

BEFORE THE ENVIRONMENTAL PROTECTION APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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ENVIR. APPEALS BOARD

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In re: :
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PPG INDUSTRIES OHIO, INC., : RCRA Appeal No. 07-01
PPG INDUSTRIES, INC., :
: :
Permit No. RCRA-004-304-689 :
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Washington, D.C.

Wednesday, July 23, 2008

The above-entitled matter came on
for TELECONFERENCE at approximately 11:00
a.m. at 1341 G Street, NW., Washington, D.C.

BEFORE:

CHARLES SHEEHAN
Presiding Judge

NIVEA BERRIOS
Senior Counsel to the Board

1 APPEARANCES:
 2 On behalf of PPG Industries Ohio, Inc.:
 3 ROBERT J. SCHMIDT, ESQUIRE
 4 Porter Wright Morris & Arthur
 41 South High Street
 Columbus, Ohio 43215
 5 (614) 227-2028
 6 On behalf of Environmental Protection Agency:
 7 THOMAS J. KRUEGER, ESQUIRE
 Associate Regional Counsel
 8 U.S. EPA Region 5
 77 West Jackson Boulevard
 9 Chicago, Illinois 60604
 (312) 886-0562

10 ALSO PRESENT:

11 Eureka Durr
 12 Mark Mahoney
 13 * * * * *

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1 This conversation of course is
 2 being transcribed, so it aids in
 3 transcription as well.
 4 Is that okay?
 5 MR. SCHMIDT: Yes, Your Honor.
 6 This is Rob Schmidt.
 7 MR. KRUEGER: Yes, Your Honor.
 8 Tom Krueger.
 9 JUDGE SHEEHAN: This is an old case.
 10 It's about 15 months old at this point, filed in
 11 May of '07. And we now have before us a seventh
 12 motion for extension of time. We're concerned
 13 about the extremely high number of extensions
 14 granted at this point, and thought the case
 15 would have been concluded by now, given some of
 16 the representations lately.
 17 In June, it was represented that
 18 you thought that you'd have complete and
 19 final resolution by July, but that didn't
 20 happen; is that right?
 21 Mr. Krueger, you want to go first
 22 about why that representation was

1 PROCEEDINGS
 2 MS. DURR: Okay, we're getting ready
 3 to start. The Environmental Appeals Board of
 4 the United States Environment Protection Agency
 5 is now in session for teleconference. in re: PPG
 6 Industries Ohio, Inc., PPG Industries, Inc.;
 7 Permit No. RCRA-OHD-004-304-689, RCRA Appeal No.
 8 07-01. The Honorable Judge Charles Sheehan
 9 presiding.
 10 JUDGE SHEEHAN: Good morning,
 11 Mr. Krueger, Mr. Schmidt.
 12 MR. SCHMIDT: Good morning, Judge.
 13 MR. KRUEGER: Good morning, Your
 14 Honor.
 15 JUDGE SHEEHAN: Yes, Judge Sheehan
 16 here, and with me is our senior counsel, Nivea
 17 Berrios, who will, if she has any questions in
 18 addition to mine, be free to ask them.
 19 Given the fact that we are on by
 20 call, I think it's best that we proceed by
 21 introducing ourselves before each of us
 22 speaks, just to be clear who it is speaking.

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1 unfulfilled? Was it the MACT issue only or
 2 other issues?
 3 MR. KRUEGER: The MACT issue certainly
 4 did slow matters down. As we indicated in the
 5 last request for extension, a recent stack test
 6 required some further evaluation by both
 7 parties, but ultimately helped us to come to a
 8 resolution.
 9 At this point, I do believe that we
 10 have resolved the matter. That is, at this
 11 point, we have agreed to six modifications to
 12 the issued permit that resolve the matters
 13 raised in PPG's petition for review.
 14 And at this point, all that remains
 15 to be done is to simply move forward and
 16 implement those modifications. And at this
 17 point what -- at least I would represent,
 18 subject to Mr. Schmidt's confirmation, all
 19 that remains to be done is to have the
 20 parties agree on the appropriate regulatory
 21 mechanism for moving forward with those
 22 modifications, proposing the modifications,

