

Bryan W. Shaw, Ph.D., *Chairman*  
Carlos Rubinstein, *Commissioner*  
Toby Baker, *Commissioner*



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

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

September 14, 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: SALADO AT WALNUT CREEK PARTNERS, LLC  
TCEQ DOCKET NO. 2012-1696-MIS-U**

Dear Ms. Bohac:

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

Sincerely,

  
Eli Martinez, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

**TCEQ DOCKET NO. 2012-1696-MIS-U**

<b>APPEAL OF THE EXECUTIVE</b>	<b>§</b>	<b>BEFORE THE</b>
<b>DIRECTOR'S USE DETERMINATION</b>	<b>§</b>	
<b>REGARDING SALADO AT WALNUT</b>	<b>§</b>	
<b>CREEK PARTNERS, LLC</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>WATERSBEND APARTMENTS USE</b>	<b>§</b>	
<b>DETERMINATION, APPLICATION</b>	<b>§</b>	
<b>NO. 15502</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</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 the Public Interest Counsel (OPIC) files this response to the appeal by Salado at Walnut Creek Partners, LLC Watersbend Apartments (Salado or Appellant) of the Executive Director's (ED) use determination on Application No. 15502 regarding the first floor units of Appellant's apartment complex.

**I. Introduction and Background**

a. Site History

Appellant owns the Salado at Walnut Creek Apartment Complex (the complex) located at 2104 East Anderson Lane, Austin, Texas, on the east side of Highway 183, approximately ¼ miles west of the intersection of Highway 290 and Highway 183. This site was the locus of "Little Walnut Creek Landfill," also known as the "Brinkley-Anderson Landfill," which was originally operated as a county dump between 1950 to 1960 before being converted into a landfill by the City of Austin from 1960 to 1968, when it was abandoned. The complex was constructed in 1984 over 14.09 acres, consisting of 25 multi-story apartments buildings.

A 1991 environmental site assessment report included a site-wide soil and gas measurement investigation which showed high concentrations of methane gas in two areas under the site, which raised health hazards and safety concerns due to the possibility of methane gas migration into the apartments, as well as structural safety due to the differential settlement of the

under-slab soil. In 1992 the Texas Department of Health, Texas Water Commission, and the City of Austin ordered the residents evacuated and the apartments closed due to the imminent health and safety hazards created by the migration of methane gas in the living areas. A 1993 study conducted by Raba-Kistner-Brytest Consultants, Inc., indicated that positive gas pressure existed in the landfill mass, and the presence of methane gas in the living areas of some of the apartments indicated that a pathway existed.

In September of 1994 the Rio Vista Apartments LLC (Rio Vista) purchased the complex. In anticipation of this acquisition, Rio Vista entered into negotiations with the Texas Natural Resource Conservation Commission (TNRCC), Texas Department of Health (TDH), Travis County, and the City of Austin to arrange for remediation, rehabilitation, and rehabilitation of the complex. A Site-Specific Comprehensive Assessment/Remediation Plan (CARP) for the soil and gas was approved by the TNRCC on April 19, 1995. The site was subsequently admitted to the TNRCC's Voluntary Cleanup Program (VCP) for the remediation work to be performed under the joint supervision of the VCP and the Municipal Solid Waste Division (MSW). On November 22, 1996 a Remedial Work Action Plan (RAWP) was approved for implementation, resulting in a Site-Specific Remedial Action Work Plan (SRAWP) that included, among other components:

1. The design and installation of ten Semi-Active Ventilation Systems (SAVS) in ten regions of the site, each consisting of a cluster of wells, venting pipes, and a Venturi-Tube Ejection System (VES).
2. The design and installation of an Active Gas Extraction System (AGES) for the under-slab spaces of all the buildings on the site.
3. Installation of methane gas detectors.

b. Applications for Use Determination

In November of 2007, Wells Fargo Bank, then-owner of the Salado at Walnut Creek Apartment Complex, submitted an application for a use determination to the Texas Commission on Environmental Quality for the following property:

Real Estate: 594,208 sq ft used for liners and cover system for landfill slurry walls, and surface impoundments. Site contains 2 stormwater retention ponds size 1,244 sq. ft. and 65,586 sq. ft. Property: Continuous emission monitors; liners

over landfill to restrict escape of wastes; semi-active gas extraction system for fugitive methane; methane monitoring and control equipment; two stormwater containment ponds; sloping of concrete surfaces for leachate collection and removal; landfill final cover system; groundwater monitoring wells; fugitive emissions containment structures; and building for active gas extraction system.

On April 10, 2007, the Executive Director of the TCEQ sent a letter to Wells Fargo indicating the outcome of his review:

A positive use determination for 100% of the two stormwater retention ponds real estate (1,224sf + 65,586 sf), continuous emission monitors; liners over landfill; semi-active gas extraction system; methane monitoring and control equipment; two stormwater containment ponds; sloping of concrete surfaces for leachate collection and removal; landfill final cover system; groundwater monitoring wells; fugitive emissions containment structures; and building for active gas extraction system. A negative determination for the 594,208 sq. ft. of real estate which is being used to house a commercial apartment complex.

