

TCEQ Docket Numbers

- 2007-0732-MIS-U (UD 06-10270/Valero Corpus Christi Refinery – Nueces County)
- 2007-0733-MIS-U (UD 06-10271/Valero Corpus Christi Refinery – Nueces County)
- 2007-0734-MIS-U (UD 06-10281/Valero Houston Refinery – Harris County)
- 2007-0735-MIS-U (UD 06-10268/Valero Houston Refinery – Harris County)
- 2007-0736-MIS-U (UD 06-10283/Diamond Shamrock McKee Refinery – Moore County)
- 2007-0737-MIS-U (UD 06-10282/Diamond Shamrock McKee Refinery – Moore County)
- 2007-0738-MIS-U (UD 06-10280/Valero Port Arthur Refinery – Jefferson County)
- 2007-0739-MIS-U (UD 06-10279/Valero Port Arthur Refinery – Jefferson County)
- 2007-0724-MIS-U (UD 06-10285/Valero Texas City Refinery – Galveston County)
- 2007-0740-MIS-U (UD 06-10284/Valero Texas City Refinery – Galveston County)

APPEAL OF THE EXECUTIVE	§	BEFORE THE
DIRECTOR’S USE DETERMINATIONS	§	
ISSUED TO VALERO REFINING -	§	
TEXAS, L.P.; DIAMOND SHAMROCK	§	
REFINING COMPANY, L.P.; AND THE	§	TEXAS COMMISSION ON
PREMCOR REFINING GROUP, INC.	§	
APPLICATION NUMBERS: 06-10268,	§	
06-10270, 06-10271, 06-10279, 06-10280,	§	
06-10281, 06-10282, 06-10283, 06-10284, and	§	
06-10285	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR’S SUPPLEMENTAL RESPONSE BRIEF TO VALERO REFINING – TEXAS, L.P., DIAMOND SHAMROCK REFINING COMPANY, L.P., AND THE PREMCOR REFINING GROUP, INC.’S APPEAL OF THE EXECUTIVE DIRECTOR’S NEGATIVE USE DETERMINATIONS

The Executive Director of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Supplement to his Response to the Appeals of the Executive Director’s Use Determinations Issued to Valero Refining – Texas, L.P., Diamond Shamrock Refining Company, L.P., and the Premcor Refining Group, Inc. (hereinafter collectively referred to as Valero).

The Executive Director files this supplemental brief to respond to the arguments made by Valero in its *Supplemental Response in Reply to the Executive Director, Public Interest Counsel, Galveston Central Appraisal District, and Harris County Appraisal District’s Response Briefs to the Appeal of the Executive Director’s Negative Use Determinations* (Valero’s Supplemental Response).

For the reasons described below, the Executive Director respectfully requests that the Commission deny the instant appeals and affirm the Executive Director’s Tier II negative use determinations.

I. Supplemental Procedural Background

These appeals were scheduled to be considered by the Commission at its January 28, 2009 public meeting. On January 16, 2009, Valero filed its Supplemental Response with the TCEQ's Office of the Chief Clerk. On January 21, 2009, the Executive Director filed the *Executive Director's Reply to Valero's Supplemental Response and Motion for Continuance*, asking the Commission to exclude Valero's Supplemental Response from the record or, in the alternative, to continue its consideration of the appeals to allow the Executive Director to prepare a detailed written reply. On January 22, 2009, General Counsel continued the appeals indefinitely pursuant to 30 Tex. Admin. Code (30 TAC) § 10.4. On November 24, 2009, General Counsel issued a briefing schedule giving the Executive Director, Office of Public Interest Counsel, and the affected appraisal districts the opportunity to respond to Valero's Supplemental Response.

II. Issues

There are three outstanding issues that are central to the resolution of these appeals:

1. Whether hydrotreaters should be classified as production equipment or pollution control property.
2. Whether hydrotreaters provide an environmental benefit at the site, as required by 30 TAC § 17.15.
3. Whether the commercial waste management exclusion prohibits Valero from receiving a positive use determination.