<p style="text-align: right;">6</p> <p>1 going through the appropriate public 2 participation measures, and assuming that 3 public participation doesn't require any 4 changes, then moving forward to modify the 5 permit as the parties have agreed.</p> <p>6 JUDGE SHEEHAN: Why couldn't the 7 permit be withdrawn and then when the new permit 8 is issued -- the old permit be withdrawn? So 9 that the petition could be withdrawn, and the 10 issue would be moot before us.</p> <p>11 MR. SCHMIDT: Your Honor, this is Rob 12 Schmidt speaking. I think from PPG's 13 perspective, the problem becomes one -- we need 14 to have a permit in place. So we can't -- and 15 we can't dismiss -- we can't withdraw the 16 current permit without having another one in 17 place effectively.</p> <p>18 The modification procedures that 19 we're talking about do have a public 20 participation element to it, which requires 21 the region to take some steps, or potentially 22 PPG, depending on what mechanism that we</p>	<p style="text-align: right;">8</p> <p>1 thermal oxidation unit and replace it with 2 some other language related to the operation.</p> <p>3 If during the public comment 4 process, the modification to the permit to 5 implement these changes, U.S. EPA is forced 6 to, because of public comment or considers 7 it -- considered the public comment worthy of 8 making this change, to go back to the 9 original permit language -- there wouldn't 10 need to be a modification of the underlying 11 permit in that case, and there wouldn't be an 12 opportunity for PPG to challenge that 13 decision.</p> <p>14 JUDGE SHEEHAN: You see our concern 15 is, we have had representations at least since 16 mid-June that this would be done by July, and 17 July, you come back and give us three new 18 issues, essentially, in addition to the MACT 19 issue you mentioned in June.</p> <p>20 The final approval, whatever that 21 means, the appropriate vehicle on the 22 implementation of mods, and then you'd like</p>
<p style="text-align: right;">7</p> <p>1 undertake to modify this permit.</p> <p>2 And during the pendency of that 3 period of time when we're modifying the 4 permit, if U.S. EPA is required due to public 5 comments to make some changes to the 6 agreed-to language that we've -- for the six 7 modifications that we're going to make to the 8 existing permit -- if U.S. EPA can't go 9 forward with a change, or has to make a 10 change that's different from the one that 11 we've agreed to, unless this appeal is still 12 pending at that point, we won't be able to 13 challenge it.</p> <p>14 I guess an example would be, in 15 order here to explain the problem is as we 16 see it -- the current permit as it exists has 17 six effectively stayed provisions that were 18 appealed. One of them relates to operational 19 parameters for a thermal oxidation unit. The 20 parties, meaning U.S. EPA and PPG, have 21 agreed to modify the language to remove 22 certain operational parameters from the</p>	<p style="text-align: right;">9</p> <p>1 until September to get back to us to tell us 2 whether you need another indefinite period of 3 time. So it's looking like rather than the 4 window shutting in this case, as we were told 5 in June, it's re-opening for an indefinite 6 length of time. So it feels like the case is 7 going out of control rather than getting more 8 controlled.</p> <p>9 MR. SCHMIDT: Your Honor, this Rob 10 Schmidt again. If that's what we have conveyed 11 to you, that is not what we intended to do. The 12 substantive issues have been resolved and --</p> <p>13 JUDGE SHEEHAN: Then let me ask, if 14 they've been resolved by all the appropriate 15 decision-makers all the way up the chain, for 16 both parties?</p> <p>17 MR. SCHMIDT: PPG -- this is Rob 18 Schmidt -- PPG has confirmed that the language 19 that was transmitted to us by U.S. EPA captures 20 all of the elements of the agreement. So we do 21 actually have now final signoff from my side on 22 the language to implement the changes to the</p>

