

BEFORE THE ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY
OF THE UNITED STATES OF AMERICA

In Re:

THE DOW CHEMICAL COMPANY,
et al.

)
)
)
)
FIFRA Docket
Nos. 415, et al.

ORDER

Intervenor Northwest Coalition for Alternatives to Pesticides has filed a motion dated February 23, 1982 for more definitive statements in response to their January 11, 1982 motion to refer questions to the National Academy of Sciences. NCAP's motion is granted in its entirety. The respondents to the January 11, 1982 motion are directed to respond in the detail requested in NCAP's February 23, 1982 motion.

IT IS SO ORDERED this _____ day of _____, 1982.

ADMINISTRATIVE LAW JUDGE

Presented by:

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9 BEFORE THE ADMINISTRATOR
10 ENVIRONMENTAL PROTECTION AGENCY
11 OF THE UNITED STATES OF AMERICA

12 In Re:

13 THE DOW CHEMICAL COMPANY,
14 et al.

15 FIFRA Docket
16 Nos. 415, et al.

17 INTERVENOR NCAP'S MOTION FOR MORE DEFINITE STATEMENTS

18 OR REPLY BRIEF

19 1. Intervenor Northwest Coalition for Alternatives to Pesticides requests
20 the parties to note the change of address above for NCAP's Authorized Representative.

21 2. Intervenor NCAP has filed a motion for referral of pertinent scientific
22 questions to a standing committee of the National Academy of Sciences. After an
23 exchange of motions and reply for more time, it now appears that NCAP has received
24 the last response from the parties.

25 I. INTRODUCTION:

26 3. Pursuant to Federal Rules of Civil Procedure §8(3)(2), NCAP replies
27 to the responsive pleadings of EPA, Dow, USDA, and NFPA in the alternative: (a).
28 NCAP moves pursuant to Federal Rules of Civil Procedure §12(e) that the Adminis-
29 trative Law Judge Order the respondents to make more definite responses before
30 NCAP is required to further reply on grounds that the responsive pleadings are so
31 vague or ambiguous that NCAP cannot reasonably be required to frame responsive
32 pleadings; or (b). If the Administrative Law Judge should not so order, this
33 memorandum be construed throughout as NCAP's reply to the responsive pleadings.

34 /

35 /

1 II. DEFECTS COMPLAINED OF AND DETAILS DESIRED:

2 4. Respondents' pleadings are so vague or ambiguous that NCAP cannot
3 reasonably be required to frame responsive pleadings. The following defects are
4 complained of Pursuant to Federal Rule 12(e). Following each defect complained
5 of, NCAP lists the details desired.

6 A. Failure to substantively respond to averments:

7 5. Perhaps no respondent noticed the elephant walking by their offices,
8 but NCAP's motion for referral to the N.A.S. (hereafter "NCAP's motion") made
9 averments of material facts, application of facts to law, and conclusions of law.
10 The averments of material facts were based on evidence, including the averment that
11 "NCAP believes that where remarks or positions are attributed to parties in the
12 exhibited documents, those remarks or positions represent the parties' opinions
13 as to material facts, application of facts to law, [and] ... conclusions of law."
14 The respondents' attention is drawn to Federal Rules of Civil Procedure §§8(a),
15 (b), (c), (d), and §12(b).* NCAP seeks the following details:

- 16 1. Do the respondents desire that NCAP's
17 un rebutted averments of fact be taken
18 as established?
19 2. Do the respondents desire that NCAP's
20 averments of application of fact to law
21 be taken as established?
22 3. Do the respondents agree that NCAP's
23 un rebutted conclusions of law be taken
24 as established?

25 B. Conflicting claims of unsubstantiated fact:

26 6. EPA respondent "is hopeful that a negotiated settlement can be
27 achieved. [EPA response, page 3.] USDA respondents argue that referral "would
28 _____

29 * NCAP states that it is without sufficient knowledge to form a belief as to the
30 truth of every averment of material fact and conclusion of law made by each
31 respondent which is not specifically admitted in this pleading, unless such
32 averments are undisputed fact appearing of record or irrelevant to NCAP's motion.
NCAP's reason for making a blanket denial are so that the motion not be further
delayed. Should any party desire a more specific answer, NCAP will attempt to
provide such specific answers at the earliest possible moment.

