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Corporate Author The Dow Chemical Company

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ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In re 2,4,5-Trichlorophenoxyacetic Acid (2,4,5-T)	))))	FIFRA Docket No. 295, et al.

DOW PREHEARING MEMORANDUM (NO. 3)

This memorandum is submitted in compliance with the direction of the Chief Administrative Law Judge at the first Prehearing Conference (Tr. Nov. 12, 1973, p. 30). It will be organized as follows:

A. Dow responses to the January 18 submissions of other parties, indicating areas of agreement and disagreement (Tr. Nov. 12, 1973, pp. 30-31).

B. Dow responses to requests of other parties for field hearings (Id., p. 50).

C. Dow objections to authenticity of Repository Exhibits of other parties (Id., p. 41).

D. Second submission of Dow Repository Exhibits, in response to January 18, 1974 submissions of other parties, indexed to applicable subject matters (Id., p. 31).

E. Other matters.

A. Dow Responses to January 18 Submissions of Other Parties

The January 18 submissions identify several areas of agreement. These should serve to limit the scope and

length of the Hearing substantially. Their affirmative contribution deserves emphasis at the outset, before addressing the controverted points at issue.

There is now agreement by EPA that a rule of reason based on "thorough scientific information, reasoned inference and reliable prediction" should determine the outcome of environmental litigations (EPA 52).* The "no risk" approach is rejected by EPA at least, and perhaps by EDF as well. The issue, therefore, now becomes application and quantification of the rule in general and to the facts of this particular case.

There is agreement by EPA that the effects of chemical compounds on humans must necessarily be predicted on the basis of animal testing. The issue instead is the method to be used to extrapolate from one species to another (EPA 14-15).

There is agreement by EPA that the registered alternatives to 2,4,5-T are environmentally acceptable (EPA 49), although the possible exception of one herbicide, silvex, is noted. Thus, the environmental acceptability of alternatives need not be litigated,** although of course the relative merits

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*Reference in this form throughout this Memorandum are to page numbers in the January 18 submission of the party identified.

**EDF's statement that it is not Respondent's burden to show the acceptability of alternatives is incorrect (EDF 11). The Administrator's Opinion in the DDT case (In re: Stevens Industries et al., I.F.&R. Docket Nos. 63 et al., June 14, 1972) indicates that to make out an affirmative case, Respondent must show acceptable alternative means of control (pp. 26-7).

of the alternatives continue to be key issues. Moreover, such alternatives now furnish standards or guidelines for determining what is an acceptable risk for 2,4,5-T and for solution of the risk/benefit equation -- in other words, if 2,4,5-T can be shown to be no more suspect than an admittedly acceptable alternative and has equal or greater benefit, it too should be acceptable.

* * *

The following discussion is in response to the specific statements of position and contentions in the January 18 submissions. It focuses upon the issues which have been identified, in an effort to further tighten them. It is not a summary or outline of the responsive evidence -- we flatly disagree with many of Respondent's and EDF's statements. Some, of course, are already answered in Dow's January 18 submission and those of other parties; some are contradicted by the findings of the Advisory Committee; some are even contradicted (or not supported) by Respondent's and EDF's own citations. These, however, will be issues for determination at the Hearing. They should not be permitted to obfuscate the key areas of agreement outlined above.

(1) 2,4,5-T Mutagenicity. The 2,4,5-T mutagenicity issue is discussed in Dow Prehearing Memorandum (No. 2) at page 96.

EPA has stated with respect to this issue:

> "One in vitro study with bacteria exposed to 2,4,5-T noted no mutagenic effects. However, a practical negative conclusion cannot be reached from this study" (EPA 20, footnote omitted).

EDF does not make this specific concession.* However, the 2,4,5-T used in the single work to which EDF refers as indicating mutagenicity of 2,4,5-T (as distinguished from TCDD itself), is admitted to be contaminated with "less than 0.1 ppm TCDD" (EDF 6). Despite EDF's attempted disclaimer, this amount of TCDD, of course, is the same as Dow's present commercial 2,4,5-T production which is being questioned by EDF for its allegedly excessive TCDD content. If mutagenicity <u>was</u> indicated, it would appear therefore that there is as much (or more) reason to believe that the cause was the TCDD contaminant, not the pure 2,4,5-T itself.

It is believed that Respondent has misconceived its burden in this matter (see Section E[1][a] of this Memorandum, <u>infra</u>). This issue should be excluded.

(2) <u>2,4,5-T Carcinogenicity</u>. The 2,4,5-T carcinogenicity issue is discussed in Dow Prehearing Memorandum (No. 2), at pages 98-9.

Respondent has stated:

> "The available information conveys no discernible indication that 2,4,5-T itself is a carcinogen" (EPA 21).

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*It should be noted that EDF admits (EDF-6) it was not aware of the negative results in appropriate mutagenicity experiments in mammalian species (Dow 96, DD-32).

EDF does not discuss the carcinogenicity issue in its January 18 submission.

As with mutagenicity, it is believed that this issue should be excluded.

(3) 2,4,5-T Delayed Lethality and Sub-Lethal Chronic Health Effects. The 2,4,5-T delayed lethality and chronic health effects issues are discussed in Dow Prehearing Memorandum (No. 2) at pages 114 and 100 *et seq.*, respectively.

Although EPA does not discuss these issues in the precise terms of the Assistant Administrator's questions, it concedes that:

> "Except for the potential reproductive and mutagenic damage previously discussed, available information does not indicate that exposure to low levels of 2,4,5-T, itself, induces chronic effects. The apparent rapid human excretion of 2,4,5-T tends to support a tentative conclusion that chronic ill health would not be expected from long-term low-level exposure" (EPA 22, footnote omitted).

These issues should also be excluded.

(4) Environmental Habitat (new issue). The possible danger of loss of wildlife environmental habitat is a new issue not outlined in the Administrator's ten questions or the July 14, 1972 Statement of Issues. It is therefore not considered in Dow Prehearing Memorandum (No. 2). Respondent's contentions are set forth at EPA 25-27.

Adjudication of the 2,4,5-T issue has already been too long delayed, and there must come a time when issues are "closed" and the case proceeds to Hearing. Although Dow

does not now contend that this issue should be separated and dealt with at some later point on the ground that it is outside the pleadings, it is hopeful that no more new issues will be suggested unless there is strong reason to believe the public interest requires their consideration at this time and in this proceeding, despite the possible delaying effect on hearing and resolution of the matter.

Moreover, Respondent has not set forth any evidence in support of its concern in this area. It has simply stated conclusions such as that "the widespread, indiscriminate removal of sagebrush by 2,4,5-T (or by other means), will eliminate the sage grouse which depends upon sagebrush for ninety-nine percent of its food" (EPA 26, footnote omitted); and that because of the "little environmental data now available" (EPA 25) Registrants have a burden to establish "a reliable conclusion that TCDD is not causing serious environmental injury" (EPA 27).