10	<p>1 permit to represent the agreement.</p> <p>2 JUDGE SHEEHAN: What about you,</p> <p>3 Mr. Krueger?</p> <p>4 MR. KRUEGER: Your Honor, we have</p> <p>5 concurrence in the language of the revised</p> <p>6 permit sections up to the level immediately</p> <p>7 below the division director who issues the</p> <p>8 permit.</p> <p>9 JUDGE SHEEHAN: Isn't the division</p> <p>10 director the person that needs to concur?</p> <p>11 MR. KRUEGER: The division director</p> <p>12 has indicated that she would like to wait until</p> <p>13 the package actually comes to her after public</p> <p>14 comment, before her final concurrence, but we</p> <p>15 have indicated to her that we strongly recommend</p> <p>16 those changes, and we anticipate there will be</p> <p>17 no problems, subject to public comment.</p> <p>18 JUDGE SHEEHAN: But I guess what I am</p> <p>19 getting at is the permit mods that have been</p> <p>20 made -- irrespective of what the public comment</p> <p>21 process yields, since that's unpredictable and</p> <p>22 no one knows what that will result in -- but as</p>	12	<p>1 the case of EPA, have not, because the signoff</p> <p>2 official hasn't concurred, hasn't successfully</p> <p>3 negotiated all terms.</p> <p>4 You have and people above you, but</p> <p>5 not the director. So that -- I'm confused,</p> <p>6 because you said you represented the party's</p> <p>7 stand, and the party in your case is EPA, but</p> <p>8 EPA hasn't concurred, according to what you</p> <p>9 just said.</p> <p>10 MR. KRUEGER: To make sure that I'm</p> <p>11 clear, the division director has indicated she</p> <p>12 did not want to formally concur until after</p> <p>13 public comment proceeded; however, we have all</p> <p>14 indications that she is onboard with the</p> <p>15 modifications which have been recommended to</p> <p>16 her.</p> <p>17 She expressed no concern, she</p> <p>18 expressed no objections. She simply</p> <p>19 indicated that her decision or her</p> <p>20 concurrence would not and could not be final</p> <p>21 until after public comment.</p> <p>22 JUDGE SHEEHAN: But why? I understand</p>
11	<p>1 far as the agreed modifications to this point,</p> <p>2 has your division director agreed with all the</p> <p>3 mods that you say that Mr. Schmidt said PPG has</p> <p>4 been willing to do?</p> <p>5 MR. KRUEGER: She has not -- everyone</p> <p>6 in the signoff chain up to her, both in counsel</p> <p>7 and on the program side, has agreed and has</p> <p>8 recommended that she agreed to those</p> <p>9 modifications.</p> <p>10 JUDGE SHEEHAN: But she has not</p> <p>11 agreed?</p> <p>12 MR. KRUEGER: She has not, but she</p> <p>13 certainly has not disagreed. As I said, she's</p> <p>14 indicated she preferred to wait, but if you want</p> <p>15 us to tell her that we need her concurrence, I</p> <p>16 anticipate we can get that very quickly.</p> <p>17 JUDGE SHEEHAN: I guess what I'm</p> <p>18 getting at, Mr. Krueger, is to say in your July</p> <p>19 17th filing -- July 16th, the parties have</p> <p>20 successfully negotiated all terms necessary to</p> <p>21 settle this matter, but it sounds from what</p> <p>22 you're saying that all the parties, at least in</p>	13	<p>1 that public comment will produce who knows what,</p> <p>2 and she needs to take a fresh look at it there,</p> <p>3 but as far as what was agreed between the</p> <p>4 parties before public comment, why can't she</p> <p>5 agree to those changes now? Putting aside what</p> <p>6 public comment may yield.</p> <p>7 MR. KRUEGER: I can get her to verify</p> <p>8 that that is her position. I think that's</p> <p>9 implicitly her position, but as I indicated, her</p> <p>10 bottom line was ultimately, she can't make a</p> <p>11 final decision until after public comment.</p> <p>12 JUDGE SHEEHAN: Again, I'm not asking</p> <p>13 about a final decision at that point. I'm</p> <p>14 asking about a final agreement by her now that</p> <p>15 the mods are acceptable.</p> <p>16 MR. KRUEGER: I can certainly get that</p> <p>17 clarification.</p> <p>18 JUDGE SHEEHAN: It doesn't seem like</p> <p>19 your statement is accurate in the joint request</p> <p>20 for extension in stating that the parties have</p> <p>21 negotiated successfully.</p> <p>22 MR. SCHMIDT: Your Honor, if I -- this</p>

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1 is Rob Schmidt -- if I may clarify a statement.
2 I think certainly, PPG's perspective on this is
3 that the party that we were attempting to
4 negotiate with was the division -- and Tom and
5 the permit writer -- because we have always
6 understood that U.S. EPA's final decision on any
7 agreed-to terms and conditions that we have
8 reached would have to be contingent upon moving
9 the permit to the permit modification process,
10 which we have always understood to include the
11 ability of U.S. EPA to make changes based upon
12 the requirements for public participation.
13 Certainly from our perspective,
14 from PPG's perspective, an agreement has been
15 reached with the necessary party, if you
16 will, the permit writer and legal counsel at
17 U.S. EPA, but we have always understood that
18 the final decision by -- well, originally I
19 was thinking the regional administrator, but
20 certainly the division head -- was going to
21 be something that was subject to the
22 modification process and public comment.

