

**SOAH DOCKET NO. 582-10-4184
TCEQ DOCKET NO. 2005-1490-WR**

CONCERNING THE APPLICATION	§	BEFORE THE STATE OFFICE
BY THE BRAZOS RIVER	§	
AUTHORITY FOR WATER USE	§	OF
PERMIT NO. 5851 AND RELATED	§	
FILING	§	ADMINISTRATIVE HEARINGS

**THE DOW CHEMICAL COMPANY’S LETTER BRIEF REGARDING CERTIFIED
QUESTIONS TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CONCERNING THE BRAZOS RIVER AUTHORITY’S APPLICATION FOR PERMIT
NO. 5851**

COMES NOW, The Dow Chemical Company (“DOW”), and files this brief in support of its position relating to the questions which have been certified in the above-referenced matter from the State Office of Administrative Hearings (“SOAH”).

I.

On October 21, 2013, the SOAH Administrative Law Judges (“ALJs”) certified the following questions to the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) associated with the Brazos River Authority’s (“BRA”) application for water use Permit No. 5851 (“Application”):

1. Commission interpretation of the deadlines established by the Environmental Flows Advisory Committee and Texas Water Code § 11.147(e-3) is needed: Are the timing requirements of these provisions mandatory?
2. Does Texas Water Code § 11.147(e-3) require that newly adopted environmental flow standards be applied immediately, or may their implementation be addressed under a § 11.147(e-1) "reopener" provision?
3. Assuming that timing requirements are directory or that application of new environmental flow standards may be addressed through a "reopener" provision, which environmental flow standard should be applied to BRA's pending application?
4. As a matter of policy, should the Commission consider establishing a "transition rule" for all applications that have been processed through technical review or referred to SOAH for contested case hearing, by which preexisting environmental flow standards might be applied to pending applications, with SB 3 standards subsequently implemented through

Texas Water Code § 11.147(c-1)'s "reopener" provision?

II.

The ALJs certified these questions pursuant to 30 Tex. Admin. Code § 80.131. The pertinent part of this rule provides that, “[c]ertified questions may be made at any time during a proceeding, regarding commission policy, jurisdiction, or the imposition of any sanction by the judge which would substantially impair a party’s ability to present its case.” 30 Tex. Admin. Code § 80.131(b). Policy questions for certification purposes include, but are not limited to “which rules or statutes are applicable to the proceeding.” 30 Tex. Admin. Code § 80.131(b)(2).

III.

The questions certified to the Commission involve interpretation of Texas Water Code § 11.147(e-3). Section 11.147(e-3) of the Texas Water Code states as follows:

Notwithstanding Subsections [11.147](b)-(e), for the purpose of determining the environmental flow conditions necessary to maintain freshwater inflows to an affected bay and estuary system, existing instream uses and water quality of a stream or river, or fish and aquatic wildlife habitats, the commission shall apply any applicable environmental flow standard, including any environmental flow set-aside, adopted under Section 11.1471 instead of considering the factors specified by those subsections.

Although Section 11.147(e-3) of the Texas Water Code requires that environmental flow standards be applied to all permits issued after the adoption of the environmental flow standards, the TCEQ is the decision-maker as to the issuance of the permit as well as the environmental flow standards. The TCEQ may have the discretion to allow a phased approach to implementation of the adopted environmental flow standards, if it finds that the environmental flow conditions in the Application, though different, are not significantly less protective than the adopted standards. BRA would bear the risk that the adopted standards for the Brazos River are

not significantly more stringent than the proposed standards.

IV.

For these reasons, Dow respectfully requests that the proceedings in this matter continue (and not be abated) according to the current Order No. 18 previously established by the ALJs, but require that BRA prove that the conditions in the Application are not significantly less stringent than the Senate Bill 3 standards that are adopted.

Respectfully submitted,



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**ATTORNEY FOR THE DOW
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CERTIFICATE OF SERVICE

I hereby certify, by my signature below, that a true and complete copy of The Dow Chemical Company's Brief Regarding Certified Questions to the TCEQ was served on the following parties of record via e-mail or U.S. regular mail as outlined below on this the 28th day of October 2013.



Fred B. Werkenthin, Jr.

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