

Tax Relief for Pollution Control Property Advisory Committee Equipment and Categories List Issues—Staff Analysis

During the December 6, 2010, advisory committee meeting an issues document was presented by TCEQ staff. This document contains staff's analysis of the issues.

Issue 1: Waste Minimization/Recycling Practices

Tier I Table items S-1: Stationary Mixing and Sizing Equipment; M-4: Compactors, Barrel Crushers, Balers, Shredder; and M-5: Solvent Recycling Systems are used to recycle self-generated waste. To be eligible for a positive use determination, Texas Tax Code §11.31(b) and 30 Texas Administrative Code §17.4(a) require the subject property to be used, constructed, acquired, or installed to meet or exceed a law, rule, or regulation adopted by a federal, state, or local environmental protection agency. Applications containing these items provide citations to 30 TAC 335.474: Pollution Prevention Plans (P2 Plan), 335.4: General Prohibitions and Texas Water Code 26.121: Unauthorized Discharges Prohibited. These rules do not require the recycling of waste or the installation of any equipment.

Staff Analysis

The executive director is aware of limited circumstances where a rule requires the use of recycling equipment. There are a number of state and federal programs that encourage specific industries to implement waste minimization and recycling practices. These programs require entities to establish waste minimization/recycling plans and goals, and impose reporting requirements. With limited exceptions, state and federal laws, rules, and regulations do not mandate the installation of waste minimization and recycling equipment.

The reuse or sale of the recovered materials meets the definition of Marketable Product. This equipment, if eligible, must be filed for on a Tier III application. These items should not be listed on the Tier I Table. In order to be eligible the all requirements of §11.31 must be met.

Issue 2: Best Management Practices

A facility may choose to operate under a general storm water permit. The permit requires the development of a Storm Water Pollution Prevention Plan (SWP3). Part of the SWP3 includes a listing of Best Management Practices (BMPs) to control storm water. BMPs include schedules of activities, prohibitions of practices, maintenance procedures, and other techniques to control, prevent or reduce the discharge of pollutants. BMPs also include treatment requirements, operating procedures, and practices to control site runoff, spills or leaks, waste disposal, or drainage from raw material storage areas. Applications requesting storm water related equipment are being received.

BMPs are not laws, rules, or regulations adopted by a federal, state, or local environmental protection agency.

Staff Analysis

Use determinations are reviewed on a case-by-case basis to ensure that all requirements are met. For the property installed as part of a BMP to be eligible it must be "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." TTC, § 11.31(b). When property has been installed as a part of the facility's BMP, a citation to the appropriate federal, state, local environmental law, rule, or regulation is still required.

An example of BMPs being eligible is a scrap recycling facility (SIC Code 5093) discharges storm water pursuant to the General TPDES Multi-Sector Industrial General Permit for Storm Water (TXR050000). The owner of the facility installs berms, trenches, and culverts to capture and divert storm water from outdoor stockpiled materials. The owner of the facility files a Tier I application for a 100% positive use determination, citing Item W-74, Diversions, on the Tier I Table. An appropriate citation would be to 40 CFR §122.26 or 30 TAC §281.25 since both regulate storm water discharges. The TCEQ may request, pursuant to 30 TAC §17.10(d)(6), a copy of the applicant's SWP3, and a copy of the signed certificate verifying that the applicant is currently covered under the terms of the general permit.

An example of a BMP which may not be eligible is the installation of a hazardous materials storage area. TCEQ and EPA regulate the storage and management of hazardous waste. The storage of hazardous materials is regulated by OSHA and other non-environmental governmental agencies. The same or similar controls (secondary containment and sumps) are installed in both areas. The listing of the storage area as a BMP does not make the BMP eligible for a positive use determination unless it was installed to meet or exceed an adopted environmental rule. A chemical storage area that is not regulated under an adopted environmental rule is not eligible for a positive determination even if it is listed as a BMP for storm water control.

Storage area secondary containment that is required by an environmental rule may be eligible for a positive use determination. An example would be a storage area used for to store oil filled containers. The portion of the secondary containment required under 40 CFR §112.7 and 112.8 would be eligible. The fact that a small portion of the storage area is for storage of oil or oil derived products does not make the entire storage area a pollution control device.