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 18, 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: ELG METALS, INC.
TCEQ DOCKET NO. 2016-0613-MIS-U

Dear Ms. Bohac:

Enclosed for filing is the Office of Public Interest Counsel's Response to Appeal of Use Determinations in the above-entitled matter.

Sincerely,

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

DOCKET NO. 2016-0613-MIS-U

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

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 ELG Metals Inc.'s (ELG or Appellant) appeal of the Executive Director's (ED) negative use determination.

I. Background

ELG submitted its application to TCEQ on September 8, 2015. The application concerns ELG's scrap metal reclaiming facility located in Houston, Harris County. On September 21, 2015, ED staff mailed the first notice of deficiency (NOD) letter to the Appellant. In response to the NOD, Appellant submitted a revised application on November 23, 2015. On December 15, 2015, the second NOD letter was mailed. ELG submitted a second revised application on February 3, 2016.

On March 30, 2016, the ED issued a 100% positive use determination for the tanks, piping, and pumps used to contain cutting fluids from metal turnings. The ED issued a negative use determination for the roofs, walls, foundations, and floors of the turnings facility, and for the "qualifying land". TCEQ received ELG's appeal of the ED's negative determination on April 22, 2016.

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.[1]

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.[2]

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.[3]

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[1] TEX. CONST. art. VIII, § 1-l(a).
[2] TEX. TAX CODE § 11.31(a).
[3] 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.[4]

Under § 11.31(k), TCEQ must establish a nonexclusive list of facilities, devices, or methods for the control of air, water, or land pollution.[5] 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.[6] 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.[7] 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.[8]

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[4] TEX. TAX CODE § 11.31(g).
[5] TEX. TAX CODE § 11.31(k)(8).
[6] TEX. TAX CODE § 11.31(g-1).
[7] TEX. TAX CODE § 11.31(l).
[8] 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).[9] 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.[10] 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.[11] 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.[12]

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.[13] 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.[14] 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

[9] 30 TEX. ADMIN. CODE § 17.2(8).
[10] 30 TEX. ADMIN. CODE § 17.14(a).
[11] 30 TEX. ADMIN. CODE § 17.2(9).
[12] 30 TEX. ADMIN. CODE § 17.2(10).
[13] 30 TEX. ADMIN. CODE § 17.10(d)(4).
[14] 30 TEX. ADMIN. CODE § 17.10(d)(1).

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

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.[16] In addition, land must include only the portion of the land acquired after January 1, 1994, that actually contains pollution control property.[17]

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.[18]

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[15] 30 TEX. ADMIN. CODE § 17.2(4).
[16] 30 TEX. ADMIN. CODE § 17.4(a).
[17] 30 TEX. ADMIN. CODE § 17.4(a)(2).
[18] 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.[19] 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.[20] The Commission may remand the matter to the ED for a new determination or deny the appeal and affirm the ED's use determination.[21]

III. Analysis

ELG sought use determinations for two different parts of its facility. One part concerns the turnings facility, and the other part concerns what ELG calls "qualifying land". ELG's appeal fails on multiple levels. By rule, ELG must explain the basis for the appeal.[22] ELG's appeal consists of a one page letter which provides no explanation whatsoever 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.

A. Land

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.[23] In the property description section of the application, ELG states that the land was acquired in 1989. The record also indicates the ED

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[19] 30 TEX. ADMIN. CODE § 17.25(a)(2)(A).
[20] 30 TEX. ADMIN. CODE § 17.25(b).
[21] 30 TEX. ADMIN. CODE § 17.25(e)(2).
[22] 30 TEX. ADMIN. CODE § 17.25(b)(5).
[23] TEX. TAX CODE § 11.31(b).

informed ELG that its 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.

B. Turnings Facility

The ED issued a negative determination for the roofs, walls, foundations, and floors of the turnings facility.[24] The ED states that the turnings facility is used as part of the production process and is not a pollution control device. Additionally, the ED states that buildings are not included under Item S-20 of the Tier I Table.

The ED has acknowledged that certain parts of the turnings facility structure are pollution control property by issuing a 100% positive use determination for the tanks, piping, and pumps used to contain cutting fluids from metal turnings. However, the ED has also appropriately distinguished those parts of the structure which control pollution from those which do not. 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.[25]

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[24] OPIC notes that the Commission previously considered a substantially similar case involving a turnings facility and ultimately denied that appeal and affirmed the ED's negative determination. *See* Derichebourg Recycling USA, Inc., TCEQ Docket No. 2015-0368-MIS-U.
[25] 30 TEX. ADMIN. CODE § 17.6(1)(B).

Regarding the Tier I Table, ELG states in its application that the turnings facility falls under Item S-20 of the Table. Item S-20 is for waste storage property used to collect and/or store waste prior to treatment or disposal.[26] Waste storage property is described to include tanks, containers, and ancillary equipment such as pumps, piping, secondary containment, and vent controls.[27] 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 in the Tier I Table, and OPIC therefore agrees that buildings should not be included under Item S-20 of the Table.

IV. Conclusion

ELG's appeal of the ED's negative use determination should be denied. The Appellant's letter fails to comply with TCEQ rule requirements regarding use determination appeals, and the properties in question do not qualify for exemption under the Texas Tax Code and TCEQ's Chapter 17 rules. OPIC therefore supports the ED's negative use determination. We respectfully recommend the Commission deny the appeal and affirm the ED's negative determination.

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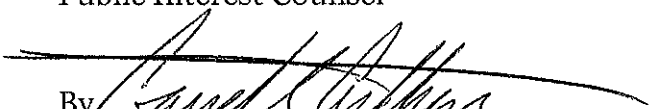
[26] 30 TEX. ADMIN. CODE § 17.14(a).
[27] *Id.*

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By 

Garrett T. Arthur
State Bar No. 24006771
P.O. Box 13087, MC 103
Austin, TX 78711
512-239-5757
512-239-6377 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 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

MAILING LIST
ELG METALS INC.
TCEQ DOCKET NO. 2016-0613-MIS-U

Ronald P. Little
Andrej Fedor, Agent
Associated Tax Appraisers
4543 Post Oak Place, Suite 232
Houston, Texas 77027
281/497-2200 FAX 713/627-8454
afedor@nationalrealty.com

Ronald P. Little
Andrej Fedor, Agent
Associated Tax Appraisers
P.O. Box 91119
Austin, Texas 78709
512/894-2095 FAX 512/894-2076
afedor@nationalrealty.com

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

Colleen Linehan
TCEQ Environmental Law Division,
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606

Bridget Bohac
TCEQ Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311