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September 3, 2013

Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk Building F
12100 Park 35 Circle
Austin, Texas 78753

Re: Reply to the Response Briefs of the Executive Director of and Office of Public Interest Counsel for the Texas Commission on Environmental Quality, and the Chief Appraiser of the Jefferson County Appraisal District; Appeal of Executive Director's Use Determination Issued to Air Products, LLC; Application No. 16632; TCEQ Docket No. 2013-1252-MIS-U

Dear Ms. Bohac:

On behalf of Air Products and Chemicals, Inc. ("**Air Products**"), attached for filing please find an original and seven copies of "Reply to the Response Briefs of the Executive Director of and Office of Public Interest Counsel for the Texas Commission on Environmental Quality, and the Chief Appraiser of the Jefferson County Appraisal District."

Also attached are the following exhibits to assist the Commission in the resolution of this matter:

- Exhibit A Air Products' Response to Notice of Technical Deficiency
(March 25, 2013)

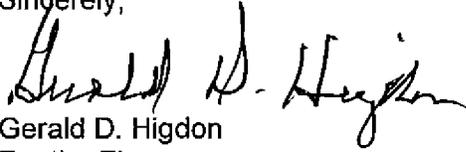
- Exhibit B Air Products' Use Determination for Pollution Control Property
Applications and Supporting Memorandum
(May 30, 2012)

- Exhibit C Air Products' Negative Use Determination Appeal
(June 23, 2013)

Bridget Bohac
September 3, 2013
Page 2

Please feel free to contact me if you have any questions or comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Gerald D. Higdon". The signature is written in a cursive style with a large initial "G".

Gerald D. Higdon
For the Firm

TCEQ DOCKET NO. 2013-1252-MIS-U
USE DETERMINATION NO. 16632

APPEAL OF THE	§	BEFORE THE
EXECUTIVE DIRECTOR'S	§	
USE DETERMINATION ISSUED	§	TEXAS COMMISSION ON
TO AIR PRODUCTS, LLC	§	
APPLICATION NO. 16632	§	ENVIRONMENTAL QUALITY

APPELLANT'S REPLY BRIEF TO THE RESPONSE BRIEFS OF THE
EXECUTIVE DIRECTOR OF AND OFFICE OF PUBLIC INTEREST COUNSEL FOR THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
AND THE CHIEF APPRAISER OF THE JEFFERSON COUNTY APPRAISAL DISTRICT

Introduction

Appellant Air Products and Chemicals, Inc. ("**Air Products**") files this reply to the response briefs of the Executive Director of and the Public Interest Council at the Texas Commission on Environmental Quality ("**TCEQ**"), and the Chief Appraiser of the Jefferson County Appraisal District, regarding the Executive Director's negative use determination issued for certain Air Products pollution control property. Specifically, Air Products submitted an Application for Use Determination on May 30, 2012, for equipment associated with carbon dioxide ("**CO₂**") 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 CO₂ will be used for enhanced oil recovery (such capture, transportation, and sequestration monitoring and verification equipment being collectively referred to as the "**CCS System**"). On May 28, 2013, TCEQ issued a negative use determination for the CCS System.

For the reasons set forth below, Air Products respectfully requests that the Commission grant Air Products' appeal and overturn the Executive Director's negative use determination for the CCS System.

Applicable Statutes

Under Tex. Tax Code § 11.31(a), 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. The statute defines "facility, device, or method for the control of air, water, or land pollution" to mean, in pertinent part, "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 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

Under Tex. Tax Code § 11.31(k) and 11.31(k)(16), the Legislature required the TCEQ to adopt rules establishing a non-exclusive list of "facilities, devices, or methods for the control of air,

¹ Tex. Tax Code § 11.31(b).

water, or land pollution,"² which must include, among other things, property used to capture and sequester CO₂ if the United States Environmental Protection Agency ("EPA") adopts a final rule or regulation regulating CO₂ as a pollutant.³ As the Public Interest Counsel concedes, "EPA has done so, and as a result, CCS Systems are now on the (k) list."⁴

Lastly, under Tex. Tax Code § 11.31(m):

"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 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."

Discussion

The Executive Director's interpretation of the Tax Code provisions contradicts the plain meaning of the statute. The Executive Director first argues that an ambiguity exists within the statutory language of Tex. Tax Code § 11.31(k) and (m), and that the Executive Director's interpretation of the statute is reasonable in light of the alleged ambiguity and thus entitled to deference. For the reasons set forth below, no such ambiguity exists.

1. The Executive Director's interpretation of Tex. Tax Code § 11.31 is not entitled to deference because the text of the statute is not ambiguous on its face, and the Executive Director's interpretation contradicts the plain language of the statute.

The Texas Supreme Court consistently holds that the object of construing a statute is to determine and give effect to the legislature's intent.⁵ Importantly, "the truest manifestation" of what lawmakers intended is what they enacted, "the literal text they voted on."⁶ As a result, we seek legislative intent "first and foremost" in the statutory text, in the plain and common meaning of the words used.⁷ Where the text of a statute is clear, text is "determinative of the legislature's

² The Legislature thus charged the TCEQ with the responsibility to identify those things which meet the definition of "facilities, devices, or methods, for the control of air, water, or land pollution." and the Legislature said the list "must include" certain things specifically identified by the Legislature, including CO₂ capture and sequestration facilities like that installed by Air Products. *Id.* § 11.31(k), (k)(16).

³ *Id.* § 11.31(k)(16).

⁴ Office of Public Interest Counsel's Response to Appeal of Use Determination, at pp. 6 and 7.

⁵ *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 484 (Tex. 1998); *In re Mo. Pac. R.R. Co.*, 998 S.W.2d 212, 216 (Tex. 1999).

⁶ *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632-33 (Tex. 2008).

⁷ *Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83, 85 (Tex. 2006); *First Am. Title Ins. Co.*, 258 S.W.3d at 632; *Liberty Mut. Ins. Co.*, 966 S.W.2d at 484.

intent."⁸ Focusing on the text of a statute also ensures that ordinary citizens are able to rely on the plain language to mean what it says.⁹

However, an agency's interpretation of a statute is given some deference if several conditions are met. First, the agency's interpretation must be in a formal opinion adopted after formal proceedings, not isolated comments during a hearing or opinions in a court brief. Second, the statutory language must be ambiguous. Finally, the agency's interpretation must be reasonable and cannot contradict the plain language of the statute.¹⁰

The Executive Director has not met this standard. As we explain below, the Executive Director's interpretation of Tex. Tax Code § 11.31 is not entitled to deference because the text of subsection (m) is not ambiguous, and the agency's interpretation not only conflicts with the statute's language, but creates an internal conflict within the statute itself.

A. The Executive Director's interpretation of subsection 11.31(m) is not entitled to deference because the statute is unambiguous on its face.

To demonstrate ambiguity of a statute, the statutory text must be ambiguous on its face; ambiguity cannot be created by extrinsic evidence of intent.¹¹ A provision is not ambiguous merely because different parties have interpreted it differently.¹² Alternative unreasonable interpretations of statutory text do not make that text ambiguous.¹³

The text of subsection (m) is not ambiguous. Subsection (m) states that "Notwithstanding the other provisions of this section," if equipment is a type of equipment included on the list in subsection (k), within 30 days of receiving certain information from the applicant TCEQ "shall determine *that*" the equipment "is used wholly or partly" for pollution control (emphasis added). When applying the ordinary meaning, courts may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning.¹⁴ To create an ambiguity that the Executive Director hopes to then have the liberty to interpret, the Executive Director first must disregard the word "that" from the statutory language and instead must replace it with the word "whether" or "if." So, in the Executive Director's view, even though the Legislature voted on a statute that 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

⁸ *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009).

⁹ *Frank v. Liberty Ins. Corp.*, 255 S.W.3d 314, 324 (Tex. App. 2008).

¹⁰ *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747-48 (Tex. 2006); *TXU Elec. Co. v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 275, 286 (Tex. 2001); *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 623 (Tex. 2011), reh'g denied (May 27, 2011).

¹¹ *Fiess*, 202 S.W.3d at 747.

¹² *Id.* at 746.

¹³ *Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 623.

¹⁴ *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 138 (Tex. App. 1986).

for an exemption under this section is a facility, device, or method included on the list adopted under 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 (emphasis added).

the Executive Director asserts that the Legislature actually meant:

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 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 **whether** 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.

The Executive Director is not permitted to apply a statute in a manner that requires re-writing the statute at issue.¹⁵

Next, under the Executive Director's interpretation, the Executive Director must ignore the plain meaning of the phrase "wholly or partly." As explained in our Response to Notice of Technical Deficiency, dated March 25, 2013,¹⁶ the plain meaning of "wholly or partly" is "at least in part." In addition, both a Texas Attorney General and a Texas Court of Appeals agree with Air Products' reading that "wholly or partly" means "at least in part" and a finding that equipment is used "wholly or partly" for pollution control is a positive use determination. The Attorney General observed in a 2001 opinion on the tax relief program 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."¹⁷ Only

¹⁵ The meaning associated with the word "that" is entirely different than the meaning associated with the word "whether." A simple example illustrates the difference: a jury's determination "that" a defendant is guilty, is something completely different than a jury's determination "whether" a defendant is guilty. In the first instance, the result is declared, and in the second instance the result is open-ended and subject to deliberation.

¹⁶ Attached as Exhibit A and incorporated by reference. Where subsequent references are made to Exhibits attached hereto, they are hereby deemed to be incorporated by reference.

¹⁷ 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>.

last year a Texas Court of Appeals noted that a determination that property is “wholly or partly” pollution control property is “termed a ‘positive’ use determination.”¹⁸ Thus “wholly or partly” cannot be interpreted to include “not at all”—the plain language of subsection (m) requires at least a partial positive use determination for (k)-listed equipment.

Two cases cited in the Executive Director’s brief offer useful examples of statutory language courts have found ambiguous. The first case involves a word that has more than one plain meaning. In *TGS-NOPEC Geophysical Co. v. Combs*, the court considered whether the statutory term “license” was ambiguous. The court concluded that the term was ambiguous because it can be used both as a verb to convey the act of giving permission, or as a noun to represent the permission or right granted.¹⁹ The second case involves a term of art that is not defined in the statute. In *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, the court considered a statutory requirement that the Railroad Commission weigh the “public interest” in permitting an injection well. Because “public interest” was not defined, the court deferred to the agency’s interpretation that “public interest” was limited to matters related to oil and gas production, rather than an open-ended inquiry including public-safety issues like traffic safety.²⁰ Similarly, in *Great American Ins. Co. v. North Austin Mun. Utility Dist. No. 1*, the court concluded that the statutory phrase “the business of insurance” was ambiguous because it was not defined; as the phrase referred to a particular trade, the court accepted extrinsic evidence as to its meaning (*i.e.*, how the phrase was used by experts in the trade).²¹ These cases demonstrate that for statutory language to be deemed ambiguous, it must be ambiguous on its face. In contrast, the statute in this case is not ambiguous on its face.

Other cases provide examples where courts found no ambiguity in statutory language. The Executive Director cites *Rylander v. Fisher Controls Intern.*, in which the court considered an agency’s interpretation of the statutory phrase “not subject to taxation.”²² The court did not defer to the agency’s interpretation of the phrase because the meaning of the phrase was evident in context and based on the ordinary meaning of those words; no agency expertise was required to interpret the phrase. Importantly, the court noted that an agency does not receive deference with respect to a nontechnical question of law—legislative intent—determined from the legislature’s use of statutory language in context and based on the ordinary meaning of those words.²³ In *Estrada v. Adame*, the court considered a statutory requirement related to elections: “Not later than the fifth day after the date the final canvass of the main election is completed, the authority responsible for ordering the main election shall order the runoff

¹⁸ *Mont Belvieu Caverns, LLC v. Tex. Comm’n on Env’tl. Quality*, 382 S.W.3d 472, 477 (Tex. App. 2012).

¹⁹ *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011).

²⁰ *R.R. Comm’n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 623-24 (Tex. 2011), reh’g denied (May 27, 2011).

²¹ *Great American Ins. Co. v. North Austin Mun. Utility Dist. No. 1*, 908 S.W.2d 415, 421 (Tex. 1995); *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 484 (Tex. 1998). “When a term used in a statute has a peculiar or technical meaning as applied to some art, science, or trade, the court will look to the particular art, science, or trade from which it was taken in order to ascertain its meaning.” *Lloyd A. Fry Roofing Co. v. State*, 541 S.W.2d 639, 642-43 (Tex. Civ. App. 1976).

²² *Rylander v. Fisher Controls Intern., Inc.*, 45 S.W.3d 291, 302 (Tex. 2001).

²³ *Id.*

election." The court found that the requirement to hold a runoff within five days after the final canvass was not ambiguous, and thus an agency's interpretation to the contrary was not entitled deference.²⁴ In *Fiess v. State Farm Lloyds*, the court concluded that the insurance policy provision, "We *do not* cover loss caused by mold," could not possibly be interpreted as, "We *do* cover loss caused by mold" (emphases added).²⁵

The Executive Director does not allege that any word or phrase in Tex. Tax Code § 11.31 is ambiguous on its face because, for example, it has more than one plain meaning, it is not defined in the statute, it is a term of art in a particular trade, or that agency expertise is required to interpret the phrase. Rather, in order to support its interpretation that (k)-listed equipment is not entitled to a positive use determination, the Executive Director interprets ambiguity into the statute with respect to how various sections of the statute relate to one another. As we explain below, the Executive Director's interpretation is not entitled to deference because the language of the statute is unambiguous on its face and the Executive Director's interpretation contradicts the plain statutory language.

