

**City of Fayetteville Staff Review Form**

**2015-0424**

**Legistar File ID**

**10/6/2015**

**City Council Meeting Date - Agenda Item Only**  
N/A for Non-Agenda Item

Jim Beavers

9/18/2015

Wastewater Treatment Plant /  
Utilities Department

**Submitted By**

**Submitted Date**

**Division / Department**

**Action Recommendation:**

Fayetteville City Staff recommends approval of change order #1 to BlueInGreen, LLC's contract #2338 and approval of a budget adjustment to fund the sales tax of \$53,630.00 for the BlueInGreen, LLC Ozone equipment at the Noland Wastewater Treatment Plant and an increase of BlueInGreen, LLC's warranty bond from one year to two years for \$4,639.06 for the total amount of the change order of \$58,269.06.

**Budget Impact:**

5400.5800.5801.00	Water/Sewer																														
Account Number	Fund																														
10008.1	Disinfection System Replacement (UV)																														
Project Number	Project Title																														
<table border="0" style="width: 100%;"> <tr> <td style="width: 15%;"><b>Budgeted Item?</b></td> <td style="width: 15%;"><u>No</u></td> <td style="width: 30%;"><b>Current Budget</b></td> <td style="width: 10%; text-align: right;">\$</td> <td style="width: 30%; text-align: right;">1,843,758.00</td> </tr> <tr> <td></td> <td></td> <td><b>Funds Obligated</b></td> <td style="text-align: right;">\$</td> <td style="text-align: right;">1,785,858.35</td> </tr> <tr> <td></td> <td></td> <td><b>Current Balance</b></td> <td style="text-align: right;"><b>\$</b></td> <td style="text-align: right;"><b>57,899.65</b></td> </tr> </table>	<b>Budgeted Item?</b>	<u>No</u>	<b>Current Budget</b>	\$	1,843,758.00			<b>Funds Obligated</b>	\$	1,785,858.35			<b>Current Balance</b>	<b>\$</b>	<b>57,899.65</b>	<table border="0" style="width: 100%;"> <tr> <td style="width: 15%;"><b>Does item have a cost?</b></td> <td style="width: 15%;"><u>Yes</u></td> <td style="width: 30%;"><b>Item Cost</b></td> <td style="width: 10%; text-align: right;">\$</td> <td style="width: 30%; text-align: right;">58,269.06</td> </tr> <tr> <td><b>Budget Adjustment Attached?</b></td> <td><u>Yes</u></td> <td><b>Budget Adjustment</b></td> <td style="text-align: right;">\$</td> <td style="text-align: right;">58,270.00</td> </tr> <tr> <td></td> <td></td> <td><b>Remaining Budget</b></td> <td style="text-align: right;"><b>\$</b></td> <td style="text-align: right;"><b>57,900.59</b></td> </tr> </table>	<b>Does item have a cost?</b>	<u>Yes</u>	<b>Item Cost</b>	\$	58,269.06	<b>Budget Adjustment Attached?</b>	<u>Yes</u>	<b>Budget Adjustment</b>	\$	58,270.00			<b>Remaining Budget</b>	<b>\$</b>	<b>57,900.59</b>
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V20140710

Previous Ordinance or Resolution # 5714

Original Contract Number: 2338

Approval Date: \_\_\_\_\_

Comments:

**MEETING OF OCTOBER 6, 2015**

**TO:** Mayor Jordan and City Council

**THRU:** Don Marr, Chief of Staff  
Water & Sewer Committee

**FROM:** Tim Nyander, Utilities Director

**DATE:** September 18, 2015

**SUBJECT:** Proposed Change Order #1 with BlueInGreen, LLC, Ozone Equipment for the Noland WWTP, to provide funding for the Sales Tax and Two year warranty Bond.

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**RECOMMENDATION:**

The Fayetteville City Administration recommends approval of the attached change order #1 and a budget adjustment to fund the sales tax for \$53,630.00 and to increase the warranty bond from one year to two years for \$4,639.06 for the BlueInGreen LLC Ozone equipment at the Noland Wastewater Treatment Plant for the total amount of \$58,269.06.

**BACKGROUND:**

Ordinance 5714 was approved by the Fayetteville City Council "An Ordinance waiving the requirements of formal competitive bidding and approving the purchase of an ozone disinfection system from BlueInGreen, LLC of Fayetteville, Arkansas in the amount of \$1,780,825.00 plus any applicable taxes for the Noland Wastewater Treatment plant."

The sales tax was unknown at the time of the Ordinance. Discussions were held with the State to determine, and attempt to lower, the sales tax charged to this project. The sales tax due has been determined by the State of Arkansas as noted above. The Requirements for a Two Year Warranty Bond have been subsequently added and BlueInGreen LLC has provided this two year bond in advance of the contract change.

**DISCUSSION:**

The Ordinance and Contract with BlueInGreen did not include funding for the sales tax, as this amount had not been determined. Thus a change order is required for the Blue in Green Contract to increase the project funding for the sales tax.

**BUDGET/STAFF IMPACT:**

Funds are available in the White River Bridge W/S Relocates project. The White River Bridge W/S project has been completed and the budgeted funds being transferred are the cost savings to the City. The current balance in the Ozone project is contingency on the construction contract and will be utilized so a budget adjustment is needed.

**ATTACHMENTS:**

Staff Review Form  
Change Order no. 1 and Attachments  
Budget Adjustment



# Contract Modification

PROJECT DATA			
Project Name:	Paul R Noland WWTP Ozone Disinfection Facilities	Client:	City of Fayetteville, AR
Project No.:	PW/WBG/399884	Project Location:	Fayetteville, AR
Report No:		Date:	9/8/2015

CONTRACT MODIFICATION DATA			
<input checked="" type="checkbox"/> Change Order	<input type="checkbox"/> Written Amendment	Modification No.:	1
To:	BlueinGreen,LLC		
Project:	PW/WBG/399884	Project No.:	PW/WBG/399884
Owner:	City of Fayetteville, AR	Engineer:	CH2M