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1 And so certainly from our
2 perspective, we've reached an agreement with
3 U.S. EPA. We understand that that agreement
4 has a contingency in it and are prepared to
5 move forward with the modification process,
6 however that ultimately is decided to be
7 done.
8 JUDGE SHEEHAN: It just sounds like
9 EPA, and if EPA is the decision-maker here, has
10 not agreed with you. Mr. Krueger, the permit
11 writer, has, but not the division director;
12 right?
13 MR. KRUEGER: Well, again, Your Honor,
14 I -- while we didn't ask her to make this
15 statement, based on our discussions with the
16 division director, I think she regards it as
17 being a final agreement subject to public
18 comment.
19 Again, she -- I think she felt that
20 it was unnecessary for her to formally say
21 yes, this is final, and maybe that's a fairly
22 fine distinction, but I think that she felt

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1 more comfortable not that going to that
2 point, feeling it wasn't necessary.
3 But again, if that is important for
4 the Board for us to clearly establish that,
5 we are happy to do that. And again, I
6 certainly don't believe that we
7 mis-represented the region's sense that the
8 parties have reached agreement here subject
9 to public comment.
10 JUDGE SHEEHAN: I'm looking for more
11 than a sense, especially when you're asking for
12 much more time now and you indicated that you
13 knew you were effectively done. Do you
14 understand the Board's concern?
15 MR. KRUEGER: I certainly do --
16 JUDGE SHEEHAN: You make signals here,
17 it's done, but then it's suddenly not done.
18 It's open again anew.
19 MR. KRUEGER: Your Honor, this is
20 Mr. Krueger again -- I don't believe that the
21 parties were mis-representing to the Board the
22 status of their progress in this, essentially

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1 our agreement that -- our belief that we have
2 resolved this matter.
3 I think the one thing we may have
4 failed to emphasize to the Board in some of
5 our previous pleadings was that this
6 agreement would then still require the
7 parties to obtain a modification of the
8 permit.
9 JUDGE SHEEHAN: Let me ask
10 Mr. Krueger, when do you anticipate you would go
11 out with a new revised permit for public
12 comment?
13 MR. KRUEGER: Our belief is that all
14 we would need to go forward with would be a
15 modification of the permit rather than a
16 completely new reissued permit.
17 JUDGE SHEEHAN: When would that date
18 be?
19 MR. KRUEGER: We have one matter that
20 we still need to resolve, Your Honor, and at
21 this point, we need to have further consultation
22 with EPA headquarters on whether the permit can

