

**ELG METALS INC.'S
REPLY TO RESPONSE BRIEFS FILED BY
THE TCEQ'S OFFICE OF PUBLIC INTEREST COUNSEL,
THE TCEQ'S EXECUTIVE DIRECTOR,
AND THE HARRIS COUNTY APPRAISAL DISTRICT**

TO: Bridget Bohac, Chief Clerk
 Texas Commission on Environmental Quality
 Office of the Chief Clerk (MC-105)
 P.O. Box 13087
 Austin, Texas 78711-3087

FROM: Associated Tax Appraisers, Agent for ELG Metals, Inc.
 4543 Post Oak Place, Suite 232
 Houston, Texas 77027

RE: TCEQ Docket No: 2016-0613-MIS-U
 Use Determination App. No: 19451
 Applicant: ELG Metals Inc.
 15135 Jacintoport Blvd., Houston, TX 77015
 Regulated Entity No: RN102185733
 Customer Reference No: CN601181027

This document is ELG Metals Inc.'s (hereinafter referred to as "ELG") reply to the response briefs filed by the Texas Commission of Environmental Quality's Office of Public Interest Counsel (hereinafter referred to as "OPIC") and Executive Director (hereinafter referred to as "ED") and the Harris County Appraisal District (hereinafter referred to as "HCAD") in regard to ELG's appeal of the Executive Director's Negative Use Determination for the roofs, walls, foundations and floors of its Turnings Facility and any the qualifying land made the basis of Use Determination for Pollution Control Property Application No. 19451.

For reasons described below, ELG respectfully requests that the Texas Commission on Environmental Quality (hereinafter referred to as "TCEQ") affirms its appeal and overturn the Executive Director's Negative Use Determination the roofs, walls, foundations and floors of its Turnings Facility and any the qualifying land made the basis of Use Determination for Pollution Control Property Application No. 19451.

**REPLY TO THE OFFICE OF PUBLIC
INTEREST COUNSEL'S RESPONSE BRIEF**

Response: “ELG’s appeal fails on multiple levels. By Rule, ELG must explain the basis for the appeal. ELG’s appeal consists of a one page letter which provides no explanation of the basis for the appeal. This appeal fails to comply with TCEQ rules governing appeal of a use determination, and on this ground alone, the Commission could deny ELG’s appeal.”

Reply: 30 Tex. Admin. Code §17.25(b)(5) does require an appellant to state the basis for the appeal of a use determination. ELG stated the basis for its appeal as the “the negative use determination for the qualifying land.” 30 Tex. Admin. Code §17.25(b)(5) does not require an explanation of the basis for the appeal, nor is its brevity grounds to deny an appeal.

Response: “The land included in ELG’s application fails to meet a key requirement for exemption under the Texas Tax Code. For land, the Tax Code states that a facility, device, or method for the control of air, water, or land pollution means land that is acquired after January 1, 1994. In the property description section of the application, ELG states that the qualifying land was acquired in 1989. The record also indicated the ED informed ELG that this land could not qualify for a tax exemption and asked ELG to remove the land from the application. ELG did not comply. As land that was acquired before January 1, 1994, the ELG land is statutorily prohibited from qualifying for a tax exemption.”

Reply: In 1989 the qualifying land made the basis of Use Determination for Pollution Control Property Application No. 19451 was acquired by Gulf Materials Recycling Corporation. A copy of the pertinent General Warranty Deed as attached hereto at Exhibit A. At the time, Gulf Materials Recycling Corporation was a separate legal entity incorporated in the State of Texas. The assets of Gulf Materials Recycling

Corporation were not conveyed to ELG Metals Inc. until after January 1, 1994. According to HCAD's records the ownership changed on December 22, 1997. A copy of HCAD's Ownership History is attached hereto at Exhibit B.

In addition, the portion of Texas Tax Code §11.31 applied to the qualifying land issue by the Texas Commission of Environmental Quality's Office of Public Interest Counsel does not take into consideration the second part of the statute, which extends the definition of a "facility, device, or method for the control of air, water, or land pollution" to "*any structure, building, installation, excavation, machinery, equipment, or device, and any attachment or addition to or reconstruction, replacement, or improvement of that property.*" Construction and/or installation of the Turnings Facility, which received a positive use determination under the same Use Determination Application, required the excavation and improvement of the qualifying land at issue. The qualifying land is part of the Turnings Facility, which was installed after January 1, 1994.

