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November 3, 2009

**Via Federal Express #8604 7726 5712**

Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC - 105)  
12100 Park 35 Circle, Building F  
Austin, TX 78753

**Re: Appellant's Reply Brief in the appeal of the Executive Director's Use Determination regarding American Marazzi Tile Inc.'s Use Determination Application No. 13868 TCEQ Docket No. 2009-1598-MIS-U**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
2009 NOV - 4 AM 11:33  
CHIEF CLERKS OFFICE

To Whom It May Concern:

The undersigned counsel for the Dallas Central Appraisal District ("Appellant") files this reply brief in response to the briefs previously filed in the above-referenced appeal. For the reasons set below, Appellant respectfully requests that the Commission deny the positive use determination for American Marazzi Tile, Inc.'s ("American Marazzi") clay storage facility and remand the determination to the Executive Director in accordance with 30 TAC § 17.25.

### **Introduction**

Appellant believes the Executive Director failed to consider the application by American Marazzi in accordance with the law and disregarded the clear intent of the Texas Legislature by granting a general 100% use determination for the clay storage facility without evidence supporting a finding that the facility contains eligible pollution control devices that provide an environment benefit. Appellant will stipulate to and generally agrees with the procedural history as set forth in the Executive Director's Response to Dallas Central Appraisal District's Appeal of the Executive Director's Use Determination Issued to American Marazzi Tile, Inc. ("ED's Brief")<sup>1</sup>

### **Appellant's Reply to the Timeliness of DCAD's Appeal**

The Executive Director has alleged in its response brief that Appellant failed to file a timely appeal alleging that Appellant missed the deadline by one day. It appears there is a simple miscalculation on the part of the Executive Director whereby it is alleged that Appellant was presumed to have received the Director's decision on "Monday, August 23, 2009"<sup>2</sup> when, in

<sup>1</sup> See, the ED's Brief, page 2.

<sup>2</sup> *Id.*, at page 3.

fact, August 23 was the previous Sunday. The actual date Appellant is presumed to have received the Director's decision is Monday, August 24, 2009. Regardless, as evidenced in the ED's Brief, Appellant's appeal was mailed on September 10, 2009 and was timely received filed by United States mail by the TCEQ on Monday, September 14, 2009.<sup>3</sup>

The Executive Director asserts that the response should be untimely due to a date stamp indicating that September 15, 2009 was the date assigned by the Chief Clerk's office, however, there is no evidence indicating why the Chief Clerk did not stamp the envelope received on the actual, timely, date of receipt, Monday September 14. Moreover, the appeal was mailed via priority mail five (5) days prior to the September 15 stamp date and travelled only from Dallas to Austin which is classified by the United States Post Office as a one-to-two day priority mail delivery. Based upon the actual September 10 mail date, the appeal likely arrived prior to September 14; nonetheless, there is no evidence reflecting the actual timing and method of either the TCEQ's or the Chief Clerk's mail review and stamping procedure. What's more, no other party has alleged that the appeal was filed in an untimely manner. In sum, Appellant's appeal was timely submitted and received by the TCEQ.

### **Appellant's Reply to the Parties' Legal Arguments**

#### The TCEQ's Use Determination is Unsupported by Law

As the Executive Director correctly points out in its response brief,<sup>4</sup> the Texas Constitution was amended on November 2, 1993 to provide that:

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. TEXAS CONST. ART. 8, § 1-1

Under this new authority, the Texas Legislature codified this amendment as Tex. Tax Code § 11.31 which similarly provides, in pertinent part:

“(a) 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 provides a service that prevents, monitors, controls, or reduces air, water, or land pollution....” [emphasis added]

The purpose of this statute is to allow an owner of a facility wherein specific devices designed to

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<sup>3</sup> See, ED's Brief, Exhibit #1.

<sup>4</sup> *Id.*, at page 1.

control pollution are located, to apply to the commission for a determination of the *actual pollution control use* of the specific device so that an exemption corresponding to the actual pollution control may be granted if warranted.<sup>5</sup> The statute clearly specifies that a person “is not entitled to an exemption from taxation under this section *solely* on the basis that the person...provides a service that prevents [pollution].”<sup>6</sup>

American Marazzi’s clay storage facility may indeed contain specific devices designed to control pollution,<sup>7</sup> however, there is no evidence presented either in its application for a use determination<sup>8</sup> or the corresponding TCEQ Use Determination<sup>9</sup> to suggest what these specific pollution control devices may be or their corresponding environmental benefit as required by Section 11.31(c)(1) of the Tax Code which clearly requires that the person applying for an exemption state “the anticipated environmental benefits.”

