

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

GARY & KATHY HENRY, et al.,
Plaintiffs,

Cause No. 03-47775- NZ

v.

THE DOW CHEMICAL COMPANY,
a Delaware corporation,
Defendant.

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**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION TO STAY PROCEEDINGS PENDING APPEAL**

Plaintiffs, by and through counsel, hereby submit this memorandum in opposition to Defendant's motion to stay proceedings pending appeal, and state as follows:

I. Dow's Conclusory and Unsupported Request for a Stay Pending Appeal Is Without Merit.

The Court should deny Dow's request for a stay of proceedings pending its appeal of this Court's order granting Plaintiffs' Motion for Class Certification. Other than merely identifying

the Court's authority to issue a stay, Dow cites no case law in support of its request and otherwise offers nothing more than conclusory and unsupported allegations of the alleged harm it claims it will suffer (and the unsupported allegation that such harm outweighs any harm to Plaintiffs) if a stay is not granted. Dow's request for a stay is legally and factually without merit.

A. Relevant Federal Case Law Illustrates the Appropriate Standard and Application of Such Standard Under Similar Facts.

In the absence of case law in Michigan addressing the propriety of a stay pending appeal of an order granting class certification, the Court can refer to federal case law that interprets similar federal rules on the issue. *See Brenner v. Marathon Oil Co.*, 222 Mich. App. 128, 133 (1997).

In *Daniels v. City of New York*, 138 F. Supp. 2d 562 (S.D.N.Y. 2001), the court considered and rejected a defendant's request for a stay pending appeal of its order granting class certification under facts very similar to those before this Court. The *Daniels* court identified the following factors that should be considered in deciding whether to grant a stay pending appeal: "(1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated 'a substantial possibility, although less than a likelihood, of success' on appeal, and (4) the public interests that may be affected." *Id.* at 564.

With respect to the first factor, the court rejected defendant's argument that it would suffer irreparable harm on account of the alleged waste of time and resources dealing with matters that would be eliminated if the class certification order was reversed on appeal. The court easily disposed of this argument, noting that "litigation costs do not rise to the level of irreparable injury." *Id.* (citing *Jayaraj v. Scappini*, 66 F.3d 36, 39 (2d Cir. 1995)) ("Mere injuries,

however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.”)).

With respect to the second factor, the court concluded that plaintiffs were likely to suffer a substantial injury if merits discovery was delayed. The court explained that the case had already been pending for over two years and that to postpone discovery would only serve to further delay the progress of the lawsuit and that such delay, in and of itself, would constitute substantial injury to plaintiffs. *Id.* at 565.

With respect to the third factor, the court concluded that there had been no showing by defendant of a substantial possibility of success on appeal. The court emphasized the deferential standard of review (*i.e.*, abuse of discretion) that its decision granting class certification would be considered on appeal. *Id.* at 564.

With respect to the fourth factor, the court concluded that “the public interest also cuts cut against a stay.” The court stated that plaintiffs were litigating a matter of serious public concern and that the public’s interest was best served by the most expeditious resolution of the matter. The court explained that “[a]ny unnecessary delay, including a stay pending appeal, is against the interests of justice and the public’s interest in its swift pursuit.” *Id.* at 565.

Accordingly, the court in *Daniels* rejected the defendant’s request for a stay pending appeal of its order granting class certification. *Id.* at 564-65.

B. This Court Should Follow *Daniels* and Deny Dow’s Request for a Stay.

This Court should follow the same rationale as the *Daniels* court and deny Dow’s request for a stay pending appeal.