<p style="text-align: right;">18</p> <p>1 be modified using the procedures set forth in 2 40 CFR Section 124.19(d). That's a relatively 3 new regulatory provision that the agency really 4 has not used much, if at all, that seems to 5 provide for a streamlined approach to permit 6 modification when that modification is resolving 7 a matter upon appeal with the agency. Because 8 it is fairly precedential, we do need to have 9 further consultations with headquarters. 10 Headquarters indicated that they 11 weren't ready to complete that consultation 12 until the region advised them the matter 13 really has been settled. We have now done 14 that. We're hoping that that will be done 15 expeditiously. 16 If this provisions of 124.19 (d) 17 are deemed not to be applicable there in 18 whole or in part, we would then proceed with 19 their standard modification provisions under 20 CFR Section 270.41. Both parties are 21 familiar with those. 22 As Mr. Schmidt indicated, we have</p>	<p style="text-align: right;">20</p> <p>1 headquarters' approval on the vehicle for 2 streamlining, or something else? 3 MR. SCHMIDT: Your Honor, this Rob 4 Schmidt. That was actually something else. We 5 reached final agreement the afternoon of 6 July 16th. And we hadn't at that point 7 exchanged the language for all six of the 8 modifications. And basically my client said we 9 have agreement but we've got to see it before we 10 can approve it. 11 And that was -- because we were 12 under the previous orders of the Board to 13 file a response by July 16th, we had to 14 include that language because -- from my 15 client's perspective, while we had reached 16 that agreement in principle, we hadn't 17 exchanged the language and we had to see the 18 language. 19 MR. KRUEGER: Your Honor, that that 20 final verification of language also had to 21 proceed within EPA Region 5, and that did happen 22 very shortly after we filed the status report.</p>
<p style="text-align: right;">19</p> <p>1 developed a document that shows the specific 2 language changes. Once we know which vehicle 3 is the appropriate vehicle to use, my belief 4 is that we can get that modification out 5 before the public within a matter of about a 6 week, establishing then appropriate public 7 communication provisions. 8 After we receive our public 9 comments, we believe we can move forward 10 expeditiously to respond to them and to 11 finalize the appropriate permit 12 modifications. So if you're asking me for a 13 specific projection, I would say that that I 14 do believe that we will have the 15 modifications resolved in about two months, 16 which was the basis for our asking for an 17 extension to September. 18 JUDGE SHEEHAN: When you say in your 19 filing on July 15th, the sentence after you say 20 you've successfully negotiated all terms, you 21 say you require further time to obtain final 22 approval. Is that what you just described, the</p>	<p style="text-align: right;">21</p> <p>1 JUDGE SHEEHAN: Although it didn't 2 occur at the division director level? 3 MR. KRUEGER: Correct. Although the 4 division director has been briefed, the division 5 director has indicated, as I expressed, no 6 problems with it. She didn't feel that she 7 wanted to say that she agreed with the 8 modifications until she saw public comment. 9 JUDGE SHEEHAN: So you say you've 10 talked to headquarters already, Mr. Krueger, 11 about the streamlining vehicle? 12 MR. KRUEGER: Yes. 13 JUDGE SHEEHAN: When did you speak to 14 them? 15 MR. KRUEGER: We've actually -- we 16 have been talking with headquarters staff about 17 this question since the beginning of the 18 calendar year, but we indicated to them that at 19 this point, we now have a final resolution and 20 we really need to answer this question quickly. 21 That communication occurred. I think our filing 22 was last Thursday, and I was in touch with the</p>

1 appropriate contacts at headquarters Friday
 2 morning first thing.
 3 JUDGE SHEEHAN: So why does it require
 4 all the way through August into September to get
 5 this out if you've already begun those
 6 conversations with headquarters earlier this
 7 year, at the beginning of this year?
 8 MR. SCHMIDT: Your Honor, Rob Schmidt.
 9 Depending on how we go forward with the
 10 modification -- and we'll have to figure out
 11 whether this is a Class II or Class III product
 12 modification to get these changes implemented,
 13 there is a -- at least, I believe a 60-day
 14 public comment period on the proposed
 15 modification.
 16 JUDGE SHEEHAN: That's not why I
 17 asked. I asked why did it take so long to get
 18 the proposed modified permit out for public
 19 comment?
 20 MR. KRUEGER: Your Honor, this is
 21 Mr. Krueger. I believe that I had represented
 22 earlier that we thought we could get it out very

1 quickly.
 2 JUDGE SHEEHAN: But you said that was
 3 September, which doesn't sound really quickly at
 4 all, given the fact that you say began the
 5 conversations with headquarters in January, or
 6 early in the calendar year, as you represented.
 7 MR. KRUEGER: Your Honor, I must have
 8 misspoken then. I thought that I said and I
 9 certainly meant to say we would have the permit
 10 modification completed by September.
 11 JUDGE SHEEHAN: You mean completed
 12 through public comment?
 13 MR. KRUEGER: Exactly.
 14 JUDGE SHEEHAN: That may be my
 15 mistake. I thought you meant just out, not with
 16 public comment received. When do you think
 17 you'll get it out then -- received with public
 18 comment?
 19 MR. KRUEGER: My belief is that we
 20 should be able to get the modifications out
 21 within about a week after we get this decision
 22 on what the appropriate vehicle would be. And I

