IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 18-1106

ANTERO RESOURCES CORPORATION,
Respondent Below, Petitioner,

v.

DALE W. STEAGER, as
STATE TAX COMMISSIONER of WEST VIRGINIA,
Petitioner Below, Respondent.

Hon. Charles E. King, Jr.
Circuit Court of Kanawha County
Civil Action No. 18-AA-218

REPLY BRIEF OF PETITIONER ANTERO RESOURCES CORPORATION

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In regards to the exemption from sales and use tax under W. Va. Code §§ 11-15-9(b)(2) and 11-15A-3(a)(2) for goods and services "directly used" in the production of natural resources (the "Direct Use Exemption"), Respondent acknowledges that the supporting legislative rule, W. Va. C.S.R. § 110-15-1 *et seq.* (the "Legislative Rule"), "clearly states that the list of exempt purchases and the list of taxable purchases for all natural resource producers is not exhaustive," citing W. Va. C.S.R. § 110-15-123.4.3.6. *See* Resp't's Br. at 19. Respondent then devotes a significant portion of his brief arguing that neither the West Virginia Code nor the Legislative Rule specifically mentions skid houses/crew quarters.[1] *See* Resp't's Br. at 19–24. Respondent's analysis is scattershot and inconsistent. While Respondent acknowledges that there are fourteen different categories for the Direct Use Exemption, including specific categories and a catchall "integral and essential" category,[2] he continues to harp on the absence of specific mention of skid houses/crew quarters in the West Virginia Code or the Legislative Rule, stating that W. Va. Code § 11-15-2(b)(4)(A) "does not include any language even implying that bedrooms, breakrooms, break areas, restrooms, bath-houses, TV lounges, kitchenettes and similar rest areas, would be directly used in the production of natural resources[.]" *See* Resp't's Br. at 21. Respondent then falsely claims that the "enumerated examples" in the Legislative Rule "clearly indicate" that the Legislature decided against extending the exemption to include the "living

[1] Respondent makes similar arguments regarding rented bathroom facilities, as discussed below.
[2] W. Va. Code § 11-15-2(b)(4)(A)(i)–(xiv).

quarters" of skid houses/crew quarters used at a natural resource production site, and asserting that Antero has thus failed to prove that the Direct Use Exemption applies, per W. Va. Code § 11-15-6(b). *Id.*

Antero has consistently and repeatedly acknowledged that W. Va. Code §§ 11-15-6(b) and 11-15A-18(c) presume that all sales and services are subject to sales and use tax until the contrary is clearly established.[3] In recognition of the presumption of taxability, Antero has provided ample evidence and analysis to clearly establish that the Direct Use Exemption applies to the skid houses/crew quarters rentals, as discussed below.

Skid houses/crew quarters are not specifically listed as exempt[4] or taxable under the West Virginia Code,[5] which is the case for *all* purchases used in the industries subject to the Direct Use Exemption. This reflects the fact that the West Virginia Code uses thirteen broad categories for the Direct Use Exemption and one catchall "integral and essential" category, not examples of specific items that are either exempt or taxable.

Furthermore, as Respondent admits, only a handful of examples of exempt items[6] and taxable items[7] are included in the Legislative Rule for natural resource producers.[8] *See* Resp't's

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[3] Respondent's brief conflates the presumption of taxability with the broad nature of natural resource production activity for purposes of the Direct Use Exemption. *See* Antero's Br. at 17 for a discussion of the Respondent's "expansive" reading of activities that are considered the production of natural resources. While the burden is on Antero to demonstrate that the Direct Use exemption applies, Antero has clearly demonstrated that all of the rentals and purchases that are involved in this matter were directly used in the production of natural resources. Respondent contends that the "living area" of skid houses/crew quarters, bathroom facilities and trash trailers and bins are "adjacent to the work site," a contention that reflects a complete lack of understanding of the operations at a typical horizontal well drill site. *See* Resp't's Br. at 7. These items are all located on the well site, and are integral and essential elements of operating a horizontal well drill site, and the rented items are thus directly used in the natural resource production process and subject to the Direct Use Exemption.

[4] W. Va. Code § 11-15-2(b)(4)(A).

[5] W. Va. Code § 11-15-2(b)(4)(B).

[6] W. Va. C.S.R. § 110-15-123.4.3.7.

[7] W. Va. C.S.R. § 110-15-123.4.3.6.