1. Hydrotreaters are production equipment.

On or about January 30, 2007, Valero filed ten Tier II use determination applications seeking 100% positive use determinations for the installation of hydrotreating equipment at five of its refineries. As provided by TCEQ guidance, Tier II applications are for property that an applicant believes is 100% pollution control property, but which is not contained on the Equipment and Categories List (ECL).¹ The applicant has the burden of demonstrating that the property is 100% pollution control property by providing financial or other information to prove that the property has no production benefits and serves entirely for pollution control.² Valero has failed to demonstrate that the hydrotreating equipment at issue is 100% pollution control property.

On February 10, 2000, the U.S. Environmental Protection Agency (US EPA) adopted regulations implementing its Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements.³ These regulations were focused on reducing vehicle emissions responsible for causing ozone and particulate matter pollution.⁴ The regulations established a two-pronged approach to emissions control: First, the regulations set tailpipe emissions standards for passenger cars, light trucks, and larger passenger vehicles. Second, the regulations required

¹ Property Tax Exemptions for Pollution Control Property, Draft Guidelines Document for Preparation of Use Determination Applications, TCEQ, p. 6 (January 2008).

² Id.

³ 65 Fed. Reg. 6698 (February 10, 2000).

⁴ Id.

reduced gasoline sulfur levels nationwide.⁵ Currently, all gasoline refined in the U.S. must meet an average standard of 30 parts per million (ppm) sulfur on an annual volume-weighted basis.⁶ Additionally, on January 18, 2001, the US EPA adopted regulations implementing the second phase of its comprehensive program for controlling emissions from heavy-duty engines and vehicles.⁷ Again, the US EPA implemented a two-pronged approach to emissions control by first establishing new exhaust emission standards for heavy-duty highway engines and vehicles, and second, by reducing highway diesel fuel sulfur levels nationwide.⁸ Currently, refiners must produce highway diesel fuel that meets a maximum sulfur standard of 15 ppm.⁹

The Executive Director does not contest that Valero installed hydrotreating equipment at its refineries to meet the stricter sulfur requirements for gasoline and highway diesel fuel. However, this does not change the fact that hydrotreating is a production activity that is integral to the refining process. The process flow diagrams attached to Valero's Supplemental Response indicate that hydrotreaters were used as part of Valero's production process before the low sulfur gasoline and diesel fuel regulations went into effect.¹⁰ Additional hydrotreating at Valero's refineries is now necessary to produce gasoline and highway diesel which meets the sulfur standards set forth by US EPA. Hydrotreating is a necessary component of Valero's production process. As such, it is production equipment that is ineligible for Tier II 100% positive use determinations. Valero has never acknowledged the production aspect of its hydrotreating equipment. Valero maintains that its hydrotreating equipment was installed entirely for pollution control purposes.¹¹

2. Hydrotreaters do not provide an environmental benefit at the site.

Environmental Benefit at the Site

The Executive Director issued negative use determinations for Valero's hydrotreaters, in part, because the equipment failed to satisfy the "environmental benefit at the site" requirement. In its Supplemental Response, Valero presents several different arguments as to why their equipment satisfies the "environmental benefit at the site" requirement. After carefully reviewing all of the information submitted, the Executive Director concludes that Valero's arguments are not dispositive of the instant appeals, and maintains its position that the hydrotreaters fail to fulfill the "environmental benefit at the site" requirement. Valero's arguments and the Executive Director's rebuttal are presented below:

Equipment and Categories List

Valero argues that its hydrotreaters meet the "environmental benefit at the site" requirement by providing the same type of environmental benefit as several pieces of equipment listed on the Equipment and Categories List (ECL). Valero supports this contention by citing Tex. Tax Code

⁵ *Id.*

⁶ 40 CFR § 80.195.

⁷ 66 Fed. Reg. 5002 (January 18, 2001).

⁸ *Id.* at 5005.

⁹ 40 CFR § 80.520(a)(1).

¹⁰ See Exhibit D, Valero's Supplemental Response.

¹¹ See Exhibit E, Valero's Supplemental Response.

