

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF )  
OPERATING PERMIT )  
ENGAGE PLANT MODIFICATION )  
DOW CHEMICAL, INC. )  
PLAQUEMINE )  
IBERVILLE PARISH )  
LOUISIANA )  
PERMIT NO. )

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**PETITION FOR OBJECTION TO PERMIT**

The Louisiana Environmental Action Network ("LEAN") brings this Petition for Objection to Permit pursuant to Clean Air Act (CAA or "Act") section 505(b) and 40 CFR 70.8(d). LEAN objects to the decision by the Louisiana Department of Environmental Quality (LDEQ) to issue a Part 70 (Title V) Operating Permit modification to DOW Chemicals, Inc. (DOW) for its Engage Plant Modification in Plaquemine, Louisiana. By issuing this modification, LDEQ is allowing DOW to illegally "bank" and "offset" emission reduction credits; to circumvent the permit procedures and requirements; and to hinder "reasonable further progress" as mandated by the Clean Air Act. This allowance will interfere with the attainment of the National Ambient Air Quality Standards ("NAAQS") for ozone in the Baton Rouge area and further impede the realization of safe and healthy air quality within Louisiana

LEAN is an incorporated, non-profit organization with members living, working and recreating in the Plaquemine area. Its members participated in the DOW Engage plant modification permit proceedings by submitting comments and attending and speaking at the public hearings. LEAN requests that the United States Environmental Protection Agency (EPA) object to the DOW operating permit modification because the permit is not in compliance with all applicable requirements including the Clean Air Act

and federal regulations, Louisiana Air Quality regulations, and substantive and procedural requirements of Louisiana's Nonattainment New Source Review (NNSR) program.

- I. DEQ'S "BANK" OF EMISSION OFFSET CREDITS VIOLATES FEDERAL LAW.
  - A. LDEQ'S ALLOWANCE OF USING CREDITS "AS GENERATED" VIOLATES FEDERAL LAW REQUIRING CREDITS TO BE VALID "WHEN USED."

In July 1999, EPA approved Louisiana's regulations on the banking and use of credits for voluntary emission reduction with the understanding that the credits would be "surplus" at the their time of use. 63 Fed.Reg. 44192, 44200. In other words, past credits must be reduced or eliminated when changes in law render emission reductions mandatory rather than voluntary. Since EPA's approval, however, DEQ has clarified that it "intended, interprets and has applied [its regulations] to prohibit such a reduction in quantity of emission reduction credits" and instead only requires that credits be surplus "when generated" to be valid for crediting. Letter from Bliss Higgins, Assistant Secretary of DEQ, to Carl Edlund, EPA Region VI (10/5/00), at 1.<sup>1</sup> Such an interpretation, though, violates federal law.

Federal law requires that emission reduction credits be surplus at the time of use. Specifically, the Clean Air Act provides that "emission reductions otherwise required by this chapter shall not be creditable as emission reductions for purposes of any such offset requirement." 42 U.S.C. § 7503(c)(2).

EPA has already announced its opinion that Louisiana's "banking" program is illegal. Specifically EPA explained:

Under Clean Air Act section 173(c)(2), ERCs must be surplus at the time they are used as offsets. EPA approved Louisiana's permitting and banking regulations (L.A.C. 33:III.504.F.10 and 623.B.1) on the basis that the regulations required that ERC's must be surplus at the time of use as offsets. Any other interpretation

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<sup>1</sup> This document and others referred to in this comment were submitted to DEQ at the public hearing held on March 6, 2001 for inclusion in the administrative record by Suzanne S. Dickey.

of the State's regulations would not have been consistent with Section 173(c)(2) of the Act, which requires that "emissions reductions otherwise required by the Act" cannot be used as offsets.

In re Operating Permit, Formaldehyde Plant Borden Chemical Inc., Petition No. 6-01-1, at p. 18 (U.S. EPA, Dec. 22, 2000).<sup>2</sup> Therefore "even if an ERC certificate has been validly issued, LDEQ must certify the ERCs as surplus at the time the credits are used to account for any new federal or state statutes, regulations, or permits which establish new baseline emission limits." Id. at 19.

