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*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

February 4, 2016

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: WISE COUNTY APPRAISAL DISTRICT  
DCP SOUTHERN HILLS PIPELINE, LLC  
TCEQ DOCKET NOS. 2016-0055-MIS-U, 2016-0056-MIS-U,  
2016-0057-MIS-U, 2016-0058-MIS-U**

Dear Ms. Bohac:

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

Sincerely,

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

Garrett Arthur, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



**DOCKET NOS. 2016-0055-MIS-U, 2016-0056-MIS-U,  
2016-0057-MIS-U, 2016-0058-MIS-U**

**WISE COUNTY APPRAISAL           §     BEFORE THE  
DISTRICT'S                           §  
APPEALS OF POSITIVE USE       §     TEXAS COMMISSION ON  
DETERMINATIONS ISSUED TO     §  
DCP SOUTHERN HILLS           §     ENVIRONMENTAL QUALITY  
PIPELINE, LLC                   §**

**OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO APPEALS OF USE DETERMINATIONS**

**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 the Wise County Appraisal District's (WCAD) appeals of the Executive Director's (ED) positive use determinations issued to DCP Southern Hills Pipeline, LLC (DCP).

**I. Background**

DCP submitted four use determination applications to TCEQ on December 14, 2015. All of the applications concern an 8-inch natural gas liquids pipeline in Wise County. The first application concerns three 8-inch automatic shut-off valves for the natural gas liquids pipeline. The second application concerns cathodic protection; fusion-bonded epoxy (FBE) on the pipe surface; adhesive for the top coat; and the top coat consisting of polyethylene or polypropylene. The third application concerns one 8-inch intelligent pipeline inspection gauge (PIG) receiver and two 8-inch PIG

launchers. Finally, the fourth application concerns nondestructive pipeline testing expenditures using radiography.

On December 23, 2015, the ED issued 100% positive use determinations on all four applications. On January 12, 2016, WCAD timely filed appeals for each of the ED's determinations.

For the reasons stated herein, OPIC respectfully recommends the Commission deny all the appeals.

## **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

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

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>

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

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

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

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

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

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>

### **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. Chapter 17 establishes three tiers of use determination applications. A Tier I application contains property that is listed on the Tier I Table in § 17.14(a).<sup>9</sup> The property listed in the Tier I Table is property that the ED has determined is used wholly for pollution control purposes, when used as described in the table, and when no marketable product arises from using the property.<sup>10</sup> A Tier II application is for property that is used wholly for the control of air, water, or land pollution, but is not located on the Tier I Table.<sup>11</sup> A Tier III application is for property used partially for the control of air, water, or land

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<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).

<sup>9</sup> 30 TEX. ADMIN. CODE § 17.2(8).

<sup>10</sup> 30 TEX. ADMIN. CODE § 17.14(a).

<sup>11</sup> 30 TEX. ADMIN. CODE § 17.2(9).

pollution and that does not correspond exactly to an item on the Tier I Table.<sup>12</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>13</sup> An 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>14</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 of the applicant's goods or service produced or provided. ... [T]he terms 'environmental benefit' and 'pollution control' are synonymous.<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;

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<sup>12</sup> 30 TEX. ADMIN. CODE § 17.2(10).

<sup>13</sup> 30 TEX. ADMIN. CODE § 17.10(d)(4).

<sup>14</sup> 30 TEX. ADMIN. CODE § 17.10(d)(1).

<sup>15</sup> 30 TEX. ADMIN. CODE § 17.2(4).

- (C) if the property is not wholly or partly used, constructed, acquired or installed to meet or exceed a 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>

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**

Three of the four applications are Tier I applications. The remaining application is a Tier II application for nondestructive pipeline testing expenditures using radiography. In each use determination certificate, the ED states that the applicable property is used 100% for pollution control to meet or exceed federal or state regulations. WCAD submitted nearly identical appeal letters for each application. In each appeal, WCAD states, "It is our opinion this equipment is not used for pollution control." The

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

<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).

appeals provide no further information or argument to support this assertion.