[8] Respondent's argument that the Legislative Rule is not antiquated is unfounded. *See* Antero's Br. at 13–14 n. 47 and 19–20 for an in-depth discussion of the antiquated nature of certain provisions in the

Br. at 19. As stated in the Legislative Rule, and as recognized by Respondent, "the list provides only some examples of [taxable items or exempt items] and is not intended to be all inclusive."[9] In apparent recognition of the fact that examples included in the Legislative Rule are not exclusive, and that the West Virginia Code includes broad categories for purposes of determining whether the Direct Use Exemption applies, Respondent deemed "well-head cages" used by Antero as being directly used in natural resource production activities, and exempt under the Direct Use Exemption, despite no specific mention of "well-head cages" in the Legislative Rule. *See* Resp't's Br. at 19. The Respondent unquestionably understands that an analysis of whether a purchase or rental falls into one of the categories deemed "integral and essential" to the natural resource production process must be undertaken, making it puzzling that in his brief, the Respondent relies heavily on the premise that because skid houses/crew quarters are not specifically mentioned in the West Virginia Code or Legislative Rule, they must be deemed subject to sales and use tax. *See* Resp't's Br. at 21 & 24.

Legislative Rule. As Respondent himself acknowledges, "[i]n 1993, the Legislature promulgated the existing legislative rule and amended the direct use exemption [under the West Virginia Code]." *See* Resp't's Br. at 10. That statement is accurate; however, Respondent fails to mention that the Legislative Rule *retains* language based on provisions of the West Virginia Code that was amended in 1993. In other words, the Legislative Rule was drafted based on pre-1993 West Virginia Code language, but was not updated prior to its effective date in order to capture statutory changes made during the 1993 regular legislative session. As a result, this language from the Legislative Rule has been antiquated from the effective date of the Legislative Rule to the date of this brief: "***[p]ersons subject to the severance tax are exempt on all purchases made by them for use in severance activities. This exemption includes purchases used either directly or indirectly in the production of natural resources, but only in activities for which the gross receipts are subject to severance tax[.]***" W. Va. C.S.R. § 110-15-123.4.3.4 (emphasis added). The fact that the Legislative Rule "specifically addresses the application of the direct use exemption to oil and gas producers" or that the Legislature enacted sunset provisions for certain legislative rules during the regular 2016 legislative session has no bearing on whether the Legislative Rule is antiquated in various respects, particularly with regard to the Direct Use Exemption for severance taxpayers. *See* Resp't's Br. at 9–10. To be clear, if the language of W. Va. C.S.R. § 110-15-123.4.3.4 is not antiquated, as Respondent suggests, this appeal would not be necessary since the distinction between direct use and indirect use would be of no consequence to Antero or any other severance taxpayer, and Antero would not be subject to sales and use tax on any purchases it makes.

[9] W. Va. C.S.R. §§ 110-15-123.4.3.6 and 123.4.3.7.

In light of the fact that the West Virginia Code includes no examples of specific goods or services that are considered subject to the Direct Use Exemption, and that the Legislative Rule includes a non-exclusive list of goods and services that are either "exempt" or "taxable" for Direct Use Exemption purposes, it is necessary to undertake an analysis of whether the skid houses/crew quarters fit under any of the thirteen specific categories under W. Va. Code § 11-15-2(b)(4)(A)(i)-(xiii), or the catchall "integral and essential" category under W. Va. Code § 11-15-2(b)(4)(A)(xiv).[10] Respondent uses five pages of his brief arguing the West Virginia Office of Tax Appeals ("WVOTA") incorrectly "mooted" the specific categories of exemption under W. Va. Code § 11-15-2(b)(4)(A)(i)-(xiii), and created a "new test" based on whether the rental charges included in the assessment are essential to Antero's business operations, instead of examining whether the particular rentals were "integral and essential" under either the thirteen specific categories or the catchall "integral and essential" category. *See* Resp't's Br. at 11–16. Antero specifically stated in its initial brief that the thirteen specific categories and the catchall "integral and essential" category should all be analyzed in order to determine if the Direct Use Exemption applies, and provided an exhaustive analysis of those categories in its initial brief. *See* Antero's Br. at 15 n. 54, 16, & 20–21.

