

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 23, 2009

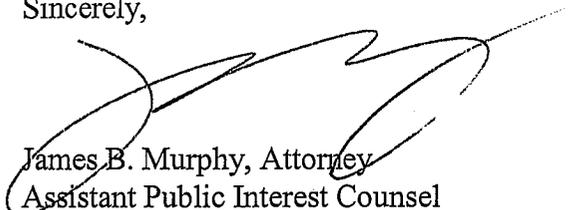
LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: AMERICAN MARAZZI TILE INC.
TCEQ DOCKET NO. 2009-1598-MIS-U**

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to the Appeal of the Executive Director's Use Determination in the above-entitled matter.

Sincerely,


James B. Murphy, Attorney
Assistant Public Interest Counsel

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 P.O. Box 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

P.O. Box 13087

Austin, Texas 78711-3087

512-239-1000

Internet address: www.tceq.state.tx.us

TCEQ DOCKET NO. 2009-1598-MIS-U

IN THE MATTER OF	§	BEFORE THE
THE APPEAL OF THE	§	
EXECUTIVE DIRECTOR'S USE	§	
DETERMINATION REGARDING	§	TEXAS COMMISSION ON
AMERICAN MARAZZI TILE,	§	
INC.'S USE DETERMINATION	§	
APPLICATION NO. 13868	§	ENVIRONMENTAL QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO THE APPEAL OF THE EXECUTIVE DIRECTOR'S USE DETERMINATION**

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

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to the Appeal of the Executive Director's (ED) Use Determination in the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

American Marazzi Tile, Inc. (Applicant) filed a Tier I Application for Use Determination for Pollution Control Property with the TCEQ on June 25, 2009. Applicant owns and operates a ceramic tile manufacturing facility in Sunnyvale, within the Dallas Central Appraisal District. Applicant requested a use determination for: installation of three new dust collectors, hoods, and dust collection systems; construction of eleven new stacks and modification of one existing stack; construction of a new clay storage facility; installation of a wastewater treatment system; and construction of a storm water diversion system. The application states that the new clay storage facility was constructed to control fugitive particulate emissions from the clay piles. The application cites 40 C.F.R. Part 60, Subpart OOO (2008), 30 TEX. ADMIN. CODE (TAC)

§ 111.151, and Special Condition Nos. 11 and 15 of its air permit, No. 19841, as the basis for the requirement for a clay storage facility.

The ED declared the application administratively complete on July 3, 2009, and initiated technical review. On July 10, 2009, the ED issued a Notice of Deficiency (NOD) to Applicant requesting the specific subsection of 40 C.F.R. Part 60, Subpart OOO that required construction or use of a clay storage facility. On July 23, 2009, Applicant responded to the NOD by letter, stating that 40 C.F.R. §§ 60.671 and 60.672(b), and Special Condition No. 11 of its air permit, required the clay storage facility. On August 18, 2009, the ED completed technical review of the application and issued a positive use determination of 100% for the projects.

On September 15, 2009, the Dallas Central Appraisal District (Dallas CAD), through its Executive Director and Chief Appraiser W. Kenneth Nolan, filed a timely protest and appeal of the ED's decision to grant a 100% positive use determination for the clay storage facility. Dallas CAD argues that the clay storage facility is a large storage warehouse capable of many uses and should not be exempt from taxation. Along with the protest letter, Dallas CAD attached an appraisal report for Applicant's entire manufacturing facility, including file photographs and sketches. Based on a review of the application, appeal, appraisal, and file, OPIC recommends the Commission deny the appeal and affirm the ED's positive use determination.

II. APPLICABLE LAW

The applicable TCEQ rules concerning tax relief for property used for environmental protection are found in 30 TAC Chapter 17. "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). The ED determines the portion of the pollution control property eligible for a positive use determination. 30 TAC § 17.4(b). The ED may not determine that property is pollution control property unless all requirements of 30 TAC § 17.4 and the applicable requirements of 30 TAC §§ 17.15 and 17.17 (relating to Review Standards and Partial Determinations) have been met. 30 TAC § 17.4(c).

Chapter 17 contains a list of items (the Equipment and Categories List or ECL) predetermined as used either wholly or partly for pollution control purposes. *See* 30 TAC § 17.14(a). The ECL contains two parts. “Part A of the [ECL] is a list of the property that the [ED] has determined is used either wholly or partly for pollution control purposes.” *Id.* “Part B of the [ECL] is a list of the pollution control property categories set forth in §11.31(k) of the Texas Tax Code.” *Id.* 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 [ECL] or that is necessary for the installation or operation of property located on Part A of the [ECL].

Tier II--An application for property that is used wholly for the control of air, water, and/or land pollution, but not on the [ECL].

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 [ECL].

Tier IV--An application containing only pollution control property which falls under a category located in Part B of the [ECL].

30 TAC § 17.2(13)–(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 (or Tier IV applications). 30 TAC § 17.15(a) and (b).

Section 17.10 addresses the application requirements for use determination. In particular, all use determination applications must contain, in addition to other information, “the specific law, rules, or regulations that are being met or exceeded by the use, installation, construction, or acquisition of the pollution control property[.]” 30 TAC § 17.10(d)(4).

