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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 NOV 10 PM 1:38
CHIEF CLERKS OFFICE
CAROLYN AHRENS
OF COUNSEL

November 10, 2008

Ms. LaDonna Castañuela
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC-105
12100 Park 35 Circle, Bldg F, 1st Floor
Austin, Texas 78753

VIA HAND DELIVERY

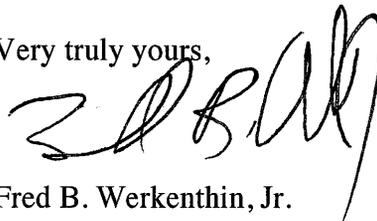
Re: *In re the Application of the City of Waco, Texas*, Water Rights Permit No. 5840;
TCEQ Docket No. 2007-0772-WR

Dear Ms. Castañuela:

Enclosed please find the original and 12 copies of The Dow Chemical Company's Reply to Responses to Hearing Requests regarding the above-referenced matter. Please return a file-stamped copy to the waiting messenger.

Thank you for your assistance in this matter. Please do not hesitate to contact me if you have any questions.

Very truly yours,



Fred B. Werkenthin, Jr.

FBW/cms
Enclosures

cc: Mr. Paul Bork VIA E-MAIL
Mr. Tim Finley VIA E-MAIL
Ms. Julie Woodard VIA E-MAIL

Ms. LaDonna Castañuela
November 10, 2008
Page 2

Ms. Monica Jacobs

VIA FACSIMILE & E-MAIL

Mr. Craig A. Mikes

VIA FACSIMILE

Mr. Ross Henderson

VIA FACSIMILE

Mr. Blas J. Coy, Jr.

VIA FACSIMILE

Ms. Bridget Bohac

VIA FACSIMILE

Mr. Kyle Lucas

VIA FACSIMILE

Mr. Ted Long

VIA E-MAIL

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

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§
§

BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

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CHIEF CLERKS OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**THE DOW CHEMICAL COMPANY’S REPLY TO RESPONSES TO HEARING
REQUESTS**

COMES NOW, The Dow Chemical Company’s (“Dow”) Reply to Responses to Hearing Requests 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 (“Waco”) filed an application to use the bed and banks of the Brazos River to convey 42,344 acre-feet per year of return flows from Waco’s wastewater treatment plant to a point downstream from the Brazos River. Notice was issued on January 24, 2005 and The Dow Chemical Company filed a hearing request on February 18, 2005. Notice was published on March 5, 2005. The City of Waco, The Executive Director for the Texas Commission on Environmental Quality and the Office of Public Counsel for the Texas Commission on Environmental Quality have all filed responses to hearing requests. The following is Dow’s reply to those responses.

A. DOW’S WATER RIGHTS

Dow's water rights are encompassed in Certificate of Adjudication No. 12-5328. Dow is authorized to divert and use from the Brazos River 150,000 acre-feet per annum for industrial and municipal use, 85,000 acre-feet per annum for industrial use, 3,136 acre-feet per annum for municipal use, and 20 acre-feet per annum for domestic and livestock use. Dow is also authorized to divert and use up to 7,500 acre-feet per annum from Buffalo Camp Bayou for

industrial and municipal purposes and 1,800 acre-feet per annum for irrigation purposes and 58,200 acre-feet per annum for municipal and industrial purposes from Oyster Creek.

The priority dates for Dow's Brazos River water rights are February 8, 1929, February 14, 1942, April 4, 1960, and March 8, 1976.

In conjunction with this Brazos River water rights, Dow is authorized to impound water in and divert and use water from Harris Reservoir, a 10,200 acre foot off-channel reservoir and Brazoria Reservoir reservoir, a 21,973 acre foot off-channel reservoir. The priority date for impounding water in Harris Reservoir is February 14, 1942 and the priority date for impounding water in Brazoria Reservoir is April 7, 1952.

Dow uses water obtained pursuant to Certificate of Adjudication No. 12-5328 to provide water for Dow's petrochemical complex in the Freeport / Lake Jackson area, to provide industrial water to other industrial concerns in the area, and to provide municipal water to municipalities in the area. Not having access to water could result in a loss of millions of dollars per day to Dow and others.

II. LEGAL STANDARDS

The legal standards for evaluating hearing requests filed after September 1, 1999 are found in 30 TAC Chapter 55, Subchapter G. Dow filed a written hearing request during the public comment period giving the name, address and daytime phone number of the person filing hearing request. Dow's hearing request established Dow's justiciable interest. The interest claim by Dow is protected by law because Dow owns a water right on the Brazos River. Water rights are vested property rights. *See Tex. Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 647 (Tex. 1971). Diversions by Waco under the proposed permit could reduce the flow of the Brazos River at Dow's diversion points and interfere with Dow's lawfully exercise of its water rights.

