



Harris County Appraisal District

13013 Northwest Freeway
Houston TX 77040
Telephone: (713) 812-5800

P.O. Box 920975
Houston TX 77292-0975
Information Center: (713) 957-7800

Legal Services Division

August 7, 2014

Via Electronic Filing

Texas Commission on Environmental Quality
Office of the Chief Clerk (MC 105)
Austin, Texas 78711-3087

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Re: Appeal of the Executive Director's Use Determination regarding EIF Channelview Cogeneration, LLC's Use Determination Application No. 12826, TCEQ Docket No. 2012-1683-MIS-U

Dear Chief Clerk:

Attached for electronic filing, please find a copy of Harris County Appraisal District's Response Brief to the Appeal by EIF Channelview Cogeneration, LLC, as referenced above.

Best regards,

Robert "Bobby" Preisler
Legal Counsel

TCEQ DOCKET NO. 2012-1683-MIS-U

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|-----------------------------|---|-----------------------|
| APPEAL OF THE EXECUTIVE | § | BEFORE THE |
| DIRECTOR'S NEGATIVE USE | § | |
| DETERMINATION REGARDING EIF | § | TEXAS COMMISSION ON |
| CHANNELVIEW COGENERATION | § | |
| LLC'S USE DETERMINATION | § | ENVIRONMENTAL QUALITY |
| APPLICATION NO. 12826 | | |

**HARRIS COUNTY APPRAISAL DISTRICT'S RESPONSE BRIEF TO EIF
CHANNELVIEW COGENERATION, LLC'S APPEAL OF THE EXECUTIVE
DIRECTOR'S NEGATIVE USE DETERMINATION ON APPLICATION NO. 12826**

TO THE HONORABLE COMMISSIONERS:

Harris County Appraisal District (hereinafter "HCAD") files this Response Brief to the appeal of the Executive Director's Negative Use Determination on Application No. 12826, as submitted by EIF Channelview Cogeneration LLC (hereinafter "Appellant"), for the Channelview Cogeneration Facility located at 8580 Sheldon Road, Houston, Harris County, Texas.

I. Background

On July 10, 2012, the Executive Director of the Texas Commission on Environmental Equality (hereinafter the "Director") issued a Negative Use Determination for Use Determination Application No. 12826 concerning heat recovery steam generators and steam turbines. Subsequently, Appellant appealed that decision. On December 10, 2012, the Texas Commission on Environmental Equality (hereinafter "TCEQ") set aside the Director's negative use determination and remanded Appellant's application to the Director for a new use determination. On June 5, 2014, the Director once again issued a negative use determination. Appellant, once again, appeals. On July 21, 2014, HCAD received a notice of the appeal, dated July 16, 2014,

from the TCEQ. The notice advises that response briefs are due on or before 5:00pm on Friday, August 8, 2014 in the Commission's Office of Chief Clerk.

II. Analysis of Property Tax Exemption Statutes

According to the Supreme Court of Texas "...exemptions from taxation are not favored by the law and will not be favorably construed."¹ The Court has further stated, "Statutory exemptions from taxation are subject to strict construction because they undermine equality and uniformity..."² That being the case, the Court has determined that "...the burden of proof of clearly showing that the organization falls within the statutory exemption is on the claimant."³ The exemption at issue in this case is found in Section 11.31 of the Texas Property Tax Code. Based on the Texas Supreme Court's instructions outlined above, the Texas Commission on Environmental Equality, in its determination of this appeal, should strictly construe Section 11.31 against the granting of the exemption, unless the Appellant meets its burden.

III. Response to Appeal

In its appeal, the Appellant makes two arguments: (1) it is irrelevant whether or not heat recovery steam generators (hereinafter "HRSGs") are used to meet or exceed environmental laws as required by Section 11.31, Texas Property Tax Code (hereinafter "Tax Code"), and (2) the Director should not be allowed to reject Appellant's "avoided emissions approach" methodology in calculating the HRSGs partial determination, and should not be allowed to adopt the cost analysis procedure methodology as it will always result in a negative result.

¹ North Alamo Water Supply Corporation v. Willacy County Appraisal District, et al, 804 S.W. 2d 894, 899 (Tex. 1991).

² Id.

³ Id.

A. HRSGs Must be Used to Meet or Exceed Environmental Laws

Appellant's first argument incorrectly states that the Director's finding that its HRSGs are not used to meet or exceed any of the environmental laws cited in its application is of no consequence. According to Subsection 11.31(a), Tax Code, "[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.*"⁴ The italicized portion of the statute is then defined in Subsection 11.31(b), Tax Code, as "...any structure, building, installation, excavation, machinery, equipment, or device ... that is 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, [Texas], or a political subdivision of [Texas]* for the prevention, monitoring, control, or reduction of air, water, or land pollution."⁵ Therefore, for the Appellant's HRSGs to be considered pollution control property, and as such entitled to the exemption, they must be "...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, [Texas], or a political subdivision of [Texas]* for the prevention, monitoring, control, or reduction of air, water, or land pollution."⁶ This prerequisite is not irrelevant but instead mandatory.