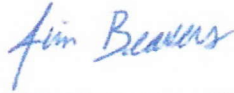
The following modification(s) to the Contractor are hereby ordered (use additional pages if required):
<p>ADD:</p> <ol style="list-style-type: none"> <li>Sales Tax \$53,630.00.</li> <li>Two Year Warranty Bond \$4,639.06.</li> </ol>
Reason for Modification(s):
Required additional funding for the sales tax and the two year warranty bond were not known or available when the contract was approved.
Attachments (List Supporting Documents):
<ol style="list-style-type: none"> <li>Copy of Ordinance 5714</li> <li>Copy of Sales tax invoice and determination</li> <li>Copy of Warranty Bond Invoice</li> <li>Revised specification 0640 pages 1 and 2 ; 0700 page 11</li> </ol>

Contract Amount or Price		Contract Times (Calculate Days)	
Original	\$1,780,825.00	Original Duration	(Refer to Agreement)
Previous Contract Modification(s) (Add/Deduct)	\$0	Previous Contract Modification(s) (Add/Deduct)	
This Contract Modification (Add/Deduct)	\$58,269.06	This Contract Modification (Add/Deduct)	
Revised Contract	\$1,839,094.06	Revised Contract Time	



# Contract Modification

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SIGNATURE RECORD			
Owner: Mayor Lioneld Jordan City of Fayetteville		Date:	
Contractor: John Kucharik, President BlueinGreen, LLC		Date:	9/11/2015
Utilities Director Tim Nyander City of Fayetteville		Date:	9/9/2015
Engineer Recommendation: Jim Beavers, P.E. Utilities Engineer		Date:	9/9/2015

**Attachment 1**

**Copy of Ordinance 5714**

**ORDINANCE NO. 5714**

AN ORDINANCE WAIVING THE REQUIREMENTS OF FORMAL COMPETITIVE BIDDING AND APPROVING THE PURCHASE OF AN OZONE DISINFECTION SYSTEM FROM BLUEINGREEN, LLC OF FAYETTEVILLE, ARKANSAS IN THE AMOUNT OF \$1,780,825.00 PLUS ANY APPLICABLE TAXES FOR THE NOLAND WASTEWATER TREATMENT PLANT

**WHEREAS**, the ultraviolet light system the City has used for wastewater disinfection since August of 1999 is near the end of its useful life as a primary disinfection system; and

**WHEREAS**, the City has worked with BlueInGreen, LLC in a multi-year pilot test of an ozone disinfection system which is not available from any other source; and

**WHEREAS**, the ozone disinfection system has been shown to reduce contaminants and color more than the City's current ultraviolet system and also has many environmental benefits above and beyond those of ultraviolet or other disinfection systems.

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, ARKANSAS:**

Section 1. That the City Council of the City of Fayetteville, Arkansas hereby finds that such circumstances constitute an exceptional situation where competitive bidding is deemed not feasible or practical, and therefore waives the requirements of formal competitive bidding and authorizes the purchase of an ozone disinfection system from BlueInGreen, LLC of Fayetteville, Arkansas in the amount of \$1,780,825.00 plus applicable taxes for the Noland Wastewater Treatment Plant.

**PASSED and APPROVED** this 7<sup>th</sup> day of October, 2014.

APPROVED:

By:

  
LIONELD JORDAN, Mayor

ATTEST:

By:

  
SONDRA E. SMITH, City Clerk/Treasurer



## **Attachment 2**

### **Copy of Sales Tax invoice and determination**

BlueInGreen, LLC  
 700 West Research Center Blvd.  
 Suite 1207  
 Fayetteville, AR 72701

# Invoice

Date	Invoice #
8/25/2015	9025-ST

Bill To
City of Fayetteville Accounts Payable 113 West Mountain Fayetteville, AR 72701

Due Date	Project
8/25/2015	9025 - Noland

Description	Amount
Invoice for Total Sales Tax on Job Calculated by City of Fayetteville - Per Attached	53,630.00 0.00
Remit Checks to address above or: Wire Instructions: Arvest Bank 75 N. East Ave. Fayetteville, AR 72701 Routing #082900872 Account #0017157629 Credit: BlueInGreen, LLC	<b>Total</b> \$53,630.00



Tax Analysis for Taxable items for BlueInGreen, LLC

June 2014 Proposed Equipment Pricing		Taxable
<b>Ozone System</b>		
2x Zenith 20x Ozone Generators (19 Quadblocks each)	\$602,600	YES
2x Carrier 23.4 Ton Chillers	\$82,750	YES
2x 75 KVA Step down Transformers	\$6,650	YES
<b>Total Taxable Amount</b>	<b>\$692,000</b>	
AR State Sales Tax 6.5%	\$44,980	
Wash. Co. Sales Tax 1.25%	\$8,650	
<b>Gross Tax Due</b>	<b>\$53,630</b>	
*Less Local Sales Tax Rebate/Refund	-\$8,619	
<b>Net Tax Due</b>	<b>\$45,011</b>	

\*Rebate is taken into consideration after payment is made to vendor. These conditions must apply to receive Rebate:

A clear invoice of sales tax charged by the vendor

Invoice date must not be older than 6 months to be eligible for rebate

Tax Analysis for Taxable items for BlueInGreen, LLC

June 2014 Proposed Equipment Pricing		Taxable
<b>Ozone System</b>		
2x Zenith 20x Ozone Generators (19 Quadblocks each)	\$602,600	YES
2x Carrier 23.4 Ton Chillers	\$82,750	YES
2x 75 KVA Step down Transformers	\$6,650	YES
<b>Total Taxable Amount</b>	<b>\$692,000</b>	
AR State Sales Tax 6.5%	\$44,980	
Wash. Co. Sales Tax 1.25%	\$8,650	
<b>*Sales Tax Due</b>	<b><u>\$53,630</u></b>	

\*Sales tax is based on destination of equipment.

