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BEFORE THE ENVIRONMENTAL PROTECTION APEALS BOARD <sup>375 AUG 07 AM 9:02</sup>  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

ORIGINAL

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In re: :  
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DOW CHEMICAL COMPANY : RCRA Appeal No. 06-01  
HANGING ROCK PLANT, :  
 :  
 :  
Permit No. OHD039-128-913 :  
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Washington, D.C.  
Tuesday, August 12, 2008

The above-entitled matter came on  
for TELECONFERENCE at approximately 11:00  
a.m. at 1140 Connecticut Avenue, NW,  
Washington, D.C.

BEFORE:  
  
CHARLES SHEEHAN  
Presiding Judge  
  
NIVEA BERRIOS  
Senior Counsel to the Board

## APPEARANCES:

On behalf of PPG Industries Ohio, Inc.:

ROBERT J. SCHMIDT, ESQUIRE  
Porter Wright Morris & Arthur  
41 South High Street  
Columbus, Ohio 43215  
(614) 227-2028

On behalf of Environmental Protection Agency:

KEVIN C. CHOW, ESQUIRE  
Office of General Counsel  
U.S. EPA Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604  
(312) 886-0562

## ALSO PRESENT:

Eurika Durr  
Mark Mahoney

\* \* \* \* \*

## 1 P R O C E E D I N G S

2 MS. DURR: The Environmental Appeals  
3 Board of the United States Environmental  
4 Protection Agency is now in session for a  
5 teleconference in re: the Dow Chemical Company  
6 Hanging Rock Plant, Permit No. OHD039-128-913;  
7 RCRA Appeal No. 06-01, the Honorable Judge  
8 Charles Sheehan presiding.

9 JUDGE SHEEHAN: Good morning. This is  
10 Judge Sheehan, and with me is Nivea Berrios, our  
11 senior attorney on the case.

12 As the order of August 6 indicates,  
13 I'd like to talk with you all today about the  
14 timing here. I begin with the -- shall we  
15 say discomfort with the fact that this case  
16 has gone on over 2 years now, it's look like  
17 it's heading into at least 2-1/2 years at  
18 this point.

19 So I'd like to understand why the  
20 delay, and whether or not we need to get on  
21 with briefing this case and having oral  
22 argument.

1 I outlined a few questions in that  
2 order. Maybe turn right to those first,  
3 asking Mr. Chow to go -- to respond  
4 initially. First, why does Ohio have to get  
5 involved in the certification at this point,  
6 if you've already represented that Ohio,  
7 contrary to what you said earlier, is no  
8 longer going to be involved as the permitting  
9 authority? What role do they play at this  
10 point if they're no longer involved in the  
11 permit?

12 MR. CHOW: I guess what you've got to  
13 understand is that the -- actually, the parties  
14 were on this kind of simultaneous track for  
15 terminating the appeal. One was the comparable  
16 fuels demonstration that I was proceeding with.  
17 The other possibility was -- you know, now that  
18 Ohio has been authorized to issue BIF permits,  
19 to actually issue a BIF permit, making EPA's  
20 permit unnecessary.

21 So a few months ago, I guess, when  
22 this all came up as possibilities -- nobody

1 knew which one would proceed faster, so we  
2 decided, well, let's request the AB to -- for  
3 more time to let both of them proceed.

4           But as Dow proceeded with the  
5 comparable fuels demonstration, and as Ohio  
6 EPA started to draft up and review a state  
7 BIF permit, I think Dow determined that it  
8 was making such good progress with its  
9 comparable fuels demonstration, with Ohio  
10 EPA's review on participation, that Ohio  
11 decided that, since the comparable fuels  
12 demonstration would be the most likely thing  
13 to occur, that it would not be appropriate  
14 use of their resources to issue a state  
15 permit which would then be rendered moot  
16 because of the comparable fuels  
17 demonstration.

18           My understanding is that the  
19 comparable fuels demonstration was just going  
20 to proceed anyway as a result of the joint  
21 venture between Dow and Chevron. That's just  
22 a business decision that they made. So Ohio

1 just told us maybe a month ago that they were  
2 not going to be issuing a state-issued  
3 permit. So that's kind of the -- that's the  
4 reason why they're not issuing a state BIF  
5 permit.

6 JUDGE SHEEHAN: I think I get that,  
7 but I don't understand why if they're not  
8 issuing the permit they need to issue the clean  
9 closure certification.

