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Author

Corporate Author United States Environmental Protection Agency (EPA)

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KIRKLAND & ELLIS

1776 K Street, N.W.
Washington, D.C. 20006

Washington Office
Area Code 202 857-5000

To Call Writer Direct
202 857- 5018

Chicago Office
Area Code 312 861-2000
Telex 25-4361
200 E. Randolph Drive
Chicago, Ill. 60601

April 23, 1979

TO: EPA Suspension Hearing Witnesses

You will find enclosed a copy of Dow's Notice of Intent to Proceed Immediately with Cancellation Hearings and to Withdraw from Suspension Proceedings, which was filed today with the Environmental Protection Agency. This decision, reached by Dow over the weekend, involved a number of complex factors.

One important consideration was the difficulty witnesses face in having to prepare more than once for important and complex testimony. Your efforts to date have been excellent and we thank you sincerely. Dow's action today will at least temporarily lighten the task you have so kindly undertaken. At the same time, your preparation of draft testimony will give us an important advantage in preparing for the cancellation hearings.

Although we do not yet know when the cancellation hearing will begin, Dow is pressing for an early start. Over the next few weeks we will keep in contact with you to discuss your role in that hearing and in the meantime are,

Cordially yours,

Edward W. Warren

Edward W. Warren

Rudolf H. Schroeter

L. Mark Wine

gka

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In re: Emergency Suspension Orders for 2,4,5-T and Silvex	)	FIFRA Docket Nos. 409, 410

NOTICE OF THE DOW CHEMICAL COMPANY'S INTENT TO PROCEED IMMEDIATELY WITH CANCELLATION HEARINGS AND TO WITHDRAW FROM SUSPENSION PROCEEDINGS

Edward W. Warren
L. Mark Wine
Richard L. McConnell, Jr.

KIRKLAND & ELLIS
1776 K Street, N.W.
Washington, D.C. 20006
(202) 857-5000

Counsel for The Dow Chemical Company

Of Counsel:

Michael J. Traynor
Dow Chemical U.S.A.
2030 Dow Center
Midland, Michigan 48640

April 23, 1979

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NOTICE OF THE DOW CHEMICAL COMPANY'S INTENT TO PROCEED IMMEDIATELY WITH CANCELLATION HEARINGS AND TO WITHDRAW FROM SUSPENSION PROCEEDINGS

The Dow Chemical Company (Dow) is today requesting that an Administrative Law Judge be appointed and that proceedings begin immediately on the Administrator's outstanding notices of intent to cancel certain uses of 2,4,5-T and silvex. Dow accordingly elects not to participate further in these suspension proceedings. Instead, in view of the intensive preparation undertaken by Dow, EPA and other interested persons over the past two months, Dow is urging that full cancellation hearings begin in June and that such hearings be completed in time for the Administrator to reach his final decision on cancellation before the beginning of the next spraying season in March 1980.

Dow continues to deplore the unscientific and politically-inspired decisions announced by Deputy Administrator Barbara Blum on March 1, to suspend uses of 2,4,5-T and silvex on an emergency basis. The Alsea II study on which these "emergency" decisions were supposedly predicated has been severely

criticized as defective and inconclusive by the scientific community. Although EPA's "emergency" action and the Alsea II study have been considered by governments around the world, none has followed EPA's lead and several have expressly rejected the Alsea II study as grounds for any regulatory action.

Indeed, this Hearing Panel itself indicated preliminarily on March 30 that the Alsea II study is "an extraordinarily opaque document," and that "it may be difficult to overcome many of the criticisms and reservations that have been expressed to date about the study." Tr. PM-54. Likewise, the District Court for the Eastern District of Michigan raised "serious questions" about the Alsea II study and other aspects of the agency's actions. Moreover, the Court expressly stated that it "would not in its judgment have ordered the emergency suspensions on the basis of the information before the EPA." Memorandum Opinion and Order (April 12, 1979).

EPA's precipitous, highly political decisions to suspend 2,4,5-T and silvex have already done irreparable damage to the agency's reputation for scientific objectivity. Its decisions have especially called into question the integrity of the RPAR process, which EPA has repeatedly characterized as an exemplary procedure for thorough, in-depth evaluation of scientific evidence concerning both the risks and benefits of pesticide use. Now, after Dow and others have devoted enormous scientific and other resources to this supposedly non-adversarial scientific inquiry, agency officials have stated that

the RPAR process is only a "literature review" manned by EPA personnel who are little more than file clerks.

At the cost of irreparably damaging public confidence in the RPAR process, EPA's emergency suspensions have achieved the dubious "accomplishment" of preventing the much-needed use of 2,4,5-T during the 1979 spraying season. The hardship to registrants, distributors, applicators and end-users has been and will continue to be severe. Unfortunately, however, these suspension proceedings offer no hope of practical relief before the end of the 1979 spraying season in June or July.

To the contrary, continuation of Dow's participation in these proceedings promises only to delay the opportunity of registrants, users and the public for full consideration of the issues in cancellation hearings. Dow, other registrants, and users must now consider the 1980 spraying season. Only by foregoing this suspension hearing and moving immediately to cancellation proceedings can there be any hope of resolving these issues fully and fairly before next spring. Because of extensive preparation already undertaken for the suspension proceedings, all parties should be ready to proceed immediately to cancellation hearings.