While the precise nature of Respondent's burden of furnishing support for itself may not be clear, certainly more than this is required to indicate justifiable concern. Indeed, where a new issue such as this is raised, the burden should be even greater.

It should also be added that this purported issue is not a 2,4,5-T matter at all. Rather it is one which questions the whole system of agriculture and rangeland management in this country. If issues such as this are to

be considered without holding Respondent strictly to its burden of showing a proper basis for concern and inquiry, the lengthy trial now anticipated by some parties would be a fraction of the actual trial time required.

(5) Other Dioxins. The other dioxin issue is discussed in Dow Prehearing Memorandum (No. 2) at pages 186 and 187 et seq.

EPA 40-44 deals with this subject. Again, however, it does not set forth affirmative evidence justifying concern. As elsewhere, it seeks to place the burden upon Registrants of showing the non-existence of contaminants. Respondent states:

> "The absence* of other chlorodioxins, chlorodibenzofurans and chlorinated hydroxy diphenyl ethers has not been carefully established for any currently registered technical 2,4,5-T products" (EPA 40).
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> * * *
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> "In any event, all chemicals made by manufacturing processes having the capability of forming impurities with the degree of toxicity of TCDD should be supported with quality control procedures capable of detecting and quantifying such materials" (EPA 41).
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> * * *
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> "The so-called 'pre-dioxins', hydroxy chlorodiphenyl ethers should also be evaluated in terms of their possible presence in 2,4,5-T formulations. If present, these materials are potential sources for 2,4,5-T related dioxin formation under environmental conditions" (EPA 41-2, footnote omitted).

*Unless otherwise noted, all underscoring is added.

* * *

> "Also, the additive toxic effect of other chlorodioxins, including the octa, hexa, hepta, penta, tri and di isomers, all of which can be found in one or more of the products listed in Table II, cannot be discounted" (EPA 43).

The above again misconstrues Respondent's burden, which is to set forth at least some evidence sufficient to justify inquiry. Were the burden otherwise, there would be no practical limit to these cases -- one cannot prove unlimited negatives.

Respondent is of course correct when it charges that the manufacture of chemicals involves the possibility of the formation of impurities. But to establish the non-existence of any possibly toxic contaminant, including those which might produce "residues below the current level of detection [which] may be unsafe" (see EPA 25)* is an obvious scientific impossibility. An effort to establish the non-existence of any conceivable toxic contaminant by scientific testing would in addition be to court economic disaster. Rather one must approach this issue on the basis of scientific logic as to what is a likely possibility and what is not and, where indicated, by analyses of data collected in monitoring studies, using the most refined and sensitive methods available.

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*EDF appears to make the same argument -- i.e., that protection is needed where failure to detect substances may possibly be the result of "insufficiently sensitive methodology" (EDF 9).

As with other issues, no contaminant should be considered in this proceeding except where Respondent has shown a sufficient basis for concern. All others should be excluded.

(6) Thermal Stress. The issue of creating TCDD by heating 2,4,5-T is discussed in Dow Prehearing Memorandum (No. 2) at pages 40-41 and 115 et seq. EPA 28-29 deals with this issue.

There does not seem to be any significant controversy with respect to chemical analysis or methodology.* TCDD can be formed by heating 2,4,5-T under certain special circumstances. However the amount of TCDD produced from the heating of 2,4,5-T under normal environmental conditions is minimal and not of toxicological significance.

(7) Non-Food Crop Uses. This consolidated proceeding involves two separate and distinct categories of issue: The first, arising out of the earlier consolidated Docket Nos. 42, 44, 45 and 48, relates to 2,4,5-T use on a single food crop for human consumption -- rice. The second relates to all other 2,4,5-T uses and was first made the subject of inquiry in the Assistant Administrator's Notice of Hearing and Statement of Issues, each dated July 19, 1973.**

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*Indeed, Dow has long recognized that it is the heat which makes possible TCDD production during trichlorophenol processing. This knowledge has helped make possible the reduced TCDD levels in current production.

**38 Fed. Reg. 19860, July 24, 1973.

Following its description of the history of this proceeding, from the initial questioning of rice use through the Court of Appeals' reversal of the Arkansas District Court injunction, Respondent's January 18, 1974 submission states that recent discovery of TCDD in Vietnamese fish and crustaceans constituted the evidence on the basis of which non-food crop uses are now being questioned. Respondent's summary is sufficiently important to warrant its repetition:

> "At this time significant new information was revealed which altered the course of this controversy. Residues of 2,4,5-T related TCDD were reported in Vietnamese fish and crustaceans, and the development of the refined instrument sensitivity (parts per trillion) necessary for determining whether TCDD is penetrating into the United States environment was disclosed.[11]*
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> "In response to the greatly increased analytical sensitivity, Respondent initiated an extensive environmental and human monitoring project for TCDD. The finding of TCDD in Vietnamese fish disclosed a potential threat to public health and to the environment from even the non-food uses of 2,4,5-T (rangeland, rights of way, forestry), and in response, pursuant to section 6(b)(2) of the FIFRA as amended, EPA issued a Notice of Intent to Hold a Hearing to determine whether all remaining registered uses of 2,4,5-T should be cancelled." (EPA 5, footnote omitted).

The significance of the Vietnamese residue findings is thus a key issue in this case. Assuming their validity, Dow

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*The footnote reference [11] is to: Baughman and Meselson. An Analytical Method for Detecting TCDD (Dioxin): Levels of TCDD in Samples from Vietnam; Environ. Health Persp., Exper. Issue No. 5, pp. 27-35, 1973.

believes the underlying factual question to be decided will be whether current U.S. 2,4,5-T production and use are such as to result in residues of similar magnitude. Dow believes the evidence will show that the 2,4,5-T used in Agent Orange contained many times more TCDD than the 2,4,5-T currently being produced in the United States, and that U.S. rates of application are generally far below those employed during the Vietnam military defoliation program. Moreover, U.S. per capita fish consumption is well below that in Vietnam, so that possible TCDD exposure is still further reduced.

The crucial consideration, of course, is the U.S. experience. Respondent was concerned by the Vietnamese information because no similar U.S. evidence existed. Accordingly, Dow is presently conducting assays of fish selected so as to replicate the Vietnamese effort under conditions which might be found in this country, as distinguished from the unknown sources of the Vietnamese residues. The results of that effort, which should be completed soon, will attest to the materiality, or lack thereof, of the Vietnamese findings, and will also bear directly on the question of U.S. TCDD residues and exposure.

A very substantial part of the Hearing in this case will be concerned with 2,4,5-T uses <u>other</u> than rice. If evaluation of Respondent's evidence with respect to the Vietnamese findings indicates that Respondent's concern with respect to other uses has been unfounded, it may be possible at the

conclusion of Respondent's case to exclude further consideration of non-food crop uses and to focus exclusively upon any remaining scientific issues and the rice use alone.*

B. Dow Responses to Requests for Field Hearings

EPA has opposed field hearings on the ground that the key issues for adjudication are scientific and technical, and beyond the purview of lay witnesses.

