# Fax Transmittal

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| To: | Bridget C. Bohac, Chief Clerk | From: | Gerard Thompson |
| Co: | TCEQ | Dept: | Environmental Group |
| Tel: | 512-239-3300 | Tel: | 610-481-5154 |
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| Date: | June 24, 2013 | Subject: | Negative Use Determination Appeal |

Message: Please find attached our appeal of the Negative Use Determination for Application # 16632.



Number of pages (including this cover page): 14

If you have any difficulties with this transmission, please call 610-481-5154

AIR PRODUCTS

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24 June 2013

Bridget C. Bohac, Chief Clerk
Mail Code 105
TCEQ
P.O. Box 13087
Austin, TX 78711-3087

RE: Negative Use Determination Appeal
Air Products LLC

Dear Ms. Bohac:

In accordance with 30 TAC §17.25 this letter conveys our appeal of the Texas Commission on Environmental Quality's Negative Use Determination issued May 28, 2013.

1. Name, address, and phone number of the person filing the appeal:

Gerard Thompson
Air Products and Chemicals, Inc.
7201 Hamilton Blvd
Allentown, PA 18195-1501
610-481-5154

2. Name and address of the recipient who received the determination

Gerard Thompson
Air Products and Chemicals, Inc.
7201 Hamilton Blvd
Allentown, PA 18195-1501

3. The application number for the use determination

Application Number: 16632

4. A request that the commission reconsider the use determination

On behalf of Air Products LLC I ask that the Commission reconsider the use determination for our Carbon Capture and Sequestration system installed at our Port Arthur, TX facility.

5. An explanation for the basis of the appeal

In his Negative Use Determination the Executive Director did not address two of the central points of our argument:

A. The CCS System is entitled to at Least a Partial Positive Use Determination, because it is a Type of Equipment Listed in Subsection 11.31(k) of the Texas Tax Code. This point is essential since the Texas Legislature specifically instructed the TCEQ to consider items such as what we have installed. Further, the Environmental Protection Agency has promulgated regulations that hold greenhouse gases, including Carbon Dioxide to be pollutants and,

B. The CCS System Must Meet or Exceed a Rule or Regulation Adopted for the Prevention, Monitoring, Control, or Reduction of Pollution – Not a Rule or Regulation that Requires Collection and Sequestration of CO2. Said differently, APCI's Carbon Sequestration controls prevent pollution. The Commissioners have determined that pollution prevention is to be considered as well as control devices.

The attached document provides a more complete explanation of these arguments as well as their relationship to the elements of our application identified in the Executive Director's determination. That document is adopted by the Motion for Consideration/Appeal and incorporated in its entirety.

If you should have any questions or require additional information please contact me by telephone at 610-481-5154 or by e-mail at thompsgp@airproducts.com.

Sincerely,
Air Products and Chemicals, Inc.

Gerard Thompson
Environmental Group

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March 19, 2013

Texas Commission on Environmental Quality
Tax Relief for Pollution Control Property Program
MC-110
P.O. Box 13087
Austin, Texas 78711-3087

Re: Response to Notice of Technical Deficiency
Air Products, LLC
Air Products Port Arthur Plant
1801 South Gulfway Drive Gate 37
Port Arthur (Jefferson County)
Regulated Entity Number: RN101941284
Customer Reference Number: CN602299257
Application Number: 16632

Dear Mr. Goodin:

On behalf of Air Products and Chemicals, Inc. ("**Air Products**"), we are responding to the Texas Commission on Environmental Quality's ("**TCEQ**") Notice of Technical Deficiency dated January 24, 2013. Air Products submitted an Application for Use Determination on May 31, 2012, for equipment associated with carbon dioxide ("**$CO_2$**") capture, transportation, and sequestration monitoring and verification equipment installed in connection with the company's hydrogen production facility at 1801 South Gulfway Drive, Port Arthur, Texas (the "**Facility**") and at the West Hastings oil field in which the $CO_2$ will be used for enhanced oil recovery (such capture, transportation, and sequestration monitoring and verification equipment being collectively referred to as the "**CCS System**").

We respond to your points in the order they are set forth in your Notice.

