



Pillsbury Winthrop Shaw Pittman LLP  
2 Houston Center | 909 Fannin, Suite 2000 | Houston, TX 77010-1018 | tel 713.276.7600 | fax 713.276.7673

Mark L. Farley  
tel 713.276.7615  
mark.farley@pillsburylaw.com

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TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

August 4, 2010

Facsimile and Certified Mail

Mr. Les Trobman  
General Counsel  
Office of the General Counsel  
MC 101  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711

Re: Appeal of Executive Director's Negative Use Determination Regarding  
Mizuho Corporate Bank MHC B (USA)'s Application No. 8262  
TCEQ Docket No. 2010-0252-MIS-U

Dear Mr. Trobman:

On July 2, 2010, your office requested the filing of legal briefs or responses in the above-referenced matter. Mizuho Corporate Bank MHC B (USA) ("MHC B") was required to file its reply brief with the Chief Clerk's Office on or before 5:00 P.M. on Friday, July 30, 2010.

The administrative assistant responsible for the filing of the reply brief on behalf of MHC B inadvertently failed to fax the reply brief to the Chief Clerk's office on July 30, 2010 as intended. The reply brief, however, was faxed to all of the interested parties (including Texas Commission on Environmental Quality staff) on July 30, 2010, see the attached facsimile and confirmation. The reply brief was sent by Federal Express to the Chief Clerk's office on July 30, 2010, arriving on August 2, 2010.

MHC B should not be punished for the inadvertent administrative oversight. None of the interested parties were prejudiced and all of the counsel of record received the reply brief on July 30, 2010.

For the aforementioned reasons, MHC B requests that the date for the filing of its reply brief be extended to August 2, 2010.

August 4, 2010  
Page 2

If you have any questions in the interim, please contact me.

Very truly yours,



Mark L. Farley



Pillsbury Winthrop Shaw Pittman LLP  
 2 Houston Center | 909 Fannin, Suite 2000 | Houston, TX 77010-1018 | tel 713.276.7600 | fax 713.276.7673

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Pillsbury Winthrop Shaw Pittman LLP  
2 Houston Center | 909 Fennin, Suite 2000 | Houston, TX 77010-1018 | tel 713.276.7600 | fax 713.276.7673

Kimberley M. Vercher  
tel 713.276.7685  
kim.vercher@pillsburylaw.com

July 30, 2010

Docket Clerk  
TCEQ Office of Chief Clerk MC 105  
12100 Park 35 Circle, Bldg. F  
Austin, Texas 78753

Re: TCEQ Docket No. 2010-0252-MIS-U; *Appeal of Executive Director's Positive Use Determination Regarding Mizuho Corporate Bank MHCBA (USA)'s Application No. 8262*; Before the Texas Commission on Environmental Quality

Dear Docket Clerk:

Enclosed please find the following document for filing in the above-referenced matter.

- MHCBA (USA) LEASING & FINANCE CORPORATION'S REPLY TO THE EXECUTIVE DIRECTOR'S RESPONSE TO MHCBA (USA) LEASING & FINANCE CORPORATION'S APPEAL OF THE EXECUTIVE DIRECTOR'S NEGATIVE USE DETERMINATION FOR APPLICATION NO. 8262

I have also enclosed the required seven (7) copies for the Chief Clerk. I have also enclosed an additional copy for file-stamping and return to my office in the self-addressed stamped envelope.

Thank you for your attention to this matter.

Very truly yours,

Kimberley M. Vercher  
Legal Assistant to Mark Farley

Enclosure

July 30, 2010  
Page 2

cc:

Ryan T. Miller  
Assistant General Counsel  
P.O. Box 920975  
Houston, Texas 77292-0975  
Fax: 713-957-5219

Susana M. Hildebrand, P.E.  
Chief Engineer's Office, MC 168  
P.O. Box 13087  
Austin, Texas 78711  
Fax: 512-239-6188

Chance Goodwin  
TCEQ Chief Engineer's Office,  
MC 168  
P.O. Box 13087  
Austin, Texas 78711  
Fax: 512-239-6188

Minor Hibbs  
TCEQ Chief Engineer's Office,  
MC 168  
P.O. Box 13087  
Austin, Texas 78711  
Fax: 512-239-1794

Robert Martinez  
TCEQ Environmental Law Division,  
MC 173  
P.O. Box 13087  
Austin, Texas 78711  
Fax: 512-239-0606

