

II. Applicable Law

A. Texas Constitution

On November 2, 1993, the Texas Constitution was amended to exempt certain pollution control property from ad valorem taxation. The amendment, known as "Prop 2", states:

> The legislature by general law may exempt from ad valorem taxation all or part of real and personal property 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, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution.[1]

B. Texas Tax Code § 11.31

Regarding pollution control property, Texas Tax Code § 11.31 states:

> A person is entitled to an exemption from taxation of all or part of real and personal property that the person owns and that is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution. A person is not entitled to an exemption from taxation under this section solely on the basis that the person manufactures or produces a product or

[1] TEX. CONST. art. VIII, § 1-l(a).

> provides a service that prevents, monitors, controls, or reduces air, water, or land pollution.[2]

Section 11.31(b) defines "pollution control property" as follows:

> [A]ny structure, building, installation, excavation, machinery, equipment, or device, and any attachment or addition to or reconstruction, replacement, or improvement of that property, that is 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, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution.[3]

Section 11.31(g) directs TCEQ to adopt rules to implement the section and states the adopted rules must:

> (1) establish specific standards for considering applications for determinations;
>
> (2) be sufficiently specific to ensure that determinations are equal and uniform; and
>
> (3) 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.[4]

Under § 11.31(k), TCEQ must establish a nonexclusive list of facilities, devices, or methods for the control of air, water, or land pollution, and the list must include HRSG's.[5] Section 11.31 also states that the standards and methods for making a determination apply uniformly to all applications for determinations, including applications relating to facilities, devices, or methods for the control of air, water, or land pollution included on the

[2] TEX. TAX CODE § 11.31(a).
[3] TEX. TAX CODE § 11.31(b).
[4] TEX. TAX CODE § 11.31(g).
[5] TEX. TAX CODE § 11.31(k)(8).

subsection (k) list.[6] The TCEQ must, by rule, update the (k) list at least once every three years, and an item may be removed from the list if the Commission finds compelling evidence to support the conclusion that the item does not provide pollution control benefits.[7] Finally, § 11.31 states that the ED may not make a determination that property is pollution control property unless the property meets the standards established by rule under § 11.31.[8]

C. TCEQ Rules Chapter 17

The TCEQ has implemented the statutory requirements of § 11.31 in Title 30 of the Texas Administrative Code (TAC), Chapter 17. Under the Chapter 17 rules, a "Tier III" application is required for all property which does not fully satisfy the requirements for a 100% positive use determination.[9] Prior to the amendment of Chapter 17, effective on December 13, 2010, the rules also allowed for a "Tier IV" application. If an applicant was seeking a partial positive use determination for an item on the 11.31(k) list, Tier IV was the appropriate application type.[10] When Tier IV was in effect, it was the responsibility of the applicant to propose a reasonable method for determining the use determination percentage, and it

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[6] TEX. TAX CODE § 11.31(g-1).
[7] TEX. TAX CODE § 11.31(l).
[8] TEX. TAX CODE § 11.31(h).
[9] 30 TEX. ADMIN. CODE § 17.17(a).
[10] *See* 30 TEX. ADMIN. CODE § 17.17(a) (2008).

was the responsibility of the ED to review the proposed method and make the final determination.[11]

Section 17.10 requires certain information be included in a use determination application. All applications must cite the specific sections of the laws, rules, or regulations being met or exceeded by the use, installation, construction, or acquisition of the pollution control property.[12] The application must also state the anticipated environmental benefits from the installation of the pollution control property for the control of air, water, or land pollution.[13] Section 17.2 defines "environmental benefit" as follows:

> The prevention, monitoring, control, or reduction of air, water, and/or land pollution that results from the actions of the applicant. ... [E]nvironmental benefit does not include the prevention, monitoring, control, or reduction of air, water, and/or land pollution that results from the use or characteristics of the applicant's goods or service produced or provided. ... [T]he terms 'environmental benefit' and 'pollution control' are synonymous.[14]

A "marketable product" is defined as:

> Anything produced or recovered using pollution control property that is sold as a product, is accumulated for later use, or is used as a raw material in a manufacturing process. Marketable product includes, but is not limited to, anything recovered or produced using the pollution control property and sold, traded, accumulated for later use, or used in a manufacturing process (including at a different facility). Marketable product does not include any emission credits or emission allowances that result from installation of the pollution control property.[15]

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[11] 30 TEX. ADMIN. CODE § 17.17(d) (2008).
[12] 30 TEX. ADMIN. CODE § 17.10(d)(4).
[13] 30 TEX. ADMIN. CODE § 17.10(d)(1).
[14] 30 TEX. ADMIN. CODE § 17.2(4).
[15] 30 TEX. ADMIN. CODE § 17.2(5).