Tax Analysis for Taxable items for BlueInGreen, LLC

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## Excise Taxes By Address

Input Mailing Address (Change Input Add.)	Output Tax Jurisdiction Address
1400 N Fox Hunter Road	1400 N Fox Hunter Rd
Fayetteville, 72701	Fayetteville, 72701-3089

Found County and City
County: Washington
City: Fayetteville

Tax Entity	Name	FIPS	DFA Code	Rate	Reduced Food Rate	Mfg Utility Rate
State	Arkansas	05		6.5%	1.5%	1.625%
County	Washington	143	72-00	1.25%	1.25%	1.25%
City						
<b>Total:</b>				<b>7.75%</b>	<b>2.75%</b>	<b>2.875%</b>

*Sales tax rate*

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## Bell, Peggy

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**From:** Roy Pearson <roy.pearson@blueingreen.com>  
**Sent:** Thursday, May 07, 2015 9:55 AM  
**To:** Bell, Peggy  
**Cc:** Nyander, Tim  
**Subject:** RE: Sales Tax letter/Ozone equipment

Peggy

Please see the itemized parts breakdown below and call me if you have any questions.

June 2014 Proposed Equipment Pricing		Change in Scope	August 2014 Estimate
<b>Oxygen System</b>			<b>\$355,000</b>
3 x DOCS 500-55	\$337,000		
Engineering Support Package	\$7,740		
Oxygen Buffer Tank	\$10,260		
<b>Ozone System</b>			<b>\$706,500</b>
2 x Zenith 20x Ozone Generators (19 quadblocks each)	\$602,600		
2x Carrier:23.4 Ton Chillers	\$82,750		
2x 75.KVA Step down Transformers	\$6,650		
Engineering Support Package	\$14,500		
<b>Ozone Destruct System</b>			<b>\$ 73,820</b>
Ozonix VOD	\$32,970	\$32,970	
Off Gas Monitor	\$7,880		
<b>HyDOZ Dissolution System</b>			<b>\$612,300</b>
Skid Mounted System	\$476,426		
3 x Flygt Submersible Pumps	\$130,350		
2x Ozone Residual Monitors	\$5,335		
2x Ambient Ozone Monitors	\$5,082		
2x Ambient Oxygen Monitors	\$5,082		
HyDOZ Master Control Panel		(\$9,975)	
<b>Total Equipment Pricing</b>	<b>\$1,724,625</b>	<b>\$22,995</b>	<b>\$1,747,620</b>

Blessings

Roy Pearson  
VP of Manufacturing  
BlueInGreen, LLC  
700 W. Research Center Blvd, Suite 1207  
Fayetteville, AR 72701  
t 479.527.6378 | c 479.236.4683  
www.blueingreen.com



*Deborah -  
Please see me.  
jpb*

**From:** Bell, Peggy [mailto:pbell@fayetteville-ar.gov]  
**Sent:** Tuesday, May 5, 2015 2:04 PM  
**To:** Roy Pearson  
**Cc:** Nyander, Tim  
**Subject:** Sales Tax letter/Ozone equipment

Roy,



STATE OF ARKANSAS  
**Department of Finance  
and Administration**

**REVENUE LEGAL COUNSEL**  
Post Office Box 1272, Room 2380  
Little Rock, Arkansas 72203-1272  
Phone: (501) 682-7030  
Fax: (501) 682-7599  
<http://www.dfa.arkansas.gov>

April 23, 2015

Lynn Hyke  
Construction & Contract Manager  
113 W. Mountain Street  
Fayetteville, Arkansas 72701



Re: Sales/Use Tax – Noland Wastewater Treatment Plant  
Opinion 20141010S

Dear Mr. Hyke:

The Department has received a request for a supplement to your Opinion No. 20141010 dated November 13, 2014. The request for a supplemental opinion came from Tim Nyander (Utilities Director), who appears to be a fellow employee in your office. As you are aware, Opinion No. 20141010 (Original Opinion) discussed whether certain components of the new Dissolved Ozone Disinfection System in the Noland Wastewater Treatment Plant qualify as pollution control machinery and equipment under Ark. Code Ann. § 26-52-402(a)(3). As you are aware, Arkansas Gross Receipts Tax Rule GR-66(A) requires the following to prove entitlement to the relevant exemption:

1. The machinery and equipment is utilized, either directly or indirectly, by manufacturing or processing plants or facilities, or cities or towns in Arkansas to prevent or reduce air or water pollution or contamination which might otherwise result from the operation of the plant or facility; and
2. The machinery and equipment is required by Arkansas or federal law or regulations to be installed and utilized to control pollution or contamination as evidenced by written documentation from the Arkansas Department of Environmental Quality or the United States Environmental Protection Agency.

The Original Opinion discussed several categories or items and concluded as follows with respect to each category:

- I. Category One: Ozone Generator Chillers and HVAC equipment that cool the pollution control machinery and equipment. It was decided that these items were not utilized in the treatment process, and, consequently, cannot qualify for the exemption under Ark. Code Ann. § 26-52-402(a)(3).
- II. Category Two: Oxygen Concentrators and Ozone Generators that acquire ozone for injection into wastewater. It was decided that these items were involved in the creation of ozone during the water treatment process for sterilization of the

wastewater during the treatment process and qualified for the exemption under Ark. Code Ann. § 26-52-402(a)(3).

- III. Category Three: Pressurized dissolution tank, submersible pumps, and injection equipment that dissolve ozone in water and mix it in the waste water stream. It was decided that these items were involved in the sterilization of the wastewater during the treatment process and qualified for the exemption under Ark. Code Ann. § 26-52-402(a)(3).
- IV. Category Four: Associated Piping and Pipe Supports that transport oxygen, raw ozone, ozone solution, and cooling water. It was decided that, while piping connecting exempt pieces of machinery would generally be considered component parts of exempt machinery, the actual function of the pieces of piping was uncertain. Consequently, the piping was not considered to qualify for the exemption at that time. Further, it was decided that pipe supports generally do not qualify as component parts of machinery unless the items qualify as special foundations; no evidence was presented to show the items qualified as special foundations; and, consequently, pipe supports cannot qualify for the exemption under Ark. Code Ann. § 26-52-402(a)(3).
- V. Category Five: Machinery that destroys excess ozone produced in the pollution control process. It was decided that the ozone destruction was not part of the water treatment process and, consequently, could not qualify for the exemption under Ark. Code Ann. § 26-52-402(a)(3) unless it was demonstrated that ozone destruction was required under federal or state environmental laws.
- VI. Category Six: Machinery that controls and monitors the wastewater treatment process is specifically excluded from the exemption under Arkansas Gross Receipts Tax Rule GR-66(E)(4) and, consequently, it was determined that these items could not qualify for the exemption under Ark. Code Ann. § 26-52-402(a)(3).