B. The Executive Director's interpretation of the phrase "in the event that" in subsection (m) is not entitled to deference because it assumes an ambiguity where none exists and contradicts the plain language of the statute.

The Executive Director argues that the ambiguity in subsection (m) stems from the phrase "in the event that such a determination is made." Subsection (m) states that if equipment identified on an application is listed under subsection (k), TCEQ "shall determine" that the equipment is used wholly or partly for pollution control, and shall provide public notice "in the event such a determination is made." According to the Executive Director, the phrase "in the event such a determination is made" would be meaningless if (k)-listed equipment could only receive a positive use determination, and, through the reference subsection (d), would require public notice of a positive use determination in all instances. The Executive Director concludes that this phrase "implies that there are instances where [(k)-listed equipment] will not receive a positive use determination."²⁶

Interpretation by implication is permissible only to supply obvious intent not expressly stated, not to contradict or add to a statute.²⁷ The Executive Director reads too much into the public notice requirements of subsection (d), and the Executive Director's interpretation fails to read subsection (m) as a whole. Subsection (m) requires the Executive Director to determine "if" a "facility, device, or method" described in an application falls on the (k)-list, and then to determine the percentage used for pollution control purposes. Subsection (m) concludes by requiring the Executive Director to take the steps in subsection (d) "in the event such a determination is made."²⁸

²⁴ *Estrada v. Adame*, 951 S.W.2d 165, 167 (Tex. App. 1997).

²⁵ *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006).

²⁶ Executive Director's Response to Air Products, LCC's Appeal of the Executive Directors Negative Use Determination, at p. 8.

²⁷ *Rylander*, 45 S.W.3d at 302.

²⁸ The literal text of subsection (m), with emphasis, is:

The Executive Director's interpretation of the statute only holds if we read into subsection (m) an internal conflict: although subsection (m) states that TCEQ "shall" issue a positive use determination for (k)-listed equipment, the Executive Director asks us to accept that the phrase "in the event such a determination is made" negates this mandate. This construction is impermissible and contradicts the plain language requiring a positive use determination for (k)-listed equipment. A statute must be read as a whole and interpreted to give effect to every part,²⁹ but the Executive Director's interpretation requires ignoring the mandate that TCEQ "shall" issue a positive use determination for (k)-listed equipment. As mentioned above, and further explained below, there is an alternative reading of subsection (m) that gives effect to every part of subsection (m) without any internal conflict.

Subsection (m) states that "if [the equipment described in an application] is [a type of equipment] on the list adopted under Subsection (k)," TCEQ "shall determine that" the equipment is used wholly or partly for pollution control. TCEQ can only make this determination "if" the equipment is a type of equipment listed under subsection (k). The presence of equipment on the list under subsection (k) is the "event" which is the subject of the determination that the TCEQ is to make. Thus, as previously stated, "in the event this determination is made" actually refers to whether TCEQ has made the determination that equipment described on an application falls under a (k)-listed category—not whether equipment falling under a (k)-listed category is entitled to a positive use determination. The Legislature, by its express language in Section 11.31(m), has rendered its judgment—which the Executive Director cannot disregard—that such listed equipment "shall" be the subject of a positive use determination.

We note that the determination that equipment falls under a (k)-listed category sometimes is not an easy one to make, but for reasons different than whether the equipment is installed to meet or exceed an adopted rule or regulation,³⁰ as argued by that Executive Director. For example, there are categories of (k)-listed equipment that clearly require the agency to use its discretion, so that the Executive Director's determination "if" a piece of equipment falls under Section 11.31(k) is a meaningful determination for the Executive Director to undertake. In the present

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 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*** (emphasis added).

Tex. Tax Code § 11.31(m).

²⁹ R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water, 336 S.W.3d 619, 628 (Tex. 2011), reh'g denied (May 27, 2011).

³⁰ Here, the Legislature through Section 11.31(k) and (m) has declared its judgment that if the U.S. EPA adopts a final rule or regulation regarding CO₂ as a pollutant, then property that is used, constructed, acquired, or installing wholly or partly to capture CO₂ from an anthropogenic source in Texas that is geologically sequestered in Texas is a facility, device or method for the control of air, water, or land pollution. Tex. Tax Code § 11.31(k), (k)(16), and (b).

situation, the equipment category most relevant to Air Products is category (k)(16). For equipment to fall under this category, the equipment must be installed (1) to capture CO₂ (2) from an anthropogenic source (3) in this state (4) that is then geologically sequestered (5) in this state, and (6) only upon the effective date of an EPA final rule regulating CO₂ as a pollutant. Determining whether equipment falls under this category (and thus is (k)-listed) requires that TCEQ make at least six separate determinations, including the determination that EPA has adopted a "final rule" regulating CO₂ as a "pollutant." Air Products' CCS System meets all of these requirements. Another example is category (k)(18), which encompasses "any other facility, device, or method designed to prevent, capture, abate, or monitor nitrogen oxides, volatile organic compounds, particulate matter, mercury, carbon monoxide, or any criteria pollutant." The fact that this category is not even limited to a certain type of equipment, but merely requires that the equipment be used for a particular purpose, demonstrates that TCEQ has a tremendous amount of discretion in determining whether a piece of equipment falls under this category.

In sum, the only ambiguity in subsection (m) is the one created by the Executive Director. This goes against a basic principle of statutory construction: while an agency's opinion can help construe an existing ambiguity, it cannot create one.³¹ The Executive Director states that subsection (m) "implies" that (k)-listed equipment could receive a negative use determination, but implications from a statutory passage are forbidden when the legislative intent may be gathered from a reasonable interpretation of the statute as it is written.³² As explained above, there is a reasonable interpretation of subsection (m) that gives effect to all provisions without ambiguity or internal conflict.

The Executive Director also cites to letters from Representatives Dennis Bonnen and Allan Ritter as proof of the ambiguity in subsection (m), as well as its negative use determination for photovoltaic cells. A close reading of the Representatives' letters reveals their concern that HB 3732 would be read to exempt property that **did not control pollution**, or to exempt **entire plants** in which pollution control equipment was installed, or to **fully exempt property that was not used wholly for pollution control**. In the present case, none of these concerns are at issue. No legitimate question exists that the CCS System controls pollution. Furthermore, Air Products does not seek to exempt its entire plant, only a part of the CCS System. Finally, Air Products seeks to exempt only 84.3% of the value of the CCS System, recognizing that the CCS System, in part, generates a marketable product, CO₂ used in enhanced oil recovery as part of the sequestration process.

Moreover, extrinsic aids may be used to aid in interpreting statutory text only where the text is ambiguous,³³ and as explained above, the statute is unambiguous on its face. And in order for an agency's interpretation of a statute to receive deference, the interpretation must be contained in a formal opinion adopted after formal proceedings.³⁴ Formal proceedings do not include

³¹ *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 748 (Tex. 2006).

³² *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 138 (Tex. App. 1986).

³³ *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009).

³⁴ *Fiess*, 202 S.W.3d at 747-48; *TXU Elec. Co. v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 275, 286 (Tex. 2001); *Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 623.

isolated comments during a hearing, opinions in a court brief,³⁵ opinion letters, policy statements, agency manuals, nor enforcement guidelines.³⁶ Neither the Representatives' letters nor the negative use determination for the photovoltaic cells are considered "formal proceedings" that are due agency deference.³⁷

C. The Executive Director's interpretation of subsection (g-1) is not entitled to deference because it creates an impermissible conflict between subsections (g-1) and (m).

The Executive Director states that the Legislature's adoption of subsection (g-1) via House Bills 3206 and 3544 demonstrates the Legislature's acceptance of TCEQ's interpretation that (k)-listed equipment is not entitled to a positive use determination. The Executive Director's position, however, does not harmonize all parts of the statute. Subsection (g-1) states that the "standards and methods" for making a determination that are established in the rules apply uniformly to all applications, including applications for (k)-listed equipment. According to the Executive Director, "standards and methods" refers to the eligibility requirements applicable to all applications, including the requirement to "meet or exceed" an adopted environmental rule or regulation. The Public Interest Counsel advances a similar argument.³⁸ Under the Executive

³⁵ *Fiess*, 202 S.W.3d at 747-48; *TXU Elec. Co.*, 51 S.W.3d at 286; *Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 623.

³⁶ *Fiess*, 202 S.W.3d at 747, citing *Christensen v. Harris Cnty.*, 529 U.S. 576, 587, (2000).

³⁷ We address the Executive Director's example of the photovoltaic cells because it demonstrates that Air Products' reading of subsection (m) is correct. Photovoltaic cells, unlike Air Products' CCS System, are not specifically listed in § 11.31(k). Rather, the application for photovoltaic cells was submitted under the catch-all category B-18, derived from Tex. Tax Code § 11.31(k)(18). At the time, TCEQ's regulations specified that category B-18 for "Regulated Air Pollutant Control Equipment" was defined as "any other facility, device, or method designed to prevent, capture, abate, or monitor nitrogen oxides, volatile organic compounds, particulate matter, mercury, carbon monoxide, or any criteria pollutant." The photovoltaic cell application received a negative use determination, which the Executive Director argues demonstrates that (k)-listed equipment may receive a negative use determination. However, a close reading of the negative use determination reveals that there was no indication that the Executive Director made the threshold finding that photovoltaic cells were (k)-listed equipment. Specifically, the Executive Director determined in its negative use determination that photovoltaic cells did not fall under category B-18 as equipment "designed to prevent, capture, abate, or monitor" the listed pollutants. Rather, the Executive Director stated that "The installation of photovoltaic panels is *used to produce power* and does not meet or exceed an adopted environmental rule, regulation, or law" (emphasis added). Thus the negative use determination was based on the Executive Director's determination that, as power producing equipment, photovoltaic cells do not fall under a (k)-listed category, and not because photovoltaic cells are deemed (k)-listed equipment that does not "meet or exceed" an environmental rule or law.

The Executive Director's decision regarding the photovoltaic cells demonstrates that Air Products' reading of subsection (m) is correct. Under subsection (m), in the event that TCEQ makes a determination that equipment on an application falls under a category listed in subsection (k), the Agency shall issue a positive use determination and comply with the public notice requirements. In the case of the photovoltaic cells, the Executive Director did not make a determination that the equipment fell under category B-18, and thus issued a negative use determination. The Executive Director's example thus does not contradict Air Products' argument that where equipment falls under a (k)-listed category, that equipment must receive a positive use determination.

³⁸ Office of Public Interest Counsel's Response to Appeal of Use Determination, at p.7.

Director's interpretation, if (k)-listed equipment does not "meet or exceed" a relevant rule, that equipment will not receive a positive use determination. However, even though the CCS System meets or exceeds several rules, as explained herein, subsection (m) requires a positive use determination for all (k)-listed equipment. Thus, the Executive Director's current interpretation of subsection (g-1) requires a conflict between subsections (m) and (g-1).

A basic principle of statutory construction is that a statute must be read as a whole and interpreted to give effect to every part.³⁹ To that end, a more reasonable reading gives effect to both subsections (m) and (g-1) and eliminates internal conflict created by the Executive Director's interpretation in its response brief: the phrase "standards and methods" refers to (i) whether something is a listed item, and (ii) the methodology for calculating the proportion of equipment used for pollution control, not to the requirement to meet or exceed an adopted environmental rule or regulation. Under this interpretation, the fact that (k)-listed equipment is entitled to a positive use determination is separate from the issue of qualifying for the (k)-list or the appropriate way to calculate the percentage of such equipment used for pollution control.

Not only does this interpretation harmonize subsections (m) and (g-1), but this interpretation was adopted by TCEQ itself during formal agency rulemaking. When proposing regulations to implement subsection (g-1), TCEQ made clear in the preamble that the Agency interprets the "uniformity" requirement of subsection (g-1) to require that all applications for partial use determinations use the same, uniform Cost Analysis Procedure to calculate the percentage of the equipment used for pollution control:

"To implement the uniformity requirements in HB 3206 and HB 3544, the proposed rulemaking would apply the [Cost Analysis Procedure (CAP)] to all partial use determinations for property that does not meet the fixed use percentage criteria established by the commission under §17.14(a) of the rules. The proposed rulemaking would eliminate Tier IV applications... The change to Tier III applications for items on the current Part B of the ECL [*i.e.*, the (k)-listed equipment] that are used partially for pollution control would change the way that applicants calculate the partial use percentage. The current provision of allowing applicants to choose their own method for calculating a use percentage for these properties has resulted in applications for the same types of property with widely varying calculated use percentages. HB 3206 and HB 3544 specifically require that the standards and methods established in the rules be uniformly applied to all applications for determinations, including applications for property listed in Texas Tax Code, §11.31(k), which is codified as Part B of the ECL in the current rules. For these partial use items, a Tier III application with the calculation of actual use percent would be required in all cases until the commission determines that a specific item is always used for pollution control at the same use percentage within a certain category of use."⁴⁰

This preamble text makes clear that TCEQ interpreted the "uniformity" requirement in subsection (g-1) as requiring that all applications for partial use determinations (including applications for (k)-listed equipment) use the specific Cost Analysis Procedure to calculate the

³⁹ *Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 628; *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 632 (Tex. 2008).