§ 11.31(g), which requires that standards adopted by the TCEQ implementing Section 11.31 “be sufficiently specific to ensure that determinations are equal and uniform.” The ECL is a list of property that the Executive Director determined “is used either wholly or partly for pollution control purposes.”¹² Thus, Valero argues that the environmental benefit provided by its hydrotreaters is analogous to the environmental benefit provided by several pieces of equipment listed on the ECL. As further explained below, this argument is not dispositive because Valero’s conclusion is based on a flawed assumption regarding the manner in which the Executive Director reviews listed ECL equipment applications.

Valero’s memorandum, dated August 20, 2008, raises the issue that several items on the recently adopted ECL provide an “environmental benefit at the site” by providing “an environmental benefit in the area of the site,” or an environmental benefit that is “created at the site.”¹³ To support this contention, Valero analyzed several pieces of equipment such as automotive dynamometers (ECL Item A-67), slurry and barrier walls (ECL Item S-15), injection wells (ECL Item S-17), and double-hulled barges (ECL Item S-23), and concluded that these pieces of equipment yielded “an environmental benefit in the area of the site” or provided an environmental benefit “created at the site.”¹⁴

Valero’s analysis is flawed because the Executive Director only grants positive use determinations for equipment that provides an “environmental benefit at the site.” This does not mean that pollution control equipment cannot provide an additional environmental benefit off-site. Valero’s analysis of ECL Item A-67 (Automotive Dynamometers) states that the benefit of utilizing the equipment “occurs when and wherever the vehicle is driven.”¹⁵ The analysis goes on to explain that when a vehicle is “driven on-site, the environmental benefit will occur on-site, and when the vehicle is used off-site, the emissions reductions will occur off-site.”¹⁶ Based on this analysis, Valero concludes that the Executive Director grants positive use determinations for equipment that provides an environmental benefit off-site; and that the hydrotreaters comply with the “benefit at the site” requirement.¹⁷ A brief examination of automotive dynamometers shows how Valero’s analysis is defective. The Executive Director only grants positive use determinations for automotive dynamometers on vehicles that operate exclusively on-site. Every piece of equipment listed on the ECL must provide an “environmental benefit at the site.”¹⁸

As part of its application, an applicant must demonstrate how each individual piece of equipment meets the “environmental benefit at the site” requirement. This demonstration must be made for items listed on the ECL as well. The Executive Director processes all use determination applications in a consistent manner, in accordance with the requirement that all “determinations

¹² 30 TAC §17.14(a).

¹³ See Exhibit A, Valero’s Supplemental Response, p. 3 – 5.

¹⁴ *Id.* at p. 5 – 7.

¹⁵ *Id.* at p. 5.

¹⁶ *Id.*

¹⁷ See Exhibit A, Valero’s Supplemental Response, p. 5 – 6.

¹⁸ The other items ECL items also provide an environmental benefit at the site. Because an item on the ECL has an environmental benefit off-site does not mean it cannot have an environmental benefit on-site. For example, slurry and barrier walls (ECL Item S-15) provide an environmental benefit at the site (i.e., affected property) by preventing pollutant migration on the affected property. Also, injection wells (ECL Item S-17) provide an environmental benefit at the site by providing an authorized method of disposal of wastes generated at the site.

are equal and uniform.”¹⁹ Valero’s argument is flawed because it assumes that equipment listed on the ECL is entitled to a positive use determination, regardless of whether or not it provides an “environmental benefit at the site.” The Commission should affirm the negative use determinations issued to Valero because the hydrotreaters fail to meet the “environmental benefit at the site” requirement.