III. RESPONSE TO ED AND OPIC

Dow agrees with the ED and OPIC that Dow is an affected person.

IV. RESPONSE TO WACO

The City of Waco's argument on page 9 and 10 of its Response to Hearing Requests is that Dow's hearing request should be denied is wrong legally and factually. The so-called safeguards are in the draft permit and not the notice. The draft permit can change. Note that on page 10 of its Response to Hearing Requests, Waco asks for changes to the draft permit. Further, the neither so-called safeguards in the draft permit nor the distance between Waco and Dow's diversion point prevent Waco's diversions from impairing Dow's use of its water rights. This is discussed further below.

A. PRIORITY

Waco asserts that Dow is protected by the junior priority of Waco's draft permit. Priority is only a theoretical protection. Priority is only a protection if the junior water right holder knows when to reduce its diversions to protect a downstream senior water right holder such as Dow. If Dow's exercise of its water rights is being impaired by out-of-priority diversions by upstream water right holders, it is virtually impossible for Dow to determine which upstream water right holder is causing the problem. There are numerous water rights in the Brazos River Basin above Dow that could impair Dow. In absence of a watermaster, stream flow restrictions in Waco's permit restricting its diversions when those diversions would impair Dow are needed to protect Dow. If upstream diversions by junior water rights are impairing Dow's water, all Dow knows is that the flow is not sufficient at its diversion point. When Dow notices that the water flow is too low at its diversion point to divert water, it must somehow figure out which of these water rights is causing the flow at Dow's diversion point to be reduced. It then would have to notify the upstream water right to reduce its diversions. If the water right causing the problem happens to be the proposed Waco water right, even after Dow notifies Waco to reduce or curtail its diversions, it would take approximately 9 days for the water to make it to Dow's diversion point.

The crux of the problem caused by this and other water rights proposed in the Brazos River to Dow is that the TCEQ staff evaluates the water right applications using its water availability model referred to as the WAM. The WAM is designed to look for unappropriated water. The unappropriated water is not necessarily there 100% of the time. The WAM does not evaluate whether a proposed junior water right will impair an existing senior water right because the WAM is coded to prohibit such a situation. The WAM computes the water available to a proposed new water right by first subtracting each month the water needed to meet all senior water rights. This is not the way that water rights are actually exercised. An upstream junior water right only looks at the flow at its diversion point and any restrictions in its permit. The draft permit proposed by TCEQ allows Waco to divert water meeting all conditions in the permit under conditions that will adversely affect Dow.

It is Dow's position, that for Dow to receive the protection its priority entitles it to a stream flow restriction based on the flow at one of the USGS flow gages in the Lower Brazos River must be added to Waco's permit.

B. STREAM FLOW RESTRICTIONS IN THE DRAFT PERMIT AND DISTANCE

Waco also asserts that the distance between Waco's diversion and Dow's diversion and the streamflow restrictions in the Draft Permit protect Dow. Dow has evaluated the effect of the permit on its water rights and determined that operations by Waco under the permit as drafted will reduce the water available at Dow's diversion point under certain conditions. The distance and the streamflow conditions in the permit may reduce but do not eliminate impairment to Dow's water rights under Waco's draft permit.

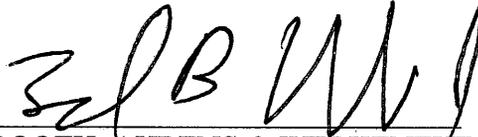
C. ACCOUNTING PLAN REQUIREMENT

Waco asserts that a nonexistent accounting plan should be taken into consideration in determining whether Dow's hearing request should be granted. The Commission must reject this concept. Dow's right to a hearing should be affected by something that does not even exist.

V. CONCLUSION

Dow's hearing request should be granted as the water right described by the notice has the potential to impair Dow's water rights. In addition, Waco's diversion, even operated pursuant to Waco's draft permit, has the potential to impair Dow's water rights.

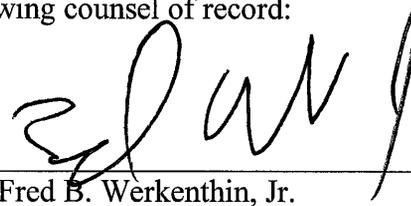
Respectfully submitted:



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ATTORNEY FOR THE DOW CHEMICAL
COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the above and foregoing has been sent on this the 10th day of November, 2008, to the following counsel of record:


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VIA E-MAIL & FACSIMILE

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