⁴⁰ 35 Tex. Reg. 6255-56 (July 16 2010). TCEQ reiterates these comments in the preamble to the final rule. 35 Tex. Reg. 10964-65 (Dec. 10, 2010).

percentage of the equipment used for pollution control. TCEQ's preamble thus contradicts the Executive Director's assertion in this matter that it interprets subsection (g-1) as imposing a uniform "meet or exceed" eligibility requirement on (k)-listed equipment. In its rulemaking, the TCEQ has documented its interpretation of subsection (g-1), and the Executive Director should not be permitted to offer a re-interpretation of subsection (g-1) in this administrative proceeding that belies its previous documented interpretation.⁴¹ **Importantly, an agency's interpretation is only eligible for deference when it is contained in formal proceedings such as rulemaking, not in a court brief.⁴² Thus the interpretation expressed in the Executive Director's response brief is not eligible for deference.**

Moreover, Air Products' reading is supported by legislative history. A House Research Organization Bill Analysis states that HB 3206 "would allow TCEQ to use a more reasonable determination formula... The fiscal impact to the state would depend on TCEQ's determination of the portion of the property that is pollution control and how it would affect school tax revenues."⁴³ This text demonstrates that the purpose of subsection (g-1) is to require a uniform method for determining the percentage of equipment used for pollution control, not, as argued by the Executive Director in this case, to require (k)-listed equipment to "meet or exceed" adopted environmental regulations.

Finally, the plain language of other parts of the statute support Air Products' reading that (k)-listed equipment is not subject to the same eligibility requirements and review process as all other equipment.

First, subsection (m) requires a positive use determination for (k)-listed equipment "notwithstanding the other provisions of this section." The phrase "notwithstanding the other provisions of this section" clearly distinguishes the process for assessing applications for (k)-listed equipment and requires a positive use determination for (k)-listed equipment regardless of any other requirements in section 11.31 based upon the Legislature's policy decision that such equipment is *per se* a "facility, device, or method for control of air, water, or land pollution" absent rulemaking by the TCEQ that affirmatively removes an item from the (k)-list after the TCEQ has found that the item does not provide pollution control benefits.⁴⁴ Additionally, as the Executive Director points out, the Legislature left subsections (k) and (m) unchanged when adopting (g-1). Thus the Legislature made an express choice not to modify the mandate in subsection (m) that (k)-listed equipment receive a positive use determination, "notwithstanding the other provisions" of section 11.31. As statutes are presumed to be enacted

⁴¹ Interestingly, the Executive Director asserted *both* positions in its response to the recent appeals of the HRSGs negative use determination, which Commissioners remanded to the Executive Director for further consideration. 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.

⁴² *Fliess v. State Farm Lloyds*, 202 S.W.3d 744, 747-48 (Tex. 2006); *TXU Elec. Co. v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 275, 286 (Tex.2001); *Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 623.

⁴³ House Research Organization, Bill Analysis, HB 3206 (May 14, 2009), available at <http://www.hro.house.state.tx.us/pdf/ba81r/hb3206.pdf#navpanes=0>.

⁴⁴ Tex. Tax Code § 11.31(b), (l), (k).

by the legislature with complete knowledge of the existing law and with reference to it,⁴⁵ we must presume that the Legislature was aware of and had no intention of repealing the subsection (m) mandate that (k)-listed property receive a positive use determination. A statute must be read as a whole and interpreted to give effect to every part,⁴⁶ and Air Products' reading ensures that subsection (m) is given effect in its entirety.

Second, subsection (m) requires TCEQ to issue a positive use determination for (k)-listed equipment within 30 days of receiving the necessary information. This expedited review period further supports Air Products' reading that (k)-listed equipment is not subject to the same eligibility requirements or review process as all other equipment. For an Agency's interpretation to receive deference, it must be reasonable.⁴⁷ Here, it would be unreasonable for the Legislature to require TCEQ to issue a positive use determination within a mere 30 days if the TCEQ had to undertake the same analysis for (k)-listed equipment as for other equipment regarding whether the equipment met or exceeded an adopted environmental rule or regulation. The 30-day deadline makes sense, however, where (a) the Legislature has applied its judgment that (k)-listed equipment meets the definition of a "facility, device, or method for the control of air, water, or land pollution"⁴⁸ and thus deemed such equipment as meeting or exceeding adopted environmental rules or regulations, and where (b) the TCEQ is required to make only two determinations: (1) whether the equipment is in fact a type of equipment listed under subsection (k), and (2) the percentage of the equipment used for pollution control.

D. The Executive Director's interpretation as contained in Flowchart B is not entitled to deference because the Flowchart B is contained in a prior version of a regulation that the Agency has expressly repealed.

The Executive Director asserts that its interpretation of subsection (k) is entitled to deference because it was adopted via rulemaking in 2008.⁴⁹ In that version of the regulations, 30 Tex. Admin. Code § 17.15(b) states that the Part B Decision Flow Chart ("Flow Chart B") shall be used to determine whether (k)-listed property qualifies as pollution control property. According to the Executive Director, Flow Chart B makes clear that the Executive Director intended to subject (k)-listed equipment to the same eligibility requirements as all other use determination applications, including the "meet or exceed" requirement.

However, there are several reasons why no deference may be extended to the interpretation as contained in Flow Chart B.

First, the Flow Chart B has been repealed—in fact, both the rule and draft guidance document that contained Flow Chart B were superseded long *before* Air Products submitted its original application on May 30, 2012. 30 Tex. Admin. Code § 17.15, which included Flowchart B, was

⁴⁵ *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990).

⁴⁶ *Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 628.

⁴⁷ *Fiess*, 202 S.W.3d at 747-48; *TXU Elec. Co.*, 51 S.W.3d at 286; *Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 623.

⁴⁸ Tex. Tax Code § 11.31(b), (k).

⁴⁹ 33 Tex. Reg. 932 (Feb. 1, 2008).

effective only until December 12, 2010.⁵⁰ When adopting the current version of the rules, TCEQ stated in the preamble, "The commission repeals § 17.15."⁵¹ The Executive Director also cites to a version of Flow Chart B in draft guidance document No. RG-461, "Property Tax Exemptions for Pollution Control Property."⁵² However, the TCEQ has never even finalized guidance document No. RG-461. Moreover, the current version of draft guidance document No. RG-461 was published in March 2011.⁵³ Texas courts distinguish a version of a statute or regulation not in effect at the time a claim arises, and have declined to apply a version of a statute in effect only before a claim arises.⁵⁴ As discussed above, ambiguity does not exist with respect to the statute at issue in this matter. As a result, Flow Chart B as contained in repealed § 17.15 and the prior version of draft guidance document No. RG-461 is not applicable to Air Products' application, and not entitled to deference.

Second, the version of Flow Chart B that appears in the prior version of draft guidance document No. RG-461 is not owed deference because guidance is not considered a "formal proceeding" that is owed deference. Deference is only extended to agency interpretations in a

⁵⁰ The prior version of the regulations was effective until December 12, 2010, but Air Products did not submit its application until May 30, 2012.

⁵¹ 35 Tex. Reg. 10969 (Dec. 10, 2010).

⁵² TCEQ, Property Tax Exemptions for Pollution Control Property, Draft Guidelines Document for Preparation of Use Determination Applications, RG-461, p.7, 22, and 48 (January 2008) (Figure: 30 Tex. Admin. Code § 17.15(b), Part B Decision Flow Chart).

⁵³ TCEQ, Property-Tax Exemptions for Pollution Control Property (DRAFT), Pub. No. RG-461 (2011), http://www.tceq.texas.gov/assets/public/implementation/tax_relief/rg461_program_guidelines.pdf.

⁵⁴ Texas courts distinguish the version of a statute in effect at the time a claim arises, and have declined to apply versions of a statute in effect only before the time the claim being litigated arose. *Tex. Health & Human Servs. Comm'n v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 624-25 (Tex. App. 2013); *Fain v. State*, No. 02-10-00412-CR, 2012 WL 752652, at *8 (Tex. App. Mar. 8, 2012), petition for discretionary review refused (Aug. 22, 2012); *In re V.L.G.*, No. 03-06-00245-CV, 2007 WL 135974, at *2 (Tex. App. Jan. 19, 2007); *Dominguez v. Gilbert*, 48 S.W.3d 789, 791 n.1 (Tex. App. 2001); *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 472 n.4 (Tex. App. 1999); *In re R.C.T.*, 294 S.W.3d 238, 244 n.2 (Tex. App. 2009); *Frank v. Liberty Ins. Corp.*, 255 S.W.3d 314, 325 n.8 (Tex. App. 2008); *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 631 (Tex. 2008); *City of Waco v. Tex. Comm'n on Env'tl. Quality*, 346 S.W.3d 781, 811-12 (Tex. App. 2011) (rev'd on other grounds, No. 11-0729, 2013 WL 4493018 (Tex. Aug. 23, 2013)).

Moreover, the Supreme Court of Texas has held that prior versions of an agency regulation are considered extrinsic evidence and may only be considered if ambiguity exists. *Fieess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006). In this case, the Supreme Court of Texas considered an insurance policy as prescribed by the Texas Department of Insurance. The Court applied principles of statutory interpretation to assess the Agency's interpretation of the policy. The dissent argued that the current policy was ambiguous, primarily by construing the preceding version of the policy, on the basis that no change was intended when the current version was adopted. The majority rejected this reasoning, finding that evidence of prior policies is extrinsic evidence, and thus inadmissible unless the current policy is ambiguous. The Court relied on the principles set forth in *Fieess* to establish conditions on the "serious consideration" test for deference to agency interpretation. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 623 (Tex. 2011), reh'g denied (May 27, 2011).

formal opinion adopted after formal proceedings.⁵⁵ Importantly, formal proceedings do not include policy statements, agency manuals, or enforcement guidelines.⁵⁶ Thus the draft guidance is not a formal proceeding, and Flow Chart B cannot receive deference as Agency interpretation.

Finally, although the Executive Director's cites to the version of Flowchart B in a prior version of draft guidance document No. RG-461, when adopting the current version of the draft guidance document the TCEQ **expressly decided not to retain Flow Chart B** in current draft guidance. In the preamble to the current version of the rules, TCEQ states that Flow Chart B "will not be retained in guidance."⁵⁷ Thus, again, Flow Chart B is not owed deference as Agency interpretation.

E. Air Products' reading of the statute would not cause absurd results, but rather would ensure that the Executive Director retains the authority to determine whether equipment is included on the (k)-list and the percentage of (k)-listed equipment used for pollution control.

The Executive Director argues that even if Air Products' reading of the statute is supported by the statute's plain language, it cannot be adopted because it would lead to absurd results.⁵⁸ As an example of such absurd results, the Executive Director compares the use of coal drying equipment (which is listed under subsection (k)) by a power plant and a mining company. At a power plant, coal drying equipment reduces moisture in the fuel source, which improves boiler performance and unit heat rate, and thereby reduces emissions. A mining company uses the same equipment prior to selling the coal to a power plant.

According to the Executive Director, Air Products' reading "would prohibit the Executive Director from distinguishing between these two applicants." This is a mischaracterization of the proper reading of the statute. While subsection (m) would require a positive use determination for both applicants because coal drying equipment is listed under subsection (k), the Executive Director retains the authority to determine what percentage of the equipment is used for pollution control. Subsection (m) merely requires that (k)-listed equipment receive a nonzero positive use determination; it does not require a 100% positive use determination. Subsection (m) thus ensures that the Executive Director retains the authority to determine the percentage of equipment used for pollution control, which in the example of the mining company's coal drying equipment, probably would be minute. Moreover, as noted above, 30 Tex. Admin. Code § 17.17(a) ensures uniformity in partial positive use determinations, by requiring that applications for partial positive use determinations use the Cost Analysis Procedure to calculate the percentage of equipment used for pollution control.

Far from causing absurd results, the proper reading of the statute is reasonable and would give effect to every part of the statute in a cohesive fashion.

⁵⁵ *Fiess*, 202 S.W.3d at 747-48; *TXU Elec. Co. v. Pub. Util. Comm'n of Tex.*, 51 S.W.3d 275, 286 (Tex.2001); *Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 623.

⁵⁶ *Christensen v. Harris Cnty.*, 529 U.S. 576, 587, 120 S. Ct. 1655, 1662-63, 146 L. Ed. 2d 621 (2000).

⁵⁷ 35 Tex. Reg. 10969 (Dec. 10, 2010).

⁵⁸ *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004).

2. The Executive Director's Interpretation that (k)-listed equipment is not entitled to a positive use determination is arbitrary and capricious under the Texas Administrative Procedure Act.