1 am very hopeful that we will have our input from
 2 headquarters on that question within about a
 3 week or so.
 4 JUDGE SHEEHAN: So you think what
 5 then -- sounds like you're guessing two weeks or
 6 so; is that right? To get it out?
 7 MR. KRUEGER: That is my current
 8 expectation. This is Mr. Krueger again. And
 9 again, that is subject to making sure that we
 10 have everything cleared with PPG as well. My
 11 impression from our discussions with the PPG is
 12 they'll work to fast-track this as well.
 13 MR. SCHMIDT: This is Rob Schmidt.
 14 Absolutely.
 15 JUDGE SHEEHAN: So given the fact that
 16 that point, we'll be probably be in the 15th or
 17 maybe 16th -- 16th month, and the Board is
 18 anxious just to get this thing resolved either
 19 by briefing it in your argument and having a
 20 decision, or by having the parties take it
 21 away -- would you have any objection to the
 22 Board ordering that the region file its response

1 to the petition in three weeks if the permit mod
 2 is not out for public comment before that time?
 3 MR. KRUEGER: Your Honor, this is
 4 Mr. Krueger. This may be a good opportunity to
 5 I think clarify some apparent confusion. The
 6 EPA Region 5 has filed its response to the
 7 petition for review. We filed that within the
 8 deadline that the Board originally established.
 9 So the matter is effectively fully
 10 briefed. And it was after EPA filed its
 11 response that the parties initiated their
 12 request for a stay, because we believe that
 13 the matter was capable of resolution by
 14 agreement rather than requiring the Board to
 15 review the merits. So the matter is fully
 16 briefed and ready to proceed, if that becomes
 17 necessary.
 18 JUDGE SHEEHAN: Okay.
 19 MR. SCHMIDT: Your Honor, this Rob
 20 Schmidt. I do want to concur with Mr. Krueger
 21 on that point that they did file their response
 22 within the timeline provided. I think that

1 proceeding at this point with oral argument or
2 any sort of hearings on this matter would not
3 really be necessary because all of the
4 substantive issues have been resolved. I mean,
5 we are at a point now where we are effectively
6 dealing only with procedural matters to
7 implement the agreement between the parties.

8 JUDGE SHEEHAN: Right, but you
9 understand our concern. The procedural matters
10 are seeming to eat up more months than the
11 substantive at this point. And again, I'm going
12 back to your representation in June that you'd
13 have complete and final resolution by July, and
14 then in July saying you had all terms necessary
15 settled.

16 But then you had three other issues
17 you put out, and you wanted until September
18 before you get back to us with another
19 proposal for how much more time it might
20 take. It doesn't sound like it's just
21 winding down. Can you understand that
22 perspective, given the way you have

1 articulated things in your recent filings?

2 MR. SCHMIDT: This is Rob Schmidt. I
3 guess my response to that would be that would
4 probably be the result of inartful drafting
5 between Mr. Krueger and myself as to not
6 alerting the Board clearly enough that there was
7 going to be a secondary set of considerations
8 once the parties had resolved the substantive
9 issues.

10 MR. KRUEGER: And this is Mr. Krueger.
11 I would agree with that. And while I think we
12 have been clearancing, we were working towards
13 an agreement to modify the permit. Perhaps we
14 could have been clearer that once that agreement
15 was reached, that we would still have to go
16 through the necessary procedural steps, as
17 Mr. Schmidt indicated.

18 JUDGE SHEEHAN: And this too in the
19 face of the statement in the July order that no
20 further extensions will be granted, and that was
21 actually said even before that, with reference
22 to the June 13 filings.

1 So it -- the concern here is that
2 we thought that this is moving to closure.
3 This is an old, old case as it is, and now we
4 are being told there is a lot more process
5 and procedure to come, which could gobble up
6 many more months.

7 But I think that you got your word,
8 Mr. Krueger, that even though -- I know it's
9 not -- you can't be absolutely clear, but you
10 expect -- well, both of you expect, within
11 two weeks, you'll get out the modified permit
12 for public comment. You're both comfortable
13 with that statement?

14 MR. SCHMIDT: Your Honor, this is
15 Mr. Schmidt --

16 JUDGE SHEEHAN: Fact
17 representations --

18 MR. SCHMIDT: As far as Mr. Krueger's
19 representations go, I certainly think that we
20 could marshal resources on our end to be able to
21 do that, depending upon what the ultimate
22 decision is as to the process.

1 MR. KRUEGER: Yes, Judge, and this is
2 Mr. Krueger. I also don't want you to take our
3 hesitation as concern that we wouldn't meet
4 those deadlines. I think as Mr. Schmidt was
5 indicating, the decision on which vehicle is
6 going to be used will determine which entity has
7 to take the laboring oar in terms of getting the
8 modifications out.

