

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*

July 20, 2010

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: **MIZUHO CORPORATE BANK MHC (USA)**  
**TCEQ DOCKET NO. 2010-0252-MIS-U**

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Appeal of Positive Use Determination in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Amy Swankholm".

Amy Swankholm, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY To: PUBLIC INTEREST COUNSEL, MC 103 P.O. Box 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

**TCEQ DOCKET NO. 2010-0252-MIS-U**

<b>USE DETERMINATION</b>	<b>§</b>	<b>BEFORE THE</b>
<b>APPLICATION NO. 8262, MIZUHO</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>CORPORATE BANK MHCB (USA)</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

**OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO APPEAL OF POSITIVE USE DETERMINATION**

**To the members of the Texas Commission on Environmental Quality:**

The Office of the Public Interest Counsel (OPIC) files this response to the MHCB (USA) Leasing and Finance Corporation's (Mizuho) appeal of the Executive Director's (ED) use determinations regarding Mizuho Corporate Bank MHCB (USA)'s use determination for Application No. 8626.

**I. BACKGROUND**

On February 15, 2010, the Harris County Appraisal District (Harris County) filed an appeal of a use determination on Application No. 8262. The use determination was originally issued in 2005. By letter dated December 3, 2009, the ED approved a request to change the company name on the use determination. A new use determination, issued under the name of Mizuho Corporate Bank MHCB (USA) and backdated to February 23, 2005, was included with the December 3, 2009 letter.<sup>1</sup>

On April 28, 2010, the Commission considered Harris County's appeal and determined to set aside the ED's revised positive use determination, because the determination was not issued in accordance with applicable statutes and rules. It then remanded the matter to the ED for a new use determination.

On May 25, 2010, the ED issued a new negative use determination Mizuho. It issued a negative use determination because Mizuho, the owner of the ENB units and the pollution control equipment at issue, is not required by law to use or possess the pollution control equipment associated with the ethylidene norbone production (ENB) units. Mizuho leases the

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<sup>1</sup> Letter to Nisseki Chemical from Ron Hartlett of the TCEQ's Chief Engineer's Office, dated December 3, 2009, a copy of which was included in Harris County's appeal.

ENB units and pollution control equipment to Sunrise Chemical, the company required to use or possess the pollution control equipment. Therefore, the ED concluded that Mizuho is not eligible to receive a positive use determination under Texas Tax Code (TTC) § 17.6(1) because Mizuho 1) is providing a service that prevents, monitors, controls, or reduces air, water, or land pollution at Sunrise Chemical's Bayport Facility; and 2) is participating in the commercial trade of pollution control equipment.

On June 16, 2010, Mizuho filed a timely appeal of the ED's negative use determination. Mizuho claims that it 1) is not providing a service that prevents, monitors, controls, or reduces air, water, or land pollution at Sunrise Chemical's Bayport Facility; and 2) is not participating in the commercial trade of pollution control equipment. In addition, it claims that the ED does not appear to have considered the economic impact of issuing a negative use determination. Mizuho then requests that the Commission remand the matter to the ED for a positive use determination or alternately, consideration of the economic impact of a negative use determination.

## **II. APPLICABLE LAW**

Under §17.25, an appraisal district or applicant has 20 days to appeal a use determination issued by the ED. 30 Texas Administrative Code (TAC) §17.25(a)(2)(A) and (B); 30 TAC §17.25(b). Upon a timely appeal, the Commission may either "deny the appeal and affirm the ED's use determination" or "remand the matter to the ED for a new determination." 30 TAC §17.25(d)(2). Should the Commission remand the use determination, the ED shall conduct a new technical review and issue a new use determination. 30 TAC §17.25(e)(1)(A) and (B). This determination is administratively appealable under the same Chapter 17 procedures as the initial determination. 30 TAC §17.25(e)(2). If the Commission denies the appeal and affirms the use determination, this decision is final and appealable. 30 TAC § 17.25(d)(3).

The TPTC and the TAC require the ED to, as soon as practicable, send notice by regular mail to the chief appraiser of the appraisal district for the county where the property is located. 30 TAC §17.12(1); *see also* Texas Property Tax Code (TPTC) § 11.31(d). The ED is also required to send a copy of the use determination letter issued by the ED. 30 TAC § 17.12(4)(C); *see also* TPTC §11.31(d).

### III. ANALYSIS

#### A. The ED properly issued a negative use determination.

When the initial positive use determination came before the Commission, the ED argued that he should not have issued a positive use determination, and recommended the Commission remand the matter so the ED may properly issue a negative use determination. In his brief, the ED explained that Mizuho would not be eligible for a positive use determination because it falls within what is known as the “commercial waste management exclusion.” The commercial waste management exclusion does not allow a facility to receive a tax exemption solely because it manufactures or produces a good used in pollution control or offers a service that monitors, controls, or reduces pollution.