Blas Coy  
TCEQ Office of Public Interest  
Counsel, MC 103  
P.O. Box 13087  
Austin, Texas 78711  
Fax: 512-239-6377

Bridget Bohac  
TCEQ Office of Public Assistance,  
MC 108  
P.O. Box 13087  
Austin, Texas 78711  
Fax: 512-239-4007

Kyle Lucas  
TCEQ Alternative Dispute Resolution  
Program, MC 222  
P.O. Box 13087  
Austin, Texas 78711  
Fax: 512-239-4015

## TCEQ DOCKET No. 2010-0252-MIS-U

APPEAL OF EXECUTIVE	§	BEFORE THE TEXAS COMMISSION
DIRECTOR'S NEGATIVE USE	§	ON ENVIRONMENTAL QUALITY
DETERMINATION REGARDING	§	
MIZUHO CORPORATE BANK	§	
MHCB (USA)'S APPLICATION NO.	§	
8262	§	

**MHCB (USA) LEASING & FINANCE CORPORATION'S REPLY TO THE  
EXECUTIVE DIRECTOR'S RESPONSE TO MHCB (USA) LEASING & FINANCE  
CORPORATION'S APPEAL OF THE EXECUTIVE DIRECTOR'S NEGATIVE USE  
DETERMINATION FOR APPLICATION NO. 8262**

MHCB (USA) Leasing & Finance Corporation ("Mizuho Corporate Bank MHCB (USA)" or "MHCB") files this reply to the Executive Director of the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") response to the appeal of the Executive Director's negative use determination for Application No. 8262.

For the reasons set forth below, MHCB respectfully requests that the Commission remand the negative use determination issued in connection with Application No. 8262 to the Executive Director for issuance of a positive use determination. Alternatively, MHCB requests that the Commission remand the negative use determination to the Executive Director for consideration of the economic impact of such a determination.

## I. PROCEDURAL AND FACTUAL BACKGROUND

### A. Use Determination for Application No. 8262

Sunrise Chemical LLC ("Sunrise Chemical") owns and operates a facility located in Pasadena, Texas.<sup>1</sup> Sunrise Chemical manufactures ethylidene norborne ("ENB") that is used as a feedstock in the production of certain types of rubber.<sup>2</sup> Sunrise Chemical currently is a joint venture between Nisseki Chemical Texas, Inc. ("Nisseki") and Sanam Corporation ("Sanam").<sup>3</sup>

In January 2004, Sunrise Chemical sold and then leased back one of its ENB units (ENB2), including the associated pollution control equipment, to MHCB.<sup>4</sup> Sunrise Chemical entered into this structured financial transaction to generate funds to allow Nisseki and Sanam to buy-out another original member of the joint venture.<sup>5</sup> When the agreement was executed,

<sup>1</sup> Churney Aff. ¶ 2 (Attached as MHCB Ex. A.).

<sup>2</sup> *Id.* at ¶ 3.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at ¶ 4.

<sup>5</sup> *Id.*

MHCB became the owner of ENB2 and was therefore liable for the property taxes associated with the equipment.<sup>6</sup>

On February 2, 2005, Sunrise Chemical submitted an application to TCEQ for a use determination for the pollution control property associated with ENB2.<sup>7</sup> Sunrise Chemical submitted the application in its own name based upon a misunderstanding of the Texas Tax Code and TCEQ's rules.<sup>8</sup> On February 23, 2005, the Executive Director issued a 100% use determination for the pollution control property associated with ENB2.<sup>9</sup>

After receiving the 100% use determination in 2005, the Harris County Appraisal District ("HCAD") created a pollution control property account in Sunrise Chemicals' name, but the pollution control exemption has never been applied to offset taxes due.<sup>10</sup>

On December 2, 2009, TCEQ was asked to correct the use determination to reflect MHCB's ownership.<sup>11</sup> On December 3, 2009, the Executive Director reissued the use determination in MHCB's name.<sup>12</sup>

On February 15, 2010, HCAD requested that the Commission reopen or reconsider the Executive Director's positive use determination for Application No. 8262.<sup>13</sup> On April 28, 2010, the Commission considered HCAD's appeal, ordered that the Executive Director's positive use determination be set aside, and remanded the matter back to the Executive Director for the issuance of a new use determination.<sup>14</sup>

On May 25, 2010, the Executive Director issued a negative use determination for Application No. 8262.<sup>15</sup> On June 18, 2010, MHCB requested that the Commission remand the negative use determination to the Executive Director for issuance of a positive use determination.<sup>16</sup>

<sup>6</sup> Sunrise Chemical re-purchased ENB2 from MHCB in January 2010. *Id.* at ¶ 9.

