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July 14, 2009

***VIA CERTIFIED MAIL - -  
RETURN RECEIPT REQUESTED***

Andrew N. Liveris, CEO and Chairman  
Dow Chemical Company  
2030 Dow Center  
Midland, MI 48764-0001

Dow Chemical Company  
Western Division Pittsburg Plant  
901 Loveridge Road  
Pittsburg, CA 94565-2811

**Re: Notice of Violations and Intent to File Suit Under the Clean Water Act**

Dear Dow Chemical Company, Owner, Site Manager, Managing Agent:

## **NOTICE**

Clean Water Act ("CWA" or "Act") § 505(b), 33 U.S.C. § 1365(b), requires that sixty (60) days prior to the initiation of a civil action under CWA § 505(a), 33 U.S.C. § 1365(a), a citizen must give notice of his/her intent to sue to the alleged violator, the EPA (both local and federal) and the State in which the violations occur. If the alleged violator is an individual or corporation, service of notice shall be accomplished by certified mail addressed to, or by personal service upon, the owner or managing agent with a copy sent to the registered agent of the corporation.

Notice is hereby given that Northern California River Watch (hereafter "River Watch") intends to bring suit in Federal District Court against Dow Chemical Company (hereafter, "Dow"), by reason of Dow's continuing violations of "an effluent standard or limitation", permit condition or requirement and/or "an order issued by the Administrator or a State with respect to such standard or limitation" under CWA § 505(a)(1), 33 U.S.C.

§ 1365(a)(1), the Code of Federal Regulations, and the Regional Water Quality Control Board's Basin Plan, as exemplified by Dow's illegally discharging of pollutants from a point source to waters of the United States in violation of a National Pollution Discharge Elimination System ("NPDES") permit.

This Notice also addresses Dow's ongoing violations of the substantive and procedural requirements of CWA § 402(p) and NPDES General Permit No. CAS000001 and CA0004910, State Water Resources Control Board Water Quality Order No. 92-12-DWQ, as amended by Order No. 97-03-DWQ ("General Industrial Storm Water Permit" or "General Permit"). The Clean Water Act prohibits storm water discharges without a NPDES permit. See 33 U.S.C. § 1342; 40 C.F.R. § 122.26.

The CWA requires that any notice regarding an alleged violation of an effluent standard or limitation, or of an order with respect thereto, shall include sufficient information to permit the recipient to identify:

**1. The specific standard, limitation, or order alleged to have been violated**

The CWA regulates the discharge of pollutants into navigable waters. The statute is structured in such a way that all discharge of pollutants is prohibited with the exception of several enumerated statutory exceptions. One such exception authorizes a polluter who has been issued a NPDES permit pursuant to the Act, to discharge designated pollutants at certain levels subject to certain conditions. The effluent discharge standards or limitations specified in a NPDES permit define the scope of the authorized exception to the CWA § 301(a), 33 U.S.C. § 1311(a) prohibition. Otherwise discharges must comply with the strict quantitative and narrative standards in the permits issued to dischargers seeking to discharge through surface and subsurface waters of the United States.

River Watch hereby gives Notice to Dow as to its continued exceedance of discharge prohibitions, effluent limits and specifications, effluent limits for toxic substances, acute toxicity, and chronic toxicity limits, receiving water limits, federal standard and regional water board standards limits, and the monitoring and reporting program established in the permit granted to Dow. The United States EPA and the Regional Water Quality Control Board have classified Dow site located at 901 Loveridge Road in Pittsburg, California, adjacent to New York slough, as a major discharger.

The site at 901 Loveridge Road in Pittsburg, California is not compliant with CWA § 301(a), 33 U.S.C. § 1311(a) and CWA §§ 402(a) and 402(b), 33 U.S.C. § 1342(a) and 1342(b) nor CWA § 402(p), 33 U.S.C. 1342(p). In addition, the CWA prohibits storm water discharges associated with industrial activities to exceed established pollution limits. See 33 U.S.C. § 1342; 40 C.F.R. § 122.26.

River Watch contends DOW is also discharging subsurface from the disposal site and ponds to surface waters without a NPDES permit. Dow's current NPDES permits do not cover these discharges. Therefore, Dow is violating the CWA by discharging pollutants from a point source (such as its pond) to a water of the United States without a NPDES permit covering these discharges in violation of the CWA.