At the time of the Original Opinion request, you were only able to produce an opinion from the Arkansas Department of Environmental Quality (ADEQ) stating that certain properly constructed ozone systems qualify as water disinfection systems. The Original Opinion noted that Arkansas Gross Receipts Tax Rule GR-66(A)(2) generally requires that any exempt pollution control machinery or equipment must be required by state or federal pollution control laws as evidenced by a written letter from either the ADEQ or federal Environmental Protection Agency. The Original Opinion was issued on the condition that your organization obtain an opinion from ADEQ verifying that all of the exempted machinery and equipment is required by state or federal pollution control laws to be installed and utilized in pollution control at the wastewater treatment plant.

You have provided an ADEQ opinion dated March 9, 2015 with your request for a supplemental opinion. The ADEQ opinion states that all of the machinery and equipment listed in your Original Opinion request:

directly or indirectly prevents or reduce [sic] air or water pollution or contamination that might otherwise result from the operation of the plant. This letter therefore serves as written documentation on what specific items are necessary for the prevention or reduction of air or water pollution or contamination that might otherwise result from the operation of the plant.

Your request for a supplemental opinion asks the Department to revisit its Original Opinion in light of the ADEQ opinion.

The ADEQ opinion does not expressly state any particular piece of machinery or equipment is required to be installed and utilized to reduce pollution or contamination under federal or state pollution control laws. The ADEQ opinion limits its conclusory analysis to whether your machinery and equipment is utilized directly or indirectly to prevent or reduce air or water pollution or contamination that might otherwise result from operation of the wastewater treatment plant. The ADEQ then reaches the conclusion that all of your machinery and equipment is utilized directly or indirectly to reduce air or water pollution qualifying that conclusion by explaining that only this office can make a determination regarding the application of the exemption under Ark. Code Ann. § 26-52-402(a)(3). Such analysis is not relevant to the requirement under Arkansas Gross Receipts Tax Rule GR-66(A)(2). You have still failed to provide a statement from ADEQ that any of your machinery and equipment is required by state or federal law to be installed and utilized to prevent or reduce air or water pollution. Consequently, the Department must continue to qualify its determination that the items listed in Categories Two and Three qualify for the exemption.

In your opinion request to ADEQ, you appear to argue that any machinery and equipment necessary to the pollution control process should qualify for the exemption. Please note that the Arkansas Supreme Court expressly rejected your proposed analysis in *Southern Steel & Wire Co. v. Wooten*, 276 Ark. 37, 631 S.W.2d 835 (1982) (providing that machinery and equipment that is necessary to pollution control but does not itself reduce air and/or water pollution or contamination does not qualify for the pollution control exemption). In *Southern Steel*, a taxpayer argued that that it had to install PH recorders to monitor its discharge of waste materials and chemicals in order to be in compliance with state pollution laws. The Arkansas Supreme Court held that the PH recorder (though necessary to the pollution control process) did not qualify for the exemption, stating: "The flaw in this argument is that the PH recorder itself does not 'prevent or reduce air and/or water pollution or contamination.' Its purpose is merely to inform the appellant of the level of pollutants present in the waste water discharge. Appellant can then take corrective action." *Id.* at 42, 631 S.W.2d at 838. That analysis was again followed in *Aluminum Co. of America v. Weiss*, 329 Ark. 225, 946 S.W.2d 695 (1997). In *Aluminum Co. of America*, a taxpayer leased heavy equipment to mitigate environmental damage resulting from mining operations that had been conducted for many years. In denying the pollution control machinery and equipment exemption claim, the Arkansas Supreme Court compared its prior rulings in *Heath v. Research-Cottrell, Inc.*, 258 Ark. 813, 529 S.W.2d 336 (1975) and *Southern Steel* and again explained that the pollution control machinery and equipment exemption solely applies to machinery and equipment that actually mitigates environmental pollution that results from the operation of a plant or



facility and does not apply broadly to exempt anything that might be related pollution control but not actually reducing air and/or water pollution.

This statutory exemption must also be considered in light of the narrow construction that must be applied to all tax exemption cases. *Holbrook v. Healthport, Inc. et al.*, 2014 Ark. 146, 432 S.W.3d 593 (stating: “Furthermore, there is a presumption in favor of the taxing power of the state, and all tax-exemption provisions must be strictly construed against the exemption. [Citation omitted]. Taxation is the rule, and exemption is the exception; therefore, any doubts should be resolved to deny the exemption.”); see also *Ark. Conference Ass’n of Seventh Day Adventist, Inc. v. Benton County Bd. of Equalization*, 304 Ark. 95, 97, 800 S.W.2d 426, 427 (1990); see also *Citifinancial Retail Services v. Weiss*, 372 Ark. 128, 133, 271 S.W.3d 494, 498 (2008); and *Weiss v. Bryce Co., LLC*, 2009 Ark. 412, at 3, 330 S.W.3d 756, 757. To interpret this exemption as broadly as you have proposed would result in a violation of this principle.

The Department (following Arkansas Supreme Court precedent) requires that machinery and equipment must actually be a component part of machinery and equipment that actually mitigates environmental pollution to qualify for the pollution control machinery and equipment exemption. Please note that the Department does not have the authority to administratively expand the scope of an exemption beyond that provided in the statute. Consequently, the regulation must be interpreted narrowly to include only such items as are authorized by the express statutory language and Arkansas Supreme Court precedent.

Under the binding Arkansas Supreme Court precedent, this office was correct in concluding that the ozone generator chillers and HVAC machinery discussed in Category One (which merely cool machinery involved in the pollution control process) could not qualify for the exemption under Ark. Code Ann. §26-52-402(a)(3). Such items do not act in the actual pollution control process. Further, this office was correct in denying the electrical controls and instrumentation in Category Six, which are also not acting in the pollution control process and are expressly excluded from the exemption under GR-66(E)(4).

Several items discussed in the Original Opinion lacked sufficient detail for the Department to reach a conclusion regarding taxability. Those items were discussed in Category Four. Neither your request for a supplemental opinion or the ADEQ opinion provide any additional information regarding the items listed in Category 4. Consequently, the Department will not revise its conclusions regarding Category 4 at this time.