Environmental Benefit in the Area

Valero argues that its hydrotreaters meet the “environmental benefit at the site” requirement because vehicles in the vicinity of the site utilize Valero’s low sulfur fuel, thereby emitting reduced amounts of sulfur oxides (SO_x), nitrogen oxide (NO_x), and particulate matter (PM).²⁰ This argument is not dispositive because the “environmental benefit at the site” requirement can only be fulfilled by environmental benefits occurring at the site. Equipment that causes an environmental benefit to occur off-site, or off-site activities that cause an environmental benefit to occur on-site, are ineligible for a positive use determination. This application of the rule creates a safeguard against the uncertainty of activities that are conducted outside of the applicant’s control. For example, it is impossible to demonstrate whether vehicles driving in the vicinity of Valero’s facilities are consuming Valero’s low sulfur fuel or low sulfur fuel produced by another refiner. Even assuming *arguendo* that all vehicles in the vicinity of Valero’s facilities are using low sulfur fuel refined by Valero, it would be impossible to generate reliable data regarding SO_x, NO_x, and PM emissions that could be attributed solely to the utilization of Valero’s low sulfur fuel.

While there is no quantitative requirement that an applicant must meet to fulfill the “environmental benefit at the site” requirement, the percentage of refined fuel used in the vicinity of Valero’s refineries is insignificant when compared to the total amount of fuel processed by the hydrotreaters. The low sulfur fuel refined by Valero will be utilized nationwide; in some instances, at a great distance from its facilities. As recognized by the US EPA, the production of low sulfur fuel is necessary to facilitate the attainment of stricter vehicle emissions standards.²¹ The environmental benefit of reduced SO_x, NO_x, and PM emissions occurs wherever the low sulfur fuel is combusted. As such, Valero is not entitled to a positive use determination because its hydrotreaters fail to meet the “environmental benefit at the site” requirement.

Environmental Benefit at the Site Due to Emissions from Vehicles Used On-Site

Valero argues that its hydrotreaters meet the “environmental benefit at the site” requirement because company, contractor, and employee-owned vehicles utilize Valero’s low sulfur fuel while they operate within their refineries.²² This argument is not dispositive because, although there is no quantitative requirement that must be met to fulfill the “environmental benefit at the site” requirement, the percentage of refined fuel used at the refineries is insignificant when compared to the total amount of fuel processed by the hydrotreaters. As previously mentioned,

¹⁹ TEX. TAX CODE § 11.31(g).

²⁰ See Exhibit A, Valero’s Supplemental Response, p. 3 – 4.

²¹ See 65 Fed. Reg. 6698 (February 10, 2000) & 66 Fed. Reg. 5002 (January 18, 2001).

²² See Exhibit A, Valero’s Supplemental Response, p. 3.

the low sulfur fuel refined by Valero will be utilized nationwide; in some instances, at a great distance from its facilities. The production of low sulfur fuel is necessary to facilitate the attainment of stricter vehicle emissions standards.²³ The environmental benefit of reduced SO_x, NO_x, and PM emissions occurs wherever the low sulfur fuel is combusted. Valero is requesting a 100% positive use determination for all of the equipment associated with its hydrotreating process. The amount of low sulfur fuel that is utilized by vehicles while on-site at one of Valero's refineries pales in comparison to the amount of low sulfur fuel that is refined for sale nationwide.

Specific Environmental Benefits at the Site

Valero argues that its hydrotreaters meet the "environmental benefit at the site" requirement because the listed processes utilize hydrorefined process fluids and yield the listed environmental benefits:

- Reduction in flaring events associated with unit shutdowns,
- Reduction in emissions from associated equipment such as heaters, boilers, and electrical production equipment,
- Reduction of emissions from sample collection stations,
- Reductions in hydrogen sulfide (H₂S) emissions from fugitive components,
- Reduction in H₂S emissions from product tanks and loading and unloading facilities,
- Reductions in the firing and flaring events of refinery fuel gas, and
- Reduction in emissions from company, contractor, and employee-owned vehicles.

Valero's argument is not dispositive because the environmental benefits Valero listed are not consistent with the environmental rules it cited in its application. The environmental benefits produced by the equipment in the list above are different from the environmental benefits that the cited rules establish. 40 CFR §§ 80.195 & 80.520(a)(1) establish sulfur limits for refined gasoline and highway diesel fuel. The purpose of the cited rules is to reduce the emissions of vehicles utilizing Valero's refined fuel, not to reduce emissions from Valero's refineries. Valero cannot claim to have installed its hydrotreating equipment to meet or exceed the low sulfur gasoline and highway diesel fuel standards, while claiming an environmental benefit that is unrelated to the cited standards.

