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OPINION COMMITTEE

*The Senate of
The State of Texas
Austin, Texas 78711*

FILE # ML-46900-11
I.D. # 46900

December 8, 2011

RQ-1026-GA

The Honorable Greg Abbott
Office of the Attorney General
P O Box 12548
Austin, TX 78711-2548

RE: Request for Attorney General's Opinion

Dear Attorney General Abbott:

I am writing to request an opinion from your office on an issue that carries broad potential impacts to local taxing authorities, including school districts across various parts of the state. The specific question pertains to the application of the pollution control exemption from ad valorem taxes passed by the Legislature in the 73rd Legislative session. While the significant economic pressures facing local jurisdictions should not influence or determine the answer to the question, the potential consequences underscore the importance of the answer. Estimates of the tax refunds exceed \$100,000,000.

As you know, authority for the pollution control exemption was placed with the Texas Commission on Environmental Quality (TCEQ). The Commission reviews applications for exclusion and makes a determination, which is then presented to the local taxing authority for purposes of exemption or rebate. The TCEQ received requests for a pollution control exclusion determination from various refineries seeking an exemption for hydrotreater equipment installed at the refineries to meet federal guidelines and requirements for low sulfur fuel. To be clear as we understand the requests, the equipment at issue provides no environmental benefit at or near the site. Instead, the equipment is a necessary component of any refinery that produces fuel for use in the United States.

The Commission staff reviewed the exemption requests and recommended a denial based on a finding of no environmental benefit at the sites. All requests received a Negative Use Determination by the TCEQ Executive Director. The Commission asked that the Executive Director's staff take another look at the requests suggesting that the Legislature intended a broader interpretation. There exists a substantial need for a close examination of the framework and scope put in place by the Texas Legislature on this exemption.

The relevant background on the issue, as we understand it, is as follows:

The 73rd Legislature created the exemption from ad valorem taxation for the installation of certain pollution control devices. The constitutional amendment (HJR 86) which

passed the Legislature and subsequently by voters as Proposition 2 in the 1993 constitutional amendment election, as well as the rules adopted by the TCEQ pursuant to the legislation's passage which became 30 TAC 17 defines "environmental benefit" as:

"The prevention, monitoring, control, or reduction of air, water, and/or land pollution that results from the actions of the applicant. For purposes of this chapter, environmental 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 provided. For the purpose of this chapter, the terms "environmental benefit" and "pollution control" are synonymous."

30 TAC 17 also specifies property which is not eligible for a tax exemption, including requests that are:

"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;"

and

"if the environmental benefit is derived from the use or characteristics of the good or service produced or provided."

In denying the requests made by Valero Corp. and other refiners for a tax exemption for the installation of hydrotreater equipment mandated by EPA for the reduction of sulfur in gasoline and diesel fuel, the TCEQ Executive Director and his professional support staff determined that the hydrotreaters did not produce an environmental benefit at the refinery site as required by §11.31 Tax Code and §17.6 of TCEQ adopted rules. The staff further stated that the hydrotreaters have the opposite effect of actually increasing onsite pollution noting that "deterioration of conditions" reviews have already been performed to verify this conclusion.

Following the Commission's remand to the Executive Director, the Commission altered its rules to omit the "at the site" threshold requirement. Addressing comments, the Commission said in part:

The Commission does not believe that eliminating the existing flow charts and rule language located at §17.15, adding a definition of "environmental benefit" at §17.2(4), and modifying the eligibility requirements at §17.6 represent an expansion of the tax relief program. These changes stem from the advisory committee's recommendation, at its March 26, 2010, meeting and included in its written comments, that the Commission remove the "environmental benefit at the site" requirement, define "environmental benefit," and modify the eligibility requirements in §17.6.

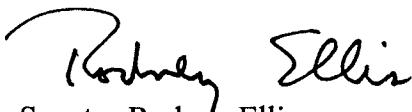
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The Commission believes that the rule language as proposed is consistent with the legislative intent of §11.31 Texas Tax Code and provides additional guidance to applicants regarding the eligibility of certain types of equipment.

We believe the ultimate questions for your office are: May the TCEQ exempt from taxation equipment that provides no environmental benefit at the site of the facility but is only utilized to make a product that may or may not confer an environmental benefit only upon its eventual use in the stream of commerce? May the Commission alter the standards of eligibility during a pending appeal of Negative Use Determination?

Thank you for your consideration of this important question.

Sincerely,



Senator Rodney Ellis
Chair, Senate Committee on Government Organization



Senator Wendy R Davis