

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*

March 23, 2011

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: SANDY CREEK POWER GENERATION FACILITY  
TCEQ DOCKET NO. 2011-0273-MIS-U**

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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**DOCKET NO. 2011-0273-MIS-U**

<b>SANDY CREEK ENERGY</b>	<b>§</b>	<b>BEFORE</b>
<b>ASSOCIATES, L.P.</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>USE DETERMINATION</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>
<b>APPLICATION NO. 13256</b>	<b>§</b>	

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

**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 appeal of the Executive Director's (ED) negative use determination regarding Sandy Creek Energy Associates, L.P. (SCEA or Appellant).

**I. Introduction**

On February 20, 2009, TCEQ received a use determination application for a raw water pretreatment system at the Sandy Creek Power Generation Facility in McLennan County. The ED issued a negative determination on January 10, 2011. On February 2, 2011, an appeal of the ED's negative determination was filed on behalf of SCEA.

For the reasons stated herein, OPIC recommends this appeal be denied.

**II. Applicable Law**

Texas Tax Code § 11.31(a) states that 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. Section 11.31(a) further states that a person is not entitled to an exemption

from taxation 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.

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.

To obtain a positive use determination under 30 TAC § 17.4, 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. In § 17.14, the Equipment and Categories List (ECL) catalogs property that the ED has determined is used either wholly or partly for pollution control purposes.

Under § 17.25(b), an appeal must be filed within 20 days after the receipt of the ED's determination letter, and a person is presumed to have been notified on the third regular business day after the date the notice of the ED's action is mailed. Section 17.25(b) further states that if an appeal is not filed within the time period specified, the ED's use determination is final. Section 17.25(b)(5) requires the appellant to explain the basis for the appeal.

### **III. Analysis**

Under 30 TAC § 17.25, SCEA's appeal deadline was February 2, 2011. The TCEQ Office of Chief Clerk received this appeal on February 2, 2011. The appeal was therefore timely filed.

The ED's negative determination states that SCEA failed to cite an applicable environmental regulation being met or exceeded by the installation of the raw water pretreatment system. The ED further states that the system is necessary for the generation of electricity.

In the application, SCEA cited Title 30 Texas Administrative Code, Chapter 288 as the specific environmental rule or regulation that is met or exceeded by the installation of the raw water pretreatment system. Citing an entire chapter, but not a specific rule or rules within that chapter, is not sufficient to satisfy 30 TAC § 17.4. However, SCEA's appeal is more specific and states that the property was installed to meet or exceed regulatory requirements including Texas Water Code (TWC) § 11.1271 and 30 TAC §§ 288.3 and 288.7.

SCEA asserts that the ED's negative use determination has no basis in fact or Texas law because the ED's determination letter offers no support for the conclusion that environmental regulations cited by SCEA are unsatisfactory. Also, SCEA asserts that the ED has failed to discern between TWC §§ 11.1271 and 11.1272, and this failure demonstrates that the negative use determination is arbitrary, capricious, and represents an abuse of discretion.

SCEA asserts the system is being installed to meet or exceed regulatory requirements found in TWC § 11.1271, 30 TAC § 288.3, and 30 TAC § 288.7. The fundamental question is whether installation of the raw water pretreatment system will meet or exceed any regulatory requirements cited by the Appellant. OPIC finds it will not.

Texas Water Code § 11.1271 requires an applicant for a new or amended water right to formulate and submit a water conservation plan and the adoption of reasonable water conservation measures.<sup>1</sup> SCEA's application and appeal contain nothing about SCEA being an applicant for a new or amended water right. Section 11.1271 is not applicable to SCEA and certainly does not require the installation of a raw water pretreatment system.

In the TCEQ rules regarding water conservation plans, § 288.3 concerns water conservation plans for industrial use and requires such plans to contain certain elements.<sup>2</sup> One of the required elements is specific, quantified five-year and ten-year goals for water savings.<sup>3</sup> However, the regulation explicitly states that these goals are not enforceable.<sup>4</sup> Under § 288.3, a water conservation plan must also address the application of state-of-the-art equipment or process modifications to improve water use efficiency.<sup>5</sup> This is a requirement to provide information in a water conservation plan, not a requirement to install specific equipment. In other words, SCEA's installation of a raw water pretreatment system is not necessary to meet or exceed any requirement found in § 288.3.

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<sup>1</sup> Texas Water Code § 11.1271(a).

<sup>2</sup> 30 TAC § 288.3(a).

<sup>3</sup> 30 TAC § 288.3(a)(3).

<sup>4</sup> *Id.*

<sup>5</sup> 30 TAC § 288.3(a)(6).

Finally, SCEA asserts that the raw water pretreatment system was installed to meet or exceed regulatory requirements found in 30 TAC § 288.7. Section 288.7 is entitled “Plans Submitted with a Water Right Application for New or Additional State Water.”<sup>6</sup> The rule requires a water conservation plan submitted with an application for a new or additional appropriation of water to include certain data and information.<sup>7</sup> Again, SCEA’s use determination application and appeal contain nothing about SCEA submitting a water right application for new or additional state water. SCEA has not submitted a water right application, and any requirements for a water conservation plan submitted with such an application are therefore not applicable to SCEA. Section 288.7 does not apply, and SCEA’s reliance on this rule is misplaced.

#### **IV. Conclusion**

To obtain a positive use determination, SCEA’s property must be used, constructed, or installed wholly or partly to meet or exceed Texas laws, rules, or regulations for the prevention, monitoring, control, or reduction of water pollution.<sup>8</sup> OPIC finds that Appellant’s raw water pretreatment system does not qualify. Of the three laws cited by Appellant, two concern water right applications and therefore do not apply unless SCEA is a water right applicant. The third law concerns water conservation plans for industrial use of water, but the installation of a raw water pretreatment system is not necessary to meet or exceed this law. Having considered each of the laws cited by Appellant, OPIC finds that SCEA has failed to show that the raw water pretreatment system is being installed to meet or exceed applicable legal requirements.

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<sup>6</sup> 30 TAC § 288.7.

<sup>7</sup> 30 TAC § 288.7(a).

<sup>8</sup> See 30 TAC § 17.4(a).

OPIIC respectfully recommends the Commission deny this appeal and affirm the ED's negative determination.

Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

By 

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## CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2011, 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.

  
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Garrett Arthur

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