Section 17.6 describes property which is not eligible for exemption from taxation and is not entitled to a positive use determination. Property is not entitled to an exemption from taxation:

(A) solely on the basis that the property is used to manufacture or produce a product or provide a service that prevents, monitors, controls, or reduces air, water, or land pollution;

(B) if the property is used, constructed, acquired or installed wholly to produce a good or provide a service;

(C) if the property is not wholly or partly used, constructed, acquired or installed to meet or exceed law, rule, or regulation 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; or

(D) if the environmental benefit is derived from the use or characteristics of the good or service produced or provided.[16]

An applicant for a use determination may appeal the ED's determination to the TCEQ Commissioners using the process provided in §17.25.[17] An appeal must be filed with the TCEQ Chief Clerk within 20 days after receipt of the ED's determination letter.[18] The Commission may remand the matter to the ED for a new determination or deny the appeal and affirm the ED's use determination.[19]

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[16] 30 TEX. ADMIN. CODE § 17.6(1).
[17] 30 TEX. ADMIN. CODE § 17.25(a)(2)(A).
[18] 30 TEX. ADMIN. CODE § 17.25(b).
[19] 30 TEX. ADMIN. CODE § 17.25(e)(2).

III. Analysis

The seventeen Appellants have all raised multiple challenges to the ED's negative use determinations, and most of the challenges are common across most of the appeals. OPIC's analysis of the issues is limited to those issues which appear to be most important to the ED and the Commissioners.[20]

A. Texas Tax Code § 11.31(k) List

Appellants assert that if an item appears on the § 11.31(k) list, it automatically qualifies for at least a partial positive use determination. This assertion is based on reading the "wholly or partly" language in § 11.31(m) to mean that a positive determination is required, and the result cannot be zero.[21] In other words, a negative use determination is not permissible. OPIC respectfully disagrees with this argument.

To assume that HRSG's are entitled to a positive use determination solely because they appear on the (k) list is to ignore other equally important subsections of § 11.31, such as (g-1). Under subsection (g-1), the standards and methods for making a use determination under § 11.31 that are established in TCEQ's implementing rules apply uniformly to all applications for determinations under § 11.31, including applications for

[20] Our evaluation of which issues are most important to the ED and Commissioners is based on careful review of the ED's prior briefing in this matter and the Commission's discussion at the December 5, 2012 Agenda.
[21] TEX. TAX CODE § 11.31(m).

facilities on the (k) list.[22] Therefore, when making a use determination, the ED must apply all relevant statutory and regulatory standards and methods, not just determine whether the property is on the (k) list.

Subsection (g) directs the TCEQ to adopt rules to implement § 11.31.[23] Subsection (b) requires eligible property to be used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by EPA, the State of Texas, or the TCEQ for the prevention, control, or reduction of air pollution.[24] To implement this statutory requirement, TCEQ adopted rule § 17.10, which states that an applicant must cite the specific sections of the laws, rules, or regulations being met or exceeded by the use, installation, construction, or acquisition of the pollution control property.[25]

As required by § 11.31(g-1), the ED considered Appellants' applications under not just subsections (k) and (m), but all applicable standards in the Texas Tax Code and the TCEQ rules. The ED appropriately looked beyond subsections (k) and (m) to evaluate these HRSG applications, and OPIC supports the ED's approach. OPIC finds that (k) list items, including HRSG's, are not automatically entitled to at least a partial positive use determination, and it is permissible for the consideration of (k) list items to result in a use percentage of zero.

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[22] TEX. TAX CODE § 11.31(g-1).
[23] TEX. TAX CODE § 11.31(g).
[24] TEX. TAX CODE § 11.31(b).
[25] 30 TEX. ADMIN. CODE § 17.10(d)(4).

B. Tier III v. Tier IV and Use of the CAP

Six of the seventeen appeals concern Tier IV applications submitted prior to January 1, 2009, meaning the current Tier III cost analysis procedure (CAP) does not apply to these applications.[26] Under Tier IV, the applicant proposed the method for determining the use determination percentage, and it was the responsibility of the ED to review the proposed method and make the final determination.[27] If these six Tier IV applications were submitted today, they would be considered Tier III applications, and use of the CAP would be mandatory.[28] The Tier IV Appellants object to the ED's use of the CAP to analyze Tier IV applications. OPIC acknowledges that Tier IV applications are not subject to the CAP, and the ED has applied the CAP to these Tier IV applications. However, the ED analyzed these six applications using both a Tier IV reasonableness standard and the Tier III CAP. Both analyses resulted in negative use determinations. OPIC fails to see the harm in allowing the Tier IV Appellants multiple ways to qualify for a positive use determination. We also note that though the Tier IV Appellants were not required to use the CAP, application of the CAP to all seventeen appeals did provide the ED a uniform way to compare the applications, and this approach is consistent with the statutory requirement that determinations be equal and uniform.[29]

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[26] *See* 35 Tex. Reg. 10965 (Dec. 10, 2010).
[27] 30 TEX. ADMIN. CODE § 17.17(d) (2008).
[28] *See* 30 TEX. ADMIN. CODE § 17.17(a).
[29] *See* TEX. TAX CODE § 11.31(g)(2).

