

**TCEQ DOCKET NO. 2010-0252-MIS-U
USE DETERMINATION NO. 8262**

APPEAL OF THE EXECUTIVE DIRECTOR'S POSITIVE USE DETERMINATION ISSUED TO MIZUHO CORPORATE BANK APPLICATION NO. 8262	§ § § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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**HARRIS COUNTY APPRAISAL DISTRICT'S REPLY BRIEF TO RESPONSE
BRIEFS**

Harris County Appraisal District (hereinafter "HCAD") files this Reply to the respective Responses of the Executive Director of the Texas Commission on Environmental Quality (hereinafter "Executive Director"), the Office of Public Interest Counsel (hereinafter, "OPIC"), and the Applicant, Mizuho Corporate Bank (hereinafter "MHCB").

As previously addressed in HCAD's February 15, 2010 Appeal of Positive Use Determination of Application No. 8262, HCAD respectfully requests that this matter be remanded to the Executive Director for an issuance of a negative use determination.

I. BACKGROUND

On February 15, 2010, HCAD filed its Appeal of Positive Use Determination for Application 8262. Thereafter, on April 6, 2010, The Executive Director filed the Executive Director's Response to Harris County Appraisal District's Appeal of the Executive Director's Positive Use Determination (the "Executive Director's Response"). Also on April 6, 2010, OPIC filed the Office of Public Counsel's Response to Appeal of Positive Use Determination (the OPIC Response). Finally, and also on April 6, 2010, Mr. Mark L. Farley, Attorney for MHCB (USA) Leasing & Finance Corporation (aka, Mizuho Corporate Bank MHCB (USA)) filed MHCB

(USA) Leasing & Finance Corporation's Response to the Harris County Appraisal District's Appeal of the Executive Director's Positive Use Determination for Application No. 8262 (the MHCB Response).

II. REPLY TO EXECUTIVE DIRECTOR

HCAD concurs with the Executive Director's Response in its entirety, including the legal analysis, legal authority and conclusions cited and stated therein. A copy of the Executive Director's Response is attached hereto as Exhibit A (attachments and exhibits omitted).

III. REPLY TO OPIC

HCAD concurs with the OPIC Response, in that OPIC recommends the matter be remanded to the Executive Director based on HCAD's assertion that it did not receive notice of the initial application for change of name on Application 8262, and that HCAD did not receive a copy of the use determination on Application 8262, and furthermore, there is a lack of record showing otherwise.¹

IV. REPLY TO MHCB

As previously stated, HCAD concurs with the Executive Director's Response, which provides a thorough analysis of the pertinent authorities and draws the proper conclusion that the matter at hand should be remanded back to the Executive Director for the issuance of a negative use determination.² Therefore, the Executive Director's Response ably addresses the contentions of MHCB in MHCB's Response. Only one additional point should be noted. In MHCB's

¹ See Office of Public Interest Counsel's Response to Appeal of Positive Use Determination at 3.

² See Executive Director's Response to Harris County Appraisal District's Appeal of the Executive Director's Positive use Determination at 1 (attached as Ex. A).

Response, MHCB states that it provides no services to Sunrise Chemical.³ However, MHCB also states in its own Response, that it provided a “structured financial transaction to generate funds”⁴ Further, MHCB goes on to state that the structured financial transaction was a master equipment lease for pollution control property.⁵ Therefore, MHCB’s own language, in its own Response, supports the conclusion drawn by the Executive Director in the Executive Directors Response, which states:

MHCB leases ENB2 and the associated pollution control equipment to Sunrise Chemical in return for lease payments. As such MHCB is providing a service that prevents, monitors, controls, or reduces air, water, or land pollution at Sunrise Chemical’s Bayport Facility; and is ineligible to receive a positive use determination under the plain language of 11.31(a) and 30 TAC §17.6(1).⁶

V. CONCLUSION

For the reasons stated herein, specifically, HCAD’s concurrence with the Response of the Executive Director and the OPIC Response, HCAD respectfully requests that the Commission grant HCAD’s appeal and remand the matter at hand back to the Executive Director for a negative use determination.

³ MHCB(USA) Leasing & Finance Corporation’s Response to the Harris County Appraisal District’s Appeal of the Executive Director’s Positive Use Determination for application No. 8262 at 3-4.

