

Bryan W. Shaw, Ph.D., P.E., *Chairman*  
Toby Baker, *Commissioner*  
Jon Niermann, *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*

May 17, 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: WMCI AUSTIN II LLC  
TCEQ DOCKET NO. 2016-0545-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 cursive script, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure



**DOCKET NO. 2016-0545-MIS-U**

**WMCI AUSTIN II LLC'S § BEFORE THE**  
**APPEAL OF NEGATIVE § TEXAS COMMISSION ON**  
**USE DETERMINATION ON § ENVIRONMENTAL QUALITY**  
**APPLICATION NO. 19883 §**

**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 WMCI Austin II LLC's (WMCI or Appellant) appeal of the Executive Director's (ED) negative use determination.

**I. Background**

WMCI submitted its application to TCEQ on February 18, 2016. The application concerns the Bexley Anderson Mill Apartments located in the City of Austin and Williamson County. On March 22, 2016, ED staff mailed a notice of deficiency (NOD) letter to the Appellant. In response to the NOD, Appellant submitted a revised application on March 31, 2016.

On April 8, 2016, the ED issued a 100% positive use determination for stormwater quality features including the water quality pond, the critical water quality zone area, and the weir structure at the outfall. The ED issued a negative use determination for the water quality transition zone. On April 14, 2016, WMCI timely filed an appeal of the ED's negative determination.

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

## 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:

[L]and that is acquired after January 1, 1994, or any 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>

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

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<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. 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 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

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<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).

<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).

provided. ... [T]he terms 'environmental benefit' and 'pollution control' are synonymous.<sup>15</sup>

Under § 17.4, to obtain a positive use determination, the pollution control property must be used, constructed, acquired, or installed wholly or partly to meet or exceed laws, rules, or regulations 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.<sup>16</sup> In addition, land must include only the portion of the land acquired after January 1, 1994, that actually contains pollution control property.<sup>17</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 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>18</sup>

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

<sup>16</sup> 30 TEX. ADMIN. CODE § 17.4(a).

<sup>17</sup> 30 TEX. ADMIN. CODE § 17.4(a)(2).

<sup>18</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>19</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>20</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>21</sup>

### **III. Analysis**

The ED's negative determination for the water quality transition zone states that the mere fact that stormwater flows across a piece of land does not make that land pollution control property.

WMCI's appeal states that water quality transition zone areas within the Edwards Aquifer are mandated by the City of Austin, act to filter runoff, prevent pollution, and should be considered pollution control property. To support this contention, WMCI cites to City of Austin Ordinance § 25-8-452, which states, "A lot that lies within a critical water quality zone must also include at least two acres in a water quality transition zone or uplands zone."

OPIC's understanding is that WMCI's "water quality transition zone" is vacant undeveloped land, and WMCI asserts this land must remain undeveloped to comply with the City of Austin ordinance. While it may be true that the City of Austin requires a certain amount of land at the Bexley Anderson Mill Apartments to be set aside and remain undeveloped, this requirement, by itself, is insufficient to make the land

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

<sup>20</sup> 30 TEX. ADMIN. CODE § 17.25(b).

<sup>21</sup> 30 TEX. ADMIN. CODE § 17.25(e)(2).

pollution control property, as that term is legally defined. By TCEQ rule, only the portion of land that actually contains pollution control property may qualify for a tax exemption.<sup>22</sup> The water quality transition zone is vacant land which contains no pollution control property. Therefore, the land being called the water quality transition zone is not eligible for a positive determination.

Some land in WMCI's application did receive a positive determination, but that land can be legally distinguished from the land which received a negative determination. The "critical water quality zone area" is the land which actually contains the water quality pond and the weir structure at the outfall. Unlike the water quality transition zone land, which is vacant and undeveloped, the critical water quality zone area is the land which contains the on-site water quality features.

Appellant's weir structure at the outfall is a stormwater containment system, which is Item W-64 on the Tier I Table. The description in the table states, "The land that is actually occupied by the containment structure is eligible for a positive use determination."<sup>23</sup> This description further emphasizes that to be eligible for a tax exemption, land must be occupied by pollution control property.

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<sup>22</sup> See 30 TEX. ADMIN. CODE § 17.4(a)(2).

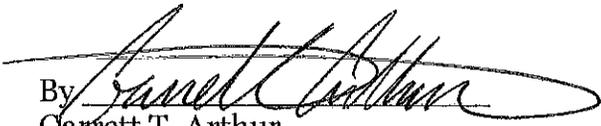
<sup>23</sup> 30 TEX. ADMIN. CODE § 17.14(a).

#### IV. Conclusion

The area that WMCI calls the water quality transition zone is vacant undeveloped land, and it does not actually contain pollution control property. Therefore, this land must receive a negative determination. OPIC supports the ED's negative determination and respectfully recommends the Commission deny the appeal and affirm the ED's negative determination.

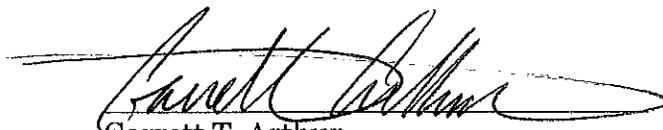
Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on May 17, 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



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