By way of example, the TCEQ application for use determination specifically requires an applicant to “Describe the property and how it will be used [for pollution control] at your facility. **Do not simply repeat the description from the Equipment & Categories List [ECL]**”<sup>10</sup> American Marazzi’s entire response to this section of the application for the clay storage facility is as follows:

“(3) Fugitive Emission Control (ECL A-6): A new clay storage facility was constructed to control fugitive particulate emissions from the clay piles to comply with 40 CFR Part 60 Subpart OOO, 30 TAC 111.151, and Special Conditions 11 and 15 or permit no. 19841.”<sup>11</sup>

Nowhere in this response does American Marazzi explain what specific devices or features of the clay storage facility will be used either wholly or partially to control particulate matter. Contrary to the clear language of the application, American Marazzi’s answer merely recites the ECL cite and states further that it complies with 40 CFR Part 60 and other apparent authority. In fact, an entire storage facility is not contemplated anywhere in A-6 of the ECL.<sup>12</sup> A-6 solely provides specific pollution control devices, including “spray nozzles, conveyor and chute covers, windshields, piping, pumps, etc. – used to reduce fugitive particulate emissions.”

In acknowledgment of the lack of information to support a use determination for the entire clay storage facility, American Marazzi submitted a letter to TCEQ on July 23, 2009 in an attempt to explain how certain individual storage bins fall within the required elements of 40 CFR Part 60. In this letter American Marazzi seems to suggest that only these storage bins

<sup>5</sup> See, Tex. Atty. Gen. Op. JC-0372, at page 5.

<sup>6</sup> See, 30 TAC § 17.6(1).

<sup>7</sup> For example, American Marazzi’s July 23, 2009 letter to the TCEQ (American Marazzi Brief, Attachment E) alleges that there may exist certain storage bins contained within the clay storage facility designed partially to control pollution as contemplated by 40 CFR Part 60 Subpart OOO, though the environmental benefit is not discussed in the letter.

<sup>8</sup> See, the TCEQ Use Determination dated August 18, 2009, attached to American Marazzi’s Brief as Attachment B.

<sup>9</sup> See, American Marazzi’s Brief, Attachment A.

<sup>10</sup> *Id.*, Attachment B.

<sup>11</sup> *Id.*, see American Marazzi’s TCEQ Application Answer No. (3) to “8 DESCRIPTION OF PROPERTY”.

<sup>12</sup> See, 30 TAC § 17.15.

*within* the facility that are alleged to be constructed to meet the requirements of 40 CFR Part 60.<sup>13</sup> However, here again American Marazzi falls short of the application requirements by providing no actual description of the alleged storage bins or their benefit in wholly or partially containing the particulate matter that will presumably be stored in the bins.

Nonetheless, the TCEQ issued a 100% use determination for not just the alleged storage bins but the entire clay storage facility, despite the lack of a supporting factual or legal basis for such an exemption. Similar to American Marazzi's application, the TCEQ Use Determination provided only a general ruling covering multiple facilities including "three new dust collectors, hoods, and dust collection system, the new clay storage facility, the wastewater treatment systems, and the stormwater diversion system." Again, there is no specified basis for the use determination associated with the entire clay storage facility or any specific pollution control device that may exist therein.

#### The TCEQ's General Unsupported Determination is Contrary to Legislative Intent

The Texas Constitution permits the legislature to narrow or eliminate pollution control exemptions if they become burdensome to taxing units or unfair to taxpayers.<sup>14</sup> Clearly, the legislature intends for the TCEQ to issue use determinations for specific pollution control devices (such as those *actually listed* in the ECL) that are allowable by law and supported by an applicant showing a tangible or calculable environmental benefit. However, allowing an applicant to submit nothing more than an improper cite to the ECL and a general federal code provision as a basis for a 100% exemption covering an entire facility points directly to the potential for abuse contemplated by the Constitution in allowing the Texas Legislature to eliminate such exemptions should they become too burdensome. This may be just one exemption for single \$2 million dollar facility, but should the application review practices of the TCEQ continue to follow the standard of review used in this determination, it is only a matter of time before every owner of a warehouse with walls and a roof in the State of Texas comes in for their own 100% use determination. The resulting burden to taxing units will inevitably call into question the exemption's justification.

#### Any Prior Exemption Determination is Irrelevant

American Marazzi also argues in their response brief that that DCAD has granted a similar exemption on a prior clay storage facility. The prior clay storage facility, in addition to being considerably smaller than the one at issue in the appeal, existed well over ten years ago and is irrelevant to any determination in the present matter as they are entirely different facilities.

#### **Conclusion**

American Marazzi's clay storage facility may or may not be more than a common warehouse. Regardless, the simple fact is that the TCEQ failed to ascertain what specific part(s) of the facility are used to wholly or partially to control pollution as intended by legislature. For

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<sup>13</sup> See, American Marazzi Brief, Attachment E.

<sup>14</sup> See, Tex. Atty. Gen. Op. JC-0372, at page 5.

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these reasons, Appellant respectfully requests that the Commission remand the TCEQ's 100% Use Determination to the Executive Director as it pertains to the clay storage facility and require that any future whole or partial determination be supported by factual evidence of a specific pollution control use and issued only for the corresponding percentage of that use in accordance with the law.

Thank you for your time and consideration of this matter.

Best regards,

NICHOLS, JACKSON, DILLARD,  
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By: \_\_\_\_\_

Whitt L. Wyatt

WLW/ds  
Enclosures

cc: Mailing List (attached)  
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