Response: "The ED states that the turnings facility is used as part of the production process and is not a pollution control device. If this is true, the turnings facility is not eligible for a positive use determination under TCEQ rule §17.6, which provides, in part, that property is not entitled to an exemption from taxation if the property is used, constructed, acquired or installed wholly to produce a good or provide a service."

Reply: All activities within the Turnings Facility are related to the handling of turnings material, which contains cutting fluid (i.e. used oil) subject to the requirements of 40 CFR Part 112. Under applicable regulation 40 CFR Part 112.7 Subpart C, the owner or operator of a non-transportation facility that generates used oil must "provide appropriate containment and/or diversionary **structures** or equipment to prevent a discharge as described in §112.1(b). The **entire containment system,**

including walls and floor, must be capable of containing oil and must be constructed so that any discharge from a primary containment system, such as a tank, will not escape the containment system before cleanup occurs.” As a used oil generator, ELG is required to provide appropriate containment and/or diversionary structures to prevent discharge. The Turnings Facility’s roofs, walls, foundations and floors were designed and installed for this purpose.

Response: “The roofs, walls, foundations, and floors of the turnings facility are the structural components of the buildings, not waste storage property. Buildings do not fit the description provided for waste storage property. Buildings do not fit the description provided for waste storage property in the Tier I Table, and OPIC therefore agreed that buildings should not be included under Item S-20 of the Table.”

Reply: ELG never received a notice of deficiency during its application process from the TCEQ regarding an issue with its use of Item S-20 of the Tier I Table to describe any part of Turnings Facility. In addition, the Tier I Table description of Item S-20 includes “secondary containment.” The Turnings Facility building is a secondary containment structure as required under applicable regulation 40 CFR Part 112.7 Subpart C. Further, the Tier I Table description of Item S-20 does not specifically exclude buildings or the structural components of a building.

REPLY TO THE EXECUTIVE DIRECTOR’S RESPONSE BRIEF

Response: “To support its application, ELG Metals cited 30 §305.125(5) and their wastewater permit, which requires the permittee to develop and implement a storm water pollution prevention plan and to operate and maintain all facilities to comply with the permit conditions. Neither the rule cited, nor the wastewater, nor the wastewater permit require an enclosed structure, such as a building, to be used,

constructed, acquired, or installed around ELG Metals' production process. ELG Metals also cited the Spill, Prevention, and Control Countermeasure (SPCC) Plan, which requires steel containment structures as a method of secondary containment. The general requirements for a SPCC Plan require the development of a plan to address potential oil spills and contain requirements for the storage of used oil. These requirements are not sufficient to establish that an enclosed structure or building is a requirement to contain oil spills. The application submitted by ELG Metals indicates that there is a crusher, vehicle maintenance area, and fuel storage area in the facility. The presence of this equipment indicated that the building is used for production purposes and that roofs, walls foundations and floors of the structure is not wholly or partly for pollution control, but was installed to enclose ELG Metals' production process."

Reply: All activities within the Turnings Facility are related to the handling of turnings material, which contains cutting fluid (i.e. used oil) subject to the requirements of 40 CFR Part 112. Under applicable regulation 40 CFR Part 112.7 Subpart C, the owner or operator of a non-transportation facility that generates used oil must "provide appropriate containment and/or diversionary **structures** or equipment to prevent a discharge as described in §112.1(b). The **entire containment system**, including walls and floor, must be capable of containing oil and must be constructed so that any discharge from a primary containment system, such as a tank, will not escape the containment system before cleanup occurs." As a used oil generator, ELG is required to provide appropriate containment and/or diversionary structures to prevent discharge. The Turnings Facility's roofs, walls, foundations and floors were designed and installed for this purpose.