DEQ has acknowledged that its regulations do not meet the standard announced by EPA. Letter from Bliss Higgins, Assistant Secretary of DEQ, to Carl Edlund, EPA Region VI (10/5/00), at 2. DEQ admits that its Emission Reduction Banking System establishes definitions and procedures for calculating credits that set forth a "surplus when generated" approach and further provides for the protection of credits once approved (LAC 33:III.605, 607.G and 621). Yet, still, LDEQ fails to openly change their interpretation; an interpretation that harms public health by permitting emissions to exceed the maximum allowed under federal law. Clearly, DEQ's "bank" is illegal and DEQ may not use the bank until its Emission Reduction Banking System is revised to meet minimum federal standards

## II. DEQ HAS MISMANAGED THE BANK.

EPA has specifically found that "it is difficult to access data documenting the amount of valid CAA offset credits in Louisiana's bank and that there are insufficiencies in the banking database." Joint Motion for Voluntary Remand, LEAN, et al. v. U.S. EPA, 99-60570 (5<sup>th</sup> Cir. October 9, 2000).

DEQ's management provides a confusing array of documents and numbers that show an overall uncertainty as to what is, and what isn't, in the bank. In fact, DEQ itself often does not know what is in the bank and what is not. For example, on March 15,

2000, DEQ submitted to the 19th Judicial District Court a document entitled "VOC Emissions Reduction Credits Banked in The Baton Rouge Ozone Nonattainment Area As of March 13, 2000," which revealed DEQ's lack of record-keeping. Barry Brooks of DEQ certified the list as being a true copy of the books, records, papers, or other documents that were in the custody of DEQ and as being a reflection of the data known by DEQ as of that date. According to DEQ, a total of 6,787.2 emission reduction credits were available for use as offsets or netting, including 4,051.7 listed credits for Dow. However, in the Louisiana emission reduction database, dated one day before DEQ's submission of this document to the court, there were no Dow credits listed. In fact, many of the applications now being put forth by Dow are the exact credits that were already certified as being banked.

This submission by DEQ to a court of law of an obviously inaccurate document destroys DEQ's credibility as the administrator of the bank. This action demonstrates that DEQ's bank is "broken." DEQ cannot even keep track of what credits are in, or not in, the bank.

Given DEQ's inability to keep track of Bank credits or to provide the public with adequate information to determine the validity of credits, DEQ and Dow must affirmatively demonstrate that the credits at issue here are valid. DEQ and Dow have not met that burden.

III. UNTIL LEGALLY REQUIRED CONTINGENCY MEASURES ARE IMPLEMENTED, NO TRANSACTIONS SHOULD BE ALLOWED THAT AFFECT THE EMISSION REDUCTION CREDIT BANK.

Under the Louisiana Administrative Code § 621(B)(1), when a "milestone" has been missed, the state shall confiscate the amount of credits needed to satisfy the missed milestone. Therefore, if Louisiana fails to attain the national standard for ozone or if it fails to make reasonable further progress, the Bank must be used to offset such

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<sup>2</sup> <http://www.epa.gov.rgytgrnj/programs/artd/air/NSR/>

failure. Furthermore, EPA approved the Emission Reduction Bank as Louisiana's contingency measure for its State Implementation Plan. 63 Fed. Reg. 44192. Under the Clean Air Act, sections 172(c)(9) and 182(c)(9), contingency measures must take effect without further action by EPA or DEQ. 42 U.S.C. 7502(c)(9), 7511a(c)(9).

In a letter dated May 10, 2000, Governor Murphy J. Foster stated that "the Baton Rouge nonattainment area failed to attain the 1-hour ozone standard by the required date of November 1999." Yet, despite the contingency measure being required to take effect immediately upon failure to attain the standard under federal law, the credits have not been confiscated and the Bank has not been reduced. Until DEQ performs its legal duty to confiscate credits, DEQ must not allow any new transactions that affect the bank.

#### IV. THE DOW EMISSION REDUCTION CREDITS ARE NOT VALID.

- A. DOW'S APPLICATIONS INVOLVE CREDITS PREVIOUSLY USED FOR THE 15 PERCENT RATE-OF-PROGRESS REQUIREMENT AND AS SUCH ARE INVALID.

Section 182(b)(1) of the Clean Air Act requires all ozone nonattainment areas classified as moderate and above to submit a SIP revision describing, in part, how these areas will achieve an actual reduction in emissions of volatile organic compounds ("VOC") of at least 15 percent during the first six years after enactment of the Act from November 15, 1990 to November 15, 1996. In order to satisfy this requirement, Louisiana's SIP revision included control measures that would be implemented to meet the total required reductions. As approved on October, 22 1996, these control measures included "Vents to Flare," "Tank Fitting Controls" and "Fugitive Emissions Controls." DEQ is now proposing to engage in "double dipping" and use the same credits again to justify increased emissions in an area that already violated minimum health standards.

