

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

GIM CHANNELVIEW COGENERATION LLC'S REPLY BRIEF

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Mere weeks before GIM Channelview Cogeneration LLC ("Channelview") filed an Application for Use Determination No. 12826 ("Application") for its four heat recovery steam generators ("HRSGs"), the Executive Director established a 61% partial positive use determination as appropriate for HRSGs. Accordingly, Channelview requested precisely that determination. In an abrupt change of course and with no explanation, however, the Executive Director issued a Negative Use Determination for Channelview's HRSGs. The Executive Director has not provided the reasoned basis required by law for rejecting the 61% partial positive use determination that it established for HRSGs, and so the Commission should remand the Negative Use Determination to the Executive Director for a new determination that accords with past Agency practice. *See* TEX. TAX CODE § 11.31(e); 30 TEX. ADMIN. CODE § 17.25(e)(2).

I. Channelview's Application Proposed a Reasonable Method for Determining the Use Determination Percentage.

At the time Channelview submitted the Application, it was the "responsibility of the [Tier IV] applicant to propose a reasonable method for determining the use determination percentage," and "the responsibility of the executive director to review the proposed method and make the final

determination.” 30 TEX. ADMIN. CODE § 17.17(d). Channelview had to look no further than the Executive Director’s own proposed methods, announced just weeks earlier.

Because HRSGs provide both pollution control and production advantages relative to turbine-based power generation without HRSGs, the Executive Director in 2008 assembled a Workgroup comprised of industry applicants, appraisal districts, and environmental and public interest groups “to assign an appropriate percentage to the pollution control aspect of the HRSGs, while taking into account the production gain associated with their installation.” *See* Executive Director’s Response Brief to Rusk County, Freestone Central, Hutchinson County, Fort Bend Central, Brazoria County, and Wharton County Appraisal Districts’ Appeals of the Executive Director’s Use Determinations, Docket No. 2008-0830-MIS-U *et al.*, at 10 (“ED’s 2008 Response”). The Executive Director ultimately decided on a positive use determination of 61% for the installation of HRSGs in a combined cycle facility. *Id.* at 10-11 (“The thermal efficiency increase or production gain derived from the installation of a HRSG is approximately 39%. . . . Based on this production value, the pollution control percentage of a HRSG installed at a combined-cycle facility is 61%. Staff is therefore recommending a positive use determination of 61% for the installation of a HRSG in a combined cycle facility.”). This recommendation accords with the Legislature’s and TCEQ’s recognition that HRSGs are eligible for partial positive use determinations. *See* H.B. 3732 (80th Leg., 2007), codified at TEX. TAX CODE § 11.31, and 30 TEX. ADMIN. CODE § 17.14(a) Tbl. Part B.

In fulfilling its charge to propose a reasonable method for determining the use determination percentage, Channelview looked to the Executive Director’s 2008 recommendation as the “reasonable method for determining the use determination percentage” for its HRSGs. But now the Executive Director, ignoring the Legislature’s and his own prior recognition that HRSGs are eligible

for partial positive use determinations, has summarily rejected the Application and Channelview's method for determining the use determination percentage, simply asserting that "[h]eat recovery steam generators . . . are used solely for production."

II. The Executive Director's Explanation of His Position Reversal is Inadequate.

The Executive Director's abrupt position reversal is not supported by a reasoned basis; in fact, the Executive Director's letter denying the Application provides no explanation at all. This is unlawful.

An agency must explain its reasoning when it appears "that [it] has departed from its earlier administrative policy or there exists an apparent inconsistency in agency determinations." *See City of El Paso v. El Paso Elec. Co.*, 851 S.W.2d 896, 900 (Tex. App.—Austin 1993, writ denied); *see also Harris County Hosp. Dist. v. PUC of Tex.*, 2012 Tex. App. LEXIS 5707, at 21 (Tex. App.—Austin 2012, no pet.). This is so because an "alteration or reversal [of an agency's prior position] must be accompanied by some reasoning – some indication that the shift is rational, and therefore not arbitrary and capricious." *See Flores v. Employees Ret. Sys. of Tex.*, 74 S.W.3d 532, 545 (Tex. App.—Austin 2003, pet. denied) (*citing Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Comm'n*, 59 F.3d 284, 291 (1st Cir. 1995)). In fact, it is an "elemental tenet[] of administrative law" that "if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." *See Miner v. F.C.C.*, 663 F.2d 152, (D.C. Cir. 1980).¹ The negative use determination at issue in this appeal says nothing at all in its own defense.