You have also failed to provide any additional proof that the ozone destruction machinery and equipment is required by state or federal pollution control laws to be installed and utilized to control or reduce pollution or contamination that might otherwise result from operation of the wastewater treatment plant. Consequently, the Department will not revise its conclusions regarding Category 5 at this time.

As stated above, you have provided no additional information regarding the items claimed to be exempt in your opinion request or proof that any of the relevant items are

required by state or federal pollution control laws. Consequently, the Department will not revise any of its conclusions in the Original Opinion.

This opinion is based on the facts as set out in your inquiry as those facts are governed by current Arkansas laws, rules, and regulations. Any change in the facts or law could result in a different opinion.

Sincerely,

A handwritten signature in black ink, appearing to read 'TE', with a long horizontal flourish extending to the right.

Todd Evans, Attorney  
Revenue Legal Counsel

March 31, 2015

Mr. Todd Evans, Attorney  
Revenue Legal Counsel  
P.O. Box 1272, Room 2380  
Little Rock, AR 72203-1272

Re: Tax Exemption Request for new ozone disinfection facilities and equipment used in the wastewater treatment processes at the City of Fayetteville's Paul R. Noland Wastewater Treatment Plant

The City of Fayetteville is planning to replace the existing ultra-violet disinfection system at the Paul R. Noland Wastewater Treatment Plant (WWTP) with a proprietary hyper-concentrated dissolved ozone disinfection system (HyDOZ) from Blue-In-Green. The City previously requested a determination of the HyDOZ components for the sales tax exemption under the tax exemption granted for pollution control machinery (under the Arkansas Department of Finance and Administration Regulation GR-66 for a sales and or use tax exemption under A.C.A 26-52-402). This previous determination request was submitted (original letter attached) by the City directly to Martha G. Hunt, Chief Counsel, Revenue Legal Counsel, for the Arkansas Department of Finance and Administration (DFA). Ms Hunt subsequently retired and the ultimate response from the DFA (response attached) came from Todd Evans, an attorney with the DFA. Mr. Evans gave his opinion on most components of the system but indicated that further investigation and determination would be required. That investigation and information request has been performed which has led to this follow-up correspondence.

Mr. Evans organized the components of the HyDOZ system into 6 different categories from which he made his exemption determinations: I-Machinery that cools the system; II-Machinery that acquires ozone for injection to the wastewater; III-Ozone dissolving machinery; IV-Associated piping and supports; V-Ozone destruction machinery; VI-Systems that control and monitor the process. Essentially, Mr. Evans rendered an opinion that categories I and V would definitely not qualify for the exemption, categories II and III definitely would qualify for the exemption, and that he would require additional information before rendering a final opinion on categories IV and V.

The City subsequently submitted another request to the Arkansas Department of Environmental Quality (ADEQ) to obtain their opinion with regard to the use of the equipment for treatment of water, as requested by Mr. Evans. (This letter is attached for clarity, as is the response letter from ADEQ) It is our understanding that ADEQ feels that all of the equipment is pollution control machinery and should therefore qualify for the exemption cited above. The purpose(s) of this correspondence therefore are: (A) To request that the DFA reconsider the validity of the use to which this equipment will be utilized for disinfection of wastewater; (B) To render an opinion with regard to the sales tax exemption request in light of the additional information included in the request to ADEQ and their subsequent response.

We apologize for the convoluted nature of this series of letters and requests. There have been a number of changes in the supervision of our Utility and obviously there have also been changes at ADEQ, all of which has led to some indecision and lack of direction on our part. We decided it would be best to just copy the previous correspondence to you instead of repeating the information here, to enable you to more fully understand the course of the previous interactions. Nonetheless, your consideration and response to this

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request are appreciated.

Please let me know if you have any questions or need additional information. I can be reached at 479-575-8386, or [tnyander@fayetteville-ar.gov](mailto:tnyander@fayetteville-ar.gov).

Sincerely Yours,

**City of Fayetteville**



Tim Nyander  
Utilities Director

C: Billy Ammons, CH2M HILL  
Attachments



STATE OF ARKANSAS  
**Department of Finance  
and Administration**

**REVENUE LEGAL COUNSEL**

Post Office Box 1272, Room 2380  
Little Rock, Arkansas 72203-1272  
Phone: (501) 682-7030  
Fax: (501) 682-7599  
<http://www.dfa.arkansas.gov>

November 13, 2014

Lynn Hyke  
Construction & Contract Manager  
113 W. Mountain Street  
Fayetteville, Arkansas 72701

Re: Sales/Use Tax – Noland Wastewater Treatment Plant  
Opinion 20141010

Dear Mr. Hyke:

The Department has received your request for an opinion dated September 8, 2014. You state that the City of Fayetteville intends to install a Hyperconcentrated Dissolved Ozone Disinfection System (System). The System utilizes BlueinGreen's proprietary technology for disinfecting water and wastewater with ozone. You have attached a letter from the Arkansas Department of Environmental Quality (ADEQ). That letter provides that using ozone is an acceptable disinfection methodology if it is constructed in a way to adequately address water disinfection at the plant. You have requested a determination of whether certain components of the System qualify as pollution control machinery and equipment under Ark. Code Ann. § 26-52-402(a)(3). You have not stated precisely where the ozone is injected into the wastewater stream for cleaning. For purposes of this opinion, I shall assume that the ozone is utilized in the treatment process, after solids are first removed from the wastewater and before all solids and other contaminants are removed from wastewater. After a general discussion of the governing law, I shall address each piece of equipment in turn.

All sales of tangible personal property and certain specifically enumerated services within the State of Arkansas are generally subject to Arkansas sales tax unless a specific exemption applies. Ark. Code Ann. § 26-52-301. Ark. Code Ann. § 26-52-402(a)(3) provides an exemption for machinery and equipment required by state or federal law or regulations to be installed and utilized (directly or indirectly) by manufacturing and processing plants, cities, or towns in this state to prevent or reduce air or water pollution or contamination that might otherwise result from the operation of the plant or facility. Sales tax exemptions are applied uniformly with use tax exemptions. Ark. Code Ann. § 26-53-112. A Taxpayer must demonstrate the following to prove entitlement to the exemption:

1. The machinery and equipment is utilized, either directly or indirectly, by manufacturing or processing plants or facilities, or cities or towns in Arkansas to prevent or reduce air or water pollution or contamination which might otherwise result from the operation of the plant or facility; and,

2. The machinery and equipment is required by Arkansas or federal law or regulations to be installed and utilized to control pollution or contamination as evidenced by written documentation from the Arkansas Department of Environmental Quality or the United States Environmental Protection Agency.

