

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 regarding the status of Dow’s implementation of certain natural resource restoration projects described in the Consent Decree as well as the status of efforts by

natural resource trustees (“Trustees”)¹ to use funds in a Restoration Account established pursuant to the Consent Decree to fund implementation of additional natural resource restoration activities.

This status report reflects project status through May 31, 2023. This is the third 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.² A description of the current status of each of these projects is set forth below.

¹ For purposes of this action, the designated natural resource trustees are: the Secretary of the Interior, acting through the United States Fish and Wildlife Service and the Bureau of Indian Affairs, the Michigan Department of Natural Resources, the Michigan Department of Environment, Great Lakes, and Energy, the Michigan Attorney General, and the Saginaw Chippewa Indian Tribe of Michigan.

² Dow has submitted several revisions of the Master Schedule to the Trustees since the initial submittal on November 16, 2020. 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. On February 8, 2023, the Trustees approved Dow’s Master Schedule Revision 5 with three minor conditions to be

- Appendix B: Midland Fish Passage Restoration Project.

This project is in the planning phase. Dow convened several meetings with Trustees and with state and federal agency permit staff as it prepared the Conceptual Design Plan. Dow submitted the Conceptual Design Plan on January 20, 2023. This plan includes descriptions of three alternatives for achieving improved fish passage and future planning steps will include selection of an alternative and development of preliminary and final designs. The Trustees have reviewed the Conceptual Design Plan and provided an approval of the document on March 20, 2023, with comments for consideration as the design progresses. Dow submitted a Mussel Survey Plan on February 16, 2023, and the Trustees approved it on March 22, 2023. Dow continues to conduct the annual fish surveys related to this project and submitted the annual Fish Survey Report for 2022 on August 10, 2022. No disputes have arisen relating to this project.

- Appendix C: Greater Midland Nature Preserve Restoration Project. This project is in the planning phase. Dow submitted the

incorporated into the next revision. No disputes have arisen relating to this requirement.

Environmental Characterization Report on June 20, 2022 and the Preliminary Design on July 20, 2022. The Trustees approved the Preliminary Design Report on October 20, 2022, with a condition that Dow respond in writing to a list of comments attached to the approval letter and address comments as appropriate in the Final Design and Implementation Plan. Both Dow and Trustee representatives have had discussions with local stakeholders about the project both before and after Dow's submittal of the Preliminary Design, including with representatives from the townships in which the project is located. A number of permits are required to begin implementation in the project area. These include:

a. EGLE/USACE Joint Permit Application, which covers permit requirements derived from state and federal rules and regulations for construction activities where the land meets the water and includes the following Parts of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended: Wetlands; Floodplains; Dams; Inland Lakes and Streams; Great Lakes Bottomlands; Critical Dunes; Environmental Areas; and High Risk Erosion Areas. Dow submitted a joint permit application for the

Greater Midland project on February 20, 2023 and is continuing to work with EGLE towards approval (no USACE permit is required for this project).

b. Midland County and Bay County Soil Erosion and Sediment Control (SESC) Permit, which covers permit requirements from the Counties for earth changes that disturb one or more acres or are within 500 feet of a county drain or waters of the state according to Part 91 of Public Act 347. Dow is currently developing the applications for these local permits. In addition, a Notice of Coverage will be required from EGLE once the SESC permits are in place.

c. Williams Township Special Use Permit, which covers proposed earthwork in the Williams Township zoning boundaries. Dow submitted a Special Use permit application on March 20, 2023 and has continued to work with the Township towards approval.

d. Williams Township Building Permit, for construction of three proposed parking lots within Williams Township. Dow is currently developing this permit application.

e. City of Midland Building Permit, for construction of two proposed parking lots within the City of Midland. Dow is currently developing this permit application.

On January 27, 2023, Dow submitted to the Trustees a draft set of proposed seed mixes that would be used to establish diverse native vegetation species on the agricultural fields being converted to habitat as a part of this project. Dow provided these seed mixes in advance of submitting the Final Design and Implementation Plan to be able to place the order for seeds relatively early in the season. The Trustees provided comments on the proposed mixes on February 17, 2023, and Dow and the Trustees continued to refine the seeds mixes, with the Trustees providing final approval on April 27, 2023. Dow submitted a Final Design and Implementation Plan to the Trustees on March 8, 2023 and received an approval with conditions from the Trustees on May 31, 2023. No disputes have arisen relating to this project.

- Appendix D: Eagle Ridge Nature Area Restoration Project.