1 be inutile, particularly if a negotiated settlement can be reached by the parties."
2 [USDA response, page 2, emphasis provided.] "Dow believes negotiations have been
3 productive, and that a settlement can be achieved." [Dow response, page 4, emphasis
4 provided.] "NFPA believes, however, that this matter is close to settlement."
5 [NFPA response, page 1.] As discussed later, EPA also believes that referral at
6 this time would be undesirable. All claims are conclusory in nature and unsub-
7 stantiated by any evidence. This is particularly inappropriate in the present
8 situation. NCAP believes that it is not genuinely disputed that it was summarily
9 ejected from the secret negotiations for a purported breach of confidentiality.
10 NCAP brought to the record in its motion evidence which has not been denied and
11 is therefore admitted that a high executive officer of Dow Chemical Company has
12 appeared in NCAP's turf making claims that should be taken as either: (a). a
13 statement of true material fact which could only have come out of the same negotia-
14 tions in which NCAP was ejected for purported breach of confidentiality, or (b).
15 highly unethical litigation in the press based entirely on false or misleading
16 information. (Perhaps the respondents can offer another explanation which NCAP
17 might accept as true.) NCAP believes that it is time that the progress of nego-
18 tions be revealed if the respondents intend to make that the main basis of their
19 opposition to the motion, particularly if their claims on the state of negotiations
20 conflict. NCAP therefore seeks more detail on the following:

- 21 1. On what matters have the parties been able
22 to tentatively agree?
- 23 2. On what matters have the parties been unable
24 to tentatively agree?
- 25 3. What are the remaining negotiation obstacles
26 other than (a) and (b) above?
- 27 4. In the alternative to providing answers to the
28 above, are the respondents willing to set some
29 non-extendable, binding deadline for completion
30 of negotiations so that there is some evidence
31 on the state of negotiations?

32 C. Conflicting claims on potential referral desirability:

33 7. Dow, USDA, and NFPA all apparently are of the unsubstantiated opinion
34 that N.A.S. referral would be of no probative value, a waste of taxpayer money,
35 and untimely by reason of NCAP failure to raise the question at the prehearing
36

conference. But respondent EPA apparently is of the belief the N.A.S. referral is only unnecessary or untimely "at this time." [EPA response, page 3.] All respondents apparently believe that NAS referral would unduly disrupt negotiations. While NCAP has specified that it is primarily the human risk questions that it would like to see referred, no party responded with an alternative specification of issues that they would desire to see referred should the Administrative Law Judge determine that such referral would be proper. NCAP believes that the parties have a duty to construct such alternative referral issues so that the Administrative Law Judge can weigh the worth of referral objectively. At the same time, NCAP is without sufficient information and knowledge to frame questions without knowledge of the progress of negotiations. The respondents would merely oppose referral. NCAP believes that if there are unresolved issues in the negotiations, many of those issues might be resolved through referral of relevant questions of scientific fact to the NAS. NCAP therefore seeks the following detail:

1. What issues of scientific material fact are still unresolved in negotiations which might be resolved or clarified through referral to the NAS?

D. Failures to note "good cause" shown:

8. All respondents contend that a referral may not be made because NCAP is purported to have made no showing of "good cause." All apparently attempt to read 40 CFR §164.50(e)(4) as requiring that the movant must include introductory matter, reasons, and evidence under a heading titled "showing of good cause," or some similar legalism. The actual wording of the rule is not so crabbed. It provides that the Administrative Law Judge may refer such questions "if he finds that good cause exists." The test should not be whether or not NCAP fails to label a portion of its motion under a heading of "good cause shown," but rather should be whether or not the ALJ can find good cause in the record. In the instant case, NCAP has submitted unrebutted evidence and reasons. By admission of the petitioner in this hearing, Dow Chemical Company, the subject of these hearings are extremely controversial, there is public concern, and there is a need "to move toward the science experts..." [Exhibit 1 to NCAP January 11 motion.]