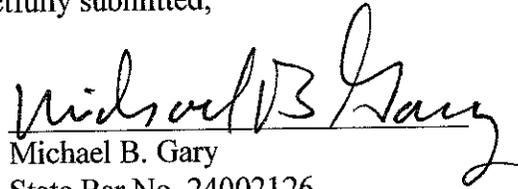
⁴ Id. at 1,4 & 5.

⁵ Id. at 4.

⁶ Executive Director’s Response to Harris County Appraisal District’s Appeal of the Executive Director’s Positive Use Determination at 4 (attached as Ex. A).

Respectfully submitted,

By:

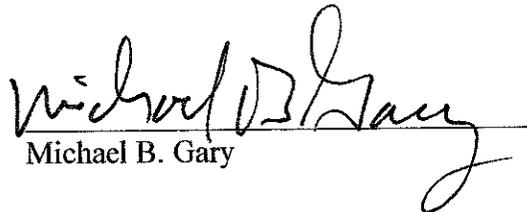


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ATTORNEY FOR,
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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2010, an original of the Harris County Appraisal District's Reply Brief to Response Briefs was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, electronically at <http://www10.tceq.state.tx.us/epic/efilings/>, and that copies were also mailed to all other persons on the attached mailing list on the same day.



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EXHIBIT A

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**EXECUTIVE DIRECTOR'S RESPONSE TO HARRIS COUNTY APPRAISAL
DISTRICT'S APPEAL OF THE EXECUTIVE DIRECTOR'S POSITIVE USE
DETERMINATION**

The Executive Director of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this response to Harris County Appraisal District's (HCAD or Appellant) appeal of the Executive Director's positive use determination issued to Mizuho Corporate Bank (MHCB) for equipment located at Sunrise Chemical L.L.C.'s (Sunrise Chemical) Bayport facility. The appeal was submitted by Ryan T. Miller, Associate General Counsel, HCAD.

For the reasons described below, the Executive Director respectfully requests that the Commission grant HCAD's appeal and remand the matter back to the Executive Director for the issuance of a negative use determination.

PROGRAM BACKGROUND

This appeal of the Executive Director's positive use determination is filed pursuant to H.B. 3121 (77th Tex. Legislature, 2001) establishing an appeals process for use determinations and the Commission rules implementing the legislation.¹

In 1993, the citizens of Texas voted to adopt a tax measure called Proposition 2. Proposition 2 was implemented when Article VIII, § 1-1 was added to the Texas Constitution on November 2, 1993. The amendment allowed the legislature to "exempt from ad valorem taxation all or part of real and personal property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution."

The Texas Legislature codified the constitutional amendment in 1993 as Tex. Tax Code § 11.31 (effective January 1, 1994). The statutory language in the codified version mirrored the language of Article VIII, § 1-1. In 2001, the legislature amended Section 11.31 when it passed H.B. 3121 (effective September 1, 2001). This bill added several new procedural requirements to § 11.31, including a provision requiring the

¹ See Tex. Tax Code § 11.31 and 30 Tex. Admin. Code (30 TAC) § 17.25.

establishment and implementation of a process to appeal use determinations.² The amendment also required the Commission to adopt new rules establishing specific standards for the Executive Director to follow in making use determinations for property that qualified for either full or partial pollution control use determinations.³ Appeals under Section 17.25 of the Commission rules may be filed by either the applicant seeking the determination, or by the chief appraiser of the tax appraisal district affected by the determination.⁴ The Appellant is required to explain the basis for the appeal.⁵

PROCEDURAL BACKGROUND

Sunrise Chemical manufactures ethylidene norborne (ENB) that is used as a feedstock in the production of certain kinds of rubber. Sunrise Chemical is currently a joint venture between Nisseki Chemical Texas, Inc. (Nisseki) and Sanam Corporation (Sanam). In January of 2004, Sunrise Chemical sold and then leased back one of its ENB units (ENB2) to MHCBC.⁶ This transaction generated the funds for Nisseki and Sanam to buy-out another original member of the joint venture.⁷ At that time, MHCBC became the owner of ENB2 and was responsible for the property taxes associated with that equipment.⁸ In February of 2005, Sunrise Chemical mistakenly applied for and received a Tier I 100% positive use determination for pollution control property associated with ENB2.⁹ That property consisted of a flare, monitoring equipment on control devices, fugitive emissions monitors, welded pipe joints, hoods and collection systems, stacks, conveyances, pumps, sumps, tanks, basins, a wastewater treatment facility, storm water containment, wastewater impoundments, monitoring and control equipment, and potable water systems. At the time the application was received, all of this property was included on the Predetermined Equipment List (PEL). In December of 2009, MHCBC asked the Executive Director to revise the Tier I 100% positive use determination to reflect MHCBC's ownership.¹⁰ No application was received or reviewed by Executive Director staff. On December 3, 2009, the Executive Director issued a revised use determination in error.¹¹ The Executive Director did not mail HCAD notice of the revised use determination. On February 18, 2010, HCAD filed a letter with the TCEQ's Office of the Chief Clerk requesting that the Commission reopen or reconsider the issuance of the positive use determination.