**Issue 1: The rule citations provided do not require the collection and sequestration of $CO_2$. In order to be eligible for a positive use determination the property must have been placed in service in order to meet or exceed an adopted environmental rule. Specifically, 40 CFR § 51.166 requires States to inventory emission sources located on nontribal lands and report this information to EPA; it does not place any requirements on the Applicant or its Facility. 40 CFR § 52.21 does not apply since the Facility does not have a Prevention of Significant Deterioration (PSD) permit. 30 TAC § 116.115(b) does not apply because the Facility's Air Quality Permit (Nos. 39693 and N63) does not contain a**

**Maximum Allowable Emission Rate for the control of $CO_2$. 30 TAC § 335.471 contains definitions for Chapter 335 and does not place any requirements on the Applicant or its Facility. 30 TAC § 335.475 requires the development of a Pollution Prevention Plan and the renewal of the plan every five years. This provision does not impose source reduction or waste minimization requirements, nor does it compel the use or installation of a certain technology, equipment, or process. 30 TAC § 101.4 generally prohibits nuisance conditions, and does not require the control of $CO_2$. The cited permits by rule of 30 TAC §§ 106.261, 106.183, 106.371, and 106.478 do not require control of $CO_2$. Emission limitations associated with permits by rule are stated in § 106.104(a)(4), and $CO_2$ is expressly excluded as a substance with an emission limitation. Please cite to a federal, state, or local environmental law, rule, or regulation being met or exceeded by the use, construction, acquisition, or installation of the subject property. Also, per the application instructions, "The application must describe how the property/equipment meets or exceeds a rule, regulation, or statutory provision that has been adopted by a federal regulatory agency, the State of Texas, or a political subdivision of Texas." Please comply with this requirement.**

**Response:**

**A. The CCS System is Entitled to at Least a Partial Positive Use Determination, Because it is a Type of Equipment Listed in Subsection 11.31(k) of the Texas Tax Code**

As a threshold matter, the TCEQ has not addressed Air Products' assertion that its CCS System must receive at least a partial positive use determination because it is a type of equipment listed in subsection 11.31(k) of the Texas Tax Code.[1] Subsection (k) sets forth a list of property "for the control of air, water, or land pollution." Per subsection (m), when TCEQ receives a tax relief application for property listed in subsection (k), the Executive Director "***shall*** determine" that the property "is used *wholly or partly*" for pollution control (emphasis added). Thus, by the express language of the Tax Code, such equipment must qualify at least in part for a positive case determination.

Although it is not clear on what basis the TCEQ seeks to evade the clear mandate of sections 11.31(k) and (m), the TCEQ previously has taken the position that notwithstanding the

[1] Subsection (k) includes property used "wholly or partly" to capture $CO_2$ from an anthropogenic source in this state that is geologically sequestered in this state—if the U.S. Environmental Protection Agency ("EPA") adopts a final rule or regulation regulating $CO_2$ as a pollutant. As explained in Air Products' application, EPA has adopted such a final rule or regulation regulating $CO_2$ as a pollutant pursuant to its Light Duty Vehicle Rule, the GHG requirements that became effective January 2, 2011. *See*, 75 Fed. Reg. 25,324 (May 7, 2010). Moreover, pursuant to EPA's Tailoring Rule, effective August 2, 2010, GHGs, including $CO_2$, became regulated pollutants at major stationary sources as early as January 2, 2011. 75 Fed. Reg. 31,514 (June 3, 2010). Permitting of emissions associated with the CCS System commenced in April 2011, after the effective date of EPA's adoption of each of these final rules regulating $CO_2$ as a pollutant. *See* Standard Permit Registration Number 95649, and Permit by Rule Registration Number 95892, and the applications therefor, dated April 7, 2011, and April 21, 2011, respectively. Through a straightforward application of the statutory language, the CCS System qualifies for the pollution control property tax exemption.

requirement placed upon the Agency under subsection (m), property listed in subsection (k) could be found to have zero percent pollution control use.[2] Essentially, the Executive Director has interpreted property "used wholly or partly ... for the control of ... pollution" to include property that is *not at all used for pollution control*. To the extent that TCEQ applies such an interpretation to Air Products' application, such interpretation is an impermissible misreading of the statute, and is arbitrary and capricious under the Texas Administrative Procedure Act ("**Texas APA**").[3]

First, the plain meaning of the term "partly" does not include "not at all." As the Attorney General observed in a 2001 opinion on the tax relief program, section 11.31 is "broadly written," and "its plain meaning is clear. It embraces any property ... 'that is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution.'" The opinion goes on to state that "the term 'wholly' clearly refers to property that is used only for pollution control," while the term "partly" "embraces property that has only some pollution-control use." The Attorney General noted that Merriam Webster's Collegiate Dictionary defines "partly" to mean "in some measure or degree."[4] Thus, by its plain meaning, the term "partly" cannot mean "not at all."