Dow obtained all necessary state and local permits and completed construction of this project on July 19, 2022. Dow submitted a Construction Completion Report to the Trustees on October 17, 2022,

and then responded to Trustee comments and submitted a revised Construction Completion Report on January 31, 2023. The Trustees approved the revised Construction Completion Report on February 8, 2023. The date of construction completion on July 19, 2022 marked the beginning of the Monitoring and Maintenance Period. Dow conducted monitoring and maintenance in 2022 consistent with the previously approved Monitoring and Maintenance Plan for this project and submitted a Monitoring and Maintenance Report on November 21, 2022. The Trustees approved this report on January 25, 2023, with the condition that Dow revise and resubmit the report with additional details added to describe the methods used to remove and/or control invasive plant species. Dow submitted the revised report on February 3, 2023, and the Trustees accepted the revised report as final on February 8, 2023. No disputes have arisen relating to this project.

- Appendix E: Tittabawassee River Floodplain Restoration and Bike Trail Project. Dow has begun implementation of this project. Dow submitted the Final Design and Implementation Plan to the Trustees in two parts on January 7, 2022 and submitted applications for permits required under NREPA Parts 31 and 303 to the Michigan

Department of Environment, Great Lakes, and Energy (“EGLE”) on April 4, 2022 (initial application) and June 10, 2022 (with corrections). The Trustees coordinated their review of the Final Design and Implementation Plan with the EGLE permit review process. On September 27, 2022, Dow submitted a revised Final Design and Implementation Plan that addressed permit requirements and Trustee comments on the January 7, 2022 submission. The Trustees approved the revised plan with conditions on October 19, 2022, and Dow received permits from EGLE for work in the floodplain on October 17, 2022. Between October of 2022 and February of 2023, Dow and the Trustees exchanged communications about additional revisions of the Final Design and Implementation Plan, and Dow submitted the final revision, meeting the conditions of the Trustees’ approval, on February 17, 2023.

In the spring and summer of 2022, Dow began certain habitat restoration activities in accordance with elements of the Final Design and Implementation Plan that were not affected by the conditions placed on the approval of the plan. These activities included application of herbicides and seeding of restoration areas with periodic mowing of the seeded areas to manage undesirable species while the native species

get established. In the winter of 2022–2023, Dow restored wetland hydrology in a portion of the floodplain by blocking a culvert and installing a berm and water control structure.

Dow is working with the Great Lakes Bay Regional Trail non-profit organization to design and construct the Bike Trail portion of the project. In the winter of 2022–2023, Great Lakes Bay Regional Trail installed culverts and boardwalks for the bike trail. Paving of the bike trail is planned for the summer of 2023. Dow and Great Lakes Bay Regional Trail expect to complete construction of the project in 2023 and open it to the public.

No disputes have arisen relating to this project.

- Appendix F: Bay City Ecological Restoration Project. This project is in the planning phase. Dow submitted the Environmental Characterization Report on June 20, 2022, and the Preliminary Design on July 20, 2022. The Trustees approved the Preliminary Design on October 20, 2022, with a condition that Dow respond in writing to a list of comments attached to the approval letter and address comments as appropriate in the future Final Design and Implementation Plan. Dow submitted an Access Road and Utilities Final Design Plan on

February 17, 2023, as required for projects described in Appendix O and P. The Trustees reviewed this plan with respect to the Bay City Ecological Restoration Project and approved it with conditions on March 20, 2023. Dow submitted a Restoration Final Design and Implementation Plan on April 13, 2023, and this is under review by the Trustees at the time of writing this report. Both Dow and Trustee representatives have had discussions with local stakeholders about the project, including with representatives from the townships in which the project is located.

A number of permits are required to begin implementation in the project area.³ These include:

a. EGLE/USACE Joint Permit Application, as described above for the Greater Midland project. Dow submitted a joint permit application for the Bay City Restoration project on December 14, 2022 (initial) and February 10, 2023 (corrected).

³ Permits may also relate to the requirements of Appendices O and P, but have been included here under the larger Bay City Restoration project for simplicity.

b. EGLE Water Line Permit for installation and connection of the water line utility. Dow submitted this permit application and received approval from EGLE on February 27, 2023.

c. EGLE Sewer Permit for installation and connection of the sanitary sewer line utility. Dow submitted this permit application on February 10, 2023.

d. Bay County Right of Way/Driveway Permit for access road driveway from Patterson Road. Dow is currently developing this permit application.

e. Bay County SESC Permit, as described above for the Greater Midland project. Dow is currently developing the permit application. In addition, a Notice of Coverage for disturbance of soil more than 5 acres will be required from EGLE once the SESC permits are in place.

f. Bangor Township Building Permit, for construction of access road and parking lots within Bangor Township. Dow is currently developing this permit application.

Dow submitted a draft set of proposed seed mixes to the Trustees on January 27, 2023, in advance of submitting the Final Design and

Implementation Plan to be able to place the order for seeds relatively early in the season. The Trustees provided comments on the proposed mixes on February 17, 2023, and Dow and the Trustees continued to refine the seeds mixes, with the Trustees providing final approval on April 27, 2023. No disputes have arisen relating to this project.

