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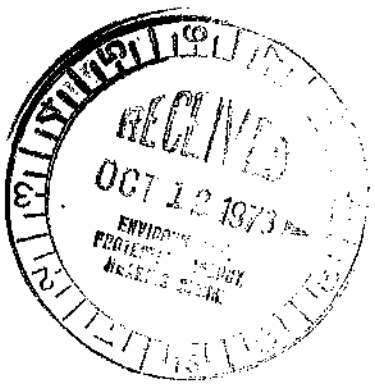

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE CHIEF ADMINISTRATIVE LAW JUDGE

In re	:	
	:	I.F. & R. Dockets No.
The Dow Chemical Company, et al., ("2,4,5-T")	:	42, 44, 45 and 48 and
Registrants.	:	I.F. & R. Docket No. 295

DOW MODIFICATION OF REQUESTS
and
RESPONSE TO MOTION TO CONSOLIDATE

This submission is furnished by Registrant The Dow Chemical Company ("Dow") in response to the Chief Administrative Law Judge's Order to File dated and filed Monday, October 1, 1973, received by certified mail Friday, October 5. It is also submitted in response to Respondent Office of Hazardous Materials Controls' Motion to Consolidate served by mail October 2, 1973.

The following responses are keyed to the specific requests set forth at pages 11 - 13 of Dow's Preliminary Prehearing Memorandum dated June 26, 1972:

I. A. Withdrawn.

B. Withdrawn.

C. Not withdrawn.

D. Withdrawn, subject to renewal of the application for Advisory Committee testimony in another form if agreement is not possible.

E. Withdrawn.

II. A-C. Modified (See below and Attachment 1). Dow is hopeful that a fair and full informal exchange of information can be agreed upon by the parties, so that the need for formal discovery can be avoided. Some preliminary such exchanges have already taken place. Dow requests that these applications be placed in suspense until the parties have met on October 19 as presently contemplated (see Attachment 1, p. 9), and a prehearing conference is conducted before the Chief Administrative Law Judge.

Discussion

Many developments following amendment of FIFRA, as most recently confirmed in Respondent's Motion and Response dated October 2, 1973 indicate that Respondent and Registrant Dow are now in general agreement with respect to the procedures

they consider applicable to this litigation. The only important procedural question remaining is with regard to the treatment to be accorded certain new possible scientific issues which may have been introduced in Docket No. 295. These relate to carcinogenicity, mutagenicity, sub-lethal and low level effects and the like. (Dow Motion For Prehearing Conference, Item 2. See, also, Dow Response to Statement of Issues, Paragraphs 8-11, Attachment 1, Item 4). Respondent's objection to consideration of this item is that it is considered "unclear and ambiguous" (Response, Item 6). Respondent has also stated (Response, Item 1(a)), however, that the issues in both Dockets "are identical in substance." If Respondent is correct in this latter comment, even this procedural question is absent, and the Dockets may be consolidated and the case proceed to trial in April without the need for further Advisory Committee consideration, further data collection and experiment or other impediment. However, Dow does believe it would be useful to explore this issue at prehearing conference to be sure there is no misunderstanding.

As indicated in Dow's Preliminary Prehearing Memorandum dated June 26, 1972, Dow's earlier applications to the Administrator, the courts and the Administrative

Law Judge, were made in order to help develop an atmosphere in which the Administrator could decide highly charged and emotional issues such as are involved in this case, in a reasoned atmosphere and without becoming subjected to unbalanced pressures. Even more important than the Eighth Circuit's decision and the amended rules of practice in this connection is the amended FIFRA. The new statute for the first time spells out the Administrator's power to conduct a formal inquiry (§ 6(b)(2)). The parties themselves have the right to litigate as adversaries if they so choose, but the Agency is no longer required to take an antagonistic position. This we beleive to be the best way in which to make possible a full, fair and free exploration of all the issues in traditional common law reliance upon the antagonists themselves producing the evidence, with the Agency participating essentially as impartial arbiter.

Technically, of course, the earlier consolidated Docket is a cancellation proceeding under the old statute, with Respondent aligned against Registrants. This is in contrast to the new Docket No. 295, which is a § 6(b)(2) inquiry. However, we hope that the distinction is more conceptual than real, and we believe that Respondent's Motion to Consolidate reflects its agreement. If this is

so, it should be possible to conduct a fully consolidated hearing without regard to such legal niceties as which FIFRA provision applies to which step in the procedure, what may be the effect of mid-stream changes in rules of practice on pre-existing motions and applications, the anomalous role of Environmental Defense Fund, Inc. ("EDF") as a possible party in the § 6(b)(2) inquiry but without standing in the cancellation proceeding, and the like.

