

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,)	
STATE OF MICHIGAN, and THE)	
SAGINAW CHIPPEWA INDIAN TRIBE)	
OF MICHIGAN,)	Civil Action No. 1:19-cv-13292
)	
Plaintiffs,)	HON. MATTHEW F. LEITMAN
)	
v.)	
)	
THE DOW CHEMICAL COMPANY,)	
)	
Defendant.)	

JOINT STATUS REPORT

In accordance with the provisions of Paragraph 33 of the Consent Decree approved and entered by the Court in this action (ECF No. 8, at PageID.572), the United States of America, the State of Michigan, the Saginaw Chippewa Indian Tribe of Michigan, and The Dow Chemical Company (“Dow”) (hereinafter collectively referred to as the “Parties”) provide this joint status report to the Court. This is the second annual such joint status report.

A. Status of Dow-implemented restoration projects:

In the period since the entry of the Consent Decree, Dow has commenced work on each of the Dow-implemented natural resource restoration projects identified in the Consent Decree. Work performed by Dow to date has been

consistent with a Master Schedule developed pursuant to Appendix Q of the Consent Decree.¹ A description of the current status of each of these projects is set forth below.

1. Appendix B: Midland Fish Passage Restoration Project. This project is in the preliminary planning phase. Dow submitted a Fish Survey Plan on November 16, 2020, and the Trustees approved it on December 18, 2020. Dow conducted fish surveys in the spring of 2021 under the approved plan with an adjustment to the target turbidity range for surveys as agreed to by the Trustees. Dow is currently conducting fish surveys in the spring of 2022 and anticipates a similar adjustment to the target turbidity range. Conditions in the project area changed because of the May 2020 failure of dams upstream from the location where the fish passage will be constructed. The next deliverables due for this project are the annual Fish Survey Report due by the end of 2022 and the Conceptual Design

¹ Dow submitted a proposed Master Schedule to the Trustees on November 16, 2020 and the Trustees approved it on January 15, 2021 with conditions to be incorporated into the next revision of the Master Schedule. The Consent Decree anticipates that the Master Schedule will be revised as due dates are re-calculated from actual dates of approvals or completion of other milestones. As of March 15, 2022, the Trustees have approved Dow's Master Schedule Revision 4 with one condition to be incorporated into the next revision. No disputes have arisen relating to this requirement.

Proposal that is due on January 20, 2023. No disputes have arisen relating to this project.

2. Appendix C: Greater Midland Nature Preserve Restoration Project. This project is in the preliminary planning phase. The first deliverables due are the Preliminary Design, due to the Trustees on July 20, 2022, and the Environmental Characterization Report, due approximately 30 days prior to the Preliminary Design. Dow has initiated site characterization work including beginning Phase I investigations, gathering soil data and soil samples (April 2022), initial hydrology and topography investigations, and initial habitat area investigations. Draft educational signage has also been started for this project. A permitting pre-application site walk with EGLE occurred on May 11-12, 2022, and a site walk with the Trustees has also been scheduled to be conducted on June 10, 2022. Both Dow and Trustee representatives have had discussions with local stakeholders about the project, including with representatives from at least one of the townships in which the project is located. No disputes have arisen relating to this project.
3. Appendix D: Eagle Ridge Nature Area Restoration Project. Dow has begun implementation on this project. Dow completed the required site characterization work and submitted the Environmental Characterization

Report and Preliminary Design to the Trustees on January 18, 2021. The Trustees approved the Preliminary Design on March 18, 2021, with conditions to be addressed in the Final Design and Implementation Plan. The Trustees provided comments on the Environmental Characterization on March 18, 2021, and Dow revised and re-submitted it on May 14, 2021. On July 2, 2021, Dow submitted the Final Design and Implementation Plan and the Monitoring and Maintenance Plan for most of the restoration activities for the project, and the Trustees approved these plans on August 25, 2021, and September 16, 2021, respectively. Dow submitted a supplement to the Final Design and Implementation on September 14, 2021, with additional details on the educational signs and pollinator area design elements and the Trustees approved the supplement with conditions on November 19, 2021.