While Dow agrees that the key issues in this case are with respect to scientific matters, the fact that so many farmers, ranchers, railroads, foresters, utilities and others choose 2,4,5-T for specific applications under specific circumstances is powerful evidence that it is the most effective and economic alternative and that actual use over a period of 25 years has produced no substantial evidence of risk to humans, wildlife or the environment.** Such matters are peculiarly within the purview of local witnesses and should not require the lengthy and geographically scattered field Hearings which some may anticipate.

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*A further reason for dealing with the rice case first is that Respondent has indicated it is the most serious in terms of risk to man (see e.g.,EPA 50). If risk there is found to be minimal, safety of other uses would seem to follow, a fortiori.

**Indeed, the testimony of one rice farmer whose wife (sometimes pregnant) and children have been "flagmen" for years during aerial application of 2,4,5-T; one whose family harvests its own rice and has kept careful records of his cultivation practices and marketing problems; or one who can testify to his family's health and the condition of his livestock, fish and wildlife populations, is certainly relevant to the issues here.

Moreover, with respect to rice the Administrator continued cancellation and rejected the recommendation of the Scientific Advisory Committee primarily because he considered that the use/benefit area had not been adequately explored. His August 6, 1971 Order stated:

> "The benefit coefficient of the cancellation equation has not yet been explored, and I do not have before me a formal record showing the extent of 2,4,5-T application to crops, its importance to crop production, or the availability of substitute controls. Such factors in this case should, in my view, be considered through the statutory hearing process to insure that all the economic and other information, including that relating to the difficulty of monitoring the manufacturing processes, as well as the scientific evidence, is part of an open record."

We hope a determination can be made at the conclusion of Respondent's case which would limit the need for substantial evidence in the use/benefit area. Until that time, however, Dow urges that for planning purposes field hearings as requested by the parties be approved and scheduled. This would bring the trial of these local issues to the communities most intimately concerned and would minimize inconvenience to third parties.

C. Dow Objections to Authenticity of Repository Exhibits

The Chief Administrative Law Judge has directed that the authenticity of documents filed in the Repository will be assumed unless challenged.* No date was fixed, this being one

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* Authenticity means that the document is what it appears to be; that is, it was prepared by the person whose name appears on it, on the date set forth, copies were furnished to those indicated, etc. Accuracy, integrity, validity, methodology, substance or admissibility generally are of course not conceded.

of the items to be considered at a further prehearing conference (Tr. Nov. 12, 1973, p. 41); see E (1), infra.

Except as to those documents which it has not been able to inspect, Dow has no objection to the authenticity of any of the documents filed in the Document Repository.

Dow has not yet been able to inspect EDF Exhibit 27, a private communication from the one dissenting member of the Administrator's nine-man 2,4,5-T Scientific Advisory Committee. By letter dated February 1, 1974 to one of Dow's attorneys (Exhibit "A" annexed), EDF advised that it considered this document to be a privileged communication. The same claim was asserted in EDF's January 31 document transmittal letter to the Hearing Clerk (p. 2) and the communication was not submitted to the Document Repository. Accordingly the authenticity of this document cannot be addressed at this time.

Dow has also not been able to inspect seven items referenced as "personal" or "private" communications in EPA's January 18 submission. By letter dated February 11, 1974 (Exhibit "B" hereto), EPA advised that the information in these communications was "orally communicated". Accordingly, there can be no issue of authenticity.

D. Additional Dow Repository Exhibits

Exhibit "C", annexed, is Dow's second schedule of documents now being submitted to the Hearing Clerk's Document Repository, in response to the January 18, 1974 submissions of the other parties. All documents in this submission are statutes or administrative regulations, which Dow anticipates

will be offered into evidence during Registrants' affirmative case, or which will facilitate preparation of the summary of the status of 2,4,5-T use in various states requested at the November 12, 1973 Prehearing Conference (Tr., p. 34).

All documents are marked and identified in the same fashion as in Dow's first submission.

E. Other Matters

(1) Request for Further Prehearing Conference

The parties' January 18 submissions have gone far in defining the issues, narrowing areas of apparent disagreement, disclosing positions and reducing the estimated scope and length of the Hearing. The responsive submissions, originally scheduled for February 22 (see pp.22, 25, *infra*) will undoubtedly be of additional help. Nevertheless, and perhaps even partly because of the value of the previous submissions, further rulings are needed at this point.

We urge the Chief Administrative Law Judge to schedule a second Prehearing Conference at an early time.* In addition to the document authenticity issue, some of the important matters on which rulings are required are as follows:

(a) Limitation of Issues. In addition to extending the inquiry to all registered 2,4,5-T uses, the Assistant Administrator's July 19, 1973 Order added four additional questions for consideration. These deal with mutagenicity, car-

* The need for scheduling another Prehearing Conference was referred to on November 12 (Tr., pp. 32-3).

cinogenicity, sub-lethal chronic health effects and delayed lethality (Statement of Issues, Items V.A.3-6; see Tr. Nov. 12, 1973, p. 16). Respondent's January 18 submission poses other new matters for consideration, including the effects on wildlife of the alleged loss of their environmental habitats (EPA 26) and the effects of such chemical compounds as chlorodibenzofurans and chlorinated hydroxy diphenyl ethers (EPA 40-41).

In accordance with the Chief Administrative Law Judge's direction, Respondent and EDF have set forth their positions and evidence with respect to these new areas, and the Registrants and other parties have responded with respect to issues raised before the January 18 submissions. As to these issues it is clear in some cases that there is no known affirmative evidence of possible harm.* A legal question to be decided is whether Registrants must then show that there is no harm. This in turn calls for rulings with respect to the extent of Respondent's burden of proceeding with evidence in this case.**

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*Thus, as discussed more fully above (pp. 3-5), EPA has stated that 2,4,5-T has no mutagenic effects (EPA 20), that the "available information conveys no discernible indication that 2,4,5-T itself is a carcinogen" (EPA 21), and that the evidence "tends to support a tentative conclusion that chronic ill health would not be expected from long-term low-level exposure" to 2,4,5-T (EPA 22).

**Respondent acknowledges a burden to "go forward with an affirmative exposition of those facts" supporting cancellation (EPA 9), but emphasizes Registrants' burden of proof (EPA 8), contends throughout that it is Registrants' burden to prove no harm, even where there is no contrary indication (e.g., EPA 20) and even suggests that it is Registrants' burden to furnish information in response to the Advisory Committee's suggestions (EPA 9) despite the fact that the Administrator himself did not accept the Advisory Committee's recommendations.

The parties clearly differ with regard to the nature of Respondent's burden. A trier of fact may find it difficult to apply the various tests set forth by the courts, such as "preponderance," "convincing," "beyond a reasonable doubt" and the like . However, Respondent clearly has a burden to do something more than express doubt and concern regarding the possibility of risk to require Registrants to establish that such "risk" is acceptable, or that the possibility does not exist.*

Section 6(b) of FIFRA as amended, which enables the Administrator to initiate proceedings with respect to cancellation, begins with the language:

> "If it appears to the Administrator that a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this subchapter or, when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment, the Administrator may . . ."

