

FILED

JUL - 2 2015

HEARING BOARD
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

1
2
3
4
5 **BEFORE THE HEARING BOARD OF THE**
6 **BAY AREA AIR QUALITY MANAGEMENT DISTRICT**
7 **STATE OF CALIFORNIA**

8
9 In the Matter of the APPEAL of)
10 VALERO REFINING COMPANY -) Docket No. 3667
CALIFORNIA)
11 From the Final Decision on the)
12 Banking of Emission Reduction Credits,)
Issued November 21, 2014)
13)
14 Re: Valero Benicia Refinery, Facility No. 12626)
_____)

15
16 The above-captioned matter is an Appeal by Valero Refining Company – California
17 (“Valero”) from the Final Decision by the Air Pollution Control Officer (“APCO”) of the Bay
18 Area Air Quality Management District (“Air District” or “District”) on Application No. 24330,
19 an application to bank emission reduction credits under the Air District’s emissions banking
20 program in District Regulation 2, Rule 4. The Appeal was filed on December 17, 2014.

21 The matter came on regularly for hearing on April 30, 2015, and was continued for
22 further hearings that were held on May 7, May 14, May 28, and June 4, 2015. All of the hearings
23 were duly noticed in accordance with the Hearing Board’s rules and other applicable legal
24 requirements.

25 Michael S. McDonough, Esq., John T. Hansen, Esq., and Alina J. Fortson, Esq., of
26 Pillsbury Winthrop Shaw Pittman, LLP, appeared for Appellant.

27 Alexander G. Crockett, Esq., appeared for Respondent.

28 At the hearings, the parties offered testimony from their respective witnesses (Donald

1 Cuffel and Susan Gustofson for Valero; Pamela Leong for the APCO) as well as documentary
2 evidence for consideration by the Hearing Board. The Hearing Board also provided an
3 opportunity for interested members of the public to speak on the matter pursuant to Health &
4 Safety Code Section 40828, but no members of the public came forward to be heard.

5 Based on all of the evidence and argument submitted in this matter, the Hearing Board
6 states the reasons for its decision and finds as to those matters before it for adjudication as
7 follows:

8 **FACTS AND BACKGROUND OF APPEAL**

9 This matter involves an application by Valero to bank emission reductions from two
10 Pipestill furnaces (Sources S-3 and S-4) that Valero shut down and removed from service.
11 Valero replaced these two Pipestill furnaces as part of the “Valero Improvement Project” (“VIP
12 Project”). The furnaces burned flue gas rich in carbon monoxide (“CO”) from Valero’s fluid
13 catalytic cracking unit and fluid coker. The VIP Project involved a number of actions that
14 benefitted the refinery, allowed Valero to comply with the requirements of a Consent Decree
15 entered into between Valero and the United States Environmental Protection Agency, and
16 resulted in voluntary, real, permanent, quantifiable and enforceable emissions reductions. These
17 actions included, among other things, replacing the two CO furnaces and their connected
18 abatement devices – electrostatic precipitators (“ESPs”) – with new, more efficient Pipestill CO
19 furnaces (S-1059 and S-1060); installation of selective catalytic reduction units to abate nitrogen
20 oxides (“NOx”) from the CO furnaces; installation of a new waste heat boiler to generate steam
21 without burning fossil fuels; installation of a Belco pre-scrubber to abate particulate matter
22 greater than 10 microns in aerodynamic diameter (“PM₁₀”); and installation of a Cansolv
23 scrubber to abate sulfur dioxide (“SO₂”) emissions from both the fluid catalytic cracking unit and
24 the fluid coker.

25 The VIP Project required a New Source Review (“NSR”) permit from the Air District
26 pursuant to District Regulation 2, Rule 2 (Permits – New Source Review). Valero submitted an
27 application for the NSR permit in 2008. The APCO determined the NSR permit application to be

28 /// ///

1 complete as of May 16, 2008. The NSR permit application was designated Application No.
2 16937.

3 The APCO prepared an Engineering Evaluation for the VIP Project NSR permit in
4 December 2008 and, that same month, issued Valero the NSR permit for the VIP Project –
5 known as an “Authority to Construct.” The APCO subsequently issued a revised Engineering
6 Evaluation for the VIP Project NSR permit in May 2009.

