

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

October 27, 2008

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 OCT 27 PM 1:31
CHIEF CLERKS OFFICE

Re: **CITY OF WACO**
TCEQ DOCKET NO. 2008-0772-WR

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Hearing Request in the above-entitled matter.

Sincerely,

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

Amy Swanholm, 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

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: www.tceq.state.tx.us

TCEQ DOCKET NO. 2008-0772-WR

2008 OCT 27 PM 1:31

IN THE MATTER OF THE
APPLICATION OF THE CITY OF
WACO FOR WATER RIGHTS
PERMIT NO. WRPERM 5840

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§

BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUESTS FOR HEARING**

COMES NOW, the Office of Public Interest Counsel ("OPIC") of the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") and files this Response to Requests for Hearing in the above-referenced matter, and would respectfully recommend referring this matter to the State Office of Administrative Hearings ("SOAH").

I. INTRODUCTION

The City of Waco ("Applicant" or "Waco") applied to TCEQ on April 21, 2004, for a Water Use Permit pursuant to Texas Water Code ("TWC") § 11.121, § 11.042, and § 11.046 and 30 Texas Administrative Code ("TAC") § 295.1. Waco intends to use the bed and banks of the Brazos River to convey up to 42,344 acre feet per year ("ac-ft/yr") of return water flows from Waco Metropolitan Area Regional Sewage System Wastewater Treatment Plant's (WMARSS) authorized discharge of 42,344 ac-ft/yr under TPDES Permit No. 11071-001. The maximum diversion rate under the Water Use Permit will be 58.6 cfs (or 26,299.68 gpm). The discharge point is located on the Southwest bank of the Brazos River, approximately 4.5 miles downstream from the crossing of Interstate Highway 35 and the Brazos River. The diversion point is located 14.35 river miles downriver from the discharge point, in McLennan County.

Waco also seeks permission to divert and use up to 42,175 ac-ft/yr of the total 42,344 ac-ft/yr of permitted return flows. This water will be used for agricultural (irrigation), industrial (electric power plant cooling), and municipal purposes within the WMARSS service areas. Although WMARSS is permitted to release 42,344 ac-ft/yr, currently the average discharge is 32,000 ac-ft/yr. Waco estimates there will be a water loss of 0.032% per river mile due to evaporation, seepage, and channel or other associated carriage loss from the point of discharge to

the point of diversion. Waco also seeks authorization to use any future authorized return flows released by WMARSS.

TCEQ received the application on April 21, 2004, and additional fees and information were received on May 20, 26, and June 29, 2004. The Executive Director ("ED") declared Waco's application administratively complete on July 13, 2004. The Applicant published notice of its water rights application on March 5, 2005, in the *Waco Tribune-Herald*, a newspaper of general circulation in McLennan County. The comment and hearing request period ended on April 4, 2005.

TCEQ received three hearing requests on February 2, 2005, February 22, 2005, and May 18, 2005. The February 2, 2005, hearing request by Chocolate Bayou Water Company was withdrawn on July 25, 2005. The hearing request submitted by TexasGen and received by the Chief Clerk's office on May 18, 2005, is not timely and therefore should not be considered by the Commission. The only timely non-withdrawn hearing request was submitted by Dow Chemical Company ("Dow") on February 22, 2005, and raises issues regarding the application's impact on downstream water availability and senior water rights holders. Dow also expresses concern about the priority date stated in Waco's draft permit. Pursuant to the analysis provided below, OPIC recommends granting Dow's hearing request and referring this matter to SOAH for a contested case hearing.

II. APPLICABLE LAW

Persons seeking to appropriate state water or to begin construction of work designed for the storage, taking or diversion of water must first obtain a permit from the Commission to make the appropriation. Texas Water Code ("TWC") § 11.121 (2006). Applications to appropriate unappropriated state water must be made pursuant to the requirements in TWC § 11.124. In accordance with TWC § 11.134, the Commission must consider the following issues in its decision to grant or deny the application: whether unappropriated water is available; whether the proposed appropriation is intended for a beneficial use, does not impair existing water rights or vested riparian rights, is not detrimental to the public welfare, considers assessments performed under § 11.147(d) and (e), 11.150, 11.151, and 11.152, and addresses water supply needs

consistent with the state and applicable regional water plans; and whether the applicant will avoid waste and achieve water conservation. TWC § 11.134(b) (2006).

A person who wants to convey and divert water down a watercourse or stream must also obtain a bed and banks authorization from the TCEQ. TWC § 11.042(c). Someone who is currently discharging water into the bed and banks of a Texas waterway may reuse these existing return flows, but the authorization shall be subject to special conditions. TWC § 11.042(b). These special conditions may address the protection of existing water rights, including certificates of adjudication, that were granted based on the availability of the discharger's return flow. *Id.* In addition, if a person wishes to divert and reuse future groundwater discharges, this authorization must be obtained before the person increases their return flow. *Id.* The commission may also include conditions requiring the return of any surplus water, as necessary to protect senior downstream permits. TWC § 11.046.

A. Requirements for Contested Case Hearing Requests

This application was declared administratively complete on July 13, 2004. As the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Title 30, Chapter 55, Subchapter G, sections 55.250-55.256 of the Texas Administrative Code ("TAC"). Under those provisions, a contested case hearing may be requested by the Commission, the Executive Director, the Applicant, and affected persons. 30 TAC § 55.251(a).