Something must make it so "appear" to the Administrator, not just charge, rumor, fear or frivolity.

Section 6(b) of the amended statute is too new for there to be any authoritative judicial determination with respect to Respondent's burden in this regard. But there is

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*Respondent acknowledges only that "[i]n theory, perhaps Registrants, in fulfilling their burden of ultimate persuasion, cannot 'prove a negative'. . . ." (EPA-51).

persuasive authority under FIFRA before the 1972 amendment and under other statutes.

Thus, in the Administrator's Opinion in the DDT case (p. 2 fn., supra), it was stated that the "Agency has the burden of going forward to establish those risks which it believes to require cancellation" and that this showing of risks, together with a showing of the availability of acceptable alternatives, "makes out an affirmative case," which then places the "burden of rebuttal" or "proof" on Registrants or users (id., pp. 25-27).*

On January 24, 1974 the Court of Appeals for the District of Columbia Circuit handed down an opinion which could have been written for the case at bar. In Hess & Clark v. Food & Drug Administration, ___ F.2d ___ (Nos. 73-1581 and 73-1589), FDA withdrew its approval of drug manufacturers' New Animal Drug Applications (NADA)** under the "general safety" clause of 21 U.S.C. § 360b(e)(1)B, which provides for such withdrawal when:

> "new evidence . . . together with the evidence available to the Secretary when the application was approved, shows that such drug is not shown to be safe for use under the conditions for use upon the basis of which the application was approved . . . ."

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* The Opinion acknowledged there had been considerable misunderstanding, stemming from Agency pronouncements and otherwise, as to the meaning of "burden of proof", and emphasized that it "should not be confused with [EPA's] burden of going forward" (id., p. 26, fn. 30).

** Analogous in this respect to a registration under FIFRA.

The Commissioner argued that his summary withdrawal of approval was justified because the manufacturers did not present "adequate test results" showing safety in their responses to his withdrawal notice.

The Court held that:

> "This argument reflects an imprecise reading of the statute. The pertinent sections permit withdrawal of an outstanding approval on the basis of 'new evidence' (a term used broadly here to include 'tests by new methods, or tests by methods not deemed reasonably applicable when such application was approved.')
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> * * *
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> "The statute plainly places on the FDA an initial burden to adduce the 'new evidence' and what that new evidence 'shows.' Only when the FDA has met this initial burden of coming forward with the new evidence is there a burden on the manufacturer to show that the drug is safe. Only at this later stage must the manufacturer produce 'adequate tests' of safety.
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> "In the instant case, we have not yet reached the second stage in this process. Rather, the issue is whether the FDA has met the initial burden of adducing the 'new evidence' and what it shows in terms of undermining the previous conclusions as to safety. The manufacturers have introduced affidavits and other evidence which challenge the FDA's showing in every particular. Because this evidence has been directed to the adequacy of the FDA's initial showing, it need not consist of the results of adequate tests in order to raise material issues of fact." (Slip sheet opinion, pp. 29-30).

On the facts there presented, the Court held that FDA skimped its responsibility and did not meet its "initial burden of coming forward with some evidence . . . to warrant shifting to the manufacturer the burden of showing safety" (id., p.32).

In a decision on the same day (January 24, 1974), the Atomic Energy Commission outlined the obligation of intervenors seeking to pose issues of environmental concern, as follows:

> "However, at this emergent stage of energy conservation principles, intervenors also have their responsibilities. They must state clear and reasonably specific energy conservation contentions in a timely fashion. Beyond that, they have a burden of coming forward with some affirmative showing if they wish to have these novel contentions explored further." In the Matter of Consumers Power Co., Dkt. Nos. 50-329, 50-330, p. 22 (footnote omitted).

The Commission emphasized that while it did "not equate this burden with the civil litigation concept of a prima facie case . . . the showing should be sufficient to require reasonable minds to inquire further" (id., p.22, fn. 27).

Dow submits that as to a number of issues, Respondent has not met its initial burden of demonstrating basis for concern as to possible risk and that with appropriate rulings such issues could be excluded. Planning and preparation for the Hearing are dependent, obviously, upon whether such issues are to be tried.

(b) Privilege. As noted above (p. 14) EDF has asserted privilege for EDF Repository Exhibit 27, a communication from Dr. Theodor Sterling to it concerning a case in British Columbia. The communication is cited by EDF in support of its allegation that:

> "Circumstantial indications that teratagenic effects in humans may have resulted from spraying of 2,4,5-T have been reported." (EDF 5).

Although a statistician and not a toxicologist, Dr. Sterling is anticipated to be one of the key EDF witnesses because he was the single dissenting member of the Administrator's Scientific Advisory Committee.

The basis for the EDF claim of privilege is not indicated, whether attorney-client, work product, or otherwise. A ruling is needed.

(c) Consolidation. Dow and EPA have agreed on a form of stipulation for consolidation of the several Dockets involved (Tr. Nov. 12, 1973, pp. 16-17). A copy of the proposed stipulation suggested by the Chief Administrative Law Judge (Tr. Nov. 12, 1973, pp. 37-8) is annexed hereto as Exhibit "D". However, the other parties have not yet agreed and the matter requires resolution.

(d) Tolerances. EDF has requested that tolerance issues be considered by the Administrative Law Judge in these proceedings (EDF 12-13).*

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*Dow notes that the EPA standard is fixed in terms of "negligible residue" tolerances, rather than the "zero" tolerance referred to by EDF. Further clarification of EDF's position in this respect will be necessary.

The question had not previously been posed and EPA has not yet indicated a position with respect to inclusion of tolerance questions. We recognize there are procedural and other difficulties because of the different statutes involved, and that the factual as well as legal issues and implications are not identical. Nevertheless, to the extent the facts and scientific data are the same and effort and expense could be saved by consideration of tolerance issues in this proceeding, Dow would be agreeable to an appropriate stipulation including such issues herein.

(e) Hearing Date. A specific date for the commencement of Hearing should be fixed at a further Prehearing Conference.

The parties have all been working towards the April trial date fixed in the Assistant Administrator's Notice of Hearing. Dow has already rented office space and living accommodations in Washington beginning in early March, so as to be organized and ready for the Hearing when it begins. A scientific conference to review the most recent data and opinions has been scheduled for March 8-10. The dates were fixed to promptly follow the February 22 date originally set for submission of responsive memoranda,* so the issues would be further narrowed and defined.

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* Arrangements for this meeting, which 50 or more scientists from various parts of the United States are expected to attend, obviously were made before the Order extending time for filing of this submission. See p. 25, infra.

Witnesses, parties and counsel, however, all have or need to make other commitments. To the extent that it is possible to do so, a specific date for commencing Hearings and schedules thereafter would be most helpful.