¹ The Executive Director and OPIC agree with Channelview that an administrative agency may be called upon to explain its reasoning for departing from an earlier administrative policy or if there exists an inconsistency in agency determinations. *See* Executive Director's Response to the Appeals Filed on the Negative Use Determination for the Heat Recovery Steam Generator Applications, at 15; *see* OPIC Response to Appeal of Negative Use Determination, at 12.

The response brief filed in defense of that determination says little more. Although the Executive Director does provide three primary justifications in his response brief to defend the Negative Use Determination—that HRSGs are used wholly for production purposes, that HRSGs provide no environmental benefits, and that HRSGs are not installed to comply with environmental rules—none of the justifications are supported by a reasoned basis or any identified evidence, and are refuted by the Executive Director’s prior statements and conclusions.

1. HRSGs Are Not Used Wholly For Production Purposes, But for Pollution Control, As Well.

The Executive Director does not dispute that a turbine-based electric generating unit without heat recovery generates more emissions per unit of power output than does one with a HRSG. Absent the installation of HRSGs, the additional emissions associated with the production of an additional 250 MWe would have to occur at the Channelview facility. *See* Application, at 6-7 (using thermodynamic property equations to calculate the equivalent amount of power that would be lost if HRSGs were not installed at the Channelview facility). Not only would additional emissions associated with the production of an additional 250 MWe result absent installation of HRSGs, but emissions would be much higher on a unit of power production basis.² Rather than burn more fossil fuel in additional pollution-emitting sources, the HRSGs provide a mix of production *and* pollution control that achieves both environmental and economic efficiencies.

While recognizing this significant emissions advantage to HRSG installation, the Executive Director declines to credit it. He characterizes this as “emissions avoidance,” ultimately concluding that he “has never recognized emissions avoidance as pollution control” and that HRSGs only

² For example, NO_x emissions at the Barney Davis Power Plant dropped from roughly 0.0010 tons/MWh to 0.0001 tons/MWh after installation of HRSGs. *See* Appeal of Negative Use Determination Issued to Topaz Power Group, LLC, TCEQ Docket No. 2012-1559-MIS-U, at Exhibit D.

remove heat, which is not a regulated pollutant. *See* Executive Director’s Response to the Appeals Filed on the Negative Use Determination for the Heat Recovery Steam Generator Applications, at 8 (“ED’s Response”). But “emissions avoidance” is a synonym for “emissions prevention,” which the Commission’s rules expressly accept as “pollution control”: “[E]nvironmental benefit” mean[s], in part, “[t]he prevention . . . of air . . . pollution” and, “for the purpose of [Chapter 17], the terms ‘environmental benefit’ and ‘pollution control’ are synonymous.” 30 TEX. ADMIN. CODE § 17.2(4). Therefore, the phrase “*pollution control* property,” as used repeatedly in TCEQ’s tax relief rules, encompasses property that is used to prevent air pollution. Further, HRSGs are installed not to just remove heat, as the Executive Director argues, but to serve as a fuel substitute—effectively and substantially *reducing* and *preventing* additional emissions of the regulated pollutant NO_x. Accordingly, the characterization of HRSGs as effecting “emissions avoidance” only affirms Channelview’s eligibility for tax relief.

The Executive Director also defends the Negative Use Determination by taking the position that HRSGs “do[] not remove air contaminants in the same manner that a traditional pollution control device does” and are not “installed in lieu of traditional control devices” like low NO_x burners. *See* ED’s Response, at 8. True, but irrelevant. The Texas Constitution and the Texas Tax Code exempt from 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.” Tex. Const. Art. 8, sec. 1-l; TEX. TAX CODE § 11.31. No requirement mandates that, to be eligible for tax relief, pollution control property must be “traditional” in any sense of the word or installed in lieu of traditional control equipment.

