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Toby Baker, *Commissioner*
Zak Covar, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*



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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 4, 2014

Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

**RE: DCP SAND HILLS PIPELINE, LLC
TCEQ DOCKET NO. 2014-0288-MIS-U**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Isabel G. Segarra Treviño".

Isabel G. Segarra Treviño, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2014-0288-MIS-U

IN THE MATTER OF	§	BEFORE THE
THE APPEAL OF THE	§	
EXECUTIVE DIRECTOR'S USE	§	
DETERMINATION	§	TEXAS COMMISSION ON
REGARDING DCP SAND	§	
HILLS PIPELINE, LLC USE	§	
DETERMINATION	§	ENVIRONMENTAL QUALITY
APPLICATION NO. 17494		

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO THE APPEAL OF THE EXECUTIVE DIRECTOR'S USE DETERMINATION**

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

The Office of Public Interest Counsel (OPIC) files this response to the Edwards Central Appraisal District's (ECAP) appeal of the Executive Director's (ED or Appellant) Use Determination for DCP Sand Hills Pipeline, LLC (DCP or Applicant) and respectfully submits the following.

I. INTRODUCTION

A. Background on tax exemptions for pollution control property in Texas.

The ECAP's appeal of the ED's positive use determination is filed pursuant to House Bill (HB) 3121 (77th Tex. Legis., 2001) establishing an appeals process for use determinations and Texas Commission on Environmental Quality (Commission or TCEQ) rules implementing the legislation.¹ In 1993, the citizens of Texas adopted a tax measure called Proposition 2. Proposition 2 amended Article VIII of the Texas Constitution by adding § 1-I. This amendment allowed the legislature to "exempt from

¹ Tex. Tax Code (TTC) § 11.31(d), (e), and 30 Tex. Admin. Code (TAC) § 17.25.

ad valorem taxation all or part of real and personal property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution.” The purpose of the program is to give tax exemptions to businesses “compelled by law to install or acquire pollution control equipment which generates no revenue for the business.”²

The constitutional amendment was codified in 1993 in Texas Tax Code (TTC) § 11.31 (effective Jan. 1, 1994). The statutory language is identical to the language found in the constitutional amendment. Section 11.31 of the TTC gives the TCEQ authority to administer a use determination program and promulgate rules. To fulfill this directive, the TCEQ now administers the Tax Relief for Pollution Control Property Program.³ The TCEQ reviews use determination applications and decides whether cited pollution control equipment or property will obtain a positive or negative use. Positive use determinations entitle the applicant to tax exemptions pursuant TTC § 11.31.

In 2001, the Texas legislature amended TTC § 11.31 through the adoption of HB 3121 (effective Sept. 1, 2001). HB 3121 placed new requirements on the TCEQ’s use determination program, including the following: (1) the creation and implementation of a use determination appeals process, and (2) the adoption of new rules establishing specific use determination standards for property that qualifies for full or partial

² Op. Att’y Gen. No. 96-128, at 1 (1996).

³ 30 Tex. Admin. Code (TAC) Ch. 17 (this Chapter contains rules that govern the TCEQ’s administration of the Tax Relief for Pollution Control Property Program).

positive use determinations.⁴ Use determinations may be appealed within twenty days of a decision by either the appellant seeking the determination, or by the chief appraiser of the tax appraisal district affected by the determination.⁵ The appellant is required to explain the basis for the appeal.⁶

B. ECAP Positive Use Determination Appeal.

DCP filed a Tier II Application for a Use Determination for Pollution Control Property for a 58.4 mile segment of the Sand Hills Pipeline in Edwards County, Texas on December 20, 2013 pursuant to the Tax Relief for Pollution Control Property Program. The Sand Hills Pipeline is a natural gas liquids (NGL) pipeline, 20 inches in diameter that extends for 720 miles – from the Permian Basin and the Eagle Ford regions to the Gulf of Mexico for marketing.⁷ The pipeline is owned and operated by DCP Sand Hills Pipeline, LLC.⁸ Established in 2013, pipeline capacity is currently limited to 200,000 barrels per day but can expand to 350,000 barrels per day.⁹ DCP seeks a positive use determination for radiography testing. In its application, DCP states that radiography testing in the 58.4 mile segment of the pipeline located in Edwards County is a type of nondestructive testing that is “instrumental in detecting weld defects that may lead to inadvertent NGL leakage” and that such leakage may “contribute to the pollution of waters and lands of the State of Texas.”¹⁰

⁴ TTC § 11.31(g).

⁵ TTC § 11.31(e) and 30 TAC § 17.25(a)(2).

⁶ 30 TAC § 17.25(b)(5).

⁷ DCP Sand Hills Pipeline, LLC Use Determination for Pollution Control Property Application (DCP Application) (December 20, 2013), at 3.

⁸ *Id.* at 1–2.

⁹ *Id.* at 3.

¹⁰ *Id.* at 4.

On February 6, 2014, the ED issued a positive use determination on DCP's application. The ECAP timely filed an appeal to the ED's positive use determination with the Chief Clerk on February 24, 2014 and again on March 7, 2014. The ECAP supports its appeal with the following rationales: (1) the property described by DCP is "intangible and not taxable," and (2) the test is not part of the pipeline.¹¹

II. APPLICABLE LAW

A. Use Determinations by the Commission.

The TCEQ rules concerning use determination applications for pollution control property are found in 30 TAC Ch. 17. Parts of Ch. 17 were amended to be effective February 7, 2008. Because DCP's application was received on December 6, 2012, after the February 7, 2008 effective date of the amendments, the current Ch. 17 rules apply to this application. Further, the TCEQ's administration of Ch. 17 must conform to the pollution control property tax exemption rules in § 11.31 of the TTC.