**2. The activity alleged to constitute a violation**

To comply with this requirement River Watch has set forth below narratives describing with particularity the activities leading to violations. In summary, the Act requires that all discharges of pollution from a point source to a water of the United States in violation of a NPDES permit are prohibited. Dow is discharging pollutants including mercury, dioxin, cyanide, lead, chromium, copper, arsenic, to name only a few, from the site at Loveridge Road and various point sources within the site, to waters of the United States. The Act prohibits the discharge of a pollutant from a point source to a water of the United States without a NPDES specific for that discharge.

The liability of Dow stems from its ownership or operation of the site or due to the activities conducted on the site by Dow.

**3. The discharger responsible for the alleged violation**

The discharger responsible for the alleged violations is Dow Chemical Company, referred to as "Dow" throughout this Notice.

**4. The location of the alleged violation**

The location or locations of the various violations is the site and facilities located at 901 Loveridge Road, Pittsburg, California. The site and facilities are further identified in the narrative section of this Notice and in records either created or maintained by or for Dow which relate to its activities at the site.

**5. The date or dates of violation or range of dates during which the alleged activities occurred**

Disposition, discharge, and release of pollutants can be traced as far back as 1939. Dow has been in violation of the CWA ever since the Act was passed. The CWA is a strict liability statute; therefore, the range of dates covered by this Notice is July 14, 2004 through the date of this Notice. River Watch will from time to time update and supplement this Notice to include all violations by Dow which occur after the date of this Notice. Violations of Dow's current NPDES permits are detailed in Dow's self monitoring reports and other

ocorrespondence from Dow to the Regional Water Quality Control Board and/or other regulatory agencies. Numerous violations identified in this Notice such as discharging pollutants to waters of the United States without a NPDES permit, failure to implement the requirements of the Act, failure to meet water quality objectives, etc., are continuous, and therefore each day is a violation. River Watch believes the violations set forth in this Notice are continuing in nature or will likely continue after the filing of a lawsuit. Specific dates of violations are evidenced in Dow's own records (or lack thereof) or files and records of other agencies including the Regional Quality Control Board, San Francisco Region GeoTracker, County Health and local police and fire departments.

**6. The full name, address, and telephone number of the person giving notice**

The entity giving notice is Northern California River Watch, 500 North Main Street, Suite 110, Sebastopol, CA 95472, Telephone and Facsimile 707-824-4372, Email US@ncriverwatch.org, referred to in this Notice as "River Watch". River Watch is a non-profit corporation organized under the laws of the State of California, dedicated to the protection and enhancement of the waters of the State of California including all rivers, creeks, streams and groundwater in Northern California.

River Watch has retained legal counsel to represent them in this matter. All communications should be addressed to:

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**BACKGROUND**

**A. Setting and Historic Use**

Dow has, since 1939, operated a chemical facility located at 901 Loveridge Road, Pittsburg, California, located on the banks of New York Slough -- a portion of San Francisco Bay. The site is large, located adjacent to wetlands, and directly connected to creeks, canals and a slough (tidal marsh) all of which are also connected to Suisun Bay, San Francisco Bay and the Pacific Ocean. The San Francisco Regional Water Quality Control Board has listed all segments of San Francisco Bay as impaired due to mercury pollution. The Sacramento San Joaquin Delta is listed as impaired for chlordane, DDT, dieldrin, dioxin compounds, furan compounds, exotic species, mercury, nickel, PCBs, dioxin-like PCBs, and

selenium. The waters affected by Dow's discharges are used for commercial and sport fishing, domestic and municipal supply, agricultural supply, fish spawning and migration, and water contact recreation.

## **B. Present Day Use**

The Dow facility is classified as a major discharger. For the past 70 years numerous highly toxic substances have been utilized, dumped, spilled, manufactured, and discharged off this site. Dow manufactures agricultural chemicals, fumigants, fungicides, carbon tetrachloride, hydrochloric acid, latex, and plastics. It conducts chemical research, filters water withdrawn from the impaired water bodies and returns the concentrated pollutants back to those impaired water bodies as a part of its process, discharges partially treated groundwater contaminated with highly dangerous chemicals and storm water associated with industrial processes to a local sewage treatment plant which also discharges to New York Slough. From 1939 to 1991, elemental mercury was used to produce chlorine at the facility. The plant also produced chlorinated solvents, carbon tetrachloride and tetrachloroethene. Hollow fiber production and power plant operations are conducted on the site by non-Dow companies.

