

**TCEQ DOCKET No. 2016-0544-MIS-U
USE DETERMINATION NO. 19881**

APPEAL OF THE EXECUTIVE DIRECTOR'S NEGATIVE USE DETERMINATION FOR CAPITOL CHEVROLET APPLICATION NO. 19881	§ § § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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**THE EXECUTIVE DIRECTOR'S RESPONSE TO CAPITOL CHEVROLET'S
APPEAL OF THE EXECUTIVE DIRECTOR'S USE DETERMINATION**

The Executive Director of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this response to Capitol Chevrolet's (applicant) appeal of the Executive Director's negative use determination for certain land listed in application number 19881. Michael Euler submitted the appeal on behalf of 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, § 1-1 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, § 1-1. 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 February 18, 2016, Capitol Chevrolet filed an application for a Tier I 100% positive use determination for: water quality ponds, a “water quality transition zone,” a stabilizing mortar retainer wall, three splitter boxes and three sedimentation ponds. The property is located at an automobile dealership in Travis County. On March 18, 2016, the Executive Director issued a Notice of Deficiency (NOD) requesting additional information regarding pollution control at the facility. On March 31, 2016, the Executive Director received a revised application from the applicant responding to some of the technical deficiencies identified by the Executive Director (Attachment 1). The applicant removed the request for a use determination for the stabilizing mortar retainer wall. On April 8, 2016, the Executive Director issued a positive use determination for the eligible pollution control property

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).

claimed in the application (the water quality ponds, the riparian rock and other structural controls located in the water quality transition zones, three splitter boxes, and three sedimentation ponds) and issued a negative use determination for the ineligible property claimed in the application (Attachment 2). The negative use determination was issued for the 50,010 square feet of land described as the “water quality transition zone.” The applicant’s appeal of the negative use determination was timely filed with the TCEQ’s Office of the Chief Clerk on April 14, 2016.

PROPERTY DESCRIPTION

Application

Capitol Chevrolet’s revised application seeks a use determination for stormwater quality control features at an automobile dealership facility in Travis County. The application requests approval for pollution control equipment included on the Tier I Table in 30 TAC § 17.14(a). 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 the Tier I Table: 1) category No. W-8 “Settling Basin” for 32,540 square feet of land on which water quality ponds are located; 2) category No. W-64 “Storm Water Containment Systems” for three splitter boxes; and 3) category No. W-57 “Conveyances, Pumps, Tanks, and Systems” for three sedimentation ponds. The application also requested a Tier I designation of 50,010 square feet of land used as a “water quality transition zone” under category No. W-64 “Storm Water Containment Systems.” The application claims that the property was installed to comply with the City of Austin Code of Ordinances § 25-8-211(B)(3), which states “in a watershed other than a Barton Springs Zone watershed, water quality controls are required for development...if the total of new and redeveloped impervious cover exceeds 8,000 square feet.”

The Executive Director granted 100% positive use determinations for the water quality ponds, the splitter boxes, the sedimentation ponds, and the riparian rock and other structural controls located within the water quality zone. The Executive Director issued a negative use determination for the 50,010 square feet of land designated as the “water quality transition zone,” stating that the fact that stormwater flows across a piece of land does not make that land pollution control property.

APPELLANT'S CLAIM

In a letter dated April 14, 2016, Capitol Chevrolet appeals the Executive Director's Negative Use Determination for the 50,010 square feet of land. In support of its appeal, Capitol Chevrolet cites two additional sections of City of Austin Code of Ordinances, § 25-8-93 and § 25-8-422. These new citations were not presented in Capitol Chevrolet's original or revised use determination application. Capitol Chevrolet now claims that a water quality transition zone is mandated by the City of Austin under these additional cited ordinances and that the transition zone acts to filter runoff, preventing pollution.