(f) State Restrictions on 2,4,5-T. At page 207 of Prehearing Memorandum (No. 2), Dow requested leave to supplement its January 18 submission of state statutory and administrative restrictions with respect to 2,4,5-T* if such information was not provided as directed by the Chief Administrative Law Judge (Tr. Nov. 12, 1973, p. 34). Such additional information was not furnished. Accordingly, as noted above (p. 15), the applicable statutes and regulations for all other states are now being submitted to the Document Repository. This material is identified in Exhibit B hereto, as DD-325-437. It does not include the foreign restrictions to which Respondent has adverted (Tr. Nov. 12, 1973, p. 34), as to which no issue appears.

(g) Scientific Advisory Committee. Dow has now had the opportunity to review the matter as suggested by the Chief Administrative Law Judge on November 12 (Tr., p. 46). In view of Respondent's and EDF's January 18 submissions, it does not intend to request Scientific Advisory Committee consideration of any new issues or evidence (Tr., p.22).

(h) Forage Unlimited (Sifon Spray Systems). Dow believes that any party wishing to offer material evidence

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* Dow's January 18 submission included statutes and regulations for Arkansas, Louisiana, Mississippi and Texas.

at the Hearing should be permitted to do so and suggested previously that the Society of American Foresters be accorded a special status if necessary for this purpose (Dow-206).

However, Dow does not believe that Forage Unlimited should be permitted to participate as a witness other than through one of the existing parties. Forage's February 4, 1974 submission is addressed largely to the merits of its own application method, as compared to other methods and techniques. We do not question Forage's presentation, but believe that interposition of a party is necessary to avoid trial of collateral issues relating to claims of individual suppliers and manufacturers.

(i) Additional Correction to Dow Prehearing Memorandum (No. 2). At page 63, line 1, the figures in columns 5 and 6 should read "113°," rather than "1130."

(j) Other Registrants. On December 12, 1973 Respondent served and filed its Analysis of Existing 2,4,5-T Registrations. The list disclosed a substantial number of registrants who are not parties to this proceeding and whose current status and, in some instances, addresses are unknown. Dow proposes a procedure whereby each of these registrants is notified directly of the pendency of the proceeding (rather than simply through Federal Register publication), so that each may determine if and to what extent it wishes to participate.

(k) Notice. Respondent's application for an extension of time to file its February 22 submission was apparently filed on February 15 but had not been received by us as of February 21. Apparently assuming no opposition, the Chief Administrative Law Judge entered an order on February 20 granting the relief requested in part. A shorter extension was requested by EDF motion dated February 19 and received by us on February 20. Granting of the Order, in effect ex parte because of the delay in the mail, will impede preparation for the scientific conference already scheduled for March 8-10 (see p. 22, supra). We are hopeful that this can be corrected by service of draft EPA and EDF responses several days early, as requested by letter dated February 20 (see Exhibit "E", annexed). Dow requests the adoption of a standard notice procedure such as telephone notice, as was furnished by EDF, to avoid such problems in the future.

Dated: New York, New York
February 22, 1974

Respectfully submitted,

Kaye, Scholer, Fierman, Hays & Handler

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

Hearing Attorneys for Registrant
The Dow Chemical Company
425 Park Avenue
New York, New York

Miriam C. Feigelson
Michael J. Traynor and
Milton R. Wessel

Of Counsel

ENVIRONMENTAL
DEFENSE
FUND

1525 18th STREET, NW, WASHINGTON, D.C. 20036/202 833-1495

February 1, 1974

Miriam C. Feigelson, Esq.
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, New York 10022

Re: 2,4,5-T -- I.F. & R. Docket No. 295

Dear Ms. Feigelson:

In preparation for our February 22 submission, we would appreciate your supplying us with copies of Exhibits 15, 25, 26, 27, 39, 40, 43, 44, 45, 48, 49, 50, 51, 102, 105, 108, 116, 125, 128, 133, 169, 170, 171, 172, and 179 listed at Exhibit A of your January 18 Prehearing Memorandum (No. 2). In accordance with Mr. Harker's suggestion after the November 12 Prehearing Conference, copies of this and all other document requests will be sent to each of the parties to the proceeding.

We are supplying herewith the documents requested in your letter of January 29, except EDF #27, which we consider to be a privileged communication.

Sincerely,

William A. Butler

William A. Butler
Counsel for Environmental Defense Fund, Consumers Union, and Harrison Wellford

Enclosures

cc: All parties, Hearing Clerk

P.S. Thank you for your kind offer to pay for the Xeroxing; however, we can supply you this small amount of copies free of charge. We may take you up on your offer for potential future large requests.

EXHIBIT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

February 11,1974

OFFICE OF
ENFORCEMENT AND GENERAL COUNSEL

Miriam C. Feigelson
Kaye, Scholer, Fierman,
Hays & Handler
Attorneys
425 Park Avenue
New York, N. Y. 10022

Re: 2,4,5-T

Dear Ms. Feigelson:

In response to your request of January 30, 1974 for copies of data referenced in Respondent's First Pretrial Brief, we are submitting all information requested, except the following:

(1) Kalter, H., Teratology of the Central Nervous System: Induced and Spontaneous Malformations of Laboratory Agricultural and Domestic Animals. Chicago, University, of Chicago Press, 1968.

This is a published volume which unfortunately, is not in EPA's permanent possession. The work is available in medical libraries.

(2) Personal Communication, Matthew Meselson, Harvard University, January 11, 1974.

This information was orally communicated.

(3) Personal Communication State of Montana Department of Fish & Game, Helena, Montana.

This information was orally communicated.

(4) Private Communication (Thomas) with Mr. Carroll Collier.

This information was orally communicated.

(5) Private Communication with OPP, Major Mabson, USAF, Washington, D. C.

This information was orally communicated.

EXHIBIT B

(6) Private Communication, USDA, Isensee.

This information was orally communicated.

(7) Page 35, fn. 83 -- this information is contained in Table I of Respondent's First Pretrial Brief. In addition, Respondent is submitting a "Summary of Rangeland Test" which briefly describes the procedures followed in the testing to date in rangeland, referenced on p. 36 of Respondent's First Pretrial Brief and a "Summary of Shrew Data" which are reported on p. 36 of the Brief.

(8) Private Communication, Fries, G., USDA, Beltsville, Maryland.

This information was orally communicated.

(9) Personal Communication, Matthew Meselson, Howard University. p. 40, fn. 91.

This information was orally communicated.

(10) General Estimates of the Rate, Timing and Costs of Application of 2,4,5-T.

This information is contained in the text, although not in tabular form, of Respondent's First Pretrial Brief, at pp. 45 et. seq.

(11) In addition, document #28 is identical to the document referenced on p. 24, fn. 54; it was merely reported in two journals. The report is enclosed.

In regard to oral communications discussed, supra, most such information will be embodied in formal testimony and subject to cross-examination during the hearing. However, in order to cooperate fully, should you wish to discuss the matters raised in said oral communications please feel free to arrange a meeting with any of the persons involved. As a matter of course, I request notification of such meetings, although my attendance is most unlikely.