In short, we believe that all those involved in all these proceedings now share the common purpose that a hearing on all issues ready for trial should begin in April, with those parties opposing and those advocating 2,4,5-T aligned against each other and with Respondent coming forward with the evidence indicating the areas of concern which occasioned the inquiry but not taking adversary positions on the merits, nor otherwise participating except as it considers such participation necessary to a full and complete explication of the issues.

As Attachment 1* indicates, the parties have

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*Attachment 1 is a revised draft of a memorandum of the first informal meeting of the parties in preparation for an April hearing. As indicated at page 9 of the draft, the parties were to furnish comments with regard to the form of the original draft. Minor revisions of the first draft are included in Attachment 1, but some may not yet have been received. However, the memorandum does reflect the discussion at the meeting and is accurate for the purpose of this submission.

already begun informally to prepare for an April hearing in accordance with the procedures outlined above. Unfortunately, the key anticipated 2,4,5-T opponents, the EDF* group, have not yet responded to the Statement of Issues or moved to intervene. However, on September 27, 1973, Dow was informed by counsel for EDF that this was because of administrative oversight (see Attachment 2) and that EDF will indeed seek to participate actively as a party in the hearing.** EDF is being invited to the second informal prehearing conference of the parties, now tentatively scheduled for October 19 in Washington, D.C.

We are hopeful that the parties will all agree on early exchanges of scientific data and experiment, risk/benefit analyses, monitoring studies,*** 2,4,5-T

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* It is assumed that Harrison Wellford, Mrs. Lorraine Huber and others will appear jointly with EDF. That was the case before the Court of Appeals for the Eighth Circuit.

** Although Dow has been unable to locate a copy, it appears that substantially this same group of opponents (including Wellford and Huber but not EDF), has "previously requested that they be made parties to any hearings conducted in regard to 2,4,5-T" (see Order of Chief Hearing Examiner Denying Leave to Intervene in Dockets No. 42, 44, 45 and 48, filed June 9, 1972).

***E.G., the current "environmental and human monitoring project" which led the Assistant Administrator to request delay of hearing until April (See Notice of Intent, July 19, 1973).

evaluations and the like, to be followed by witness lists and testimony summaries. Formal requests to admit and related interrogatories should then be unnecessary and will be withdrawn, because EDF's position has already been well stated and Respondent will not be taking a position. All that would be required by way of formal prehearing procedures before the Chief Administrative Law Judge would be consideration of the joint recommendations of the parties and, possibly, resolution of the questions referred to above relating to any new and additional issues in Docket No. 295 which might require additional data collection and experiment and/or Advisory Committee evaluation. Even the interests of third parties who have filed responses in inadequate form or untimely can be safeguarded in fashion which should be satisfactory to them, because surely one of the primary parties will be agreeable and even anxious to offer the testimony and evidence of any responsible person.

Conclusion

Dow respectfully asks that its June 26, 1972 requests be modified as indicated herein, that a Prehearing Conference be convened by the Chief Administrative Law Judge in Docket No. 295 as well as in the earlier consolidated Dockets and that the two conferences be held

jointly on or before November 16, 1973.

Dow also requests that this submission and Paragraphs 5-12 of its Response to the Statement of Issues dated August 21, 1973, be considered its response to ~~Registrant's~~ Respondent's Motion to Consolidate.

Dated: New York, New York,
October 9, 1973.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER,

by _____
Milton R. Wessel,
A Member of the Firm.
Hearing Attorneys for The Dow Chemical Company, Registrant.

425 Park Avenue,
New York, New York 10022

Milton R. Wessel and
Miriam C. Feigelson,

and

James N. O'Connor and
Michael J. Traynor,
Of Counsel.

In re: 2,4,5-T

The following organizations (or members or divisions thereof) which had filed formal Responses to the Environmental Protection Agency's Statement of Intent, conferred in Room 3056-S, United States Department of Agriculture on Tuesday, September 25, 1973, from 9:00 a.m. until 1:00 p.m.:

United States Department of Agriculture
United States Department of Transportation
    Federal Railroad Administration
Association of American Railroads
    Chessie System (Chesepeake & Ohio Railway and Baltimore & Ohio Railroad)
    Southern Railroad
National Forestry Products Association
    Weyerhaeuser Company
The Dow Chemical Company

The parties reviewed the background of the present inquiry, and agreed that it was of major importance to resolve the long pending issues promptly, and that everything should be done to meet the proposed April, 1974 date for hearing.

