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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 21, 2010

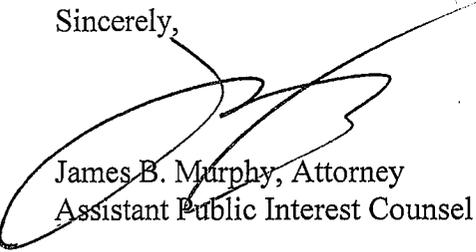
LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: ENCORE WIRE CORPORATION
TCEQ DOCKET NO. 2010-1585-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

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TCEQ DOCKET NO. 2010-1585-MIS-U

IN THE MATTER OF	§	BEFORE THE
THE APPEAL OF THE	§	
EXECUTIVE DIRECTOR'S USE	§	
DETERMINATION REGARDING	§	TEXAS COMMISSION ON
ENCORE WIRE CORPORATION'S	§	
USE DETERMINATION	§	
APPLICATION NO. 14259	§	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

Encore Wire Corporation (Applicant) has filed a Tier I Application for Use Determination for Pollution Control Property with the TCEQ. Applicant owns and operates a copper wire manufacturing facility in McKinney, within the Collin Central Appraisal District. Applicant requests a use determination for installation of two Excel Model EX63 Balers. The application states that the balers were installed to reduce and recycle scrap nylon, cardboard and PVC generated in the manufacturing process. The application also states that the balers were installed to meet or exceed the following environmental rules and regulations: 30 TEX. ADMIN. CODE (TAC) §§ 335.4, 335.473 and 335.476; Pollution Prevention Act of 1990 § 6607, 42 U.S.C. § 13106; Emergency Planning and Community Right-to-Know Act § 313, 42 U.S.C.

§ 11023; and TPDES Industrial Storm Water Multi-Sector General Permit No. TXR050000, Part III.A.5(e) .

Applicant filed its original application on February 10, 2010. On April 13, 2010, the TCEQ Executive Director (ED) issued a Notice of Deficiency (NOD) to Applicant requesting several items of additional information. Applicant submitted a revised application on May 18, 2010. The ED issued a second NOD on June 15, 2010 requesting the specific subsection of the adopted environmental rule requiring installation of the balers. Applicant submitted a second revised application on July 19, 2010. On August 23, 2010, the ED completed technical review of the application and issued a negative use determination for the balers.

Applicant filed a timely protest and appeal of the ED's decision on September 20, 2010. Applicant argues that installation of the balers was directly related to complying with the above cited environmental rules. Applicant states that TCEQ has historically issued positive use determinations without the requirement that the equipment be directly referenced or listed in a rule. Applicant argues that the controlling standard from these past decisions is whether the equipment is installed to meet the pollution control intent of a regulatory requirement. Based on a review of the application, appeal, and file, OPIC recommends the Commission deny the appeal and affirm the ED's negative 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

As an initial matter, the appeal is timely filed. An applicant may appeal a use determination within 20 days after receipt of the ED’s notice of his decision. 30 TAC § 17.25(b). A person is presumed to have received the notice on the third regular business day after it is mailed. 30 TAC § 17.25(b). The ED mailed notice of the negative use determination

on August 30, 2010. Applicant filed its appeal on September 20, 2010, which is within 23 days of the ED's notice and thus timely filed.

As to the merits of the appeal, the rules and regulations cited by Applicant do not require installation of the balers. The Pollution Prevention Act of 1990 and the Emergency Planning and Community Right-to-Know Act are federal statutes that require facilities to file reports with the Environmental Protection Agency (EPA) detailing toxic compounds released during their operations. These reports must include source reduction and waste minimization activities used by the facilities to reduce the release of the toxics. These statutes do not require a particular level of source reduction or waste minimization, and do not specify methods used to reduce the release of toxics.

Similarly, Commission rules at 30 TAC §§ 335.473 and 335.476 are recordkeeping and planning requirements. The rules require facilities to prepare pollution prevention plans with measureable goals for source reduction and waste minimization of toxic chemicals and to outline projects aimed at achieving these goals with a schedule of implementation. The rules also require facilities to submit annual progress reports detailing the extent to which these goals were achieved. Failure to submit these plans and progress reports is a violation and subjects a facility to enforcement. If a facility achieves a 90% reduction in pollutants from the base year and meets other criteria, it may apply for an exemption from these planning requirements.

It is clear the ED is correct that these federal and state recordkeeping and planning requirements do not require installation of the balers. Although the rules and regulations require preparation of pollution control plans, the contents of these plans are left to the facilities. There are no enforceable limits and failure to achieve planned pollution control goals does not subject a

facility to enforcement. The 90% pollution reduction target to qualify for a planning exemption is an incentive for facilities, but is also not an enforceable pollution reduction target.

It is equally clear that these regulatory requirements are intended to encourage pollution control through source reduction and waste minimization. Applicant argues that the tax exemption is available for equipment installed to meet the pollution control intent of a regulatory requirement, regardless of whether that equipment is required. Applicant argues past Commission decisions support this standard, but does not cite any cases.

OPIC concludes the standard advocated by Applicant expands the tax exemption too broadly. Under Applicant's standard, any equipment a facility installs to reduce pollution would qualify for the tax exemption, even though rules and regulations do not require the equipment or set a limit on emissions and discharges. The tax exemption is designed to ameliorate the cost of pollution control property specifically required by rules and regulations or otherwise installed to meet an enforceable emission or discharge limit, not to provide an incentive to purchase and install the property.

As an additional basis for the tax exemption, Applicant cites the requirement to establish best management practices (BMP) in the general storm water permit covering the facility. The general storm water permit requires Applicant to apply BMPs to reduce the discharge and potential discharge of pollutants in storm water. Applicant argues that the balers reduce potential discharges into storm water by limiting exposure from outdoor handling, storage, and landfill waste. Applicant states that balers are an industry-wide accepted BMP to reduce waste formation.

The use of BMPs as the basis for the tax exemption presents a more difficult question. The potential exists to expand the tax exemption too broadly for the reasons discussed above

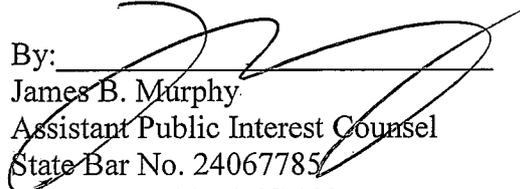
with the recordkeeping and planning provisions. Similar to the pollution prevention plan, BMPs do not set enforceable emission and discharge limits and do not require specific pollution control equipment. However, unlike the recordkeeping and planning requirements, which do not require pollution control, BMPs require pollution control measures. Ultimately, OPIC concludes BMPs are too open-ended and thus an insufficient basis to qualify for the tax exemption.

IV. CONCLUSION

OPIC recommends the Commission deny the appeal and affirm the ED's negative use determination.

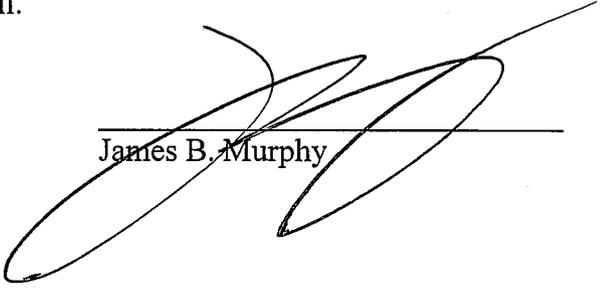
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2010 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

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TCEQ DOCKET NO. 2010-1585-MIS-U

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