APPELLANT'S CLAIM

HCAD claims that MHCBC is not eligible to receive a positive use determination because:

² See Tex. Tax Code § 11.31(e) and 30 TAC § 17.25.

³ See Tex. Tax Code § 11.31(g).

⁴ See Tex. Tax Code § 11.31(e) and 30 TAC § 17.25(a)(2).

⁵ See 30 Tex. Admin. Code § 17.25(b)(5).

⁶ See Letter from Mark L. Farley, dated March 5, 2010 (Attached as ED's Exh. #1).

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ See Letter from Mark L. Farley, dated March 5, 2010 (Attached as ED's Exh. #1).

¹¹ See Use Determination No. 8262 (December 3, 2009).

1. MHCB is leasing the equipment to Sunrise Chemical; and
2. MHCB does not utilize the property at its facility.

LEGAL ANALYSIS

1. AS A LESSOR OF POLLUTION CONTROL PROPERTY, THE COMMERCIAL WASTE MANAGEMENT EXCLUSION PROHIBITS MHCB FROM RECEIVING A POSITIVE USE DETERMINATION

As a lessor of ENB2, the commercial waste management exclusion prohibits MHCB from obtaining a positive use determination. The relevant portion of Section 11.31(a) of the Texas Tax Code reads:

“A person is entitled to an exemption from taxation of all or part of real and personal property that the person owns and that is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution. 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...” (emphasis added).

30 TAC § 17.6(1) mirrors the second sentence of Section 11.31(a), providing that property is not eligible for a positive use determination “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.” These provisions provide the basis for what has come to be known as the “commercial waste management exclusion.” TCEQ guidelines describe the commercial waste management exclusion as follows:

“Commercial Waste Management Facilities: The statute does not allow a facility to receive an exemption solely because it manufactures or produces a good that is used in pollution control or offers a service that monitors, controls, or reduces pollution. For example, suppose a company operates a hazardous-waste incinerator and contracts with other companies to dispose of their hazardous waste for a fee. The incinerator will not be eligible for a positive use determination since it is considered commercial waste disposal equipment. However, pollution control equipment, such as baghouses or scrubbers needed to comply with environmental regulations while operating the unit, would be eligible. If a company installed and operated an incinerator to dispose of its own waste and did not accept others’ waste for a fee, the incinerator would be eligible for a positive use determination.”¹²

¹² See Property Tax Exemptions for Pollution Control Property, Draft Guidelines Document for Preparation of Use Determination Applications, RG-461, p. 4, September 1, 2009 (Attached as **ED’s Exh. # 2**).

On November 15, 1996, the Texas Attorney General's Office issued Letter Opinion No. 96-128; which, at the request of Representative Tom Craddick, provided the Texas Attorney General's Office's interpretation of Section 11.31(a) of the Texas Tax Code. In examining the legislative history of Section 11.31(a), the Attorney General's Office noted:

*“A consideration of the legislative history of this provision demonstrates that it was not intended to give tax relief to those who are primarily engaged in the commercial business of pollution control or abatement, but rather **was intended to give such relief to businesses compelled by law to install or acquire pollution control equipment which generates no revenue for such businesses...***

The hearings on H.B. 1920 and H.J.R. 86 before the House Ways and Means Committee, as well as the House Research Organization's bill analysis, make plain that the purpose of the legislation is to insure that businesses required by law to install pollution control equipment which generates no additional profit for them are not taxed on such property. H.P. Whitworth of the Texas Chemicals Council, testifying for the bill, said, “The [pollution control] equipment we are talking about today does not produce a penny of revenue. It's in there simply for the welfare as we see it of the general population. And anybody that adds it to his plant or his business cannot expect that investment to return him anything...

