Item ID Number	05273	☐ **Not Scanned**
Author		
Corporate Author	United States Environmental Protection Agency (EPA)	
Report/Article Title	Respondent's Exhibit List, and Submission of Respondent on Cross-Examination - both in re: Emergency Suspension Orders for 2,4,5-T and Silvex, FIFRA Docket Nos. 409, 410, April 12, 1979	
Journal/Book Title		
Year	1979	
Month/Day	April 12	
Color	☐	
Number of Images	0	
Descripton Notes	Item includes a cover letter from L. Mark Wine of Kirkland and Ellis.	

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April 13, 1979

To: Potential Dow Witnesses at EPA Hearing

I have enclosed for your information a copy of the Environmental Protection Agency's Exhibit List and Submission on Cross-Examination.

Sincerely yours,

L. Mark Wine

LMW:bac
Enclosures

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

APR 13 1979

OFFICE OF
GENERAL COUNSEL

Ms. Sonia G. Anderson
Hearing Clerk
U.S. Environmental Protection Agency
4th and M Streets, S.W.
Washington, D.C. 20460

Re: FIFRA Docket Nos. 409, 410

Dear Ms. Anderson:

Respondent Environmental Protection Agency herewith submits an exhibit list representing with considerable specificity its best extimate, as of this time, of the exhibits which respondent will introduce at the hearing.

Furthermore, respondent became aware yesterday that many copies of its statement of direct evidence were missing a page listing the names of several witnesses and the subject of their testimony. This page is attached.

Very truly yours,

Michael S. Winer

Michael S. Winer
Deputy Associate General Counsel
Environmental Protection Agency

April 12, 1979

Dr. William Loy, Geographer, University of Oregon

Dr. Loy will discuss the geography of Oregon areas in which 2,4,5-T and silvex are used.

Allen Pumphrey, Farmer

Mr. Pumphrey will describe damage to vegetation on his farm resulting from the use of 2,4,5-T in an adjacent forest area.

Kathleen O'Hagan, Teacher

Ms. O'Hagan will describe an exposure incident involving the use of 2,4,5-T on a right-of-way adjacent to a school yard and building.

Gisella Green, Homeowner

Ms. Green will describe an exposure incident involving spray drift onto her property.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Respondent's Exhibit ist" were hand-delivered or mailed express postage paid, on April 12, 979, to the following persons:

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Michael S. Winer

pril 12, 1979

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

RESPONDENT'S EXHIBIT LIST

In preparing its statement of intended direct evidence due April 10, 1979, respondent EPA concentrated foremost on developing a witness list consisting of the best qualified witnesses. It simply was not possible to provide a complete exhibit list at the same time the witness list was filed. Many of the Agency's witnesses have only recently been contacted, and for those witnesses it was not possible to identify exhibits in time to meet the April 10, 1979 deadline. In many instances a final compilation of exhibits cannot be made until a final witness statement is prepared and ready for service on the Hearing Panel and the parties.

A further reason for the tentativeness of this list is that some exhibits are listed prior to confering with the witness regarding the exhibits. For these reasons we expect that some exhibits will be deleted, while others will be added, as hearing preparation progresses.

The list which follows consists of the names of witnesses who will introduce exhibits, followed by a tentative listing of the exhibits.

Dr. Roy Albert

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CAG, April 4, 1979

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Dr. K. Diane Courtney
Dr. Henry Spencer

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Dr. James Allen

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Dr. Robert Duncan
Dr. Jack Griffith
Ms. Ann Barton
Dr. Thomas Keefe
Dr. Eldon Savage
Dr. John Davies

Letter from Dr. John Davies to Mr. Edwin Johnson, February 27, 1979, re Review of Alsea II. (ARI-118)

Affidavit of Dr. Robert Duncan for Dow v. Blum, Civil Action No. 79-100064, United States District Court for the Eastern District of Michigan, Northern Division, April 2, 1979.

