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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 8, 2013

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: AIR PRODUCTS AND CHEMICALS, LLC
TCEQ DOCKET NO. 2013-1252-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,

A handwritten signature in black ink, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



DOCKET NO. 2013-1252-MIS-U

AIR PRODUCTS AND	§	BEFORE THE
CHEMICALS, LLC	§	TEXAS COMMISSION ON
USE DETERMINATION	§	ENVIRONMENTAL QUALITY
APPLICATION NO. 16632	§	

**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 Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to Air Products and Chemicals, LLC's (Appellant) appeal of the Executive Director's (ED) negative use determination.

I. Introduction

In Port Arthur, Jefferson County, Appellant owns and operates a plant which produces hydrogen, steam, and electricity to supply the adjacent Valero Energy Corporation petroleum refinery. The Port Arthur plant also separates, purifies, delivers, and sequesters carbon dioxide (CO₂). On May 31, 2012, Appellant applied to the TCEQ for a use determination regarding carbon capture and sequestration (CCS) equipment. The ED completed his technical review of this application on May 24, 2013 and issued a negative use determination on May 30, 2013. On June 24, 2013, Appellant filed an appeal of the ED's negative use determination.

II. Applicable Law

On November 2, 1993, the Texas Constitution was amended to exempt certain pollution control property from ad valorem taxation. The amendment states:

The legislature by general law may exempt from ad valorem 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.¹

Regarding pollution control property, Texas Tax Code § 11.31 states:

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. A person is not entitled to an exemption from taxation under this section solely on the basis that the person manufactures or produces a product or provides a service that prevents, monitors, controls, or reduces air, water, or land pollution.²

Section 11.31(b) defines “pollution control property” as follows:

[A]ny structure, building, installation, excavation, machinery, equipment, or device, and any attachment or addition to or reconstruction, replacement, or improvement of that property, 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, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution.³

Section 11.31(g) directs TCEQ to adopt rules to implement the section and states the adopted rules must:

- (1) establish specific standards for considering applications for determinations;
- (2) be sufficiently specific to ensure that determinations are equal and uniform; and
- (3) allow for determinations that distinguish the proportion of property that is used to control, monitor, prevent, or reduce pollution from the proportion of property that is used to produce goods or services.⁴

¹ TEX. CONST. art. VIII, § 1-l(a).

² TEX. TAX CODE § 11.31(a).

³ TEX. TAX CODE § 11.31(b).

⁴ TEX. TAX CODE § 11.31(g).

Under § 11.31(k), TCEQ must establish a nonexclusive list of facilities, devices, or methods for the control of air, water, or land pollution, and the list must include property that is used, constructed, acquired, or installed wholly or partly to capture carbon dioxide from an anthropogenic source in this state that is geologically sequestered in this state.⁵ Section 11.31 also states that the standards and methods for making a determination apply uniformly to all applications for determinations, including applications relating to facilities, devices, or methods for the control of air, water, or land pollution included on the Subsection (k) list.⁶ Finally, § 11.31 states that the ED may not make a determination that property is pollution control property unless the property meets the standards established by rule under § 11.31.⁷

The TCEQ has implemented the statutory requirements of § 11.31 in Title 30 of the Texas Administrative Code (TAC), Chapter 17. Under the Chapter 17 rules, a use determination application can be “Tier I”, “Tier II” or “Tier III.”⁸ Section 17.14 provides a table which lists property that the ED has determined is used wholly for pollution control purposes when used as described in the table and when no marketable product arises from using the property.⁹ Under § 17.14, a Tier I application is required for property listed in the Tier I Table and used wholly for pollution control purposes, and a Tier I application must not include any property not listed in the Tier I Table or used for pollution control purposes at a use percentage different than what is listed in the table.¹⁰ A Tier II application is for property that is used wholly for the control of air, water, or

⁵ TEX. TAX CODE § 11.31(k)(16).

⁶ TEX. TAX CODE § 11.31(g-1).

