TCEQ DOCKET No. 2016-0337-MIS-U
USE DETERMINATION NO. 19449

APPEAL OF THE EXECUTIVE DIRECTOR'S NEGATIVE USE DETERMINATION FOR ELG METALS, INC. APPLICATION NO. 19449	**§ § § § §**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

THE EXECUTIVE DIRECTOR'S RESPONSE TO ELG METALS, INC. APPEAL OF THE EXECUTIVE DIRECTOR'S NEGATIVE USE DETERMINATION

The Executive Director of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this response to ELG Metals, Inc. (ELG Metals or Applicant) appeal of the Executive Director's negative use determination for certain property listed in application number 19449. Ronald Little, of the Associated Tax Appraisers, submitted this appeal for the Applicant.

For the reasons described below, the Executive Director respectfully requests that the Commission deny the Applicant's appeal and affirm the Executive Director's negative use determination.

PROGRAM BACKGROUND

The Applicant challenges the Executive Director's determination that certain property is not used for pollution control purposes as provided under the Tax Relief Program for property used for environmental protection (also called the "Prop 2" program) established in the Texas Constitution, Texas Tax Code Section (§) 11.31, and 30 Texas Administrative Code (TAC) Chapter 17. The appeal of the Executive Director's negative use determination was filed pursuant to 30 TAC § 17.25, which establishes the appeals process for use determinations issued by the Executive Director.

In 1993, the citizens of Texas voted to adopt a tax measure called Proposition 2. Proposition 2 was implemented when Article VIII, § 1-l was added to the Texas Constitution on November 2, 1993. The amendment allowed the legislature to "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."

The Texas Legislature codified the constitutional amendment in 1993 as TEX. TAX CODE § 11.31 (effective January 1, 1994). The statutory language in the codified version mirrored the language of Article VIII, § 1-l. Under the Prop 2 program, certain property owners may apply to the Executive Director for a determination of pollution control use for their subject property. In 2001, the legislature amended TEX. TAX CODE § 11.31 when it passed HB 3121 (effective September 1, 2001). This bill added several new procedural requirements to TEX. TAX CODE § 11.31, including a provision requiring the establishment and implementation of a process to appeal use determinations. The amendment also required the Commission to adopt new rules establishing specific standards for the Executive Director to follow in making use determinations for property that qualified for either full or partial positive use determinations.[1] Appeals under 30 TAC § 17.25 may be filed by either the applicant seeking the determination, or by the chief appraiser of the tax appraisal district affected by the determination.[2] The appellant is required to explain the basis for the appeal.[3]

PROCEDURAL HISTORY

On September 8, 2015, ELG Metals filed an application for a Tier I 100% positive use determination for a wastewater treatment system and land located at a scrap metal reclaiming facility. On September 21, 2015, TCEQ issued a Notice of Deficiency (NOD) requesting additional information regarding pollution control at the facility. On November 23, 2015, TCEQ received a revised application from the Applicant responding to some of the technical deficiencies identified by TCEQ. On December 15, 2015, TCEQ issued a second NOD to the Applicant, requesting additional information and the Applicant submitted a second revised application on December 21, 2015. On February 11, 2016, the Executive Director issued a positive use determination for the eligible pollution control property claimed in the application and issued a negative use determination for the ineligible property claimed in the application. The Applicant's appeal of the negative use determination was filed with the TCEQ's Office of the Chief Clerk on March 7, 2016.

[1] TEX. TAX CODE § 11.31(g).
[2] TEX. TAX CODE § 11.31(e) and 30 TAC § 17.25(a)(2).
[3] 30 TAC § 17.25(b)(5).

PROPERTY DESCRIPTION

Application

ELG Metals' application seeks use determinations for real property and for the installation of a wastewater treatment system at its scrap metal reclaiming facility located in Harris County. The application requests approval for pollution control equipment included on the Tier I Table in 30 TAC § 17.14(a) and for real property that is not included on the Tier I Table. For property that is used as described in the Tier I Table, the Executive Director has predetermined that the property is used wholly for the control of pollution. The application designated property under Tier I Table item No. W-59 "Wastewater Treatment Facility/Plant" and cited the Applicant's active Permit to Discharge Wastes (WQ0005018000) and 30 TAC § 305.125(1), which requires that the permittee has a duty to comply with all permit conditions. The application also lists land that was acquired in 1989, but states that the installation of the pollution control property and change in use of the property occurred from 1996 to 2011.

APPELLANT'S CLAIM

ELG Metals appeals the Executive Director's negative use determination for the land listed in the application. ELG Metals takes no position on the Executive Director's positive use determination. ELG Metals does not provide arguments in its appeal as to why the Executive Director's negative use determination is incorrect. Harris County Appraisal District did not submit an appeal of the Executive Director's use determinations.

LEGAL ANALYSIS

ELG METALS IS NOT ENTITLED TO A POSITIVE USE DETERMINATION FOR THE LAND IDENTIFIED IN THE APPLICATION

The Executive Director reviewed the application and issued a positive use determination for the wastewater treatment equipment installed at the property and issued a negative use determination for the land identified in the application.

The Executive Director determined that the wastewater treatment system installed at the facility met the requirements for a positive use determination because it was installed to

meet the wastewater permit requirements and it was constructed to process wastewater generated on site. Further, new wastewater treatment facilities are specifically included on the Tier I Table in TAC § 17.14(a)[4].

The Executive Director determined that the land identified in the application did not meet the requirements to qualify for a tax exemption as pollution control property. Article VIII, § 1-l of the Texas Constitution specifically states that the tax exemption for pollution control property applies to real and personal property "that would otherwise be taxable for the first time on or after January 1, 1994."[5] This is codified in the Texas Tax Code § 11.31(b) and in 30 TAC § 17.4(a)(1), which requires that the "property must have been constructed, acquired, or installed after January 1, 1994." Additionally, 30 TAC § 17.6(1)(A) states that property is not entitled to a tax exemption solely on the basis that the property is used to provide a service that prevents, monitors, or reduces air, water, or land pollution.

In its application, the Applicant states that the land was acquired in 1989 but that the use of the land changed between 1996 and 2011. Although the use of the land may have changed, ELG Metals was the owner of the property prior to January 1, 1994. Therefore, the Executive Director disagrees with the Applicant and asserts that the Applicant has failed to demonstrate that the land listed in the application meets the requirements of 30 TAC § 17.4 and § 17.6.

[4] The application identified the wastewater treatment equipment as eligible property under Tier I Table W-59, which applies to new wastewater treatment facilities construed to process wastewater generated on site. *See* 30 TAC § 17.14 Tier I Table.
[5] Tex. Const. art VIII, § 1-l.

CONCLUSION

After careful review of the issue raised in the appeal, the Executive Director respectfully recommends that the commission deny the appeal and affirm the Executive Director's negative use determination. The Executive Director reviewed ELG Metals' application and found that the land identified in the application failed to meet the requirements of 30 TAC Chapter 17.

Respectfully submitted,

Texas Commission on Environmental Quality

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CERTIFICATE OF SERVICE

I certify that on April 14, 2016, an original and seven copies of the "Executive Director's Response to ELG Metals, Inc. Appeal of the Executive Director's Negative Use Determination" was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, and a complete copy was transmitted by mail, facsimile, electronic mail or hand-delivery to all persons on the attached mailing list.

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