3. The commercial waste management exclusion prohibits Valero from receiving a positive use determination.

The Executive Director reiterates his position that Valero manufactures a product that prevents, controls, or reduces air, water, or land pollution. Under 30 TAC § 17.6, "property is not entitled to an exemption from taxation solely on the basis that the property is used to manufacture or produce a product or provide a service that prevents, monitors, controls, or reduces air, water, or land pollution." Valero states that it does not produce a product that prevents, controls, or reduces pollution even though it is attempting to receive a positive use determination due to reductions in emissions from the use of low sulfur fuel by consumers. The US EPA adopted

²³ See 65 Fed. Reg. 6698 (February 10, 2000) & 66 Fed. Reg. 5002 (January 18, 2001).

federal fuel specifications to reduce emissions from the combustion of gasoline and highway diesel fuel. If the fuel itself does not reduce pollution, then Valero has no basis upon which to submit an application.

Valero also argues that pollution control property can emit pollution.²⁴ This is directly analogous to manufacturers of certain pollution control equipment. A good example is the manufacture of low NO_x burners. When used, a low NO_x burner generates pollution, although less pollution than a regular burner. A low NO_x burner is manufactured so that the end user can meet emission limits. This is just like Valero's low sulfur fuel. When low sulfur fuel is used by the consumer, it generates emissions, although they are less than the emissions coming from the use of regular fuel. Also, the sulfur reduction in the fuel allows the consumers' vehicles to meet emission limitations.

The reductions due to low NO_x burners and low sulfur fuel are realized by someone other than the manufacturer. A manufacturer of a low NO_x burner would not be granted a positive use determination for the emission reductions its product creates elsewhere. However, a manufacturer of a low NO_x burner could receive a positive use determination for a low NO_x burner it manufactured that is used, constructed, or installed at its site; however, that would not enable the entire low NO_x burner production line to receive a positive use determination. Therefore, Valero should be given a negative use determination because its product is a product that reduces pollution.

III. Conclusion

After careful consideration of Valero's Supplemental Response, the Executive Director respectfully requests that the Commission deny the instant appeals and affirm the Executive Director's Tier II negative use determinations. Valero has failed to provide any factual or legal basis upon which the Commission should reverse the Executive Director's negative use determinations in this case. The allegations propounded by Valero in their Supplemental Response do not alter the findings and the final negative use determinations issued by the Executive Director. The Executive Director's negative use determinations in this case are consistent with the terms and mandates set forth in the relevant statutes and rules.

Accordingly, the Executive Director respectfully requests that the Commission deny the instant appeals and affirm the Executive Director's negative use determinations.

²⁴ See Exhibit A, Valero's Supplemental Response.

Respectfully submitted,

TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY

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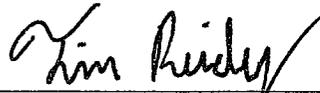
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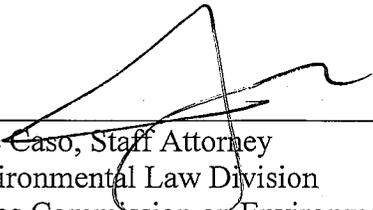


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REPRESENTING THE EXECUTIVE DIRECTOR,
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CERTIFICATE OF SERVICE

I certify that on December 15, 2009, the original and 7 copies of the Executive Director's Supplemental Response to the Appeals of the Executive Director's Use Determinations Issued to Valero Refining – Texas, L.P., Diamond Shamrock Refining Company, L.P., and the Premcor Refining Group, Inc. was filed with the Office of the Chief Clerk, Texas Commission on Environmental Quality, and was served by first-class mail, electronic mail, agency mail, or facsimile to all persons on the attached mailing list.



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**MAILING LIST
VALERO USE DETERMINATION APPEALS**

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