##### Vents to Flare

EPA credited emission reductions from L.A.C.33.III § 2115 towards the 15 percent rate-of-progress requirement as being permanent and enforceable. Louisiana

estimated a reduction in emissions of 3.7 tons per day between 1990 and 1996 based on this rule. Louisiana's Plan includes Dow as one of the four listed companies at which reductions have occurred and for which Louisiana is taking credit. Dow is listed as incorporating process changes into its polyethylene facility accounting for a 0.2 tons per day reduction of emissions, purported to be an overall reduction of 100 tons per year. These were done in accordance with state permits 2008-M1 and 2008-M2. Yet, Dow is now double dipping and asking to use these same reductions again as credits in VOC Application 6 and VOC Application 11. Per L.A.C. 33.III § 607 and CAA § 173(c)(2), only reductions that are voluntary and surplus may be used as offsets.

#### Tank Fitting Controls

Louisiana added requirements to its VOC storage regulation (LAC 33:III.2103) to control emissions from guidepole wells and stilling well systems in external floating roof storage tanks. In its 15% Rate of Progress Plan, the State takes credit for the reductions resulting from compliance, listing Dow as one of five facilities that would implement controls. Dow is credited as contributing 86 tons per year toward the ROP Plan in Louisiana's report. However, the state permit from which these reductions are enforceable or "taken" is not listed.

Many of Dow's VOC applications take credit for reductions resulting from modification or replacement of tanks. Pursuant to L.A.C. 33.III § 607 and CAA § 173(c)(2), these reductions are not voluntary or surplus and may not be used as emission reduction credits.

#### Fugitive Emissions Controls

This control measure, LAC 33:III.2122, tightens leak detection and repair requirements for several types of industries, including polymer manufacturing. DEQ, with this control measure, neither lists the facilities from which it expects reductions to be credited nor states the expected amount. Instead, it lists all facilities within the Baton

Rouge nonattainment area as contributing 3,794 tons of credits toward its 15 % Rate of Progress.

Any Dow application which relies on fugitive emission controls will be ineligible for use as offsets if already used. Therefore, until these reductions are properly identified and marked as being contributed toward the ROP Plan, no applications may be credited or used as offsets.

**B. DOW'S APPLICATIONS DO NOT MEET THE SURPLUS REQUIREMENTS OF THE CLEAN AIR ACT AND ARE THEREFORE INVALID FOR BANKING OR USE.**

Section 173(c)(2) of the CAA states: "emission reductions otherwise required by this chapter shall not be creditable as emission reductions for purposes of any such offset requirement." 42 U.S.C. § 7503(c)(2). As noted previously, this section requires that credits be surplus when they are used by the offsetting facility, rather than when they are banked. Many of the Dow applications do not meet this requirement as they involve modifications or replacements that are now legally required.

This type of non-surplus application can be seen in applications 8 and 10. These applications involve the installation of two 5 million gallon capacity tanks (EC-3 and EC-4) to replace Environmental Wastewater Ponds EC-1 and EC-2 at the Dow facility. The Environmental Ponds were closed in 1992. Specifically, EC-1 was closed and taken out of service on September 29, 1992 and EC-2 was taken out of service on October 30, 1992.

In September 20, 1995, LAC 33:III.2153, Subchapter M, Limiting Volatile Organic Compound Emissions from Industrial Wastewater was promulgated. Under the rule, "VOC wastewater" stream from an affected source category with either a VOC concentration greater than or equal to 10,000 ppm or to a VOC concentration greater than or equal to 1,000 ppm and a flow rate greater than or equal to 10 liters per minute (2.64 gpm) would have to be controlled. However, wastewater components are exempt

from the control requirements of the rule if, by November 15, 1996, the overall VOC emissions from the wastewater of affected source categories is at least 90 percent less than the 1990 baseline emissions inventory.

Under LAC 33:III.2153.G.4, Dow submitted Notice of Exemption and Submittal of Control Plan requesting exemption status. Since 1990, Dow claims to have reduced VOC emissions by nearly 95% in its wastewater operations because of the aforementioned replacement of the wastewater ponds with the tanks. DEQ approved Dow's exemption provided, however, that Dow maintains a greater than 90% reduction in wastewater emissions.

Therefore, the 90% emission level is actually a requirement imposed upon Dow as a condition of Dow's avoidance of the VOC wastewater rule and Dow cannot legally bank that portion of the emission reduction. If Dow is currently operating at a consistent 93.6% efficiency, the only surplus potentially created is the 3.6% above the 90% required.