⁷ TEX. TAX CODE § 11.31(h).

⁸ 30 TEX. ADMIN. CODE § 17.2.

⁹ 30 TEX. ADMIN. CODE § 17.14(a).

¹⁰ *Id.*

land pollution, but is not located on the Tier I Table.¹¹ If a marketable product is recovered from property listed in the Tier I Table, a Tier III application is required.¹²

Section 17.10 requires certain information be included in a use determination application. All applications must cite the specific sections of the laws, rules, or regulations being met or exceeded by the use, installation, construction, or acquisition of the pollution control property.¹³ The application must also state the anticipated environmental benefits from the installation of the pollution control property for the control of air, water, or land pollution.¹⁴

Section 17.2 defines “environmental benefit” as follows:

The prevention, monitoring, control, or reduction of air, water, and/or land pollution that results from the actions of the applicant. ... [E]nvironmental benefit does not include the prevention, monitoring, control, or reduction of air, water, and/or land pollution that results from the use or characteristics of the applicant’s goods or service produced or provided. ... [T]he terms ‘environmental benefit’ and ‘pollution control’ are synonymous.¹⁵

A “marketable product” is defined as:

Anything produced or recovered using pollution control property that is sold as a product, is accumulated for later use, or is used as a raw material in a manufacturing process. Marketable product includes, but is not limited to, anything recovered or produced using the pollution control property and sold, traded, accumulated for later use, or used in a manufacturing process (including at a different facility). Marketable product does not include any emission credits or emission allowances that result from installation of the pollution control property.¹⁶

¹¹ 30 TEX. ADMIN. CODE § 17.2(9).

¹² 30 TEX. ADMIN. CODE § 17.14(a).

¹³ 30 TEX. ADMIN. CODE § 17.10(d)(4).

¹⁴ 30 TEX. ADMIN. CODE § 17.10(d)(1).

¹⁵ 30 TEX. ADMIN. CODE § 17.2(4).

¹⁶ 30 TEX. ADMIN. CODE § 17.2(5).

Section 17.6 describes property which is not eligible for exemption from taxation and is not entitled to a positive use determination. Property is not entitled to an exemption from taxation:

- (A) solely on the basis that the property is used to manufacture or produce a product or provide a service that prevents, monitors, controls, or reduces air, water, or land pollution;
- (B) if the property is used, constructed, acquired or installed wholly to produce a good or provide a service;
- (C) if the property is not wholly or partly used, constructed, acquired or installed to meet or exceed law, rule, or regulation 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; or
- (D) if the environmental benefit is derived from the use or characteristics of the good or service produced or provided.¹⁷

An applicant for a use determination may appeal the ED's determination to the TCEQ Commissioners using the process provided in § 17.25.¹⁸ An appeal must be filed with the TCEQ Chief Clerk within 20 days after receipt of the ED's determination letter.¹⁹ The Commission may remand the matter to the ED for a new determination or deny the appeal and affirm the ED's use determination.²⁰

III. Discussion

The appeal deadline in this matter was June 24, 2013. Appellant filed that day, and this appeal is therefore timely.

To be eligible for a positive use determination, this Appellant's property must be used, constructed, acquired, or installed wholly or partly to meet or exceed rules or

¹⁷ 30 TEX. ADMIN. CODE § 17.6(1).

¹⁸ 30 TEX. ADMIN. CODE § 17.25(a)(2)(A).

¹⁹ 30 TEX. ADMIN. CODE § 17.25(b).

²⁰ 30 TEX. ADMIN. CODE § 17.25(e)(2).

regulations adopted by the U.S. Environmental Protection Agency (EPA), the State of Texas, or the TCEQ for the prevention, monitoring, control, or reduction of air pollution.²¹ In the application, the Appellant must specify the laws, rules, or regulations being met or exceeded by the use, installation, construction, or acquisition of the property.²² Appellant cited 40 C.F.R. § 51.166, 40 C.F.R. § 52.21, 30 TAC § 116.115(b), 30 TAC § 335.471 et seq., 30 TAC § 335.475, and 30 TAC § 101.4. The ED found that none of the cited rules are appropriate to support a positive use determination.