As explained above, subsection (m) mandates at least a partial positive use determination for (k)-listed equipment. Any implication to the contrary contradicts the statutory requirements of Tex. Tax Code § 11.31. As such, the Executive Director's interpretation that (k)-listed equipment is not entitled to at least a partial positive use determination⁵⁹ is an impermissible misreading of the statute.

To the extent that TCEQ applies this erroneous interpretation to Air Products' application, such an interpretation is arbitrary and capricious under the Texas Administrative Procedure Act ("**Texas APA**").⁶⁰ The Texas APA requires a reviewing court to reverse or remand a case in which substantial rights of the appellant are prejudiced because administrative inferences or decisions violate a statute, exceed the agency's statutory authority, are arbitrary and capricious, or are characterized by an abuse of discretion.⁶¹ Texas courts have held that an agency's decision is considered arbitrary and capricious if it is based on non-statutory criteria.⁶² As explained above, subsection (m) requires TCEQ to issue a positive use determination for (k)-listed equipment. By ignoring this mandate, the Executive Director violates a statutory requirement, considers non-statutory criteria, and exceeds its authority regarding determinations for (k)-listed equipment. The statute empowers the Executive Director to make two determinations with respect to (k)-listed equipment: first, whether equipment described in an application falls under a category of the subsection (k) list, and second, what percentage of the equipment is used for pollution control.⁶³ The statute does not authorize the Executive Director to determine *whether* equipment falling under a category of the subsection (k) list should receive a positive use determination. An agency possesses only those powers that the legislature expressly confers upon it and is prohibited from exercising a power contrary to a statute.⁶⁴

Moreover, enforcing the Executive Director's erroneous interpretation amounts to an abuse of discretion. An agency abuses its discretion when in making a decision it omits a factor that the

⁵⁹ 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. "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.

⁶⁰ Tex. Gov't Code §§ 2001.001 et seq.

⁶¹ *Id.* § 2001.174(2).

⁶² Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc., 665 S.W.2d 446, 454 (Tex. 1984) (holding that "Arbitrary and capricious agency action also may be found when an agency improperly bases its decision on non-statutory criteria"); Pub. Util. Comm'n of Tex. v. S. Plains Elec. Co-op., Inc., 635 S.W.2d 954, 957 (Tex. App. 1982) (reiterating that "an agency's consideration of a non-statutory standard amounts to arbitrary and capricious action requiring reversal").

⁶³ Tex. Tax Code § 11.31(m).

⁶⁴ Office of Pub. Util. Counsel v. Tex.-N.M. Power Co., 344 S.W.3d 446, 451 (Tex. App. 2011).

legislature intended the agency to consider, or reaches a completely unreasonable result after weighing the relevant factors.⁶⁵ As explained above, the plain language of the statute requires a positive use determination for (k)-listed equipment. If 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.⁶⁶ 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).

3. Even if the agency's interpretation is entitled to deference, and (k)-listed equipment may receive a negative use determination, Air Products' equipment is entitled to at least a partial positive use determination because it meets or exceeds a relevant environmental law, rule, or regulation and it not used wholly for production purposes.

A. Air Products' CCS System meets or exceeds a law, rule, or regulation adopted for the prevention, monitoring, control, or reduction of air, water, or land pollution.

Even if the statutory language of Tex. Tax Code § 11.31 were ambiguous, and the agency's interpretation did not conflict with the statutory language, Air Products' CCS System is nonetheless entitled to at least a partial positive use determination because it meets or exceeds "rules or regulations adopted by any environmental protection agency... for the prevention, monitoring, control, or reduction of air, water, or land pollution."⁶⁷ As further explained in Air Products' application⁶⁸ and its Response to Notice of Technical Deficiency,⁶⁹ the CCS System meets or exceeds the following specific rules.

i. Air Products' CCS System exceeds the rule requiring major sources to implement best available control technology and requirements under EPA's Tailoring Rule.

As explained more fully in Air Products' application materials⁷⁰ and its Response to Notice of Technical Deficiency,⁷¹ the EPA adopted its Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule on June 3, 2010,⁷² long before Air Products sought approval to construct the CCS System and before filing its Use Determination for Pollution Control Property

⁶⁵ City of El Paso v. Pub. Util. Comm'n of Tex., 883 S.W.2d 179, 184 (Tex. 1994).

⁶⁶ Tex. Gov't Code § 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).

⁶⁷ Tex. Tax Code § 11.31(b); 30 Tex. Admin. Code § 17.4(a).

⁶⁸ Attached as [Exhibit B](#).

⁶⁹ Attached as [Exhibit A](#).

⁷⁰ Attached as [Exhibit B](#).

⁷¹ Attached as [Exhibit A](#).

⁷² 75 Fed. Reg. 31,514 (June 3, 2010).

Application. As a major source of CO₂, on that date Air Products' Facility became subject to federal rules regulating CO₂ as a pollutant. However, the *timing* of those requirements to Air Products' Facility was subject to a phase-in period. More specifically, as adopted 40 C.F.R. § 52.21 requires obtaining a Prevention of Significant Deterioration ("**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 CO₂—starting on July 1, 2011.⁷³ And according to EPA's guidance on the PSD permitting requirements, carbon capture and sequestration could be considered as BACT in these circumstances.⁷⁴ In addition, facilities with Title V permits, like Air Products' Facility, must address greenhouse gas requirements when they renew or revise their Title V permits.⁷⁵

Here, the Facility is a major source of CO₂ and is currently operating under a Title V permit, which was last issued in 2011. Title V permits are issued for a maximum of five years, at which point the permit must be renewed.⁷⁶ At the time of renewal, a permit will be updated to include any standards applicable to the facility. The Facility's permit must be renewed in 2015, and the renewed permit will incorporate all greenhouse gas requirements that became applicable to the Facility under the Tailoring Rule based on the Facility's major source CO₂ emissions.⁷⁷ Understanding that the Facility will be subject to express obligations regarding its CO₂ emissions at the time of permit renewal, Air Products has already installed the CCS System to reduce CO₂.

According to the Executive Director, Air Products is not at this time subject to 40 C.F.R. § 52.21, and therefore this rule cannot be cited in its application for tax relief. In essence, the Executive Director penalizes Air Products for *exceeding* the current mandatory requirements being phased-in with respect to Air Products' Facility when it voluntarily installed the CCS System earlier than it will be required to control CO₂ emissions. By controlling CO₂ emissions before the deadlines being phased-in with respect to Air Products' Facility, Air Products is currently exceeding a regulation to which it is subject. Accordingly, a positive use determination for the CCS System is warranted.

ii. Air Products' CCS System meets or exceeds the rule intended to prevent pollution that causes nuisance conditions.

30 Tex. Admin. Code § 101.4 is intended to prevent pollution occurring through discharges of air contaminants that cause nuisance conditions. CO₂ is an air contaminant.⁷⁸ Here, the CCS System captures greater than 90 percent of CO₂ from the process gas stream used in a

⁷³ 40 C.F.R. § 52.21(a)(2)(iii), (j)(3), (b)(49)(v)(b); 75 Fed. Reg. 31,514.

⁷⁴ EPA, PSD and Title V Permitting Guidance for Greenhouse Gases, EPA-457/B-11-001, March 2011, Appendix H.

⁷⁵ 75 Fed. Reg. 31,514, 34,523.

⁷⁶ 40 C.F.R. § 70.6(a)(2).

⁷⁷ 75 Fed. Reg. 31,516.

⁷⁸ CO₂ is produced by a process that is not natural. Tex. Health & Safety Code § 382.003(2). The U.S. Supreme Court has held that greenhouse gases ("**GHGs**"), including CO₂, are pollutants under the federal Clean Air Act. *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007).

hydrogen production facility, thereby preventing nuisance conditions associated with CO₂ from arising, as required by 30 Tex. Admin. Code § 101.4.

The Executive Director states in its response brief that § 101.4 is not a sufficient rule for purposes of the tax relief program because it is “a general prohibition against creating an air quality nuisance” that “does not compel the use, construction, acquisition, or installation of pollution control equipment, nor does it explicitly limit CO₂ emissions.” However, the Executive Director mischaracterizes the statutory requirements and its own regulations.

The statute and the rule require merely that the cited rules or regulations have been “adopted ... for the prevention, monitoring, control, or reduction of air, water, or land pollution.”⁷⁹ There is no requirement that the cited rule compel the installation of specific equipment. As we explained in our Response to Notice of Technical Deficiency,⁸⁰ even the TCEQ Commissioners have agreed that the cited rule “doesn’t have to specifically name a piece of equipment.”

Additionally, there is no requirement that the cited rule explicitly limit a certain contaminant. The fact that a qualifying rule can be for the purpose of “monitoring” pollution illustrates the incorrectness of the Executive Director’s assertion that the rule must “limit” a contaminant. A “monitoring” rule would not impose a limit on a particular contaminant, but merely require measurement of a contaminant.

Thus the cited rule is sufficient, and the installation and use of the CCS System meets or exceeds this regulation.

iii. Air Products’ CCS System meets additional environmental rules for the prevention, monitoring, control, or reduction of air, water, or land pollution.

As explained more fully in Air Products’ application⁸¹ and Response to Notice of Technical Deficiency,⁸² the CCS System meets or exceeds the following additional rules:

- 30 Tex. Admin. Code § 335.471 *et seq.* requires preparation of pollution prevention plans that identify source reduction and waste minimization projects to be undertaken.⁸³
- 40 C.F.R. § 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.⁸⁴

⁷⁹ Tex. Tax Code § 11.31(b); 30 Tex. Admin. Code § 17.4(a).

⁸⁰ Attached as [Exhibit A](#).

⁸¹ Attached as [Exhibit B](#).

⁸² Attached as [Exhibit A](#).

⁸³ 30 Tex. Admin. Code § 335.474(1)(B)-(C).

⁸⁴ 40 C.F.R. § 51.166(a), (j).

- 30 Tex. Admin. Code § 116.115(b) requires that a permit holder comply with the permit's conditions, including the maximum emission rates for contaminants.

B. Air Products' CCS System is not required to meet or exceed a rule that requires the installation of a CCS System or any other pollution control equipment.

In its response brief, the Executive Director states that the purpose of Tex. Tax Code § 11.31 is to "provide tax relief to businesses that are compelled by law to install or acquire pollution control equipment," citing to a 1996 opinion of the Texas Attorney General. However, the text of the statute merely requires that the cited rule have been "adopted ... for the prevention, monitoring, control, or reduction of air, water, or land pollution."⁸⁵ And as explained fully in our Response to Notice of Technical Deficiency,⁸⁶ the TCEQ Commissioners have confirmed in the HRSG proceedings 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.⁸⁷

The Executive Director offers an example supporting Air Products' position that the cited rule need not specifically require the installation of certain (k)-listed equipment in order for that equipment to be eligible for a positive use determination. Specifically, the Executive Director contrasts the use of coal drying equipment by a power plant and a mining company. The Executive Director implies that the use of such equipment at a power plant would receive a positive use determination, because the equipment reduces moisture in the fuel source, which improves boiler performance and unit heat rate, and thereby reduces emissions. However, we are not aware of any regulations that specifically require the installation of coal drying equipment at a power plant. Nonetheless, the Executive Director appears to conclude that the use of such equipment at a power plant is eligible for tax relief because it can help a power plant comply with requirements related to emissions reduction. Thus, with such an admission, and without the existence of a rule or regulation requiring the use of coal drying equipment at a power plant, the Executive Director's cited example actually serves to support Air Products' argument that Air Products is not required to cite a rule that specifically requires the installation of the CCS System to qualify for a positive use determination.

C. The fact that Air Products' CCS has some production value does not disqualify the equipment from a positive use determination for the portion of the equipment used for pollution control.

The Executive Director seems to suggest that pollution control equipment that also generates revenue is not eligible for tax relief. Specifically, the Executive Director cites to the 1996 opinion of the Texas Attorney General, which states that Tex. Tax Code § 11.31 is intended to provide tax relief to businesses compelled by law to install or acquire pollution control equipment "which generates no revenue for such businesses." The proposition that pollution control equipment

⁸⁵ Tex. Tax Code § 11.31(b); 30 Tex. Admin. Code § 17.4(a).

⁸⁶ Attached as [Exhibit A](#).

⁸⁷ TCEQ Commissioners Agenda Meeting, Use Determination Appeals, Docket Nos. 2012-1529-MIS-U et al. (Dec. 5, 2012).

that also generates revenue is not eligible for tax relief is refuted by the statute, TCEQ's own regulations, and a subsequent opinion of the Texas Attorney General.

The statute states that tax relief is available to "all or part" of property used for pollution control,⁸⁸ and requires an applicant to identify "the proportion of the installation that is pollution control property."⁸⁹ Similarly, 30 Tex. Admin. Code § 17.17 sets forth a process for calculating the percentage of pollution control property used for pollution control, as opposed to the percentage used for production purposes. Finally, in a 2001 opinion, the Texas Attorney General states that "property that serves both a production and a pollution-reduction purpose, is not entitled to a tax exemption on the total value of the property [but] may receive only a partial tax exemption."⁹⁰ The statute "clearly extends" to equipment "that is used to make a product and by its design limits pollution," and the statute offers tax relief to equipment "wholly used to control pollution" as well as equipment "used only partly to control pollution."

