

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
BEAUMONT DIVISION

|                              |   |                                    |
|------------------------------|---|------------------------------------|
| _____                        | ) |                                    |
| UNITED STATES OF AMERICA     | ) |                                    |
| AND STATE OF TEXAS,          | ) |                                    |
|                              | ) |                                    |
| Plaintiffs,                  | ) |                                    |
|                              | ) |                                    |
|                              | ) |                                    |
| v.                           | ) | Civil Action No. 1:21-cv-00516-MJT |
|                              | ) |                                    |
| E. I. DU PONT DE NEMOURS AND | ) |                                    |
| COMPANY, and                 | ) |                                    |
| PERFORMANCE MATERIALS,       | ) |                                    |
| NA, INC.                     | ) |                                    |
|                              | ) |                                    |
| Defendants.                  | ) |                                    |
| _____                        | ) |                                    |

AGREEMENT AND ORDER REGARDING MODIFICATION OF  
CONSENT DECREE

1. On January 28, 2022, this Court entered a Consent Decree (ECF No. 8) in the above-captioned matter (“the Decree”) to resolve the claims in the Complaint (ECF No. 1). The Decree requires, among other things, that Settling Defendants perform injunctive relief at the Sabine River petrochemical manufacturing facility located at 3055 Farm Road 1006, Orange, Orange County, Texas (“Facility”). The detailed injunctive relief requirements of the Decree are set forth in Appendices A through E of the Decree. Plaintiffs and Settling Defendants (“the Parties”) now propose to modify Appendix A (Benzene Waste Operations NESHAP) of the Decree as set forth in this *Agreement and Order Regarding Modification of Consent Decree* (“Agreement and Order”) to provide that Settling Defendant The Dow Chemical Company

(“TDCC”) will use alternative technology to achieve one of the objectives of Appendix A concerning control of benzene emissions at the Facility.

2. Background: The Decree resolves all claims for civil penalties and injunctive relief alleged in the Complaint (ECF No. 1) filed by the United States and the State of Texas against Defendant E.I. du Pont de Nemours and Company (“DuPont”) and Performance Materials, NA, Inc. (“PMNA”)<sup>1</sup> for multiple violations of federal and state environmental law during operations at the Facility, through the Date of Lodging of the Decree. Among other claims, the Complaint states claims pursuant to Section 113(b)(2) of the Clean Air Act (“CAA”), 42 U.S.C. §7413(b)(2), equivalent state law, and regulations promulgated thereunder. Specifically, Title I of the CAA establishes a technology-based control program (i.e., based on Maximum Achievable Control Technology) to reduce stationary source emissions of hazardous air pollutants (“HAPs”). See CAA Section 112(d), 42 U.S.C. § 7412(d). Section 112 of the CAA, 42 U.S.C. § 7412, directs EPA to promulgate standards to reduce emissions of listed HAPs. These standards are collectively referred to as the National Emission Standards for Hazardous Air Pollutants or “NESHAP.” Federal NESHAP provisions for general and specific source categories of HAPS are found in 40 C.F.R. Part 63.

3. Benzene is a listed HAP under Section 112(b). In March 1990, EPA promulgated national emission standards applicable to benzene-containing wastes set forth at 40 C.F.R. Part 61, Subpart FF (National Emission Standards for Benzene Waste Operations) (hereafter “BWON”). EPA has delegated the BWON program to Texas. The Facility has multiple emissions points for HAPS from benzene waste streams subject to provisions of the BWON.

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<sup>1</sup> After the filing of the Complaint in this action, but prior to the Court’s entry of the Decree, defendant PMNA merged with and into TDCC. TDCC, as the surviving company, was made a Settling Defendant under the Decree. (ECF No. 8)

Claims 14-28 of the Complaint alleged violations of the BWON requirements. Accordingly, among other injunctive relief, the Decree contains injunctive relief set forth in Appendix A pertaining to those BWON requirements.

4. Consent Decree. Paragraph 11 of the Decree is entitled “Benzene Waste Operations National Emission Standards for Hazardous Air Pollutants” and provides that Defendants shall undertake the measures set forth in Appendix A of this Consent Decree relating to 40 C.F.R. Part 61, Subpart FF. Appendix A currently requires, among other measures, that “Defendants shall complete installation of primary and secondary carbon canisters at locations currently utilizing single canisters and shall operate them in series.” *Id.* at ¶ 5.a.

5. The Facility has a number of locations that are subject to this Appendix A, Paragraph 5, requirement. After entry of the Decree, TDCC approached the governments and proposed to use alternative control technology at two of those locations. The two locations are: (1) the Ethylene Stripper Area (Bldg. 1285) – with two vent streams associated with wastewater; and (2) the API Separator (Bldg. 1213) – with one vent stream associated with wastewater. At those locations, TDCC currently utilizes single carbon canisters as a secondary control device and utilizes a flare (or a waste steam superheater for the small stream from the API Separator) as the primary control.

6. Under the proposed alternative, at these two locations TDCC will be required to substitute a thermal oxidizer (“TOX”) for the current primary control, and the flare will become the secondary control. A TOX is a process unit for air pollution control that decomposes HAPs such as benzene at a high temperature and releases harmless breakdown components into the atmosphere. Carbon canisters operated in series will remain the required control device at the other Facility locations that currently utilize single carbon canisters.

7. Paragraph 90 of the Decree provides: “The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections XII (Dispute Resolution) and XIX (Modification), or effectuating or enforcing compliance with the terms of this Decree.” (ECF No. 8)

8. Paragraph 91 of the Decree provides: “The terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court. Non-material changes to the Decree, shall include, but are not limited to, schedule changes of six months or less, or resulting from force majeure.” (ECF No. 8)

9. Because the proposed modification to Appendix A of the Decree involves a change of technology and in the schedule for injunctive relief of potentially greater than six months, the Parties seek the Court’s approval of this modification to the Decree.

