

Bryan W. Shaw, Ph.D., P.E., *Chairman*  
Toby Baker, *Commissioner*  
Zak Covar, *Commissioner*  
Richard A. Hyde, P.E., *Executive Director*



*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 8, 2015

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: DERICHEBOURG RECYCLING USA, INC.  
TCEQ DOCKET NO. 2015-0368-MIS-U**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett Arthur", written in a cursive style.

Garrett Arthur, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



**DOCKET NO. 2015-0368-MIS-U**

**APPEAL OF  
USE DETERMINATION BY  
DERICHEBOURG RECYCLING  
USA, INC.**                    §    **BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**  
   §  
   §  
   §

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

**To the Members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to Derichebourg Recycling USA, Inc.'s ("Derichebourg" or "Appellant") appeal of the Executive Director's (ED) negative use determination.

**I. Background**

Appellant submitted a use determination application to TCEQ on June 6, 2014. Appellant owns and operates a scrap metal recycling plant at 7501 Wallisville Road in Houston, Harris County. Appellant sought a positive use determination for the Turnings Facility. On February 11, 2015, the ED issued a 100% positive use determination for the containment walls, sump, tanks, piping, and pumps used to collect cutting fluids and water. Also on February 11, 2015, the ED issued a negative use determination for the roofs, walls, foundations, and floors of the Turnings Facility. On March 6, 2015, Derichebourg filed a timely appeal of the ED's negative determination.

For the reasons stated herein, OPIC respectfully recommends the appeal be denied.

## **II. Applicable Law**

### **A. Texas Constitution**

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

The legislature by general law may exempt from ad valorem taxation all or part of real and personal property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution.<sup>1</sup>

### **B. Texas Tax Code § 11.31**

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

A person is entitled to an exemption from taxation of all or part of real and personal property that the person owns and that is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution. A person is not entitled to an exemption from taxation under this section solely on the basis that the person manufactures or produces a product or provides a service that prevents, monitors, controls, or reduces air, water, or land pollution.<sup>2</sup>

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

[A]ny structure, building, installation, excavation, machinery, equipment, or device, and any attachment or addition to or reconstruction, replacement, or improvement of that property, that is used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution.<sup>3</sup>

---

<sup>1</sup> TEX. CONST. art. VIII, § 1-l(a).

<sup>2</sup> TEX. TAX CODE § 11.31(a).

<sup>3</sup> TEX. TAX CODE § 11.31(b).

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

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

Under § 11.31(k), TCEQ must establish a nonexclusive list of facilities, devices, or methods for the control of air, water, or land pollution.<sup>5</sup> Section 11.31 also states that the standards and methods for making a determination apply uniformly to all applications for determinations, including applications relating to facilities, devices, or methods for the control of air, water, or land pollution included on the subsection (k) list.<sup>6</sup> The TCEQ must, by rule, update the (k) list at least once every three years, and an item may be removed from the list if the Commission finds compelling evidence to support the conclusion that the item does not provide pollution control benefits.<sup>7</sup> Finally, § 11.31 states that the ED may not make a determination that property is pollution control property unless the property meets the standards established by rule under § 11.31.<sup>8</sup>

---

<sup>4</sup> TEX. TAX CODE § 11.31(g).

<sup>5</sup> TEX. TAX CODE § 11.31(k)(8).

<sup>6</sup> TEX. TAX CODE § 11.31(g-1).

<sup>7</sup> TEX. TAX CODE § 11.31(l).

<sup>8</sup> TEX. TAX CODE § 11.31(h).