Respondent's analysis of the Direct Use Exemption for the skid houses/crew quarters is best summarized in this conclusory statement: "[t]he Legislature could have adopted an exemption for skid houses/crew quarters for the production of natural resources in remote locations, but did not do so." *See* Resp't's Br. at 24.[11] Antero covered this point at length in its initial brief, but the argument bears repeating: the entirety of the skid houses/crew quarters are

[10] *See also* W. Va. C.S.R. § 110-15-2.27.

[11] Respondent states in another portion of his brief, however, that the "catchall" provision under W. Va. Code § 11-15-2(b)(4)(A)(xiv) was necessary, in part, because the Legislature could never be detailed enough to avoid overlooking an item that should be subject to the Direct Use Exemption.

an integral and essential part of Antero's production activities at each well site. These facilities, and the generators, transformers, electrical and water hook ups necessary to operate and maintain them, are used exclusively by individuals who are essential to the drilling activities and that are currently, or were previously, required to remain at the drill site around the clock for weeks at a time. These individuals spend the majority of their time at the drill site performing necessary drilling functions, and it is necessary for them to have a facility at the drill site where they can sleep, bathe, and perform other everyday tasks.

The rental of skid houses/crew quarters to house essential personnel who are required to remain at the well site around the clock over extended periods of time does not fall squarely into any of the uses or of property or services that are deemed not to constitute direct use or consumption in the activity of production of natural resources, including property or services that are for "the personal comfort of personnel" or "incidental or convenient" to the production of natural resources.[12] The skid houses/crew quarters are not provided for the "personal comfort" or "convenience" of these personnel; rather, the facilities are essential to allow these individuals to remain at the drill site in order to satisfactorily perform the duties expected by Antero. Respondent fails to address the testimony of Antero's witness Alvyn Schopp, Antero's Chief Administrative Officer, Regional Senior Vice President and Treasurer, who testified that the skid houses/crew quarters are "worse than your worst hotel. This is a very loud operation. This is not a hotel setup. It's a singlewide trailer that has sleeping quarters, a small kitchenette and an office space in it, and they're there for safety reasons."[13]

Antero rents the skid houses/crew quarters from Wolf Pack Energy, through its subsidiary Wolf Pack Rentals, LLC (hereinafter "Wolf Pack") because these facilities are

[12] *See* W. Va. Code § 11-15-2(b)(4)(B)(i)–(vi); W. Va. C.S.R. § 110-15-2.27.2.1-6.
[13] Antero A.R. 0260.

integral and essential to Antero's operations at its various well sites. The Circuit Court viewed this "contractual" element as critically important in its analysis, and held that the WVOTA had exceeded its authority in treating a contractual agreement as a qualifying purchase for the Direct Use Exemption. Respondent relies on this analysis in his brief, stating that "[a]ccording to the OTA decision, two parties to a contract can now create their own tax exemption simply by agreeing to contract terms and paying for the associated expense." Resp't's Br. at 14. In advocating for his position, Respondent once again demonstrates a complete lack of understanding of the operations at a horizontal natural gas work site, arguing that "Antero should not be allowed to expand a tax exemption to accommodate its staffing considerations" and suggesting that Antero could hire additional directional drillers to ensure that no directional drillers have to remain on site for more than a twelve hour shift. *See* Resp't's Br. at 15.

Currently, Antero uses four directional drillers at each well site, with each two person crew spending two consecutive weeks at the well site and then taking two weeks off, in order to ensure that the well is drilled in the safest manner possible during Antero's around the clock operations. *See* Antero's Br. at 24. Respondent apparently believes that there is an endless pool of directional drillers for Antero to hire for its West Virginia drilling operations, and that cycling the directional drillers on and off the well site every 12 hours would have no impact on the safety of Antero's drilling operations. Alvyn Schopp described the issue with constant shift changes, testifying that "[s]hift changes are the most dangerous part of this operation, because the [new shift workers] don't know what was going on for the last 12 hours," and that the industry developed its schedules because it is "the safest way to do it in these remote locations."[14] The schedule used by Antero is especially important for directional drillers who are charged with knowing the orientation of the drill bit in order to ensure that the drill does not encroach into a

[14] Antero A.R. 0295–96.

well that is already producing or into another mineral owner's property.[15] Respondent suggests that Antero should arrange for "an additional set of two directional drillers to work the night shift for the two week periods or utilize a different business model," completely ignoring the fact that Antero already uses two sets of two directional drillers for each drill site, and failing to recognize the safety concerns associated with shift changes among directional drillers. *See* Resp't's Br. at 15.