7 Valero sought to use some of the voluntary emission reductions from the shutdown of S-3
8 and S-4 as contemporaneous emission reduction credits in order to satisfy the “offsets”
9 requirements in the District’s NSR rule. The Engineering Evaluations and NSR permit reflected
10 that the APCO calculated emissions reductions from the VIP Project by comparing post-change
11 emissions as limited by the NSR permit with a “baseline” period set by the District. The APCO
12 calculated the amount of credit available for use in connection with the NSR permit based on the
13 average emissions from S-3 and S-4 during the “baseline period,” which is defined in Regulation
14 2-2-605 as the “the 3 year period immediately preceding the date that the application is complete
15” (District Reg. 2-2-605.1.) The APCO selected April 2005 to March 2008 as the baseline
16 period, which was the 36-month period of complete, actual emissions data immediately
17 preceding the completeness date of the NSR permit application.

18 Valero subsequently went forward and implemented the VIP Project. Valero shut down
19 the old CO furnaces and their connected ESPs on December 31, 2010, and began operating the
20 newly-installed equipment in February of 2011.

21 Subsequently, in 2012, Valero submitted a banking application seeking to bank the
22 additional voluntary emission reductions generated by the shutdown of the CO furnaces from the
23 VIP Project pursuant to District Regulation 2, Rule 4 (Permits – Emission Banking). The
24 banking application used the April 2005 to March 2008 baseline period used for the VIP Project
25 NSR permit. The APCO determined the banking application to be complete as of May 15, 2012.
26 The banking application was designated Application No. 24330.

27 To determine the amount of emission reduction credits that Valero was eligible to bank
28 under Application No. 24330, the APCO applied District Regulation 2-2-605 (Emission

1 Calculation Procedures, Emission Reduction Credits). Regulation 2-2-605 provides that the
2 amount of bankable emission reduction credits is based on the emissions from S-3 and S-4
3 during a “baseline period,” again defined as the “the 3 year period immediately preceding the
4 date that the application is complete” (District Reg. 2-2-605.1.) In its proposed and final
5 decisions on Valero’s banking application, the APCO interpreted this provision to mean that the
6 baseline period for Application No. 24330 was the 3-year period immediately preceding the date
7 that Application No. 24330 was complete, which was May 15, 2012. The APCO therefore used a
8 baseline period of May 15, 2009 through May 14, 2012. Because Sources S-3 and S-4 were shut
9 down on December 31, 2010, the baseline period included 16½ months of non-operation of those
10 sources, during which time there were no emissions. This period of zero emissions reduced the
11 average emissions during the baseline period, and therefore the amount of emission reduction
12 credit that Valero could bank.

13 The APCO evaluated Application No. 24330 on this basis, and based thereon issued a
14 proposed decision to partially approve Application No. 24330 and grant banking credit to Valero
15 in the amount of 2,433.37 tons per year of SO₂ emissions, and no NO_x, PM₁₀ or precursor
16 organic compound (“POC”) credits. The APCO provided public notice and an opportunity to
17 comment on the proposed decision pursuant to District Regulation 2-4-405. The APCO received
18 comments from Valero and one other member of the public. The APCO considered the
19 comments received, and then issued the final decision to partially approve Application No.
20 24330 to award banking credit to Valero in the amount of 2,461.3 tons per year of SO₂ and 7.11
21 tons per year of POC, and no credit for NO_x and PM₁₀.

22 Valero objected to the APCO’s determination of the baseline period in this manner.
23 Valero argued at several points during the banking application process, including during the
24 public comment period, that the end of the baseline period for the banking application should
25 have been the date that the NSR permit application (Application No. 16937) for the VIP Project
26 was complete in 2008, not the date that the banking application (Application No. 24330) was
27 complete in 2012. Valero commented to the APCO that setting the baseline period for the
28 banking application to end in 2012 instead of 2008 would mean that the period of non-operation

1 of Sources S-3 and S-4 after they were shut down would be included in the baseline, which
2 would result in lowered average emissions during the baseline period and a correspondingly
3 lowered amount of bankable emission reduction credit.