These type of "sleight-of-hand" credits, where reductions appear to surplus but are, in reality, reductions that would have been and are required, are illegal. Granting such credits would violate the law and DEQ's duty to ensure cleaner air for the citizens of Louisiana.

**C. THE APPLICATIONS FAIL TO MEET LOUISIANA REGULATIONS AND ARE THEREFORE INVALID.**

In order to be banked, the proposed reductions must meet the requirements of the Emission Reduction Banking System, Louisiana Administrative Code, Title 33, Part III, Chapter 6, and, as these are VOC applications, will often involve Chapter 21, Control of Emission of Organic Compounds .

Application 4 provides an example of how the requirements of Chapter 6 are not being met. New emissions must be compared to the average emissions of two

consecutive years of operation at the plant to determine how much of the reduction may be banked. Any reductions may, if surplus, be banked with DEQ. The two consecutive years must occur within the baseline period as established by DEQ. Specifically, the baseline period "shall be a time period of at least two consecutive years within the five years immediately preceding the date the emission reduction occurred." § 605.

In Application 4, Dow used reports generated in April of 1988 and 1989 to average the emissions from the plant. Reports generated at these times would reflect data collected from April 1987 to April 1988 and April 1988 to April 1989. However, the emission reductions occurred in June of 1994, so the five-year period only extends back to June of 1989. Therefore, the data used by Dow to compare average emissions is invalid, rendering this application invalid.

Another example of misapplication of the regulations is found in Application 9. In this application, Dow requests credit for reduced emissions from its Dock II site. Dow concluded that the Dock II facility was not subject to the Marine Vapor Recovery Rules ("MVRR") (L.A.C. 33:III.2108), since the emissions associated with the ship and barge loading at the site were less than 100 tons per year. Dow has applied to bank the reductions made from complying with the Marine Vapor Recovery Rule at Dock II. However, Dow's combined docking facilities do not meet the exemption requirements and are required to comply with the MVRR.

The Marine Vapor Recovery regulations do not give any suggestion that docking sites may be subdivided for regulation purposes. Instead, the rules state that an affected facility is any marine loading operation with an uncontrolled emission of 100 tons per year. A facility is "the combination of all structures, buildings, equipment and other operations located on one or more contiguous or adjacent properties owned or operated by the same person." L.A.C. 33:III:605. Accordingly, Dow must consider all of its dock sites at the Iberville site as one in determining whether reductions are required.

Because the facility was required to make the reductions, Dock II cannot now be separated out by Dow for emission reduction credit and the application is invalid.

V. ISSUANCE OF THIS PERMIT VIOLATES PERMIT PROCEDURES AND REQUIREMENTS.

A. DOW'S PERMIT APPLICATION MISREPRESENTS AND/OR OMITTS RELEVANT INFORMATION.

Dow has failed to include or misrepresented numerous pieces of relevant information in its application. First, Dow failed to include in its netting analysis an increase in VOC emissions of 119.91 tpy from its Power II plant, which occurred in 1999. Second, Dow failed to include in its netting analysis increased emissions from its polyethelene C plant. Accordingly, this makes Table 4-2 of the application inaccurate. Pursuant to LAC 33:III.517, a permit shall contain, among other things, information regarding emissions from the sources of all regulated air pollutants, including: the identity and location of each point of emissions, the size and height of the outlets of such emissions, the temperature of such emissions, the rate of emissions of each pollutant, in tons per year and in such terms as are necessary to establish compliance consistent with applicable test methods, the composition and description of the air pollutants being emitted from each point. Dow's omission clearly violates §517 of the Louisiana Administrative Code and, under such circumstances, its permit application must be denied. Third, Dow's 4.1.3 statement in its application is incorrect. **As discussed above**, Dow should be using LAER as it has not identified enough valid ERCs to justify reductions at a 1.3:1 ratio. Finally, it is evident that the total emission numbers in Tables 3-1, 3-2, 3-3 and 3-4 of Dow's permit application do not tally with the emission numbers in Table 4-1. Pursuant to LAC 33:III.517(B), a permit applicant must certify the truth, accuracy, and completeness of its application. Dow has not complied.

B. DOW'S PERMIT APPLICATION IS INCOMPLETE AS IT DID NOT PROVIDE A COMPLETED COMPLIANCE CERTIFICATION.

The Louisiana Administrative Code requires permit applicants to complete and submit a certification of compliance along with their application. See L.A.C. 33:III.507 and L.A.C. 33:III.517. Implicit in any certification is a signature attesting to the validity of the statement being made. This is evidenced by the signature line at the end of Dow's compliance certification. However, a representative of Dow Chemical never signed its certification form. This is a violation of express permitting requirements, and a permit cannot be granted under such circumstances.