- Appendix G: Saginaw River Mouth Boating Access Site Expansion Project. This project is in the construction phase. Dow and the Trustees had anticipated delaying in-water work until the summer of 2023 because of high water levels in the Great Lakes; however, Dow made the decision to move forward in 2022 by modifying construction methods to allow in-water work to be conducted in the dry. Dow was able to obtain all necessary permits and complete the in-water work and most of the rest of the project in 2022, but the final asphalt paving and other finishing features were delayed until May 2023 due to weather. The boat launch and parking lot were temporarily reopened to the public over the winter. The final asphalt and paving and other finishing features were completed, and the boat launch and parking lot were reopened to the public again in May 2023. No disputes have arisen relating to this project.

- 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 31, 2023, 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. 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.

Consistent with the approved Site Control Plan to monitor and ensure compliance with easements and property use restrictions, Dow completed aerial surveys of a subset of the properties in the fall of 2022. Dow is reviewing the photographic information and planning for site visits to validate results in late spring or early summer of 2023. Dow performed the aerial surveys for the subset of properties to be monitored in 2023 in April, before leaf-out, instead of in the fall after the leaves fall.

No disputes have arisen relating to this restoration project.

- Paragraph 10: Shiawassee National Wildlife Refuge Expansion. This is an ongoing project. 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. Dow is in the process of acquiring the first two properties for this project in coordination with the U.S. Fish and Wildlife Service, including having negotiated sales prices with landowners and having completed Phase I Environmental Site Assessments, all of which were accepted by the Trustees pursuant to Paragraphs 10(d)(i) and 10(d)(ii). Dow has submitted deed, survey, and title insurance documents to the Trustees pursuant to Paragraph 10(d)(iii) and is working with the Trustees to finalize the property purchases. Dow has been providing the required bimonthly progress reports to the Trustees. Dow provided a Communications Plan to the Trustees on July 20, 2022 that describes the specific efforts it plans to take to find willing sellers and acquire properties. The Trustees provided comments on the plan to Dow on August 24, 2022, and Dow has been implementing that plan in coordination with the Trustees. No disputes have arisen on this project.

B. List of deliverables currently being developed by Dow and deliverables under review by the Trustees⁴:

1. Deliverables under development by Dow:

- Midland Fish Passage Restoration Project:
Preliminary Design
- Saginaw River Mouth Boating Access Site
Expansion: Construction Completion Report
- Greater Midland Nature Preserve Restoration
Project: Monitoring and Maintenance Plan
- Bay City Ecological Restoration Project:
Monitoring and Maintenance Plan

2. Deliverables under review by the Trustees:

- Bay City Ecological Restoration Project: Final
Design and Implementation Plan
- Shiawassee National Wildlife Refuge Expansion
Project: Acquisition-related documents for two
properties pursuant to paragraph 10(d)(iii) of the
Consent Decree

⁴ Status as of May 31, 2023.

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. This is an interest-bearing account invested in U.S. Treasury instruments. The Trustees have invested in securities with different durations and staggered maturation dates based on an investment strategy documented in a Trustee Council Resolution signed in November of 2021.

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 provided for in the Consent Decree and further described in the Restoration Plan:

Project / Trustee Costs⁵	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/upgrad- ing of equipment needed for habitat restoration and maintenance, and purchase of water control structures.
Thomas Township Nature Preserve Project	K	\$764,000	Invasive species management, planting native vegetation, spillway repair, trail development, interpretive signs, observations areas.

⁵ FWS = U.S. Fish and Wildlife Service; EGLE = Michigan Department of Environment, Great Lakes, and Energy; MDNR = Michigan Department of Natural Resources; SCIT = Saginaw Chippewa Indian Tribe of Michigan

Project / Trustee Costs⁵	Consent Decree Appendix/ Paragraph	Total Amounts Approved by Resolution(s)	Activities Funded
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.
FWS planning and oversight costs	15	\$215,720	Leading Trustee Council, restoration planning, oversight of Dow-implemented restoration projects, management and oversight of Trustee-implemented projects.
EGLE planning and oversight costs	15	\$80,000	Restoration planning, oversight of Dow-implemented restoration projects, management and oversight of Trustee-implemented projects.

Project / Trustee Costs⁵	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.
SCIT planning and oversight costs	15	\$80,000	Restoration planning, oversight of Dow- implemented restoration projects, management and oversight of Trustee- implemented projects.

4. For the Shiawassee National Wildlife Refuge

Restoration Project, the Refuge has created a new connection channel and installed four water control structures to restore flow through the Ferguson Bayou area of the Refuge. In addition, the Refuge restored vegetation in the Ferguson Bayou area and completed a cooperative agreement with the local county to assist in re-routing a county drain as well as upgraded Refuge equipment to facilitate the Moist Soil Unit 9 project.