4 Valero also raised two additional points during the public comment period that are
5 relevant to this Appeal. First, Valero stated that it no longer intends to build the Hydrogen Plant,
6 which was one of the elements of the VIP Project that was included in the NSR permit for the
7 VIP Project. Valero asked to be awarded additional banking credit for emission reductions from
8 the shutdown of Sources S-3 and S-4 that were used for the permitting of the Hydrogen Plant.
9 The APCO stated in the Response to Comments document that it agreed with Valero on this
10 point, and so it issued a second banking certificate in the amount of an additional 27.95 tons per
11 year of SO₂ emissions and 7.11 tons per year of POC emissions, which was conditioned upon
12 Valero making an enforceable commitment not to build the Hydrogen Plant by either
13 relinquishing its permit or allowing the permit to expire without being renewed. With this
14 additional credit, the APCO's final decision was to award Valero a total of 2,461.3 tons per year
15 of SO₂ credits and 7.11 tons per year of POC credits, and no credit for NO_x and PM₁₀.

16 Second, Valero stated that the APCO used an incorrect PM₁₀ emission factor in the
17 calculations of how much PM₁₀ credit was available for banking. The APCO stated in the
18 Response to Comments that this issue was moot, because regardless of which PM₁₀ emissions
19 factor is used (the APCO's emissions factor or the alternative emissions factors offered by
20 Valero), there was no PM₁₀ credit left for banking in any event. Valero stated in its Appeal that
21 the APCO erred with respect to these two issues as well.

22 STANDARD OF REVIEW

23 The Hearing Board's decision in this Appeal is governed by Section 3.6 of the Hearing
24 Board's rules, which provides as follows:

25 The traditional legal presumption is one of the correctness of a regulatory
26 agency's action. California Evidence Code Section 664 ("It is presumed that
27 official duty has been regularly performed.") The Board may not readily
28 substitute its judgment for that of the District's expertise. The Board's role is to
determine whether the APCO's interpretation of the applicable legal requirements
in its action is fair and reasonable and consistent with other actions of the APCO
and whether the APCO followed proper and appropriate procedures and

1 guidelines. The burden of proof in an appeal is on the party challenging the
2 APCO's action or finding. California Evidence Code Section 660.

3 The scope of the Hearing Board's review is deference to the District's
4 determination with the burden on the Appellant(s) to show the District's action
5 was erroneous. Specifically, it is the Board's task to determine whether the
6 agency's interpretation of its duty was reasonable and if its performance of that
7 duty was regularly performed.

8 The Hearing Board applied this standard in reaching its decision in this matter.

9 **BASIS AND REASONS FOR DECISION**

10 The parties agree that the amount of emission reduction credit that Valero was eligible to
11 bank is determined by District Regulation 2-2-605 (Emission Calculation Procedures, Emission
12 Reduction Credits).¹ Regulation 2-2-605 provides that the amount of credit that can be banked is
13 based on an emissions "baseline," which is based on a source's emissions during the "baseline
14 period." The parties also agree that the rule stating what period of time comprises the baseline
15 period is set forth in Subsection 1 of Regulation 2-2-605 (Regulation 2-2-605.1), which states (in
16 pertinent part) that "[t]he baseline period consists of the 3 year period immediately preceding the
17 date that the application is complete" The parties disagree on how Regulation 2-2-605.1
18 should be applied to a banking application such as Valero's banking application at issue in this
19 case.

20 The APCO takes the position that the baseline period is the 3-year period immediately
21 preceding the date that the banking application itself was complete. The APCO's position is that
22 where Regulation 2-2-605.1 refers to "the application," it means the application under review to
23 which Regulation 2-2-605.1 is being applied. The APCO's position is that therefore that the
24 baseline period for Application No. 24330 is the 3-year period preceding the date that
25 Application No. 24330 was complete.