VI. AS ALL OF THE REDUCTIONS PROPOSED BY DOW, WITH THE EXCEPTION OF VOC-19, OCCURRED MORE THAN FIVE (5) YEARS PRIOR TO THE DATE OF APPLICATION, NETTING IS ILLEGAL AS TO THOSE REDUCTIONS AND CANNOT BE USED IN A NETTING ANALYSIS OF A PART 70 PERMIT MODIFICATION.

A reduction may only be used for purposes of netting within five years of the date it was made. L.A.C. 33:III.605. With the exception of proposed Volatile Organic Compound Reduction #19 (VOC-19) (which does not represent enough emission reductions to proceed with Dow's proposed Engage plant project), this five year time period has expired as to all of the reductions proposed by Dow. Accordingly, the use of netting (beyond the reductions alleged in VOC-19) with respect to the proposed major modification would violate the Louisiana Administrative Code. Furthermore, under Louisiana emission reduction banking regulations, Chapter 6 of Title 33, Part III of the Louisiana Administrative Code, all emission reductions used for netting or offsetting must come from emission reductions already certified by the DEQ as being valid. See L.A.C. 33:III.605 and L.A.C. 33:III 607. Dow Chemical currently has no approved credits in DEQ's bank for use in netting or offsetting. Any netting done prior to issuance of an emission reduction credit certificate is illegal under Louisiana law.

VII. DOW'S APPLICATION FAILS TO COMPLY WITH §173 OF THE CLEAN AIR ACT AND CORRESPONDING PROVISIONS OF THE LOUISIANA ADMINISTRATIVE CODE.

A. DOW HAS FAILED TO COMPLY WITH §173 OF THE CLEAN AIR ACT.

Pursuant to the Clean Air Act, a permit may only be issued to Dow for its major modification in a nonattainment area if five requirements are met. 42 U.S.C. §4503.<sup>3</sup> First, Dow must demonstrate that it has sufficient offsets to proceed with its project and, at the same time, not hinder reasonable further progress. *Id.* Second, Dow must show that it has complied with LAER. *Id.* Third, Dow must prove that all of its other facilities are in compliance. Fourth, Louisiana must be adequately implementing its SIP. *Id.* Fifth, an alternative sites, sizes, processes, and control techniques analysis must demonstrate that the Engage project's benefits outweigh its environmental and social costs. *Id.*

Dow has not shown that the Engage plant will not hinder reasonable further progress.

For the reasons set forth in Sections IV and VI, *supra*, and Section X, *infra*, Dow has not demonstrated that it has sufficient offsets to ensure reasonable further progress in the Baton Rouge nonattainment area.

The Engage plant does not comply with LAER.

As discussed in Section V(A), *supra*, Dow has not complied with LAER. It has deliberately circumvented implementation of such controls without meeting the requirements for doing so.

Dow has not proven that its other facilities are in compliance.

Either in its application or by way of attachment, Dow has not shown that its other facilities are in compliance with federal and state requirements.

LDEQ has not adequately implemented its SIP

As discussed in Section VIII, *infra*, EPA has determined that LDEQ has failed to properly implement its SIP.

Dow did not conduct an alternative sites, sizes, processes, and control techniques analysis, and, for that reason it has not demonstrated that the Engage plant's benefits outweigh its environmental and social costs.

Dow never considered alternative sites or projects when addressing this issue. In its application, it repeatedly notes the benefits of the site it has chosen (notably, part of an existing facility), but never discusses other sites or their inadequacies. Additionally, Dow does not assert that it considered alternative projects in its application; it simply praises the wonders of its Engage project. Given Dow's failure to address this issue, there is no reason for LDEQ to approve the permit modification. Without having considered alternative sites or projects, Dow has given LDEQ no basis to conclude that other sites or projects would not provide more protection to the environment.

Even if alternative sites and projects had been considered, the adverse environmental effects of the modification significantly outweigh its economic benefits, if any. Dow dismissed this requirement of the Clean Air Act as inapplicable, neither addressing the benefits, nor the adverse harm of the Engage plant. Apparently, Dow felt that expanding an existing unit somehow exempted it from federal law. This simply is not the case. The reason for Dow's avoidance of this analysis has nothing at all to do with a misunderstanding of the Clean Air Act, however. Quite to the contrary, Dow knows that if it was to undertake this analysis, it would prove what it already suspects: the environmental will be significantly harmed by the Engage plant, and the economic benefits of that facility, if any, are uncertain.