Clearly pollution control equipment that generates limited revenue (like the CCS System) is still eligible for tax relief for the percentage of the equipment used for pollution control. Air Products' application has followed TCEQ procedures in calculating the proportion of the CCS System used for pollution control purposes.

D. Air Products' CCS System is not used wholly for production purposes.

As explained above, where equipment serves both a production and pollution-reducing purpose, the equipment may receive tax relief only for the percentage of the equipment used for pollution control. Thus if the entirety of the equipment is used for production purposes, then the equipment may not be entitled to any tax relief.

Here, however, the CCS System is not used wholly for production purposes. In our Response to Notice of Technical Deficiency,⁹¹ Air Products clarified that the CCS System is not used 100% for pollution control and does generate a marketable product. Air Products estimated the capital cost of the CCS System at \$238,672,000. Out of an estimated capital cost of nearly \$240 million, Air Products expects that the Net Present Value Marketable Product is less than \$40 million (less than one-sixth of the capital cost). Because the value of the marketable product is so small compared to the capital cost for the CCS System, Air Products is undertaking the installation of the equipment with the help of a financial assistance grant from the Department of Energy. After applying the Cost Analysis Procedure required under TCEQ rules, Air Products determined that 84.3% of the capital cost (or \$201,200,000) would be eligible for tax relief.

The Chief Appraiser of the Jefferson County Appraisal District states in its response brief that the CCS System is not entitled to a positive use determination because after capturing CO₂ from the Facility, the equipment will be used in enhanced oil production efforts. The Chief Appraiser

⁸⁸ Tex. Tax Code § 11.31(a).

⁸⁹ *Id.* § 11.31(c).

⁹⁰ 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/html/jc0372.htm>.

⁹¹ Attached as Exhibit A.

appears to imply that because the captured CO₂ will be used in enhanced oil production, the CCS System is used solely for production and is not at all used for pollution control. However, the Chief Appraiser ignores Air Products' estimate that less than one-sixth of the capital cost of the equipment is attributable to the value of marketable product, meaning that the vast majority of the equipment is used for pollution control.

Again, the Executive Director's example regarding coal drying equipment (which is listed under subsection (k)) is instructive in our case. The Executive Director states that coal drying equipment is not eligible for a positive use determination if used by a mining company to reduce moisture of coal that is then sold to a power plant. Under such circumstances, the equipment is used entirely for production purposes, and under the Executive Director's interpretation of the statute is not eligible for a positive use determination. In contrast, the Executive Director implies that this same equipment would be eligible for a positive use determination if used by a power plant because it reduces moisture in the fuel source, which improves boiler performance and unit heat rate and thereby reduces emissions. When used at a power plant, the primary purpose of such equipment is pollution control.

Even if we were to accept the Executive Director's flawed interpretation of the statute, Air Products' CCS System is still eligible for a positive use determination because it is not used entirely for production purposes. The use of the CCS System at the Facility is akin to the use of coal drying equipment at a power plant, not a mining company. Thus the CCS System must receive at least a partial positive use determination for the percentage of the equipment used for pollution control.

Conclusion

In sum, Air Products' equipment is entitled to at least a partial positive use determination under Tex. Tax Code § 11.31 because it is a type of equipment listed under subsection 11.31(k), and under subsection (m) TCEQ "shall" issue a positive use determination for (k)-listed equipment "notwithstanding the other provisions" of section 11.31. TCEQ's interpretation to the contrary is not entitled to deference because the statutory language is not ambiguous, the agency's interpretation is unreasonable and contradicts the plain language of the statute, and the agency's interpretation does not appear in a formal opinion adopted after formal proceedings. Accordingly, under applicable sections of the Texas Government Code, and applicable case law, the TCEQ's Negative Use Determination with respect to the CCS System is arbitrary and capricious and an abuse of discretion.

As explained above, the statutory language is unambiguous on its face. The Executive Director does not allege that any word or phrase in Tex. Tax Code § 11.31 is ambiguous on its face because, for example, it has more than one plain meaning, it is not defined in the statute, it is a term of art in a particular trade, or that agency expertise is required to interpret the text. Rather, in order to support its interpretation, the Executive Director interprets ambiguity into the statute with respect to how various sections of the statute relate to one another, where no ambiguity exists; by such action, the Executive Director creates an internal conflict within the statute. Because the Executive Director's interpretation impermissibly creates ambiguity and internal conflict in the statute, and contradicts the statute's plain language, it is unreasonable and thus not entitled to deference. The proper reading of the statute honors the subsection (m) mandate to issue a positive use determination for (k)-listed equipment and ensures that the entirety of section 11.31 is given effect.

Although extrinsic aids may not be used to interpret unambiguous statutory text, the Executive Director cites to several extrinsic documents to support its erroneous interpretation. The Executive Director cites to a prior version of the regulations, which is not owed deference because TCEQ repealed the relevant language and expressly declined to retain it in guidance. The Executive Director also cites to draft guidance that has been superseded, letters from legislators submitted after section (k) was adopted and that raise concerns not posed by the CCS System, and a prior negative use determination for a different type of equipment that does not fall on the (k)-list. None of these documents constitute formal agency opinions adopted after formal proceedings, an additional reason why the Executive Director's interpretation is not owed deference. Moreover, these aids constitute non-statutory criteria upon which the Executive Director is basing its decision.

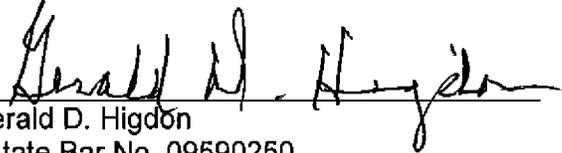
Consequently, the Executive Director's interpretation, as applied to Air Products, is arbitrary and capricious and constitutes an abuse of discretion under the Texas APA and applicable case law. The Executive Director is bound by statute to issue at least a partial positive use determination for property like the CCS System that is listed in subsection (k).

Alternatively, even if we accept the Executive Director's unreasonable interpretation that (k)-listed equipment must meet or exceed a relevant environmental rule, Air Products' CCS System would nonetheless qualify for at least a partial positive use determination. As explained above, the CCS System meets or exceeds multiple relevant rules and is not used solely for production purposes. In fact, the production value of the CCS System amounts to less than one-sixth of the capital cost of its installation. Per the unambiguous statutory requirements, the CCS System must receive at least a partial positive use determination.

FOR THESE REASONS, Appellant respectfully requests that the Commission grant Air Products' appeal and overturn the Executive Director's negative use determination for the CCS System.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2013, APPELLANT'S REPLY BRIEF TO THE RESPONSE BRIEFS OF THE EXECUTIVE DIRECTOR OF AND PUBLIC INTEREST COUNSEL FOR THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, AND THE JEFFERSON COUNTY TAX APPRAISER was sent to the following persons, in the manners specified:

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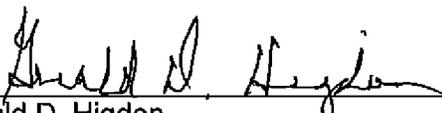
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Gerald D. Higdon

Exhibit A

Air Products' Response to Notice of Technical Deficiency
(March 25, 2013)



Attorneys & Counselors

16632
Revision 2

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March 25, 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 ("CO₂") 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 CO₂ 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 CO₂. 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 § 116.116(b) does not apply because the Facility's Air Quality Permit (Nos. 39693 and N63) does not contain a

Allanta, Austin, Chicago, Dallas, Hong Kong, Houston, London, Los Angeles, New Orleans, New York, Sacramento, San Francisco, Washington DC

Maximum Allowable Emission Rate for the control of CO₂. 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 CO₂. The cited permits by rule of 30 TAC §§ 106.261, 106.183, 106.371, and 106.478 do not require control of CO₂. Emission limitations associated with permits by rule are stated in § 106.104(a)(4), and CO₂ 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 CO₂ 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 CO₂ as a pollutant. As explained in Air Products' application, EPA has adopted such a final rule or regulation regulating CO₂ as a pollutant pursuant to its Light Duty Vehicle Rule, the GHG requirements that became effective January 2, 2011. See, 75 Fed. Reg. 26,324 (May 7, 2010). Moreover, pursuant to EPA's Tailoring Rule, effective August 2, 2010, GHGs, including CO₂, 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 CO₂ as a pollutant. See Standard Permit Registration Number 95649, and Permit by Rule Registration Number 95692, 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 CO₂ 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/hm/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 CO₂ would be eligible for the tax exemption. Further, if "wholly or partly" may be read to mean "nothing at all," then the statute could be read to allow a tax exemption for property not capturing any CO₂ at all. Again, these are absurd results.

- Subsection (l) 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*

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).

Mr. Chance Goodlin
March 25, 2013
Page 5

*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 APA¹⁴ 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 CO₂

TCEQ states that the rules cited in Air Products' application "do not require the collection and sequestration of CO₂." 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 CO₂ 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. 2012-1629-MIS-U et al. (December 6, 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 CO₂, but as the TCEQ Commissioners have agreed in principle, the System need not meet or exceed a rule that requires removal of CO₂ 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.

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 CO₂—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 CO₂, and the modifications associated with installing the CCS System would have caused an increase in CO₂ 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 CO₂ 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 CO₂ *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*.

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 CO₂.

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 CO₂.²⁸ However, CO₂ 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 CO₂, are pollutants under the federal Clean Air Act.³⁰ The fact that the permit does not provide a cap on CO₂ emissions may be interpreted in one of two ways. If the lack of a cap means there is no limit on CO₂ emissions, then implementing the CCS System to control CO₂ 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 CO₂ are permitted, then implementing the CCS System to control CO₂ 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 CO₂ (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 CO₂ (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 CO₂.

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 CO₂." 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).

Mr. Chance Goodin
March 25, 2013
Page 10

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, CO₂ is an air contaminant. Additionally, EPA concluded its endangerment finding that GHGs, including CO₂, "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 CO₂ 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 CO₂ is meaningful. Here by definition, the facility is a "major source" of CO₂ 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 CO₂ from the process gas stream used in a hydrogen production facility, thereby preventing nuisance conditions associated with CO₂ 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 CO₂. Emission limitations associated with permits by rule are stated in § 106.104(a)(4), and CO₂ 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.

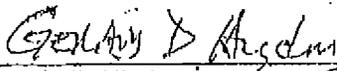
Mr. Chance Goodin
March 25, 2013
Page 11

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.

ATTACHMENTS

4. City, State, Zip: Port Arthur, TX 77640

Section 7. Appraisal District with Taxing Authority

1. Appraisal District: Jefferson County Appraisal District
2. District Account Number(s): New Property

Section 8. Contact Name

1. Company Name: Air Products and Chemicals, Inc.
2. First Name of Contact: Gerard
3. Last Name of Contact: Thompson
4. Salutation: Mr. Mrs. Ms. Dr. Other:
5. Title: Environmental Manager
6. Mailing Address: 7201 Hamilton Boulevard
7. City, State, Zip: Allentown, PA 18195-1501
8. Phone Number/Fax Number: 610-481-5154/610-716-5590
9. Email Address: thompsgp@airproducts.com
10. Tracking Number (optional):

Section 9. Property/Equipment Description, Applicable Rule, and Environmental Benefit

For each piece, or each category, of pollution control property/equipment for which a use determination is being sought, answer the following questions.

Attach additional response sheets to the application for each piece of integrated pollution control property/equipment if a use determination is being sought for more than one (1) piece.

General Information

1. Name the property/equipment: The Air Products' Port Arthur Plants 1 and 2 CO₂ separation, purification, delivery, and sequestration system.
2. Is the property/equipment used 100% as pollution control equipment? Yes No
If the answer is 'Yes,' explain how it was determined that the equipment is used 100% for pollution control: The Port Arthur CO₂ system is part of a Department of Energy (DOE) project to develop and demonstrate technology to successfully capture, purify, deliver, and sequester CO₂.
3. Does the property/equipment generate a Marketable Product? Yes No
If the answer is 'Yes,' describe the marketable product: Successfully sequestering the CO₂ at the Denbury Resources West Hastings oil field, provides Denbury the ability to enhance its oil recovery from its existing field. This result of sequestration provides a small measure of income to offset a fraction of the cost to separate, purify, transport, and sequester the CO₂.

