

**TCEQ DOCKET No. 2016-0545-MIS-U
USE DETERMINATION NO. 19883**

APPEAL OF THE EXECUTIVE	§	BEFORE THE TEXAS COMMISSION
DIRECTOR'S NEGATIVE USE	§	
DETERMINATION FOR WMCI	§	ON
AUSTIN II/BEXLEY	§	
ANDERSON MILL APTS	§	
APPLICATION NO. 19883	§	ENVIRONMENTAL QUALITY

**THE EXECUTIVE DIRECTOR'S RESPONSE TO WMCI'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 WMCI Austin II/Bexley Anderson Mill Apartments' (WMCI or applicant) appeal of the Executive Director's negative use determination for certain land listed in application number 19883. 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, WMCI filed an application for a Tier I 100% positive use determination for: “water quality transition zone” with water quality pond (243,500 square feet); an “upland water quality area (88,100 square feet);” and a weir structure. The property is located at a residential apartment complex in Williamson County. On March 18, 2016, the Executive Director issued a Notice of Deficiency (NOD) requesting additional information regarding the property identified as the “upland water quality area.” On March 31, 2016, the Executive Director received a revised application from the applicant (Attachment 1). The applicant revised the application by renaming the “upland water quality area” as the “critical water quality zone.” On April 8, 2016, the Executive Director issued a positive use determination for the eligible pollution control property claimed in the application (the stormwater quality features including the water quality pond, critical water quality zone area, and the weir structure at the outfall) and issued a negative use determination for the ineligible property claimed in the application (Attachment 2). The negative use determination was issued for the 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

WMCI’s revised application seeks a use determination for stormwater quality control features at a residential apartment complex in Williamson 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-57 “Conveyances, Pumps, Tanks, and Systems” for 243,500 square feet of land designated as the “water quality transition zone;” 2) category No. W-57 “Conveyances, Pumps, Tanks, and Systems” for 88,100 square feet of land designated as the “critical water quality zone area;” and 3) category No. W-64 “Storm Water Containment Systems” for the weir structure at SWQ Outfall. 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.”

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).

The Executive Director granted 100% positive use determinations for the stormwater quality features including the water quality pond, critical water quality zone area, and the weir structure at the outfall. The Executive Director issued a negative use determination for the 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, WMCI appeals the Executive Director’s Negative Use Determination for the land designated as the “water quality transition zone.” In support of its appeal, WMCI 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 WMCI’s original or revised use determination application. WMCI 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

WMCI 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. The Executive Director appropriately issued a negative use determination for certain land identified in the application. Neither the application, nor the newly provided citations in the appeal, adequately explain how the “water quality transition zone” land is used to control pollution to meet an environmental rule.

WMCI requested that 243,500 square feet of land be granted a 100% positive use determination under Tier I Category No. W-57. It is difficult to discern WMCI’s argument that the land is used as pollution control property. Although it is not explicitly stated, WMCI 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 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 water quality pond, critical water quality zone area, and the weir structure at the outfall. However, the applicant was not granted a positive use determination for the land without the control features. The applicant designated the “water quality transition zone” under Tier I Table category No. W-57, but the land itself is not a conveyance, pump, sump, tank or basin. When considering land as part of a stormwater quality control system, 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 property tax relief to property owners who were required to invest capital to acquire or install pollution control property. WMCI’s application inappropriately includes land without pollution control features. If WMCI is concerned about the real 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 pollution control property that 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 WMCI’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, 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 17, 2016, an original and seven copies of the “Executive Director’s Response to WMCI’s 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 mailing list.

By Don Redmond
Don Redmond, Attorney
Environmental Law Division

Mailing List
WMCI Austin II/Bexley Anderson Mill Apts.
TCEQ DOCKET No. 2016-0545-MIS-U

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

WMCI Austin II LLC
3951 Stillman Pkwy.
Glen Allen, Virginia 23060

WMCI Austin II LLC
Bexley Anderson Mill Apts.
8601 Anderson Mill Rd.
Austin, Texas 78729-4700

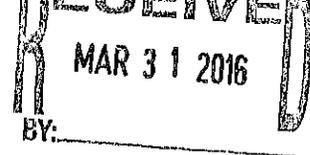
Chief Appraiser
Williamson County Appraisal District
625 FM 1460
Georgetown, Texas 78626
pir@wcad.org

Vic McWherter
TCEQ Office of Public Interest Counsel MC103
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Docket Clerk
TCEQ Office of Chief Clerk MC 105
P.O. Box 13087
Austin, Texas 78711-3087

Attachment 1

19883 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: WMCI Austin II LLC
2. Mailing Address: 3951 Stillman Pkwy.
3. City, State, Zip: Glen Allen Va. 23060
4. Customer Number (CN): 604869974
5. Regulated Entity Number (RN): 104792296
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: Bexley Anderson Mill Apts
2. Type of Mfg. Process or Service: Multi Family Residence
3. Street Address: 8601 Anderson Mill Rd.
4. City, State, Zip: Austin, Tx. 78729-4700
5. County: Williamson
6. Appraisal District Account Number(s): R391726