1 9. No respondent has proposed any alternative remedy for alleviating
2 that concern or controversy. Instead, respondents invoke the scientific infalli-
3 bility of the secret negotiations process. This is nonsense and not to point.
4 Secret negotiations will not be accepted by the public as a definitive explanation
5 of risk, nor could the result of any such negotiations meet the National Environ-
6 mental Policy Act requirement of an environmental statement in its section 102(2)(C).
7 Certainly USDA respondents would not seriously expect to long sustain NEPA court
8 challenges to use of 2,4,5-T and silvex (assuming reregistration for the sake of
9 argument only) if there is no concise definitive document available to summarize
10 the risks of use. Federal user agencies (and federal funding or permitting agencies)
11 have a duty under NEPA to study the effects of use and to make underlying documents
12 relied upon in making the decision available to the public pursuant to the FOIA.
13 [NEPA §102(2)(C).] Unless there is a concise document which would satisfy most
14 requestors, federal user, funding, or permitting agencies would be required to
15 make all underlying documents in the registration decision available to the public
16 without charge to the extent practicable. [NEPA §102(2)(C), 5 USC §552(a)(4)(A),
17 40 CFR §1506.6(f).] Surely the expense of an NAS referral pale by comparison.
18 Dow cannot reasonably plead the the Scientific Advisory Panel report could meet
19 that need, since the SAP report was prepared before most of the testimony was
20 introduced. NCAP therefore seeks the following detail:

- 21 1. Do the respondents view NCAP's averment
22 of the necessity for a concise document
23 for the benefit of the public as being so
 irrelevant that no response is required?
- 24 2. How do the respondents propose that federal
25 agencies meet their NEPA disclosure duties
26 without such a document?
3. How will public concerns be alleviated without
 such a document?

27 E. Failures to come to point on the value of the
28 NAS report to the Administrative Law Judge:

29 10. NCAP made a point that the NAS "report would aid the parties and
30 the Administrative Law Judge in separating matters of fact from matters of law, and
31 would likely help in simplifying the proceedings." NCAP believes that respondent
32 Dow is close to the mark, the record in this proceeding is voluminous. The risk

1 models used, the fine points of the scientific studies, the the opinions of a great
2 number of experts are all in the record. NCAP did not intend to lead the respondents
3 to believe that the witnesses were biased, but instead intended to merely point out
4 that based on the same record, opposing parties have come to opposing opinions on
5 the risk to human health. This is not unusual at all in contested cases, in fact
6 there would be no contested cases if society could somehow guarantee that everyone
7 would come to the same conclusions based on the same information. The point NCAP
8 raises is that raised by Dow:

9 ... we should try to move toward the science
10 experts, trying to size up a risk at the start
11 of a regulatory proceeding, then let the proceeding
focus more on what should be done about it. [NCAP
January 11, 1982 memorandum, page 6.]

12 NCAP agrees with Dow, particularly in the instance where the parties have apparently
13 been deadlocked in negotiations for nearly a year. NCAP still believes that an NAS
14 report could enhance negotiations, lend to the weight of the decision in this case,
15 simplify the proceedings, and aid the parties and the Administrative Law Judge in
16 sifting the essentials from a voluminous record. NCAP therefore seeks the following
17 detail:

- 18 1. Do the parties believe that an NAS study
19 would not help in "trying to size up [the]
risk?"

20 II. CONCLUSION:

21 9. For grounds stated in this memorandum or motion and NCAP's January
22 11, 1982 motion, Intervenor NCAP respectfully requests that either its January 11
23 or today's motion be granted in their entirety.

24 DATED this 23rd day of February, 1982.

25
26 Stevens Van Strum
27 STEVENS VAN STRUM
28 Authorized Representative
29 Northwest Coalition for
Alternatives to Pesticides

30 CERTIFICATE OF SERVICE

31 I CERTIFY that copies of this motion or reply brief were mailed first class postage
32 prepaid on February 23rd 1982 to the persons named on the service list attached to
NCAP's January 11, 1982 motion to refer questions to the National Academy of Sciences.