CONFIDENTIAL

Attachment 3

Air Products LLC Port Arthur, Texas
CO2 Separation, Purification, Transport, and Sequestration
Tier III Partial Use Determination

Capital Cost of the New CO2 Plant (w/pipe, w/o GTG-HRSG): \$238,672,000

Useful Life: 10 Years

Interest Rate: 10%

Net Present Value Marketable Product: \$37,463,000

Production Capacity Factor: 100%

$$\text{CAP Equation} = \frac{(1.00 \times \$238,672,000) - \$37,463,000}{\$238,672,000} \times 100 = 84.3\%$$

$$\text{Eligible Capital Cost: } 0.843 \times \$238,672,000 = \$201,200,000$$

Attachment 4
Port Arthur CO2 - Capital Equipment List

1A13 Mechanical Equipment

- 1A13 CW Pumps
- 1A13 VSA Cooling Water Recycle Pumps
- 1A13 Trim Cooler Recycle Pumps
- 1A13 CT Blowdown Pumps
- 1A13 Waste Sump Lift Pumps
- 1A13 Product Blowers
- 1A13 CO2 Compressor
- 1A13 Rinse Compressors

1A13 Mechanical Equipment

- 1A13 Seal Gas Dryer
- 1A13 Back-up Seal Gas Compressor
- 1A13 JW Skid
- 1A13 Rinse Oil Recovery Skids
- 1A13 Rinse Comp Aux Skids
- 1A13 HRSG Chemical Dosing Unit
- 1A13 HRSG System
- 1A13 GT System
- 1A13 Cooling Tower System
- 1A13 Instrument Air Skid
- 1A13 Vacuum Blower Inlet Silencer
- 1A13 Vacuum Blower Discharge Silencer
- 1A13 Sidestream Filter

1A13 Mechanical Equipment

- 1A13 SMR Burners
- 1A13 VSA Vessel Internals
- 1A13 Adsorbers Vessels
- 1A13 Surge Tanks
- 1A13 Mole Sieve
- 1A13 VSA Alumina
- 1A13 VSA Ceramic Balls
- 1A13 NH3 SCR Upgrades for SMRs
- 1A13 Drier System

1A13 Mechanical Equipment

- 1A13 NG Gas Knock-Out Drum
- 1A13 CO2 Product Compressor Suction Sep
- 1A13 CO2 Product Condensate Drum
- 1A13 CO2 5th Stage Discharge Separator
- 1A13 Cogen Unit Continuous Blowdown Drum
- 1A13 Neutralization System/Tank

1A13 Mechanical Equipment

- 1A13 Blower Aftercoolers
- 1A13 CO2 Comp Aftercooler
- 1A13 CO2 Disposal Vaporizer

Attachment 4
Port Arthur CO2 - Capital Equipment List

1A13 HRSG Blowdown Cooler

~~1A13 HRSG Blowdown Cooler~~

1A13 Vacuum Blower Motor 1st Stage

1A13 Vacuum Blower Motor 2nd Stage

1A13 Vacuum Blower 3rd Stage

1A13 CO2 Product Compressor Motor

1A13 CO2 Rinse Compressor Motor

1A13 GT/ Transformers/ Substation

1A13 69kV Upgrades

1A13 PDC-Electric Bldg

~~1A13 Electric Components~~

1A13 69KV Step-Up Transformer

1A13 Dead-End Structure

1A13 13.8kV Switchgear Bus Tap Addition

1A13 4160V to 480V Transformer

1A13 13.8kV to 4kV Transformer

1A13 Bus Duct/Cables

1A13 LV VFD

1A13 HV Cable

~~1A13 Process Control Equipment~~

~~1A13 VSA Control Equipment~~

1A13 VSA Automatic Valves

1A13 VSA Bulk Instruments

Pending SPMatl Activity

~~1A13 Process Control Equipment~~

1A13 Control Valves

1A13 Safety Devices

1A13 DCS

1A13 MPC Hardware

1A13 Bulk Instruments

1A13 Transmitters/Manifolds

1A13 Analyzer Bldg

1A13 Analyzer Bldg Equip

1A13 CEMS Equip & Bldg

1A13 Flowmeters

1A13 Paymeters

~~1A13 Mechanical Systems Equipment~~

1A13 Manual Valves

1A13 Traps, Strainers, Misc Devic

1A13 VSA Manual Valves

~~1A13 ISBL Skids/PAKs~~

1A13 ISBL PA1 Piping

1A13 ISBL PA1 Steel/ Pipe Supports

1A13 ISBL PA2 Piping

1A13 ISBL PA2 Steel/ Pipe Supports

1A13 Process Piping assemblies/ sklds

1A13 Fuel Gas Skid

Attachment 4
Port Arthur CO2 - Capital Equipment List

- 1A13 VSA Skids
- 1A13 Blower Piping assemblies/skids
- 1A13 Rinse Compressor Skids
- 1A13 OSBL Rack and Yard Steel
- 1A13 OSBL Piping

~~1A13 Special Buildings~~

- 1A13 Spare Parts Building
- 1A13 CW Treatment Bldg Modula
- 1A13 Blower Building

~~1A13 Freight~~

- 1A13 Freight Road/Rail
- 1A13 Freight Air
- 1A13 Warehousing/Export Boxing
- 1A13 Freight Ocean
- 1A13 Import Duties & Customs Fees

~~1A13 Operation Materials~~

~~1A13 Plant Materials~~

- 1A13 Commissioning/Start up Parts
- 1A13 Signs & Nameplates
- 1A13 Maintenance Supplies
- 1A13 Office Equipment
- 1A13 Spare Parts Racking / Storage
- 1A13 Maintenance Tools
- 1A13 Safety Equipment
- 1A13 In Plant Radios
- 1A13 PC Hardware & Links
- 1A13 Laboratory Equipment
- 1A13 Initial Chems and Lubes

~~1A13 Plant Spares~~

- 1A13 CO2 Product Compressor Spares
- 1A13 Rinse Compressor Spares
- 1A13 Blower Spares
- 1A13 Instr Air Comp Spares
- 1A13 Dryer Unit Spares
- 1A13 Oil Removal Skid Spares
- 1A13 GT/HRSG - LTSA Spares
- 1A13 GT/HRSG - non - LTSA Spares
- 1A13 GT/HRSG - other Spares
- 1A13 Plant Spares - misc.
- 1A13 JW Spares
- 1A13 Pump Spares
- 1A13 Burner Spares
- 1A13 Safety Valve Spares
- 1A13 Valve & Instr Spares
- 1A13 VSA Skid Valve Spares
- 1A13 Analyzer Spares
- 1A13 DCS Spares

Attachment 4
Port Arthur CO2 - Capital Equipment List

1A13 Cooling Tower Spares
1A13 Motor Spares
1A13 HV/LV Electrical Gear Spares
1B113 Pipe
1B113 Coating
1B113 Fittings
1B113 Excess Flow Valves
1B113 Inline Valves
1B113 EFV Station Valves
1B113 Paymeter
1B113 Instrumentation
1B113 Operations Materials

Attachment 5
Notice of Technical Deficiency - January 24, 2013

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

- Capital Cost New – Project capital costs were provided by the Air Products Senior Project Senior Manager
- Capital Cost Old – Not applicable, no existing facility
- Production Capacity Old – Not applicable, no existing facility
- Production Capacity New – 100%: New facility
- Marketable Product Value – Ten years of projected product (CO₂) sales provided by Commercial and Project Management were employed.
- Production Cost - Ten years of project operation and maintenance costs provided by Global Operations were employed.
- Interest Rate – 10% per 30 TAC §17.17(c)(2)
- Production Capacity Factor – 1.0: New facility
- Useful Life – 10 year projection provided by APCI Commercial Management.

Exhibit B

Air Products' Use Determination for Pollution Control
Property Applications and Supporting Memorandum
(May 30, 2012)



2800 JPMorgan Chase Tower, 600 Travis
Houston, TX 77002
Telephone: 713-226-1200
Fax: 713-229-3717
www.lockelord.com

Gerald D. Hgdon
Direct Telephone: 713-228-3709
Direct Fax: 713-229-2535
hgdon@lockelord.com

May 30, 2012

Texas Commission on Environmental Quality
Tax Relief for Pollution Control Property Program
Building F, Mail Code 110
12100 Park 35 Circle
Austin, Texas 78753

Re: *Air Products LLC*; Use Determination for Pollution Control Property Applications

Ladies and Gentlemen:

We represent Air Products LLC. We have enclosed the following documents:

- (1) Completed Use Determination for Pollution Control Property Application for Plants 1 and 2 CO₂ separation, purification, delivery and sequestration system, with the following Attachments ("Application No. 1"):
 - (a) Attachment 1;
 - (b) Attachment 2;
 - (c) Attachment 3;
 - (d) Memorandum, dated May 25, 2012, by Locke Lord LLP; and
 - (e) Air Products Check No. 1000030935 in the amount of \$2,500.00 (tendered to the Cashier's Office only).

- (2) Completed Use Determination for Pollution Control Property Application for Low NO_x burners, Selective Catalytic Reduction, an ammonia analyzer and a NO_x gas analyzer with the following Attachments ("Application No. 2"):
 - (a) Attachment 1;
 - (b) Attachment 2;
 - (c) Attachment 3; and

Atlanta, Austin, Chicago, Dallas, Hong Kong, Houston, London, Los Angeles, New Orleans, New York, Sacramento Washington DC

HOU:0026269/00001:1599705v1

- (d) Air Products Check No. 1000030936 in the amount of \$150.00 (tendered to the Cashier's Office only).
- (3) Two complete copies of completed Application No. 1 (for equipment located in two appraisal districts); and
- (4) A complete copy of completed Application No. 2.

We will follow up with your office regarding these applications in due course. We appreciate the commission's consideration of the enclosed applications.

Very truly yours,


Gerald D. Higdon
For the Firm
By Commission
Cow

GDH/cms
Enclosures

cc: Mr. Jack Cernobyl, Air Products LLC
Gerald J. Pels, Locke Lord LLP

16682 Revision 1

Texas Commission on Environmental Quality

Use Determination for Pollution Control Property Application

A person seeking a use determination must complete this application form. For assistance in completing the application form please refer to the *Instructions for Use Determination for Pollution Control Property Application Form TCEQ-00611*, as well as the rules governing the Tax Relief Program in Title 30 Texas Administrative Code Chapter 17 (30 TAC 17). Information relating to completing this application form is also available in the TCEQ regulatory guidance document, *Property-Tax Exemptions for Pollution Control Property, RG-461*. For additional assistance, please call the Tax Relief Program at 512-239-4900.

You must supply information for each field of this application form unless otherwise noted.

Section 1. Eligibility

1. Is the property/equipment subject to any lease or lease-to-own agreement? Yes No
2. Is the property/equipment used solely to manufacture or produce a product or provide a service that prevents, monitors, controls, or reduces air, water or land pollution?
Yes No
3. Was the property/equipment acquired, constructed, installed, or replaced before January 1, 1994? Yes No

If the answer to any of these questions is 'Yes', then the property/equipment is not eligible for a tax exemption under this program.

Section 2. General Information

1. What is the type of ownership of this facility?
Corporation Limited Partner Other: Limited Liability Company
Sole Proprietor Utility Company
Partnership
2. Size of Company: Number of Employees
1 to 99 500 to 999 2,000 to 4,999
100 to 499 1,000 to 1,999 5,000 or more
3. Business Description: (Briefly describe the type of business or activity at the facility)
Hydrogen and steam production and electricity generation to supply adjacent Valero Energy Corporations petroleum refinery along with the separation, purification, delivery, and sequestration of carbon dioxide through Denbury Resources, Inc.
4. Provide the North American Industry Classification System (NAICS) six-digit code for this facility. 325120

Section 3. Type of Application and Fee

1. Select only one:

Tier I -- Fee: \$150

Tier II -- Fee: \$1,000

Tier III -- Fee: \$2,500

2. Payment Information:

Check/Money Order/Electronic Payment Receipt Number:

Payment Type: Check

Payment Amount: \$2500.00

Name on payment: Air Products LLC

Total Amount: \$2500.00

NOTE: Enclose a check, money order to the TCEQ, or a copy of the ePay receipt along with the application to cover the required fee.

Section 4. Property/Equipment Owner Information

1. Company Name of Owner: Air Products LLC

2. Mailing Address: 7201 Hamilton Boulevard

3. City, State, Zip: Allentown, PA, 18195

4. Customer Number (CN): 602299257

5. Regulated Entity Number (RN): 101941284

6. Is this property/equipment owned by the CN listed in Question 4? Yes No

If the answer is 'No,' please explain:

7. Is this property/equipment leased from a third party? Yes No

If the answer is 'Yes,' please explain:

8. Is this property/equipment operated by the RN listed in Question 5? Yes No

If the answer is 'No,' please explain:

Section 5. Name of Property/Equipment Operator (If different from Owner)

1. Company Name:

2. Mailing Address:

3. City, State, Zip:

4. Customer Number (CN):

5. Regulated Entity Number (RN):

Section 6. Physical Location of Property/Equipment

1. Name of Facility or Unit where the property/equipment is physically located: Air Products LLC

2. Type of Mfg. Process or Service: Hydrogen, electric power, and steam production

3. Street Address: 1801 South Gulfway Drive, Gate 37

Use Determination for Pollution Control Property Application--Form TCEQ-00611

Effective December 2010

Page 2 of 6

4. City, State, Zip: Port Arthur, TX 77640

Section 7. Appraisal District with Taxing Authority

1. Appraisal District: Jefferson County Appraisal District
2. District Account Number(s): New Property

Section 8. Contact Name

1. Company Name: Air Products and Chemicals, Inc.
2. First Name of Contact: Gerard
3. Last Name of Contact: Thompson
4. Salutation: Mr. Mrs. Ms. Dr. Other:
5. Title: Environmental Manager
6. Mailing Address: 7201 Hamilton Boulevard
7. City, State, Zip: Allentown, PA 18195-1501
8. Phone Number/Fax Number: 610-481-5154/610-716-5590
9. Email Address: thompsgp@airproducts.com
10. Tracking Number (optional):

Section 9. Property/Equipment Description, Applicable Rule, and Environmental Benefit

For each piece, or each category, of pollution control property/equipment for which a use determination is being sought, answer the following questions.