A hearing requestor must make their request in writing 30 days after the publication of the notice of the application and identify the requestor's personal justiciable interest affected by the application, specifically noting the "requestor's location and distance relative to the activity" 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." 30 TAC § 55.251(b), (c); 30 TAC § 295.171.

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." 30 TAC § 55.256(a). 30 TAC section 55.256(c) provides relevant factors to be considered in determining whether a person is affected. These factors include, but are 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) Likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) Likely impact of the regulated activity on 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 TAC § 55.256(c). In addition, governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. 30 TAC § 55.256(b).

The Commission shall grant a request for a contested case hearing if (1) the request is made by the applicant, or (2) the request is made by an affected person, timely filed with the chief clerk, and made pursuant to a right to hearing authorized by law. 30 TAC § 55.255(b). The Applicant may request a direct referral to SOAH, but an application may only be directly sent to SOAH if “the executive director, the applicant, the public interest counsel and all timely hearing requestors agree on a list of issues and maximum expected duration of the hearing.” 30 TAC § 55.254(g).

III. HEARING REQUESTS

A. Dow is an Affected Person.

TCEQ received a timely hearing request contesting Waco's application from The Dow Chemical Company (“Dow”). Dow states in its hearing request that it is a downstream senior water rights holder and that under Certificate of Adjudication No. 12-5328, it is authorized to divert water from the Brazos River in and around Freeport, Texas for use at its Texas Operations facility. Dow states it is concerned the Applicant's permit will negatively impact the water availability in the Lower Brazos River thereby reducing stream flow and impacting Dow's senior

water rights. Dow is also concerned with the priority date used in the draft permit,¹ and the conditions in the draft permit designed to protect the senior water rights holders. Dow contends that granting Waco's permit without clear safeguards to protect Dow's senior water rights would harm Dow's interests.

The Commission may grant an application only when the proposed use will not impair existing water rights.² Therefore, Dow's interest in the potential adverse effects to its existing water rights is protected by the law under which the application will be considered.³ Furthermore, a reasonable relationship exists between the interest claimed and the activity regulated, as Dow states that it holds Certificate of Adjudication No. 12-5328. This Certificate may be impacted by Waco's proposed permit.⁴ Similarly, Waco's proposed appropriation may affect water availability⁵ and, thereby, the regulated activity may impact Dow's use of its own appropriations.⁶ Therefore, Dow's interest in the potential adverse effects to its existing water rights is protected by the law under which the application will be considered.⁷ Based on this showing, OPIC recommends the Commission find Dow is an affected person entitled to a hearing.

IV. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends the Commission grant Dow's contested case hearing request and refer this matter to SOAH for a contested case hearing.

¹ The Draft Permit issued on August 31, 2006, lists the time priority for Waco's right as July 13, 2004.

² TWC § 11.134(b)(3)(B).

³ 30 TAC § 55.256(c)(1).

⁴ 30 TAC § 55.256(c)(3); *see also United Copper v. Grissom*, 17 S.W.3d 797, 803 (Tex.App.-Austin 2000) (citing *Heat Energy Advanced Tech., Inc. v. West Dallas Coalition for Env't'l Justice*, 962 S.W.2d 288 (Tex.App.-Austin 1998, pet. denied)) (stating that the affected person standard "does not require parties to show that they will ultimately prevail on the merits; it simply requires them to show that they will *potentially suffer harm* or have a justiciable interest that will be affected.") (emphasis added).

⁵ 30 TAC § 297.42.

⁶ 30 TAC § 55.256(c)(4), (5).

⁷ 30 TAC § 55.256(c)(1).

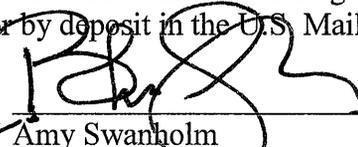
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
Amy Swanholm
Assistant Public Interest Counsel
State Bar No. 24056400
P.O. Box 13087 MC 103
Austin, Texas 78711
(512) 239-6363 PHONE
(512) 239-6377 FAX

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2008, the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


FOR _____
Amy Swanholm

TEXAS
COMMISSION
ON ENVIRONMENTAL
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CHIEF CLERKS OFFICE

**MAILING LIST
CITY OF WACO
TCEQ DOCKET NO. 2008-0772-WR**

FOR THE APPLICANT:

Monica Jacobs
Kelly Hart & Hallman
301 Congress Ave. Suite 2000
Austin, Texas 78701
Tel: (512) 495-6400
Fax: (512) 495-6401

FOR THE EXECUTIVE DIRECTOR:

Todd Galiga, Senior Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

Craig A. Mikes, Technical Staff
Texas Commission on Environmental Quality
Water Supply Division, MC- 160
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-5049
Fax: (512) 239-2214

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-4007

**FOR ALTERNATIVE DISPUTE
RESOLUTION:**

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

REQUESTERS:

Donald McArthur, Vice President of
Environmental Affairs
NRG Texas Power L.L.C.
P.O. Box 4710
Houston, Texas 77210-4710

Steve Morton
Moltz, Morton, O'Toole L.L.C.
106 E. 6th St. The Littlefield Bldg. Ste. 700
Austin, Texas 78701-3659