TCEQ DOCKET No. 2016-0613-MIS-U
USE DETERMINATION NO. 19451

APPEAL OF THE EXECUTIVE DIRECTOR'S NEGATIVE USE DETERMINATION FOR ELG METALS, INC. APPLICATION NO. 19451	**§ § § § §**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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

The Executive Director of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this response to ELG Metals, Inc.'s (ELG Metals or applicant) appeal of the Executive Director's negative use determination for certain property listed in application number 19451. Ronald Little, of the Associated Tax Appraisers, submitted this appeal for the applicant.

The Executive Director issued a positive use determination for eligible property included in the application. The Executive Director issued a negative use determination for real property and a building (specifically, the roofs, walls, foundations, and floors of the Turnings Facility) located at 15135 Jacintoport Boulevard, Houston, Harris County (the facility). The Executive Director determined that the building was installed for production purposes and not used, constructed, acquired, or installed wholly or partly to meet or an exceed an environmental law, rule or regulation. Also, buildings are not included under Item S-20 of the Tier I table. The Executive Director determined that the real property in the application was ineligible for a positive use determination because the applicant failed to provide sufficient property documentation demonstrating that the land is used for pollution control. The Executive Director respectfully requests that the Commission deny the applicant's appeal and affirm the Executive Director's negative use determination.

PROGRAM BACKGROUND

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

In 1993, the citizens of Texas voted to adopt a tax measure called Proposition 2. Proposition 2 was implemented when Article VIII, § 1-l was added to the Texas Constitution on November 2, 1993. The amendment allowed the legislature to "exempt from ad valorem taxation all or part of real and personal property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution."

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

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[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).

PROCEDURAL BACKGROUND

On September 8, 2015, ELG Metals filed an application for a Tier I 100% positive use determination for real property and the building, containment walls, tanks, piping, and pumps installed at the facility. On September 21, 2015, TCEQ issued a Notice of Deficiency (NOD) requesting that the applicant identify additional information regarding pollution control at the facility. ELG Metals submitted a revised application, received by the TCEQ on November 23, 2015. On December 15, 2015, TCEQ issued a second NOD to the applicant, requesting additional information, including a description of the business operations that occur within the building. TCEQ received a second revised application from the applicant on February 3, 2016. The second application failed to provide a detailed description of the business operations that occur within the building, failed to explain how the Turnings Facility is used as a pollution control property, and failed to cite the specific permit requirement or environmental regulation that requires the applicant to enclose the structure for pollution control. On March 30, 2016, the Executive Director issued a negative use determination for the real property and the building (roofs, walls, foundations, and floors of the facility) and a positive use determination for the eligible equipment (containment walls, sump, tanks, piping, and pumps used to collect cutting fluids and water).

APPELLANT'S CLAIM

ELG Metals appeals the Executive Director's negative use determination for the land identified in the application and the building of the Turnings Facility (specifically, the roofs, walls, foundations, and floors of the facility). ELG Metals does not provide arguments in its appeal as to why the Executive Director's negative use determination is incorrect. Harris County Appraisal District did not submit an appeal of the Executive Director's use determinations.

LEGAL ANALYSIS

I. The building was installed for production purposes and not used, constructed, acquired, or installed wholly or partly to meet or exceed an environmental law, rule or regulation.

The Executive Director reviewed the application and issued a positive use determination for the tanks, piping, and pumps installed at the facility and issued a negative use determination for the roofs, walls, foundations and floors of the Turnings facility.

Texas Tax Code § 11.31(a) 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." Buildings in which a business operates its production process are considered to be installed for production purposes, and not as a method for the control of air, water, or land pollution. ELG Metals did not submit information demonstrating that the building is required for pollution control. Thus, ELG Metals is not entitled to a Tier I 100% positive use determination for the roofs, walls, foundations, and floors of the building.

To support its application, ELG Metals cites 30 TAC § 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 permit require an enclosed structure, such as a building, to be used, constructed, acquired, or installed around ELG Metals' production process. ELG Metals also cites 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 indicates that the building is used for production purposes and that the roofs, walls, foundations and floors of the structure is not used wholly or partly for pollution control, but was installed to enclose ELG Metals' production process.