The matter of preparing the issues for hearing was reviewed in some depth. It was agreed that overall there would undoubtedly be well in excess of one hundred witnesses, and that the Hearing might last a substantial period of time. Preparation by way of interviewing potential

witnesses, conducting surveys and completing factual analysis must begin promptly.

There was discussion of the difficult administrative problems being faced by the Environmental Protection Agency, and a conclusion reached that it was unlikely that a formal pre-hearing conference would be called by an Administrative Law Judge for some period of time. The parties agreed that if everyone proceeded in good faith, there was no reason why the failure to hold a formal pre-hearing conference need stand in the way of moving forward with preparation. None of the parties considered itself either an advocate or an opponent of 2,4,5-T as such; Dow itself as Registrant stated that it would be a 2,4,5-T proponent in the hearing only because all of its investigations confirmed that the benefits of 2,4,5-T use far outweighed the risks and that were any adverse evidence adduced it would be the first to withdraw the product from the market. Rather it was both the view of each individual party and the consensus of all that the purpose of their participation was to insure that a complete record be developed and all relevant facts and considerations explored in sufficient depth to permit a reasoned and proper judgment. For this reason, it was desirable that all other anticipated parties be invited to a further meeting, to which hopefully a representative of the Environmental Protection Agency's Office of General Counsel would also come, at which further procedural steps might be taken.

The parties present agreed upon the following course of preparation and action, until a formal pre-hearing

conference was held and pre-hearing order entered:

1. Parties.

For the purposes of preparation, it would be assumed that each of the parties furnishing Mr. Fullerton a statement of its intention to be a party (rather than just a witness) in the Hearing, would be a party for purposes of preparation. Accordingly, notices of all formal motions, applications and the like would be served on all such parties.

2. Consolidation.

It would be assumed that the rice and other use proceedings would be joined for purposes of a single hearing.

3. Hearing Date.

It would be assumed that the Hearing would commence April 1, 1974, and that each party would prepare with that date in mind.

4. Issues.

It would be assumed that the issues in the consolidated Hearing would include all of the issues in the rice proceeding, as more specifically set forth in the Administrator's Orders of August 6 and November 4, 1971, and April 13, 1972, and all other uses of 2,4,5-T, such as

forestry, rights of way and rangeland. However, as to scientific issues, only Items VA-1 and 2 (teratogenicity and other adverse reproductive effects) would be assumed to be issues; Items VA-3-6 (mutagenicity, carcinogenicity, sub-lethal effects and delayed lethality) would not be assumed to be issues in the absence of some further indication of the evidentiary basis upon which these additional matters were based. It was pointed out that if there were any evidence in support of these latter new issues posed in Docket No. 295, it might involve a very different type of preparation, perhaps including quite long-term scientific studies, additional Advisory Committee consideration and the like, all of which might prejudice the desired April Hearing date.

5. Witness Statements.

It would be assumed that summaries of the testimony of each witness would be submitted to an Administrative Law Judge at some time in advance of the witness' actual testimony. It was assumed that the form of each such statement, preparation of which would begin promptly as witnesses are interviewed, would consist of a brief summary of the witness' background, qualifications and conclusions, in sufficient detail to avoid surprise and permit preparation of cross-examination, but not at

such length or detail as to duplicate the witness' subsequent oral direct testimony.

6. Witness Testimony.

Because witnesses have already begun to inquire with respect to date, place and other circumstances, it was assumed that in general the following procedure would apply:

a. The Agency would proceed first with any evidence it desires to adduce, to be followed by any parties offering evidence to sustain respondent's burden of coming forward with evidence in opposition to continued use of 2,4,5-T. They would be followed by Registrants, U.S. Department of Agriculture, U.S. Department of Transportation and other federal agencies and other parties offering evidence in connection with specific uses and benefits.

b. The Administrative Law Judge might be requested to permit limited exceptions to the above progress by order of parties, where a specific subject matter was being considered which cut across party lines (e.g., toxicology), or where hearings were being held in the field and it would convenience the Administrative Law Judge, the parties and the witnesses to take a number of witnesses at the same time, even though being advanced by different parties.

c. It was also assumed that witness testimony would in general be taken in Washington, D.C. where the witness lived within a reasonable distance, and elsewhere in the United States where a number of witnesses might be brought together for convenience of all concerned.

7. Party Participation.

It was assumed that there would be several levels of participation. Some parties, such as USDA and Dow would undoubtedly participate fully, with hearing counsel present throughout the Hearing, examination and cross-examination on all issues except where redundant, submission of memoranda, motions, proposed findings of fact and the like. Other parties might participate only with respect to specific subject matters if they so chose, such as forestry or railroad uses, and would probably be permitted to participate if they wished without the need to retain outside hearing counsel.

