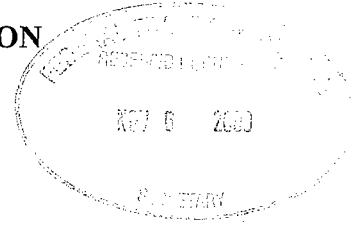


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



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In the Matter of )  
The Dow Chemical Company )  
a corporation, )  
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Docket No. C-4243  
File No. 081-0214

**PETITION OF THE DOW CHEMICAL COMPANY TO REOPEN  
AND MODIFY DECISION AND ORDER**

The Dow Chemical Company (“Dow” or “Respondent”) hereby requests that the Decision and Order finalized on April 9, 2009 by the United States Federal Trade Commission (the “Commission”) in the above-captioned matter (the “Decision and Order”) be reopened and modified pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission’s Rules of Practice and Procedure, 16 C.F.R. § 2.51. As discussed in detail below, Dow requests that Paragraph I.YYY of the Decision and Order be modified to permit Dow to lease rather than sell the Torrance, California latex polymers facility included in the divestiture required by the Decision and Order.

I. Background

On January 9, 2009, Dow and the Commission executed an Agreement Containing Consent Orders that included an Order to Hold Separate and Maintain Assets (“Hold

<sup>1</sup> All capitalized terms used but not defined in this petition have the meanings assigned to such terms in the Decision and Order.

Separate Order”) and the Decision and Order (collectively, the “Consent Agreement”) to settle the Commission’s charges related to Dow’s acquisition of Rohm and Haas Company (“R&H”). On January 23, 2009, the Commission accepted the Consent Agreement for public comment. On April 1, 2009, Dow consummated its acquisition of R&H.<sup>2</sup> The proposed Consent Agreement received final approval from the Commission on April 9, 2009.

Among other terms, the Decision and Order requires Dow to divest its Acrylic Acid Business and its Latex Polymers Business.<sup>3</sup> Importantly, the inclusion of the Latex Polymers Business in the divestiture was intended to strengthen the competitiveness of the Acrylic Acid Business through vertical integration, not to remedy a stand alone competitive problem in acrylic latex polymers, which was not identified as an affected relevant market in the Commission’s Complaint.

On July 31, 2009, Dow entered into an Asset Purchase Agreement (“APA”) with Arkema Inc., a subsidiary of the Arkema Group (“Arkema”), which requires Dow to sell the Acrylic Acid Business and the Latex Polymers Business to Arkema.<sup>4</sup> On August 10, 2009, Dow filed a petition with the Commission seeking approval of the divestiture of the Acrylic Acid Business and the Latex Polymers Business to Arkema (the “Divestiture Petition”). The Commission placed the Divestiture Petition on the public record for comment on August 14, 2009, and the public comment period ended on September 14, 2009.

The Acrylic Acid Business includes Dow’s Clear Lake, Texas acrylic acid and esters facility, Dow’s acrylic acid and esters customer contracts in North, South, and Central America, and certain intellectual property. The Latex Polymers Business consists of Dow’s latex

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<sup>2</sup> After the merger, Rohm and Haas Company remained as a separate corporate entity that is a wholly-owned subsidiary of and included within The Dow Chemical Company.

<sup>3</sup> Decision and Order, III.A.

<sup>4</sup> The APA is attached as Confidential Exhibit 1

polymer plants in Alsip, Illinois, St. Charles, Louisiana, and Torrance, California, its research and development center in Cary, North Carolina, its North American customer contracts, and certain intellectual property. The Torrance facility is the smallest of the three latex plants and its capacity accounts for about [REDACTED] of the capacity of the Latex Polymers Business.

In particular, the Latex Polymers Business includes the Torrance Facility, defined as “all of Respondent’s right, title, and interest in the Facility Assets: 1. Located at the real property described in Exhibit 5 to this Decision and Order; and 2. Primarily related to or Necessary for the research, development, production, and manufacture in the United States, and the marketing and sale in the United States, Puerto Rico, Canada, and Mexico, of Latex Polymers Products.”<sup>5</sup> Facility Assets include “All real property interests, including rights, title, and interests in and to owned or leased property, together with all easements, rights of way, buildings, improvements, and appurtenances.”<sup>6</sup> Exhibit 5 to the Decision and Order describes the Torrance industrial site.