Response: “In its application, ELG Metals cites item S-20 of the Tier I Table. The property described in Item S-20 is “[t]anks, containers and ancillary equipment such as pumps, piping, secondary containment, and vent controls (e.g., Resource Conservation Recovery Act Storage Tanks, 90-Day Storage Facilities, Feed Tanks to Treatment Facilities).” The building that houses ELG Metals’ production process does not fall within this description. A building is not a tank or container. Because the building does not meet any of the descriptions in Tier I Table S-20, ELG Metals is not entitled to a Tier I 100% positive use determination for the roofs, walls, foundations, and floors of the building.”

Reply: ELG never received a notice of deficiency during its application process from the TCEQ regarding an issue with its use of Item S-20 of the Tier I Table to describe any part of Turnings Facility. In addition, the Tier I Table description of Item S-20 includes “secondary containment.” The Turnings Facility building is a secondary containment structure as required under applicable regulation 40 CFR Part 112.7 Subpart C. Further, the Tier I Table description of Item S-20 does not specifically exclude buildings or the structural components of a building.

Response: “The applicant did not provide documentation demonstrating that the land associated with the facility would be eligible for an exemption as pollution control property. In its application, ELG Metals states that the land was acquired in 1989. Article VIII, § 1-1 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.” 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.

Further, even if documentation is submitted showing that ELG Metals acquired the property after 1994, there is insufficient documentation to demonstrate that the land is used solely for pollution control. Section 17.10(d)(6) of the Texas Administrative Code required that the use determination application contain all information necessary to determine the eligibility of the application. The Executive Director issued Notices of Deficiencies requesting additional information about the land identified on the application on December 15, 2015 and February 3, 2016. The Executive Director also provided notice to ELG Metals that land occupied by production buildings is not considered to be a pollution control device, except when an environmental rule or regulation requires the activity to occur within an enclosed structure. ELG Metals failed to provide the Executive Director with the requested property information demonstrating when the land claimed in the property was acquired and failed to cite an environmental rule or regulation requiring the facility be enclosed.”

Reply: In 1989 the qualifying land made the basis of Use Determination for Pollution Control Property Application No. 19451 was acquired by Gulf Materials Recycling Corporation. A copy of the pertinent General Warranty Deed as attached hereto at Exhibit A. At the time, Gulf Materials Recycling Corporation was a separate legal entity incorporated in the State of Texas. The assets of Gulf Materials Recycling Corporation were not conveyed to ELG Metals Inc. until after January 1, 1994. According to HCAD’s records the ownership changed on December 22, 1997. A copy of HCAD’s Ownership History is attached hereto at Exhibit B.

In addition, the portion of Texas Tax Code §11.31 applied to the qualifying land issue by the Texas Commission of Environmental Quality’s Executive Director does not take into consideration the second part of the statute, which extends the

definition of a “facility, device, or method for the control of air, water, or land pollution” to “*any structure, building, installation, excavation, machinery, equipment, or device, and any attachment or addition to or reconstruction, replacement, or improvement of that property.*” Construction and/or installation of the Turnings Facility, which received a positive use determination under the same Use Determination Application, required the excavation and improvement of the qualifying land at issue. The qualifying land is part of the Turnings Facility, which was installed after January 1, 1994.

REPLY TO THE HARRIS COUNTY APPRAISAL DISTRICT’S RESPONSE BRIEF

Response: “The roofs, walls, foundation, and floors of the Turnings Facility do not meet or exceed rules or regulations adopted by an environmental protection agency of the United States, this state, or a political subdivision of the state for the prevention, monitoring, control, or reduction of air, water, or land pollution.”

Reply: All activities within the Turnings Facility are related to the handling of turnings material, which contains cutting fluid (i.e. used oil) subject to the requirements of 40 CFR Part 112. Under applicable regulation 40 CFR Part 112.7 Subpart C, the owner or operator of a non-transportation facility that generates used oil must “provide appropriate containment and/or diversionary **structures** or equipment to prevent a discharge as described in §112.1(b). The **entire containment system**, including walls and floor, must be capable of containing oil and must be constructed so that any discharge from a primary containment system, such as a tank, will not escape the containment system before cleanup occurs.” As a used oil generator, ELG is required to provide appropriate containment and/or diversionary structures to prevent discharge. The Turnings Facility’s roofs, walls, foundations and floors were designed and installed for this purpose.