A review of other parts of the statute that use the term, "wholly or partly," definitively establishes the interpretation's validity. According to principles of statutory construction, a term used more than once in a statute should generally be given the same meaning throughout the entire statute.[5] Looking at the other parts of the statute, interpreting "partly" to mean "not at all" would yield absurd results. For example:

- Subsection (a) provides that a person is *entitled to a tax exemption* for property used "wholly or partly" for pollution control. Under TCEQ's interpretation, property *not used at all* for pollution control would be eligible for an exemption. That is if "partly" can be construed to mean "not at all," then a tax exemption could exist for property used "wholly or [not at all]" for pollution control. Obviously, that cannot be the legislature's intent.

- In subsection (k), the list of property used for pollution control includes property used "wholly or partly" to capture $CO_2$ from an anthropogenic source in this state that is

[2] TCEQ Executive Director's Response to the Appeals Filed on the Negative Use Determinations for the Heat Recovery Steam Generator Applications, Docket Nos. 2012-1529-MIS-U et al. ("**Executive Director's Response**"). "Just because a piece of equipment is listed in §11.31(k) does not mean that it is automatically entitled to a positive use determination." *Id.* at 3. "Section 11.31(m) requires the Executive Director to distinguish the production portion of the §11.31(k) listed equipment from the pollution control portion. The Executive Director must determine the appropriate use determination percentage, which includes 0% if none of the equipment is used for pollution control." *Id.* at 6.

[3] Tex. Gov't Code §§ 2001.001 et seq.

[4] Attorney General of Texas John Coryn, Opinion No. JC-0372 Re: Whether certain types of property at new facilities qualify for a tax exemption as pollution-control property under section 11.31 of the Tax Code (RQ-330-JC), available at https://www.oag.state.tx.us/opinions/opinions/49cornyn/op/2001/htm/jc0372.htm.

[5] "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. U.S.*, 510 U.S. 135, 143 (1994).

geologically sequestered in this state.[6] Under TCEQ's interpretation, if applied consistently, property *not used at all* for capturing $CO_2$ would be eligible for the tax exemption. Further, if "wholly or partly" may be read to mean "nothing at all," then the stature could be read to allow a tax exemption for property not capturing any $CO_2$ at all. Again, these are absurd results.

- Subsection (i) requires a "person seeking an exemption" to provide the local appraiser with a copy of the Executive Director's letter "determining that the [property] is used wholly or partly as pollution control property." Under TCEQ's interpretation, property *not used at all* for pollution control could be the subject of the Executive Director's letter. Obviously, there is no need for an appraiser to receive a letter indicating no tax exemption is applicable.

TCEQ guidance demonstrates that the Agency itself interprets "wholly or partly" to mean "in some measure or degree" as opposed to "not at all." According to the guidance, to obtain tax relief an applicant must obtain "a determination that the property/equipment is used for pollution control" (which includes "the percentage of property/equipment use that pertains to pollution control"), then submit this use determination to the local appraisal district "to obtain the property tax exemption."[7] TCEQ guidance thus assumes that the Executive Director's determination that the property is used "wholly or partly" for pollution control is the same as "a determination *that* the property/equipment is used for pollution control" (emphasis added).

Other parts of the statute demonstrate the legislature's intent that property listed in subsection (k) be presumed to have at least some pollution control benefits. Subsection (k) affirmatively states that the listed property is "for the control of air, water, or land pollution."[8] Moreover, the TCEQ may only remove property from the list in subsection (k) if it finds "compelling evidence to support the conclusion that the item does not provide pollution control benefits."[9] Necessarily, this means that the legislature determined that all property listed in subsection (k) provides some pollution control benefits. Accordingly, with regard to property listed in subsection (k), the Executive Director is charged with responsibility to determine "how much" such property is used for pollution controls,[10] *i.e.* is it used wholly or just in part. But for property not so listed, he must determine "if" it is used "wholly or partly" for pollution control.[11]

Note that while applicants generally must identify the environmental benefits of the installation of pollution control property in order to obtain tax relief, the Executive Director must determine "that" property listed in subsection (k) is used "wholly or partly" for pollution control *regardless of*

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[6] Tex. Tax Code § 11.31(k)(16).