OPIC supports the ED’s application of the “commercial waste management exception” to this situation. 30 TAC § 16.6(1) states that:

The following are not exempt from taxation and are not entitled to a positive use determination under this chapter:

(1) 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.<sup>2</sup>

The ED has issued guidance documents explaining this exemption and interpreting the rule to include situations similar to this.<sup>3</sup> The ED has also issued negative use determinations to companies leasing pollution control equipment in situations almost identical to this one.<sup>4</sup>

Mizuho is essentially offering services to Sunrise Chemical. Under 30 TAC § 16.6(1), “property is not entitled to an exemption from taxation solely on the basis that the property is used to...provide a service that prevents, monitors, controls, or reduces air, water, or land pollution.” Mizuho is providing a service by renting pollution control equipment to Sunrise

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<sup>2</sup> See also TTC § 11.31(a).

<sup>3</sup> Property Tax Exemptions for Pollution Control Property, Draft Guidelines Document for Preparation of Use Determination Applications, RG-461, p. 4, September 1, 2009.

<sup>4</sup> *ED’s Response to Harris County Appraisal District’s Appeal of the ED’s Positive Use Determination*, p. 4-5, April 6, 2010 (OPIC’s Attachment A).

Chemical. Therefore, Mizuho is not eligible to receive a tax exemption for the pollution control equipment it is leasing to Sunrise Chemical.

## **B. Economic Impact**

Mizuho questions whether the ED should have considered the economic impact of issuing a negative use determination. Such an inquiry would be contrary to the legislative intent of the Texas Tax Code, under which this program is administered, as well as TCEQ rules. It would also require the ED to alter its review methods.

TCEQ rules do not require the ED to determine the economic impact of a positive or negative use determination. The rules lay out a process that is primarily focused on determining whether the equipment in question offers an environmental benefit, not an economic benefit. In fact, companies that are able to generate a marketable byproduct from their pollution control equipment are prohibited in some instances from receiving a 100% positive use determination. 30 TAC 17.17(c).

In addition the Texas Attorney General's Office, in Letter Opinion No. 96-128 states that the tax exemption Mizuho has applied for was "intended to give relief to businesses compelled by law to install or acquire pollution control equipment which generates no revenue for such businesses..." It also states that "[t]he 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."<sup>5</sup>

The economic impact of this program was considered by the legislature when it was debating whether to adopt this program. These statutes and rules were set up to prevent economic hardship in companies required to purchase and maintain expensive equipment that benefits the public generally. The program was not intended to confer an economic benefit on companies that choose to engage in the business of leasing pollution control equipment for profit.

By granting tax exemptions to companies required by law to possess and operate pollution control equipment, the legislature is effectively denying public taxing entities' tax revenue that otherwise they would be collecting. But this tax exemption is justified because it rewards companies for complying with laws that ensure clean air and water for the citizens of

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<sup>5</sup> Letter Opinion No 96-128, Tex. Attorney General's Office (November 15, 1996).

those same entities. Through this exchange, the denial of tax revenues to public taxing entities is justified. But this justification does not apply in this situation. Municipalities should not be denied tax revenue in favor of a finance company that leases pollution control equipment, and therefore squarely fits within one of the exemptions in TTC § 11.31(a) and 30 TAC § 16.6. By issuing negative use determinations to companies that lease pollution control equipment to other companies that utilize the equipment, the ED is administering this program in a manner consistent with the rules and the intent of the legislature.

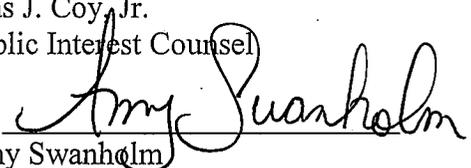
In addition, to determine the economic impact of a positive or negative use determination may require extensive financial information about the applicant. This information is not currently required to be submitted to the ED. Mizuho asks the ED to conduct a review based on information it does not have. Further, use determinations are currently issued by the Air Quality Division of the TCEQ. Although this area is well equipped to handle the technical review necessary to determine what constituted pollution control equipment, this area may not be equally equipped to conduct potentially detailed financial reviews. Therefore, OPIC concludes that the ED reviewed this matter in a manner consistent with the governing rules and correctly issued a negative use determination.

#### IV. CONCLUSION

For the reasons discussed above, OPIC supports the ED's negative use determination and recommends that the Commission deny Mizuho's appeal.

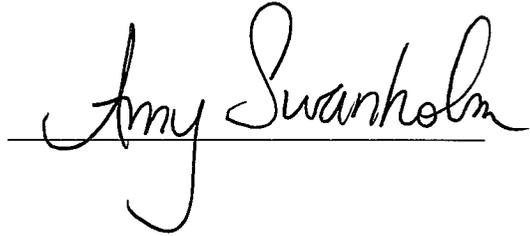
Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 20, 2010, the original and seven true and correct copies of the foregoing document were filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.

A handwritten signature in cursive script that reads "Amy Swanholm". The signature is written over a horizontal line.

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