The plain language of the second sentence of section 11.31(a), as well as the legislative history of the section as a whole, demonstrates clearly that the purpose of the statute is tax relief for businesses required by law to use or possess pollution control devices or equipment. The statute was not intended to provide a tax exemption to businesses which are engaged for profit in the commercial trade of pollution control or abatement.” (emphasis added).¹³

MHCB owns ENB2 and the associated pollution control equipment which comprises Use Determination No. 8262.¹⁴ MHCB leases ENB2 and the associated pollution control equipment to Sunrise Chemical in return for lease payments. As such, MHCB is providing a service that that prevents, monitors, controls, or reduces air, water, or land pollution at Sunrise Chemical's Bayport Facility; and is ineligible to receive a positive use determination under the plain language of 11.31(a) and 30 TAC §17.6(1).

The Executive Director has consistently applied this interpretation of Tex. Tax Code 11.31(a) to other lessors of pollution control property.¹⁵ For example, Use Determination Application No. 13702 was filed by WAM BE, an asphalt manufacturing equipment

¹³ Letter Opinion No. 96-128, Tex. Attorney General's Office (November 15, 1996) (Attached as ED's Exh. #3).

¹⁴ Letter from Mark L. Farley, dated March 5, 2010 (Attached as ED's Exh. #1).

¹⁵ See Use Determination Application No. 13702, June 23, 2009 Notice of Deficiency (NOD), July 21, 2009 Email from Mark Drezda to Ron Hatlett, July 23, 2009 NOD Response, Use Determination No. 13702 Technical Review Document, and Use Determination No. 13702 (Attached as ED's Exh. #4).

leasing company, seeking a Tier I 100% positive use determination for a baghouse dust collection system leased to Ironhorse Asphalt, a manufacturer of asphalt. The application was declared administratively complete on June 15, 2009, and technical review began on June 19, 2009.¹⁶ On June 23, 2009, Executive Director staff issued a Technical Notice of Deficiency (NOD) stating, "The business description lists this company as being an equipment leasing company. Who owns the baghouse? Who owns the asphalt plant?"¹⁷ On July 23, 2009, WAM BE's representative responded that "WAM BE owns all property included on this application as well as all property physically located at this facility, which includes both the baghouse and the asphalt plant. WAM BE is the lessor, and Ironhorse Asphalt is the lessee of this equipment."¹⁸ On August 18, 2009, the Executive Director issued a negative use determination, stating "Section 11.31(a) of the Texas Tax Code requires that the person own the property and use it for pollution control. The owner of this property leases it to another party who uses it as pollution control property."¹⁹ The Executive Director's Technical Review Document described the reasoning behind the final negative determination as follows: "The property is owned by WAM BE and leased to Ironhorse Asphalt which operates the facility. As the owner of the baghouse WAM BE is providing a service of controlling pollution and the property is not eligible for [a] positive use determination."²⁰ The use determination at issue is analogous to Use Determination No. 13702, and the current appeal should be decided in a manner that is consistent with the Executive Director's decision in that matter.

CONCLUSION

After careful consideration of the appeal filed by HCAD on Use Determination Number 8262, the Executive Director concludes that its positive use determination was issued in error. As a lessor of pollution control equipment, the commercial waste management exclusion prohibits MHCB from obtaining a positive use determination. The Appellant has raised this issue in their appeal, and has provided the legal basis upon which the Commission should reverse the Executive Director's use determination in this case.

Accordingly, the Executive Director respectfully requests that the Commission grant the instant appeal and remand the matter back to the Executive Director for the issuance of a negative use determination.

Respectfully submitted,
Texas Commission on Environmental
Quality

Mark R. Vickery, P.G.
Executive Director

¹⁶ See Use Determination No. 13702 Technical Review Document (Attached as ED's Exh. #4).

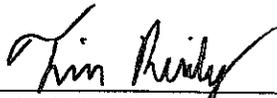
¹⁷ See June 23, 2009 NOD (Attached as ED's Exh. #4).

¹⁸ See July 23, 2009 NOD Response (Attached as ED's Exh. #4).

¹⁹ See Use Determination No. 13702 (Attached as ED's Exh. #4).

²⁰ See Use Determination No. 13702 Technical Review Document (Attached as ED's Exh. #4).

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REPRESENTING THE EXECUTIVE
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QUALITY

CERTIFICATE OF SERVICE

I certify that on April 6, 2010 an original and seven copies of the "Executive Director's Response to Harris County Appraisal District's Appeal of the Executive Director's Positive Use Determination" was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, and a complete copy was transmitted by mail, facsimile, electronic mail or hand-delivery to all persons on the attached mailing list.


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