Dow began habitat restoration actions in the fall and winter of 2021 with the removal of invasive species, brush hogging and herbicide applications in the pollinator habitat area. Dow also installed animal habitat boxes and cleared areas for trails and the proposed parking lot area. Dow is in the process of obtaining the necessary permits from the City of Midland in order to complete work at Eagle Ridge. Dow has ordered and received supplies and materials for the boardwalks, benches, signage, and has

ordered seed mixes to complete the restoration work. Dow is on schedule to complete the construction phase of this project in 2022.

No disputes have arisen relating to this project.

4. Appendix E: Tittabawassee River Floodplain Restoration and Bike Trail

Project. As part of the planning process, Dow completed required site characterization steps for this project. As a part of site characterization, Dow submitted generic and site-specific sampling plans for persistent pesticides to the Trustees on June 14, 2021, and October 19, 2021, respectively, and the Trustees approved each with comments on September 20, 2021, and November 2, 2021, respectively. Dow completed the pesticide sampling on November 3, 2021. In addition, Dow submitted a baseline floristic quality assessment plan to document initial conditions of vegetation on September 8, 2021, and the Trustees approved this plan with conditions on September 15, 2021. Dow completed the baseline floristic quality assessment by September 23, 2021. Dow submitted the Environmental Characterization Report to the Trustees on October 1, 2021.

Dow submitted the Preliminary Design to the Trustees in two parts on October 20, 2021, and the Trustees approved both parts of the Preliminary Design with conditions on December 17, 2021.

Dow submitted the Final Design and Implementation Plan to the Trustees in two parts on January 7, 2022, and has been meeting with Michigan Department of Environment, Great Lakes, and Energy (“EGLE”) permitting staff and the Trustees to determine if any modifications to the design are needed prior to submitting a permit application. The Trustees are reviewing the Final Design and Implementation Plan in coordination with the permit pre-application process.

Dow is working with the Great Lakes Bay Regional Trail non-profit organization to design and implement the Bike Trail portion of the project. Dow removed trees in the proposed route during the winter of 2020-2021 and 2022 to avoid impacts to summer tree-roosting bats prior to the potential construction of the trail. Dow has initiated management actions for invasive plant species on the property. In 2022, Dow will begin habitat restoration activities, including seeding of restoration areas and application of herbicide, hydrology improvements (culvert blocking and installation of a berm and water control structure), and construction of a parking lot area on the western side of the property. Bike trail construction details are currently being reviewed by the EGLE permitting group.

No disputes have arisen relating to this project.

5. Appendix F: Bay City Ecological Restoration Project. This project is in the preliminary planning phase. The first deliverables due are the Preliminary Design, due to the Trustees on July 20, 2022, and the Environmental Characterization Report, which is due approximately 30 days prior to submission of the Preliminary Design.

Dow has initiated site characterization work, including beginning Phase I investigations, gathering soil data and soil samples (April 2022), initial hydrology and topography investigations, and initial habitat area investigations. A permitting pre-application site walk with EGLE occurred on May 11-12, 2022, and a site walk with the Trustees has also been scheduled to be conducted on June 10, 2022. Dow has also begun discussions with a potential partner (Saginaw Basin Land Conservancy) for future transfer of ownership of this property.

No disputes have arisen relating to this project.

6. Appendix G: Saginaw River Mouth Boating Access Site Expansion Project. Dow completed the required site characterization actions and submitted the Environmental Characterization Report on September 2, 2021, and then submitted the 50% Design Plan on September 24, 2021. Dow provided 90% design plans to the Parks and Recreation Division of the Michigan Department of Natural Resources that manages the Boating

Access Site and conducted pre-application site visits with EGLE permitting staff. The final design was submitted to the Trustees on March 31, 2022 and approval with conditions was provided in May 2022.