First, Dow has not made any showing of legally cognizable harm that would support its request for a stay. Without any elaboration, Dow merely identifies “class notification” and

“discovery” as issues that would be a “waste of the resources of both this Court and the parties” if the class certification order was reversed on appeal. With respect to class notification, the Court has already approved the form of notice in its order granting class certification, subject only to revision to conform to the Court’s order. *See* Order (10/21/05) at 5 (“IT IS FURTHER ORDERED that the notice set forth in Plaintiffs’ Memorandum Opinion and herein marked as Exhibit A is hereby approved by the Court as the notice to be utilized in this class action, subject to being modified in compliance with this order.”). Plaintiffs have already submitted the revised notice as requested by the Court. The only modifications from the form of notice approved and attached as Exhibit A to the Court’s Order were the insertion of the Court’s approved class definition on page 1 and the insertion of the necessary date and time frames on page 2. Any further time or resources by the Court or parties in getting the notice in final form for distribution to class members is minimal at best. Furthermore, it is Plaintiffs, not Dow, who will bear the burden of the expense associated with the notice, and Plaintiffs want to proceed forward with notice during the pendency of any appeal. *See* MCR 3.501(C)(6)(A) (“The plaintiff shall bear the expense of the notification required by subrule (C)(1). The court may require the defendant to cooperate in the notice process, but any additional costs incurred by the defendant in doing so shall be paid by the plaintiff.”).

With respect to discovery, Dow’s conclusory allegation that such discovery would be a waste of time and resources is clearly without merit. The substantive discovery to be pursued against Dow and third parties by the class representatives in this lawsuit is co-extensive with the merits discovery that will occur regardless of whether or not class certification is upheld on appeal. There is absolutely no benefit to be achieved in time or resources by delaying commencement of this discovery. In fact, this case has been pending since March, 2003, and any

further delay in Plaintiffs' ability to conduct merits discovery would cause substantial injury to Plaintiffs. Indeed, Plaintiffs have already suffered substantial injury during the over year-long stay imposed by the Michigan Supreme Court during its consideration of Plaintiffs' medical monitoring claim.

For example, during the time period of this prior stay, Dow and its agents were involved in extensive studies and testing, and continued to conduct questioning and testing of individuals in the Flood Plain, some of whom are named Plaintiffs or represented parties, while Plaintiffs were not permitted to inquire as to Dow's studies and were not able to obtain split samples of the testing conducted by Dow. Further, on June 3, 2005, the Detroit Free Press and the Midland Daily News revealed that, unbeknownst even to the Michigan Department of Environmental Quality ("MDEQ"), Dow had been conducting secret dioxin studies. Hugh McDiarmid, Jr., "Dow dioxin tests upset state", Detroit Free Press, website, June 3, 2005; Kathie Marchlewski and the Associated Press, "Regulators rap Dow on testing", Midland Daily News, website, June 3, 2005, true and correct copies of which are attached as Exs. 1 and 2, respectively. Dow conducted at least a dozen secret studies, many of which occurred during the period of the prior stay. Ex. 1 at p. 1. These studies took place without the approval or oversight of the MDEQ, and certainly without Plaintiffs' ability to obtain the information or examine the protocol under which the studies were conducted.

Any stay provides a tremendous advantage to Dow, while at the same time prejudicing Plaintiffs' right to obtain discoverable material in a timely and protected manner. In effect, a stay would tie Plaintiffs' hands while allowing Dow free range to do whatever it wants, even conducting its own informal discovery regarding Plaintiffs and their property. For this reason, a

stay should clearly not be granted and Plaintiffs should be permitted to proceed with discovery in this case.

Second, Dow has made no attempt at any showing of a substantial possibility of success on appeal. This Court's order granting class certification is well-reasoned and supported by a vast body of case law supporting class certification in environmental contamination cases like this one. Moreover, similar to the abuse of discretion standard in the federal system, this Court's order will be considered, if at all, under a deferential standard of review. *See, e.g., Coponen v. Wolverine Pipe Line Company, Inc.*, 2004 WL 2196487 (Mich. App. 2004) ("This Court will review a trial court's order of class certification for clear error.").