Texas Tax Code § 11.31 sets out two requirements to obtain a tax exemption for pollution control property. First, the person must own the property.¹² Second, the property must be used for pollution control.¹³ The TCEQ has adopted rules to determine whether an applicant satisfies the second requirement.

To obtain a positive use determination under 30 TAC § 17.4, the pollution control property must be used, constructed, acquired, or installed wholly or partly to meet or exceed laws, rules, or regulations adopted by any environmental protection agency of the United States, Texas, or a political subdivision of Texas, for the prevention,

¹¹ ECAP Appeal (Feb. 24, 2014 and Mar. 7, 2014).

¹² TTC § 11.31(a).

¹³ Id.

monitoring, control, or reduction of air, water, or land pollution. In § 17.14, the Equipment and Categories List catalogs property that the ED has determined is used, either wholly or partly, for pollution control purposes. Section 17.15(a) provides a Decision Flow Chart which is used for each item of property submitted in a use determination application to determine whether the particular item will qualify as pollution control property. Under § 17.25, an applicant and the chief appraiser of the appraisal district in which the property subject to the application is located have 20 days to appeal a use determination issued by the ED.

B. Environmental Statutes and Regulations Raised by DCP.

DCP cites to state and federal environmental laws. DCP cites to the general Texas prohibition on disposal of industrial solid waste without a permit.¹⁴ DCP states that leaks from the pipeline would be considered industrial solid waste and solid waste under state law. Industrial solid waste is defined as “[s]olid waste resulting or incidental to any process of industry or manufacturing, or mining or agricultural operation, which may include hazardous waste as defined in this section.”¹⁵ Transportation of NGL by pipeline is an industrial activity; leaks from the DCP pipeline can be considered industrial solid waste. Solid waste is defined as:

“[a]ny garbage, refuse, sludge from waste treatment plant, water supply treatment plant or air pollution control facility, and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, municipal, commercial, mining, and agricultural operations....”¹⁶

¹⁴ 30 TAC § 335.4.

¹⁵ 30 TAC § 335.1(39).

¹⁶ 30 TAC § 335.1(138)(A).

Specifically excluded from the definition are “waste materials which result from activities associated with the exploration, development, or production of oil or gas...”¹⁷ Therefore, any leak from the DCP pipeline can be considered industrial solid waste but not solid waste.

DCP also cites the federal welding inspection standard of acceptability in 49 Code of Federal Regulations (CFR) § 195.228. This federal regulation requires that visual inspections of pipeline be followed by nondestructive testing. Nondestructive testing can be accomplished “by any process that will clearly indicate any defects that may affect the integrity of the well.”¹⁸ DCP’s application states that radiography is “one of the most reliable and widely used nondestructive methods” and can “detect internal flaws, defects, or damage in the welds.”¹⁹ DCP’s decision to use radiography fits within the wide latitude of nondestructive testing methods allowed by 40 CFR § 195.234(a).

III. DISCUSSION

DCP’s positive use determination was issued on February 6, 2014, ECAP filed its appeal with the TCEQ Chief Clerk on February 24, 2014. ECAP’s appeal was received by the TCEQ within the twenty days as required by 30 TAC § 17.25. OPIC respectfully objects to the ED’s positive use determination and concurs with the ECAP’s appeal for the following reasons.

While DCP represents that testing has been done, it has not represented that it owns the radiography testing equipment. The purpose of the Tax Relief for Pollution Control Property Program is to prevent the imposition of additional taxation on

¹⁷ 30 TAC § 335.1(138)(a)(iii).

¹⁸ 49 CFR § 195.234(a).

¹⁹ DCP Application, at 4.

businesses required by law to install pollution control equipment or property.²⁰ The program targets businesses which have purchased equipment or property to comply with environmental laws. While radiography testing is a form of federally mandated nondestructive testing, DCP does not state that it has purchased equipment or property to comply with this requirement. Granting a positive use determination for testing alone would allow a tax exemption for a required activity rather than for the purchase of pollution control equipment. DCP is not entitled to a positive use determination without a showing that it owns the equipment used for the testing activity.

Further, granting DCP a positive use determination for its radiography testing may contravene legislative intent. In its application, DCP does not disclose the owner of the radiography equipment or whether it paid for any portion of the equipment. Pollution control equipment and property cannot generate revenue. As DCP's ownership status of the equipment is unknown, DCP cannot assure the Commission that the equipment is not used to generate revenue. In summary, OPIC cannot find that any tax exemption exists for the action of testing, as opposed to actual ownership of tangible equipment and property as mandated by the legislature.

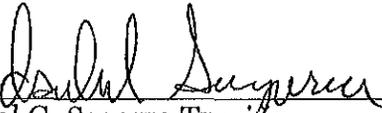
IV. CONCLUSION

OPIC respectfully recommends that the Commissioners grant ECAP's appeal and reverse the ED's positive use determination because DCP has not shown that it owns the radiography equipment which is the basis of its application.

²⁰ Op. Att'y Gen. No. 96-128, at 1.

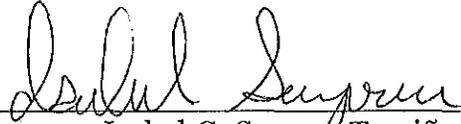
Respectfully submitted,

Office of Public Interest Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2014 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to the Appeal of the Executive Director's Use Determination was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



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