Attach additional response sheets to the application for each piece of integrated pollution control property/equipment if a use determination is being sought for more than one (1) piece.

General Information

1. Name the property/equipment: The Air Products' Port Arthur Plants 1 and 2 CO₂ separation, purification, delivery, and sequestration system.
2. Is the property/equipment used 100% as pollution control equipment? Yes No
If the answer is 'Yes,' explain how it was determined that the equipment is used 100% for pollution control: The Port Arthur CO₂ system is part of a Department of Energy (DOE) project to develop and demonstrate technology to successfully capture, purify, deliver, and sequester CO₂.
3. Does the property/equipment generate a Marketable Product? Yes No
If the answer is 'Yes,' describe the marketable product: Successfully sequestering the CO₂ at the Denbury Resources West Hastings oil field, provides Denbury the ability to enhance its oil recovery from its existing field. This result of sequestration provides a small measure of income to offset a fraction of the cost to separate, purify, transport, and sequester the CO₂.

What is the appropriate Tier I Table or Expedited Review List number? 30 TAC §17.17(b)
Expedited Review List Pollution Control Property, B-16 Carbon Dioxide Capture and Geological
Sequestration Equipment.

4. Is the property/equipment integrated pollution control equipment? Yes No

*If the answer is 'No,' separate applications must be filed for each piece of
property/equipment.*

5. List applicable permit number(s) for the property/equipment: 30 TAC 106.261, 183, 371,
and 478,

Incremental Cost Difference

6. Is the Tier I Table percentage based on the incremental cost difference? Yes No

If the answer is 'Yes,' answer the following questions:

7. What is the cost of the new piece of property/equipment?
8. What is the cost of the comparable property/equipment?
9. How was the value of the comparable property/equipment calculated?

Property/Equipment Description

10. Describe the property/equipment. (What is it? Where is it? How is it used?) The CO₂
control system separates CO₂ from the normal plant process syngas, purifies the CO₂,
compresses it and transports it to final sequestration via pipeline. Please see Attachment 1
for a more complete project and process description and Attachment 2 for a process flow
diagram.

Applicable Rule

11. What adopted environmental rule or regulation is being met by the construction or
installation of the property/equipment? The citation must be to the subsection level. 40
CFR §§ 51.166 and 52.21; 30 TAC § 116.115(b); 30 TAC §§ 335.471 et seq., 335.475. See also
attached memorandum from Locke Lord LLP.

Environmental Benefit

12. What is the anticipated environmental benefit related to the construction or installation of
the property/equipment? The capture and sequestration of more than one million tons per
year of carbon dioxide currently emitted to the atmosphere.

Section 10. Process Flow Diagram (Optional)

Attach documentation to the application showing a Process Flow Diagram for the
property/equipment.

Section 11. Partial-Use Percentage Calculation

This section must be completed for all Tier III applications. Attach documentation to the
application showing the calculations used to determine the partial-use percentage for the
property/equipment.

Section 12. Property Categories and Costs

List each piece of property/equipment of integrated pollution control property/equipment for which a use determination is being sought.

Property/Equipment Name	Item Table No. of Expedited Review List No.	Use Percent	Estimated Dollar Value
Land:			
Property: Separation, purification, transport, and sequestration of CO ₂ from the Port Arthur syngas stream.	B-16	89.6	\$213,850,000
Property:			
Property:			
Total:			\$213,850,000

Attach additional response sheets to the application if more than three (3) pieces.

NOTE: Separate applications must be filed for each piece of nonintegrated pollution control property/equipment.

Section 13. Certification Signature

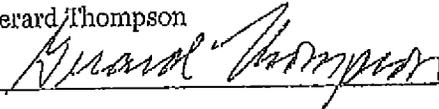
Must be signed by owner or designated representative.

By signing this application, I certify that I am duly authorized to submit this application form to the TCEQ and that the information supplied here is true and accurate to the best of my knowledge and belief.

Printed Name: Gerard Thompson

Date: 6/27/2012

Signature: _____



Title: Environmental Manager

Company Name: Air Products and Chemicals, Inc.

Under Texas Penal Code 37.10, if you make a false statement on this application, you could receive a jail term of up to one year and a fine up to \$2,000, or a prison term of two to 10 years and a fine of up to \$5,000.

Application Submission

Send the completed application and the appropriate fee, along with a complete copy of the completed application for the appraisal district, to:

U.S. Mail

Cashiers Office, MC 214
Tax Relief Program
TCEQ
PO Box 13088
Austin TX 78711-3088

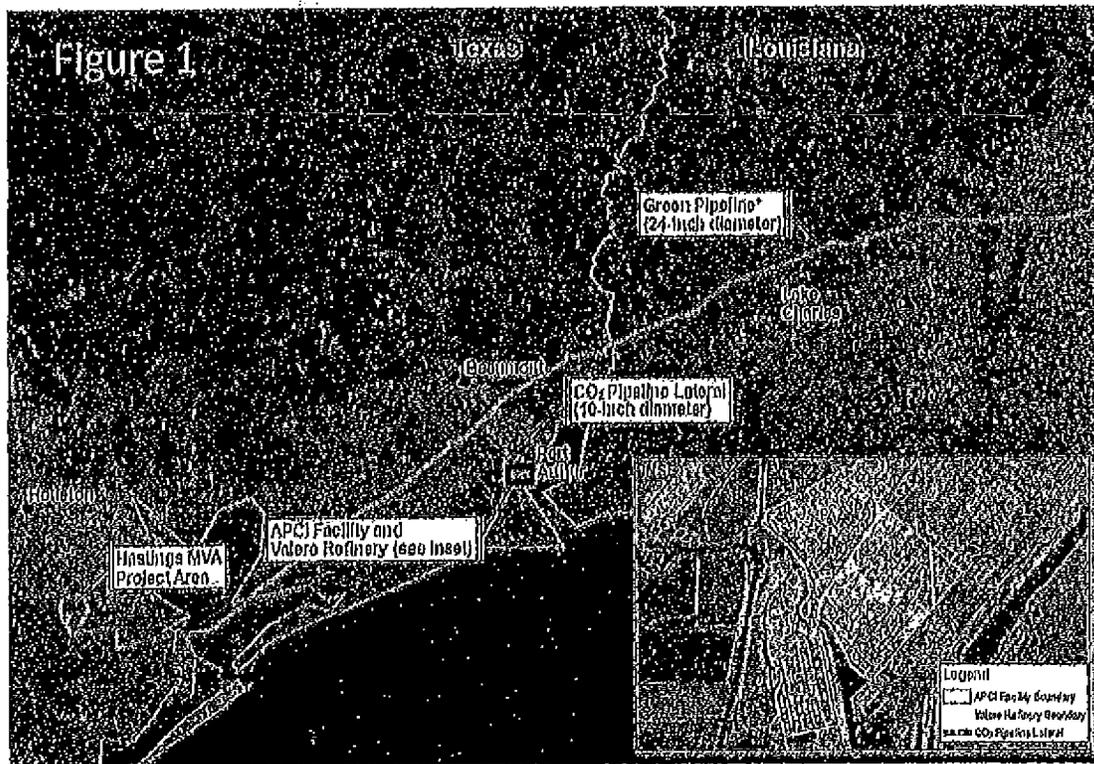
Physical Address

Cashier's Office, MC 214
Building A
TCEQ
12100 Park 35 Circle
Austin TX 78753

Attachment 1

PROCESS DESCRIPTION AND LOCATION

The Air Products' Port Arthur CO₂ Capture Units are integrated with the existing Port Arthur 1 (PA1) and Port Arthur 2 (PA2) plants each of which produce hydrogen, electric power, and steam for use by the Valero Energy Corporation refinery. The PA1 and PA2 hydrogen plants are located within the Valero Port Arthur Refinery near Port Arthur, Texas. Air Products has operated PA1 since 2000 and PA2 since 2006. Both the PA1 and PA2 plants use SMR technology for H₂ production and deliver the hydrogen to Valero and other West Gulf Coast customers via pipeline. Each CO₂ Capture Unit will recover CO₂ from the syngas generated by the steam methane reformer (SMR) at each site. CO₂ capture at each site will be achieved through two Vacuum Swing Adsorption (VSA) trains each of which will be nominally capable of recovering up to 760 tons/day of CO₂. Captured CO₂ from the four VSA trains are aggregated at the Port Arthur 2 site where it is compressed and dehydrated for delivery to the Denbury Resources, Inc. West Hastings oil field in Brazoria County via pipeline (See Figure 1 below). To make possible the final sequestration of the separated CO₂, Air Products installed an approximately 12.8 mile pipeline to deliver the CO₂.



CONFIDENTIAL

Attachment 3

Air Products LLC Port Arthur, Texas
CO2 Separation, Purification, Transport, and Sequestration
Tier III Partial Use Determination

Capital Cost of the New CO2 Plant (w/pipe, w/o GTG-HRSG): \$238,672,000

Useful Life: 10 Years

Interest Rate: 10%

Net Present Value Marketable Product: \$24,940,000

Production Capacity Factor: 100%

$$\text{CAP Equation} = \frac{(1.00 \times \$238,672,000) - \$24,940,000}{\$238,672,000} \times 100 = 89.6\%$$

$$\text{Eligible Capital Cost: } 0.896 \times \$238,672,000 = \$213,850,000$$

Locke Lord

Attorneys & Counselors

2800 JPMorgan Chase Tower, 600 Travis
Houston, TX 77002
Telephone: 713-226-1200
Fax: 713-223-3717
www.lockelord.com

Memorandum

Date: May 25, 2012

To: Tax Relief Program, MC 110
Building F
Texas Commission on Environmental Quality ("TCEQ")
Attention: Susana Hildebrand
12100 Park 35 Circle
Austin TX 78753

From: Gerald J. Pels
Gerald D. Higdon
ATTORNEYS FOR AIR PRODUCTS LLC

Subject: Air Products LLC; Use Determination for Pollution Control Property Application.

This Memorandum accompanies and supports the Use Determination for Pollution Control Property Application filed by Air Products LLC ("Air Products") associated with CO₂ 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 CO₂ will be used for enhanced oil recovery (such capture, transportation, and sequestration monitoring and verification equipment being collectively referred to as the "CCS System"). Although Air Products is also simultaneously filing related applications for Pollution Control Property used in

connection with a new gas turbine and Heat Recovery Steam Generator cogeneration system installed at the Facility, and wastewater separation, collection, treatment and transport equipment at the Facility, this memorandum focuses only upon the CCS System.

I. INTRODUCTION¹

The U.S. Department of Energy (“DOE”) awarded a financial assistance grant under the American Recovery and Reinvestment Act of 2009 in the form of a cooperative agreement to Air Products. The DOE selected Air Products to receive funding from the Industrial Carbon Capture and Sequestration (“ICCS”) program at the National Energy Technology Laboratory (“NETL”) for its Recovery Act: Demonstration of CO₂ Capture and Sequestration of Steam Methane Reforming Process Gas Used for Large Scale Hydrogen Production project. DOE will provide financial assistance in a cost sharing arrangement with Air Products. Total cost of the proposed project, including capital, operations and maintenance, and selling, general and related expenses, is estimated at \$431 million.

Air Products will design and demonstrate a state-of-the-art system to concentrate CO₂ from two steam methane reformer (“SMR”) hydrogen (“H₂”) production plants, and purify the CO₂ to make it suitable for delivery via pipeline for injection and sequestration in an existing oil field for an enhanced oil recovery (“EOR”) project. Air Products proposes to retrofit each of its two Port Arthur SMRs, located at the Facility, with a vacuum swing adsorption (“VSA”) system to separate the CO₂ from the process gas stream, followed by compression and drying processes. This process will convert the initial stream, which contains greater than ten percent (10%) CO₂, to greater than 97 percent CO₂ purity for delivery to a proposed 12.8-mile-long pipeline lateral, with negligible impact on the efficiency of H₂ production.

¹ See, Final Environmental Site Assessment (DOE/EA-1846), dated June 2011, prepared by the U.S. Department of Energy and National Energy Technology Laboratory for a more complete discussion of the CCS System.

The technology that Air Products will employ will capture greater than 90 percent of the CO₂ from the process gas stream used in a world-class scale H₂ production facility. The project will involve engineering and design, construction, commissioning and startup, and the operation of all components of the project. A monitoring, verification, and accounting ("MVA") program to monitor CO₂ injection and sequestration in a portion of the West Hastings Field in Brazoria County, Texas will also be designed and implemented as part of this project.

This project supports the goal of advancing Carbon Capture and Sequestration ("CCS") technologies from the demonstration stage to commercial scale viability.

The three major components of the project are:

- Design, construction, and operation of a carbon capture facility at the two existing Air Products Port Arthur SMR H₂ production plants (PA1 and PA2) located within the existing Valero Port Arthur Refinery;
- Design, construction, and operation of a 12.8-mile-long, 8-inch-diameter pipeline lateral to transport compressed CO₂ from the Port Arthur carbon capture facility to the Denbury Green Pipeline at a point north of Port Arthur; and
- Perform MVA activities at a designated site within the existing West Hastings Field south of Houston, Texas.