[7] TCEQ, Property-Tax Exemptions for Pollution Control Property 4 , available at http://www.tceq.texas.gov/assets/public/implementation/tax_relief/rg461_program_guidelines.pdf.

[8] Tex. Tax Code § 11.31(k).

[9] *Id.* § 11.31(l).

[10] *Id.* § 11.31(m).

[11] *Id.* § 11.31(d).

*whether the applicant submits information on environmental benefits.*[12] This demonstrates the legislature's assumption that property listed in subsection (k) has environmental benefits and, thus, pollution control benefits.[13] A "zero" benefit determination is not contemplated or even authorized by the Tax Code.

***Thus the statute clearly requires at least a partial positive use determination for property listed under subsection (k), including the CCS System.*** Any interpretation to the contrary impermissibly ignores the legislature's will in violation of the Texas APA[14] and is an arbitrary and capricious abuse of Agency discretion.[15] If the TCEQ wished to adopt a new approach in evaluating tax relief applications for property listed in subsection (k), the Agency was required to do so via the process for valid rulemaking outlined in the Texas APA.[16] Because TCEQ has not done so, it is bound by the statute as is, which mandates at least a partial positive use determination for property like the CCS System that is listed in subsection (k).

**B. The CCS System Must Meet or Exceed a Rule or Regulation Adopted for the Prevention, Monitoring, Control, or Reduction of Pollution—not a Rule or Regulation that Requires Collection and Sequestration of $CO_2$**

TCEQ states that the rules cited in Air Products' application "do not require the collection and sequestration of $CO_2$." This, however, is not the appropriate standard. Air Products' CCS System must simply "meet or exceed rules or regulations adopted ... for the prevention, monitoring, control, or reduction of air, water, or land pollution."[17] At the December 5 TCEQ Commissioners Agenda Meeting,[18] when faced with similar arguments from the Executive Director, the Commissioners confirmed that the cited rule or regulation need not require a specific type of pollution control property, nor set forth a specific method by which the equipment must control pollution.[19]

At the Agenda Meeting, the Commissioners considered the applications for tax relief for HRSGs, and the Executive Director's decision denying the requested relief.[20] In his decision, the Executive Director argued that HRSGs are not eligible for tax relief because no applicants

[12] *Id.* §§ 11.31(c, m). In this instance, however, no question reasonably exists that the CCS System, by reducing $CO_2$ emissions, does not provide environmental benefits.

[13] TCEQ defines "environmental benefit" as synonymous with "pollution control." 30 TAC §17.2(4)

[14] Tex. Gov't Code § 2001.174(2)(A).

[15] *Id.* § 2001.174(2)(F).

[16] *Id.* §§ 2001.023-.030. "Rule" is defined as "a state agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency." *Id.* § 2001.003(6)(A).

[17] Tex. Tax Code § 11.31(b); 30 TAC § 17.4(a).

[18] TCEQ Commissioners Agenda Meeting, Use Determination Appeals, Docket Nos. 2012-1529-MIS-U et al. (December 5, 2012) ("**TCEQ Commissioners Meeting**").

[19] *Id.*

[20] The HRSGs and Air Products' CCS Systems are similarly situated because both are listed under subsection (k). *See also* note 1.

had cited a "rule that requires the installation of the HRSG," nor a "generally applicable efficiency standard that could only be met by installation of a HRSG."[21] Although less relevant to Air Products' application, the Executive Director also argued that HRSGs did not remove pollutants, but rather avoided emissions through increased efficiency, and that the Executive Director had "never recognized emissions avoidance as pollution control."[22]

The Commissioners rejected both of these arguments. First, the Commissioners addressed whether the cited "rule or regulation" must require the installation of the specific piece of equipment for which an applicant is seeking tax relief. Chairman Bryan W. Shaw stated that, historically, the Commissioners had not required that the specific type of equipment be mandated by the cited rule. Rather, the Commissioners had required, in accordance with the statute, that the equipment "meet or exceed a standard." The Chairman emphasized that this flexible approach incentivizes new control measures: "faster, more efficient ways of getting the environmental results ... while maintaining cost effectiveness." Even the Executive Director's staff member, Dan Long, agreed, stating that the cited rule "doesn't have to directly say which piece of equipment" must be used. Thus the cited rule or regulation need not require a specific type of pollution control property.