10 MR. CHOW: That's a result of the  
11 comparable fuels demonstration. Once -- my  
12 understanding of the process is -- and Rob can  
13 properly explain this a little bit more than I  
14 can -- that once the comparable fuels  
15 demonstration is made and Dow conducts its clean  
16 closure on a couple of units, that Dow would be  
17 preparing a report, mailing it to Ohio, and then  
18 Ohio would be reviewing it and -- you know,  
19 accepting or rejecting the results of this  
20 report.

21 And that's the clean closure  
22 certification that would give Dow the

1 certainty and closure that it needs to  
2 make -- to have a successful comparable fuels  
3 demonstration.

4 JUDGE SHEEHAN: Given the slow pace in  
5 this case at this point, it sounds like that's a  
6 recipe for multiple months more time; right?

7 MR. CHOW: We've talked to Ohio EPA  
8 about exactly how long it would take for them to  
9 review these clean closure reports, and they  
10 could not give us a specific timeline or a  
11 particular date, but I think the Ohio EPA staff  
12 members said, maybe it'll take us a couple of  
13 weeks. But they could not commit it to any  
14 particular time frame.

15 That's kind of the -- that's the  
16 source of some uncertainty on our part as  
17 to -- I mean, Rob and I were trying to figure  
18 out how much time should we ask. We have no  
19 idea how long Ohio EPA will take other than  
20 Ohio -- a low-level Ohio EPA staffer said,  
21 well, maybe it'll take us a couple of weeks.

22 So taking them at their word, and

1 building in a little extra time, we decided  
2 that November 21st would be an appropriate  
3 time.

4 MR. SCHMIDT: I think --

5 JUDGE SHEEHAN: So --

6 MR. SCHMIDT: I'm sorry.

7 JUDGE SHEEHAN: Is that Mr. Schmidt?

8 MR. SCHMIDT: Yes, Your Honor. I  
9 wanted to offer another point on this, and that  
10 is -- due to the uncertainty with Ohio EPA, when  
11 Kevin and I were discussing the timeline, that  
12 is when we discussed alternatives to a permanent  
13 modification at the federal level, and  
14 terminating this appeal before going through  
15 that process.

16 We're faced with Ohio EPA having  
17 final say on the closure of the unit, both  
18 because of delegations and because of the  
19 comparable fuels demonstration that's  
20 currently being made.

21 But once we get that certification  
22 of clean closure from Ohio EPA -- and I will



1 also convey that I have relayed to Ohio EPA's  
2 legal counsel that this is a decision that  
3 needs to be made in short order because of  
4 this appeal and because of trying to resolve  
5 federal permitting issues. He understood  
6 that and did commit to making his best  
7 efforts to resolve or to ensure the closure  
8 certification.

9 I guess what we were talking about,  
10 Kevin and I, was the possibility of finding a  
11 way to resolve this appeal after closure was  
12 certified by Ohio EPA but before we go  
13 through the modification process at the  
14 federal level to remove the BIF permit  
15 conditions.

16 I think that's something that I've  
17 convinced my client is the most appropriate  
18 thing to do rather than wait for a permanent  
19 modification to go through.

20 So we've tried our best to reduce  
21 the timeline for concluding this appeal,  
22 taking into account the uncertainty presented

1 by Ohio EPA's decision-making process -- by  
2 reaching an agreement that we will withdraw  
3 this appeal as soon as that certification is  
4 confirmed, and as soon as the agency confirms  
5 that it does not consider us subject to the  
6 BIF permit anymore, and then we will wrap up  
7 the permanent modification that is necessary  
8 to remove the BIF permit after we withdraw  
9 the appeal.

10 And that was our best effort to try  
11 and reduce the timeline, understanding that  
12 everybody wants to get this matter resolved.

13 JUDGE SHEEHAN: So you'd withdraw the  
14 appeal when the certification is approved, but  
15 when the certification is approved is anyone's  
16 guess.

17 MR. SCHMIDT: I guess I would say it's  
18 not a question of multiple, multiple months, but  
19 Ohio EPA didn't want to give us a definitive  
20 answer on how long it would take them to review  
21 the closure.

22 JUDGE SHEEHAN: When are you going to

1 get the final information on the fuel  
2 demonstration to Ohio?

3 MR. SCHMIDT: We are working -- well,  
4 let's see, we've completed -- to give you a  
5 quick thumbnail overview -- the boiler that was  
6 subject to the RCRA permit in this case has two  
7 product lines that generate waste that are mixed  
8 in a tank and then sent to the boiler for  
9 burning. One of the process lines has already  
10 been cleaned and tested and sampled and meets  
11 the comparable fuels demonstration.