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: Project Mgr
7. Suffix:
8. Mailing Address: 625 Waugh Way
9. City, State, Zip: Bastrop, Tx. 78602-7465
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 and more
3. Business Description: (Briefly describe the type of business or activity at the facility)
Lessors of Residential Buildings and Dwellings
4. Provide the North American Industry Classification System (NAICS) six-digit code for this facility. 531110

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: Bexley Anderson Mill Apartments
2. Is the property used 100% as pollution control equipment? Yes No

Explain your answer: As defined by City of Austin, Stormwater Quality standards set forth in City Code of Ordinances for such Commercial Projects in the Lake Travis Watershed. Said Projects must furnish SWQ Development Plans to City of Austin Public Works & Engineering that meet or exceed City of Austin § 30-5-213 - **WATER QUALITY CONTROL STANDARDS**

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-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: Edwards Aquifer Permit 11-05102402

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?) The property used to provide protection to the immediate watershed, is a Stormwater Quality (SWQ) Detention pond in concert with Critical Water Quality Zone Areas with Weir Structure at the SWQ Outfall receives runoff from the internal stormwater infrastructure and sheet flowing stormwater. Rain Events which are introduced into the SWQ Pond Thru Critical Water Quality Zone Areas, settle, and the vegetated bench and embankments of the SWQ Pond provide permanent filtration of potential pollutants.
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? Benefit is simply put, that pollutants which are captured and/or suspended prior to maintenance of the sedimentation and filtration basin of the Stormwater Quality Pond and Critical Water Quality Zone Areas contribute to a cleaner watershed and surface water sources in the region

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 Transition Zone with Water Quality Pond (243,500 SF)	W-57	100	2,008,875.00
Property: Critical Water Quality Zone Area 88,100 S.F.	W-57	100	264,300.00
Property: Weir Structure at SWQ Outfall	W-64	100	27,125.00
Property:			
Property:			
Total:			2,300,300.00

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: 266143

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: 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; WMCI Austin II LC
Bexley Anderson Mill Apts.
8601 Anderson Mill Rd.
Austin, Tx. (Williamson County)
Application Number: 19883

Dear Mr. Hatlett,

I am resubmitting a revised Positive Use Determination Application to you today, March 28, 2016. At Issue is the reference on Pg. 4, Section 8 of the Positive Use Determination Application to Upland Water Quality Area as Pollution Control Property.

ISSUE 1:

In response, we are now referencing this area as Critical Water Quality Zone on the revised Application. The area of Upland Water Quality Area is within the CWQZ and doesn't change the area called out in the original application. Engineer of record called out Upland Water Quality Area, so we repeated this nomenclature in error.

ISSUE 2:

I have corrected the Estimated Dollar Value on Pg. 4, Section 8 to reflect the true total amount.

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: 19883

County: Williamson

USE DETERMINATION CERTIFICATE

This certifies that
WMCI Austin II LLC
Bexley Anderson Mill Apts
8601 Anderson Mill Rd
Austin, Texas

installed the following property that is used 100% for pollution control to meet or exceed federal or state regulations:
stormwater quality features including water quality pond, critical water quality zone area, and weir structure at
outfall.

April 8, 2016

Date

A handwritten signature in black ink that reads "David Brymer".

David Brymer
Division Director

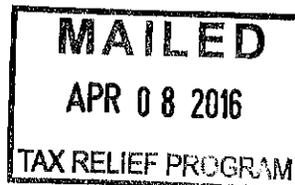
Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Jon Niermann, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 8, 2016



Mr. Mike Euler
Consultant
Stormwater Planning & Design LLC
625 Waugh Way
Bastrop, Texas 78602

Re: Notice of Use Determinations
WMCI Austin II LLC
Bexley Anderson Mill Apts
8601 Anderson Mill Rd
Austin (Williamson County)
Regulated Entity Number: RN104792296
Customer Reference Number: CN604869974
Application Number: 19883

Dear Mr. Euler:

This letter responds to WMCI Austin II LLC'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 Bexley Anderson Mill Apts.

The TCEQ has completed the review for application #19883 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 for the water quality transition zone. The mere fact that stormwater flows across a piece of land does not make that land pollution control property.

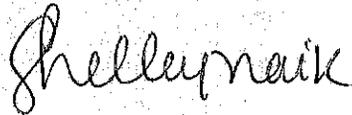
In order to request an exemption for the eligible property, the attached Use Determination Certificate and a completed Application for Pollution Control Property Tax Exemption, Form #50-248 (please see www.cpa.state.tx.us), must be provided to the chief appraiser of the appropriate appraisal district 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. Mike 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, Williamson County Appraisal District, 625 FM 1460, Georgetown, Texas 78626