Stevens Van Strum

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In re:

The Dow Chemical Company, et al.

FIFRA Docket Nos. 415, et al.

EPA RESPONSE TO NCAP MOTION FOR REFERRAL
TO THE NATIONAL ACADEMY OF SCIENCES

INTRODUCTION

On January 11, 1982, the Northwest Coalition for Alternatives to Pesticides (hereafter NCAP) moved the Administrative Law Judge to initiate procedures leading to a referral to the National Academy of Sciences (hereafter NAS) of questions relating to the risk phase of the above-captioned proceeding. NCAP has not submitted specific questions for referral, and has failed to show that referral is "necessary or desirable" as required by both FIFRA and the Rules of Practice for this hearing. Accordingly, the NCAP motion should be denied.

DISCUSSION

1. NCAP has Failed to Meet the
Requirements of FIFRA §6(d)

Section 6(d) of FIFRA permits the ALJ to refer relevant questions of scientific fact to a Committee of the NAS upon the request of a party to the hearings:

Upon the request of any party to the public hearing and when in the Hearing Examiner's judgment, it is necessary or desirable, the Hearing Examiner shall at any time before the hearing record is closed, refer to a Committee of the National Academy of Sciences, the relevant questions of scientific fact involved in the public hearing. FIFRA §6(d).

In order to refer questions to the NAS, the Administrative Law Judge must find that the referral is either necessary or desirable. Thus, referral of scientific questions to the NAS is not an automatic procedure. Indeed, in amending FIFRA in 1972, Congress added the requirement that a request for referral be subject to concurrence of the Administrative Law Judge, */ and expressly required that referral be based on his finding that referral is either necessary or desirable. **/

Here, while NCAP, a party to the hearing, has requested referral, it has not demonstrated that a referral to the NAS is either necessary or desirable at this time.

a) NCAP Has not Established the Necessity
for a Referral to the NAS

Any "necessity" for a referral to the NAS arises from the potential utility of NAS comment to resolution of relevant questions of scientific fact. In this case, Respondent believes that current negotiations may lead to settlement of this case. Such a conclusion to the hearing renders referral less useful and thus less necessary than if the hearing were to continue. If negotiations break down and the hearing resumes, the Administrative Law Judge can, of course, reevaluate the necessity of referral to the NAS.

Even if the hearing does resume, referral is optional, depending on the necessity or desirability of such referral.

*/ The 1964 version of FIFRA, 78 Stat. 190, 7 U.S.C. §§135-135K at section 4(c) permitted referrals on the request of a registrant without a demonstration of necessity or desirability.

**/ The 1972 Amendments to FIFRA added the necessary and desirable requirement to the statute. 86 Stat. 973, 7 U.S.C. §136-136y.

If NCAP's view that only the NAS can provide an unbiased evaluation of certain issues is intended to demonstrate necessity (or desirability), NCAP's position ignores a key fact. These issues, which might be referred, have been fully ventilated in a public hearing, and all parties to the proceeding have had an opportunity to establish bias on the part of any witness, if possible. Nonetheless, neither NCAP nor any other party to the hearing has moved to strike the testimony of any witness on the ground of improper bias. It is unseemly for NCAP to suggest at this stage of the proceedings that the record in this proceeding is infected with improper bias, since NCAP never once alleged bias during the trial. */

b. NCAP has not Shown that a Referral
to the NAS is Desirable.

FIFRA §6(d) also permits a referral to the NAS if the Administrative Law Judge finds that referral would be desirable. Respondent believes that a referral to the NAS at this time would be undesirable for the reasons discussed below.

Referral to the NAS at this time may be wasteful in view of the progress which the parties have made during the current intensive negotiations aimed at settlement of this proceeding. Respondent is hopeful that a negotiated settlement can be achieved. Under these circumstances, where NAS referral would not contribute to the outcome of the case, it is pointless to require the Agency

*/ NCAP has also argued that an NAS review would provide information of significant probative value. Since NCAP has not specified the questions it would propose for referral, it is impossible to respond to the substance of this allegation.

to expend resources to brief a referral, financially underwrite NAS's services, and require the NAS to undertake such a dubious project. This unjustifiable use of government funds and resources would appear particularly wasteful under current Agency budget limitations. Again, the more prudent course would be to wait to determine if there will be a settlement. If there is no settlement, the case is certain to continue in hearings for at least six months to a year. This would allow more than enough time to refer questions to the NAS.