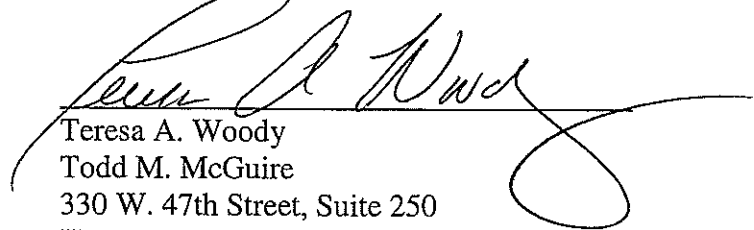
Finally, the public's interest would be best served by denying Dow's request for a stay pending appeal and permitting Plaintiffs to proceed forward with this lawsuit. Whether maintained as a class action or as thousands of individual lawsuits, this case involves a matter of serious public concern — Dow's release of hazardous contaminants in the Tittabawassee River and the resulting pollution of properties' in the one-hundred year Flood Plain of the Tittabawassee River. The most expeditious resolution of this lawsuit is in the public's best interest. This case has already been pending for over two years. Any unnecessary delay, including a stay pending appeal, is against the interests of justice and the public's interest in its swift pursuit.

WHEREFORE, Plaintiffs respectfully request that the Court deny Defendant's Motion to Stay Proceedings Pending Appeal.

Dated: November 4, 2005

Respectfully submitted,

STUEVE SIEGEL HANSON WOODY LLP

A handwritten signature in black ink, appearing to read "Teresa A. Woody", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

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EXHIBIT 1



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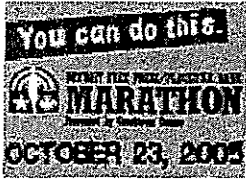
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Dow dioxin tests upset state

It's an issue of trust, government scientists say

June 3, 2005

BY HUGH McDIARMID JR.

FREE PRESS STAFF WRITER

Dow Chemical Co. conducted secret dioxin studies in violation of their operating license, say state and federal regulators -- a blow to trust between the company and officials negotiating Dow's plan to clean up the pollutant.

Government scientists on an April field trip stumbled across a Dow contractor sampling Tittabawassee River sediment, said Greg Rudloff, corrective activities project manager with the federal Environmental Protection Agency. The state Department of Environmental Quality demanded information from Dow, which produced a dozen studies analysts are just starting to review.

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"That they have not been forthcoming with us is a concern," Rudloff said Wednesday.

The final batch of Dow's studies arrived at state offices this week.

"We were upset," said Jim Sygo, deputy director of the Michigan Department of Environmental Quality. "We just had no idea they were going to do that sort of sampling.

"Has this created damage to the process" of a negotiated cleanup? "I would say no. Has this created a credibility issue? The answer to that is yes."

Dow spokesman John Musser disputed the contention that regulators were kept in the dark.

"That's not accurate," he said. "We've done nothing here to hide that information."

He said the DEQ was aware of most, if not all, of the testing, although he conceded work plans might not have been submitted in some cases. The nature of most of the testing, he said, did not require the state's approval anyway.

The testing occurred in 2003-05, including last summer when the company was in tense negotiations with the state over plans to clean up the

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contaminated watershed. The company is required to have such work approved by regulators who ensure scientific protocols are followed.

"That's something that was not done," said Sygo. Furthermore, the state was unable to request samples of tested material, which commonly are used to independently validate Dow's results.

"So we will approach those materials with caution," said Sygo, referring to Dow's test results.

Dow could be liable for penalties, including fines for violating terms of its operating license, but that issue has not yet been discussed by DEQ brass, said Sygo.

The controversy fuels the ire of Dow critics who have contended for decades that the company has failed to adequately address cleanup of contamination that extends dozens of miles downstream from Dow's Midland plant through the Tittabawassee River valley, the Saginaw River and Saginaw Bay.

"We were told there was no sampling or analytical data going on, and there was," said Michelle Hurd-Riddick, an outspoken Dow critic from Saginaw. "Now they've given us this data, but you don't know if you have all of it. What if they only gave 75% of it? We just don't know."

The data might have been used by Dow negotiators during last summer's cleanup negotiations, she suggested — putting state negotiators at a disadvantage.