12 That line, we could -- essentially  
13 there are three things that we have to  
14 certify as clean for purposes of closing this  
15 unit. The second item is the tank. It's  
16 called the R-35 tank. It's a mixing tank  
17 basically for the two products -- or the  
18 waste from the two product lines. That tank  
19 is scheduled to be taken out of service and  
20 cleaned within the next two weeks.

21 We have to get a temporary tank on  
22 site to allow us to accumulate any materials

1 from that tank -- sludge and other materials,  
2 as well as allowing us to continue to work on  
3 the second product line.

4 The second product line has already  
5 been cleaned. We cannot properly test it  
6 yet. We should have that testing done in  
7 September for -- to allow us to submit to  
8 Ohio EPA by the end of September the closure  
9 certification request. That's the timeline.

10 So within the next -- assuming  
11 nothing goes wrong with the testing of  
12 sampling, that indicates we have a problem  
13 with the -- that we need to more cleaning for  
14 closure, within the next six to eight weeks,  
15 Ohio EPA should have that information.

16 JUDGE SHEEHAN: And then begins the  
17 uncertain period?

18 MR. SCHMIDT: Correct. That begins  
19 the uncertainty associated with their review,  
20 but again, if we get the certification reports  
21 to them by the end of September, perhaps early  
22 October, we would -- again, this is a -- Kevin

1 and I were looking at the possibility of them  
2 taking anywhere from four to six weeks to  
3 review.

4 If they certify it within that  
5 period of time, I'm assuming the region would  
6 be able to provide us with notification that  
7 they no longer consider us subject to the BIF  
8 portions of the permit, and we can at that  
9 point withdraw the appeal. So again, that's  
10 why the November 21st date that we proposed  
11 was kind of how we reached the timeline for  
12 resolving this matter.

13 JUDGE SHEEHAN: By the way, I'll ask  
14 Ms. Berrios to jump in here if she has any  
15 questions. I should have said that at the  
16 outset.

17 MR. CHOW: Judge, the letter that EPA  
18 is writing, it's more of a -- I characterize it  
19 more as a comfort letter than anything. I think  
20 Dow just wanted some assurances that EPA would  
21 consider the appeal and the permit, at least of  
22 their portions to be moved after the clean

1 closure certification. EPA is agreeable to  
2 doing that. And that is not a difficult letter  
3 to write.

4 JUDGE SHEEHAN: Okay. But getting  
5 back to Ohio for a moment, I am not  
6 understanding why it is that at this point, with  
7 a lot of energy invested into this case and with  
8 the permit issues, you're still unable to get  
9 any better guarantee from Ohio about their  
10 timeline than some -- as you put it -- a  
11 "low-level staffer."

12 Why can't you get somebody at a  
13 management level to commit for Ohio -- we'll  
14 turn it around within two weeks or something  
15 like that rather than just go into this  
16 uncertain cloudy mode of a low-level person  
17 giving you a vague representation and you've  
18 got nothing better than that.

19 Why can't you get higher-level  
20 people in the state to give you more comfort  
21 than that?

22 MR. CHOW: I suppose we could talk to

1 some managers over there and see if there's any  
2 way they can maybe clear the schedules of their  
3 staffers or something, but yeah, we could try  
4 doing that --

5 MR. SCHMIDT: Your Honor, I will offer  
6 an observation based on practicing in Ohio for  
7 the last decade or so -- we can try that and  
8 certainly a request from U.S. EPA to Ohio EPA  
9 for assistance in making sure that this is a  
10 high priority for the people that need to make  
11 the decision will certainly be something that  
12 Ohio EPA will listen to.

13 I have in my experience not found  
14 them willing to set deadlines for themselves  
15 in any matter. I would think a joint request  
16 would be something that they will look  
17 favorably on, but I would -- in my  
18 experience, it's unlikely that we would get  
19 an actual definitive statement that they will  
20 take action by a certain date.

21 I would hope that they would give  
22 that to the Region V, but in my experience,

1 they're going to want to leave themselves  
2 wiggle-room in case somebody is unable to  
3 reach a decision within that period of time.

