

Bryan W. Shaw, Ph.D., *Chairman*  
Carlos Rubinstein, *Commissioner*  
Toby Baker, *Commissioner*  
Zak Covar, *Executive Director*



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

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

October 4, 2012

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

**RE: EN SERVICES, LP  
TCEQ DOCKET NO. 2012-1529-MIS-U**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanholm".

Amy Swanholm, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



**TCEQ DOCKET NO. 2012-1529-MIS-U**

<b>IN THE MATTER OF THE APPEAL</b>	<b>§</b>	<b>BEFORE THE</b>
<b>BY EN SERVICES, LP OF NEGATIVE</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>USE DETERMINATION</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>
<b>NO. 08-12696</b>	<b>§</b>	

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

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

The Office of the Public Interest Counsel (OPIC) files this response to the appeal by EN Services LP on behalf of Entergy Power Ventures LP., Northeast Texas Electric Cooperative, and East ATexas Electric Cooperative, (EN Services or Appellant) of the negative use determination issued by the Executive Director (ED).

**I. INTRODUCTION**

In July 2008, EN Services submitted a Tier IV use determination application to the Texas Commission on Environmental Quality (TCEQ). EN Services sought use determinations for two thermally efficient heat recovery steam generators (HRSG) associated with electric power generation at the Harrison County Power Project in Marshall, Harrison County, Texas. The application describes the property as using combined-cycle technology to power two combustion turbines. These turbines are routed to two heat recovery steam generators where the steam is then used to turn a steam turbine and generate additional electricity.

On July 10, 2012, the ED issued a negative use determination for the facility, stating that HRSGs are used solely for production and are not considered pollution control equipment. On July 31, 2012, EN Services appealed the ED's negative use determination for the two HRSG units.

## **II. APPLICABLE LAW**

### **A. Legislative History**

On November 2, 1993, Texas voters approved a constitutional amendment exempting certain pollution control property/equipment from property taxation. This amendment added Section (§) 1-1 to Article 8 of the Texas Constitution. Legislation to implement the amendment was approved in House Bill (HB) 1920, 73rd Texas Legislature, 1993. This legislation added Texas Tax Code (TTC) § 11.31. The intent of the constitutional amendment was to ensure that capital expenditures undertaken to comply with environmental rules did not increase a facility's property taxes. The 77th Texas Legislature, 2001, amended Texas Tax Code (TTC) §11.31 to require the TCEQ to adopt specific standards for evaluating applications and create a formal procedure to allow applicants or appraisal districts to appeal a final determination.

The 80th Legislature, 2007, amended TTC, §11.31 by adding three new subsections. The first change required the TCEQ to adopt a nonexclusive list of property/equipment that included a list of 18 different categories, i.e., the Expedited Review List that is specified in 30 TAC §17.17(b). The second change required that the list be reviewed at least once every three years and established a standard for removing property/equipment from the list. The third change established a 30-day review period

for applications that contain only property/equipment listed on the Expedited Review List.

The 81st Texas Legislature, Regular Session, 2009, passed HB 3206 and 3544, amending TTC, §11.31 by adding two new sections. New section (g-1) requires that applications containing property/equipment adopted under TTC, §11.31(k) be reviewed using the methods and standards adopted under TTC, §11.31(g). New section (n) requires the establishment of a permanent advisory committee that is charged with advising the commission on the implementation of TTC, §11.31. In addition, the legislation corrected the agency's name in the statute and allowed for electronic appraisal district notifications as required by TTC, §11.31(d).

On November 18, 2010, the TCEQ adopted changes to 30 TAC Chapter 17 to establish procedures and mechanisms for obtaining a use determination required to implement the amendments to TTC, §11.31 by HB 3206 and HB 3544, 81st Texas Legislature, Regular Session, 2009.

### **B. 30 Texas Administrative Code Chapter 17**

The rules state that 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 Tier I Table), predetermined as used wholly for pollution control purposes. 30 TAC § 17.14. In addition, there are three 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 the Tier I table; 30 TAC § 17.2(8)

Tier II- An application for property that is used wholly for the control of air, water, and/or land pollution, but is not located on the Tier I Table in §17.14(a); 30 TAC § 17.2(9)

Tier III- An application for property used partially for the control of air, water, and/or land pollution and that does not correspond exactly to an item on the Tier I Table in §17.14(a); 30 TAC § 17.2(10)

In addition, a Tier III partial use determination “submitted for all property that is either not on the Tier I Table located in §17.14(a) of this title (relating to Tier I Pollution Control Property), or does not fully satisfy the requirements for a 100% positive use determination.” 30 TAC § 17.17(a). To calculate partial use for Tier III applications, the cost analysis procedure (CAP) in 30 TAC § 17.17(c) must be used. *Id.* If the cost analysis procedure produces a negative number or a zero, the property is not eligible for a positive use determination. 30 TAC § 17.17(d).

Under § 17.25, an appellant 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). The general counsel may remand a matter from the commission’s agenda to the executive director if the executive director or the public interest counsel requests a remand. 30 TAC § 17.25(d).

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(f)(A) and (B). This determination may be appealed. 30 TAC § 17.25(f)(2). If the Commission denies

the appeal and affirms the use determination, this decision is final and appealable. 30 TAC § 17.25(e)(3).

### III. REQUIREMENTS FOR APPEAL

Under § 17.25, an appellant has 20 days to appeal a use determination issued by the ED. 30 TAC § 17.25(a)(2)(A) and (B). The Appellant submitted its appeal of the ED's July 10, 2012 use determination within the 20 day deadline. Therefore this appeal is timely and may be considered by the Commission.

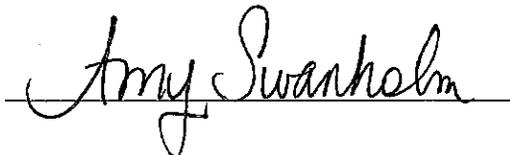
An appeal filed under Chapter 17 shall, among other things, "explain the basis for the appeal" of the ED's use determination. 30 TAC § 17.25(b)(5). Appellant has failed to state any basis for its appeal. Appellant has not met the threshold requirements of for the form and timing of an appeal under Chapter 17, therefore OPIC recommends denial of this appeal.

### IV. CONCLUSION AND RECOMMENDATION

OPIC recommends the Commission deny this appeal, as the Appellant has not met the requirements of 30 TAC § 17.25(b).

Respectfully submitted,

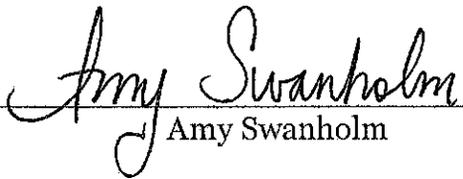
Blas J. Coy, Jr.  
Public Interest Counsel

By 

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 4, 2012, 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.

  
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Amy Swanholm

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