Indeed, the Attorney General has opined that Section 11.31 of the Tax Code is “broadly written” and its plain meaning clear: “It embraces *any* property, real or personal, ‘that is used *wholly or partly* as a *facility, device, or method* for the control of air, water, or land pollution.” Op. Att’y Gen. JC-0372, at 5 (2001) (emphasis added). In that opinion, the Attorney General specifically addressed whether “pollution-reducing production equipment,” like a HRSG, should be treated differently than more traditional “add-on” control equipment. On the one hand, the Attorney General found that the term “wholly” in Section 11.31 of the Tax Code does refer to property that is used only for pollution control, such as an add-on device. *Id.* at 6. On the other, “[t]he term ‘partly’ embraces property that has only *some* pollution-control use . . . [and] this broad formulation clearly embraces more than just add-on devices.” *Id.* Further, “[t]his broad formulation clearly embraces not only ‘facilities’ and ‘devices’ but also ‘methods’ that prevent, monitor, control, or reduce pollution,” with methods being “an extremely broad term that clearly embraces means of production designed, at least in part, to reduce pollution.” *Id.* The Attorney General’s opinion, unlike the Executive Director’s, accords with the statute’s purpose of rewarding investment in lower pollution: HRSGs lead to reduced combustion, in some cases resulting in alleviating the need for “traditional” add-on devices altogether.

2. The Installation of HRSGs Results in Environmental Benefits and Contributes to Compliance with NOx Emissions Limitations

Another of the Executive Director’s positions is that there is no environmental benefit associated with the installation of HRSGs and that HRSGs were not installed in order to meet or exceed an environmental rule. *See* ED’s Response, at 10. That position is not supported by facts or any identified evidence.

The Executive Director is specifically authorized to make a use determination for certain property, such as HRSGs, “without regard to whether the [anticipated environmental benefit]

information required by Subsection [11.31](c)(1) has been submitted.” See TEX. TAX CODE § 11.31(m).³ But even if the Executive Director were required by statute to consider anticipated environmental benefits of HRSGs in making use determinations, Channelview adequately provided that information in its Application: The very definition of “environmental benefit” in TCEQ’s tax relief rules includes prevention of air pollution and, absent the installation of HRSGs, additional emissions associated with the production of an additional 250 MWe would have to occur at the Channelview facility. This explains why, weeks before Channelview submitted its Application in 2008, the Executive Director concluded that HRSGs provide environmental benefits “by acting as a fuel substitute, . . . eliminating the need for the additional burning of hydrocarbon-based fuel to obtain the same increase in electrical energy generation at the site” See ED’s 2008 Response, at 11. Nothing offered in the Executive Director’s response brief, or in the technical review documents associated with the Negative Use Determination, undermines this conclusion.

Further, the Executive Director now takes the position that because Channelview has not cited to a rule that specifically requires the installation of a HRSG, no nexus exists between the

³ The Harris County Appraisal District takes the position that Channelview must adequately detail anticipated environmental benefits as a prerequisite to obtaining a positive partial use determination because it believes Subsection (m) applies only when an application for an exemption has been submitted to the appraisal district, and not to the TCEQ. See Harris County Appraisal District’s Response Brief to GIM Channelview, LLC’s Appeal of the Executive Director’s Negative Use Determination on Application No. 12826, at 3 (“Harris County Response”). And because Channelview has not submitted that application yet, the argument goes, Subsection (m) does not apply to Channelview. The Harris County Appraisal District misreads the statute.

First, the “application for an exemption” referenced in Subsection (m) is the application for a use determination submitted to TCEQ. Subsection (m) describes that application as “an application for an exemption *under this section*”—Section 11.31(m). A separate section of the Tax Code lays out the requirements for subsequently filed applications for exemptions submitted to appraisal districts. See TEX. TAX CODE § 11.43.