### C. TCEQ Rules Chapter 17

The TCEQ has implemented the statutory requirements of § 11.31 in Title 30 of the Texas Administrative Code (TAC), Chapter 17. Under the Chapter 17 rules, a "Tier III" application is required for all property which does not fully satisfy the requirements for a 100% positive use determination.<sup>9</sup> For property in a Tier III application, the Cost Analysis Procedure (CAP) must be used to determine the creditable partial percentage.<sup>10</sup> If the CAP produces a negative number or a zero, the property is not eligible for a positive use determination.<sup>11</sup>

Section 17.10 requires certain information be included in a use determination application. All applications must cite the specific sections of the laws, rules, or regulations being met or exceeded by the use, installation, construction, or acquisition of the pollution control property.<sup>12</sup> The application must also state the anticipated environmental benefits from the installation of the pollution control property for the control of air, water, or land pollution.<sup>13</sup> Section 17.2 defines "environmental benefit" as follows:

The prevention, monitoring, control, or reduction of air, water, and/or land pollution that results from the actions of the applicant. ... [E]nvironmental benefit does not include the prevention, monitoring, control, or reduction of air, water, and/or land pollution that results from the use or characteristics

---

<sup>9</sup> 30 TEX. ADMIN. CODE § 17.17(a).

<sup>10</sup> 30 TEX. ADMIN. CODE § 17.17(c).

<sup>11</sup> 30 TEX. ADMIN. CODE § 17.17(d).

<sup>12</sup> 30 TEX. ADMIN. CODE § 17.10(d)(4).

<sup>13</sup> 30 TEX. ADMIN. CODE § 17.10(d)(1).

of the applicant's goods or service produced or provided. ... [T]he terms 'environmental benefit' and 'pollution control' are synonymous.<sup>14</sup>

A "marketable product" is defined as:

Anything produced or recovered using pollution control property that is sold as a product, is accumulated for later use, or is used as a raw material in a manufacturing process. Marketable product includes, but is not limited to, anything recovered or produced using the pollution control property and sold, traded, accumulated for later use, or used in a manufacturing process (including at a different facility). Marketable product does not include any emission credits or emission allowances that result from installation of the pollution control property.<sup>15</sup>

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

- (A) solely on the basis that the property is used to manufacture or produce a product or provide a service that prevents, monitors, controls, or reduces air, water, or land pollution;
- (B) if the property is used, constructed, acquired or installed wholly to produce a good or provide a service;
- (C) if the property is not wholly or partly used, constructed, acquired or installed to meet or exceed law, rule, or regulation adopted by any environmental protection agency of the United States, Texas, or a political subdivision of Texas for the prevention, monitoring, control, or reduction of air, water, or land pollution; or
- (D) if the environmental benefit is derived from the use or characteristics of the good or service produced or provided.<sup>16</sup>

---

<sup>14</sup> 30 TEX. ADMIN. CODE § 17.2(4).

<sup>15</sup> 30 TEX. ADMIN. CODE § 17.2(5).

<sup>16</sup> 30 TEX. ADMIN. CODE § 17.6(1).

An applicant for a use determination or the affected county appraiser may appeal the ED's determination to the TCEQ Commissioners using the process provided in §17.25.<sup>17</sup> An appeal must be filed with the TCEQ Chief Clerk within 20 days after receipt of the ED's determination letter and must explain the basis for the appeal.<sup>18</sup> The Commission may remand the matter to the ED for a new determination or deny the appeal and affirm the ED's use determination.<sup>19</sup>

### **III. Analysis**

The justification for the ED's February 11, 2015 negative use determination is stated as follows:

A negative determination is issued for the roofs, walls, foundations, and floors of the Turnings Facility. The Turnings Facility is used as part of the production process at this facility and is not a pollution control device. The eligible portions of the facility are those items that are installed and used to control, monitor, or prevent air, water, or land pollution.

In its appeal, Derichebourg asserts that all of the pollution control property made the subject of the application is used, constructed, acquired, and installed wholly to meet or exceed an adopted environmental regulation, and the property is used wholly as a facility, device, or method for the control of pollution.

---

<sup>17</sup> 30 TEX. ADMIN. CODE § 17.25(a)(2)(A).

<sup>18</sup> 30 TEX. ADMIN. CODE § 17.25(b).

<sup>19</sup> 30 TEX. ADMIN. CODE § 17.25(e)(2).