Response: “The Turnings Facility is used as part of the production process at this facility and is not a pollution control device.”

Reply: All activities within the Turnings Facility are related to the handling of turnings material, which contains cutting fluid (i.e. used oil) subject to the requirements of 40 CFR Part 112. Under applicable regulation 40 CFR Part 112.7 Subpart C, the owner or operator of a non-transportation facility that generates used oil must “provide appropriate containment and/or diversionary **structures** or equipment to prevent a discharge as described in §112.1(b). The **entire containment system**, including walls and floor, must be capable of containing oil and must be constructed so that any discharge from a primary containment system, such as a tank, will not escape the containment system before cleanup occurs.” As a used oil generator, ELG is required to provide appropriate containment and/or diversionary structures to prevent discharge. The Turnings Facility’s roofs, walls, foundations and floors were designed and installed for this purpose.

Response: “The buildings are not included under Item S-20 of the Tier I Table.”

Reply: ELG never received a notice of deficiency during its application process from the TCEQ regarding an issue with its use of Item S-20 of the Tier I Table to describe any part of Turnings Facility. In addition, the Tier I Table description of Item S-20 includes “secondary containment.” The Turnings Facility building is a secondary containment structure as required under applicable regulation 40 CFR Part 112.7 Subpart C. Further, the Tier I Table description of Item S-20 does not specifically exclude buildings or the structural components of a building.

Response: “Section 11.31 of the Tax Code provides that “[a] person is 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.” Subsection 11.31(b) defines “facility,

device, or method for the control of air, water, or land pollution” as “land that is acquired after January 1, 1994...” According to its first and revised applications, the Appellant acquired land 1989. Since the Appellant acquired the qualifying land before January 1, 1994, by definition, it is not a “facility, device or method for the control of air, water, or land pollution” and is not entitled to an exemption from taxation as pollution control property.”

Reply:

In 1989 the qualifying land made the basis of Use Determination for Pollution Control Property Application No. 19451 was acquired by Gulf Materials Recycling Corporation. A copy of the pertinent General Warranty Deed as attached hereto at Exhibit A. At the time, Gulf Materials Recycling Corporation was a separate legal entity incorporated in the State of Texas. The assets of Gulf Materials Recycling Corporation were not conveyed to ELG Metals Inc. until after January 1, 1994. According to HCAD’s records the ownership changed on December 22, 1997. A copy of HCAD’s Ownership History is attached hereto at Exhibit B.

In addition, the portion of Texas Tax Code §11.31 applied to the qualifying land issue by the Harris County Appraisal District does not take into consideration the second part of the statute, which extends the definition of a “facility, device, or method for the control of air, water, or land pollution” to ***“any structure, building, installation, excavation, machinery, equipment, or device, and any attachment or addition to or reconstruction, replacement, or improvement of that property.”***

Construction and/or installation of the Turnings Facility, which received a positive use determination under the same Use Determination Application, required the excavation and improvement of the qualifying land at issue. The qualifying land is part of the Turnings Facility, which was installed after January 1, 1994.

Mailing List
ELG Metals Inc.'s
TCEQ Docket No. 2016-0337-MIS-U

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281/457-2500

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M358229

159-67-0104

EXHIBIT A

GF#89115823
Randy Rice/18/1s

GENERAL WARRANTY DEED

THE STATE OF TEXAS §
COUNTY OF HARRIS §

10/21/89 10:24 AM M358229

BIRMINGHAM RAIL & LOCOMOTIVE CO., INC., an Alabama corporation ("Grantor"), for and in consideration of the sum of TEN AND NO/100 DOLLARS (\$10.00) paid to Grantor and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, has GRANTED, SOLD and CONVEYED and does hereby GRANT, SELL and CONVEY unto GULF MATERIALS RECYCLING CORPORATION, a Texas corporation ("Grantee") that certain land located in Harris County, Texas, and being more particularly described in Exhibit A attached hereto and incorporated herein by reference, together with all improvements located on such land (such land and improvements being collectively referred to as the "Property").