<sup>7</sup> See Application for Use Determination, dated February 2, 2005 (Attached as MHCB Ex. B.).

<sup>8</sup> Charney Aff. ¶ 6 (Attached as MHCB Ex. A.).

<sup>9</sup> See Use Determination, dated February 23, 2005 (Attached as MHCB Ex. C.).

<sup>10</sup> Charney Aff. ¶ 7 (Attached as MHCB Ex. A.).

<sup>11</sup> See Reissued Use Determination and Transmittal Letter, dated December 3, 2009 (Attached as MHCB Ex. D.).

<sup>12</sup> *Id.*

<sup>13</sup> See Letter from Ryan T. Miller, Assistant General Counsel, Office of General Counsel, Harris County Appraisal District, to LaDonna Castanuela, Chief Clerk, Texas Commission on Environmental Quality (Feb. 15, 2010) (Attached as MHCB Ex. E).

<sup>14</sup> See Commission Order in "*Appeal filed by Harris County Appraisal District with regard to the positive use determination issued by the Executive Director to Mizuho Corporate Bank MHCB (USA)*", TCEQ Docket No. 2010-0252-MIS-U; Use Determination No. 8262 (May 3, 2010) (Attached as MHCB Ex. F).

<sup>15</sup> See Negative Use Determination, dated May 25, 2010 (Attached as MHCB Ex. G).

<sup>16</sup> See Letter from Mark L. Farley, to LaDonna Castanuela, Chief Clerk, Texas Commission on Environmental Quality (June 16, 2010) (Attached as MHCB Ex. H).

## B. Response Briefs

On June 20, 2010, the Executive Director, the Office of Public Interest Counsel, and HCAD filed response briefs.<sup>17</sup>

The Executive Director and the Office of Public Interest Counsel argue that MHCB is ineligible for the pollution control property exemption because it was providing "services" to Sunrise Chemical.<sup>18</sup> This argument has no factual support. There simply is no basis to assert that MHCB was providing services to Sunrise Chemical. See § II.A, *infra*.

The Office of Public Interest Counsel also argues that the Executive Director's failure to review the potential economic consequences of issuing the negative use determination were proper.<sup>19</sup> However, during the April 28, 2010 hearing before the Commission, two of the Commissioners specifically questioned the potential economic consequences of issuing negative use determinations to applicants in similar situations to MHCB. See § II.B, *infra*.

HCAD merely referred the Commission to the prior record, so no reply is required.<sup>20</sup>

## II. MHCB IS ENTITLED TO THE POSITIVE USE DETERMINATION

MHCB is entitled to a positive use determination for Application No. 8262. MHCB met all of requirements contained in both Section 11.31(a) of the Texas Tax Code which provides the exemption and TCEQ's implementing rules. Furthermore, the exclusion for "services" in the statute does not apply to MHCB.

### A. MHCB Is Not Providing a Service to Sunrise Chemical

There is no factual basis for the assertion that MHCB is ineligible for the exemption because it was providing "services" to Sunrise Chemical. The relevant statutory exclusion provides as follows: "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

<sup>17</sup> See Executive Director's Response to Mizuho Corporate Bank's Appeal of the Executive Director's Negative Use Determination, TCEQ Docket No. 2010-0252-MIS-U, Use Determination No. 8262 (July 20, 2010) (Attached as MHCB Ex. I); Office of Public Interest Counsel's Response to Appeal of Positive Use Determination, TCEQ Docket No. 2010-0252-MIS-U, Use Determination No. 8262 (July 20, 2010) (Attached as MHCB Ex. J); Harris County Appraisal District's Response Brief to the June 16, 2010 Appeal by Mizuho Corporate Bank MHCB (USA), TCEQ Docket No. 2010-0252-MIS-U, Use Determination No. 8262 (July 20, 2010) (Attached as MHCB Ex. K).

<sup>18</sup> See Executive Director's Response to Mizuho Corporate Bank's Appeal of the Executive Director's Negative Use Determination, TCEQ Docket No. 2010-0252-MIS-U, Use Determination No. 8262, p. 5 (July 20, 2010) (Attached as MHCB Ex. I); Office of Public Interest Counsel's Response to Appeal of Positive Use Determination, TCEQ Docket No. 2010-0252-MIS-U, Use Determination No. 8262, p. 3-4 (July 20, 2010) (Attached as MHCB Ex. J).