Second, the Commissioners considered whether the cited "rule or regulation" must set forth a specific method by which the equipment must control pollution. According to Chairman Shaw, TCEQ drafted the regulations to "encourage and incentivize least-cost compliance," in order to comply with the will of the legislature. He noted that it is not the intent of the Commissioners nor the Executive Director to "disincentivize energy efficiency or new, more efficient approaches." Rather, the statute allows applicants to "find ways to achieve standards and achieve environmental protections in the most cost effective way." Commissioner Carlos Rubenstein agreed that the legislature intended for the requirements to be flexible, in order to incentivize innovative ways to reduce pollution. With respect to the HRSGs, he pointed out that one should not be required to "forego energy efficiency, and then on the back end ... put something back in, a scrubber or something on the back end, to produce the same goal." Commissioner Baker agreed, noting that it would not be appropriate to discount the fact that increased efficiency leads to emission avoidance. As the Chairman observed, this flexibility acknowledges that a strong economy is required to encourage further investment in environmental protections. These comments prove that the cited rule or regulation need not set forth a specific method by which the equipment must control pollution.

Here Air Products' CCS System collects and sequesters $CO_2$, but as the TCEQ Commissioners have agreed in principle, the System need not meet or exceed a rule that requires removal of $CO_2$ through collection and sequestration. Rather, the CCS System must merely meet or exceed a rule "adopted ... for the prevention, monitoring, control, or reduction of air, water, or land pollution."[23] And as explained in the next section, Air Products has identified such rules in its application.

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[21] Executive Director's Response at 11.

[22] *Id.* at 8.

[23] Tex. Tax Code § 11.31(b); 30 TAC § 17.4(a).

### C. The CCS System Meets or Exceeds Rules or Regulations for the Prevention, Monitoring, Control, or Reduction of Pollution

According to the TCEQ, Air Products' CCS System does not "meet or exceed" the following rules or regulations cited in its application. As explained fully in Air Products' application, the CCS System does meet or exceed these rules. Below we provide a brief overview of these rules and specifically address TCEQ's claims in the Notice of Deficiency.

- **40 CFR § 52.21 does not apply since the Facility does not have a Prevention of Significant Deterioration (PSD) permit.**

40 CFR § 52.21 requires obtaining a PSD permit and implementing the best available control technology ("**BACT**"), where a major source undergoes a major modification that causes an emissions increase of at least 75,000 tons per year of $CO_2$—starting on July 1, 2011.[24] And according to the U.S. Environmental Protection Agency's ("**EPA**") guidance on the PSD permitting requirements, carbon capture and sequestration could be considered as BACT in these circumstances.[25]

Here, the Facility is a major source of $CO_2$, and the modifications associated with installing the CCS System would have caused an increase in $CO_2$ emissions greater than 100,000 tons per year (without consideration of the capture controls). Thus the facility would have been required to comply with the PSD permitting and BACT requirements as of July 1, 2011. The only reason Air Products was not required to obtain a PSD permit and implement BACT is because it sought authorization to make the modifications three months before July 1.[26] As a result, Air Products agreed to install $CO_2$ control technology *before* it was required to implement BACT under the regulations. ***The installation and use of the CCS System thus exceeds these regulations***, because Air Products voluntarily implemented measures to capture and sequester $CO_2$ *before* it was required to do so.

- **40 CFR § 51.166 requires States to inventory emission sources located on nontribal lands and report this information to EPA; it does not place any requirements on the Applicant or its Facility.**

40 CFR § 51.166 requires that State Implementation Plans include measures to prevent significant deterioration of air quality, including the PSD permitting and BACT requirements outlined above.[27] This federal regulation imposes requirements on the state Plans, which are enforceable at the state level. Thus the Facility is subject to this regulation, and as explained above, ***the installation and use of the CCS System exceeds these regulations***.

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[24] 40 CFR §§ 52.21(a)(2)(iii), 52.21(j)(3), 52.21(b)(49)(v)(b); 75 Fed. Reg. 31,514 (June 3, 2010).

[25] EPA, PSD and Title V Permitting Guidance for Greenhouse Gases, EPA-457/B-11-001, March 2011, Appendix H.

[26] Air Products applied for authorization in April of 2011. The timing was controlled by separate timing concerns related to the Department of Energy's participation in the project.

[27] 40 CFR §§ 51.166(a, j).