These practical reasons for going immediately to cancellation hearings are strongly supported by the grave legal questions that Dow already has raised regarding these suspension proceedings. The Administrator's unprecedented and unlawful appointment of Hearing and Technical Support Panels rather than an Administrative Law Judge to conduct these proceedings

has raised fundamental questions as to the fairness and integrity of these hearings.

Without questioning the personal integrity of any Panel member, it must not be forgotten that each member is an EPA employee whose position, advancement, and career depends ultimately upon the approval of his supervisors within the agency, including the Administrator. Moreover, as is already apparent, many of the Hearing and Technical Support Panel members have worked with or under the supervision of key agency witnesses. In short, this is a case of agency scientists judging the decision of the agency head and the testimony of their agency colleagues, under circumstances where future dealings, including particularly career advancement, may well be affected by the outcome of these proceedings.

On April 9, Dow requested that the Administrator appoint an Administrative Law Judge to conduct these proceedings. In support, Dow cited statutory and constitutional requirements, as well as the practical considerations previously noted. The Administrator refused to consider these important issues, denying Dow's request within a day after receipt, without even requesting a response from agency counsel.

The conduct of these proceedings to date has served only to confirm the need for an Administrative Law Judge. As the transcript makes obvious, the Hearing Panel is not experienced in the conduct of formal adjudicative proceedings such as these. This understandable inexperience already has jeopardized the rights of all parties.

Especially troubling is the apparent inability of the Hearing and Technical Support Panel members even to identify, much less avoid, ex parte contacts prohibited by the Administrative Procedure Act and the agency's own rules of practice. Any decision here must be based solely on the record assembled in these hearings. Yet, Panel members already have engaged in wide-ranging, extra-record inquiries of their own. However commendable such inquiries may appear to persons of scientific training, they are entirely inappropriate and unlawful in a formal adjudicative proceeding such as this which must be decided solely on the record assembled by the parties.

Similarly, Dow is not convinced that its procedural rights under the Administrative Procedure Act would be respected were it to participate further in these proceedings. As clearly stated at the beginning of these hearings, Dow rejects the Panel's suggestion that it can impose "prior restraints" on a party's right to cross-examine opposing witnesses. Nor does the Panel's denial of the parties' right to present oral direct testimony conform to the Administrative Procedure Act.

The Panel's attitude toward the protection of Dow's trade secret and confidential data is yet another outgrowth of its members' lack of experience in the conduct of formal adjudicative proceedings. After arduous negotiations in which Dow made concessions on virtually all issues, the affected groups (including other registrants, agency counsel, and the Environmental Defense Fund) agreed to a confidentiality agreement

and protective order that would have allowed the use of Dow's confidential data in the proceedings.

Although similar protective orders are routinely entered by courts and have been entered by Administrative Law Judges in other suspension cases, the Hearing Panel refused to enter such an order. Only after prolonged discussion and a request for reconsideration by agency counsel did the Panel finally recognize the need for a protective order on Friday, April 20. Even then, the Panel was unable to draft an order adequate to protect Dow's interests.

In withdrawing from these proceedings today, Dow also withdraws its offer to make its confidential and trade secret data available for use in these suspension proceedings.

To proceed to cancellation hearings with the greatest possible expedition, Dow today is petitioning the Chief Administrative Law Judge to refer the cancellation proceeding already requested by Dow to himself or to another Administrative Law Judge. By separate Motion, Dow is requesting that a prehearing conference be convened within 10 days and that a schedule be established with cancellation hearings to begin in June and to conclude by fall, allowing the Administrator ample time to render his final decision before the 1980 spraying season begins next March. The time alloted for cancellation hearings should be more than sufficient to permit full evidentiary presentations by all parties.

From the public's standpoint, the course taken by Dow today should be especially welcomed. Thus, in contrast to

these suspension proceedings, all interested persons -- not just registrants and EPA, but also users, environmental groups, other government agencies and members of the public -- will be allowed to participate as full parties to the cancellation proceedings. Moreover, rather than considering short-term risks and benefits in the limited context of a suspension hearing, cancellation hearings will permit the Administrative Law Judge -- and ultimately the Administrator and the courts -- to decide once and for all whether the great benefits bestowed by these products outweigh the risks, if any, posed by their continued use.

When all of the relevant scientific, economic and other evidence is considered fully and deliberately in cancellation proceedings, Dow is confident that both 2,4,5-T and silvex will be found to be not only safe but indispensable tools for agriculture, forestry, and all other uses, and that the suspended registrations accordingly will be restored for the public benefit.

Respectfully submitted,

Edward W. Warren

Edward W. Warren
L. Mark Wine
Richard L. McConnell, Jr.