By a notice of deficiency letter dated December 11, 2014, ED staff reminded Appellant that roofs, walls, foundations, and floors of buildings are eligible for a positive use determination only when an adopted environmental rule or regulation requires the activity to occur within an enclosed structure. The ED has acknowledged that certain parts of the Turnings Facility structure are pollution control property by issuing a 100% positive use determination for the containment walls, sump, tanks, piping, and pumps used to collect cutting fluids and water. However, the ED has also appropriately distinguished those parts of the structure which control pollution from those which do not. The ED states that the Turnings Facility is used as part of the production process and is not a pollution control device. If this is true, the Turnings Facility is not eligible for a positive use determination under TCEQ rule § 17.6, which provides, in part, that property is not entitled to an exemption from taxation if the property is used, constructed, acquired or installed wholly to produce a good or provide a service.<sup>20</sup>

Derichebourg bears the responsibility to explain the basis for the appeal.<sup>21</sup> The appeal consists of a one-page letter, and the explanation of the basis for the appeal, as set forth above, is quite limited. Without further explanation and more information, OPIC finds this appeal to be insufficient, and we cannot support it.

---

<sup>20</sup> See 30 TEX. ADMIN. CODE § 17.6(1)(B).

<sup>21</sup> See 30 Tex. Admin. Code § 17.25(b)(5).

#### IV. Conclusion

Based on the available record, OPIC must respectfully recommend that the Commission deny this appeal and affirm the ED's negative use determination.

Respectfully submitted,

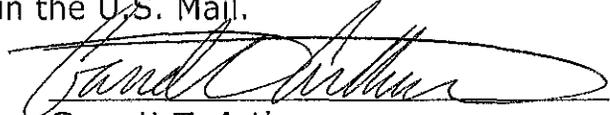
Vic McWherter  
Public Interest Counsel

By 

Garrett T. Arthur  
State Bar No. 24006771  
P.O. Box 13087, MC 103  
Austin, TX 78711  
512-239-5757  
512-239-6377 (fax)

## CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2015, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.



Garrett T. Arthur



**MAILING LIST**  
**DERICHEBOURG RECYCLING USA, INC.**  
**TCEQ DOCKET NO. 2015-0368-MIS-U**

Derichebourg Recycling USA, Inc.  
7501 Wallisville Rd.  
Houston, Texas 77020-3543  
Tel: 713/675-2281 Fax: 713/675-2285

Ronald P. Little  
Associated Tax Appraisers  
4543 Post Oak Place, #232  
Houston, Texas 77027  
Tel: 281/497-2200 Fax: 713/627-8454  
[rlittle@nationalrealty.com](mailto:rlittle@nationalrealty.com)

Andrej Fedor  
Associated Tax Appraisers  
P.O. Box 91119  
Austin, Texas 78709  
Tel: 512/894-2095 Fax: 512/894-2076  
[ata@atatax.net](mailto:ata@atatax.net)

Sands Stiefer, Chief Appraiser  
Harris County Appraisal District  
P.O. Box 920975  
Houston, Texas 77292-0975  
Tel: 713/812-5800 Fax: 713/957-5210

Shelly Naik  
Texas Commission on Environmental  
Quality  
Office of Air, MC-206  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-4900 Fax: 512/239-6188

Ron Hatlett  
Texas Commission on Environmental  
Quality  
Office of Air, MC-206  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-6348 Fax: 512/239-6188

David Brymer  
Texas Commission on Environmental  
Quality  
Office of Air, MC-206  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-4900 Fax: 512/239-6188

Robert Martinez  
Don Redmond  
Texas Commission on Environmental  
Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-0600 Fax: 512/239-0606

Bridget Bohac  
Texas Commission on Environmental  
Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-3300 Fax: 512/239-3311

Kyle Lucas  
Texas Commission on Environmental  
Quality  
Alternative Dispute Resolution, MC-222  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: 512/239-0687 Fax: 512/239-4015