26 Valero takes the position that this interpretation of Regulation 2-2-605.1 is unfair,
27 unreasonable, and inconsistent with other actions of the APCO. Valero argues that where
28

26 ¹ The parties agree that the version of the regulations that governed Valero's banking application
27 was the version that was in effect as of the date of the complete banking application – May 15,
28 2012. All references herein to District regulations are to the version that was in effect at the time
of the banking application, except where specifically stated otherwise.

1 Regulation 2-2-605.1 refers to “the application,” the only interpretation of that language that is
2 fair, reasonable and consistent with the APCO’s prior actions and the rulemaking history and
3 policy objectives, is for “the application” to mean the application for the permitting action that
4 made the emission reductions at issue enforceable. Valero argues that in this case, the emission
5 reductions that Valero sought to bank were made enforceable through conditions in the NSR
6 permit, and so the baseline period must be based on the date that the NSR permit application,
7 Application No. 16937, was complete. Valero further presented evidence that it relied on the
8 District’s selection of the April 2005 to March 2008 baseline period to govern both the
9 determination of offset requirements in the NSR permitting action and the calculation of
10 bankable credits in excess of those offset requirements, and in so relying, invested over \$500
11 million in implementing the voluntary emissions reductions in the VIP Project. Valero argues
12 that the APCO’s interpretation of Regulation 2-2-605.1 must be overturned because it was not
13 “fair and reasonable and consistent with other actions of the APCO” pursuant to the Standard of
14 Review set forth in Hearing Board Rule 3.6.

15 Having considered all of the evidence and arguments presented in this matter, the
16 Hearing Board concludes that the APCO’s interpretation of Regulation 2-2-605.1, and its
17 application of that provision in this particular case, was fair and reasonable and consistent with
18 other actions of the APCO. The APCO’s interpretation of Regulation 2-2-605.1 was reasonable,
19 and the APCO applied this interpretation fairly and consistently to Valero in the same manner as
20 it has applied it to other similarly-situated applicants seeking to bank emission reduction credits
21 under similar circumstances. This conclusion is based on the following reasons.

22 First, the APCO’s interpretation of Regulation 2-2-605.1 is a reasonable reading of the
23 language of the regulation. There is nothing unreasonable in interpreting the reference to “the
24 application” in Regulation 2-2-605.1 to mean the particular application under review for which
25 the baseline period is being established. The language of Regulation 2-2-605.1 does not compel
26 Valero’s interpretation – that the reference to “the application” means the application for the
27 permitting action that made the emission reduction enforceable – and the APCO did not act
28 unreasonably in declining to adopt that interpretation.

1 Second, the APCO's interpretation is reasonable in light of the larger context of the two
2 rules in which the baseline emissions calculation provision in Regulation 2-2-605 arises, the
3 NSR permitting rule in Regulation 2, Rule 2 and the emissions banking rule in Regulation 2,
4 Rule 4. The APCO's position is that "application" refers to the NSR permit application in the
5 context of an NSR permit application under Regulation 2, Rule 2; and that "application" refers to
6 the banking application in the context of a banking application under Regulation 2, Rule 4. The
7 APCO's interpretation of Regulation 2-2-605.1 in this manner was reasonable in light of this
8 regulatory context. The regulatory context does not compel Valero's interpretation, and the
9 APCO did not act unreasonably in declining to adopt that interpretation.

10 Third, the APCO's interpretation is reasonable in light of the Air District's statements of
11 how it intended Regulation 2-2-605.1 to apply when the District adopted the current version of
12 the regulation in 2000. When the current version was adopted, the Air District prepared a Staff
13 Report explaining the District's intent behind the amendments being made to Regulation 2 at the
14 time. The Staff Report included comments from the regulated community about what would
15 happen to the emissions baseline in the event that an applicant delayed submitting its banking
16 application for some time after a source was shut down, along with the Air District's responses
17 on the issue. The comments from the regulated community noted that if there was a delay in the
18 submission of a complete banking application after the emission reductions occur, then the
19 emissions baseline will decline and the amount of bankable credit will be reduced. The Air
20 District confirmed that this was indeed how the rule was intended to work, stating that "If you
21 submit your permit application after the rule change, it will reduce the available credits. Very
22 few of the banking applications we have received are for anything other than shutdowns. The
23 rule change will require complete banking applications before reductions occur for full credit; a
24 delay in application will result in a reduction in credit." (APCO Exhibit 24, at p. Comment-9.)
25 These statements of how the Air District intended Regulation 2-2-605.1 to apply in the case of a
26 delayed banking application further support the reasonableness of the APCO's interpretation.