4 I want to try.

5 MR. CHOW: I know. I'm certainly  
6 willing to.

7 JUDGE SHEEHAN: I understand that they  
8 probably can't certify absolutely that they can  
9 turn it around in X number of days or weeks, but  
10 it is troubling that you're going on a low-level  
11 person's date representations at a time 2-1/2  
12 years down the pike when this case should have  
13 been done by now, much less being it another  
14 sort of beginning stage or another cycle here.  
15 It's not very reassuring to think you're still  
16 not getting much out of Ohio, or not even  
17 getting any kind of higher-level commitment to  
18 try.

19 MR. SCHMIDT: I would -- this is Rob  
20 Schmidt again -- I can certainly commit to  
21 making an effort to get higher-level managers at  
22 Ohio EPA to try to move this as expeditiously as



1 possible. I will certainly do that.

2 MR. CHOW: EPA will make contact as  
3 well.

4 JUDGE SHEEHAN: Mr. Chow, would you  
5 have any objection if this was not wrapped up in  
6 the sense of the appeal being withdrawn  
7 by -- say the November 21st date that I think is  
8 now on the table -- that Region V be directed to  
9 file its brief?

10 MR. CHOW: Yeah, probably. I mean, if  
11 we file the brief and then Dow was on the verge  
12 of finishing its comparable fuels demonstration  
13 and submitting its clean closure reports and  
14 then two or three -- whatever -- how many weeks  
15 later, Ohio EPA certifies the closure, then all  
16 that work would have been for naught.

17 JUDGE SHEEHAN: Right. I understand  
18 that, except that on looking at the laundry list  
19 here, request for more time, beginning in '06,  
20 and every time it looks like positive statements  
21 were made about being near agreement in  
22 principle, agreement in principle on all issues,

1 think we can wrap this up by September 21st.  
2 And each time, the good news is offset by more  
3 bad news. So there's a certain amount of  
4 skepticism here that I'm sure you can  
5 appreciate.

6 MR. CHOW: Sure. I do appreciate  
7 that. And it's just -- I don't know if I  
8 would characterize this case as being cursed,  
9 but it just seems like we were on the verge of  
10 something and then something happens along the  
11 way. But at this time, I just do really feel  
12 that we're at the end of the line here. I  
13 personally can't imagine something that would  
14 occur that would prevent the comparable fuels  
15 demonstrations from being accepted at some  
16 point.

17 But I've been wrong before, so I  
18 can't say with certainty that this will be  
19 the last time. All I can say is that it  
20 would just be -- I think -- it would just be  
21 an inappropriate use of my time and the  
22 government resources to file the brief on

1 every single item that Dow has appealed. And  
2 these are highly technical issues, too.

3 I mean, we spent a lot of time  
4 trying to get all of our experts together  
5 just going through these things in minute  
6 detail and running models and calculations  
7 and gathering more information. So to have  
8 to go back into that when the case is just  
9 about over -- that's just a formality of  
10 trying to terminate the permit or -- I would  
11 prefer not to have to file the brief.

12 I mean, I can understand why,  
13 filing the brief would at least -- would  
14 preclude these constant requests for  
15 additional time. But I -- at this time, I  
16 don't think that would be appropriate use of  
17 EPA resources, because I would have to gather  
18 back my experts and my staff people and our  
19 experts -- we've had an awful time trying to  
20 get them scheduled to meet with us. They are  
21 so busy, and their expertise is so much in  
22 demand that -- and then I would have to

1 explain to them the reason we have to do this  
2 is because we just haven't been able to  
3 terminate this.

4           So it would get -- unless I get  
5 some management approval of this thing, it  
6 would get shoved down to the bottom of their  
7 priority list.

8           I can see the point, but I don't  
9 think it would be a good thing to do right  
10 now.

11           JUDGE SHEEHAN: It sounds like you  
12 appreciate, though, from the board's point of  
13 view, our job is to move cases, and this case  
14 has done nothing but sit for well over two  
15 years. It's one of our oldest cases. And if  
16 somebody were looking at our docket, they would  
17 certainly wonder why in the world we had given  
18 so many extensions for so little fruit.

19           MR. CHOW: My job is to move cases,  
20 too, and I have been concerned about -- but I  
21 understand your point of view completely. I  
22 should say I think at this point -- I think we

1 really, really are the end. A few more months I  
2 think really will do it. Everything seems -- I  
3 think we have a plan and we have a timeline  
4 that'll be subject to Ohio EPA's uncertainties  
5 as far as getting its review done.

6 JUDGE SHEEHAN: Let me ask this: what  
7 degree of probability do you both feel -- you  
8 can each speak independently if you wish -- to  
9 the prospect that this appeal would be withdrawn  
10 by November 21st?