Furthermore, a referral to the NAS would needlessly delay the settlement negotiations. The parties engaged in active negotiations are expending substantial resources in these negotiations. If a referral were made, Respondent and probably other parties would be required to divert manpower from the settlement effort and devote a substantial effort to the proposal of questions and briefing of issues, making it difficult to conduct serious negotiations. In short, the motion to refer questions to the NAS would seriously interfere with the negotiation process.

2. NCAP has Failed to Meet the Requirements of the Rules of Practice

40 CFR §164.50(e)(4) amplifies the provisions of FIFRA §6(d) with an additional test based on the timing of the request for a referral. If the request for a referral is not made during the prehearing conference stage, this regulation requires that in addition to meeting the statutory test that the referral be necessary and desirable, the movant also show "good cause" in support

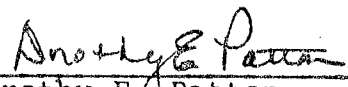
a motion for referral. */ This additional requirement has the effect of encouraging the requesting parties to make their request for referral during the prehearing phase of the proceeding. This allows the other parties and the Administrative Law Judge to plan and prepare for the major undertaking involved in a referral to the NAS.

NCAP fails to allege good cause for requesting a referral at this late stage of the proceeding. Indeed, it neither explains why it did not make this request for referral to the NAS during the prehearing stage of the proceeding, nor claims that it could not have done so. NCAP's motion must fail in the absence of a showing of good cause for the late filing of this request.

CONCLUSION

For all of the foregoing reasons, NCAP's motion should be denied.

Respectfully submitted,


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Counsel for Respondent

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February 8, 1982

*/ 40 CFR §164.50(e)(4) provides the following:
"Request and Submission Subsequent to Prehearing Conference. At any time before the hearing is closed, the Administrative Law Judge or a party by motion may request that questions of fact not previously referred be referred, or that questions previously referred be amended or expanded. The Administrative Law Judge may refer such questions if he finds that good cause exists and that reference of such questions is necessary or desirable."

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the matter of)
)
The Dow Chemical Company,) FIFRA Docket No. 415
et al.,)
)

RESPONSE OF SECRETARY OF AGRICULTURE FOR THE
UNITED STATES TO NCAP'S MOTION TO REFER QUESTIONS
TO THE NATIONAL ACADEMY OF SCIENCES

On January 11, 1982, the Northwest Coalition for Alternatives to Pesticides filed "Intervenor NCAP's Motion to Refer Questions to The National Academy of Sciences," (hereinafter Motion) and moved the Administrative Law Judge (ALJ) to "determine that there is an affirmative intent of the parties to refer questions of scientific fact to a committee designated by the National Academy of Sciences." (NAS) Motion at 1. The time in which to respond to the motion was extended to February 8, 1972, by the Order Granting Motion for Extension of Time, January 22, 1982. On behalf of the Secretary of Agriculture, we oppose NCAP's proposal that the ALJ issue an order at this time which would permit the parties to submit proposed questions.

The Environmental Protection Agency Rules of Practice issued pursuant to FIFRA provide that the ALJ may refer questions of scientific fact to a committee of the NAS if he determines that submission of questions is "necessary or desirable." 40 C.F.R. §164.50(e)(2). Referral at this time could lead to substantial delay. Submission of questions to a committee would be a time-consuming process. Following NCAP's suggested timetable, questions would not be submitted until 30 days after the ALJ

issued an order inviting such submissions. Any questions which might then be proposed would require careful consideration by the ALJ. If he then did decide to refer a question to the NAS for committee consideration, the committee, after formation, would have 60 days to report. 7 U.S.C. §136(d).