The Regional Water Quality Control Board attempts to regulate Dow by way of several permits. According to the United States EPA however, the company has had non-compliance permit issues each quarter from January 2006 to December 2008 (most recent quarter not reported at present).

## **C. Summary of Representative Violations**

Sampling results represent an instant in time. The discharges from Dow however, occur for many hours each day. According to a report from the United States EPA there is no safe limit for Dioxin. Dow discharges Dioxin TCDD-TEQ. The daily maximum allowable limit for discharge of dioxin is  $2.8E-08$   $\mu\text{g/l}$ . Sampling of this deep water discharge to New York Slough shows that dioxin is discharged well above (NPDES Point Source Discharge WDR Order No. R2-2008-0030). In July 2008, Dioxin TCDD-TEQ was detected at 9 mg/l daily maximum. In November 2008 it was detected at 7.55 mg/l daily maximum. In January 2009 it was detected at 5.13 mg/l daily maximum.

Temperature is an important water quality parameter. Dow's discharge is too hot for the surrounding beneficial uses such as marine life. For example, in July 2008 although the maximum temperature allowable is 11.1 degrees Celcius, samples showed the discharge to be as hot as 29 degrees . In August and September 2008, the temperatures were both sampled at 29.1 degrees Celcius.

## **D. Ground Water And Soils**

The contaminated soils from the facility leach contamination into the groundwater which is hydraulically connected to the surface waters. Reports prepared by Dow discuss the porosity and permeability of the soils - "[H]orizontal hydraulic gradients are influenced by the effects of vertical gradients and the variations in aquifer permeability (hydraulic connectivity) present at the site." "...an assumed effective porosity of 30 percent for all units ... and estimated average hydraulic conductivities (K) values derived from aquifer testing and modeling."

Groundwater clean up has not resulted in maintenance of the required 5-foot separation of contaminated soils from groundwater - a violation of Provision I and II of the WDR. In October 2008, 18 wells showed less than a 5-foot separation. In January through June 2008 at least 5 wells had less than a 5-foot separation. The geosynthetic clay liner covers are not performing as required and contribute additional leachate through percolation of stormwater through the contaminated soils.

The "Site Clean up Requirements", Volume II, Self Monitoring Reports (WDR Order R2-2002-014) indicate that pollution appears worse in many wells. For example, 1,2-Dichloroethene increased from 4.09 µg/l to 14.56 µg/l from 2007 to 2008. Benzene and chlorobenzene also increased in similar ratios. Trichloroethene and vinyl chloride doubled. Tetrachloroethene Mercury increased in 4 wells.

Contaminants in groundwater in and below sediments of the former outfall pond (on the bay front) are high. The Water Quality Objective for Municipal Supply is .002 mg/l for mercury, 0.05mg/l for arsenic, .05 mg/l for lead and 0.1 mg/l for nickel. In July, 2008 Mercury was detected as high as 6,200 mg/l., arsenic was detected at 14.4 mg/l, 2.12 mg/l, lead was detected at 0.52 mg/l and nickel was detected at 0.64mg/l.

## **E. Concerns and Continuing Violations**

Dow continues to operate and control a very contaminated site, to produce dangerous products, to utilize extremely hazardous ingredients in its manufacturing, and to generate concentrated polluted wastewater, some of which enters a publicly operated sewage treatment facility and some of which enters New York Slough. Dow continues to take an incremental approach to the serious and chronic situation which has existed on its property for decades, a situation that adversely affects public health and the environment.

As a result of spills and releases due to the past chemical handling practices, groundwater beneath the site is extensively contaminated with chlorinated solvents and other volatile and semi-volatile organic chemicals as well as mercury, dioxin, cyanide, lead, etc.

These groundwaters are hydrologically connected with adjacent surface waters which are also being polluted by the illegal discharges.