8. Administrative Supervision.

It appeared that there would be a substantial number of problems and administrative areas of concern. For the convenience of everyone, it was agreed that Raymond W. Fullerton, U.S. Department of Agriculture, Office of General Counsel, Room 2042, South Agriculture Building, 12th and Independence Streets, S.W. Washington, D.C. 20250 (tel. 202-447-6324) would be coordinating attorney. Without giving up any of its own individual rights and interests, each party would make an effort to coordinate matters through Mr. Fullerton's office. For example, experience teaches that in major litigations of

this kind, initially an effort is made to meet the convenience of all attorneys and parties in terms of calendar appointments and the like, following which it is quickly discovered that this is impossible, from which point forward no one's individual convenience can be served. Accordingly, each participant is requested to furnish Mr. Fullerton a calendar of important other commitments from October 1, 1973 to March 31, 1974, with Mr. Fullerton being authorized to communicate significant calendar problems to the Hearing Clerk or the Agency as appropriate when new schedules are to be fixed.

9. Other Parties.

It was noted that the only party which had submitted a timely response opposing further use of 2,4,5-T was Professor Chessin of the Department of Botany, University of Montana. In the past, Harrison Welford, et al., Dr. Samuel Epstein and Environmental Defense Fund have indicated opposition to continued use of 2,4,5-T. An inquiry directed to Professor Chessin with regard to his participation had not yet been answered, and no one was in a position to be certain that the other previous opponents would not make a motion to intervene at some later point. It was concluded that the nature of the Hearing would be quite different if there were no substantial opponents to 2,4,5-T

in uses other than rice, and that if there were such opponents, they should be invited and encouraged to participate in these informal pre-hearing proceedings. Accordingly, it was agreed that a copy of this memorandum should be furnished to Harrison Welford, Dr. Epstein and Environmental Defense Fund (in addition to the Agency's Office of General Counsel), with a request for advice as to whether or not such organizations or individuals wished to participate, and with an invitation to attend the next meeting of all parties.

10. Subject Matter Allocation.

The matter of allocating subject matters for preparation was considered only briefly, with the following tentative outline appearing:

Dow Manufacturing
- Toxicology and Teratology
- Use on rice
- Electric and gas pipeline utilities
- All other issues not specifically undertaken by another party

USDA
- Toxicology and Teratology (USDA/Dow presentations will not be duplicative of each other)
- Rangeland uses, to extent not taken by other parties
- The need for a Rule of Reason

DOT
- Highway and other road, canal and similar rights of way

National Forestry Products Association
(Weyerhaeuser)
- Forestry uses

American Association of Railroads (Federal Railway Administration, C&O, B&O and Southern Railroad)
Railroad rights of way

11. Timetable:

The following preparation timetable was adopted:

October 8, 1973	Each party to advise Mr. Fullerton whether or not he intends to participate as a party. Participating parties to furnish comments with regard to form of this memorandum before circulating to those not present.
October 17, 1973	Each participating party to furnish tentative list of all witnesses it proposes to adduce, and witnesses it anticipates will oppose such testimony.
October 19, 1973	Second informal pre-hearing conference among all those who have indicated an interest in participating as parties, including Environmental Protection Agency, Office of General Counsel.
December 31, 1973	All affirmative witnesses should have been interviewed by this time.
February 6, 1974	Written statements in the summary form described above should be completed by this time.

Milton R. Wessel
Reporter pro tem.

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

(212) PLAZA 9-8400

September 27, 1973

John Dienelt, Esq.
Environmental Defense Fund
1525 - 18th Street, N.W.
Washington, D.C. 20036

In Re: 2,4,5-T
Docket No. 295

Dear Mr. Dienelt:

This will confirm my telephone advice to you this morning that Dow will not object to EDF's petition to intervene as untimely, in light of the reason stated. If we do object to EDF's motion to intervene in Docket 295, it will be on substantive grounds such as were the subject of the Chief Administrative Law Judge's denial of leave to intervene in the earlier Consolidated Dockets Nos. 42, 44, 45 and 48.

Enclosed is a copy of the memorandum of the meeting of certain parties which had filed timely formal responses as discussed.

I look forward to working with you.

Sincerely,

Milton R. Wessel

MRW:skl
Enclosure

Attachment 2

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Modification and Response dated October 9, 1973, of Registrant The Dow Chemical Company was served today by postage prepaid mail, upon the persons whose names and addresses are listed below:

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Dated: October 9, 1973

Milton R. Wessel