

Ad Valorem Tax Exemption/Pollution Control Property: Supreme Court of Texas Addresses Challenge to Texas Commission on Environmental Quality Interpretation



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The Supreme Court of Texas (“Court”) addressed in a May 3rd opinion a challenge to a Texas Commission on Environmental Quality (“TCEQ”) interpretation of the term “pollution control project” in the context of an ad valorem tax exemption. See *Brazos Electric Power Cooperative, Inc. v. Texas Commission on Environmental Quality and Richard A. Hyde, Executive Director of the Texas Commission on Environmental Quality*, 2019, WL 1966835.

Brazos Electric Power Cooperative (“Brazos Electric”) had applied for an ad valorem tax exemption under Tier IV, seeking a 100% positive use determination for their heat recovery steam generators (“HRSG”) used in its Johnson County facility, with the TCEQ in April 2009.

The Executive Director of TCEQ (“Executive Director”) claimed the application had been put on hold pending the resolution of the county appraiser’s appeals regarding Tier IV use determinations.

Other than the Executive Director sending a letter to Brazos Electric notifying them that the application would be subject to newly promulgated rules, no activity appears in the administrative record until March 2012. In July 2012, the Executive Director issued a negative use determination for the application.

In 1993, the Texas Constitution was amended to authorize the Texas Legislature to exempt from ad valorem taxation “all or part of the real and personal property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by the environmental protection agencies ... for the prevention, monitoring, control or reduction of air, water, or land pollution.” This ratification made the Texas Tax Code Section 11.31(a) effective. The process for Exemption is described in Section 11.31(c), (d), (e).

The property owner must first submit an application to the Director. Brazos Electric did so in 2009. A cost benefit analysis and the stated purpose of the proposed exempted property must be included. Section 11.31 (g) & (h), requires TCEQ to establish specific standards and allow for determinations that distinguish the proportion of the property in relation to underlying pollution policy.

In 2007, the Legislature amended Section 11.31. It added subsection (k), which directs TCEQ “to adopt rules establishing a nonexclusive list of facilities, devices or methods for the control of air, water, or land pollution.” These must include HRSGs among other devices, referred to as “the k-list.” The k-list was meant to streamline the exemption application process.

The 2007 amendment also added subsection (m). This provision allows the k-list application to omit the benefit analysis, otherwise required by the exemption application process under Section 11.31(c) (1). It also expedites the process for the k-list property by requiring the Director to issue a determination within thirty days after the application is completed.

The Court in *Brazos* was tasked with determining whether the Section 11.31 of the Texas Tax Code provides TCEQ the discretion to deny an ad valorem tax exemption for HRSG, devices the Legislature has deemed “pollution control property.” The Court held Section 11.31 mandates a positive use determination for HRSGs, as well as other “k-list” property.

The Court holds that TCEQ does not have the discretion to deny an ad valorem tax exemption for HRSG, devices the Legislature has deemed “pollution control property.” The Court also holds that it is the Executive Director’s responsibility to determine what proportion of the property is purely productive and what proportion is for pollution control. However, the Executive Director may not determine that the pollution control proportion is zero or negative. The creation of the k-list, of per se pollution control property, has the effect of curbing the Executive Director’s discretion.

The Legislature affirmatively designated HRSGs along with certain other types of property, as pollution control property and has directed TCEQ to determine that a HRSG is at least partly pollution control property.

A copy of the opinion can be downloaded [here](#).