### **Tier I Applications**

OPIC will first discuss the three Tier I applications. Each Tier I application cites to the applicable Tier I Table number. If a property item is included on the Tier I Table, then the ED has already determined that the item is used wholly for pollution control purposes, assuming it is used as described in the table and no marketable product arises from using the property.<sup>20</sup> WCAD's opinion that the Tier I properties are "not used for pollution control" is insufficient to overcome the finding which the ED necessarily made prior to placing the properties on the Tier I Table. Further, WCAD is not claiming that a marketable product arises from use of the properties or that the subject properties are not used as described in the table.

While it is possible that WCAD disagrees with these properties being included in the Tier I Table, that issue would be more appropriately addressed through the rulemaking process, not the appeal process. For now, the Tier I Table does include the relevant DCP properties, and OPIC must therefore concur with the ED's positive use determinations for DCP's Tier I applications.

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<sup>20</sup> See 30 TEX. ADMIN. CODE § 17.14(a).

### **Tier II Application**

DCP's fourth application is a Tier II application, meaning DCP believes that the property at issue is used wholly for the control of air, water, or land pollution, but the property is not located on the Tier I Table. The Tier II application concerns expenditures for nondestructive pipeline testing which was performed using radiography. The ED has issued a use determination certificate which states that the nondestructive pipeline testing expenditures are installed property that is used 100% for pollution control to meet or exceed federal or state regulations.

According to DCP, weld inspections and testing must be conducted as a form of leak detection and prevention during pipeline construction. DCP further states that radiography is one of the most reliable and widely used nondestructive testing methods and has been carried out on the pipeline using X-rays to detect internal flaws, defects, or damage in the welds. DCP concludes that nondestructive testing is instrumental in detecting weld defects that could cause leakage of natural gas liquids (NGL) from the pipeline, which could pollute waters and lands of the state.

Texas Tax Code § 11.31(a) 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." (emphasis added) OPIC interprets this statutory language to mean that the property in question

must meet two requirements to qualify for a tax exemption. First, the property must be owned by the person seeking exemption. Second, the property must be used wholly or partly as a facility, device, or method for the control of pollution.

DCP's application does not indicate that DCP owns any equipment necessary to perform radiography testing. However, OPIC acknowledges that testing intended to find pipeline leaks could be considered a method to control pollution. OPIC is also aware that in a similar prior case, the Commission's interpretation of § 11.31 differed from OPIC's interpretation that the property ownership prong of the statute must be satisfied by tangible physical property, which would not include capitalized costs of testing.<sup>21</sup>

In 2014, the Edwards Central Appraisal District appealed the ED's positive use determination for DCP Sand Hills Pipeline, LLC's radiography testing expenditures. During the Agenda discussion, the Commission indicated that testing can qualify as a method of pollution control where the capitalized cost of the testing is included in the value of the property. Ultimately, the Commission denied the appeal and affirmed the ED's positive use determination.<sup>22</sup> Given the similarity of these two cases, and to respect prior Commission precedent, OPIC recommends that the current DCP Tier II

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<sup>21</sup> See TCEQ Docket No. 2014-0288-MIS-U; Edwards Central Appraisal District's Appeal of Executive Director's Positive Use Determination regarding DCP Sand Hills Pipeline, LLC; July 2, 2014 Agenda.

<sup>22</sup> *Id.*

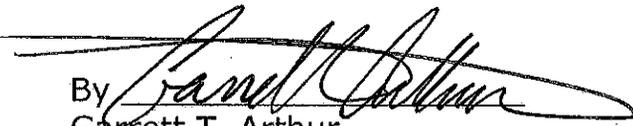
application be handled in a manner consistent with the 2014 application. Respect for Commission precedent on use determination appeal decisions provides consistency for the regulated community when those entities face similar decisions about incurring certain costs.

#### **IV. Conclusion**

For the reasons stated herein, OPIC respectfully recommends the Commission deny WCAD's appeals of the three Tier I applications and affirm the ED's use determinations. To be consistent with past precedent, we further recommend that the Commission also deny WCAD's appeal of the Tier II application and affirm the ED's use determination.

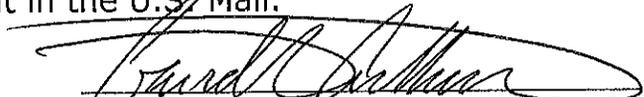
Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2016, 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**  
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**TCEQ DOCKET NOS. 2016-0055-MIS-U, 2016-0056-MIS-U,**  
**2016-0057-MIS-U, 2016-0058-MIS-U**

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