In November 2010, Wells Fargo sold the apartment complex to Salado at Walnut Creek Partners LLC, who applied for a use determination on the same property by application submitted June 3, 2011. On July 13, 2012, the Executive Director determined that certain property included in the application was not eligible for a positive use determination in accordance with Title 30 Texas Administrative Code §17.4. Specifically, the first floors of the apartment buildings were deemed ineligible because they “do not control, monitor, or prevent air, water, or land pollution.” On August 1, 2012, Appellant submitted a timely brief appealing the negative use determination, arguing that Wells Fargo had been granted a positive determination for the first floor apartments in 2007, and that “no intervening factors or changes...account for the denial.”

Based on the limited information available, OPIC recommends that the Commission deny Salado’s appeal and affirm the executive director's negative use determination for the first floor units of the complex.

## **II. Applicable Law**

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. 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) that have been predetermined as wholly used for pollution control purposes when used as shown in the description section, and when no marketable product arises from using the property. 30 TAC § 17.14(a). If the executive director determines that the equipment is not being used in a standard manner (*e.g.*, use in production or recovery of a marketable product), the executive director may require that a Tier III application, using the Cost Analysis Procedure, be filed by the applicant to calculate the appropriate use determination percentage. *Id.*

Under § 17.25, an appraisal district or applicant has 20 days to appeal a use determination issued by the ED. 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.” § 17.25(e)(2). Should the Commission remand the use determination, the ED shall conduct a new technical review of the application that includes an evaluation of any information presented during the commission meeting, and upon completion of the technical review issue a new use determination. 30 TAC § 17.25(f)(1)(A) and (B). This determination is appealable under the same Chapter 17 procedures as the initial determination. 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. Analysis**

In the application submitted to the commission, Appellant describes the relevant property as a “fugitive emission containment structure and methane capture system.” Appellant states that the property consists of two components: the first component is the fugitive emission

containment structure and methane capture system itself—22 post-tension inverted concrete boxes that also serve as the first floor slab of the 22 buildings at the site. The second component is the first floor apartment units, which “provide the enclosed space for the continuous fugitive emission monitoring and detection system.” The Tier I Table or Expedited Review numbers listed in the application for this property are S-21 and M-12. Category S-21 refers to “fugitive emission containment structures,” described as “structures or equipment used to contain or reduce fugitive emissions or releases from waste management activities (e.g., coverings for conveyors, chutes, enclosed areas for loading and unloading activities).” Category M-12 refers to “methane capture equipment,” described as “equipment used to capture methane generated by the decomposition of waste material on site” where methane is sent to a control device rather than used.

OPIC finds that first floor apartment structures do not constitute qualifying property under either category S-21 or M-12. To the extent that the first floor apartment units are “containment structures” wholly constructed to contain or reduce fugitive methane emissions from waste management activities, a second evacuation and remediation plan is warranted. The AGES system built underneath the complex captures fugitive emissions so that they will not endanger the inhabitants of the first floor apartments. The AGES system has already been granted a positive use determination. This principle extends even more forcefully to the extent that the units would be considered “methane capture equipment.” The apartment units are intended as dwellings for habitation and should not be utilized as industrial fugitive emission management structures.

Appellant clearly uses the first floor apartment units to provide a service: housing for renters. The Texas Administrative Code specifies that property used, constructed, acquired or installed wholly to produce a good or provide a service is not eligible for a tax exemption.<sup>1</sup> Further, a Tier I exemption is intended for property used wholly for pollution control purposes, when no marketable product arises from using the property, and from which a marketable product is not recovered.<sup>2</sup> Apartment housing is a marketable product, and the units are not only part of that product, they are the product itself. To the extent the units may fall into either

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<sup>1</sup> 30 TAC §17.6.

<sup>2</sup> 30 TAC 17.14(a) & attached graphic.

category S-21 or M-12, they are otherwise not eligible for tax exemption under the commission's rules.

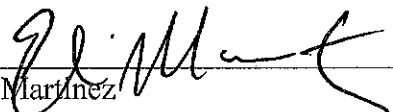
Lastly, Salado provides little argument to support its basis for appeal. The argument that "no intervening factors or changes... account for the denial" of the first floor apartment units does not address the merits of the application before the commission. Furthermore, Salado ignores the 2007 negative determination "for the 594,208 sq. ft. of real estate which is being used to house a commercial apartment complex." OPIC finds that this negative determination likely includes the first floor units, and that the position of the Executive Director has not changed—only the specificity of the language contained in the notice of use determination.

### III. Conclusion

OPIC finds that the ED correctly issued a negative use determination. OPIC recommends the Commission deny the appeal and affirm the executive director's use determination under 30 TAC § 17.25(e)(3).


Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 14, 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.

  
Eli Martinez



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