

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

December 15, 2009

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

Re: **VALERO REFINING - TEXAS, L.P.**
TCEQ DOCKET NOS. 2007-0724-MIS-U, 2007-0732-MIS-U, 2007-0733-MIS-U,
2007-0734-MIS-U, 2007-0735-MIS-U, 2007-0736-MIS-U, 2007-0737-MIS-U,
2007-0738-MIS-U, 2007-0739-MIS-U, 2007-0740-MIS-U

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Brief in Response to Appellant's Supplemental Reply in the above-entitled matter.

Sincerely,


Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

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TCEQ DOCKET NOS.

**2007-0724-MIS-U, 2007-0732-MIS-U, 2007-0733-MIS-U, 2007-0734-MIS-U,
2007-0735-MIS-U, 2007-0736-MIS-U, 2007-0737-MIS-U, 2007-0738-MIS-U,
2007-0739-MIS-U, 2007-0740-MIS-U**

APPEAL OF EXECUTIVE DIRECTOR'S	§	BEFORE THE
USE DETERMINATIONS REGARDING	§	
VALERO REFINING – TEXAS, L.P.	§	
USE DETERMINATION NOS.	§	TEXAS COMMISSION ON
06-10268, 06-10270, 06-10271, 06-10279,	§	
06-10280, 06-10281, 06-10282, 06-10283,	§	
06-10284, & 06-10285	§	ENVIRONMENTAL QUALITY

**OFFICE OF PUBLIC INTEREST COUNSEL'S
BRIEF IN RESPONSE TO APPELLANT'S SUPPLEMENTAL REPLY**

To the members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this brief in response to Valero Refining-Texas, L.P., Diamond Shamrock Refining Company, L.P., and the Premcor Refining Group, Inc.'s ("Appellant") supplemental reply regarding Appellant's appeals of the Executive Director's (ED) negative use determinations.

I. Introduction

OPIC's position regarding these appeals has not changed. We have reviewed and considered Appellant's supplemental brief, and OPIC continues to recommend the Commission deny all of Valero's appeals. OPIC's original response in this matter was filed April 7, 2008, and the substance of that response is incorporated herein. At this time, OPIC additionally provides the following brief discussion of each argument stated in Appellant's supplemental brief.

II. Appellant's Arguments

A. Environmental Benefit at the Site

Appellant argues that its hydrotreaters provide an environmental benefit onsite at the refineries in a manner similar to other equipment on the Equipment and Categories List (ECL). However, hydrotreaters are not included in the ECL and are most accurately described as production equipment.

Hydrotreating devices are installed for the production of low-sulfur gasoline or diesel. The hydrotreaters are part of production processes which eventually result in low-sulfur gasoline and diesel, but the hydrotreaters themselves do not result in an onsite environmental benefit, as required by 30 Texas Administrative Code (TAC) § 17.15. Low-sulfur fuels may result in reduced tail pipe emissions from vehicles using such fuels, but the removal of additional sulfur during the refining process actually results in a net increase of sulfur dioxide emissions at the site.

The requirement that eligible property provide an environmental benefit at the site stems from the fact that exempting pollution control property from property taxation increases the tax burden on the affected community and its residents. To balance this increased tax burden, it is only fair that the exempted property provide an environmental benefit in the form of reduced pollution.

Appellant's hydrotreaters are used to produce low-sulfur fuels, not reduce pollution. This production equipment also does not provide an environmental benefit at the site, as required by 30 TAC § 17.15. For these reasons, OPIC concludes that Appellant's hydrotreaters do not qualify as pollution control property and therefore should not be exempted from property taxation.

B. Manufacturer of Pollution Control Property

Texas Tax Code § 11.31(a) states, “A person is not entitled to an exemption from taxation under this section solely on the basis that the person manufactures or produces a product or provides a service that prevents, monitors, controls, or reduces air, water, or land pollution.” Appellant asserts that it is not a manufacturer of pollution control property and is therefore not excluded from property tax exemption under § 11.31. While it is debatable whether Valero is a manufacturer of pollution control property, it is not necessary to answer this question in order to deny Valero’s appeals. Regardless of whether Valero is a manufacturer of pollution control property, Valero’s appeals should still be denied because the hydrotreaters are production equipment and do not provide onsite environmental benefits.

Valero asserts that it is unfairly being required to pay taxes on property that it was required to purchase by EPA regulations. As pointed out by the ED, Valero’s production goal is to produce gasoline or diesel that meets federally imposed specifications.¹ Valero has chosen to be in the gasoline and diesel refining business. The property at issue is not pollution control property, and the taxes on production equipment such as hydrotreaters are essentially part of Valero’s cost of doing business.

¹ See Executive Director’s 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, p. 22.

C. XTO Energy Use Determination

Appellant attempts to distinguish the Commission's decision in the XTO Energy use determination case from its current appeals. After reviewing the Commission's discussion and decision in that case, OPIC finds that XTO Energy provides guiding precedent for Valero's current appeals and supports the ED's negative use determinations.

While XTO Energy involved sulfur removal from natural gas instead of gasoline or diesel, the similarities of these two cases are far greater than the differences. In that case, Commissioners Ralph Marquez and Larry Soward agreed that stripping sulfur from natural gas is not pollution control.² Commissioner Soward further stated that the process of desulfurization is product enhancement to make the product more marketable.³ OPIC finds the XTO Energy case to be directly analogous to Valero's current appeals and disagrees with Valero's attempt to distinguish that case. The decision in XTO Energy should serve as precedent for the Commission's current decision.

III. Conclusion

OPIC concurs with the ED's negative use determination for each of the Valero applications. We find that the ED correctly applied the relevant law, and the law dictates the negative use determinations made by the ED. We also find that the ED's determinations are consistent with prior Commission precedent. OPIC respectfully recommends the Commission deny all of Valero's appeals.

² *Id.* at 28.

³ *Id.* at 28.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 15, 2009, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served by electronic mail, first-class mail, and/or facsimile to all persons on the attached mailing list.



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