Literature reviewed for Oregon Miscarriage Study

Zip Code Map of Study Area

Spray data map from the Bureau of Land Management

Spray data map from the U.S. Forest Service

Spray data map from Starker

Spray data map from Willamette

Final Alsea Report - February 28, 1979

Chart of Spray Usage in Alsea Area

Mr. Charles Poole

First Alsea Report

Literature reviewed for Oregon Miscarriage Study

Zip Code Map of Study Area

Spray data map from the Bureau of Land Management

Spray data map from the U.S. Forest Service

Spray data map from Starker

Spray data map from Willamette

Final Alsea Report- February 28, 1979.

Chart of Spray Usage in Alsea Area

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Definitions of pastures and rangelands. Memo from Chief, PSB to B. Brown, Project Manager for Silvex, 2/13/79.

Prepared by PSB staff to provide the laymen with a general definition of pastures and rangeland.

Distribution of Silvex-Containing Products Among Registrants, by Product Type, delivered 2/27/79.

Shows number of commercial and consumer products for each type (granular, with fertilizer, etc.) and groups the registrants by classes of active ingredients incorporated into products distributed in 1976. Not a definitive list of registrants because some retailers' products were included under their formulators to more closely reflect the sources.

Matrix Presentations of the Registered Uses of Silvex Against the Same or Comparable Uses of Alternates. Delivered to B. Brown 2/27/79.

Registered uses of silvex are compared with alternates with the same or comparable uses in a matrix format. This matrix was from the Suspect Chemical Review of Silvex, 1976, and was updated by PSB staff.

Silvex Suspect Chemical Review, 1976. Memo from Chief, PSB to Acting Deputy Director, Benefits and Field Studies Division, 2/6/79.

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A Report of the USDA-States-EPA 2,4,5-T RPAR Assessment Team.
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Omit - Duplicate

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The draft and final reports on 2,4,5-T were provided to C.R. Lewis, a member of the Assessment Team, by L.A. Norris, Co-Leader of the USDA-States-EPA 2,4,5-T RPAR Assessment Team.

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John W. Anderson

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Exhibits lists for the following witnesses will be provided with their witness statements:

Dr. Frederick Kutz

Mr. Donald Marlowe

Dr. William Loy

Mr. Allen Pumphrey

Ms. Kathleen O'Hagan

Ms. Gisella Green

Mr. Howard Horowitz

Mr. Edwin Johnson

Respectfully submitted,

Michael S. Winer/ap

Michael S. Winer
Deputy Associate General Counsel
Environmental Protection Agency

April 12, 1979

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

SUBMISSION OF RESPONDENT ON CROSS-EXAMINATION

Michael S. Winer
Deputy Associate General Counsel
Environmental Protection Agency
Kevin Lee
Timothy Backstrom

April 12, 1979

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

SUBMISSION OF RESPONDENT ON CROSS-EXAMINATION

I. General Overview

Pursuant to the Hearing Panel's order of April 4, 1979 Respondent EPA hereby submits its tentative designation of the registrants witnesses for whom it believes it will request cross-examination, a statement of the need for such cross-examination, and an estimate of the time such cross-examination will require.

It is important that the Panel understand that the following outline of the Agency's hearing plans is extremely tentative. In the absence of a witness statement, it is not possible to determine, with any degree of confidence, how critical a given witness will be or how long cross-examination might take. It is our experience that the number or identity of exhibits is not a valuable guide to the necessity or length of cross-examination. Indeed, even the identity of the witness sheds little light on these questions. It is only through substantive written submission which provide reasonable notice as to the critial points upon which the witness will testify that reasonable estimates of the need for and length of cross-examination can be formulated. Even then, the length of the

cross-examination may be difficult to estimate because the degree of cooperation and forthrightness varies among witness. In short, we believe that the estimates which we are now providing to the hearing panel are extremely crude and may bear little relationship to the ultimate course of the hearings.

The Panel has asked for a brief statement of the likely benefit of cross-examination. This also poses a problem due to the limited information available to us regarding the actual content of registrants' general direct testimony. As a general matter we are familiar with Dow's theory of their case, but we cannot reliably predict which evidence Dow will submit in support of their position. We are even less familiar with the direct case which the other active parties intend to present. Since it is unlikely that registrants will present witnesses who will agree with the Agency position on any major issue, we can predict that we will disagree with the thrust of the testimony of registrants' witnesses. It follows that we will desire cross-examination of these witnesses in order to demonstrate that they have not met their burden of persuasion.