Dow had anticipated conducting in-water work in 2023 due to high water levels in the Great Lakes; however, Dow has recently made the decision to move forward with all of the work in 2022 by modifying construction methods to allow in-water work to be conducted in the dry.

No disputes have arisen relating to this project.

7. Paragraph 7(b): Tittabawassee River Green Corridor Natural Resource Restoration Project. This is an ongoing project. Dow submitted the annual status report for this project on January 25, 2022, and in it stated that it had acquired easements and property use restrictions consistent with the requirements described in Section C of Appendix I on 1,984 acres of property within the eight year floodplain of the Tittabawassee River. This is an increase of 124 acres since the last annual status report. Under the Consent Decree, Dow has until July 20, 2024 to complete acquisition of easements on a total of 2,000 acres within the floodplain. Dow submitted a Site Control Plan to monitor and ensure compliance with easements and property use restrictions on July 29, 2021. The Trustees disapproved the submittal and provided comments to Dow.

Dow submitted a revised Site Control Plan on December 3, 2021 that the Trustees approved with one condition on December 20, 2021. Dow and the Trustees are coordinating with the U.S. Environmental Protection Agency (“USEPA”) and EGLE remedial staff to coordinate the Site Control Plan for this restoration project with the Post-Removal Site Control Plan that Dow submitted to USEPA and EGLE as part of the remedial process underway along the Tittabawassee River.

No disputes have arisen relating to this restoration project.

8. Paragraph 10: Shiawassee National Wildlife Refuge Expansion. This is an ongoing project. Dow established the Shiawassee Trust Account and paid \$1.2 million plus interest into it in December of 2020 as required by the Consent Decree. The Consent Decree sets forth a period of not less than five years for Dow to use best efforts to identify and acquire properties under paragraph 10. No land has yet been acquired. Dow has been providing the required bimonthly progress reports to the Trustees. The Trustees have requested that Dow provide a plan that describes the specific efforts it plans to take to find willing sellers and acquire properties. This communications plan will be provided to the Trustees in June 2022.

B. List of deliverables currently being developed by Dow and deliverables under review by the Trustees²:

(1) Deliverables under development by Dow:

- Greater Midland Nature Preserve Restoration Project: Site-Specific Pesticide Sampling Plan, Environmental Characterization Report, and Preliminary Design
- Tittabawassee River Floodplain Restoration and Bike Trail Project: supplements and/or revisions to the Final Design and Implementation Plan
- Bay City Ecological Restoration Project: Site-Specific Pesticide Sampling Plan, Environmental Characterization Report, and Preliminary Design
- Shiawassee National Wildlife Refuge Expansion Project: Communication Plan and the next Bimonthly (every two months) Report

(2) Deliverables under review by the Trustees:

- Tittabawassee River Floodplain Restoration and Bike Trail Project: Final Design and Implementation Plan and Monitoring and Maintenance Plan

² Status as of May 31, 2022.

C. Status of Trustee efforts to utilize funds in the Restoration

Account:

1. The Restoration Account is held in the Department of the Interior's NRDAR Fund in Account #0094.
2. The Trustees published a final Restoration Plan (as described in Consent Decree paragraphs 4.dd and 5) in March of 2020.
3. Through a series of Trustee Council Resolutions since September of 2020, the Trustees have approved transfers of funds from the NRDAR Fund to be used for the following activities and projects:

Project / Trustee Costs³	Consent Decree Appendix/ Paragraph	Total Amounts Approved by Resolution(s)	Activities Funded
Shiawassee National Wildlife Refuge Restoration Project	J	\$1,277,219.50	Implementation of a channel connection, re-routing of a county drain, replacement/upgrading of equipment needed for habitat restoration and maintenance, and purchase of water control structures