Collectively, the CCS System will be constructed, installed, and used to meet or exceed laws, rules or regulations adopted by the Environmental Protection Agency ("EPA") and/or the Texas Commission on Environmental Quality ("TCEQ") for prevention, monitoring, control, or reduction of a pollution. Thus, the CCS System constitutes Pollution Control Property within the meaning of 30 Tex. Admin. Code. § 17.2 (7), and Tex. Tax Code § 11.31(b). As set forth in Air Products application, the CCS System meets the other eligibility conditions set forth in 30 Tex.

Admin. Code § 17.4(a), and consequently, a positive use determination is warranted.

II. APPLICABLE ENVIRONMENTAL RULES OR REGULATIONS BEING MET OR EXCEEDED BY THE CCS SYSTEM

Texas law provides that “[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.” Texas Tax Code § 11.31(a).

The term “facility, device, or method for the control of air, water, or land pollution” means:

. . . any 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.

Texas Tax Code § 11.31(b) (emphasis added).

The CCS System is among the type of equipment that TCEQ has specifically identified as pollution control equipment eligible for the pollution control property tax exemption under Texas Tax Code § 11.31, provided that the EPA has adopted a final rule or regulation regulating CO₂ as a pollutant.² EPA has adopted such a final rule or regulation regulating carbon dioxide as a pollutant pursuant to its Light Duty Vehicle Rule, the greenhouse gas requirements of which became effective January 2, 2011.³ Moreover, pursuant to EPA’s Tailoring Rule, effective August 2, 2010, greenhouse gases (“GHG”), including carbon dioxide, became regulated pollutants at major stationary sources as early as January 2, 2011.⁴ Permitting of emissions associated with the CCS System commenced in April 2011, after the effective date of EPA’s

² See Tex. Tax Code § 11.31(k)(16).

³ See, 75 Fed. Reg. 25,324 (May 7, 2010).

⁴ 75 Fed. Reg. 31514 (June 3, 2010).

adoption of each of these final rules regulating carbon dioxide as a pollutant.⁵ Through a straightforward application of the statutory language, the CCS System qualifies for the pollution control property tax exemption.

The TCEQ has nevertheless informally communicated to Air Products that because at the time of Air Products’ applications for air authorizations, the final rules regulating carbon dioxide as a pollutant only applied to mobile sources, and new or modified major stationary sources that were otherwise subject to Prevention of Significant Deterioration (“PSD”) or Title V permitting for pollutants other than GHG⁶, the plain language of §11.31 does not apply to the CCS System, and the installation of the CCS System does not meet or exceed applicable rules or regulations for the prevention, monitoring, control, or reduction of air, water, or land pollution. TCEQ has advanced this argument notwithstanding that the Texas Tax Code and the TCEQ’s rules make none of these distinctions regarding the type of sources that must be the subject of EPA’s final rule regulating carbon dioxide as a pollutant. The statute and the TCEQ’s rules only stipulate that “an EPA final rule regulating carbon dioxide as a pollutant” be effective.⁷ The Light Duty Vehicle Rule and the Tailoring Rule fulfill that stipulation.

Yet even considering the TCEQ’s preliminary feedback, as more fully explained below, the installation and use of the CCS System meet or exceed several TCEQ and/or EPA rules or regulations for the prevention, monitoring, control, or reduction of air, water, or land pollution.

⁵ 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.

⁶ The facility modifications for the installation of the CCS System did not involve an increase in non-GHG PSD or Title V pollutant emissions that would at that time otherwise trigger PSD or Title V permitting requirements. Based upon this facility’s CO₂ potential emissions, this facility became subject to PSD and Title V operating permit requirements under the Tailoring Rule on July 1, 2011, as such permits are renewed or revised, or potentially as the Facility is modified. 75 Fed. Reg. 31516.

⁷ Tex. Tax Code § 11.31(k)(16). 30 Tex. Admin. Code § 17.17(b), Table at B-16.

A. The Installation and Use of the CCS System Meet or Exceed 40 CFR § 51.166 and § 52.21.

With or without construction and operation of the CCS System, Air Products' facility has the potential to emit significantly more than 1,000,000 tons of CO₂ per year, and thus easily qualifies as a major source of CO₂. The modifications associated with the CCS System also involve the installation of a new cogeneration unit to supply electricity to the CO₂ removal units. Without consideration of the capture controls represented by the CCS System, the aggregate increase in CO₂ emissions associated with these modifications would have exceeded 100,000 tons per year. Based upon the Facility's incremental potential CO₂ emissions, the Facility was expressly subject to PSD and Title V operating permit requirements under the Tailoring Rule on July 1, 2011.⁸ Had Air Products waited a mere 3 months to submit its applications for air authorizations associated with the CCS System, Air Products would have had to fulfill PSD technology review requirements and apply best available control technology ("BACT") for each regulated NSR pollutant that it would have the potential to emit in significant amounts, including, in this case, GHG, and thus CO₂.⁹ EPA has developed BACT guidance for implementing these new PSD permitting requirements that expressly include carbon capture and sequestration as one of the control technologies to consider as a potentially viable CO₂ control for modification projects at hydrogen production facilities.¹⁰ Consequently, had Air Products submitted its air authorization applications in July 2011, rather than April 2011, given the DOE funding available in this instance, construction and use of the CCS System represents a viable control for this project that would have met or exceeded the requirements of 40 CFR 51.166 and

⁸ 75 Fed. Reg. 31516

⁹ 40 CFR 51.166(j), and 52.21(j).

¹⁰ PSD and Title V Permitting Guidance for Greenhouse Gases, EPA-457/B-11-001, March 2011, Appendix H.

52.21 to identify and implement CO₂ emission control technology accepted as BACT. By seeking authorization to construct and operate the CCS System when it did, Air Products, in essence, has implemented an emission control technology that meets or exceeds the definition of BACT for CO₂ emissions from its Facility at a faster pace than otherwise would have been required.¹¹ With the benefit of DOE funding, the installation and use of CCS System at the Facility thus also serves to *exceed* the requirements of 40 CFR 51.166 and 52.21, and a positive use determination from the TCEQ therefore is warranted for the CCS System.

B. The Installation and Use of the CCS System Meet or Exceed 30 Tex. Admin. Code § 116.115(b) and § 101.4.

A holder of an air emissions permit shall comply with conditions to its permit.¹² Among those conditions is the requirement that total emissions of air contaminants from any of the sources of emissions shall not exceed the values stated in the table attached to the permit entitled “Emission Sources - Maximum Allowable Emission Rates.”¹³

An air contaminant includes any gas produced by any process other than natural.¹⁴ Accordingly, the CO₂ emitted by the Facility is an air contaminant, especially in light of the Supreme Court’s determination that GHG, including CO₂, is a pollutant under the Federal Clean Air Act.¹⁵ Consequently, the Facility’s CO₂ emissions must be included within the “total emissions” from sources that must not exceed the values stated in the table attached to Air Products’ air permit for its Facility.

CO₂, however, is not listed in the Maximum Allowable Emission Rates table affixed to

¹¹ Air products understands that while BACT for CO₂ has been recognized to include CCS, CCS is not the exclusive means to establish BACT for permitting purposes.

¹² 30 Tex. Admin. Code §116.115(b).

¹³ *Id.*, § 116.115(b)(F).

¹⁴ Tex. Health & Safety Code § 382.003(2)

¹⁵ *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007).

Air Products’ permit.¹⁶ This omission can mean one of two things: (1) CO₂ emissions are not limited, or (2) no emissions of CO₂ are permitted. The first interpretation is consistent with existing regulatory practice. Thus, the control of CO₂ emissions using the CCS System necessarily must exceed the regulatory requirement under 30 Tex. Admin. Code, § 116.115(b)(F). If, on the other hand, the illogical second interpretation applies, then the CCS System at least serves as a control used in an effort to meet the regulation. In either case, the CCS System is property used to meet or exceed applicable rules or regulations for the prevention, monitoring, control, or reduction of air, water, or land pollution, and thus is pollution control property within the meaning of 30 Tex. Admin. Code § 17.2(7). Moreover, reduction of CO₂ emissions in this manner ensures that Air Products meets or exceeds the general requirements set forth in 30 Tex. Admin. Code § 101.4 as to CO₂. A positive use determination from the TCEQ with respect to the CCS System is thus justified.

C. The Installation and Use of the CCS System Meet or Exceed 30 Tex. Admin. Code §§ 335.471 et seq.

Air Products is subject to Pollution Prevention Planning requirements under 30 Tex. Admin. Code §§ 335.471 et seq.¹⁷ Under these regulations, Air Products must identify source reduction and waste minimization projects to be undertaken.¹⁸ “Source reduction” has the meaning assigned by the Federal Pollution Prevention Act of 1990, and includes any practice that reduces the amount of any pollutant or contaminant entering into the environment, or that reduces the hazards to public health and the environment associated with the release of such pollutants or contaminants.¹⁹ Source reduction expressly includes equipment or technology

¹⁶ Air Products’ Air Quality Permit 39693 and N63, dated December 15, 2009.

¹⁷ POLLUTION PREVENTION PLANNING ID Number P06985.

¹⁸ 30 Tex. Admin. Code §335.474(1)(B) and (C)

¹⁹ 30 Tex. Admin. Code §335.471(13).

modifications that accomplish these goals.²⁰

“Pollutants or contaminants” include any substance that after release into the environment may reasonably be anticipated to cause a variety of adverse effects upon any organism.²¹ In its endangerment finding, EPA expressly stated that GHG, including CO₂, “may reasonably be anticipated to . . . endanger public health. . . .”²² EPA based its finding, in part, upon its consideration of evidence demonstrating that climate change to which it asserts CO₂ contributes will cause increases in regional ozone pollution, with associated increases in the risk of respiratory illnesses and premature death.²³ Based upon EPA’s reasoning, CO₂ thus constitutes a pollutant which Pollution Prevention Planning is designed to and may address. In fact, EPA reached this same conclusion under the federal Pollution Prevention Act, to which the definition of “source reduction” is tied under 30 Tex. Admin. Code §335.471(13).

In February 2010, EPA issued its 2010 – 2014 Pollution Prevention Program Strategic Plan.²⁴ In that Strategic Plan, EPA 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.²⁵

As stated, Air Products is required to engage in pollution prevention planning with its attendant source reduction efforts pursuant to 30 Tex. Admin. Code §§ 335.471 et seq. Air Products has recently amended its Pollution Prevention Plan for the Facility to incorporate construction and use of the CCS System as a source reduction activity because of its unique

²⁰ *Id.*

²¹ 30 Tex. Admin. Code §335.471(10).

²² 74 Fed. Reg. 66,496, 66,497.

²³ *Id.*, at 66,525.

²⁴ <http://www.epa.gov/p2/pubs/docs/P2StrategicPlan2010-14.pdf>

²⁵ *Id.*, at 3-4.

viability at the Facility. Thus, the installation and use of the CCS Facility meets or exceeds regulations adopted by the TCEQ for the prevention, monitoring, control, or reduction of air, water, or land pollution, and Air Products is entitled to a positive use determination from the TCEQ with respect to the CCS System.

III. PUBLIC POLICY STRONGLY SUPPORTS AIR PRODUCTS’ APPLICATION AND A POSITIVE USE DETERMINATION

CO₂ emissions from industrial sources have been linked to climate change, and because of that linkage EPA has concluded that GHG, including CO₂, endanger the public health and welfare.²⁶ The pursuit of widespread cost effective deployment of CCS as a means of controlling CO₂ emissions has thus become a national priority.²⁷

Air Products’ CCS System is one of a handful of projects to receive U.S. Department of Energy funding in pursuit of advancing the viability of commercial scale CCS technologies. The federal government and Air Products are together investing several hundred million dollars on a project the express purpose of which is to prevent, monitor, control, or reduce air pollution in the form of CO₂ emissions. Without a positive use determination from the TCEQ in response to Air Products’ application, the economic viability of this nationally-sponsored project is jeopardized, and the data, experience, and lessons that the project may provide to inform future policy decisions may not be fully realized. Public policy considerations argue strongly in support of a positive use determination from the TCEQ.

IV. CONCLUSION

As shown above, Air Products has demonstrated that environmental rules and regulations are being and will be met or exceeded by the CCS System, and thus the CCS System properly

²⁶ 74 Fed. Reg. 66,496.

²⁷ Report of the Interagency Task Force on Carbon Capture and Storage, p. 7.

qualifies as pollution control property. The CCS System is precisely the type of equipment that should qualify as pollution control property, especially in light of prevailing federal public policy that encourages the reduction of CO₂ emissions and that seeks to facilitate the commercial deployment of CCS technology. Accordingly, the TCEQ should grant a positive use determination in response to Air Products' application with respect to the CCS System.

Please feel free to contact us or the applicant directly if we may provide additional information.

Exhibit C

Air Products' Negative Use Determination Appeal
(June 23, 2013)



Air Products and Chemicals, Inc.
7201 Hamilton Boulevard
Allentown, PA 18195-1501
Telephone (610) 481-4911

23 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 their Negative Use Determination the Commission 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 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

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 Commission's determination.

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