LEGAL ANALYSIS

CAPITOL CHEVROLET 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 stormwater pollution control property installed at the facility, including the land on which identified pollution control equipment is located. The Executive Director appropriately issued a negative use determination for the 50,010 square feet of land identified in the application. Neither the application, nor the newly provided citations in the appeal, adequately explain how the land is used to control pollution to meet an environmental rule.

Capitol Chevrolet requested that 50,010 square feet of land be granted a 100% positive use determination under Tier I Category No. W-64. It is difficult to discern Capitol Chevrolet's argument that the land is used as pollution control property. Although it is not explicitly stated, Capitol Chevrolet appears to be arguing that City of Austin ordinances require it to keep a certain portion of its property in an unimproved or undeveloped state as a "water quality transition zone." And further, they would argue that such designation of a "water quality transition zone" under the Austin ordinances makes the land itself eligible for a tax exemption under the Prop 2 program established in Tax Code Section 11.31. The application also suggests that vegetation and riparian rock on the land "act to contain and

greatly eliminate the potential that pollutants enter the immediate watershed during a rain event.”

The Executive Director does not believe that the land is eligible for a positive use determination as pollution control property under Tax Code Section 11.31 in this situation. The applicant was issued positive use determinations for the identified pollution control features, including the riparian rock and other structural controls within the water quality transition zone. However, the applicant was not granted a positive use determination for the land without the control features. The Commission rule in the Tier I Table of 30 TAC § 17.14 for Category No. W-64 explains that “the land that is actually occupied by the containment structure is eligible for a positive use determination.” Conversely, land that is not occupied by pollution control equipment is not eligible for a positive use determination under this category. TCEQ rule in 30 TAC § 17.4(a)(2) provides: “land must include only the portion of the land acquired after January 1, 1994, *that actually contains pollution control property.*” In considering similar stormwater control property, the Executive Director has consistently excluded adjacent lands that do not contain the stormwater control systems for the reason that the land is not considered pollution control property just because stormwater flows over it. The Executive Director properly distinguished the pollution control features at the facility that were eligible for a positive use determination from the portion of the land that was not eligible for a use determination.

The Prop 2 Tax Relief program was established to provide tax property tax relief to property owners who were required to incur capital expenditures to acquire or install pollution control property. Capitol Chevrolet’s application inappropriately includes land without pollution control features. If Capitol Chevrolet is concerned about the property tax consequences for its compliance with City of Austin ordinances, it should present these concerns to the appraisal district when a taxable value is established for the property. The Executive Director does not believe the applicant’s land is entitled to a positive use determination and eligible for a tax exemption under the Prop 2 program established in Texas Tax Code Section 11.31 and the TCEQ’s rules in 30 TAC Chapter 17.

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 Capitol Chevrolet's 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

Richard Hyde
Executive Director

Robert Martinez, Director
Environmental Law Division

By Don Redmond

Don Redmond, Attorney
Environmental Law Division
P.O. Box 13087, MC-173
Austin, Texas 78711-3087
Phone: 512.239.0612
Fax: 512.239.0606

REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that on May 18, 2016, an original and seven copies of the “Executive Director’s Response to Capitol Chevrolet’s Appeal of the Executive Director’s 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.

By Don Redmond
Don Redmond, Attorney
Environmental Law Division

Mailing List
Capitol Chevrolet
TCEQ DOCKET No. 2016-0544-MIS-U

Michael Euler, CFM
Stormwater Planning & Design LLC
625 Waugh Way
Bastrop, Texas 78602-7465
euler@att.net

Capitol Chevrolet
6200 S. IH-35
Austin, Texas 78745-4531
FAX 512-445-1230
rruiz@capitolchevy.com

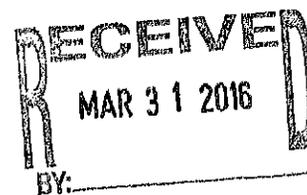
Chief Appraiser
Travis County Appraisal District
P.O. Box 149012
Austin, TX 78714
FAX 512-835-5317