³ FWS = U.S. Fish and Wildlife Service; EGLE = Michigan Department of Environment, Great Lakes, and Energy; MDNR = Michigan Department of Natural Resources

Project / Trustee Costs³	Consent Decree Appendix/ Paragraph	Total Amounts Approved by Resolution(s)	Activities Funded
Thomas Township Nature Preserve Project	K	\$514,000	Invasive species management, planting native vegetation, spillway repair, trail development, interpretive signs, observations areas
Saginaw Riverfront Park Restoration Project	L	\$250,000	Invasive species management, planting native vegetation, interpretative signage, observation platform. Remaining \$750,000 plus interest for this project was placed in a subaccount for long-term maintenance.
Saginaw Chippewa Tribe Restoration Project	N	\$300,000	Saginaw Chippewa Indian Tribe of Michigan is working with partners to find suitable land to purchase. Two parcels are under consideration.
FWS planning and oversight costs	15	\$118,601	Leading Trustee Council, restoration planning, oversight of Dow-implemented restoration projects, management and oversight of Trustee-implemented projects
EGLE planning and oversight costs	15	\$30,000	Restoration planning, oversight of Dow-implemented restoration projects, management and oversight of Trustee-implemented projects

Project / Trustee Costs³	Consent Decree Appendix/ Paragraph	Total Amounts Approved by Resolution(s)	Activities Funded
MDNR planning and oversight costs	15	\$80,000	Restoration planning, oversight of Dow-implemented restoration projects, management and oversight of Trustee-implemented projects
Saginaw Chippewa Tribe planning and oversight costs	15	\$80,000	Restoration planning, oversight of Dow-implemented restoration projects, management and oversight of Trustee-implemented projects

4. As a part of restoration planning activities, the Trustees have been working closely with Thomas Township and have developed a draft work plan for the initial phases of the restoration project described in Appendix K.
5. The Trustees' restoration planning activities have also included coordinating with the agencies and other partners that are designing and building fish spawning reefs in Saginaw Bay to plan for the project described in Appendix M.
6. The Trustees issued a request for pre-proposals from the public for Natural Resource Restoration Projects to be funded with \$5 million as described in Consent Decree paragraph 16. The Trustees received 23

pre-proposals by the December 31, 2021, deadline and are currently evaluating the pre-proposals using the criteria described in the Restoration Plan. Based on the evaluation of pre-proposals, the Trustees have begun preparing a Draft Supplemental Restoration Plan that will describe a preferred suite of projects to the public for review and comment later in 2022. After consideration of the public comments received, the Trustees anticipate being able to select specific projects for funding.

D. Status of additional projects

While not required by paragraph 33, Dow and the State are providing the following status report on the two projects that are described in Section IX, Additional State Requirements:

1. Appendix O: Rear Range Lighthouse Renovation and Preservation Funding Project. This project is in the preliminary planning phase. A high level project schedule has been developed and provided in the Master Schedule for EGLE to review. Discussions regarding land descriptions and needed land use restrictions are underway between Dow and the State of Michigan. Dow has also retained a consultant specializing in lighthouse/historic building restoration to assist with

the design process. An update call was held with the State on April 4, 2022. No disputes have arisen related to this project.

2. Appendix P: BaySail Environmental Education Program Project. A Conservation Easement providing for use of specified property for the BaySail Environmental Education Program is currently being developed in conjunction with the Michigan Attorney General Office. A high level project schedule has been developed and provided in the Master Schedule for EGLE to review, and preliminary work on surveys, land use restrictions and planning are underway. Discussions regarding land descriptions and needed land use restrictions are underway between Dow and the State of Michigan. In addition, outreach to Saginaw Valley State University and the BaySail organization has been made and further meetings will be scheduled in 2022 regarding project planning. An update call was held with the State on April 4, 2022. No disputes have arisen related to this project.

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Respectfully submitted,

FOR THE UNITED STATES OF
AMERICA

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CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on June 29, 2022 I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/ Polly A. Synk
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