Submission of questions to a committee of the NAS is unnecessary at this time. Questions proposed to be referred likely would be duplicative of scientific testimony already presented at the hearing. A report from a committee would be unduly cumulative if it merely constitutes another analysis of documents already discussed in detail at the hearings. See Motion at 4, item 9. If questions of scientific fact are raised for referral subsequent to prehearing conferences, the agency regulations require the ALJ to find that "good cause exists" for referral in addition to determining that the referral is necessary or desirable. 40 C.F.R. §164.50(e)(4). NCAP has proffered no reasons for its failure to request a referral of such a question early in the hearing or at the time when other parties were discussing the issues it now suggests for referral. Further, NCAP shows no compelling reasons for referral at this juncture.

The topics discussed by NCAP in its memorandum have been dealt with at some length in the hearing. Additional consideration would be inutile, particularly if a negotiated settlement can be reached by the parties. Going through the referral process would entail increased expense for the government and additional commitments of already scarce resources. Therefore, referral at this time is neither necessary nor

desirable. For these reasons, the Secretary of Agriculture
opposes the Motion of NCAP.

Respectfully submitted,


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BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY
OF THE UNITED STATES OF AMERICA

In re:

The Dow Chemical Company, et al.

)
)
) FIFRA Docket
) Nos. 415, et al.
)

THE DOW CHEMICAL COMPANY'S
RESPONSE TO NCAP'S MOTION FOR REFERRAL
TO THE NATIONAL ACADEMY OF SCIENCES

INTRODUCTION

The Dow Chemical Company (Dow) submits this response in opposition to Intervenor NCAP's Motion To Refer Questions to the National Academy of Sciences, dated January 11, 1982. Dow moved to extend the time for this response to coincide with the timing of EPA's response to the NCAP motion. Motion for Extension of Time (Jan. 25, 1982).

NCAP's motion should be denied because it does not meet the statutory standard for National Academy of Sciences (NAS) referral, because it is untimely, and because NCAP has not even attempted to meet the "good cause" showing required by EPA's hearing regulations for late NAS referral requests.

ARGUMENT

- A. Referral to an NAS Committee Is Not "Necessary or Desirable," but Would Merely Duplicate the Risk Hearings and Cause Unnecessary Delay.

Under FIFRA, "questions of scientific fact" may be referred to an NAS committee only when the Administrative Law Judge determines that such reference is "necessary or desirable." 7 U.S.C. § 136d(d). In the circumstances presented here, reference to an NAS committee would serve no useful purpose, would disrupt ongoing settlement discussions, and would delay these proceedings. The requested reference is therefore neither "necessary" nor "desirable."

NCAP's motion, in essence, seeks to reargue before an NAS committee the risk evidence already addressed in exhaustive detail in a year of risk hearings before the Administrative Law Judge. Through the testimony of more than 100 witnesses, filling more than 20,000 pages of hearing transcript, as well as more than 1,000 documentary exhibits, the scientific evidence on 2,4,5-T, silvex, and TCDD has been explored thoroughly and carefully from all perspectives. The witnesses included many of the researchers who conducted the key studies on these compounds, as well as other prominent scientific experts from around the world. The risk evidence was also subjected to intensive scrutiny by EPA's Scientific Advisory Panel, which concluded that EPA should not even initiate FIFRA Section 6(b)(2) hearings on 2,4,5-T and silvex. Review of Notices of Intent

to Hold FIFRA Section 6(b)(2) Hearing on 2,4,5-T and Silvex (September 26, 1979).

The reconsideration of the risk evidence by an NAS committee would not advance knowledge or understanding of the issues, but would merely require NAS scientists to perform a needless and duplicative task. For example, it is hard to imagine a more wasteful use of scientific talent than another reexamination of the Alsea II study, the study most prominently featured in NCAP's motion. At least eight Dow and EPA witnesses testified concerning Alsea II.^{1/} Numerous scientific reviews discussed during the hearings found the Alsea II conclusions invalid. (See, e.g., Exhibits 1159, 1168, 815, 1164, 1169, 1170, 1154). The other toxicology and exposure issues addressed in the risk hearings were subjected to similarly rigorous examination.

