Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*

Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 5, 2008

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 DEC -5 PM 2:09
CHIEF CLERKS OFFICE

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

Re: **BORGER ENERGY ASSOCIATES, L.P.**
TCEQ DOCKET NO. 2008-0832-MIS-U

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Hutchinson County Appraisal District's Appeal of the Executive Director's Use Determinations regarding Borger Energy Associates, LP.

Sincerely,

for Amy Swanholm, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 DEC -5 PM 2:09

CHIEF CLERKS OFFICE

TCEQ DOCKET NO. 2008-0832-MIS-U

IN THE MATTER OF THE APPEAL BY THE HUTCHISON COUNTY APPRAISAL DISTRICT OF USE DETERMINATION NO. 07-11971	**§ § §**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO APPEAL OF USE DETERMINATIONS

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Office of the Public Interest Counsel (OPIC) files this response to Hutchinson County Appraisal District's ("Hutchinson") appeal of the Executive Director's (ED) use determinations regarding Borger Energy Associates L.P. ("Borger").

I. Introduction

In March 2008, Borger submitted a Tier IV use determination application to the Texas Commission on Environmental Quality ("TCEQ"). Borger sought use determinations for two thermally efficient heat recovery steam generators ("HRSG") associated with an electric power generation facility in Borger, Texas. The application describes the property as using natural gas-fired combined-cycle technology to power two combustion turbines. These turbines are routed to two heat recovery steam generators where the steam is then exported to a nearby refinery. The application also states that these facilities' emissions are regulated under 40 CFR part 60, § 407(c) of the Federal Clean Air Act, relating to NOx control. In support of the application Borger provided to the ED a proposed formula for calculating the pollution control values of the HRSGs and the turbine system.

On May 1, 2008, the ED issued a use determination for the Borger facility. The ED rejected Borger's proposed formula but nevertheless issued a 100% positive determination for

the HRSG units concluding that the equipment was pollution control equipment and was installed to meet or exceed federal and/or state regulations. The ED made a negative determination for the steam turbine because the use of the steam turbine provides no environmental benefit to the site and is not considered pollution control equipment. In rejecting the applicant's proposed formula for calculating the pollution control value of the HRSGs and steam turbines the ED concluded that the outcome from the applicant's formula is outcome determinative and did not focus on the pollution control aspects of the property. The ED provides no further explanation or analysis supporting his decision.

On May 16, 2008, Hutchinson appealed the ED's use determination for the two HRSG units. Hutchinson states that the HRSG units' primary purpose is not to satisfy air pollution requirements. Instead, Hutchinson claims the units are production equipment.

We take no position on the merits of the Appellant's issues with the ED's decision at this time because we find that the ED provided no basis for the percentages he concluded were appropriate. Based on the limited information in the record, we conclude that while the ED may reject an applicant's proposed formula for determining the percentages of equipment associated with pollution control, he must provide an explanation of the specific method and analysis used to determine the percentages he recommends. For this reason, OPIC recommends that the Commission remand this matter for a new technical review and new use determination that fully lays out the method and formula used to reach the correct percentage for the use determination.

II. Applicable Law

The applicable TCEQ rules concerning tax relief for property used for environmental protection are found in Title 30 of the Texas Administrative Code (TAC), Chapter 17. Parts of Chapter 17 were amended to be effective February 7, 2008. Because Brazos' application was

deemed administratively complete after the February 7 effective date of the Chapter 17 amendments, the current Chapter 17 rules apply to these applications.

To obtain a positive use determination, "the pollution control property must be used, constructed, acquired, or installed wholly or partly to meet or exceed 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." 30 TAC § 17.4(a). Chapter 17 contains a list of items (the Equipment and Categories List, or ECL) that have been predetermined as used either wholly or partly for pollution control purposes. 30 TAC § 17.14. The ECL contains two parts: "Part A is a list of the property that the executive director has determined is used either wholly or partly for pollution control purposes, [and] Part B is a list of categories of property which is located in Texas Tax Code (TTC), §11.31(k)." 30 TAC § 17.14(a). In addition, there are four different types of use determination applications;

Tier I--An application which contains property that is in Part A of the figure in §17.14(a) or that is necessary for the installation or operation of property located on Part A of the Equipment and Categories List; 30 TAC § 17.2(13)

Tier II-An application for property that is used wholly for the control of air, water, and/or land pollution, but not on the Equipment and Categories List, located in §17.14(a); 30 TAC § 17.2(14)

Tier III-An application for property used partially for the control of air, water, and/or land pollution but that is not included on the Equipment and Categories List, located in §17.14(a); 30 TAC § 17.2(15)

Tier IV--An application containing only pollution control property which falls under a category located in Part B of the figure in §17.14(a). 30 TAC § 17.2(16)

Section 17.15(a) and (b) provide Decision Flow Charts for making use determinations. There are two Decision Flow Charts, one for non-Tier IV applications, and one for those applications with just items from Part B of the ECL. 30 TAC § 17.15(a) and (b).

In addition, a partial use determination "must be requested for all property that is either not on Part A of the ECL... or does not fully satisfy the requirements for a 100% positive use determination." 30 TAC § 17.17(a). To calculate partial use for Tier IV applications, the cost analysis procedure in 30 TAC § 17.17(d) must be used. *Id.* Section 17.17(d) states that "[i]t 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." 30 TAC § 17.17(d).

Under § 17.25, an appraisal district or applicant has 20 days to appeal a use determination issued by the ED. 30 TAC § 17.25(a)(2)(A) and (B); 30 TAC § 17.25(b). Upon a timely appeal, the Commission may either "deny the appeal and affirm the ED's use determination" or "remand the matter to the ED for a new determination." 30 TAC § 17.25(d)(2). Should the Commission remand the use determination, the ED shall conduct a new technical review and issue a new use determination. 30 TAC § 17.25(e)(1)(A) and (B). This determination may be appealed under the same Chapter 17 procedures as the initial determination. 30 TAC § 17.25(e)(2). If the Commission denies the appeal and affirms the use determination, this decision is final and appealable. 30 TAC § 17.25(d)(3).

III. Analysis and Conclusion

Hutchinson appeals the ED's use determination, stating that the HRSG units are production equipment, and the primary purpose is not pollution reduction. Therefore, they argue, the HRSGs do not qualify for a 100% tax exemption. In his Use Determination analysis,

the ED disagrees with Borger's proposed formula for calculating the pollution control value of the HRSGs. Nevertheless, the ED recommends a 100% exemption for the HRSGs and concludes that "the most appropriate formula has been determined by the Executive Director." However, the ED does not explain what the formula is or how he reached the conclusion of a 100% positive use determination even though he disagrees with the calculation methodology provided by Borger. As described in 30 TAC § 17.17(d), the ED is required to review the proposed method and make the final determination. However, it is impossible to review that determination in this appeal without more information about how the ED calculated the use determination percentage. Therefore, OPIC recommends the Commission remand the matter to the ED for a new determination with instructions that the ED conduct a new technical review and issue a new use determination based upon a specific method and supporting analysis to assess a use determination percentage for the HRSGs. [1]

Respectfully submitted,

Blas J. Coy, Jr.
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[1] As allowed by 30 TAC § 17.25(d)(2) 30 TAC § 17.25(e)(1)(A) and (B).

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2008, the original and seven true and correct copies of the foregoing document were filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.

Vi McWhirt
for Amy Swanholm

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