Because the building was installed for production purposes, ELG Metals is not entitled to a Tier 100% positive use determination for the roofs, walls, foundations, and floors of the building.

II. Buildings are not included under Item S-20 of the Tier I Table.

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.

III. The applicant failed to demonstrate that the land is used for pollution control.

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-l of the Texas Constitution specifically states that the tax exemption for pollution control property applies to real and personal property "that would otherwise be taxable for the first time on or after January 1, 1994."[4] 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. The Executive Director issued Notices of Deficiencies requesting additional information about the land identified in the application on December 15, 2015 and February 3, 2016. ELG Metals failed to provide the Executive Director with the requested property documentation or information demonstrating when the land was acquired.

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 requires that the use determination application contain all information the Executive Director deems reasonably necessary to determine the eligibility of the application. The Executive Director issued Notices of Deficiencies requesting additional information about the land identified in 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

[4] Tex. Const. art VIII, § 1-l.

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 that the facility be enclosed. Without sufficient documentation demonstrating that the land is used solely for pollution control, the Executive Director determined that the land did not meet the requirements for a positive use determination as a pollution control property.

CONCLUSION

After careful review of the issue raised in the appeal, the Executive Director concludes that the original Tier I negative use determination for the real property and the building at the facility is correct. ELG Metals has failed to provide any legal basis upon which the Commission should reverse the Executive Director's negative use determination in this case. The Executive Director's negative use determination is consistent with the terms and mandates set forth in the relevant statutes and rules. Accordingly, the Executive Director respectfully recommends that the Commission deny the appeal and affirm the Executive Director's negative use determination.

Respectfully submitted,

Texas Commission on Environmental Quality

Richard Hyde
Executive Director

Robert Martinez, Director
Environmental Law Division

By _____
Colleen Lenahan, Attorney
State Bar #24087914
Environmental Law Division
P.O. Box 13087, MC-173
Austin, Texas 78711-3087
Phone: 512.239.6909
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 ELG Metals, Inc. Appeal of the Executive Director's Negative Use Determination" was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, and a complete copy was transmitted by mail, facsimile, electronic mail or hand-delivery to all persons on the attached mailing list.

By _____
Colleen Lenahan, Attorney
Environmental Law Division

Mailing List
ELG Metals, Inc.
TCEQ Docket No. 2016-0613-MIS-U

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

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

Robert Martinez
TCEQ Environmental Law Division MC 173
P.O. Box 13087
Austin, Texas 78711-3087
512/239-0600 FAX 512/239-0606
robert.martinez@tceq.texas.gov

ELG Metals, Inc.
Southern Division
15135 Jacintoport Blvd
Houston, Texas 77015
281/457-2100 FAX 281/457-2500

Andrej Fedor, Agent
Associated Tax Appraisers
P.O. Box 91119
Austin, Texas 78709
281/497-2200 FAX 713/627-8454
afedor@nationalrealty.com

Ronald P. Little, Agent
Associated Tax Appraisers
4543 Post Oak Place, #232
Houston, Texas 77027
281/497-2200 FAX 713/627-8454
ata@atatax.net

Chief Appraiser
Harris County Appraisal District
P.O. Box 922004
Houston, Texas 77292
713/812-5800 FAX 713/957-5210

Robert "Bobby" Preisler
Legal Counsel
Harris County Appraisal District
P.O. Box 920975
Houston, Texas 77292-0975
713) 957-5284 Fax: (713) 957-5219
rpreisler@hcad.org

David Brymer
Shelley Naik
TCEQ Air Quality Division MC 206
PO Box 13087
Austin, Texas 78711-3087
512/239-4900 FAX 512/239-6188
david.brymer@tceq.texas.gov
shelley.naik@tceq.texas.gov

Ron Hatlett
TCEQ Office of Air MC 110
P.O. Box 13087
Austin, Texas 78711-3087
512/239-6348 FAX 512/239-6188
ronald.hatlett@tceq.texas.gov