5. For the Thomas Township Nature Preserve Project, the

Trustees have been working closely with Thomas Township to plan the

restoration work on their property and established a Memorandum of Understanding and a cooperative agreement between the Michigan Department of Natural Resources and Thomas Township to implement the work described in Appendix K. The Trustees and Thomas Township are coordinating the timing of restoration activities with Dow because Dow will be conducting response actions under the Superfund project at three locations on the Thomas Township Nature Preserve in 2023.

6. For the Saginaw Riverfront Park Restoration Project, the Trustees funded management of invasive plant species, planting of native vegetation, and development of interpretative signage and an observation platform for the project area now known as the Saginaw River Headwaters Rec Area. The Trustees also placed the remaining \$750,000 plus interest for this project in a subaccount to provide for long-term maintenance.

7. For the Saginaw Chippewa Tribe Restoration Project, the Saginaw Chippewa Indian Tribe of Michigan continues to work with partners to seek out appropriate parcels for acquisition and is currently working with one landowner on a potential property for future

restoration, including using a small amount of project funds to assess the parcel prior to a change in ownership to the tribe.

8. The Trustees' restoration planning activities have 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 as well as coordinating with Dow, the U.S. Environmental Protection Agency, and EGLE on the ongoing response actions in the area.

9. In November of 2021, the Trustees issued a request for pre-proposals from the public for additional Natural Resource Restoration Projects that the Trustees could select and fund with Restoration Account monies as described in Consent Decree paragraph 16. The Trustees received 23 pre-proposals by the December 31, 2021 deadline and then evaluated the pre-proposals using the criteria described in the Restoration Plan. Based on the evaluation of pre-proposals, the Trustees prepared a Draft Supplemental Restoration Plan that describes Trustees' preferred suite of ten projects. The Trustees released the Draft Supplemental Restoration Plan for public review and comment on February 24, 2023. After consideration of the

public comments received by the deadline of March 27, 2023, 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 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's Corrective Measures Proposal for property including and surrounding this project is currently under review by USEPA's program under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.* EPA's decision regarding any further corrective actions that may be required at the site may impact project designs and any potential land use restrictions, which remain to be determined as of now. Dow has also consulted with the State Historic Preservation Office (SHPO), which has assisted with the

design process by reviewing and commenting on Dow's draft restoration plans. Update calls were held with the State on November 4, 2022 and April 10, 2023. Dow submitted an Access Road and Utilities Final Design Plan on February 17, 2023, and the State approved this plan on March 22, 2023 as being consistent with the requirements of both Appendix O and Appendix P. Dow also submitted a Rear Range Lighthouse Renovation Design Plan on February 3, 2023, and the State approved this plan on March 24, 2023 as being consistent with the requirements of both Appendix O and Appendix P. On May 18, 2023, Dow informed the Trustees that Dow was declaring force majeure for certain obligations requiring a permit from the United States Army Corps of Engineers. Dow anticipates that delays in the issuance of this permit will prevent Dow from meeting the July 20, 2023 deadline for installation of utilities to the education center and lighthouse. Dow and the Trustees have agreed to extending this deadline to July 20, 2025, which harmonizes these requirements with other requirements Appendices O and P. No disputes have arisen related to this project.

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. Dow's Corrective Measures Proposal for property including and surrounding this project is currently under review by USEPA's RCRA program. USEPA's decision regarding any further corrective actions that may be required at the site may impact project designs and any potential land use restrictions, which remain to be determined. 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 2023 regarding project planning. Update calls were held with the State on November 4, 2022 and April 10, 2023. Dow submitted an Access Road and Utilities Final Design Plan on February 17, 2023, and the State approved this plan on March 22, 2023 as being consistent with the requirements of both Appendix O and Appendix P. Dow also submitted a Rear Range

Lighthouse Renovation Design Plan on February 3, 2023, and the State approved this plan on March 24, 2023 as being consistent with the requirements of both Appendix O and Appendix P. As mentioned above, Dow declared force majeure for certain portions of this project on May 18, 2023. No disputes have arisen related to this project.

Respectfully submitted,

U.S. DEPARTMENT OF JUSTICE

MICHIGAN DEPARTMENT OF
ATTORNEY GENERAL

/s/ Steven J. Willey

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Attorney for Plaintiff United States
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/s/ Matthew J. Meyerhuber

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Dated: July 19, 2023

Dated: July 19, 2023

SAGINAW CHIPPEWA INDIAN
TRIBE OF MICHIGAN

THE DOW CHEMICAL COMPANY

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Attorney for Defendant The Dow
Chemical Company

Dated: July 19, 2023

Dated: July 19, 2023

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on July 19, 2023, 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/ Matthew J. Meyerhuber

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