The Torrance latex plant is one of several facilities located on the Dow-owned industrial site. The Dow-owned site, which includes both the Torrance latex plant and the leased premises of other tenants and operators (but no other Dow production facilities), is a single legal parcel. Under the California Subdivision Map Act, it is illegal to sell (or transfer fee title to) the portion of the Dow Overall Site that relates to the Torrance latex plant without first creating the Torrance latex plant as a separate legal parcel. [REDACTED]

[REDACTED]

[REDACTED] For this reason, the original Dow plan was to divest and transfer the entire Torrance

<sup>5</sup> Decision and Order, I.XXX.

<sup>6</sup> Decision and Order, I.LL.

site (including the property leased by tenants) to the Acrylic & Latex Business Acquirer. Dow marketed the business this way when seeking a potential acquirer.

During the course of negotiations with Arkema, Dow learned that Arkema is not interested in purchasing the entire site [REDACTED]

[REDACTED]

[REDACTED] An affidavit outlining from Arkema outlining its position is attached as Confidential Exhibit 2 to this Petition. Dow therefore agreed to Arkema's request that it lease the Torrance latex plant site to Arkema while Dow simultaneously pursued creation of the latex plant site as a legal parcel under the Subdivision Map Act. Dow and Arkema agreed upon the form of a long-term lease for the latex facility (Torrance Building Lease, Exhibit AA to the APA).<sup>7</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The initial term of the lease is ten years and Arkema has two options to renew the lease for additional ten-year terms.<sup>8</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>7</sup> The Torrance Building Lease is attached as Confidential Exhibit 3.

<sup>8</sup> Torrance Building Lease, Sections 2.1, 2.2.

The Torrance Building Lease obligates Dow to seek to create the Torrance latex plant site as a separate parcel under the Subdivision Map Act, a process that has already begun.<sup>9</sup> Once the Torrance latex plant site has been created as a legal parcel, Arkema has the option to purchase the latex plant site for [REDACTED] at any time during the lease term, including the renewal terms.<sup>10</sup> The amount of the purchase price was designed to provide an incentive for Arkema to exercise the purchase option and is well below the anticipated market price of the parcel.

Dow has already begun the subdivision process. Dow has engaged DCA Civil Engineering, a Torrance based-engineering firm it has used in the past for similar projects, to represent Dow in connection with obtaining a subdivision map of the latex plant site. DCA has outlined the primary steps for obtaining and recording the necessary subdivision map. These steps can be summarized as follows:

1. Conduct preliminary meetings with the City of Torrance Planning and Engineering Departments to present the proposed project and review possible issues.
2. Conduct a topographic field survey of the Torrance site.
3. Prepare a tentative subdivision map in accordance with City of Torrance requirements.
4. Prepare and submit to the City of Torrance the subdivision application documents.
5. Process the subdivision map application with the City of Torrance requirements.

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<sup>9</sup> Torrance Building Lease, Section 5.1.

<sup>10</sup> Torrance Building Lease, Sections 6.1, 6.4. The Torrance Building Lease obligates Dow to seek the subdivision of the property. Torrance Building Lease, Section 5.1.

6. Prepare for, and represent Dow at, the City of Torrance Planning Commission public hearing on the subdivision application. It is possible that a hearing and decision from the City of Torrance City Council may also be required.

7. Once the City of Torrance approval has been obtained, prepare the final subdivision map in accordance with city and state requirements.

8. Process the final map with the City of Torrance and the County of Los Angeles.

9. Provide for coordination of the map process with Dow and Dow's consultants.

10. Coordinate recordation of the final subdivision map with the City of Torrance and the County of Los Angeles officials.

DCA estimates that it will take [REDACTED] to complete the steps up to and including the City Planning Commission hearing and approval. The process of preparing the final subdivision map and coordinating with the City of Torrance and the County of Los Angeles will take about [REDACTED]. Thus, the entire process is expected to take [REDACTED], though additional delays are possible.