This conveyance is made and accepted subject to only those matters (the "Permitted Exceptions") set forth in Exhibit B, attached hereto and incorporated herein by reference.

TO HAVE AND TO HOLD the Property, together with all and singular the rights and appurtenances pertaining thereto, including all of Grantor's right, title and interest in and to adjacent streets, alleys and rights-of-way, subject to the Permitted Exceptions, unto Grantee and Grantee's successors and assigns forever, and Grantor does hereby bind itself and its successors to warrant and forever defend the Property unto Grantee and Grantee's successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

EXECUTED on the date set forth in the acknowledgement attached hereto to be effective as of the 6 day of October, 1989.

BIRMINGHAM RAIL & LOCOMOTIVE CO., INC.

By: Carle Jones, Sr
Name: Carle Jones, Sr
Title: President

RETURN TO: STEWART TITLE CO.
111 BAGBY
SUITE 2000
HOUSTON, TEXAS 77002

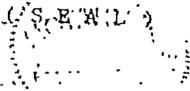
159-67-0105

Address of Grantee:

P.O. Box 96166
Houston Texas 77215-6166

THE STATE OF TEXAS §
COUNTY OF HARRIS §

This instrument was acknowledged before me on Oct 6, 1989, by Carlisle Jones Sr. President of Birmingham Rail & Locomotive Co., Inc., on behalf of such corporation.



Virginia V. Gray
Notary Public in and for
said County and State

My Commission Expires:
January 1, 1991

Printed Name of Notary:
VIRGINIA V. GRAY

AFTER RECORDING RETURN TO:

EF76
89100501

EXHIBIT "A"

July 21, 1987

159-67-0106

DESCRIPTION

BEING 6.0000 acres of land located in the Richard and Robert Vinca Survey, Abstract No. 76, Harris County, Texas and being a portion of that certain 4430.600 acre tract of land conveyed to Jacintoport Corporation by deed recorded under County Clerk's File No. P 051415 of the Official Public Records of Real Property, Harris County, Texas, said 6.0000 acre of land in more particularly described as follows:

COMMENCING at the intersection of the east right-of-way line of Appelt Road (based on a width of 60 feet) with the north right-of-way line of Jacintoport Boulevard (based on a width of 100 feet) from which a 5/8 inch iron rod found bears South 75 deg. 27 min. 56 sec. East-18.00 feet;

THENCE South 75 deg. 27 min. 56 sec. East, along said north right-of-way line, a distance of 197.39 feet to the POINT OF BEGINNING having coordinates of X=3,223,724.40 and Y=718,610.624 feet;

THENCE North 14 deg. 37 min. 36 sec. East, a distance of 110.22 feet to the northwest corner of a metal building;

THENCE South 75 deg. 22 min. 24 sec. East, along the north edge of said metal building, a distance of 16.01 feet;

THENCE North 14 deg. 37 min. 36 sec. East, at 14.85 feet pass the southwest corner of a metal building, at 95.05 feet pass the northwest corner of a metal building, containing the same course a total distance of 195.05 feet to a nail set in concrete;

THENCE South 75 deg. 27 min. 56 sec. East, a distance of 68.16 feet;

THENCE North 14 deg. 32 min. 04 sec. East, a distance of 499.78 feet to the northwest corner of the herein described tract;

THENCE South 75 deg. 27 min. 56 sec. East, a distance of 326.01 feet to the northeast corner of the herein described tract in the west line of a 45 foot wide Missouri Pacific Railroad right-of-way from which a chain link fence corner post bears South 08 deg. 40 min. 01 sec. West-4.74 feet;

THENCE South 14 deg. 32 min. 04 sec. West, along the west line of said Missouri Pacific Railroad right-of-way, a distance of 422.01 feet to the beginning of a curve to the right;

THENCE continuing along the west line of said Missouri Pacific Railroad right-of-way same being the arc of said curve having a Central Angle of 51 deg. 26 min. 04 sec., a Radius of 515.42 feet, an Arc Length of 462.69 feet and a Long Chord which bears South 40 deg. 15 min. 06 sec. West-447.31 feet to a 5/8 inch iron rod found for the southeast corner of the herein described tract in the north right-of-way line of said Jacintoport Boulevard;

THENCE North 75 deg. 27 min. 56 sec. West, along said north right-of-way line, a distance of 216.56 feet to the POINT OF BEGINNING and containing 6.0000 acre of land.