Efforts have been made by Dow over recent years to remediate some of the pollution. The San Francisco Bay Regional Water Quality Control Board has documented violations and issued formal and informal orders to comply several times in the past 3 years. According to the United States EPA, Dow has had non-compliance permit issues each quarter from January 2006 to December 2008 (most recent quarter not reported at present).

### **1. Point Source Discharge**

The intake water used by Dow is taken from the impaired water bodies, then filtered. The concentrated and undesirable pollutants, referred to as simply brine, are discharged back to the impaired New York Slough. Chemical additives and build up in the towers, much of which is toxic, is also blown down and discharged to New York Slough.

Dioxin is a general term that describes a group of hundreds of chemicals that are highly persistent in the environment. The most toxic compound is 2,3,7,8-tetrachlorodibenzo-p-dioxin or TCDD. Dow is nonetheless permitted to release this chemical into New York Slough under supervision of the Regional Water Quality Control Board. Dow however, does not comply with the Regional Board's requirements and exceeds its permit limits for dioxin. Dioxin was reported to exceed concentration limits as recently as July 2008 and January 2009 (9 mg/l and 5.13 mg/l respectively). Dioxins and furans are some of the most toxic chemicals known to science. A draft report released for public comment in September 1994 by the United States EPA clearly describes dioxin as a serious public health threat. The public health impact of dioxin may rival the impact that DDT had on public health in the 1960's. According to the EPA report, there appears to be no "safe" level of exposure to dioxin.

Another example of the problem with Dow's process and discharge involves the discharge of cyanide. In May of 2008, cyanide sampling data from the Dow site and facilities exceeded the monthly limit set in Dow's discharge permit.

The total permitted discharge into New York Slough, a portion of Suisun Bay, from this chemical company is significant. Dow has discharged and continues to discharge and dispose of copper, cyanide, and even dioxin into New York Slough, in amounts which exceed the allotted amount for these toxic chemicals.

## **2. Hydraulically and Hydrologically Connected Contaminated Groundwater**

The ground surface at this site is at sea level or below. Soils and groundwater contaminated with chemicals mingle with the waters of the Bay less than 50 feet away, especially at higher tides. Toxic chemicals have been documented at the banks of Bundesen Bay and near the historic chemical dump sites. Groundwater and tidal waters come into direct contact with untreated and extremely toxic substances byway of leaching as well as through actual contact with contaminated soils.

The minimum 5-foot separation required between contaminated soils and groundwater, necessary to begin to protect the integrity of ground and hydrologically connected surface waters, is not maintained. This is significant insofar as the contamination in the soil is very extensive. Inadequate and piecemeal manner of treatment methods, pump failures, non aggressive remediation efforts, and other discharge violations, continue to result in releases of contamination from this site to surface waters.

Dow reported in 2008 that groundwater separation minimum requirements were not met in at least 14 water level monitoring points -

“Shallow groundwater less than 50 feet from the shoreline in the Former Outfall Pond area of the Dow facility exceeds Basin Plan objective for total recoverable mercury in several sample locations by factors ranging from greater than 10 to greater than 100 times. Methyl mercury, the most toxic and bioavailable form of mercury, is also present in groundwater at some of the same locations in excess of the proposed draft TMDL Phase I target level for methylmercury in surface water. The average mercury concentration in surface and sediment samples collected from the Former Outfall Pond area exceeds the California hazardous waste threshold for mercury.”

With respect to other constituents of a highly toxic nature, chlorobenzene was detected as high as 600µg/l in the year 2000 and the limit is 70µg/l. Vinyl chloride was as high as 20,000 µg/l and the maximum limit is 0.5 µg/l. The sampling again only represents a moment in time, however the contaminated soils leach and otherwise make contact with groundwater and surface waters repeatedly over time. Tetrachloroethene Trichloroethene, and Methylene Chloride were measured in the thousands and maximum allowable limits for these are only 5 µg/l. The site is leaking high amounts of pollutants and has been apparently for decades.

Sampling of the contaminated soils and groundwater in 2008, indicated that in many areas the contamination is the same or worse than it was in 2007. For example,



1,2-dichloroethene was at 4.09 µg/l in 2007 and 14.56 µg/l in 2008; 1,2-dichloropropane was 1,240 µg/l in 2007 and 2,010 µg/l in 2008.