To be clear, Antero's decision to contract with Wolf Pack to rent the skid houses/crew quarters does not make the skid houses/crew quarters integral and essential for purposes of the Direct Use Exemption, and Antero has never advocated for that interpretation. Rather, Antero contracts with Wolf Pack for the rental of the skid houses/crew quarters *because* they are integral and essential to the operations of Antero's well sites. The skid houses/crew quarters are necessary for workers who are required to remain at the well sites around the clock, per best industry practices, to ensure that the sites are operated in the safest, most efficient manner possible. Antero has clearly established that the rental of the skid houses/crew quarters are "integral and essential" to its natural resource production activities, per W. Va. Code § 11-15-2(b)(4)(A)(xiv), thus qualifying the rentals for the Direct Use Exemption.

B. THE CIRCUIT COURT INCORRECTLY DETERMINED THAT RENTED BATHROOM FACILITIES WERE NOT DIRECTLY USED IN ANTERO'S NATURAL RESOURCE PRODUCTION ACTIVITIES BASED ON A PERVASIVE MISAPPLICATION OF THE WEST VIRGINIA CODE AND WEST VIRGINIA CODE OF STATE RULES

Respondent opens the bathroom facilities portion of his brief by arguing that the WVOTA decision "created a distinction between indoor industries versus outdoor industries which has never been drawn by the Legislature." *See* Resp't's Br. at 14. Antero addressed this false equivalency in its initial brief, and reiterates that so-called "indoor industries" do not incur

[15] Antero A.R. 0278–79.

the substantial ongoing bathroom facility costs that are incurred by so-called "outdoor" industries. *See* Antero's Br. at 35 n. 108. Furthermore, "indoor" industries are generally not subject to sales or use tax for the contracting services that are incurred in having bathroom facilities constructed. *Id.*

Consistent with his argument regarding skid houses/crew quarters, Respondent argues that "the statute does not include the words 'Porta-Potties', 'Porta-Johns', 'bathrooms', 'restrooms', 'septic systems', and 'sanitary facilities'. . . . These words are not found in the legislative rule either." *See* Resp't's Br. at 28 (all misplaced commas and misplaced period in Respondent's Brief) (internal citation omitted). The lack of mention of specific terms relating to bathroom facilities under the thirteen specific categories[16] is no surprise, given that the focus of the West Virginia Code is on broad categories of property or services that are subject to the Direct Use Exemption and not on specific items. Furthermore, Respondent fails to recognize that the specific examples of exempt or taxable items included in the Legislative Rule are not exclusive.[17] The Legislative Rule does not include bathroom facilities in either the list of taxable examples or exempt examples, and does not otherwise directly address bathroom facilities,[18] making it necessary to undertake an analysis of whether such facilities fit under any of the thirteen specific categories under W. Va. Code § 11-15-2(b)(4)(A)(i)–(xiii), or the catchall

[16] W. Va. Code § 11-15-2(b)(4)(A)(i)–(xiii).

[17] W. Va. C.S.R. §§ 110-15-123.4.3.6 & 4.3.7. ("The list provides only some examples of [taxable or exempt] items and is not intended to be all inclusive.").

[18] As noted in Antero's initial brief, W. Va. C.S.R. § 110-15-123.4.3.6 discusses light bulbs and fixtures, supplies and machinery, tools, parts and materials used in "bath-houses." Bath-houses are distinct from bathroom facilities, since bath-houses are typically used by workers following completion of a worker's shift, while bathroom facilities are used throughout workers' shifts. Antero's Br. at 17–18 n. 66. Respondent suggests to this Court that "[w]hether a bath-house is a restroom for employees or a changing room for swimmers is irrelevant for this Court's analysis[,]" and proceeds to argue that bathroom facilities at remote drilling sites are for the "comfort of employees." *See* Resp't's Br. at 23. To the contrary, the distinction is quite relevant, since bathroom facilities are made available to workers at the well site for use during their shifts, and are integral and essential to ensure the around the clock operations at the well site. The contention that bathroom facilities are only available for the "comfort" of the site workers is meritless.

"integral and essential" category under W. Va. Code § 11-15-2(b)(4)(A)(xiv). Antero has demonstrated that the bathroom facilities are exempt pursuant to the specific "pollution control and environmental quality or protection" and "safety" categories, and the catchall "integral and essential" category, as discussed below.