The subdivision map process is a discretionary decision and requires the approval of the City of Torrance Planning Commission, so DCA cannot guarantee the success of any subdivision map application. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

II. The Proposed Modification is Not a Material Change to the Order

The proposed modification allowing Arkema to lease the Torrance facility for as long as 30 years with an option to purchase is not materially different than a provision selling the property to Arkema. Under the Torrance Building Lease, Arkema will have the right to buy the latex plant as soon as the subdivision is complete. [REDACTED]

[REDACTED] The purchase price of the latex plant would be a nominal [REDACTED] – far below the likely assessed value of the site. The [REDACTED] purchase price was chosen to provide Arkema with a strong incentive to purchase the latex plant site. In any event, a lease term of 30 years is well in excess of the depreciated useful life of the equipment within the facility.

[REDACTED] operation of a facility pursuant to a long-term lease arrangement is a common arrangement in the chemical industry, and in no way limits the competitiveness of the Torrance latex plant. The Commission has recognized the viability of such arrangements in the Decision and Order, which provides that the Acrylic & Latex Acquirer will operate leased facilities at Clear Lake, Texas and St. Charles, Louisiana.

III. The Proposed Modification is in the Public Interest

Section 2.51 of the Commission’s Rules of Practice and Procedure, 16 C.F.R. § 2.51, provides that an order may be reopened and modified “if the public interest so requires.” A request for modification pursuant to Section 2.51 “shall contain a satisfactory showing that

changed conditions of law or fact require the rule or order to be altered, modified, or set aside, in whole or in part, or that the public interest so requires.”

The proposed modification is in the public interest because it will allow Arkema to be a more competitive operator of the Latex Polymers Business. Dow was fully prepared to sell the entire parcel to Arkema as envisioned by the Decision and Order. Arkema, however, stated in no uncertain terms that it did not want the entire parcel. [REDACTED]

[REDACTED]

[REDACTED] Since the Latex Polymers Business only operates on a portion of the site, owning the rest of the site would have no impact on Arkema’s competitiveness. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Without the proposed modification, there is a substantial likelihood that the divestiture of the Acrylic Acid Business and the Latex Polymers Business to Arkema will be, at a minimum, delayed, and very possibly, abandoned by Arkema altogether. As discussed at length in the Divestiture Petition, Dow believes that Arkema is in many ways the best prospective purchaser of the divested business. Arkema is an experienced international chemical company that produces acrylic acid and esters as well as other chemistries in fields that neighbor those of the Acrylic Acid Business and the Latex Polymers Business. For instance, Arkema manufactures methyl methacrylate, a key raw material in the production of certain latex polymers. Arkema’s Coatex subsidiary manufactures specialty acrylic-based polymers used as dispersants and thickeners in numerous applications.



Given Arkema's qualification as a buyer, it is in the public interest that the possibility of a divestiture to Arkema not be jeopardized (or delayed) by insistence that Arkema take ownership of the entire parcel. This is especially true given that the Torrance latex facility accounts for only a small portion of the entire Latex Polymers Business, which itself is ancillary to the Acrylic Acid Business which is at the heart of the Commission's competitive concerns.

While a financial buyer may be more than willing to take on the role of landlord in addition to its role as operator of the Acrylic Acid Business and the Latex Polymers Business, there is no reason to believe that doing so would enhance its ability to compete in acrylic acid (or in latex polymers), and certainly no reason to believe that a financial buyer that owned the entire site would be more competitive than Arkema with a long-term lease to the latex plant site. The difference between a sale and a lease is inconsequential from a competitive perspective relative to the competitive advantages offered by divesting the Acrylic Acid Business and the Latex Polymers Business to Arkema, an acrylic acid producer and experienced chemical industry competitor. The proposed modification is thus in the public interest because a divestiture to Arkema with a lease to the Torrance latex plant with a term of as long as 30 years is more likely to enhance competition than a divestiture to an unidentified buyer that includes a sale of the property.