Vic McWherter
TCEQ Office of Public Interest Council MC 105
P.O. Box 13087
Austin, Texas 78711-3087
vic.mcwherter@tceq.texas.gov

Docket Clerk
TCEQ Office of Chief Clerk MC 105
P.O. Box 13087
Austin, Texas 78711-3087

Attachment 1

1988/ Revised



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. Property Owner Information

1. Company Name of Owner: Capitol Chevrolet
2. Mailing Address: 6200 S. IH35
3. City, State, Zip: Austin, Tx. 78745-4531
4. Customer Number (CN): 600246029
5. Regulated Entity Number (RN):102797321
6. Is this property/equipment owned by the CN listed in Question 4? Yes No

If the answer is 'No,' please explain:

To be eligible for a positive use determination the property must be owned and operated by the same entity.

7. Is this property subject to any lease or lease-to-own agreement? Yes No

If the answer is 'Yes,' please explain:

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

If the answer is 'No,' please explain:

To be eligible for a positive use determination the property must be owned and operated by the same entity.

Section 2. Physical Location of Property

1. Name of Facility or Unit where the property is physically located: Capitol Chevrolet
2. Type of Mfg. Process or Service: Automobile Dealership
3. Street Address: 6200 S IH35
4. City, State, Zip: Austin, Tx. 78745-4531
5. County: Travis
6. Appraisal District Account Number(s): 336619, 380862, 380863, 447320

Section 3. Contact Name

1. Company Name: Stormwater Planning & Design LLC
2. First Name of Contact: Michael
3. Middle Initial: M
4. Last Name of Contact: Euler
5. Salutation: Mr. Mrs. Ms. Dr. Other:
6. Title: Sr. Project Mgr.
7. Suffix:
8. Mailing Address: 625 Waugh Way
9. City, State, Zip: Bastrop, Tx. 78602
10. Phone Number/Fax Number: 713-859-2406
11. Email Address: euler@att.net
12. Self-Assigned Tracking Number (optional):

Section 4. General Information

1. What is the type of ownership of this facility?
Corporation Limited Partner Other:
Sole Proprietor Limited Liability Corporation
Partnership Utility
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)
Automobile Dealers, new only or new and used
4. Provide the North American Industry Classification System (NAICS) six-digit code for this facility. 441110

Section 5. Property Description, Applicable Rule, and Environmental Benefit

For each piece, or each category, of pollution control property 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 if a use determination is being sought for more than one (1) piece.

General Information

1. Name the property: Water Quality Ponds, Water Quality Transition Zone, Splitter Boxes (3). Sedimentation Ponds (3)
2. Is the property used 100% as pollution control equipment? Yes No

Explain your answer: Each of the pieces of Property called out in Line 1, Section 5 are required elements of the Construction and Post Construction aspects of this Facility to satisfy TCEQ and City of Austin Rules/Ordinances when Developing in the Edwards Aquifer Recharge Zone

3. Does the property generate a Marketable Product? Yes No

Marketable Product: 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).

If the answer is 'Yes,' describe the marketable product:

4. What is the appropriate Tier I Table or Expedited Review List number? W-8, W-57, W-64
5. Is the property integrated pollution control equipment? Yes No
- If the answer is 'No,' separate applications must be filed for each piece of property.*
6. List applicable permit number(s) for the pollution control property: City of Austin Watershed Protection Permit # 1237

Incremental Cost Difference

7. Is the Tier I Table item number A-86, A-112, A-114, A-182, or S-22? Yes No

If the answer is 'Yes,' the use determination percentage is based on the incremental cost difference and you must answer the following questions:

8. What is the cost of the new piece of property? n/a
9. What is the cost of the comparable property without controls? n/a
10. How was the value of the comparable property calculated? n/a