Sincerely,

Timothy L. Harker

cc: All parties

Dow Repository Exhibits

No.	
DD-322	Circular 15 - Official Standards for Seed Certification in Arkansas, issued by Arkansas State Plant Board, revised August 1971.
DD-323	Handbook of Seed Certification Regulations, published 1970, Mississippi Seed Improvement Association, State College, Mississippi.
DD-324	Texas Seed Certification Standards, Texas Department of Agriculture, (excerpt, pp. 143-147).
DD-325	Alabama Pesticide Act of 1971, Code of Alabama, 1971 Cum. Supp., Title 2 §§ 337 (12a) et seq.
DD-326	Regulations Governing Sale, Offering for Sale, Transportation and Distribution of Pesticides in Alabama, Department of Agriculture and Industries, Division of Agricultural Chemistry (1971).
DD-327	State of Alabama, Department of Agriculture and Industries, Division of Agricultural Chemistry, "Application for Registration of Pesticides For Year Ending December 31, 19__".
DD-328	Alaska Enviromental Conservation Act, Alaska Stat., Title 46 §§ 46.03.010 et seq.
DD-329	Pesticide Control Regulations, State of Alaska Department of Environmental Conservation, September, 1973.

EXHIBIT C

DD-330 Arizona Pesticide Act, Arizona Rev. Stat. Ann. §§ 3-341 et seq.

DD-331 Technical Rules and Regulations of the Arizona Pesticide Act, State of Arizona, Office of State Chemist, 1972.

DD-332 "Application for Registration of Pesticides," State of Arizona, Office of State Chemist.

DD-333 Produce Carrying Spray Residue, Cal. Agric. Code §§ 12501 et seq.

DD-334 Economic Poisons, Calif. Agric. Code §§ 12751 et seq.

DD-335 Restricted Materials, Calif. Agric. Code §§ 14001 et seq.

DD-336 Regulations Concerning Economic Poisons, Calif. Admin. Code §§ 2327 et seq.

DD-337 Regulations Concerning Restricted Herbicides, Calif. Admin. Code §§ 2448 et seq.

DD-338 Regulations Concerning Sale, Use and Possession of Sodium Fluoroacetate (Compound 1080), Calif. Admin. Code §§ 2470 et seq.

DD-339 "Restricted Materials - Permit required for possession and use," State of California, Department of Food and Agriculture.

DD-340 The Pesticide Act, Colorado Revised Statutes 1963 (1967 Supp.) §§ 6-12-1 et seq.

DD-341 Rules and Regulations Pertaining to the Administration and Enforcement of the Pesticide Act, State of Colorado, Department of Agriculture.

DD-342 The Connecticut Pesticide Control Act, Conn. General Statutes Chapter 348, Part Ia, §§ 19-293 et seq. (effective October 1974).

DD-343 State of Connecticut, Department of Environmental Protection, Regulation cancelling certain "pesticides."

DD-344 Pesticide Law, State of Delaware Code Ann., Title 3 §§ 1201 et seq.

DD-345 Rules and Regulations in Regards to the Pesticide Law, State of Delaware, State Department of Agriculture (1972).

DD-346 "Application for Permit to Buy and Use Restricted Use Pesticide," State of Delaware, State Department of Agriculture.

DD-347 "Application for Permit to Sell - Restricted Use Pesticide," State of Delaware, State Department of Agriculture.

DD-348 Florida Pesticide Law, Florida Statutes Ann. §§ 487 et seq.

DD-349 State of Florida, Rules of the Department of Agriculture and Consumer Services; Chapter 5E-2, Pesticides (revised 1967).

DD-350 The Georgia Economic Poisons Act, Ga. Code Ann. 5-1501 et seq.

DD-351 Georgia Pesticide Use and Applications Act, Ga. Code Ann. 5-1501a et seq.

DD-352 Rules and Regulations for the Enforcement of the Georgia Economic Poisons Act as amended, Georgia Department of Agriculture §§ 40-60-01 et seq. (1965).

DD-353 "Economic Poisons Registration Application," Georgia Department of Agriculture.

DD-354 Pesticide Law, Idaho Code §§ 22-3401 et seq.

DD-355 Pesticide Law Rules and Regulations, State of Idaho, Department of Agriculture (1972).

DD-356 Illinois State Commercial Feed Act with General Regulations to Feed Act, Ill. Rev. Stat., Chap. 56-1/2 §§ 66.1-66.16.

DD-357 Illinois State Commercial Fertilizer Act with General Rules and Regulations to Fertilizer Act, Ill. Rev. Stat., Chap. 5 §§ 55.1-55.23.

DD-358 Illinois State Economic Poison Law with General Rules and Regulations to Economic Poison Act, Ill. Rev. Stat., Chap. 5 §§ 87c1-87c13.

DD-359 Pesticides Control Act, Burns Ind. Stat. Ann. §§ 15-3-1-2 et seq.

DD-360 Pesticide Act of Iowa, Code of Iowa 1971 §§ 206 et seq. and §§ 206A et seq.

DD-361 Pesticide Act Rules, State of Iowa, Department of Agriculture (1963).

DD-362 Rules with respect to use of Agricultural Chemicals, Iowa Department of Agriculture and Chemical Technology Review Board, Rules 1.1(206A) et seq. (1971).

DD-363 "Application for Registration of Pesticides," State of Iowa, Department of Agriculture.

DD-364 Agricultural Chemical Act of 1974 (amended in 1963), Kansas Statutes Ann. §§ 2-2205.

DD-365 Kansas Agricultural Chemical Act, Rules and Regulations, §§ 4-1-1 et seq., Kansas State Board of Agriculture (1966).

DD-366 "Application for Registration of Agricultural Chemicals (Economic Poisons)," Kansas State Board of Agriculture.

DD-367 Kentucky Pesticide Use and Application Act of 1972, Kentucky Revised Statutes §§ 217B.010 et seq.

DD-368 Maine Economic Poisons Law, Maine Revised Statutes Ann., Title 22 §§ 1451 et seq.

DD-369 Maryland Pesticide Law of 1958 as amended by Act of 1971, Annotated Code of Maryland, Article 48 §§ 129-149.

DD-370 Hazardous Substances and Pesticides Law as amended by Chapter 506 of the Acts of 1972, Ann. Laws of Mass. Chap. 94B.

DD-371 Economic Poison Law, Michigan Stat. Ann. §§ 12.352(1) et seq.

DD-372 Pesticide Applicator's Law, Michigan Stat. Ann. §§ 12.353(1) et seq.

DD-373 Economic Poisons Applicators Regulation No. 632, Michigan Department of Agriculture, Plant Industry Division (1971).

DD-374 Restricted Use Pesticides Regulation No. 633, Michigan Department of Agriculture, Plant Industry Division (1972).

DD-375 The Minnesota Spraying and Dusting Law, Minn. Stat. Ann. §§ 18.031 et seq.

DD-376 Structural Pest Control Act, Minn. Stat. Ann. §§ 18A.01 et seq.