KIRKLAND & ELLIS
1776 K Street, N.W.
Washington, D.C. 20006
(202) 857-5000

Counsel for The Dow Chemical Company

Of Counsel:

Michael J. Traynor
Dow Chemical U.S.A.
2030 Dow Center
Midland, Michigan 48640

April 23, 1979

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Notice of The Dow Chemical Company's Intent to Proceed Immediately With Cancellation Hearings and to Withdraw From Suspension Proceedings" were served by hand, or by express mail, federal express, special delivery, or first class mail postage prepaid, on April 23, 1979 to the persons on the attached list.

Edward W. Warren

Edward W. Warren

Anthony P. Brown, Esq.
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, California 94120
Counsel for Chevron Chemical Co.

Timothy Atkeson, Esq.
Steptoe & Johnson
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
Counsel for Chevron Chemical Co.

Robert L. Ackerly, Esq.
Sellers, Connor & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006
Counsel for Lebanon Chemical Corp.

Graham Purcell, Esq.
Doub, Purcell, Muntzing & Hansen, Chartered
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Counsel for Riverdale Chemical Company, Frank Miller & Sons, Tobacco States Chemical Company, PBI Gordon Corp., Pueblo Chemical & Supply Company and Platte Chemical Company

Fernando Erazo, President
Heritage House Products Corp.
1025 Northern Boulevard
Roslyn, New York 11576

John J. Rademacher
Assistant Legal Counsel
American Farm Bureau Federation
425-13th Street, N.W.
Washington, D.C. 20004

O. Russell Armstrong, Esq.
Davis & McLeod
499 S. Capitol Street, S.W.
Suite 407
Washington, D.C. 20003
Counsel for The National Cattlemen's Association

Jacqueline M. Warren, Esq.
William A. Butler
Counsel for the Environmental Defense Fund, Inc.
1525-18th Street, N.W.
Washington, D.C. 20036

Richard dec. Hinds, Esq.
Cleary, Gottlieb, Steen & Hamilton
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Michael S. Winer, Esq.
Deputy Associate General Counsel for Litigation
U.S. Environmental Protection Agency
401 M Street, S.W.
Room 527, West Tower
Washington, D.C. 20460

Joseph E. Stevens, Esq.
Lathrop, Koontz, Righter, Clagett, Parker & Norquist
26th Floor, Mutual Benefit Life Building
2345 Grand Avenue
Kansas City, Missouri 64108
Counsel for The Andersons, WEGRO, Division of Old Fort Industries, Inc., Amchem Products, Inc., and Imperial, Inc.

Floyd E. Gabriel, II, Esq.
c/o Eugene Bond, Esq.
Jones, Tullar & Cooper
2001 Jefferson Davis Highway
Suite 1002
P.O. Box 2266 Eads Station
Arlington, Virginia 22202
Counsel for Farmers Union Central Exchange, Inc. and Universal Cooperatives, Inc.

Robert S. Kirk, Jr., Esq.
Vertac, Inc.
Suite 2414, Clark Tower
5100 Poplar Avenue
Memphis, Tennessee 38137
Counsel for Vertac, Inc.

Bonide Chemical Company
2 Wurz
Yorkville, New York 13485

John R. Diem, Vice-President
Southern Agricultural Insecticides, Inc.
P.O. Box 218
Palmetto, Florida 33561

Mr. Frank B. Stewart, Vice-President
The Charles H. Lilly Company
7237 N.E. Killingsworth
Portland, Oregon 97218

John J. Balardo, Esq.
Corporate Counsel
2727 Walker, N.W.
Grand Rapids, Michigan 49504

Melvin R. Wilcox, II, Esq.
Roberts, Harbour, Smith, Harris, French & Ritter
404 North Green Street
Longview, Texas 75601
Counsel for T.O. Bell/dba Forage Unlimited

Jon D. Loft, President
Lofts Pedigreed Seed, Inc.
P.O. Box 146
Bound Brook, New Jersey 08805

Jerome R. Schindler, Esq.
Smith-Douglass Division
Borden Chemical
Borden, Inc.
180 E. Broad Street
Columbus, Ohio 43215

Mr. Houston Gervais, President
Louisiana Pesticide Applicators Association
Baton Rouge, Louisiana 70803

Gene R. Currie, Esq.
Box 423 West 6th Avenue
Shenandoah, Iowa 51601
Counsel for MFA Oil Company and Land-O-Lakes, Inc.

J. David Nickerson
Director Technical Services
USS Agri-Chemicals
P.O. Box 1685
Atlanta, Georgia 30301

Robert W. Cummings
Asst. Vice-President
J. & L. Adkies, Inc.
182-12 93rd Avenue
Jamaica, New York 11423

John R. Wittpenn, President
Rockland Chemical Co., Inc.
P.O. Box 809
West Caldwell, New Jersey 07006

Aldo Blasio, President
Farmingdale Garden Labs, Inc.
136 Verdi Street
Farmingdale, New York 11735

Mr. Roger A. Shores, President
Bartels and Shores Chemical Co.
1400 St. Louis Avenue
Kansas City, Missouri 64101

Walter W. Church, Esq.
Kampmann, Church, Burns & Clark
P.O. Box 17409
North Broadway Station
San Antonio, Texas 78217

Bernard H. Lorant, Esq.
Lorant and Lorant, P.C.
P.O. Box 868
Highland Park, Illinois 60035