The chief appraiser of the appraisal district for the county in which the property is located or the applicant has 20 days to appeal a use determination issued by the ED. 30 TAC § 17.25(a)(2)(A)–(B) and (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). If the Commission remands 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 is appealable 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, the Commission’s decision is final and appealable. 30 TAC § 17.25(d)(3).

III. DISCUSSION

Dallas CAD argues the tax exemption for pollution control property should not apply to Applicant’s clay storage facility because the storage warehouse is “nothing more than a very large pre-engineered steel warehouse that could serve any number of roles fit for such a storage facility.” Letter from W. Kenneth Nolan, Dallas CAD, to Ron Haslett, TCEQ (September 10, 2009). The ED determined the clay storage facility falls under ECL No. A-6, which pertains to

“Water/Chemical Sprays and Enclosures for Particulate Suppression” and includes “[s]pray nozzles, conveyor and chute covers, windshields, piping, pumps, etc. – used to reduce fugitive particulate emissions.” 30 TAC § 17.14. The rule provides a 100% use percentage for such equipment. *Id.* Although a clay storage facility is not specifically listed, it would appear to qualify as an “Enclosure[] for Particulate Suppression.” As a result, it receives a 100% use percentage regardless of its potential for other uses, so long as it is necessary “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).

The application states that the clay storage facility is necessary to comply with 40 C.F.R. Part 60, Subpart OOO (2008), 30 TAC § 111.151, and Special Condition Nos. 11 and 15 of its air permit. In addition, Applicant points to 40 C.F.R. §§ 60.671 and 60.672(b) as specific federal environmental regulations that are met or exceeded by the construction of the storage facility. 40 C.F.R. § 60.672(b)¹ prohibits discharge from a “storage bin,” defined as a facility for storage of non-metallic minerals prior to further processing or loading, of either fugitive emissions exhibiting greater than 10 percent opacity or visible fugitive emissions. *See* 40 C.F.R. § 60.671 (Definitions). If stored outside, fugitive emissions from the raw clay would almost certainly exceed 10 percent opacity or be visible. Thus, it appears the clay storage facility is used to comply with the federal regulations for pollution control purposes.

Similarly, 30 TAC § 111.151 prohibits Applicant from exceeding allowable rates for particulate matter. Special Condition No. 11 requires Applicant to store and handle raw materials inside of a building. Special Condition No. 15 requires Applicant to partially enclose

¹ Note that the exclusion in 40 C.F.R. § 60.670(c)(3) for common clay plants and pumice plants with capacities of 9 megagrams per hour (10 tons per hour) or less does not appear to apply to Applicant’s manufacturing operation.

and sprinkle stockpiles to achieve maximum control of fugitive dust emissions. The clay storage facility is used to comply with these requirements.

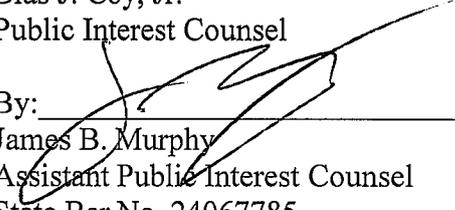
Furthermore, the appraisal submitted by Dallas CAD does not disclose any use of the clay storage facility other than for clay storage and pollution control. The appraisal states that the storage warehouse is used for clay storage. *See* Advanced Valuation Systems, Inc., Self-Contained Appraisal Report of American Marazzi Tile as of January 1, 2009 (June 30, 2009), at 54. Although the storage warehouse may be capable of other uses, there is no indication in the file or the appraisal that Applicant has used it for anything except clay storage. Accordingly, Applicant appears to use the clay storage facility for pollution control purposes to comply with federal and state law, and the positive use determination is proper.

IV. CONCLUSION

OPIC recommends the Commission deny the appeal and affirm the ED's 100% positive use determination.

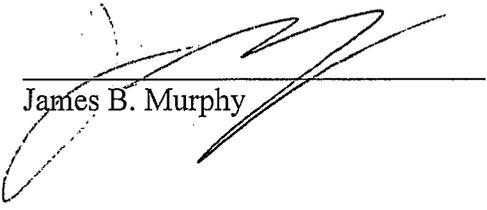
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: 
James B. Murphy
Assistant Public Interest Counsel
State Bar No. 24067785
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-4014 Phone
(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2009 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to the Appeal of the Executive Director's Use Determination was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



James B. Murphy

MAILING LIST
AMERICAN MARAZZI TILE INC.
TCEQ DOCKET NO. 2009-1598-MIS-U

Steven T. Wiederwax
American Marazzi Tile Inc.
359 Clay Rd.
Sunnyvale, Texas 75182
Tel: 972/226-0110 Fax: 972/226-2263

Chief Appraiser
Dallas County Appraisal District
2949 N. Stemmons Freeway
Dallas, Texas 75247

Susana M. Hildebrand, P.E.
Texas Commission on Environmental Quality
Air Permits Division, MC-206
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4900 Fax: 512/239-6188

Ron Hatlett
Texas Commission on Environmental Quality
Small Business & Environmental Assistance,
MC-110
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3100 Fax: 512/239-5678

Minor Hibbs
Texas Commission on Environmental Quality
Chief Engineer's Office, MC-168
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-1795 Fax: 512/239-1794

Robert Martinez
Texas Commission on Environmental Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-4007

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4010 Fax: 512/239-4015

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311