10. Plaintiffs and Settling Defendants agree to the redlined modifications of Paragraphs 1 and 5 of Appendix A as provided below. Although the Defendants are jointly responsible for other injunctive relief required in the Decree, the Parties have agreed that TDCC – which proposed the alternative technology – will alone be responsible for fulfilling the obligations relating to the TOX technology at the Facility.

11. The Assistant Attorney General on behalf of the United States, an Assistant Attorney General of the State of Texas on behalf of the State, and the undersigned representatives of the Settling Defendants certify that they are fully authorized to enter into the terms and conditions of this Agreement and Order and to execute and legally bind such party to

this document.

12. By the signatures of their representatives to this document, the Plaintiffs and the Settling Defendants hereby approve the modifications to the January 28, 2022 Consent Decree set forth below.

NOW THEREFORE, it is hereby AGREED, ORDERED, ADJUDGED and DECREED as follows:

A. The January 28, 2022 Consent Decree at Appendix A, Paragraphs 1 and 5, is hereby modified with the additional language set forth below in red font:

1. Defendants, **or Defendant, as applicable**, shall perform the measures set forth in this Appendix relating to 40 C.F.R. Part 61, Subpart FF (BWON,” “Benzene Waste Operations NESHAP,” or “Subpart FF”) to minimize fugitive benzene emissions at the Facility.

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5. **Carbon Canisters. Except for those locations identified and addressed separately in Paragraph 5.h. below**, Defendants shall comply with the requirements of this Paragraph 5 at the Facility locations where one or more carbon canisters are or are planned to be installed and utilized as a control device under the Benzene Waste Operations NESHAP. To the extent that any applicable state or local rule, regulation, or permit contains more stringent requirements than those set forth in this Paragraph 5, compliance with those more stringent requirements may satisfy the requirements of this Paragraph 5 instead.

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- h. Thermal Oxidizer. The Dow Chemical Company (“TDCC”) shall comply with the requirements of this Paragraph 5.h. at the following Facility locations currently utilizing single carbon canisters as a secondary control device under the Benzene Waste Operations NESHAP: the Ethylene Stripper Area (Bldg. 1285) and the API Separator (Bldg. 1213). TDCC represents that operating a thermal oxidizer (as the primary control) and the flare (as the secondary control) at these two locations is more effective at controlling benzene emissions than operating the current primary controls and carbon canisters in series (as the secondary control). To the extent that any applicable state or local rule, regulation, or permit contains more stringent requirements than those set forth in this Paragraph 5.h.,**

compliance with those more stringent requirements may satisfy the requirements of this Paragraph 5.h. instead.

- i. Not later than eighteen (18) months after the Effective Date of this Modification to this Consent Decree, TDCC shall complete installation and begin operation of a thermal oxidizer as the primary control (with the flare as the secondary control) for VOC streams at the locations listed in Paragraph 5.h. Within thirty (30) days after installation of the thermal oxidizer has been completed, TDCC shall submit a report notifying EPA and TCEQ of the date of installation and the date it commenced operation at the Facility.
- ii. Within two hundred and ten (210) days after installation of the thermal oxidizer has been completed, TDCC shall complete and submit the results of a stack test demonstrating that the thermal oxidizer is achieving a Destruction and Removal Efficiency for VOCs of at least 99% or a VOC concentration of no more than 20 ppmv on a dry basis corrected to 3.0% oxygen. If the stack test results do not achieve either standard identified in the preceding sentence, then TDCC shall, within one hundred and twenty (120) days after receipt of the stack test results, submit to EPA for review and approval, in consultation with TCEQ, pursuant to Section VI (Approval of Deliverables) of this Consent Decree, a Thermal Oxidizer Corrective Action Plan (“TOX CAP”) that identifies with specificity the compliance schedule that TDCC shall implement to ensure that the Facility complies with either standard identified above as soon as practicable. Within thirty (30) days after receipt of EPA’s approval of the TOX CAP, TDCC shall commence implementation of the approved TOX CAP according to the schedule provided in the TOX CAP.

B. Except as specifically provided in this Agreement and Order, all other terms and conditions of the January 28, 2022 Consent Decree will remain unchanged and in full effect.

C. Consistent with Paragraph 98 of Section XXI of the Decree (Public Participation), this Agreement and Order shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with

Department of Justice policy and as provided in regulations at 28 C.F.R. § 50.7 and Tex. Water Code § 7.110. The United States and the State each reserve the right to withdraw or withhold consent if comments by the public regarding the Agreement and Order disclose facts or considerations which indicate that the modification to the Consent Decree is inappropriate, improper, or inadequate. This Paragraph does not create any rights exercisable by any person other than the Plaintiffs.

SO ORDERED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2023.

\_\_\_\_\_  
United States District Judge

FOR THE UNITED STATES:

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FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Date: \_\_\_\_\_

**Greene, Mary E** Digitally signed by Greene, Mary E  
Date: 2023.01.05 14:14:38 -05'00'

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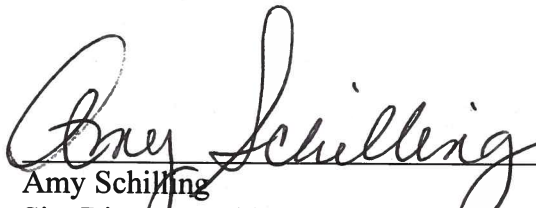


Thomas Warnock (Oct 4, 2022 16:00 EDT)

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FOR THE DOW CHEMICAL COMPANY (as  
legal successor to Performance Materials NA, Inc.):

A handwritten signature in cursive script, reading "Amy Schilling", written over a horizontal line.

Amy Schilling  
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