Arkansas Gross Receipts Tax Rule GR-66(A).

The governing regulation specifically discusses water treatment plants and requires the following for machinery and equipment to qualify for purposes of GR-66(A)(1):

Machinery and equipment used in a city or county wastewater treatment plant are exempt if the machinery and equipment is used to remove contaminants from wastewater. The treatment process begins when solids are first removed from the wastewater and ends when all solids and other contaminants are removed from wastewater.

Arkansas Gross Receipts Tax Rule GR-66(E).

You have provided a letter from ADEQ regarding the System. The ADEQ letter states that ADEQ would consider certain properly constructed ozone systems to qualify as water disinfection systems. This letter does not qualify for purposes GR-66(A)(2) since it does not state that any particular component of the System is exempt. Please note that, if any particular component of the System is not required to be installed under Arkansas and Federal law, it cannot qualify for the exemption under Ark. Code Ann. § 26-52-402(a)(3).

For purposes of this opinion, I shall assume that you have obtained an opinion from the ADEQ or EPA stating that all System components are required to be installed as required by GR-66(A)(2). As stated above, you must demonstrate that the machinery and equipment is actually utilized in the removal of pollution and contaminants from wastewater during the treatment process to qualify for the exemption. The relevant machinery and descriptions from your opinion are as follows:

- I. Category One: Machinery that cools the System
  - a. Ozone Chiller – the ozone generators cannot function without being constantly cooled since the ozone production process creates a great deal of heat. The generators must be cooled to consistently produce the disinfectant.
  - b. HVAC equipment – The ozone generation and oxygen concentration equipment must be kept within a controlled climate to optimize performance of the wastewater disinfectant.
- II. Category Two: Machinery that acquires ozone for injection to wastewater
  - a. Oxygen concentrator – production of ozone for wastewater disinfection requires a highly concentrated oxygen source as provided by these units. These units are the first step in the generation of the disinfectant for treatment of the wastewater.

- b. Ozone generator – raw ozone is produced by combining highly concentrated oxygen from the concentrator with electricity within these units. These units are where the ozone is generated for transport to the wastewater for treatment.

### III. Category Three: Ozone Dissolving Machinery

- a. HyDOZ pressurized dissolution tank and injection equipment – This specific system allows the ozone to be fully dissolved into the liquid carrier water which then serves as the primary delivery system for disinfectant to the wastewater.
- b. HyDOZ submersible pumps – These pumps produce the necessary pressurized carrier water into which ozone is dissolved prior to final mixing with the waste stream for disinfection.

### IV. Category Four: Associated Piping and Supports

- a. Piping and pipe supports – Raw ozone, ozone production cooling water, concentrated oxygen, and ozone solution injection water must all be transported through a series of very specific and specialized piping which is an integral part of the generation and injection of the disinfectant into the wastewater.

### V. Category Five: Ozone Destruction Machinery

- a. Ozone destruction unit – although the system will be operated with the intention of only producing enough ozone to accomplish disinfection of the wastewater, these destruct units are essential to safe wastewater disinfection without adverse localized environmental impacts.

### VI. Category Six: Systems the Control and Monitor the Process.

- a. Electrical controls and instrumentation – Each step in the ozone production and injection process is highly automated, monitored, and controlled to provide a functional disinfection system.

As shown above, I have attempted to categorize certain type of machinery to simplify this analysis. Categories Two through Three involve machinery for the creation of ozone and the injection of ozone into the water treatment process for sterilization of the wastewater during the treatment process. The machinery and equipment would be considered to be utilized in the water treatment process. Consequently, the machinery and equipment discussed in those categories would qualify for the exemption under Ark. Code Ann. § 26-52-402(a)(3) so long as the requirement of GR-66(A)(2) is satisfied.

I lack sufficient detail to determine the taxability of the items in Category Four. Generally, piping connecting exempt pieces of machinery would be considered component parts of those machines and likewise exempt. *See S. H. & J. Drilling Corp. v. Qualls*, 268 Ark. 71, 593 S.W.2d 178 (1980); *Southern Steel and Wire Co. v. Wooten*, 276 Ark. 37, 631 S.W.2d 835 (1982); *see also* Arkansas Gross Receipts Tax Rule GR-55(F)(1). It is uncertain, however, if the piping at issue functions in that capacity. Additionally, pipe supports generally do not qualify as component parts of machinery unless it can be demonstrated that the supports are uniquely customized to the machinery and work in unison with the machinery to accomplish the machinery's purpose without which the machine could not function. It is uncertain if the pipe supports would satisfy

this requirement. If the pipe supports do not function as components of pollution control machinery, the supports would generally be taxable as tangible personal property.

Category One involves machinery that merely cools the machinery discussed in Categories Two through Five. This machinery does not create a chemical for the water treatment process or inject that chemical into the water treatment process. This machinery is not utilized in the water treatment process, and, consequently, cannot qualify for the exemption under Ark. Code Ann. § 26-52-402(a)(3).

Category Six involves machinery that controls and monitors the water treatment process. Please note that Arkansas Gross Receipts Tax Rule GR-66(E)(4) specifically states that “machinery and equipment used for measuring, controlling, or testing the treatment process” do not qualify for the exemption under Ark. Code Ann. § 26-52-402(a)(3). *See also Southern Steel & Wire Co. v. Wooten*, 276 Ark. 37, 631 S.W.2d 835 (1982) (providing that machinery and equipment that is necessary to pollution control but does not itself reduce air and/or water pollution or contamination does not qualify for the pollution control exemption). Consequently, this machinery and equipment cannot qualify for the exemption under Ark. Code Ann. § 26-52-402(a)(3).