- **30 TAC § 116.115(b) does not apply because the Facility's Air Quality Permit (Nos. 39693 and N63) does not contain a Maximum Allowable Emission Rate for the control of $CO_2$.**

30 TAC § 116.115(b) requires that a permit holder comply with the permit's conditions, including the maximum emission rates for contaminants. This rule applies here because Air Products holds Air Quality Permit 39693 and N63, dated December 15, 2009, and the rule requires permit compliance. It is true that Air Products' permit does not state a maximum emission rate for $CO_2$.[28] However, $CO_2$ is an air contaminant because it is produced by a process that is not natural,[29] and the U.S. Supreme Court has held that greenhouse gases ("**GHGs**"), including $CO_2$, are pollutants under the federal Clean Air Act.[30] The fact that the permit does not provide a cap on $CO_2$ emissions may be interpreted in one of two ways. If the lack of a cap means there is no limit on $CO_2$ emissions, then implementing the CCS System to control $CO_2$ emissions *exceeds* the permit requirements by reducing emissions of an air contaminant where no reduction is required. If the lack of a cap means that no emissions of $CO_2$ are permitted, then implementing the CCS System to control $CO_2$ emissions is *an effort to meet* the permit requirements. Either way, ***the installation and use of the CCS System meets or exceeds the rule.***

- **30 TAC § 335.471 contains definitions for Chapter 335 and does not place any requirements on the Applicant or its Facility.**

Air Products' application cites 30 TAC § 335.471 *et seq.* as a whole, not merely section 335.471. Please see below for an explanation as to why the regulation as a whole is sufficient for purposes of the tax relief requirements.

- **30 TAC § 335.475 requires the development of a Pollution Prevention Plan and the renewal of the plan every five years. This provision does not impose source reduction or waste minimization requirements, nor does it compel the use or installation of a certain technology, equipment, or process.**

30 TAC § 335.471 *et seq.* requires preparation of pollution prevention plans that identify source reduction and waste minimization projects to be undertaken.[31] Source reduction includes any practice that reduces pollutants entering the environment, reduces hazards to the public or the environment associated with release of pollutants or contaminants, and includes equipment or technology modifications that accomplish these goals.[32]

According to the TCEQ, this rule is not sufficient because it "does not impose source reduction or waste minimization requirements." The Agency, however, applies the wrong standard. The

[28] Air Products' Air Quality Permit 39693 and N63, dated December 15, 2009.

[29] Tex. Health & Safety Code § 382.003(2)

[30] Massachusetts v. EPA, 127 S.Ct. 1438 (2007).

[31] 30 TAC § 335.474(1)(B, C).

[32] *Id.* § 335.471(13).

requirement is that pollution control property "meet or exceed rules or regulations adopted ... for the *prevention, monitoring, control, or reduction* of air, water, or land pollution" (emphasis added).[33] This is a broad standard: the rule may be one that controls pollution by imposing numeric emission caps, or one that is intended to prevent pollution. Chairman Shaw made this exact observation during the TCEQ Commissioners Meeting. After quoting the statute, he stated that applicants are not limited to "just control in the form of a pollution abatement device that's added on the tail end," because "prevention is specifically mentioned" in the statute. He confirmed that property is not disqualified from tax relief merely because it is "used in a way to reduce emissions through prevention." Here, 30 TAC § 335.471 *et seq.* is intended to prevent pollution, which necessarily includes the discharge of air contaminants like $CO_2$ (as explained above). EPA has specifically designated the Pollution Prevention Program as a mechanism for reducing GHG emissions.[34] This rule is thus sufficient.

Alternatively, TCEQ believes that this rule is insufficient because it does not "compel the use or installation of a certain technology, equipment, or process." However, as explained above, the cited rule need not require a specific type of pollution control property, nor a specific method by which the equipment must control pollution. In fact, at the TCEQ Commissioners Agenda Meeting, the Executive Director's staff agreed that "the rule doesn't have to specifically name a piece of equipment." Chairman Shaw also pointed out that, historically, the Commissioners had not required that the specific type of equipment be mandated by the rule, and noted that the Commissioners planned to continue with that approach in the future. That the cited rule does not require the use of a specific technology, equipment, or process is thus irrelevant.