11 Mr. Chow, what's your --

12 MR. CHOW: I have 95 percent certainty  
13 on that.

14 JUDGE SHEEHAN: What about you,  
15 Mr. Schmidt?

16 MR. SCHMIDT: Not quite 95 percent,  
17 but I would say that if I needed to put a number  
18 on it, I'd say 80 to 90 percent. And that's  
19 just -- I mean, there are a couple of moving  
20 pieces that we don't have control over. But  
21 those moving pieces I think we can put pressure  
22 on to get the review done. And the -- frankly,

1 I would agree with Kevin that at this point,  
2 really what we're trying to get through is a  
3 procedural hurdle, and that will take care of  
4 all this.

5           Previously, on a previous request  
6 for extensions, I think -- we have reached  
7 agreement on all the issues that we appealed  
8 some time ago, and the problems that were  
9 presented by trying to find a mechanism to  
10 implement those changes in light of some  
11 fairly significant regulatory  
12 changes -- meaning the delegation of the BIF  
13 program to Ohio EPA as well as the  
14 determination that the best approach for the  
15 facility was to go through the comparable  
16 fuels demonstration -- I think that those are  
17 actually -- I would say they're not bad news  
18 in terms of what's happening. They may be  
19 bad news in terms of moving this appeal  
20 forward, but I think they're actually  
21 positive events that have just happened to  
22 have a negative impact on how fast we could

1 get this case resolved.

2 In particular, the comparable fuels  
3 demonstration -- that's an environmentally  
4 positive thing; removing hazardous waste from  
5 being burned at the facility is certainly  
6 something that -- Ohio EPA was very positive  
7 about our efforts to move that forward -- and  
8 thus, I think we will get their cooperation  
9 in terms of moving this thing to final  
10 closure.

11 JUDGE SHEEHAN: I'll ask Ms. Berrios  
12 if she has any questions.

13 MS. BERRIOS: I just have a  
14 (inaudible) make sure that I understood  
15 correctly, will Dow then withdraw the petition  
16 after it receives a formal acknowledgement from  
17 the region that they're no longer subject to the  
18 BIF portion of the permit? And then after that,  
19 we'll proceed with permanent modification?

20 MR. SCHMIDT: That's correct.

21 MS. BERRIOS: Okay. Thank you.

22 JUDGE SHEEHAN: I'll conclude then by

1 noting a couple of things. First, I will take  
2 this back to the other judges -- I spoke to one  
3 this morning and we discussed the concern of the  
4 Board the duration this case has already had.

5           And number two, Mr. Chow and/or  
6 Mr. Schmidt, I strongly suggest that I if the  
7 consequences, especially for the region are  
8 grim, if the region has to file its brief,  
9 the expenditure of resources involved and so  
10 on, Region V oversees the state program,  
11 Region V presumably funds the state program,  
12 you might get some higher-level person,  
13 program and/or legal to talk to their  
14 counterparts in Ohio to be sure they can do  
15 their part.

16           MR. CHOW: Yeah, absolutely.

17           JUDGE SHEEHAN: And Ohio certainly has  
18 this interest -- or should have an interest in  
19 cooperating with Region V and not leaving  
20 Region V hanging.

21           So I'll take this back and discuss  
22 this, in light of this conversation, with the



1 other judges and we'll go from there. We'll  
2 see something shortly.

3 Does anybody -- Mr. Schmidt,  
4 Mr. Chow -- have anything to add before we  
5 conclude?

6 MR. SCHMIDT: Not me? Mr. --

7 MR. CHOW: Nope.

8 JUDGE SHEEHAN: Okay.

9 MR. CHOW: No, Your Honor, I don't  
10 have anything.

11 JUDGE SHEEHAN: Thanks very much.

12 MR. CHOW: Thank you.

13 MR. SCHMIDT: Thank you.

14 (Whereupon, at approximately  
15 11:24 a.m., the HEARING was  
16 adjourned.)

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C E R T I F I C A T E

This is to certify that the foregoing  
transcript in the Matter of:


DOW CHEMICAL COMPANY  
HANGING ROCK PLANT  
PERMIY NO. OHD039-128-913

BEFORE: THE HONORABLE CHARLES SHEEHAN

DATE: AUGUST 12, 2008

PLACE: WASHINGTON, D.C.

represents the full and complete proceedings of  
the aforementioned matter, as electronically  
recorded and reduced to typewriting.

A handwritten signature in cursive script, reading "Mark Mahoney", is written over a horizontal line.

MARK MAHONEY