As Dow's ERCs are invalid and reasonable further progress would be hindered by the proposed modification, adverse environmental impacts have not been avoided, even minimally. Increasing emissions in a nonattainment area without reducing any emissions is a guaranteed way to prevent improvement in air quality and, in turn, harm

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<sup>3</sup> This provision was adopted by the Louisiana legislature in its air regulations. L.A.C. 33:III.504(D). Accordingly, as discussed in the following section, in addition to violating federal law, Dow's permit

the environment. Additionally, the fact that Dow has circumvented the implementation of LAER (which would require better controls on Dow's emissions than are currently in place), while not making any real reductions, demonstrates that Dow has not taken even minimal steps to avoid adverse environmental effects.

Dow did not identify adverse environmental effects of its project (whether an increase in emissions of a criteria pollutant, an increased risk of spills, an increased risk of release, etc...). Dow failed to list, specifically, what types of chemicals, what quantities of chemicals, and what characteristics of chemicals it will be producing. While Dow stated that the amount of hazardous waste generated by the Engage plant would be "minor," it did not identify how much hazardous waste will be generated. Dow further stated that it "may" secure project wastes in existing or solid waste landfills. However, it failed to identify the alternative(s). Dow failed to identify the air as a pathway for the release of hazardous materials from the Engage plant that could endanger local residents or living organisms. No percentage was listed by Dow concerning the likelihood of such a release. Dow failed to address the short term effects of both the Engage plant construction and the resultant emissions. Dow concluded that the long term impact of its project would be "minimal." However, LDEQ has no basis to agree with that conclusion on the face of the permit application. Again, Dow did not say whether the project would increase ozone levels or risk the release of hazardous materials. Indeed, the fact that there will be increased truck, barge, and train traffic to supply the proposed expansion suggests that Dow's conclusion with respect to long term effects is highly suspect.

There is clearly an adverse environmental impact with respect to the Engage plant, but Dow did not address it. At the same time, Dow did not note any economic benefits of its project. There is nothing on the face of their permit application which

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application violates state law.

suggests that there are any positives to the Engage project, other than those befalling Dow directly. Dow has clearly violated the Clean Air Act through its failure to make these required analyses.

B. DOW HAS FAILED TO COMPLY WITH PROVISIONS OF THE LOUISIANA ADMINISTRATIVE CODE.

Section 504(C) requires the owner or operator of a proposed major stationary source or major modification to submit specific and necessary information to the Office of Environmental Services, Permits Division, in order to "perform any analysis or make any determination required under this regulation." See LAC Title 33, Part III, §504(C). The minimum information the owner/operator is required to give by law is listed in §504(C)(1-3). Section 504(C)(1) requires the owner/operator to give "a description of the nature, location, design capacity, and typical operating schedule of the major stationary source or major modification, including specifications and drawings showing the design and plant layout." §504(C)(1). *Dow's permit application fails to demonstrate compliance with this provision.* Additionally, §504(C)(2) requires the owner/operator to furnish "a detailed schedule for construction of the major stationary source or major modification . . ." §504(C)(2). *Dow's permit application fails to demonstrate compliance with this provision.* Furthermore, §504(C)(3) mandates that the owner/operator give "a detailed description of the planned system of emission controls to be implemented, emission estimates, and other information necessary to demonstrate that the LAER or any other applicable limitation will be maintained." *Dow Chemical never gave such detailed description, as required by law in its permit application.*

Section 504(D) governs the source requirements for nonattainment new source review. This section requires the owner/operator of a facility, prior to any new major construction, to obtain a permit from LDEQ. §504(d). This section sets forth those mandatory prerequisites to the granting of a permit in §504(D)(1),(2),(4) and (5-7).