DD-377 The Economic Poisons and Services Law, Minn. Stat. Ann. §§ 24.069 et seq.

DD-378 Rules and Regulations, Chap. 16: AGR 348-367, Custom Spraying and Dusting, State of Minnesota, Department of Agriculture (1972).

DD-379 Rules and Regulations, Chap. 12: AGR 233-254, Structural Pest Control, State of Minnesota, Department of Agriculture (1973).

DD-380 Rules and Regulations, Chap. 15: AGR 329-347, Economic Poisons and Devices, State of Minnesota, Department of Agriculture (1956).

DD-381 Missouri Economic Poisons Act, Mo. Rev. Stat. §§ 263.270 et seq.

DD-382 Montana Pesticides Act, Rev. Code of Montana 1947 §§ 27-213 et seq.

DD-383 Economic Poisons and Devices Law of 1972, Nebraska Rev. Stat. §§ 2-2601 et seq.

DD-384 Regulation to Implement Nebraska Economic Poison & Devices Act, State of Nebraska, Department of Agriculture, Bureau of Plant Industry.

DD-385 Pesticide Control Act, Nevada Rev. Stat. 1971 §§ 586.010 et seq.

DD-386 Regulations for the Enforcement of the Nevada State Department of Agriculture (1956).

DD-387 Economic Poisons Act, New Hampshire Stat. Ann. Chap. 438.1

DD-388 Regulations, New Hampshire Pesticides Control Board (1970).

DD-389 "Prohibited - Prohibited-Limited Use - Restricted Pesticides," New Hampshire Pesticides Control Board (1973). (2,4, 5-T; 2, 4-0; MCPA, Silvex not listed).

DD-390 The Economic Poison Act of 1951, N.J. S.A. 4:8A-1 et seq.

DD-391 New Jersey Pesticide Control Act, N.J. S.A. 13:1F-1 et seq.

DD-392 Proposed Pesticide Control Regulations, New Jersey Department of Environmental Protection (1973).

DD-393 New Mexico Pesticide Control Act, N.M. Stat. Ann. §§ 45-25-1.

DD-394 Regulatory Order No.1, New Mexico Department of Agriculture (1973).

DD-395 "Application for Registration of Pesticides and Services," New Mexico Department of Agriculture.

DD-396 N.Y. Environmental Conservation Law §§ 33-0101 et seq. (McKinney's 1971).

DD-397 N.Y. Agriculture and Markets Law §§ 148 et seq. (McKinney's 1972).

DD-398 Circular 864, Part 326 - Rules and Regulations Relating to Restricted Pesticides, New York State Department Environmental Conservation (1973).

DD-399 North Carolina Pesticide Law of 1971, N. Car. Gen. Stat. §§ 143-434 et seq.

DD-400 Regulation #1 of the North Carolina Pesticide Board (1971).

DD-401 North Dakota Insecticide, Fungicide and Rodenticide Act, N.D. Cent. Code §§ 19-18-01 et seq.

DD-402 Ohio Pesticide Use and Applicator Law, Ohio Rev. Code Ann. §§ 921.41 et seq.

DD-403 Ohio Economic Poisons Law, Ohio Rev. Code Ann. §§ 921.11 et seq.

DD-404 Regulations as to Use and Application of Economic Poison, AG-65-61.01 et seq., State of Ohio, Department of Agriculture (1973).

DD-405 Pesticide Law, Okla. Stat., title 2 §§ 3-61 *et seq*.

DD-406 Rules and Regulations for Pesticide Law, Agricultural Code §§ 3-301 *et seq*., Oklahoma State Department of Agriculture, Entomology and Plant Industry Division.

DD-407 "Application for Registration of Pesticides in Oklahoma," Oklahoma State Department of Agriculture, Plant Industry Division.

DD-408 State Pesticide Control Act, Oregon Rev. Stat. Chap. 634.

DD-409 Notice and Proposed Regulations, Oregon State Department of Agriculture (October, 1973).

DD-410 "Application for a Permit to Use an Experimental Pesticide," Oregon State Department of Agriculture.

DD-411 Pennsylvania Pesticide Act of 1957, Purdon's Pa. Stat. §§ 111.2 *et seq*.

DD-412 Market Regulation No. 4 (Revised), To Regulate the Sale, Distribution and Commercial Application of Economic Poisons and Devices in the Commonwealth of Puerto Rico, Commonwealth of Puerto Rico, Department of Agriculture.

DD-413 The Rhode Island Pesticide Control Law, Rhode Island General Laws §§ 23-41-1 *et seq*.

DD-414 Economic Poisons Act, Rhode Island General Laws §§ 2-8-1 *et seq*.

DD-415 Regulations Relating to the Control and Regulation of Pesticides in Rhode Island, Rhode Island Department of Natural Resources.

DD-416 Insecticides, Fungicides and Rodenticides, S.D. Compiled Laws Ann. §§ 39-19-1 et seq.

DD-417 The Pesticide Act as amended with Rules, Regulations, Definitions and Standards, Tenn. Code Ann. §§ 43-701 et seq.

DD-418 The Utah Pesticide Control Act, Utah Code §§ 4-4-30 et seq.

DD-419 Economic Poison Application Act, Amended 1967 with Regulations, Utah Code Ann. §§ 4-4-14 et seq.

DD-420 Insecticide, Fungicide and Rodenticide Act, Utah Code Ann. §§ 4-4-1 et seq.

DD-421 Regulations under the Utah Insecticide, Fungicide and Rodenticide Act, Utah State Board of Agriculture.

DD-422 Pesticide Control Act, Vermont Stat. Ann., Title 6 §§ 1101 et seq.

DD-423 Pesticide Registration Act, Vermont Stat. Ann., Title 6 §§ 911 et seq.

DD-424 Virginia Pesticide Law, Code of Va. §§ 3.1 - 189 et seq.

DD-425 Rules and Regulations for the Enforcement of the Virginia Pesticide Law, State Board of Agriculture and Commerce (1970).

DD-426 Regulations for Control of Pesticides, State of Virginia, State Board of Agriculture and Commerce.

DD-427 "Application for Pesticides Registration," Virginia Department of Agriculture and Commerce, Division of Product and Industry Regulation.

DD-428 Washington Pesticide Control Act, Wash. Rev. Code Ann. §§ 15.58.010 et seq.

DD-429 Washington Pesticide Application Act, Wash. Rev. Code Ann. §§ 17.21.010 et seq.

DD-430 Regulations Relating to Restricted Use Pesticides, State of Washington, Department of Agriculture (1973).

DD-431 "Application for the Registration of Pesticides," State of Washington, Department of Agriculture.

DD-432 The Pesticide Act of 1961, W. Va. Code Ann. §§ 19-16A-1.

DD-433 Regulations - The West Virginia Pesticide Act, West Virginia Department of Agriculture.

DD-434 "Application for Registration of Economic Poisons," West Virginia Department of Agriculture.

DD-435 Wisconsin Pesticide Law, Wis. Stat. Ann. §§ 94.67-94.71.