1. Pollution Control and Environmental Quality or Protection

Respondent incorrectly characterizes Antero's position, claiming that Antero argues that the United States Department of Labor's Occupational Safety and Health Administration ("OSHA"), through its regulations,[19] "created a *de facto* exemption from the West Virginia Consumer Sales Tax[,]" and adding that "whether Porta-Potties are exempt from the consumers sales tax under the direct use exemption is a question to be decided by the West Virginia Legislature and not OSHA." *See* Resp't's Br. at 27–28. Antero agrees that this is a question for the West Virginia Legislature, and the West Virginia Legislature created broad categories of purchases that qualify for the Direct Use Exemption, allowing taxpayers to establish that certain goods and services are directly used in the natural resource production process by demonstrating that the goods or services are "integral and essential" to the production process, through both specifically designated activities like pollution control and environmental quality or protection,[20] safety, and the "catchall" integral and essential category.[21] It was the West Virginia Legislature that enacted this exemption, not OSHA. The OSHA requirements are cited to exhibit the integral and essential nature of the bathroom facility rentals.

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[19] 29 C.F.R. § 1910.141(c)(1)(i) (requires that six toilet facilities must be provided if the number of employees is between 111 and 150, with one additional facility required for each additional 40 employees over 150); 29 C.F.R. § 1910.141(a)(2) (requires that potable water be provided at worksites for drinking, washing of person, cooking, washing of foods, washing of cooking or eating utensils, washing of food preparation or processing premises, or personal services rooms). Personal service rooms include rooms dedicated to toilet use. 29 C.F.R. § 1910.141(b)(1)(i).

[20] The OSHA regulations cited in footnote 17 fall under Subpart J of the regulations: General Environmental Controls.

[21] W. Va. Code § 11-15-2(b)(4)(A)(i)–(xiv); W. Va. C.S.R. § 110-15-2.27.1.

The West Virginia Code and the Legislative Rule specifically treat pollution control and environmental quality or protection activities and facilities as being "directly used" in natural resource production, and subject to the Direct Use Exemption.[22] The definitions of pollution control and environmental quality or protection activity or facility[23] state that services or devices used or intended primarily for "water pollution" qualify for the natural resource production activity Direct Use Exemption. The discharge or deposit of sewage in a manner that contaminates ground or surface water constitutes "water pollution" to the extent the waters are made detrimental to the public and the public interest.[24] The port-a-potties, conex weatherized water and sewer boxes, potable water and septic cleaning unquestionably prevent contamination of ground or surface water with sewage at the well sites, and thus qualify under the Direct Use Exemption as property used in pollution control and environmental quality or protection activity.

Respondent incorrectly suggests that Antero's entire argument for treating the bathroom facilities as pollution control or environmental quality of protection property is based on guidance from the West Virginia Department of Environmental Protection's Division of Waste and Water Management and Division of Air Quality (the "WVDEP"), which provides an annual list to the Respondent for purposes of the special property tax valuation program for pollution abatement control equipment. *See* Resp't's Br. at 29. However, Antero references the WVDEP

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[22] W. Va. Code § 11-15-9(b)(4)(A)(xiii); W. Va. C.S.R. § 110-15-2.27.1.13; *see also* W. Va. C.S.R. § 110-15-123.4.3.7.a.1.

[23] Pollution control means "any service, system, method, construction, device or appliance appurtenant thereto used or intended for the primary purpose of eliminating, preventing, or reducing air, noise or ***water pollution***, or for the primary purpose of treating, pretreating, modifying or disposing of any potential solid, liquid or gaseous pollutant which, if released without such treatment, pretreatment, modification or disposal, might be harmful, detrimental or offensive to the public and the public interest." W. Va. C.S.R. § 110-15-2.27.1.13.a (emphasis added). Environmental quality or protection activity or facility means "services, devices (including identifiable parts of devices), systems or facilities used or intended for use primarily for the protection of the public and the public interest through the ***control, reduction or elimination of*** air, ***water*** or noise ***pollution*** immediately caused by and directly related to the activity of . . . natural resource production." W. Va. C.S.R. § 110-15-2.27.1.13.b (emphasis added).