Property Description

11. Describe the property. (What is it? Where is it located within the production process? How is it used to control, prevent, or monitor pollution?) 3 Splitter Boxes are used to segregate stormwater runoff from potential pollutants before discharging into the MS4, Water Quality Ponds and Water Quality Transition Zones which by means of vegetated cover and riparian rock act to contain and greatly eliminate the potential that pollutants enter the immediate watershed during a rain event. The 3 sedimentation ponds segregate and suspend any pollutants discharged into the ponds before discharging into the immediate watershed
12. What adopted environmental rule or regulation is being met by the construction or installation of the property? The citation must be to the specific section, subsection, paragraph, subparagraph, or clause level. Describe how the property meets or exceeds the requirements. City of Austin Code of Ordinances §**25-8-211(B)(3)**. **Water Quality Control Requirement (B)** In a Watershed other than Barton Springs Zone Watershed, water quality controls are required for development (3) if the total of the new and redeveloped impervious cover exceeds 8,000 Square Feet.

Environmental Benefit

13. What is the anticipated environmental benefit related to the construction or installation of the property? As a result of the permanent structural controls (manmade and developed naturally) being implemented and maintained, the immediate watershed and aquifer are made safe from possible pollutants from being introduced into the MS4 during and after a rain event

Section 6. Process Flow Diagram (Optional)

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

Section 7. 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.

Section 8. Property Categories and Costs

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

Property Name	Tier 1 Table No. or Expedited Review List No.	Use Percent	Estimated Dollar Value
Land: Water Quality Ponds 32,4500 SF	W-8	100	607,500.00
Property: Water Quality Transition Zone 50,010 SF	W-64	100	750,150.00
Property: Splitter Boxes (3)	W-64	100	285,000.00
Property: Sedimentation Ponds (3)	W--57	100	375,000.00
Property:		100	
Total:			2,017,650.00

Attach additional response sheets to the application if more than five (5) pieces of property need to be listed.

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

Section 9. Type of Application and Fee

1. Type of Application being filed: *Select only one.*

Tier I – Fee: \$150

Tier II – Fee: \$1,000

Tier III – Fee: \$2,500

2. Fee Payment Type:

Check

Money Order

Electronic Payment

3. Payment Receipt Number: 266048

4. Payment Amount: 150.00

5. Payer Name on Payment: Mike Euler

6. Total Amount of Payment: 150.00

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.

In accordance with the TCEQ's Delinquent Fee Protocol, the Tax Relief Program will not consider applications administratively complete until all delinquent fees the company owes to the TCEQ are paid.

Information regarding the TCEQ's Delinquent Fee Protocol is available at:

<http://www.tceq.state.tx.us/agency/delin/index.html>.

Section 10. Certification Statement

Must be signed by owner or designated representative.

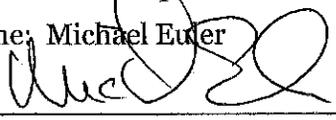
I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I further certify that the property listed in this application is eligible for a tax exemption under Texas Tax Code, §11.31 given that:

- the property is not solely used, constructed, acquired, or installed to manufacture or produce a good or provide a service, including a good or service that prevents, monitors, controls, or reduces air, water, or land pollution,
- the environmental benefit associated with the property is not wholly derived from the use or characteristics of the goods or services produced by the property,
- the property is wholly or partly used, constructed, acquired, or installed to meet or exceed law, rule, regulation adopted by an 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,
- the property is not used for residential purposes, or for recreational, park, or scenic uses as defined by Texas Tax Code, §23.81,
- the property is not a motor vehicle, except for a dedicated service motor vehicle used solely for pollution control, and
- the property was not acquired, constructed, or installed before January 1, 1994.

I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Printed Name: Michael Euler

Date: January 31, 2016

Signature:  _____

Title: Sr. Project Mgr.

Company Name: Stormwater Planning & Design LLC

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.