Appellants all argue that the ED has misapplied the CAP in various ways, including inappropriate inputs, mistaken values, and predetermined outcomes. OPIC acknowledges that the CAP may not be the best tool to evaluate pollution control which results from an energy efficient process as opposed to a discreet add-on device. But OPIC is also aware that the CAP is the legally required tool for the majority of the HRSG applications, and the CAP was adopted by the Commission with stakeholder input. Pollution prevention through energy efficiency serves the public interest, and OPIC supports this principle. However, we cannot find that the ED has misapplied the CAP, and at present, cannot offer a better alternative to the CAP.

C. Possible Rulemaking Needed

Appellants contend that the ED has in practice removed HRSG's from the § 11.31(k) list without doing the rulemaking required by § 11.31(l).[30] OPIC respectfully disagrees. However, OPIC does believe that one of two possible rulemaking options is now necessary.

The first option is to formally remove HRSG's from the "Expedited Review List" in TCEQ rule § 17.17. That list is the Texas Tax Code § 11.31(k) list with changes as authorized by § 11.31(l). The TCEQ may remove an item from the list if there is compelling evidence to support the conclusion that the item does not render pollution control benefits.[31] Given that some of these HRSG applications have been pending for over six years,

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[30] *See* TEX. TAX CODE § 11.31(l).
[31] 30 TEX. ADMIN. CODE § 17.17(b).

and the ED has now twice made negative determinations, OPIC believes it is time for the ED to realistically assess whether a HRSG can ever qualify for a positive use determination, and if not, initiate rulemaking to remove HRSG's from the list.

The second option would be a reassessment of the CAP to determine whether it is the best method to account for pollution prevention which takes the form of process efficiency. This option could occur through rulemaking, or a less formal process possibly involving work sessions, stakeholders, and the permanent advisory committee. Perhaps the CAP just needs to be tweaked, or perhaps the CAP needs to be supplemented with a different methodology specific to efficiency. OPIC recognizes that consensus on this issue has been difficult to achieve, but to stop the current cycle consisting of negative determination, followed by appeal, followed by possible remand, a different approach is needed.

IV. Conclusion

For the reasons state herein, OPIC respectfully recommends the Commission deny all of the appeals and affirm the ED's negative use determinations.

If the Commission intends to remand these matters to the ED for new determinations, OPIC respectfully recommends the Commission provide the ED specific guidance on how, under the current rules, to credit energy efficiency which prevents pollution.

Finally, OPIC respectfully recommends the Commission encourage the ED to initiate one of the two rulemaking options discussed above. We recognize this final recommendation may need to be accomplished in a separate Commission action, but we recommend one of the two rulemaking options, regardless of the Commission's decision on these appeals.

Respectfully submitted,

Office of Public Interest Counsel

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2014, 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.

Garrett T. Arthur

Mailing List

Application Nos./ TCEQ Docket Nos.	Appellant	County
No. 07-11926/ Docket No. 2008-0851-MIS-U	CER-Colorado Bend Energy, LLC	Wharton County
Nos. 12210 and 12211/ Docket No. 2012-1559-MIS-U	Topaz Power Group, LLC	Nueces County
Nos. 15506, 16410, 16411, and 16412/ Docket No. 2012-1562-MIS-U	Cottonwood Energy Company, LP	Newton County
No. 12268/ Docket No. 2012-1586-MIS-U	Wolf Hollow I, LP	Hood County
No. 13534/ Docket No. 2012-1587-MIS-U	South Texas Electric Cooperative, Inc.	Victoria County
No. 13544/ Docket No. 2012-1635-MIS-U	Brazos Electric Power Cooperative, Inc.	Johnson County
No. 16413/ Docket No. 2012-1648-MIS-U	Brazos Electric Power Cooperative, Inc.	Jack County
No. 12271/ Docket No. 2012-1650-MIS-U	Midlothian Energy, LLC	Ellis County
No. 12202/ Docket No. 2012-1660-MIS-U	Wise County Power Company, LLC	Wise County
No. 12272/ Docket No. 2012-1682-MIS-U	Hays Energy, LLC	Hays County
No. 12203/ Docket No. 2012-1662-MIS-U	Ennis Power Company, LLC	Ellis County
No. 07-11914/ Docket No. 2008-0830-MIS-U	Tenaska Gateway Partners, Ltd.	Rusk County
No. 07-11971/ Docket No. 2008-0832-MIS-U	Borger Energy Associates, LP	Hutchinson County
No. 12826/ Docket No. 2012-1683-MIS-U	EIF Channelview Cogeneration, LLC	Harris County
No. 07-11994/ Docket No. 2008-0850-MIS-U	Freeport Energy Center, LLC	Brazoria County
No. 07-11969/ Docket No. 2008-0849-MIS-U	Brazos Valley Energy LLC	Fort Bend County
No. 07-11966/ Docket No. 2008-0831-MIS-U	Freestone Power Generation, LLC	Freestone County

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