<sup>19</sup> Office of Public Interest Counsel's Response to Appeal of Positive Use Determination, TCEQ Docket No. 2010-0252-MIS-U, Use Determination No. 8262, p. 4-5 (July 20, 2010) (Attached as MHCB Ex. J).

<sup>20</sup> Harris County Appraisal District's Response Brief to the June 16, 2010 Appeal by Mizuho Corporate Bank MHCB (USA), TCEQ Docket No. 2010-0252-MIS-U, Use Determination No. 8262, p. 2-3 (July 20, 2010) (Attached as MHCB Ex. K).

prevents, monitors, controls, or reduces air, water, or land pollution."<sup>21</sup> For this exclusion to apply, MHCB would have had to provide a "service" that "prevents, monitors, controls, or reduces air, water, or land pollution," which it did not.

The pollution control property at issue was the subject of a Master Equipment Lease between MHCB and Sunrise Chemical.<sup>22</sup> The Master Equipment Lease was a lease under the Uniform Commercial Code ("UCC"), Chapter 2A-Leases. Article 2A is intended to codify "the law with respect to leases of goods."<sup>23</sup> Importantly, the UCC only governs contracts related to the sale or leasing of goods, not contracts for services.<sup>24</sup>

Accordingly, there simply is no basis to assert that the lease between MHCB and Sunrise Chemical represented a contract for services. MHCB did not operate the equipment.<sup>25</sup> It did not inspect the equipment.<sup>26</sup> It did not maintain the equipment.<sup>27</sup> It performed no services.<sup>28</sup> The transaction between MHCB and Sunrise simply related to the lease of goods.

Furthermore, there is no basis to assert that the lease between MHCB and Sunrise Chemical represented a contract for a "service that prevents, monitors, controls, or reduces air, water, or land pollution." The lease was merely a structured financial transaction used to generate funds.

Instead, as outlined in TCEQ's guidance document regarding the pollution control property exemption, the exclusion cited by the Executive Director and the Office of Public Interest Counsel is intended to cover situations where an entity is operating pollution control equipment and then contracts with other parties to manage their waste streams (*e.g.*, a commercial hazardous waste incinerator or a waste water treatment plant).<sup>29</sup> Those situations are quite different from MHCB's situation where an entity conveys a legal interest to another party to have possession and use of fixed equipment that comprise a chemical manufacturing process unit as part of a structured financial transaction. Unlike the examples in TCEQ's guidance document, MHCB is not in the business of providing pollution control services or leasing pollution control equipment.

The Executive Director argues that it has consistently interpreted TEX. TAX CODE § 11.31(a) and TCEQ's implementing rules to prohibit MHCB and similarly situated lessors from receiving a positive use determination and cites a response to a public information request as

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<sup>21</sup> TEX. TAX CODE § 11.31(a) (emphasis added).

<sup>22</sup> See Chamey Aff. ¶ 4 (Attached as MHCB Ex. A.).

<sup>23</sup> See TEX. BUS. AND COM. CODE § 2A.101 cmt. (emphasis added).

<sup>24</sup> See *id.*

<sup>25</sup> See Chamey Aff. ¶ 5 (Attached as MHCB Ex. A.).

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*

<sup>29</sup> See TEX. COMM'N ON ENV'T CONTROL, PROPERTY-TAX EXEMPTIONS FOR POLLUTION CONTROL PROPERTY, DRAFT RG 461 (2009).

support.<sup>30</sup> The response to the public information request does not contain sufficient information to reply to the Executive Director's assertion, but the Commission should note that some applications containing the words "lease" or "leased" in the property description field were granted positive use determinations.

Lastly, the clear intent of the statute is to provide tax incentives to companies required by environmental regulations to make large investments in pollution control equipment in Texas.<sup>31</sup> Sunrise Chemical is the classic example of such a company. Sunrise Chemical was required by environmental regulations to make large investments in pollution control property during the construction of and for the operation of ENB2.

In January 2004, Sunrise Chemical sold and then leased back ENB2, including the associated pollution control equipment, to MHCB. According to the terms of the Master Equipment Lease, Sunrise Chemical indemnified MHCB for property taxes.<sup>32</sup> To deny a positive use determination to MHCB is to in effect deny a positive use determination to Sunrise Chemical, the company the statute was designed to incentivize. Sunrise Chemical should not be denied the benefit of the pollution control equipment exemption merely because it chose to enter into a structured financial transaction with MHCB.