Even if Arkema eventually decides to proceed with the purchase of the entire parcel at the Commission's insistence, it is near certain that there will be a substantial delay in the consummation of the divestiture if the modification is not approved. Such delay would make it impossible for Dow to complete the divestiture by the November 27, 2009 deadline under the Decision and Order. Delay in the consummation of the divestiture will hinder the Commission's goal of reestablishing an independent competitor in the relevant markets as alleged in the Complaint. Right now, these businesses are owned by Dow but held separate and operated

independently pursuant to the Hold Separate Order. These businesses cannot be incorporated into Arkema's long-term strategy until the transaction is complete. The competitiveness of the businesses will be maximized once the divestiture is complete and the businesses are integrated into Arkema.

If Arkema and Dow abandon the proposed transaction, there will be an even longer delay in the completion of the divestiture. Dow will have to find a new buyer, negotiate divestiture agreements with that buyer, and seek Commission approval of that transaction. As discussed above, delay in the divestiture will have deleterious effects on the Acrylic Acid Business and the Latex Polymers Business, and, accordingly, on competition in the markets referenced in the Commission's complaint.

#### IV. Request for a Shortened Public Comment Period

Under the terms of the Decision and Order, Dow is required to complete the divestiture of the Acrylic Acid Business and the Latex Polymers Business by November 27, 2009 (240 days after the April 1, 2009 closing of Dow's acquisition of R&H).<sup>11</sup> Dow and Arkema plan to close the divestiture of the Acrylic Acid Business and the Latex Polymers Business as quickly as possible. Accordingly, Dow requests that the Commission limit the standard 30-day public comment period to 14 days.

Furthermore, the full 30-day public comment period is unnecessary in this instance, as the planned lease of the Torrance Facility was discussed at length in the Divestiture Petition, which was on the public record for 30 days, providing substantial opportunity for public comment on the issue.

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<sup>11</sup> Decision and Order, III.A.

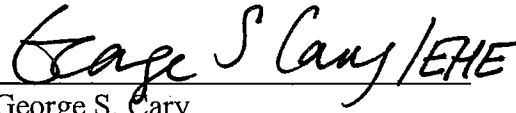
V. Request for Confidential Treatment

Because this petition and its attachments contain confidential and competitively sensitive business information relating to the divestiture of the Acrylic Acid Business and the Latex Polymers Business, Dow has redacted such confidential information from the public version of this petition and its attachments. The disclosure of this information would prejudice Dow and Arkema, cause harm to the ongoing competitiveness of the Acrylic Acid Business and the Latex Polymers Business, and impair Dow's ability to comply with its obligations under the Consent Agreement. Pursuant to Section 4.9(c) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 4.9(c), Dow requests, on its own behalf and on behalf of Arkema, that the confidential version of this petition and its attachments and the information contained herein be accorded confidential treatment. The confidential version of this petition should be accorded such confidential treatment under 5 U.S.C. § 552 and Section 4.10(a)(2) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 4.10(a)(2). The confidential version of this petition is also exempt from disclosure under Exemptions 4, 7(A), 7(B), and 7(C) of the Freedom of Information Act, 5 U.S.C. §§ 552(b)(4), 552(b)(7)(A), 552(b)(7)(B), & 552(b)(7)(C), and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a(h).

Conclusion

For the foregoing reasons, Dow respectfully requests that the Commission expeditiously approve Dow's request to reopen and modify the Decision and Order, as soon as practicable after expiration of the public comment period.

Respectfully submitted,

Handwritten signature in black ink, appearing to read "George S. Cary / EHE". The signature is written in a cursive style and is positioned above a horizontal line.

George S. Cary

Elaine Ewing

Cleary, Gottlieb, Steen & Hamilton LLP

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Washington, D.C. 20006

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Counsel for Dow

Dated: November 6, 2009

**CONFIDENTIAL EXHIBIT 1**

**Asset Purchase Agreement  
(Redacted)**

**CONFIDENTIAL EXHIBIT 2**

**Affidavit from William Hamel, Vice President and General Counsel, Arkema Inc.  
(Redacted)**

**CONFIDENTIAL EXHIBIT 3**

**Torrance Building Lease – Exhibit AA to the Asset Purchase Agreement  
(Redacted)**