Second, Harris County’s reading would make Subsection (m) nonsensical, because no applicant would submit an application for an exemption to an appraisal district prior to submitting an application for a use determination to TCEQ, or prior to actually receiving a positive use determination. This is because a use determination is far more than merely an “asset characterization.” see Harris County Response at 3. Rather, it is determinative: Once the Executive Director issues a positive use determination, “[t]he chief appraiser *shall accept* a final determination by the executive director as conclusive evidence that the facility, device, or method is used wholly or partly as pollution control property. See TEX. TAX CODE § 11.31(i) (emphasis added). Thus, Channelview’s plain reading of subsection (m) accords perfectly with its common-sense reading.

installation of a HRSG and an environmental rule. *See* ED's Response, at 11. This, in spite of his conclusion in 2008 that HRSGs were installed in order to meet or exceed an environmental rule adopted to control NOx emissions as specified by 40 CFR § 60.44Da and 30 Tex. Admin. Code § 106.512.⁴ *See* ED's 2008 Response, at 11. The Executive Director's new position that an environmental rule must specifically require the installation of a HRSG or that there must be a generally applicable efficiency standard that could only be met by installation of a HRSG is an ad hoc overlay on the Tax Code's tax exemption scheme that has no basis in statute or rule.

III. There Is No Reasoned Basis for the Executive Director's Rejection of Channelview's Method for Determining the Use Determination Percentage.

Because the Executive Director has recommended a 61% partial positive use determination for HRSGs in the past, and because the Executive Director has not articulated an adequate, factual, and considered explanation for its position reversal, TCEQ approval of the Executive Director's Negative Use Determination for Channelview's HRSGs would be arbitrary and capricious. *See, e.g., Harris County Hosp. Dist.*, 2012 Tex. App. LEXIS 5707, at 19-20 (holding that the PUC's failure to follow its own rules and precedent was arbitrary and capricious). An administrative agency acts arbitrarily and capriciously when it fails to consider a factor that the Legislature has directed it to consider, makes a decision without regard to facts, relies on findings not supported by evidence, or if otherwise there does not appear to be a rational connection between the facts and the decision. *City of Waco v. Tex. Comm'n on Envtl. Quality*, 346 S.W.3d 781, 819 (Tex. App.—Austin 2011, pet. denied). Since the Executive Director's position reversal was undertaken without regard to identified facts and because there is no rational connection between the facts and the decision, it

⁴ Notably, in Channelview's case, the installation of HRSGs also helps the facility comply with the allowable amount of NOx emissions in the Houston-Galveston-Brazoria ozone non-attainment area, as specified by 30 Tex. Admin. Code § 117.1205.

would be arbitrary and capricious for the Commissioners to deny Channelview's appeal and affirm the Executive Director's Negative Use Determination.

The Harris County Appraisal District has taken the position that "Channelview wishes to complain of methodologies and calculations that would apply only if the subject property were not used solely for production," and that "Channelview injects an unauthorized reasonableness standard upon the Executive Director and an unauthorized requirement for the Executive Director to articulate flaws in the property owner's calculations." *See* Harris County Appraisal District's Response Brief to GIM Channelview, LLC's Appeal of the Executive Director's Negative Use Determination on Application No. 12826, at 5. This misstates Channelview's position, supported by case law, which is that an administrative agency's change in position needs to be adequately explained. This is especially true in this context, because the Legislature intended for the Executive Director's use determinations to be "equal and uniform," *see* TEX. TAX CODE § 11.31(g)(2); H.B. 3121 (77th Leg., 2001); 33 Tex. Reg. 932 (Feb. 1, 2008), a statutory directive that undercuts the Executive Director's argument that Channelview's Negative Use Determination is not "generally applicable." *See* ED's Response, at 17. Because the outcome of the Executive Director's position reversal is not equal and uniform relative to its past decisions, TCEQ approval of the Executive Director's Negative Use Determination would not only be arbitrary and capricious, but would also run counter to Legislative intent.

IV. The Commissioners Should Remand the Negative Use Determination

The Executive Director has not adequately explained his position reversal and, as explained above, he cannot do so in a way that rationally connects facts to the decision. Channelview asks that the Commissioners remand this matter to the Executive Director for a new determination that accords with past Agency practice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2012, the foregoing document was electronically filed with the TCEQ Chief Clerk, and copies were served to all other parties listed below via email or certified mail, return receipt requested.

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