Moreover, referral to NAS would be cumbersome, expensive and time-consuming. The proposed order submitted by NCAP with its motion would require all parties to file, within 30 days, "proposed questions of scientific fact accompanied by reasons supporting their submission to the [NAS] committee. . . ." Under EPA's hearing regulations, all parties would then have an opportunity to file responses to the proposed questions. 40 C.F.R. § 164.50(e)(2).

^{1/} Dow presented the testimony of Dr. Steven Lamm (WS 853), Dr. Sheldon Wagner (WS 855), Dr. Alan Agresti (WS 856) and Dr. E. G. McQueen (WS 854). EPA presented the testimony of Dr. Robert Duncan (WS 476), Dr. Thomas Keefe (WS 473), Dr. Jack Griffith (WS 468) and Mr. Robert Heath (WS 938).

Thereafter, the Administrative Law Judge would be required to review the proposed questions and responses, to determine whether reference is "necessary or desirable," and to "prepare in his discretion appropriate questions." Id. If the Administrative Law Judge decided to refer questions to the NAS, the burdensome preliminary process of preparing questions would be followed by lengthy consideration at the NAS, with the costs of the NAS committee borne by EPA and, ultimately, the taxpayers of the United States.

Participation in the referral process would divert time and resources from the ongoing settlement negotiations. Dow believes negotiations have been productive, and that a settlement can be achieved. Inevitably, the negotiations and these proceedings would be delayed by NAS referral.

In light of the comprehensive examination of the risk evidence in the hearings, the dubious benefits of reconsideration by the NAS, and the inevitable delay which would accompany any referral, NCAP's proposal for referring questions to the NAS cannot meet the statutory "necessary or desirable" standard, and must be denied.

B. NCAP's Motion Is Untimely, and Does Not Meet the "Good Cause" Requirement for Late Referral Requests.

EPA's hearing regulations encourage parties who wish to request NAS referral to do so at an early stage of the proceedings. Thus, the regulations make requests for NAS reference one of the ten specific matters to be considered

at a prehearing conference. 40 C.F.R. § 164.50(a). The Administrative Law Judge specifically directed the parties' attention to this provision of the regulations, in setting the first prehearing conference at the outset of these proceedings. Notice of Prehearing Conference (May 11, 1979). NCAP did not respond to this notice by requesting NAS referral prior to the risk hearings.

In addition, the hearing regulations require a special showing of "good cause" where a request for NAS referral is made late in the proceedings. Where the request is made at a prehearing conference or prior to the public hearing, the parties are directed to file proposed questions for consideration by the Administrative Law Judge under the "necessary or desirable" standard. 40 C.F.R. § 164.50(e)(1), (2). Subsequent requests for NAS referral -- like NCAP's motion here -- are subject to the "good cause" requirement, in addition to the "necessary or desirable" standard. 40 C.F.R. § 164.50(e)(4).

NCAP offers no excuse for filing its request for NAS reference now, nearly three years after the initiation of these proceedings. Moreover, NCAP's motion does not attempt to make the "good cause" showing required at this stage of the proceedings. NCAP's memorandum in support of its motion is based on 40 C.F.R. § 164.50(e)(2), and does not even cite subsection (e)(4), which imposes the "good cause" requirement on late requests. Memorandum of Points and Authorities

in Support of Intervenor NCAP's Motion To Refer Questions to the National Academy of Sciences at 2 (Jan. 11, 1982).

CONCLUSION

For all the foregoing reasons, NCAP's motion for NAS referral fails to satisfy either the "necessary or desirable" standard established by FIFRA, or the "good cause" requirement for late requests found in EPA's hearing regulations. Accordingly, the motion should be denied.

Respectfully submitted,

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L. Mark Wine

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Counsel for The Dow Chemical
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February 8, 1982

BEFORE THE
ENVIRONMENTAL PROTECTION AGENCY
OF THE UNITED STATES OF AMERICA

.....