Air Products is subject to the cited rule,[35] and recently amended its Pollution Prevention Plan for the Facility to incorporate construction and use of the CCS System as a source reduction activity that reduces $CO_2$ (which, as explained above and in Air Products' application, is considered both an air contaminant and a pollutant). ***Thus the cited rule is sufficient, and the installation and use of the CCS System meets or exceeds this regulation.***

- **30 TAC § 101.4 generally prohibits nuisance conditions, and does not require the control of $CO_2$.**

30 TAC § 101.4 prohibits the discharge of air contaminants that may constitute a nuisance condition. According to TCEQ, this rule does not suffice for purposes of the tax relief program because it does not "require the control of $CO_2$." Again, however, this is not the correct standard. The rule or regulation must have been "adopted ... for the *prevention, monitoring, control, or reduction* of air, water, or land pollution" (emphasis added).[36] This is a broad

[33] Tex. Tax Code § 11.31(b); 30 TAC § 17.4(a).

[34] In EPA's 2010–2014 Pollution Prevention Program Strategic Plan, the agency announced its intention to identify and leverage pollution prevention opportunities to reach five key goals. EPA's first goal was to use the Pollution Prevention Program to reduce the generation of GHG emissions to mitigate climate change, including by the promotion of alternative technologies to control GHG. EPA, 2010-2014 Pollution Prevention (P2) Program Strategic Plan 3-4 (February 2010), available at http://www.epa.gov/p2/pubs/docs/P2StrategicPlan2010-14.pdf.

[35] Pollution Prevention Planning ID Number P06985.

[36] Tex. Tax Code § 11.31(b); 30 TAC § 17.4(a).

standard: the rule may be one that controls pollution via numerical emission caps, or a rule that is intended to prevent or monitor pollution.

30 TAC § 101.4 is intended to prevent pollution occurring through discharges of air contaminants that cause nuisance conditions. As explained above, $CO_2$ is an air contaminant. Additionally, EPA concluded its endangerment finding that GHGs, including $CO_2$, "may reasonably be anticipated to ... endanger public health."[37] EPA based its finding, in part, on its consideration of evidence demonstrating that climate change (to which $CO_2$ contributes, according to EPA) will cause increases in regional ozone pollution, which is associated with increased risk of respiratory illness and death.[38] In this case, Air Products' control of $CO_2$ is meaningful. Here by definition, the facility is a "major source" of $CO_2$ and as of July 11, 2012 was subject to full PSD permitting. Presumably, the Agency is not suggesting that controlling what would be a major source does not fall squarely within the rule's intent.

Here, the CCS System captures greater than 90 percent of $CO_2$ from the process gas stream used in a hydrogen production facility, thereby preventing nuisance conditions associated with $CO_2$ from arising, as required by 30 TAC § 101.4. ***Thus the cited rule is sufficient, and the installation and use of the CCS System meets or exceeds this regulation.***

- **The cited permits by rule of 30 TAC §§ 106.261, 106.183, 106.371, and 106.478 do not require control of $CO_2$. Emission limitations associated with permits by rule are stated in § 106.104(a)(4), and $CO_2$ is expressly excluded as a substance with an emission limitation.**

Air Products cited these rules in response to application Question 5 (Section 9) on the applicable permit numbers for the property equipment, not Question 11 (Section 9) on the cited rule or regulation being met by the construction or installation of the property/equipment.

**Issue 2: Please review the answers provided for question 2 and 3 in Section 9 to ensure they are appropriate. If a marketable product is being produced by the property/equipment it cannot be 100% pollution control property/equipment.**

**Response:** We are providing a revised Page 3 of the application to state in Question 2 of Section 9 that the equipment is not used 100% for pollution control.

**Issue 3: Please provide a listing of the equipment that is included in the application. What pieces, if any, of the electrical generation unit are included?**

**Response:** Please see Attachment 4 for a list of equipment included in the application. None of the listed equipment is associated with the electrical generation unit.

[37] 74 Fed. Reg. 66,496-97 (Dec. 15, 2009).

[38] *Id.* at 66,525.

**Issue 4: Please provide an explanation on how each variable of the cost analysis procedure was calculated.**

**Response:** Please see Attachment 5 for an explanation of how each variable of the cost analysis procedure was calculated. Additionally, please note that we are providing a revised Estimated Dollar Value based upon more current information that became available since the date of the application.[39] The revised Estimated Dollar Value and updated cost calculations are included in a revised version of Attachment 3, also attached.

Gerald J. Pels
For the Firm

Gerald D. Higdon
For the Firm

[39] The original Estimated Dollar Value, as stated in Section 12 of the application, was $222,613,422. The revised Estimated Dollar Value is $201,200,000.