Stormwater Planning & Design LLC
625 Waugh Way
Bastrop, Tx. 78602

March 28, 2016

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Mr. Ron Hatlett
Tax Relief for Pollution Control Property Program
Air Quality Division

RE; Capitol Chevrolet
6200 S IH-35
Austin, Tx. (Travis County)
Application Number: 19881

Dear Mr. Hatlett,

I am resubmitting a revised Positive Use Determination Application to you today, March 28, 2016. Issue 1, is in reference to Questions 1 and 11 (Section 5) and listing the property in Section 8 with a location of said property. Issue 2, is addressing the citation to the adopted environmental rule or regulation.

ISSUE 1:

In response, we have decided to remove the Stabilizing Motor Retaining Wall as Pollution Control Property from the revised Application.

ISSUE 2:

In response, we have limited our answer to a single Water Quality Control Requirement within the City of Austin Environmental Regulations that applies to this Property.

We strive to present correct and accurate Positive Use Determination Applications to the TCEQ, and greatly appreciate your remarks after reviewing our work. We look to use this information to present complete and accurate Applications in the future.

Thank You for your time as always,
Michael Euler CFM
(713) 859-2406 euler@att.net

Attachment 2

The State of Texas
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



Application Number: 19881

County: Travis

USE DETERMINATION CERTIFICATE

This certifies that
Capitol Chevrolet
Capitol Chevrolet
6200 S IH 35
Austin, Texas

installed the following property that is used 100% for pollution control to meet or exceed federal or state regulations:
water quality ponds, the riparian rock and other structural controls located in the water quality transition zones, three splitter boxes, and three sedimentation ponds.

April 8, 2016

Date

A handwritten signature in black ink, appearing to read "David Brymer".

David Brymer
Division Director

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



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 8, 2016

Mr. Michael Euler
Consultant
Stormwater Planning & Design LLC
27104 Decker Prairie-Rosehill
Magnolia, Texas 77355



Re: Notice of Use Determinations
Capitol Chevrolet
Capitol Chevrolet
6200 S IH 35
Austin (Travis County)
Regulated Entity Number: RN102797321
Customer Reference Number: CN600246029
Application Number: 19881

Dear Mr. Euler:

This letter responds to Capitol Chevrolet's Application for Use Determination, received February 18, 2016, pursuant to the Texas Commission on Environmental Quality's (TCEQ) Tax Relief for Pollution Control Property Program for the Capitol Chevrolet.

The TCEQ has completed the review for application #19881 and has determined that certain property included in the application is not eligible for a Positive Use Determination. The TCEQ has issued a Positive Use Determination for the eligible property in the application in accordance with Title 30 Texas Administrative Code (TAC) §17.4 and a Negative Use Determination for the ineligible property in accordance with §17.4 and §17.6. The justification for the Negative Use Determination is provided below.

A negative determination is issued for the 50,010 square foot water quality transition zone. The mere fact that stormwater flows across a piece of land does not make that land pollution control property.

In order to request an exemption for the eligible property, the attached Use Determination Certificate and a completed Application for Pollution Control Property Tax Exemption, Form #50-248 (please see www.cpa.state.tx.us), must be provided to the chief appraiser of the appropriate appraisal district no later than April 30th of the applicable tax year.

Please be advised that a Use Determination may be appealed by the applicant or the chief appraiser of the applicable appraisal district. The appeal must be filed with the TCEQ Chief Clerk within 20 days after the receipt of this letter in accordance with 30 TAC §17.25.

Mr. Michael Euler
Page 2
April 8, 2016

If you have questions regarding this letter or need further assistance, please contact Ronald Hatlett of the Tax Relief for Pollution Control Property Program by telephone at (512) 239-6348, by e-mail at Ronald.Hatlett@tceq.texas.gov, or write to the Texas Commission on Environmental Quality, Tax Relief for Pollution Control Property Program, MC-110, P.O. Box 13087, Austin, Texas 78711-3087.

Sincerely,



Shelley Naik, Team Leader
Stationary Source Programs
Air Quality Division

SN/RH

Enclosure

cc: Chief Appraiser, Travis County Appraisal District, PO Box 149012, Austin, Texas
78714