We do not mean to imply by the foregoing that we will, in fact, necessarily ask to cross-examine every witness. Once we have actually seen the proposed testimony we may be in a position to waive cross-examination on some occasions, particularly if the direct testimony of a given witness is irrelevant an unduly repetitive. Indeed, due to the time constraints we will make every effort to waive cross-examination as frequently as possible.

We are mindful of the dilemma of the Hearing Panel insofar as it must make some preliminary allocation of time between the opposing parties. It is our experience that an allocation of time for cross-examination, in the absence of a review of actual witness statements, can best be made by comparing the number of witnesses opposing parties intend to present. It will no doubt be necessary to make adjustments and set priorities during the course of the hearings. However, we believe that a sound initial estimate can be made by allocating time for cross-examination in proportion to the number of opposing witnesses.

Finally, it is important to emphasize the need to reserve some time for rebuttal. The Agency will need to present a brief rebuttal case following conclusion of the registrants direct case. Rebuttal is an absolutely indispensable component of the Agency's presentation because it is its only opportunity to introduce evidence in response to the registrants direct presentation. Because the Agency introduces its direct evidence first, registrants are able in their direct case to respond to every point raised by the Agency. Rebuttal provides a similar opportunity for the respondent, and the applicable section of the EPA Rules of Practice, 40 CFR § 1674.80(a), provides that the party making the initial evidentiary presentation is entitled to rebuttal. Therefore, respondent requests that the panel allocate at least 3 days for rebuttal introduction of evidence by the Agency at the conclusion of the last phase of registrants'

direct case. We agree with Dow that "five days for the Panels' witnesses is probably much more time than is necessary" and that the Panel should thus "limit itself to two days and should reserve several days for rebuttal testimony." Dow Direct Evidence Submission, at 3.

II. Anticipated Benefits of and Preliminary Estimates of Time Needed for Cross-examination

The estimates of the time which EPA will require for cross-examination of opposing witnesses which follow are based on the Hearing Panel's current intention to afford all active parties only twenty-two days for presentation of evidence. We agree with Dow that twenty-two days is not likely to be sufficient for the parties' presentation of evidence and cross-examination." Dow Direct Evidence Submission, at 3. However, we believe that the inevitable difficulties which will be associated with the current allocation of remaining hearing time can only be aggravated by the excessive oral direct testimony which Dow has requested. Moreover, Dow's intention to present such a large number of witnesses enhances the already considerable potential for repetitive testimony. Respondent will submit separate pleadings addressing these issues prior to the third pre-hearing conference.

The estimates which follow reflect our basic conviction that the interests of fundamental fairness will be best served if the time accorded each party for cross-examination is proportionate to the number of opposing witnesses. Thus, any reduction in the number of opposing witnesses which the petitioners will present will enable a corresponding adjustment in the portion of the total available time required for cross-examination of such witnesses.

We have assigned each opposing witness to an evidentiary category which appears to best describe his area of expertise and intended testimony. These categories were created to assist the Panel in setting priorities for scheduling of testimony. We recognize that many of these witnesses will testify on matters in more than one of the following categories.

A. Toxicological Effects

On the basis of the prior comments by Dow and other registrants, and the accompanying exhibits, EPA expects the proposed witnesses on risk to challenge the Administrator's findings that 2,4,5-T, silvex, and/or TCDD have carcinogenic and adverse reproductive effects in test animals. In view of the vast literature which shows that these chemicals do in fact produce such effects in test animals, EPA expects to request time as indicated to cross-examine the following witnesses in order to demonstrate that the registrants' contentions have insufficient merit to sustain their statutory burden of persuasion.