E. L. Smoys, Jr.
 E. L. Smoys, Jr.
 Registered Public Surveyor No. 1949

ABS76, ELS
 ELS/bc



159-67-0107

EXHIBIT B TO SPECIAL WARRANTY DEED

PERMITTED EXCEPTIONS

1. Restrictive covenants filed of record under Clerk's File No. F305216 of the Real Property Records of Harris County, Texas.
2. An easement 65 feet wide along the rear (northerly) property line, together with an unobstructed aerial easement 10 feet in width south of and adjacent thereto, granted to Houston Lighting & Power Company by instrument recorded in Volume 6774, Page 366 of the Deed Records of Harris County, Texas.
3. Reservation by Grantor unto itself, its successors and assigns of a private, perpetual, nonexclusive easement and right-of-way (herein called the "Utility Bank Easement") as set out in Paragraph I, Part III of Deed dated September 21, 1977, from Jacintoport Corporation to Birmingham Rail & Locomotive, Inc. filed September 21, 1977, under Clerk's File No. F305216 of the Real Property Records of Harris County, Texas.
4. An unobstructed easement 10 feet in width and 59.3 feet in length at and below ground level and upward to a plane 20 feet above the ground, and from said plane and upward 20 feet in width, located in the southerly portion of subject property, as granted to Houston Lighting & Power Company by instrument recorded under Clerk's File No. F647090 of the Real Property Records of Harris County, Texas.
5. The conveyance by the United States of America of all right, title and interest of the United States of America in and to all minerals and mineral rights, including gas and oil in, and under said property and those premises subject to that certain Deed Without Warranty dated October 13, 1970, from the United States of America to William E. Brock, recorded in Volume 8214, Page 438 of the Deed Records of Harris County, Texas, which deed provides that in connection with the development and production of the minerals so conveyed, including drilling therefor, the grantee therein, his heirs in title and assigns, lessees or otherwise, shall utilize only the surface locations designated in such deed as "DRILL SITES" which are located on Parcel Nos. B-15, B-16, B-29, B-43, B-44, B-47, B-53, B-57 and B-58 as referred to therein, none of which Drill Sites is located on said property.

159-67-0108

6. Covenants, rights and agreements by and between Grantor and Grantee in Deed dated September 21, 1977, from Jacintoport Corporation to Birmingham Rail & Locomotive, Inc., filed September 21, 1977, under Clerk's File No. F305216 of the Real Property Records of Harris County, Texas.

FILED
OCT 11 2 56 PM '89
John P. Redman
HARRIS COUNTY CLERK
HARRIS COUNTY, TEXAS

ANY PROVISION HEREIN WHICH RESTRICTS THE SALE, RENTAL, OR USE OF THE DESCRIBED REAL PROPERTY BECAUSE OF COLOR OR RACE IS UNLAWFUL AND VOID UNDER FEDERAL LAW, THE STATE OF TEXAS }
COUNTY OF HARRIS }

I hereby certify that this instrument was FILED in File Number, Sequence on the date and at the time stamped hereon by me, and was duly RECORDED, in the Official Public Records of Real Property of Harris County, Texas on

OCT 11 1989



John P. Redman
COUNTY CLERK,
HARRIS COUNTY, TEXAS

EF76
89100503

RECORDER'S MEMORANDUM
AT THE TIME OF RECORDATION, THIS INSTRUMENT WAS FOUND TO BE INADEQUATE FOR THE BEST PHOTOGRAPHIC REPRODUCTION BECAUSE OF ILLEGIBILITY, CARBON OR PHOTO COPY, DISORDERED PAPER, ETC

EXHIBIT B

 Print

Ownership History: 0410320010103

**15135 JACINTOPORT BLVD
HOUSTON TX 77015**

Owner

ELG METALS INC

GULF MATERIALS RECYCLING

Effective Date

12/22/1997

1/1/1990

[end of record]

-close window-