Category Five involves machinery that destroys ozone that is not utilized in the water treatment process. It is apparent that this machinery does not create a chemical for the water treatment process or inject that chemical into the water treatment process. It is uncertain whether this machinery and equipment is required by ADEQ to be installed and utilized to prevent release of ozone from the water treatment process. At this point, you have failed to demonstrate that this machinery and equipment qualifies for the exemption under Ark. Code Ann. §26-52-402(a)(3); however, I would be pleased to revisit this issue and provide a supplemental opinion should ADEQ ultimately determine that this equipment must be installed and utilized under Arkansas law to prevent ozone pollution that might otherwise result from your facility.

This opinion is based on the facts as set out in your inquiry as those facts are governed by current Arkansas laws, rules, and regulations. Any change in the facts or law could result in a different opinion.

Sincerely,



Todd Evans, Attorney  
Revenue Legal Counsel





September 8, 2014

Martha G. Hunt, Chief Counsel  
Revenue Legal Counsel  
P. O. Box 1272, Room 2380  
Little Rock, AR 72203-1272

Re: Tax Exemption Determination for the HyDOZ Disinfection System

Dear Ms. Hunt,

The City of Fayetteville is planning to replace the existing UV Disinfection System at the Noland Wastewater Treatment Plant with the HyDOZ (Hyperconcentrated Dissolved Ozone) Disinfection System. The HyDOZ system utilizes BlueInGreen's proprietary technology for disinfecting water and wastewater with ozone.

The City of Fayetteville requests a determination of the eligibility of the HyDOZ components for a sales tax exemption for pollution control machinery under the Arkansas Department of Finance and Administration Regulation GR-66 A.C.A 26-52-402.

Attached is the letter from ADEQ that confirmed that this system is a viable disinfection method. Revised Plans and Specifications for the system were submitted to ADEQ on July 14<sup>th</sup>, 2014. I have attached a layout of the proposed design installation of the system, which will consist of critical and essential equipment as listed below:

- Oxygen concentrator (3)
  - Production of ozone for wastewater disinfection requires a highly concentrated oxygen source as provided by these units. These units are the first step in the generation of the disinfectant for treatment of the wastewater.
- Ozone generator (2)
  - Raw ozone is produced by combining highly concentrated oxygen from the concentrator with electricity within these units. These units are where the ozone is generated for transport to the wastewater for treatment.
- Ozone Chiller (2)
  - The ozone generators cannot function without being constantly cooled since the ozone production process creates a great deal of heat. The generators must be cooled to consistently produce the disinfectant.
- Ozone destruction unit (2)
  - Although the system will be operated with the intention of only producing enough ozone to accomplish disinfection of the wastewater, these destruct units are essential to safe wastewater disinfection without adverse localized environmental impacts
- HyDOZ pressurized dissolution tank and injection equipment (2)

- This specific system allows the ozone to be fully dissolved into the liquid carrier water which then serves as the primary delivery system for the disinfectant to the wastewater.
- HyDOZ submersible pumps (3)
  - These pumps produce the necessary pressurized carrier water into which ozone is dissolved prior to final mixing with the waste stream for disinfection
- HVAC equipment
  - The ozone generation and oxygen concentration equipment must be kept within a controlled climate to optimize performance of the wastewater disinfectant,
- Piping and pipe supports
  - Raw ozone, ozone production cooling water, concentrated oxygen, and ozone solution injection water must all be transported through a series of very specific and specialized piping which is an integral part of the generation and injection of the disinfectant into the wastewater.
- Electrical controls and instrumentation
  - Each step in the ozone production and injection process is highly automated, monitored, and controlled to provide a functional disinfection system

Your consideration and response to this request are appreciated. We hope that you will recognize that the individual components of this disinfection system must function together as a unit, much like the individual components of the engine of a vehicle, in order to accomplish the goal of performing this essential task of disinfecting the waste stream in a remarkably environmentally friendly and ecologically sustainable manner. Please let me know if you have any questions or need additional information. I can be reached at 479-575-6850, or [lhyke@fayetteville-ar.gov](mailto:lhyke@fayetteville-ar.gov).

Sincerely Yours,



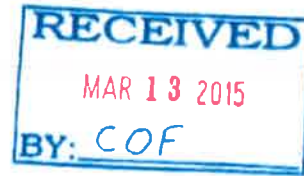
Lynn Hyke  
Construction & Contract Manager

# ADEQ

ARKANSAS  
Department of Environmental Quality

MAR 9 2015

Tim Nyander, Utilities Director  
City of Fayetteville  
113 West Mountain  
Fayetteville, AR 72701



RE: NPDES Permit AR0020010, AFIN 72-00781  
Request for Sales Tax Exemption

Dear Mr. Nyander:

The Department reviewed your letter dated January 16, 2015, and requested additional information in a letter dated February 2, 2015. The January 16<sup>th</sup> letter and additional information requested a sales tax exemption determination from the Arkansas Department of Environmental Quality (ADEQ) for items being installed as part of the wastewater treatment plant improvements. The items were requested to be exempt from sales tax pursuant to the Arkansas Department of Finance and Administration (DFA) Regulation GR-66 under A.C.A. § 26-52-402. ADEQ has reviewed these items and has determined that all of the items on your list directly or indirectly prevents or reduce air or water pollution or contamination that might otherwise result from the operation of the plant.

This letter therefore serves as written documentation on what specific items are necessary for the prevention or reduction of air or water pollution or contamination that might otherwise result from the operation of the plant. The Arkansas Department of Finance and Administration administers this tax exemption and makes the final determination as to which specific items in your proposal qualify as machinery or equipment used to prevent or reduce water pollution.

If you have any questions, please call the Arkansas Department of Finance and Administration Revenue Legal Division at (501) 682-7030 or Mo Shafii of my staff at (501) 682-0622.

Sincerely,

A handwritten signature in blue ink that reads "Becky W. Keogh".