[24] W. Va. C.S.R. § 110-15-2.27.1.13.d.

list of pollution abatement control equipment for property tax purposes because of the lack of guidance in the antiquated Legislative Rule, or other official materials of the Respondent, regarding types of property that the Respondent deems to be for pollution control and environmental quality or protection for purposes of the Direct Use Exemption. As noted in Antero's initial brief, the WVDEP lists dozens of categories under which particular items are pre-approved as pollution abatement control equipment for property tax purposes. *See* Antero's Br. at 28. The WVDEP does not provide a microanalysis of every item that may or may not fall under a specifically listed category, as borne out by the fact that "Groundwater Treatment Systems" category gives no examples of equipment that may fall under that category, and the "Hazardous Spill Prevention Equipment" category provides only three non-exclusive examples. The bathroom facilities qualify as Groundwater Treatment Systems, since they collect and process sewage in order to reduce the contamination level in the groundwater, and as Hazardous Spill Prevention Equipment, since they are used primarily to keep hazardous materials from being exposed to the environment.

In short, the WVDEP's involvement in the process for property tax purposes is typically limited to providing the pre-approved list of items to the Tax Department.[25] Ideally, Antero could rely on the Legislative Rule for a discussion of equipment that does or does not qualify as pollution control environmental quality or protection equipment for purposes of the Direct Use Exemption; however, no such guidance exists. As a result, Antero referenced the only guidance

[25] Respondent again misreads statutory language that he is charged with administering in citing to W. Va. Code §§ 11-6A-5 and 11-6A-5a for the mistaken proposition that only coal waste power projects and wind power projects may have property that qualify as pollution abatement control equipment for property tax purposes. A cursory reading of W. Va. Code § 11-6A-1 *et seq.* makes it abundantly clear that the special property tax treatment for pollution control facilities are available to *all* industries. Coal waste disposal power projects and wind power projects have special rules particular to those types of projects, which necessitated stand-alone sections of the West Virginia Code for those types of facilities.

available that provides any useful information in regards to pollution control equipment in the context of West Virginia taxes.[26]

2. Safety

It is uncontroverted that the Direct Use Exemption applies to the use of property or consumption of services in natural resource production activity that is for personnel, plant, product, or community safety.[27]

Respondent has reversed course on his own guidance in regards to the whether portable toilets are "directly used" by natural resource producers due to the "safety" provision of the Direct Use Exemption. In 2001, Respondent responded to a question from a coal producer in regards to the use of portable toilets at the producer's mine sites, advising that "***[t]he availability of portable toilets is considered to be a safety item. As a result, the rentals of the portable toilets are considered to be exempt as the toilets are directly used in the [natural resource] production activity.***"[28]

Respondent argues that the precedential value of the legal log letter is limited to the taxpayer that requested the guidance, espousing arguments regarding estoppel in the process. *See* Resp't's Br. at 35. Respondent argues that the legal log correspondence letters

> are not Technical Assistance Advisories and have no precedential value under the law. Assuming *arguendo* that the Supreme Court chooses to construe the letters as a Technical Assistance Advisory, the TAA only applies to the particular taxpayer who requested the legal advice for the particular transaction in the letters. *See* W. Va. Code § 11-10-5r(a).

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[26] While the legislative rule for the special property tax valuation program includes some limitations based on property primarily installed for plant operations, no such provision is applicable to the Direct Use Exemption.

[27] W. Va. Code § 11-15-2(b)(4)(A)(xiii); W. Va. C.S.R. §§ 110-15-2.27.1.14 & 110-15-123.4.3.7.a.3.

[28] Legal Log 01-003, "Sales/Use Tax – A Discussion of the Application of Sales Tax to Certain Activities of a Natural Resources Producer," written by John E. Montgomery, Managing Attorney for the Legal Division and dated January 25, 2001. Antero A.R. 0753–58.

Resp't's Br. at 35.

However, this Court has held that the Tax Department may not arbitrarily refuse to apply the determination of a Technical Assistance Advisory ("TAA") to a taxpayer with a similar or identical fact pattern to the taxpayer that requested the TAA, and such arbitrary decisions may represent an abuse of discretion. *Preston Memorial Hosp. v. Palmer*, 213 W. Va. 189, 578 S.E.2d 383 (2003). In that case, which involved the application of sales and use tax in regards to certain employer-employee relationships, the Court noted that it "saw no discernable difference" between the situation of the taxpayer that requested the TAA and Preston Memorial Hospital. *Id.* at 194, 578 S.E.2d at 388.