Dow Witnesses

Perry J. Gehring - five hours
Ray Harbison - two hours
Richard J. Kociba - three and one-half hours
Colin N. Park - three hours
John C. Ramsey - one and one-half hours
Bernard A. Schwetz - three hours
H. Tuchmann-Duplessis - four hours
Philip G. Wantanabe - one and one-half hours

Other Witnesses

Harvey Warnick (Chevron) - one hour

B. Exposure

On the basis of the prior comments by Dow and other registrants, and the accompanying exhibits, EPA expects the proposed witnesses on risk to challenge the Administrator's findings that use of 2,4,5-T and silvex on pastures, timber, and rights-of-way leads to exposure to these chemicals which creates a risk of carcinogenic and adverse reproductive effects in humans. In view of information showing that use of these pesticides results in dissemination to the environment and to places of human habitation and work, EPA expects to request time as indicated to cross-examine each of the following witnesses in order to demonstrate that the registrants' contentions have insufficient merit to sustain their statutory burden of persuasion.

Dow Witnesses

Norman Akesson - two hours
R. W. Bovey - one and one-half hours
Werner H. Braun - one and one-half hours
Donald Crosby and/or Anthony Wong - two and one-half hours
Fred Decker - one and one-half hours
Milton E. Getzendaner and/or David J. Jensen - two hours
Byland R. Johns - one and one-half hours
Donald Morehouse - one and one-half hours
Michael Newton - one and one-half hours
Louis Shadoff - one and one-half hours
James M. Witt - one and one-half hours
Alvin Young - two hours

Other Witnesses

Richard Cavalli (Chevron) - two hours
J. David Nickerson (Agri-Chem) - two hours
Kevin Foley (Andersons') - one hour

C. Alsea II and Other Epidemiological Evidence

On the basis of the prior comments by Dow and other registrants, and the accompanying exhibits, EPA expects the proposed witnesses to challenge the Administrator's findings that the Alsea II study, considered in conjunction with data on animal toxicity and data on exposure, indicates that the use of 2,4,5-T and silvex create a risk of adverse reproductive effects in humans. In view of analyses showing that there are excess miscarriages in the Alsea area relative to the control area, a finding which is corroborated by the data on animal toxicity and human exposure, EPA expects to request time as indicated to cross-examine each of the following witnesses in order to demonstrate that the registrants' contentions have insufficient merit to sustain their statutory burden of persuasion.

Dow Witnesses

Philip D. Darney - one and one-half hours
Thomas Downs - one and one-half hours
Benjamin Holder - one and one-half hours
Cecil B. Jacobsen - two hours
Richard Jones - one and one-half hours
Steven H. Lamm - five hours
Nathan Mantel - three hours
Kenneth R. Niswinder - one and one-half hours
Logan Norris - two hours

D. Benefits

On the basis of the prior comments by Dow and other registrants, and the accompanying exhibits, EPA expects the proposed witnesses to challenge the Administrator's findings

that a temporary suspension will not result in unacceptable adverse impacts. In view of information which demonstrates that viable alternatives are available and that a temporary interruption of application will have little lasting impact, EPA expects to request time as indicated to cross-examine each of the following witnesses in order to demonstrate that the registrants' contentions have insufficient merit to sustain their statutory burden of persuasion.

Dow Witnesses

William C. Bramble - one hour
Boysie Day - one and one-half hours
O. Hale Fletchall - one hour
Carl Hendrickson - one hour
Dennis Holewinski - one hour
Garlyn O. Hoffman - one and one-hour hours
Harvey A. Holt - one hour
Dayton L. Klingman - one hour
B. Ted Kuntz - one and one-half hours
Robert A. Nosse - one hour
Clark Row - one hour
Steven K. Shapiro - one hour
Eugene Smith - one hour
Ronald E. Stewart - one hour
Michael Towns - one hour
Ruffin Van Bossuyt, Jr. - one hour
Clay Williams - one hour
John D. Walstad - one hour
Noel Yoho - one hour

Other Witnesses

D. P. Hogan (Chevron) - one and one-half hours
Joseph White (Chevron) - one and one-half hours
J. E. Wells, Jr. (Agri-Chem) - one and one-half hours
Dwight Habermehl (Old Fort, Imperial) - one hour
Gene Currie (Old Fort, Imperial) - one hour
Ronald A. Meier (Andersons') - one hour

Respectfully submitted,

Michael S. Winer
Kevin Lee
Timothy Backstrom
Environmental Protection Agency

April 12, 1979

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Submission of Respondent on Cross-Examination" were hand-delivered or mailed first class postage prepaid, on April 12, 1979, to the following persons:

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April 12, 1979