**B. The Executive Director Should Have Considered Economic Consequences During Its Review of Application No. 8262**

As discussed above, during the April 28, 2010 hearing before the Commission, two of the Commissioners specifically questioned the potential economic consequences of issuing negative use determinations to applicants in similar situations to MHCB. Although the Commission's rules do not require the Executive Director to determine the economic impact of a positive or negative use determination, the rules also do not prohibit such a review. Accordingly, the Executive Director should have considered the economic consequences during its review of Application No. 8262.

**III. CONCLUSION**

For the aforementioned reasons, MHCB is entitled to the pollution control property exemption provided by Section 11.31 of the Texas Tax Code. Accordingly, MHCB respectfully requests that the Commission remand the negative use determination issued in connection with Application No. 8262 to the Executive Director for issuance of a positive use determination. Alternatively, MHCB requests that the Commission remand the negative use determination to the Executive Director for consideration of the economic impact of such a determination.

<sup>30</sup> See Executive Director's Response to Mizuho Corporate Bank's Appeal of the Executive Director's Negative Use Determination, TCEQ Docket No. 2010-0252-MIS-U, Use Determination No. 8262, p. 5 (July 20, 2010) (Attached as MHCB Ex. I).

<sup>31</sup> HOUSE COMM. ON WAYS AND MEANS, BILL ANALYSIS, Tex. H.B. 1920, 73rd Leg., R.S. (1993).

<sup>32</sup> See Charney Aff. ¶ 5 (Attached as MHCB Ex. A.).

Respectfully submitted,

*Mark L. Farley* / *My resignation*  
*Tom*  
Mark L. Farley  
Pillsbury Winthrop Shaw Pittman LLP  
State Bar No. 24014650  
909 Fannin Street, Suite 2000  
Houston, Texas 77010  
Telephone: 713.276.7615  
Facsimile: 281.582.7807

Attorney for MIICB (USA) Leasing &  
Finance Corporation

CERTIFICATE OF SERVICE

I certify that on 7/30, 2010, MHC B (USA) Leasing & Finance Corporation's Reply to the Executive Director's Response to MHC B (USA) Leasing & Finance Corporation's Appeal of the Executive Director's Negative Use Determination for Application No. 8262 was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, and a complete copy was transmitted by certified mail, return receipt requested or electronic mail to all persons on the attached mailing list.

Mark L. Farley / *by permission*  
Mark L. Farley  
Pillsbury Winthrop Shaw Pittman LLP  
State Bar No. 24014650  
909 Fannin Street, Suite 2000  
Houston, Texas 77010  
Telephone: 713.276.7615  
Facsimile: 281.582.7807

Mailing List  
Mizuho Corporate Bank MHC (USA)  
Use Determination No. 8262, TCEQ Docket No. 2010-0252-MIS-U

Ryan T. Miller  
Assistant General Counsel  
P.O. Box 920975  
Houston, Texas 77292-0975

Susana M. Hildebrand, P.E.  
Chief Engineer's Office, MC 168  
P.O. Box 13087  
Austin, Texas 78711

Chance Goodin  
TCEQ Chief Engineer's Office,  
MC 168  
P.O. Box 13087  
Austin, Texas 78711

Minor Hibbs  
TCEQ Chief Engineer's Office,  
MC 168  
P.O. Box 13087  
Austin, Texas 78711

Robert Martinez  
TCEQ Environmental Law Division, MC  
173  
P.O. Box 13087  
Austin, Texas 78711

Bias Coy  
TCEQ Office of Public Interest Counsel,  
MC 103  
P.O. Box 13087  
Austin, Texas 78711

Bridget Bohac  
TCEQ Office of Public Assistance,  
MC 108  
P.O. Box 13087  
Austin, Texas 78711

Kyle Lucas  
TCEQ Alternative Dispute Resolution  
Program, MC 222  
P.O. Box 13087  
Austin, Texas 78711

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Pillsbury Winthrop Shaw Pittman LLP  
 2 Houston Center | 909 Fannin, Suite 2000 | Houston, TX 77010-1018 | tel 713.276.7600 | fax 713.276.7673

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Phone No:

NORTHERN VIRGINIA

Confirm:

Confirmed By:

ORANGE COUNTY

SACRAMENTO

SAN DIEGO

From: Kim M. Vercher

Phone No: 713.276.7685

SAN DIEGO-NORTH COUNTY

Direct Fax No: 713.276.7673

SAN FRANCISCO

User No: 15873

C/M No:

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SILICON VALLEY

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