The legal log letter includes a fact pattern almost identical to Antero's fact pattern, with no discernible difference between the two: both the entity that submitted the request for guidance to the Respondent and Antero are natural resource producers, and the legal log letter was based on whether portable toilets used at a natural resource production site are subject to the Direct Use Exemption. The legal log letter reveals Respondent's long held position on this issue, a position that Respondent, via a managing attorney in the Tax Department's Legal Division, correctly analyzed eighteen years ago. No provisions of the West Virginia Code or the Legislative Rule have changed in order to suggest a different analysis, and natural gas well sites should be treated no differently than coal mines. Astoundingly, Respondent contends that it is a "*non sequitur* to argue that Porta-Potties are directly used in the production of natural resources." Resp't's Br. at 35. Antero, frankly, cannot imagine a more logical argument: Respondent has directly addressed whether portable bathroom facilities used at natural resource productions sites are directly used in the production process, and determined that such items are "safety items"

subject to the Direct Use Exemption. Respondent's attempt to walk away from its prior analysis represents an arbitrary conclusion and is an abuse of discretion

3. Integral and Essential

Respondent acknowledges that "there is an obvious need" for bathroom facilities at Antero's remote job locations where natural resources are produced, but proceeds to claim that bathroom facilities are for the "personal comfort" of employees (despite no testimony at the hearing to that effect). *See* Resp't's Br. at 29. Respondent fails to demonstrate that federally required bathroom facilities at remote drill sites, when such facilities are exposed to extreme weather conditions during Antero's around the clock operations, are for the "personal comfort" of well site workers. Furthermore, Respondent effectively concedes that bathroom facilities at remote well sites are not included among the examples of "comfort facilities," by listing only breakrooms, employee lounge areas, or bathhouses among items that he deems as being for the "personal comfort" of employees, based on his misguided interpretation of the Legislative Rule. *See* Resp't's Br. at 29.

C. THE CIRCUIT COURT INCORRECTLY DETERMINED THAT RENTED TRASH BINS AND TRAILERS WERE NOT DIRECTLY USED IN ANTERO'S NATURAL RESOURCE PRODUCTION ACTIVITIES BASED ON THE MISCONCEPTION THAT ECONOMIC WASTE WAS NOT THE PRIMARY TYPE OF WASTE DISPOSED OF IN THE TRAILERS AND BINS

In analyzing whether the trash bins and trailers are subject to the Direct Use Exemption, Respondent gives short shrift to OSHA requirements that Antero remove all sweepings, solid or liquid wastes, refuse, and garbage from its drill sites in order to avoid creating a menace to health, and that such removal must occur as often as necessary to maintain the place of employment in a sanitary condition.[29] As with the bathroom facility OSHA rules, this federal requirement demonstrates that the trash bins are integral and essential to maintain Antero's well

[29] 29 C.F.R. § 1910.141(a)(4)(ii).

sites in a sanitary condition. As noted above, under the West Virginia Code and Legislative Rule, natural resource producers can establish that certain goods and services are directly used in the natural resource production process by demonstrating that the goods or services are "integral and essential" to the production process, through both specifically designated activities like pollution control and environmental quality or protection, storage, removal or transportation of economic waste, and the "catchall" integral and essential category.[30] Antero has established that the Direct Use Exemption applies to the trash trailers and bins, as discussed below.

Antero's witness Alvyn Schopp testified that at least 90% of the waste disposed of in the trash bins and trailers rented by Antero from Wolf Pack are used for "commercial waste," and noting that, "no one's going to buy a rollout [trash bin or trailer] so somebody can throw their pop can into that rollout. I mean, if we're filling up rollouts, it's not with pop cans and somebody's drink or water bottles. It's because it's commercial waste running through that process."[31] Respondent strains to spin this compelling testimony by arguing that Antero has drawn a distinction between "commercial waste" and "economic waste," and stating that the term "commercial waste" is not found in the West Virginia Code or the Legislative Rule. *See* Resp't's Br. at 37. Respondent mischaracterizes Antero's position in claiming that Antero "used the term 'commercial waste' in the generic sense of any waste generated by a business. In short, Antero is arguing that storage, removal and transportation of virtually all waste from the drill site is economic waste." *Id.* Antero's position on this point could not be clearer: Alvyn Schopp's reference to "commercial waste" is in regards to waste created as a result of the natural resource production process, i.e., economic waste. *See* Antero's Br. at 38.