27 Fourth, the APCO's interpretation is reasonable in light of the previous baseline rule that
28 was in effect prior to the adoption of the current rule in 2000. Under the pre-2000 version, the

1 baseline rules stated explicitly that the emissions baseline for a banking application was
2 established using a 12-month period within the five years immediately preceding “the banking
3 application date.” (APCO Exh. 21, at p. 2.) The rules did not provide for the use of a prior NSR
4 permit application completeness date for establishing the baseline for a banking application
5 under any circumstances. Nor did they provide for the use of the application for the permitting
6 action that made the emission reduction enforceable, which is Valero’s interpretation. They
7 stated that the determinative application for establishing the baseline period for all banking
8 applications was the banking application itself, and never any previous NSR permit application.
9 This regulatory history further supports the reasonableness of the APCO’s interpretation.

10 Fifth, the APCO’s interpretation is reasonable in light of the APCO’s treatment of similar
11 applications by other similarly-situated facilities in the past. The parties identified two examples
12 since the current baseline rules in Regulation 2-2-605 were adopted in 2000 that presented the
13 same situation as Valero’s application here – namely, a situation where the applicant
14 implemented an emission reduction pursuant to a project for which the APCO granted an NSR
15 permit, such that the reductions were enforceable under that NSR permit; and then the applicant
16 subsequently submitted a banking application seeking to bank the emission reductions that were
17 generated some time later than the NSR permit application. In both cases, the APCO took the
18 same position on establishing the baseline period under Regulation 2-2-605.1 as the APCO did in
19 this case. In both of these previous examples, the APCO used the banking application as the
20 operative “application” that is used to establish the baseline period, which is how the APCO
21 interpreted and applied Regulation 2-2-605.1 here. In neither case did the APCO use the prior
22 NSR permit application to establish the baseline period, which is what Valero’s interpretation
23 requires. This history of applying Regulation 2-2-605.1 the same way in similar situations in the
24 past further supports the reasonableness of the APCO’s interpretation, and demonstrates that the
25 APCO applied this interpretation to Valero’s banking application in a manner that was fair and
26 reasonable and consistent with other actions of the APCO.

27 The Hearing Board therefore finds that the APCO’s interpretation of Regulation 2-2-
28 605.1, and its application of Regulation 2-2-605.1 to Valero’s banking application in this case,

1 was fair, reasonable, and consistent with other actions of the APCO, for all of the reasons
2 outlined above.

3 Valero presented evidence that notwithstanding these reasons, District staff took a
4 contrary position in connection with the NSR permit issued for the VIP Project and in the
5 subsequent banking application process. The Hearing Board does not find anything from the
6 NSR permitting process or banking application process that would alter the conclusion that the
7 APCO's interpretation of Regulation 2-2-605.1 is reasonable. The APCO's position in
8 Application No. 16937 (the NSR permit application) and in Application No. 24330 (the banking
9 application) was set forth in the Engineering Evaluations for those applications, and in the NSR
10 permit and final banking decision that were issued pursuant to those applications. There is
11 nothing in any of those documents that is inconsistent with the APCO's position that the baseline
12 period for the banking application is based on the date of the banking application itself.

13 Valero also presented evidence that District staff members nonetheless made statements
14 to the contrary during the application review process, and that based on such statements Valero
15 understood that it would be able to use the baseline period from the prior NSR permit application
16 for the subsequent banking application. But there is no evidence that Valero ever confirmed such
17 an understanding in writing. Furthermore, the position of an individual Air District staff member
18 does not bind the agency as a whole, especially in cases where such a position was not reflected
19 in the actual permitting documents that District staff prepared, and where it was not the position
20 that the APCO took in approving the NSR permit application or banking application. The
21 Hearing Board therefore finds that Valero has not demonstrated that the APCO ever took an
22 inconsistent position that would justify a conclusion that the APCO's position in this matter was
23 unreasonable or otherwise improper.