Appellant asserts the carbon capture and sequestration (CCS) system is entitled to at least a partial positive use determination because it is a type of equipment listed in Texas Tax Code § 11.31(k). OPIC respectfully disagrees. Section 11.31(k) requires TCEQ to establish a nonexclusive list (the “(k) List”) of facilities, devices, or methods for the control of air, water, or land pollution and specifies certain items that must be on the list. If EPA adopts a final rule or regulation regulating CO₂, the list must include property that is used, constructed, acquired, or installed wholly or partly to capture carbon dioxide from an anthropogenic source in Texas that is geologically sequestered in Texas.²³ EPA has done so, and as a result, CCS systems are now on the (k) List. However, to assume that CCS systems are entitled to a positive use determination solely because they appear on the (k) List is to ignore other equally important subsections of § 11.31.

Under Subsection (g-1), the standards and methods for making a use determination under § 11.31 that are established in TCEQ’s implementing rules apply uniformly to all applications for determinations under § 11.31, including applications for

²¹ See TEX. TAX CODE § 11.31(b).

²² 30 TEX. ADMIN. CODE § 17.10(d)(4).

²³ TEX. TAX CODE § 11.31(k)(16).

facilities on the (k) List.²⁴ In other words, when making a use determination, TCEQ must apply all relevant statutory and regulatory standards and methods, not just determine whether the property is on the (k) List.

Subsection (g) directs the TCEQ to adopt rules to implement § 11.31.²⁵ Subsection (b) requires eligible property to be used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by EPA, the State of Texas, or the TCEQ for the prevention, monitoring, control, or reduction of air, water, or land pollution.²⁶ To implement this statutory requirement, TCEQ adopted rule § 17.10, which states that an applicant must cite the specific sections of the laws, rules, or regulations being met or exceeded by the use, installation, construction, or acquisition of the pollution control property.²⁷

As required by Subsection (g-1), the ED considered Appellant's application under all applicable standards, including § 11.31(b), the (k) List, and TCEQ rule § 17.10. While the subject property is on the (k) List, the ED found that Appellant's application does not comply with § 11.31(b) and TCEQ rule § 17.10. Appellant did not comply with § 11.31(b) and § 17.10 because the rules and regulations cited by Appellant, as being met or exceeded by use of the CCS, do not apply or are not appropriate. OPIC agrees with the ED's explanations of why Appellant's cited rules and regulations are not appropriate.

Texas Tax Code § 11.31 must be read and applied as a whole, and OPIC finds the ED has done this. The ED has harmonized and applied all applicable standards under § 11.31, not just the (k) List, to make this use determination. OPIC is not persuaded by

²⁴ TEX. TAX CODE § 11.31(g-1).

²⁵ TEX. TAX CODE § 11.31(g).

²⁶ TEX. TAX CODE § 11.31(b).

²⁷ 30 TEX. ADMIN. CODE § 17.10(d)(4).

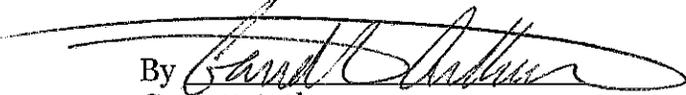
Appellant's (k) List argument, and finds that the ED's negative use determination is appropriate.

IV. Conclusion

OPIC respectfully recommends the Commission deny the appeal and affirm the ED's negative use determination.

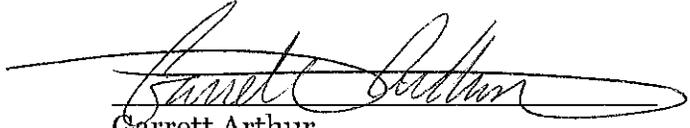
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2013, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.


Garrett Arthur

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