DD-436 Pesticide Use and Control, Wisc. Administrative Code §§ Ag. 29.01 et seq.

DD-437 Wyoming Environmental Pesticide Control Act of 1973, Wyo. Stat. Ann. §§ 35-262.1 *et seq*.

Stipulation as to Pleadings

The following, as parties to Consolidated FIFRA Docket Nos. 42, 44, 45, 48 and 295 acting through their respective attorneys or agents, hereby consent to the adjudication in each of I.F. & R. Docket Nos. 42, 44, 45 and 48 of all the issues contained in the Statement of Issues promulgated by the Assistant Administrator for Hazardous Materials Control, of the U. S. Environmental Protection Agency on July 19, 1973, as part of the Notice of Intent to Hold a hearing on 2,4,5-T, published in the Federal Register on July 24, 1973 38 Fed. Reg. 19859.

Each of the following parties also hereby waives any right which it may otherwise possess to object to or to contest the adjudication of any or all of said issues in I.F.& R. Docket Nos. 42, 44, 45 and 48 on the ground that the Notice of Cancellation or subsequent Orders of the Administrator in I.F.& R. Docket Nos. 42, 44, 45 and 48 did not give adequate notice that any or all of such issues would be adjudicated.

Respectfully submitted,

Timothy L. Harker
Counsel for Respondent
Environmental Protection Agency
401 M Street, S. W.
Washington, D. C. 20460

EXHIBIT D

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
ATTORNEYS
425 PARK AVENUE
NEW YORK, N.Y. 10022

TELEPHONE
(212) PLAZA 9-8400

CABLE ADDRESSES
KAYEMACLER NEW YORK
KAYEMACLER NEUILLY/SEINE

TELEX NUMBERS
NEW YORK DOMESTIC 126921
NEW YORK INT'L 234860
PARIS: LEFEBVRE 62971F

EUROPEAN OFFICE:
3, VILLA EMILE-BERGERAT
92523 NEUILLY (PARIS), FRANCE

TEL: 637.05.00

February 20, 1974

BY HAND

Timothy L. Harker, Esq.
Office of General Counsel
Environmental Protection
Agency
401 M Street, S.W.
Washington, D.C. 20460

William A. Butler, Esq.
Environmental Defense
Fund, Inc.
1525 18th Street, N.W.
Washington, D.C. 20036

Re: 2,4,5-T
(FIFRA Dkt. Nos. 295 et al.)

Gentlemen:

We just received in this morning's mail a copy of the EDF motion for a two-week extension of time (to March 11) for its February 22 submission. When I telephoned the Hearing Clerk to make arrangements for filing a response by hand requesting that the date be fixed no later than March 5 so that it could be in our hands before a scientific conference now scheduled to begin March 8, I was referred to Judge Perlman's secretary. She, in turn, read me a copy of an Order filed today on the basis of an application made by Respondent on February 15. The latter has not yet been received in this office, so that in effect, the granting of the application is *ex parte* as to us.

Although it may seem to others that the dates fixed at the November 12 Prehearing Conference are not of critical significance, as the annexed draft of our intended opposition papers makes clear, the further delineation of issues we had expected to receive by Monday, February 25 were key documents to be used in preparation for the conference which will begin

EXHIBIT E

Timothy L. Harker, Esq.
William A. Butler, Esq.

February 20, 1974

March 8 in Washington, D.C.

I am writing to urge that you furnish us at least draft responses in sufficient time before March 8 so that we can pinpoint the issues to the maximum extent at the conference. We will make whatever arrangements are necessary to have these picked up by hand at your offices on March 7, or earlier if possible.

Sincerely,

Miriam C. Feigelson

Attachments

MCF:cw

Copies: All parties, Hearing Clerk
(By Hand)

MRW
DRAFT
022073

DOW'S RESPONSE TO ENVIRONMENTAL DEFENSE FUND ET AL.'S MOTION FOR TWO-WEEK EXTENSION OF TIME IN WHICH TO FILE ITS REPLY BRIEF

1. This is in opposition to EDF's motion for a two-week extension of time to serve and file its submission now due February 22, 1974.

2. Dow has been working toward the April, 1974 trial date fixed in the Assistant Administrator's Notice of Hearing. Jointly with USDA it has scheduled a scientific conference in Washington, D.C. for March 8-10, to consider the issues and open questions to be defined by the January 18 and February 22 submissions of the parties, and to identify any scientific areas in which additional preparation is needed before April. It is expected that fifty or more scientists will attend from all over the United States.

3. Also by way of preparation for an April Hearing, Dow has rented Washington office space beginning in early March so as to be organized and ready for the Hearing when it begins.

4. We are reluctant to oppose any attorney's or party's request for an adjournment because of other commitments.

Nevertheless this case involves a substantial number of parties and counsel. Undoubtedly at a further prehearing conference, schedules can be arranged so as to achieve the maximum accomodation of future long-term commitments of parties and counsel, and we urge that this be done as soon as possible. But the shifting of schedules to accomodate special or short-term conflicts of one person could well prejudice the interests of many others, as in this instance.

5. EDF's time should be extended to no later than March 5 so that its submission can be received by March 7 to be available for use at the conference beginning March 8.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Dow Prehearing Memorandum (No. 3), dated February 22, 1974 was served today by postage prepaid mail, upon the persons whose names and addresses are listed below:

Amchem Products, Inc.
Ernest G. Szoke, Chief Counsel
Brookside Avenue
Ambler, Pennsylvania 19002

American Farm Bureau Federation
William J. Kuhfuss, President
225 Touhy Avenue
Park Ridge, Illinois 60068

Association of American Railroads
Harry J. Breithaupt, Jr., Esq.
General Counsel
Law Department
American Railroads Building
Washington, D. C. 20036

Environmental Defense Fund, Inc.
Consumers Union of United States, Inc.
Harrison Wellford
William A. Butler, Esq.
1525 18th Street, N.W.
Washington, D. C. 20036

Environmental Protection Agency
Timothy L. Harker, Esq.
Office of General Counsel
401 M Street, S.W.
Washington, D. C. 20460

National Forest Products Association
William D. Rogers, Esq.
Richard Wertheimer, Esq.
Arnold & Porter
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Thompson-Hayward Chemical Company
C. E. Lombardi, Jr., Esq.
Blackwell Sanders Matheny Weary & Lombardi
Five Crown Center
2480 Pershing Road
Kansas City, Missouri 64108

Transvaal, Inc.
J. Robert Hasness
Director of Technical Services
P. O. Box 69
Jacksonville, Arkansas 72076

United States Department of Agriculture
Raymond W. Fullerton, Esq.
Alfred R. Nolting, Esq.
Margaret Bresnahan Carlson, Esq.
Office of the General Counsel
12th & Independence Sts., S.W.
Washington, D C. 20250

United States Department of Transportation
J. Thomas Tidd, Esq.
General Counsel
Washington, D. C. 20590

Miriam C. Feigelson

Miriam C. Feigelson

Dated: New York, New York
February 22, 1974