⁴ Tex. Prop. Tax Code § 11.31(a) (WESTLAW current through 2013) (emphasis added).

⁵ Tex. Prop. Tax Code § 11.31(b) (WESTLAW current through 2013) (emphasis added).

⁶ *Id.*

The TCEQ, as required by Subsection 11.31(g), Tax Code, has established rules to effectuate its use determination process.⁷ These rules are found in the Texas Administrative Code (“TAC”).⁸ Subsection 17.15(b), TAC, provides a Decision Flow Chart that must be used for making use determinations on property such as Appellant’s HRSGs.⁹ The final determination that the Director must make according to the flow chart is whether the equipment is installed in order to meet or exceed an adopted environmental rule or regulation (see Attachment 1). According to the Director’s June 5, 2014 Use Determination Letter, he answered that question in the negative and was required to issue a negative use determination pursuant to 17.15(b), TAC, and Subsection 11.31(h), Texas Tax Code.¹⁰

Appellant contends that since HRSGs are listed in Subsection 11.31(k), Tax Code, the Legislature has determined that they meet or exceed environmental laws as a matter of law and that citation to an environmental law is unnecessary. That being the case, according to the Appellant, Subsection 11.31(m), Tax Code, relieves it of the “obligation to demonstrate functionality [or purpose] in meeting or exceeding any environmental rules.”¹¹ This cannot be the case. Subsection 11.31(m) of the Texas Tax Code States:

Notwithstanding the other provisions of this section, if the facility, device, or method for the control of air, water, or land pollution described in an application for an exemption under this section is a facility, device, or method included on the list adopted under

⁷ “The commission shall adopt rules to implement this section.” Tex. Prop. Tax Code § 11.31(g) (WESTLAW current through 2013).

⁸ 30 Tex. Admin. Code § 17 (2008).

⁹ “For applications containing only property located in Part B of the figure in §17.14(a) of this title (relating to Equipment and Categories List), the Part B Decision Flow Chart shall be used for each item or process to determine whether the particular item will qualify as pollution control property. The executive director shall apply the standards in the Part B Decision Flow Chart when acting on an application containing only property which is listed in Part B of the Equipment and Categories List.” 30 Tex. Admin. Code § 17.15(b) (2008).

¹⁰ “The executive director may not make a determination that property is pollution control property unless the property meets the standards established under rules adopted under this section.” Tex. Prop. Tax Code § 11.31(h) (Westlaw 2013).

¹¹ EIF Channelview Cogeneration, LLC’s Appeal of Notice of Negative Use Determination at 2.

Subsection (k), the executive director of the Texas Commission on Environmental Quality, not later than the 30th day after the date of receipt of the *information required by Subsections (c)(2) and (3)* and without regard to whether the information required by Subsection (c)(1) has been submitted, shall determine that the facility, device, or method described in the application is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution and shall take the actions that are required by Subsection (d) in the event such a determination is made.¹²

According to Subsection 11.31(m), Tax Code, if a use determination application is submitted to the Director for an item listed in Subsection 11.31(k), Tax Code, the applicant must submit information required under “...Subsections (c)(2) and (3)...”¹³ Subsection 11.31(c)(3), Tax Code, requires the applicant to submit information detailing “the *purpose* of the installation of such facility, device, or method...”¹⁴ The purpose that each item of property entitled to an exemption under Section 11.31, Tax Code (which has been spelled out by the Legislature in Subsection 11.31(b), Tax Code), must be that it is “...used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental 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,”¹⁵ and whether an item listed under Subsection 11.31(k), Tax Code, fulfills this purpose is a decision left to the Director.¹⁶

B. The Director Is Not Required to Accept Appellant’s “Avoided Emissions Approach”

Appellant’s second argument complains of the Director’s rejection of its proposed methodology for calculating the partial use determination. The Appellant is correct that under Subsection 17.17(d), TAC, the Appellant was required to propose a reasonable method for

¹² Tex. Prop. Tax Code § 11.31(m) (WESTLAW current through 2013) (emphasis added).

¹³ Id.

¹⁴ Tex. Prop. Tax Code § 11.31(c)(3) (emphasis added).

¹⁵ Tex. Prop. Tax Code § 11.31(b) (WESTLAW current through 2013).

¹⁶ Tex. Prop. Tax Code § 11.31(d) (WESTLAW current through 2013) and 30 Tex. Admin. Code § 17.15(b) (2008).

determining the partial use determination but once proposed, it was the responsibility of the Director to review the proposed method and make a final determination.¹⁷ In the present case, Appellant offered an “avoided emissions approach” which the Director reviewed and determined was not acceptable. Further, according to Subsection 17.17(e), TAC, “[i]f the cost analysis procedure *or* the method accepted by the Director under subsection [17.17](d) of this section produces a negative number or zero, the property is not eligible for a positive use determination.”¹⁸ Since there was no method accepted by the Director in this case, the Director applied the cost analysis procedure and found that it produced a negative number and as such it is not eligible for a positive use determination.