§504(D)(1) requires that all existing sources owned or operated by the applicant in the state be in compliance with "all applicable state and federal emission limitations and standards, the Federal Clean Air Act, and all conditions in a state or federally enforceable permit, or schedule for compliance." §504(D)(1). *Dow Chemical has not submitted information about its compliance in accordance with 504(D)(1).* §504(D)(2) requires the owner/operator to design the new source "such that the LAER will be met and maintained for each pollutant emitted with is subject to regulation." §504(D)(2). This LAER "must be applied to each new emissions unit and to each existing emissions unit at which an emissions increase will occur as the result of the proposed modification." §504(D)(2). Dow Chemical has avoided LAER by opting to offset at the higher 1.3 to 1 ratio, provided for under the Louisiana Administrative Code. However, as Dow's offsets are not valid, it should be subject to the requirements of §504(D)(2). *Because it has not demonstrated LAER, Dow's permit should be denied.* §504(D)(4) also requires a showing from the new source that "the total tonnage of the emissions increase that would result from the proposed construction or modification shall be offset by an equal or greater reduction as applicable, in the actual emissions of the regulated pollutant from the same or other sources in accordance with Subsection F.9 of this Section." §504(D)(4). Furthermore, this provision notes that "a higher level of offset reduction may be required in order to demonstrate that a net air quality benefit will occur." §504(D)(4). *Dow does not have any valid emission reductions available for offsetting. Because Dow cannot offset this increase in pollution, the permit should be denied.* §504(D)(5) requires a showing that "[e]mission offsets shall provide net air quality benefit, in accordance with offset ratios listed in Table 1, in the area where the national ambient air quality standard for that pollutant is violated." §504(D)(5). *Dow has not met this requirement.* §504(D)(6) requires the new source to meet all applicable federal and state emission requirements. §504(D)(6). *Dow has not met all applicable emission requirements,*

*pursuant to new source performance standards or national emission standards. §504(D)(7) requires the owner/operator of any new source to look to alternative sites. §504(D)(7). Dow Chemical has failed to demonstrate in the public record that it analyzed alternative sites and demonstrated that benefits of locating in the nonattainment area significantly outweigh the environmental and social costs imposed.*

Section 504(F) governs emission offsets. This section requires that "[a]ll emission offsets approved by the department shall meet the . . . criteria [listed in 504(F)(1-10)]." §504(F). *Dow has not met at least five of these criteria.* §504(F)(3) requires all emission reductions claimed as offset credits to be "federal enforceable *prior* to commencement of construction of the proposed new source or major modification." §504(F)(3). Furthermore, the section states that "all emission reductions claimed as offset credit shall occur prior to or concurrent with the start of the operation of the proposed major stationary source." §504(F)(3). *Dow has not met this requirement.* §504(F)(4) requires that these emission reductions claimed as offset credits to "be sufficient to ensure Reasonable Further Progress (RFP), as determined by the administrative authority." §504(F)(4). *Dow has not met this requirement.* Its claimed emission reduction credits are not sufficient to ensure reasonable further progress. The Baton Rouge area failed to meet the 1999 deadline for attainment of the ozone standard and continues to experience numerous days of air quality below national health standards. §504(F)(5) rejects the use of offset credits for emission reductions to the extent that they have been previously relied upon by the EPA in "issuing any permit or in demonstrating attainment or reasonable further progress." §504(F)(5). *Dow has not met this requirement.* §504(F)(7) requires the owner/operator of a new source or major modification to provide the Office of Environmental Services, Permits Division with specific information. §504(F)(7). *Dow has not provided the Permits Division with this information.* §504(F)(10) prohibits the use of "emission reductions otherwise required by the Federal

Clean Air Act or by state regulations [for] the purposes of satisfying the offset requirement." §504(F)(10). *Dow has violated this express prohibition.*

VIII. LDEQ SHOULD NOT BE GRANTING ANY PERMITS, MUCH LESS DOW'S FACIALLY INVALID PERMIT MODIFICATION, AT THIS TIME AS LOUISIANA'S SIP HAS NOT BEEN ADEQUATELY IMPLEMENTED.

A permit may be granted under Title V of the Clean Air Act only if "the Administrator has not determined that the applicable implementation plan is not being adequately implemented for the nonattainment area in which the proposed source is to be constructed or modified." CAA §173(a)(4). EPA has twice stated that LDEQ's plan is illegal. In a 5th Circuit court document, EPA stated that Louisiana "[did] not calculate the number of ERCs in the ERC bank in accordance with [the Agency's] expectations" and it "is difficult to access data documenting the amount of valid CAA offset credits in Louisiana's bank and that there are insufficiencies in the banking database." *Exhibit C at 4*. Further, because Louisiana designated its ERC bank as the SIP contingency measure required by the Clean Air Act, "the parties agree[d] that EPA's approval of Louisiana's contingency measure plan should be remanded to the EPA . . . ." *Exhibit C at 5*. Finally, in a recent response by EPA to a public petition opposing a Borden Chemical permit approval, EPA acknowledged that "[i]n the course of discussing t[he] petition with LDEQ, it came to light that LDEQ has applied its regulations in a manner that does not comport with EPA's interpretation of the state's permitting and banking regulations regarding the applicability of a 'surplus when used' requirement." *Exhibit D at 24*. These acknowledgements constitute EPA's express and public determination that LDEQ has failed to properly implement its SIP. LDEQ must not grant any Title V permits until EPA determines that the deficiencies have been corrected and Louisiana's SIP is being properly implemented.

