

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 OCT 27 PM 4:11

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

CHIEF CLERKS OFFICE

October 27, 2008

Re: **TCEQ DOCKET NO. 2008-0772-WR**, Executive Director's response to hearing requests on Application No. 5840 by City of Waco for the appropriation of return flows and to use the bed and banks in McLennan County, Texas.

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced matter, please find the original and 7 copies of the Executive Director's Response to the Hearing Requests. Please forward this filing to the Office of the General Counsel. If you have any questions, please call me at 239-6257.

Sincerely,

A handwritten signature in black ink, appearing to read "Ross W. Henderson", written over a horizontal line.

Ross W. Henderson,
Staff Attorney
Environmental Law Division

Enclosure

cc: Mailing List

**MAILING LIST
CITY OF WACO
DOCKET NO. 2008-0772-WR; PERMIT NO. WRPERM 5840**

FOR THE APPLICANT:

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FOR ALTERNATIVE DISPUTE

RESOLUTION:

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FOR THE CHIEF CLERK:

Ms. LaDonna Castañuela
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REQUESTERS:

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WITHDRAW OF REQUEST:

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TCEQ DOCKET NO. 2008-0772-WR

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**APPLICATION BY CITY OF WACO §
FOR THE APPROPRIATION OF §
RETURN FLOWS AND TO USE THE §
BED AND BANKS IN MCLENNAN §
COUNTY, TEXAS; APPLICATION §
NO. 5840. §**

**BEFORE THE CHIEF CLERKS OFFICE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

TO THE HONORABLE COMMISSIONERS:

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to hearing request for the City of Waco's (the City or Applicant) application for a new appropriation of water in McLennan County, Texas. The Executive Director supports issuance of the permit if certain special conditions are included. The Executive Director received three hearing requests on the application from the Dow Chemical Company (Dow), Texas Genco II, LP (Now known as "NRG Texas Power, LLC" or "NRG"), and Chocolate Bayou Water Company (Chocolate Bayou). Chocolate Bayou has withdrawn its hearing request. The ED recommends approval of the hearing request from Dow. Finally, NRG's hearing request should be denied on the basis that it was not submitted within the deadline prescribed by the Commission's rules.

1. BACKGROUND

The Application

The City of Waco filed an application (the Application) pursuant to Texas Water Code, Sections 11.121, 11.042 and 11.046. The City seeks to use the bed and banks of the Brazos River, Brazos River Basin, to convey 42,344 acre-feet per year of effluent return flows from the

Waco Metropolitan Area Regional Sewage Wastewater Treatment Plant 14.35 river miles to a downstream diversion point in McLennan County, Texas. The City seeks to divert and use, not to exceed 42,175 acre-feet of the 42,344 acre-feet of return flows for agricultural, industrial, and municipal purposes within the City's current service area. The effluent return flows are 12.9% groundwater-based.

The Executive Director has recommended several special conditions and restrictions on the permit including, but not limited to: requiring that the return flows be actually available; requiring the Applicant to submit and maintain a daily accounting plan; and requiring minimum stream flows before the Applicant may divert water. The ED supports issuance of the permit if the special conditions are included in the permit.

Procedural History

The Application was received on April 21, 2004 and declared administratively complete on July 13, 2004. Notice was mailed to Water Rights Holders in the Brazos River Basin on January 24, 2005 and Newspaper Notice was published on March 5, 2005. The deadline for comment and hearing requests ended 30 days later on April 4, 2005. A timely hearing request was received from Dow on February 18, 2005. A hearing request was also received from Chocolate Bayou on February 2, 2005 and was subsequently withdrawn by Chocolate Bayou on July 20, 2005. After the deadline had expired, a hearing request was also received from NRG on May 18, 2005.

Additional information was submitted by the Applicant on January 6, 2006 and August 24, 2006. The technical review of the Application was complete in August of 2006. On October 20, 2006, the ED submitted a request to have the Application considered for Alternative Dispute Resolution (ADR) at the TCEQ. The Applicant and protesting parties never entered formal

ADR, however, the parties had informal discussions relating to settlement of the case over an extended period. On May 27, 2008, the Executive Director submitted a request to have the matter set before the Commission.

2. RESPONSE TO HEARING REQUESTS

Legal Authority

The application is subject to the procedures for evaluating hearing requests on applications declared administratively complete on or after September 1, 1999 in 30 Texas Administrative Code (TAC) Chapter 55, Subchapter G (Sections 55.250-55.256).