[30] W. Va. Code § 11-15-2(b)(4)(A)(i)–(xiv); W. Va. C.S.R. § 110-15-2.27.1.15.
[31] Antero A.R. 0287.

Respondent references the testimony of Respondent's sole witness, whose knowledge of Antero's well site operations is based entirely on a single site visit. Respondent has never offered any evidence directly disputing Antero's evidence that at least 90% of the waste disposed of in the trash trailers and bins is "commercial" or "economic" waste. Instead, Respondent's sole witness testified to her "understanding that it was the types of waste that Alvyn Schopp testified to, as far as being just the regular waste from the trailers, as well as something that could have been packaging" that was placed in the trash bins, and that she was "under the impression there's no mud products in those bins[.]"[32] The "understanding" and "impression" of Respondent's witness are not correct, as demonstrated by the uncontroverted testimony of Alvyn Schopp. Respondent relies upon this "understanding" to conclude that the "trash bins were not a direct use purchase." Resp't's Br. at 36–37.

Both the West Virginia Code and the Legislative Rule make it clear that the Direct Use Exemption applies to "storing, removing or transporting ***economic waste*** directly resulting from the activit[y] of . . . production of natural resources."[33] Furthermore, "[u]ses of property or services which will constitute direct use when used by a person engaged in the business of . . . the production of natural resources . . . shall include . . . [t]angible personal property or services used in the storage, removal or transportation of ***economic waste directly resulting*** from the activit[y] of . . . production of natural resources[.] For example, ***trash bins*** used to store waste directly resulting from manufacturing are directly used in manufacturing."[34] Additionally, "production of natural resources" specifically includes ***any reclamation, waste disposal or***

[32] Antero A.R. 0321–22.
[33] W. Va. Code § 11-15-2(b)(4)(A)(xii); *see also* W. Va. C.S.R. §§ 110-15-2.27.1.12 (emphasis added).
[34] W. Va. C.S.R. §§ 110-15-123.3.1 & 123.3.1.12.

associated environmental activities.[35] In recognition of the clear import of this language from the West Virginia Code and the Legislative Rule, Respondent makes desperate arguments, first claiming that the Legislative Rule "only lists two direct use purchases for the production of oil and natural gas." *See* Resp't's Br. at 39. This contention completely glosses over the fact that the aforementioned language regarding economic waste and trash bins is applicable to *all* natural resource producers, and that the language of W. Va. C.S.R. §§ 110-15-123.4.3.7.d is merely intended to provide non-exclusive list of exempt items used by oil and natural gas producers.

Respondent also argues that the trash bins and trailers could not possibly be "directly related" to natural resource production activities, despite the clear testimony of Alvyn Schopp that approximately 90% of the waste placed in the trash bins is commercial or economic waste.

Finally, Respondent claims that Antero has provided "no evidence" that the WVDEP treats trash bins or trailers as pollution abatement control equipment for property tax purposes. This contention ignores the clear language of the annual list provided by the WVDEP, which provides that "containers" and "other equipment dedicated for use in relocating waste" are pre-approved as pollution abatement equipment, meaning that no further approval from the WVDEP is required. This is reflected in Respondent's cover letter for the list, which states that it is a "listing of pollution abatement control equipment approved by the [WVDEP]." The trash bins and trailers unquestionably are dedicated to collecting and relocating large quantities of waste that results from the production process.

Respondent's primary explanation for not applying the Direct Use Exemption to Antero's rental of trash bins and trailers is based on the mistaken "impression" of Respondent's witness that only "regular waste" was placed in the trash trailers and bins, and not the economic waste

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[35] W. Va. Code § 11-15-2(b)(14)(B); W. Va. C.S.R. § 110-15-2.64; & W. Va. C.S.R. § 110-15-123.4.3 (emphasis added).

for which the bins and trailers are actually used. That is simply not the case, and Antero's rental of trash trailers and bins is exempt from sales and use tax pursuant to the Direct Use Exemption.

II. CONCLUSION

Accordingly, Antero respectfully requests that the Court reverse the Kanawha County Circuit Court's *Final Order Granting the West Virginia State Tax Department's Petition for Appeal.*

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