9 So we can only -- I think we can
10 only really fairly speak for our own clients,
11 but I will indicate that -- as Mr. Schmidt
12 did, I think my client is ready to move
13 forward within that time frame.

14 JUDGE SHEEHAN: I think Ms. Berrios
15 has a question.

16 MS. BERRIOS: I had a question for
17 Mr. Krueger. You mentioned 124.19(b) as the
18 provision given with modification. Is that a
19 new provision, and how new is it?

20 I have a copy here of the CFR, but
21 it's a 2006 version, and it doesn't -- the
22 provision that relates to 124.19 (b) doesn't

<p style="text-align: right;">30</p> <p>1 deal with mechanism, so I was wondering if 2 this was a new provision, recent one? 3 Mr. Krueger? 4 MR. KRUEGER: Yes, I don't have it 5 here in front of me, and I apologize for that. 6 My belief is that that provision was added at 7 roughly the time that the Agency revised its 8 procedural rules. That still seems new to me, 9 although I realize that's probably been in place 10 now for about four or five years. 11 But it was done in conjunction with 12 that. And as I indicated, from all the 13 research that I've done and all the people 14 I've talked to, it's not anything that the 15 Agency has really had to invoke very much at 16 this point. 17 MR. SCHMIDT: Your Honor, Rob Schmidt. 18 If I may offer an observation. I have a second 19 RCRA permit appeal in front of the Board pending 20 right now on behalf of the Dow Chemical Company. 21 And in that -- that case has also resolved 22 itself on a substantive basis, but the question</p>	<p style="text-align: right;">32</p> <p>1 and indicate to us whether or not there's any 2 disagreement on her part with approval, at 3 least as of the mods between the parties 4 whatever -- putting aside whatever the public 5 comment might be. 6 And also, Mr. Krueger, urge you to 7 get with OGC or whomever you're speaking to 8 at headquarters to wrap up the vehicle 9 issue -- streamlining issue so that this 10 begin can get out quickly. 11 MR. KRUEGER: Yes, Judge. I certainly 12 intend to do that. And you know, I understand 13 and share the Board's concern that this has 14 dragged on for some time now. You know, I will 15 note that the Board was very gracious in 16 granting the last extension. On seeing there 17 will be no further extensions unless the parties 18 have successfully negotiated all terms to settle 19 this matter, I genuinely do believe we have 20 reached that point. If we hadn't, we wouldn't 21 have made the further request for extension of 22 stay.</p>
<p style="text-align: right;">31</p> <p>1 has been posed in that case as well as to what 2 procedures need to be used to modify the 3 underlying RCRA permit. 4 And the response in that matter was 5 the same as Mr. Krueger's response, in that 6 this procedural rule appears to be something 7 that has not been used a great deal. And I 8 think that Mr. Krueger's observation about 9 headquarters needing to be involved is 10 something that I've experienced in another 11 context. 12 JUDGE SHEEHAN: I think unless the 13 parties have anything more to add, we can wrap 14 this up. Again, I do want to stress, I'm going 15 to speak about this with the other judges, who I 16 think shared the frustration that this has gone 17 on quite a while and gone on -- most recently in 18 the face of representation that it was about to 19 conclude -- and suddenly it doesn't seem like 20 it's about to conclude at all. 21 I would, Mr. Krueger, urge you 22 to get with your division director right away</p>	<p style="text-align: right;">33</p> <p>1 I do firmly believe that the 2 Board's willingness to grant us time to see 3 if we could reach an agreed resolution has 4 produced a substantive resolution at this 5 point that is advantageous to all the parties 6 and to the Agency. 7 We are grateful for the extensions 8 the Board has granted us, and I do firmly 9 believe that by September, if we are 10 completely done, we're going to be well along 11 in the process, and have something tangible 12 to show the Board and have a very concrete 13 idea of the fact that this is going to be 14 resolved. 15 JUDGE SHEEHAN: Thank you both. 16 MR. SCHMIDT: Thank you, Your Honor. 17 MR. KRUEGER: Thank you. 18 (Whereupon, at approximately 19 11:33 a.m., the TELECONFERENCE 20 was adjourned.) 21 * * * * * 22</p>

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