Title 30, Sections 55.251 (b) and (c) of the TAC require a hearing request to:

- (1) be in writing and be filed with the Office of the Chief Clerk during the public comment period;
- (2) give the name, address, and daytime telephone number of the person who files the request;
- (3) identify the person's personal justiciable interest affected by the application including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public; and
- (4) request a contested case hearing.

A hearing request must comply with requirement (1) above and must "substantially comply" with requirements (2) through (4). 30 TEX. ADMIN. CODE § 55.251(c).

A request for a contested case hearing must be granted if the request is made by an affected person and the request:

- (A) complies with the requirements of 30 TEX. ADMIN. CODE § 55.251;
- (B) is timely filed; and
- (C) is pursuant to a right to hearing authorized by law

30 TEX. ADMIN. CODE § 55.255(b)(2).

An “affected person” is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to the general public does not constitute a justiciable interest. 30 TEX. ADMIN. CODE § 55.256(a).

To determine whether a person is an affected person, all relevant factors must be considered, including but not limited to:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) the likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) the likely impact of the regulated activity on the use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TEX. ADMIN. CODE § 55.256(c).

Dow's Hearing Request

A timely hearing request was received from Dow on February 18, 2005. Dow holds senior water rights more than 300 miles downstream from the proposed diversion point (Certificate of Adjudication No. 12-5328. Dow states that it has a personal justiciable interest in ensuring that its senior water rights in the Brazos River Basin are not negatively affected by the granting of this permit. Dow's hearing request complied with all of the requirements of TEXAS ADMIN. CODE § 55.255.

NRG's Hearing Request

A hearing request was received from NRG on May 18, 2005, however, the deadline for such requests lapsed on April 4, 2005. NRG has downstream senior water rights (COA Nos. 12-5325 and 12-5320) approximately 287 miles from the proposed diversion point and downstream contract water rights (CA 235).

Analysis

Dow's request for a contested case hearing meets the requirements in 30 TEX. ADMIN. CODE § 55.251. Dow's hearing request: (1) was filed in writing with the Office of the Chief Clerk before the end of the public comment/hearing request period; (2) provided the Protestants' names, addresses, and telephone numbers; (3) explained how the Protestant believes the application would affect its justiciable interests; and (4) included a specific request for a contested case hearing. Dow also included statements in its request explaining their interest and concerns with the application and proposed permit.

NRG's hearing request was not received within the comment period. Therefore, the hearing

request does not meet the requirement of 30 TEX. ADMIN. CODE § 55.251(1), that the request must be filed in writing with the Office of the Chief Clerk before the end of the public comment/hearing request period. Accordingly, the ED has not evaluated NRG's affected party status. The ED recommends denial of the hearing request based upon the fact that it was untimely.

In order to become a party, a protestant must also be an "affected person." A determination of who is an "affected person" must consider the relevant factors listed under 30 TEX. ADMIN. CODE § 55.256.

**Whether the interest claimed is protected by the
law under which the application will be considered**

Dow has at least one valid permit or certificate of adjudication which entitles it to use State water. The Commission may not grant an application if it would impair existing water rights or vested riparian rights. TEX. WATER CODE § 11.134(b)(3)(B). Dow states that it is concerned that the Applicant's proposed diversions could negatively impact the availability of water in the lower Brazos River Basin to meet Dow's more senior water rights. Dow states that the Application must have "clear safeguards to protect Dow's senior water rights." Dow's senior water rights are clearly protected by WATER CODE § 11.134(b)(3)(B).

**Whether a reasonable relationship exists between
the interest claimed and the activity regulated**

Protecting the Protestant's water rights from impairment is reasonably related to the Commission's consideration of the Applicant's water right application. As stated above, under Section 11.134 of the Texas Water Code, the Commission must consider protection of these

water rights.

3. CONCLUSIONS

Conclusion on Hearing Requests

For the reasons stated above, the Executive Director recommends that Dow's hearing request be granted and NRG's hearing request be denied.

Length of Contested Case Hearing

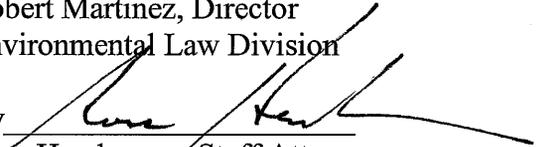
If the Commission decides to grant a hearing request and refer the application to SOAH, the Executive Director recommends that the hearing be no more than six months.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Mark R. Vickery, P.G., Executive Director

Robert Martinez, Director
Environmental Law Division

By 
Ross Henderson, Staff Attorney
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2008, a true and correct copy of the foregoing document was sent by first class, agency mail and/or facsimile to the persons on the attached Mailing List.



Ross Henderson

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ON ENVIRONMENTAL
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