A further concern to River Watch is that partially treated groundwater extracted from the soils and groundwater beneath the site that are highly contaminated with chemicals is released to the publicly operated sewage treatment plant which also has its discharge point in New York Slough. Sewage treatment plants are not designed to treat and neutralize hazardous and toxic substances.

Contaminated groundwater from Dow's facility discharges to New York Slough, a Basin Plan designated municipal water source protected by several state and federal laws (described in detail in Dow's permit) created to protect sensitive and important habitats, food, sources, and other beneficial uses. Currently, the site contains chemical manufacturing facilities, a groundwater treatment plant, one active Class II landfill, and a number of inactive or closed solid waste management units or dumps, leaching contaminants into ground and surface waters. The contaminants migrate to the banks of Bundesen Bay and New York Slough, a portion of Suisun Bay. Even after chemical dumps are closed, they continue to leach contaminants for many years especially if rain is permitted to flow through the chemicals and soil. Closure of Dow's historic dumps has not prevented rain from entering the dump piles. Dow has no NPDES permit allow these discharges.

### **3. Stormwater Discharge**

As of 2008, storm water runoff associated with industrial processes at the facilities have been routed to the treatment plant and then enter the publicly owned sewage treatment plant - Delta Diablo Sanitation District. Copper is one of the many harmful constituents found in storm water associated with Dow's industrial processes. The publicly operated treatment plant also uses New York Slough as its disposal area. Dow's discharge of copper to the public municipal waste water treatment plant regularly exceeds the limit deemed protective of beneficial uses. Copper is now entering the sewage treatment plant and is then being disposed of in the Bay. Copper bioaccumulates in marine life which is ingested by humans. According to the U.S. Department of Health and Human Services, some of the ways in which copper enters the environment are through manufacturing operations and through waste water releases into rivers and lakes. Some of the risks of breathing or ingesting high levels of copper are irritation to the nose and throat, nausea, vomiting and diarrhea, damage to liver and kidneys and even death.

### **4. Remediation of Pollution**

Although Dow has caused and has known about the serious problems with its process and its contaminated site, the efforts to remediate have been piecemeal, involuntary, and

extremely slow, especially when seen in comparison with the potential ability of Dow to properly clean up and manage this site. Monitoring and investigation have been drawn out for many years and have been conducted in a haphazard manner. Although the site is highly contaminated, studies are narrowly focused resulting in many chemicals being under-monitored and not cleaned up. Each study of a chemical takes months and sometimes years to design and implement.

Investigations of the mercury pollution occurred in 1999 and again in 2008. In the interim 9 years, mercury continued to be released into the estuary. In July 2008, mercury readings in a monitoring well at a point where the site meets the shoreline, was 240,000 ppb.

In 2008, Dow reported, "high concentrations of mercury have been observed in shallow groundwater," in existing wells (204A). The semi annual sampling report for August 2008 reported mercury in the groundwater near the perimeter of the site at over 400,000 n/l (459,000 and 508,000 respectively). In 1997, the San Francisco Regional Water Quality Control Board sent a letter to Dow requiring a plan to determine the unusually high concentrations of lead discharging from the site. The readings at that time were 770 ppb. The maximum contaminant level allowed for lead in this water body is 1.5 ppb.

Cyanide, copper, and dioxin are just a few of the other highly toxic chemicals that continue to be discharged by this chemical facility. The facility takes in water from the slough and the adjacent canal. It uses approximately half of the water before discharging the other half in the form of concentrated pollutants, or what Dow refers to as brine, (millions of gallons per week) back into the estuary.

After years of study, investigation, and monitoring, the levels of arsenic in the groundwater is very high. The site is adjacent to a tidal marsh, shares the groundwater with the slough and is hydrologically connected. to waters of the United States. Arsenic readings in July of 2008 were 81 $\mu$ /l, 11 $\mu$ /l and 400 $\mu$ /l. Mercury was 429  $\mu$ g/l.