Becky W. Keogh  
Director

cc.: Todd Evans, Attorney – Revenue Legal Counsel – DFA w/copy of request  
Central File

**Attachment 3**

**Copy of Copy of Warranty Bond Invoice**



# Invoice

700 W Research Center Blvd., Suite 1207  
 Fayetteville, AR 72701  
 Phone (479) 527-6378 Fax (479) 668-0841

**RECEIVED**

**FEB 13 2015**

**PURCHASING**

**TO:**

**CITY OF FAYETTEVILLE, AR**  
**ACCOUNTS PAYABLE**  
 113 West Mountain  
 Fayetteville, Arkansas 72701

**REMIT TO:**

BlueInGreen LLC  
 Attn: Accounts Receivable  
 700 W. Research Center Blvd  
 Fayetteville, AR 72701  
 (479) 471-1468

<b>Our Invoice Number</b>				
F1214-01				

QTY	UNIT	DESCRIPTION	UNIT PRICE	TOTAL
1	EA	Maintenance Bond SSB0429077 to City of Fayetteville, AR for supply Ozone Disinfection System for OMI Treatment Plant  For Fayetteville PO# 14-0000436-100 dated 12/19/2014	\$4,639.06	\$4,639.06
			SUBTOTAL	\$4,639.06
			SALES TAX	N/A
			SHIPPING & HANDLING	
			OTHER	
			<b>TOTAL</b>	<b>\$4,639.06</b>

**Attachment 4**

**Revised specification 0640 pages 1 and 2; 0700 page 11**

**SECTION 0640**

**WARRANTY BOND**

We, \_\_\_\_\_, as principal (“Principal”),  
and \_\_\_\_\_  
as surety (“Surety”), are hereby jointly and severally held and firmly bound unto the City of  
Fayetteville for the payment of \_\_\_\_\_  
\_\_\_\_\_ Dollars  
(\$ \_\_\_\_\_), subject to the terms and conditions provided herein.

WHEREAS, Principal executed and entered into that certain Agreement with City of Fayetteville  
for

PAUL R. NOLAND WWTP – OZONE DISINFECTION FACILITIES

dated \_\_\_\_\_, 20\_\_ (the “Contract”), the provisions of which are  
incorporated herein by reference, and unless otherwise defined herein all defined terms used or  
referred to herein shall have the meaning ascribed thereto in the Contract. In addition to other  
obligations and liabilities, the Contract required Principal to perform the Work for the Project  
and to furnish this Bond to City of Fayetteville in compliance with Article 22 of the General  
Conditions.

NOW THEREFORE, the obligations of Principal and Surety herein shall remain in full force and  
effect as provided herein, subject to becoming null and void upon the occurrence of either or both  
of the conditions that (a) Principal shall fully perform and satisfy all obligations and liabilities of  
Principal under the warranty and guarantee provisions of Article 29 of the General Conditions, as  
modified or supplemented by the Supplementary Conditions or any other applicable Contract  
Documents, at any time within TWO YEARS after the date of Final Acceptance or such longer  
period of time as may be prescribed therein (the “Warranty Period”), all of which includes  
without limitation either correcting the defective Work, or removing and replacing it with  
nondefective Work, or paying all direct, indirect or consequential costs of such correction or  
removal and replacement, all as provided therein, or (b) City of Fayetteville shall fail to institute  
a lawsuit, action or other proceeding under this Bond before the expiration of three (3) months  
following the end of the Warranty Period.

FURTHER PROVIDED, that (a) any changes, modifications, amendments, alterations or supplementations in or to the Contract, and Contract Documents or the Work, or the giving by City of Fayetteville of any extension of time for the performance of the Contract, or any other forbearance on the part of either City of Fayetteville or Principal to the other, shall not in any way release the Principal or Surety, or either of them, from their liability hereunder, notice to the Surety of any of the foregoing being hereby waived, (b) in no event shall the aggregate liability of Surety exceed the amount set out herein, and (c) the rights and obligations hereof shall be binding upon and shall inure to the benefit of Principal, Surety, City of Fayetteville and their respective heirs, legal representatives, partners, privies, successors and assigns, provided that nothing herein shall authorize the assignment of any such rights and obligations.

Date of project final completion is \_\_\_\_\_. The bond shall be 50% of the final project value and shall effective for a period of TWO YEAR. The TWO YEAR Bond provided by the Principal and Surety does not change the TWO-YEAR warranty required of the equipment supplier BlueInGreen, LLC.

Executed on the \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_.

By \_\_\_\_\_

\_\_\_\_\_(Seal)

Witness: )

)

Attest: )

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_(Seal)

Surety

**END OF SECTION 0640**



Work provided by the Contract Documents. Such Bonds shall be executed by the Contractor and a corporate bonding company licensed to transact such business in the state in which the Work is to be performed and named on the current list of "Surety Companies Acceptable on Federal Bonds" as published in the Treasury Department Circular Number 570. The expense of these Bonds shall be borne by the Contractor. If at any time a surety on any such bond is declared a bankrupt or loses its right to do business in the state in which the Work is to be performed or is removed from the list of Surety Companies accepted on Federal Bonds, Contractor shall within ten (10) days after notice from the City of Fayetteville to do so, substitute an acceptable Bond (or Bonds) in such form and sum and signed by such other surety or sureties as may be satisfactory to the City of Fayetteville. The premiums on such Bond shall be paid by the Contractor. No further payments shall be deemed due nor shall be made until the new surety or sureties have furnished an acceptable Bond to the City of Fayetteville.

- 22.2 At the time of Final Acceptance of the Work by the City of Fayetteville, the Contractor shall furnish to the City of Fayetteville a Warranty Bond in the amount of fifty (50) percent of the amount of the final Contract Price. The Warranty Bond shall guarantee the Work in accordance with Article 29 of the General Conditions **TWO YEARS** from the date of Final Payment or as otherwise specified and is in addition to the TWO YEAR WARRANTY furnished by BlueInGreen, LLC. It shall be on the form shown in Section 0640 - Warranty Bond.

## **23. ASSIGNMENTS**

- 23.1 Neither the Contractor nor the City of Fayetteville shall sell, transfer, assign or otherwise dispose of the Contract or any portion thereof, or of his right, title or interest therein, or his obligations thereunder, without consent of the other party.

## **24. INDEMNIFICATION**

- 24.1 The Contractor will indemnify and hold harmless the City of Fayetteville and the Engineer and their agents and employees from and against all claims, damages, losses and expenses including attorneys' fees arising out of or resulting from the performance of the Work, provided that any such claims, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including the loss of use resulting therefrom; and is caused in whole or in part by any negligent or willful act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.
- 24.2 In any and all claims against the City of Fayetteville or the Engineer, or any of their agents or employees, by any employee of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, the indemnification obligation shall not be limited in any way by any