Musser said every bit of data from the studies has been supplied to regulators, who say they requested the data during a conference call last month. Sygo said the information would be posted on the DEQ's Web site next week. Musser said the studies were geared toward developing a comprehensive plan to investigate and characterize the contamination. That plan, due to the state by year's end, is a key step in creating a cleanup strategy — something the state, Dow and environmentalists all want.

Assailing Dow for conducting studies that will create a better cleanup plan is counterproductive, said Musser: "No good deed goes unpunished," he said.

But activists say the controversy is part of a pattern of Dow's intransigence.

"We know this company has a habit of selectively presenting data," said Tracey Easthope, director of the environmental health program at the Ecology Center in Ann Arbor. She referred to last summer when the company issued a press release implying its study of dioxin in Tittabawassee valley wildlife showed levels were safe. Weeks later, state health officials using the same data issued an unprecedented warning against eating some game meat.

"It's important that we connect the dots between these things, and ask, 'What are the consequences to the company?' If there aren't any, we lose the oversight power of the DEQ."

Contact **HUGH McDIARMID JR.** at 248-351-3295 or mcdiarmid@freepress.com.



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Regulators rap Dow on testing

Kathie Marchlewski and The Associated Press, Midland Daily News

06/03/2005

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State and federal regulators say The Dow Chemical Co. overstepped its boundaries and damaged its credibility by secretly conducting dioxin-related studies along the Tittabawassee River flood plain. Dow officials deny the claim, saying the company was working on fulfilling its corrective action requirements. They acknowledge that studies were not first approved by regulators.

"These are all things we felt would assist us in developing a comprehensive and efficient plan for remedial investigation," Dow spokesman John Musser said. The company by year-end is required to submit remedial investigation plans to the state as part of the framework of remediation plans outlined and agreed to in January.

In all, about a dozen studies were conducted by Dow in the summer of 2004 and in recent months. Some samples of soil and sediment were taken and analyzed for dioxin and furan levels and devices that will be used to study the movement of sediments and soils during flooding events were set up.

Regulators became aware of the studies when they discovered a Dow contractor working on the river, said Greg Rudloff, corrective activities project manager with the EPA.

The state Department of Environmental Quality demanded Dow release the information it has collected, which it did and which analysts are starting to review.

"That they have not been forthcoming with us is a concern," Rudloff said.

DEQ Director Steven Chester told the Daily News the work might have violated Dow's operating license, which requires corrective action be taken to remediate dioxin levels in and outside the Midland plant. "Pursuant to the operating license and standard practice, sampling occurs pursuant to work plans," Chester said.

By conducting work without DEQ knowledge, the department had no way to split samples and ensure accuracy, he said. "The data may be of limited value. We may not be able to rely on it, it may be incomplete."

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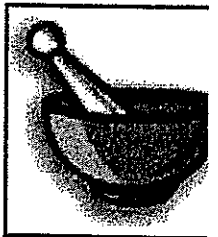
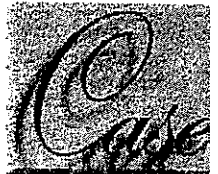
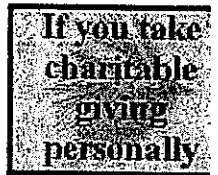
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DEQ Deputy Director Jim Sygo was surprised that Dow had been working without approval of plans. "We just had no idea they were going to do that sort of sampling," he said. "Has this created damage to the process (of a negotiated cleanup)? I would say no. Has this created a credibility issue? The answer to that is yes."

Musser said the intent of the work was not to leave out the DEQ, but to move forward. "Our interest was in keeping the ball rolling," Musser said. "Given the weather, you have to go when you can go and do things when you can do them." He does not believe there was a violation of the operating permit and understands that the DEQ might not accept the data collected.

Chester said the incident will not slow down the process under way by the state and company to address contamination. "We're moving forward," he said. "This will not have an adverse impact on our commitment."

He doesn't expect there to be similar issues between the department and Dow in the future. "The fact that there is acknowledgment that this occurred may keep it from occurring in the future," he said.

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