The Regional Water Quality Control Board's Basin Plan identifies beneficial uses for waters of the State in the region of the site, including surface waters and groundwaters. The Basin Plan also identifies water quality objectives, discharge prohibitions and effluent limitations intended to protect beneficial uses. The Basin Plan contains water quality objectives and beneficial uses of New York Slough and contiguous waters. The beneficial uses of New York Slough are: industrial service and process supply; municipal and domestic water supply; agricultural supply; navigation; water contact and non-contact recreation; commercial and sport fishing; wildlife habitat; preservation of rare and endangered species; fish migration and spawning; and, estuarine habitat.

## CONTINUING VIOLATIONS

Sampling demonstrates that the location of this facility, the persistent nature and volume of the untreated and contaminated soils and groundwater, the on-going manufacturing and disposal of extremely hazardous and toxic substances by Dow make this site a continuing source and threat of contamination to waters of the United States.

In general, River Watch believes remediation must be conducted much more proactively to remove existing threats both to the environment and to public health. The geomorphology of the area indicates that sand, gravel, and clay lenses, which act as conduits, as well as underground pipes and trenches cause significant off-site-migration of pollutants to waters of the United States.

For decades, pollutants have been discharged from the site to New York slough and the surrounding wetlands, creeks, and Bay - all waters of the United States. As a direct result of Dow's violations of the CWA, River Watch's use and enjoyment of the New York slough environs has been adversely affected.

Pursuant to CWA § 301(a), 33 U.S.C. § 1311(a), the EPA and the State of California have formally concluded that violations by Dow as identified in this Notice are prohibited by law. Beneficial uses of New York Slough, Kirker Creek, Contra Costa Canal, Bundeson Bay, Suisun Bay and San Francisco Bay are being affected in a prohibited manner by these violations. The EPA and the State of California have identified Dow's operations at the site as a point source, the discharges from which contribute to violations of applicable water quality standards.

From July 14, 2004 through the date of this Notice, Dow has violated the CWA by failing to acquire a NPDES permit and for discharging pollutants into waters of the United States without a NPDES permit. Each and every discharge is a separate violation of the CWA.

These enumerated violations are based upon review of the Regional Water Quality Control Board's files and Geotracker files for Dow, as well as other files publicly available. In addition to all of the above violations, this Notice covers any and all violations evidenced by Dow's records and monitoring data which Dow has submitted (or failed to submit) to the Regional Board and/or other regulatory agencies during the period July 14, 2004 through the date of this Notice. This Notice also covers any and all violations which may have occurred but for which data may not have been available or submitted or apparent from the face of the reports or data submitted by Dow to the Regional Board, Geotracker or other regulatory agencies.

Pursuant to CWA § 309(d), 33 U.S.C. § 1319(d), each of the above-described violations of the CWA subjects the violator to a penalty of up to \$32,500.00 per day/per violation for violations occurring within 5 years prior to the initiation of a citizen enforcement action. In addition to civil penalties, River Watch will seek injunctive relief preventing further violations of the Act pursuant to CWA § 505(a) and § 505(d), 33 U.S.C. §§ 1365(a) and (d), and such other relief as is permitted by law. Lastly, CWA § 505(d), 33 U.S.C. § 1365(d), permits prevailing parties to recover costs and fees.

The violations of Dow as set forth in this Notice affect the health and enjoyment of River Watch and its members who reside, work and recreate in the affected area. River Watch and its members use this watershed for domestic water supply, agricultural water supply, recreation, sports, fishing, swimming, hiking, photography, nature walks and the like. Their health, property rights, use and enjoyment of this area is specifically impaired by Dow's violations of the CWA as described herein.

### CONCLUSION

River Watch believes this Notice sufficiently states grounds for filing suit. At the close of the 60-day notice period or shortly thereafter River Watch intends to file a citizen's suit under the Act against Dow for the violations enumerated herein.

During the 60-day notice period, River Watch is willing to discuss effective remedies for the violations noted in this Notice. However, if Dow wishes to pursue such discussions in the absence of litigation, it is suggested that those discussions be initiated within the next 20 days so that they may be completed before the end of the 60-day notice period. River Watch does not intend to delay the filing of a lawsuit if discussions are continuing when the notice period ends.

Very truly yours,

  
Jack Silver

JS:lhv

cc: Lisa Jackson, Administrator  
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