IV. Conclusion

Based on the foregoing and for the reasons stated herein, Harris County Appraisal District respectfully requests that the Commission deny EIF Channelview Cogeneration, LLC’s appeal, and uphold the Executive Director’s Negative Use Determination for Application No. 12826.

¹⁷ “For applications containing only property falling under a category listed in Part B of the Equipment and Categories List, located in §17.14(a) of this title (relating to Equipment and Categories List), a use determination must be calculated. It is the responsibility of the applicant to propose a reasonable method for determining the use determination percentage. It is the responsibility of the executive director to review the proposed method and make the final determination.” Tex. Admin. Code § 17.17(d) (2008).

¹⁸ Tex. Admin. Code § 17.17(e) (2008) (emphasis added).

Respectfully submitted,

By:



L. Susan Herrera
State Bar No. 09530160
Robert "Bobby" Preisler
State Bar No. 24070448
Legal Services Division
Harris County Appraisal District
P. O Box 920975
Houston, Texas 77292-0975
Telephone: (713) 957-5282
Telecopy: (713) 957-5210
ATTORNEY FOR,
HARRIS COUNTY APPRAISAL DISTRICT

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2014, an original of the Harris County Appraisal District's Response Brief was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, electronically at www.tceq.texas.gov/goto/eFilings, and that copies were also mailed to all other persons on the attached mailing list on the same day.



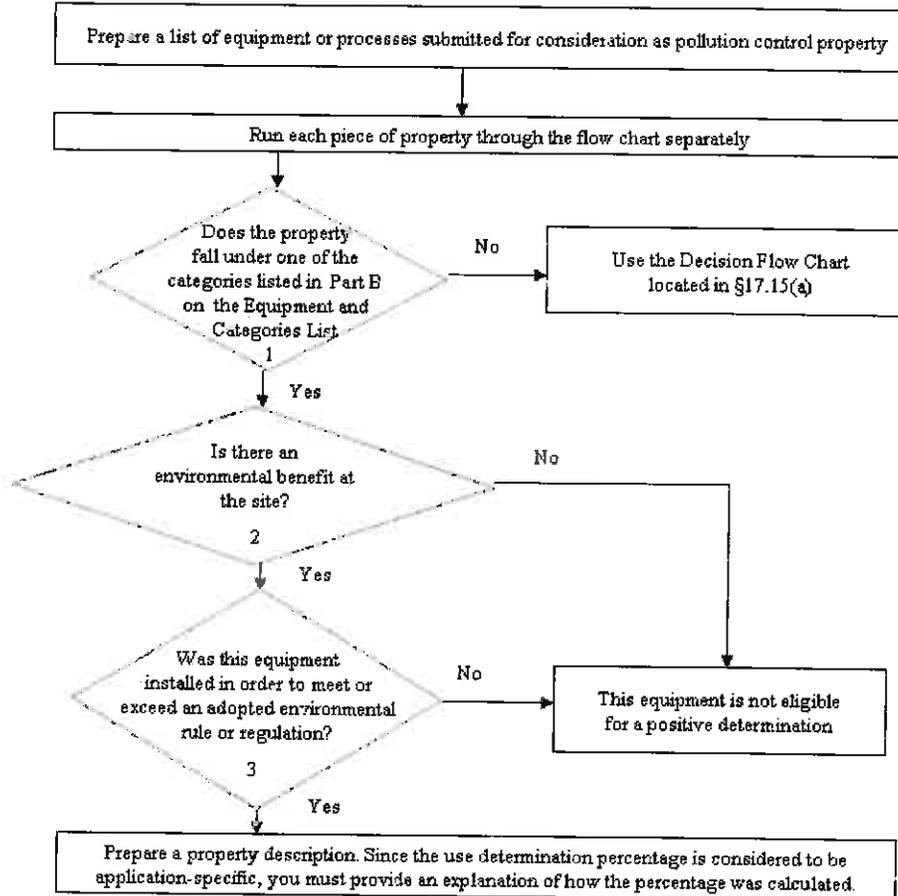
Robert "Bobby" Preisler

ATTACHMENT 1

Figure: 30 TAC §17.15(b)

PART B DECISION FLOW CHART

For Applications Containing Only Equipment listed in Part B on the
Equipment And Categories List



Where:

1. Determine if the property is listed in Part B on the Equipment and Categories List. If not, then use the Decision Flow Chart located in §17.15(a).
2. Is there an environmental benefit at the site? If the answer is no then the property is not eligible for a positive use determination.
3. Determine if the equipment was installed in order to meet or exceed an adopted environmental rule or regulation. If the answer is no then the property is not eligible for a positive use determination.