



January 31, 2022

Office of the Chief Clerk
Texas Commission on Environmental Quality
Attn.: Agenda Docket Clerk
Mail Code 105
P.O. Box 13087
Austin TX 78711-3087

*Via Electronic Filing
and CMRRR 7021 1970 0001 2753 1523*

**RE: Docket No. 2021-1391-WR
Union Carbide Corporation's Reply to San Antonio Water System's Response to
Contested Case Hearing Requests Regarding Application No. 13098**

Dear Sir/Madam:

Union Carbide Corporation ("UCC"), a wholly owned subsidiary of The Dow Chemical Company, submits the following reply to San Antonio Water System's ("SAWS") response to third-party requests for contested case hearing regarding Application No. 13098.

Procedural History

On September 20, 2021, UCC timely filed a comment and requested a contested case hearing regarding SAWS Application No. 13089 for a bed and banks permit. In that comment and request, UCC explained why it will be affected by the application in ways not common to the general public. Seven commenters also requested a contested case hearing. One of those other commenters also filed a plea to the jurisdiction. On January 14, 2022, SAWS filed a response to the third-party requests for contested case hearing and the plea to the jurisdiction. On the same day, the TCEQ's Executive Director filed a response to these third-party requests for contested case hearing and the plea to the jurisdiction.

SAWS' Response to Requests for Contested Case Hearings

In its response, SAWS generally argues that (1) there is no right to a contested case hearing on a request for bed and banks authorization, and (2) none of the requesters for contested case hearing meet the "affected persons" requirements under Texas law.

TCEQ Executive Director's Response to Requests for Contested Case Hearings

For its part, the TCEQ Executive Director found that all eight requesters, including UCC, met the procedural and substantive requirements for a contested case hearing. Therefore, the Executive

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Director recommended that the application for a contested case hearing be granted by the TCEQ Commission.

Texas Law Does Allow for a Contested Case Hearing in this Scenario

SAWS's arguments that contested case hearings are not allowed for bed and banks authorization requests are fatally flawed. One only needs to look at Texas Water Code §11.132(a):

Notice shall be given to the persons who in the judgment of the commission may be affected by an application, including those persons listed in Subdivision (2), Subsection (d), of this section. The commission, on the motion of a commissioner or on the request of the executive director or any affected person, shall hold a public hearing on the application.

By its very nature, an applicant under §11.042(b) of the Texas Water Code is asking to appropriate return flows that had been considered state water, by trying to prove to the TCEQ that they were derived from privately owned groundwater. In addition, if the accounting is incorrect (both in terms of what portion is truly from privately owned groundwater, or what the transportation losses truly are), water included in a §11.042(b) authorization may in fact include water subject to a prior appropriation. Thus, owners of water rights in that basin "may be affected" by the granting of a §11.042(b) application. Finally, the TCEQ's Environmental Law Division, on behalf of the Executive Director, concluded that a contested case hearing is authorized by law and that the requesters met the requirements of being an "Affected Person."

UCC Clearly Meets the "Affected Person" Requirements

SAWS argues that, because §11.042(b) of the Texas Water Code refers to *privately owned* groundwater, UCC and others are not "Affected Persons" under 30 TAC §55.256. However, this simplistic view belies the complexity involved in proving and properly accounting for what is privately owned groundwater. This is especially true when it comes to water in the Edwards Aquifer since it often represents spring water that later becomes surface water.

UCC is the owner of water rights in the Guadalupe River Basin. UCC also shares water rights with the Guadalupe-Blanco River Authority. UCC's primary diversion point is approximately 3 miles upstream from SAWS' requested diversion point. As UCC understands it, SAWS' supply water includes surface water, Edwards Aquifer ground water that would have become surface water, imported ground water, and captured water. Thus, there is a clear risk to UCC that, on a given day, water discharged and diverted by SAWS would be inaccurately declared as being derived from privately owned ground water and deemed not to be subject to senior water rights.

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In addition, any authorized quantities in the SAWS permit would necessarily be based on the current Water Availability Model ("WAM") to determine if the water requested is in fact available and unique. Because the supply of water in the Guadalupe River Basin during droughts is already very limited, and any inaccuracy in the WAM could adversely affect the reliability of its water supply, UCC must be given an opportunity to challenge the accuracy of the WAM model calculations.


The SAWS diversion of water also creates a risk of saltwater intrusion, which would not be properly mitigated by the small amount of water proposed to be set aside for Environmental flows. This, in turn, would affect the water quality of UCC's water supply. Finally, UCC believes that the proposed provisions for addressing proposed changes to SAWS' diversion point are not adequate given the significant risks to UCC associated with SAWS moving its diversion point further upstream.

Conclusion

For all these reasons, it is clear that the reliability of UCC's water supply may be affected by SAWS' bed and banks permit. Therefore, UCC meets the requirements to be an "Affected Person" and its request for a contested case hearing should be granted.

If you have any questions or require additional information, please contact Carlos Moreno at cmoreno3@dow.com. Thank you for your cooperation in this matter.

Sincerely,



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cc: Submitted electronically at <https://www.tceq.texas.gov/goto/eFilings> (WRPERM 13098)