24 Finally, regarding the two additional technical issues Valero raised in its Appeal
25 involving (i) the amount of additional credit to be granted in the event that Valero does not build
26 the Hydrogen Plant and (ii) the correct PM₁₀ emissions factor, the Hearing Board does not find
27 any reason to grant Valero's Appeal as to either of these issues. Although Valero identified these
28 issues in its Appeal as additional grounds for the Appeal, it did not present any substantive

1 evidence or argument in its briefs or during the hearing on these issues. Conversely, the APCO
2 presented evidence and argument explaining how the APCO addressed these two issues and why
3 (i) the APCO acted properly with respect to calculating the amount of additional credit Valero is
4 entitled to in the event it does not build the Hydrogen Plant, and (ii) the question of the correct
5 PM₁₀ emissions factor is moot. The Hearing Board therefore finds that Valero failed to satisfy its
6 burden of proof to demonstrate that the APCO erred in any way with respect to these issues.

7 For all of these reasons, the Hearing Board determined at the hearing that the APCO's
8 Final Decision was reasonable and that Valero's Appeal should be denied. The Hearing Board
9 also made the following additional determinations in connection with its decision to deny the
10 Appeal: (i) that the Hearing Board encourages the Air District to reconsider the fairness of
11 denying banking credits under these circumstances; (ii) that the Hearing Board encourages the
12 Air District make its interpretation of the baseline rules clear to the public and to regulated
13 entities that may be affected by it; (iii) that the Hearing Board encourages the Parties to engage
14 in settlement discussions with the aim of avoiding any need for further litigation regarding this
15 matter.

16 **ORDER DISMISSING APPEAL**

17 THEREFORE, THE HEARING BOARD ORDERS:

18 The Appeal by Valero Refining Co. – California in Docket No. 3667 shall be and hereby
19 is DISMISSED.

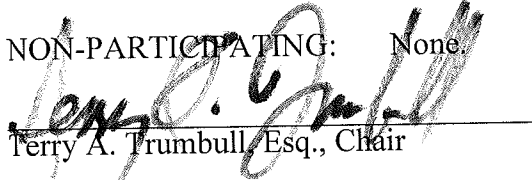
20 Moved by: Peter Y. Chiu, M.D., P.E.

21 Seconded by: Terry A. Trumbull, Esq.

22 AYES: Gilbert G. Bendix, P.E.; Peter Y. Chiu, M.D., P.E.;
Terry A. Trumbull, Esq.

23 NOES: Rolf Lindenhayn, Esq.; Barbara Toole O'Neill

24 NON-PARTICIPATING: None

25 
26 Terry A. Trumbull, Esq., Chair

27 
Date

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

BEFORE THE HEARING BOARD
OF THE
BAY AREA AIR QUALITY MANAGEMENT DISTRICT
STATE OF CALIFORNIA

In the Matter of the Appeal of)
VALERO REFINING COMPANY -) DOCKET NO. 3667
CALIFORNIA,)
From Final Decision on Banking of) CERTIFICATE OF SERVICE
Emission Reduction Credits, Issued)
November 21, 2014 (Plant #B2626).)
_____)

STATE OF CALIFORNIA)
City and County of San Francisco) ss.

I, Sean Gallagher, do hereby certify under penalty of perjury as follows:

That I am a citizen of the United States, over the age of eighteen years and not a party to the above entitled action; that I served a true copy of the attached Order Dismissing Appeal on:

John T. Hansen
Pillsbury Winthrop Shaw Pittman LLP
Four Embarcadero Center, 22nd Floor
San Francisco, CA 94111-5998

by depositing same in the United States certified mail, return receipt requested on July 7, 2015; and on

Brian Bunger
District Counsel
Bay Area Air Quality Management District
939 Ellis Street, 7th Floor
San Francisco, CA 94109

by hand-delivery deposit of same in the in-box of the District Counsel's office, on July 7, 2015.

DATED: July 7, 2015


Sean Gallagher
Clerk of the Boards