IX. DOW FAILED TO OBTAIN A PERMIT PRIOR TO COMMENCING CONSTRUCTION AND SHOULD NOT BE ALLOWED TO BENEFIT FROM ITS ONGOING VIOLATION.

Prior to constructing any new major stationary source or major modification a permit shall be issued obtained from the Louisiana Department of Environmental Quality in accordance with the requirements of the Louisiana Administrative Code. L.A.C. 33:III.504(D). According to Dow's permit application, construction of the Engage plant was to begin on January 1, 2001. To date, Dow's permit modification has not been granted. Commenters have learned from Dow's representative, David Graham, that Dow, sometime after its proposed construction date, prepared its property for the laying of the Engage plant foundation. Apparently, this involved "clearing land" and "performing groundwork." "Begin actual construction" is defined, in part, as "the installation of building support and foundations and the laying of underground pipework." See L.A.C. 33:III.504(G). Accordingly, Dow has begun construction and has been out of compliance for up to three months. This is a violation of the Clean Air Act, subjecting Dow to noncompliance penalties under CAA §120. Allowing Dow to modify its Title V operating permit when it has willfully ignored a condition of construction would be contrary to the law and policy of the Clean Air Act.

X. A NEW FACILITY IN THE BATON ROUGE NON-ATTAINMENT AREA WILL HINDER REASONABLE FURTHER PROGRESS TOWARD ACHIEVING THE OZONE STANDARD.

The issuance of Dow's proposed permit, including the modifications to the permit, will not provide for sufficient reductions to achieve reasonable further progress towards attaining the ozone standard in the nonattainment area. The permit, including the modifications, should be denied until such time as LDEQ has provided for sufficient reductions to achieve such progress.

The Clean Air Act §173(a)(1) provides that, in this case, a permit may be issued if LDEQ has determined that by the time Dow begins operation of its Engage plant, sufficient offsetting emissions reductions will have been obtained such that total

emissions will present reasonable further progress toward attainment. Reasonable further progress (in this case) means reductions in emissions of VOCs for the purpose of ensuring attainment of the applicable national ambient air quality standard. 42 U.S.C. §7501.

The requirements for reasonable further progress are included in, but not limited to, Clean Air Act Section 173(a)(1)(A). This section is referenced by Sections 172(c)(5) and 182(a)(2)(C). This permitting provision first requires an emissions reduction below the baseline value, and emissions reductions in accordance with Section 182(c)(10) for serious ozone nonattainment areas. In addition to the minimum requirements of 182(c)(10), Section 173(a)(1)(A) requires that emissions reductions represent reasonable further progress as defined in Section 171. Section 171 requires adequate emissions reductions "for the purpose of ensuring attainment of the applicable national ambient air quality standard".

The lack of real reductions from Dow, along with the increase in emissions from the new Engage plant, ensure that attainment of the ozone standard for Baton Rouge is still a long way off. At the start of 2001, Baton Rouge had four of its eleven monitors in noncompliance for the ozone standard and a design value of 135. According to EPA data, in 1996, DOW contributed 54% of all VOCs and 59% of all NOx in Iberville Parish. *Exhibit B.* This permit cannot be issued until Dow has made sufficient emissions reductions. The need to go beyond §182(c)(10) becomes even more important now that EPA has recognized that LDEQ has not operated its banking system in accordance with the CAA or EPA policy.

## XI. CONCLUSION

Under the Clean Air Act, industrial growth in a non-attainment area must be treated with the strictest scrutiny. LDEQ has failed to do so with respect to the preliminary granting of the permit in question. Indeed, LDEQ has failed to comply with

the basic requirements of the Clean Air Act in proposing to grant this permit which would exacerbate attainment difficulties in the Baton Rouge area. LDEQ has violated federal law concerning the use of the emission reduction credit bank and has mismanaged Louisiana's bank. Iberville Parish has not met the federal based standard for ozone, and bank credits must be confiscated. Credits sought by Dow represent reductions that are legally required and thus not voluntary, and are invalid under federal and state law. Considering all these factors, until LDEQ's emission reduction credit program is reformed to conform to minimum requirements of federal law, public health and welfare will suffer.

Respectfully submitted,

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