In re:)

The Dow Chemical Company, et al.) FIFRA Docket
Nos. 415, et al.
_____)

NATIONAL FOREST PRODUCTS ASSOCIATION'S
MEMORANDUM IN OPPOSITION TO THE
NCAP MOTION FOR REFERRAL TO THE
NATIONAL ACADEMY OF SCIENCES

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Counsel for the National Forest
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February 5, 1982

NATIONAL FOREST PRODUCTS ASSOCIATION'S
MEMORANDUM IN OPPOSITION TO THE
NCAP MOTION FOR REFERRAL TO THE
NATIONAL ACADEMY OF SCIENCES

National Forest Products Association (NFPA) opposes the NCAP motion to refer certain questions to the National Academy of Sciences.

The NCAP motion is, to say the least, untimely. It comes about three years after this proceeding began, two years after hearings in this proceeding began, and almost one year after this proceeding was stayed for purposes of settlement.

The NCAP motion is also pointless. It would generate, at great expense, a report for the Administrative Law Judge which will be of no use to the Administrative Law Judge. A reference to the National Academy of Sciences (NAS) is designed to provide expert guidance to the Administrative Law Judge on scientific questions which the Administrative Law Judge must decide in a FIFRA hearing. NFPA believes, however, that this matter is close to settlement. There will be no scientific questions for the Administrative Law Judge to decide if this matter is settled, and, therefore no need whatsoever for any report from the NAS.

Accordingly, we submit that the NCAP motion should be denied. A reference to the NAS is not "necessary or desirable", within the meaning of FIFRA, 7 U.S.C.

§ 164.50(e)(2). Moreover, NCAP has not shown "good cause" for this out-of-time and useless diversion. See 40 C.F.R. § 164.50(e)(4).

- - - - -

1. The motion is untimely. As the Court is well aware, this proceeding commenced on February 28, 1979 -- about three years ago -- when EPA issued emergency suspension orders and notices of intent to cancel certain registrations for 2,4,5-T and silvex. 44 Fed. Reg. 15874 et seq.

Hearings before this Court began in March of 1980 -- about two years ago. At the outset of these hearings, the Court directed the attention of all parties -- including NCAP -- to those matters which, in accordance with EPA hearing regulations, are to be considered at the outset, including any reference to the NAS. See Notice of Pre-hearing Conference (May 11, 1979). Neither NCAP nor any other party requested any such reference.

On March 20, 1981 -- nearly one year ago -- hearings were suspended, to permit negotiation of a settlement. At no time prior to the suspension of hearings for settlement did NCAP request any NAS reference.

Now -- three years after this proceeding began, two years after hearings commenced, and one year after hearings were suspended for purposes of settlement -- NCAP moves for a reference to the NAS. To say that this request is untimely is to understate matters considerably.

2. The request is pointless. The NCAP motion is not only out-of-time, it is groundless. A reference at this point to the National Academy of Sciences would accomplish nothing.

FIFRA and EPA hearing rules provide for reference to the NAS of "relevant questions of scientific fact involved in the public hearing." 7 U.S.C. § 136d(d). The obvious purpose of such a reference is to provide expert guidance to the Administrative Law Judge on scientific questions which the Administrative Law Judge will have to decide in the course of the hearing.

In this case, however, we expect there to be nothing for the Administrative Law Judge to decide. Hearings have been suspended for purposes of settlement. Settlement negotiations have been extensive and productive. NFPA believes that the parties are not far from a settlement agreement. And a settlement agreement will make it unnecessary for the Court to decide any of the questions which NCAP proposes to refer to the NAS.

Thus, reference to the NAS would waste scarce scientific resources, waste considerable taxpayer money, and divert the parties from prompt completion of a dispositive settlement, all for the purpose of providing advice to the Administrative Law Judge on questions which the Administrative Law Judge will not have to decide. The NCAP motion bears high cost for no benefit.

CONCLUSION

NFPA respectfully suggests that reference to the NAS is neither necessary nor desirable, within the meaning of FIFRA and EPA hearing regulations, and that NCAP has

failed to demonstrate good cause for such a reference.

Accordingly, NFPA urges that NCAP's motion be denied.

Respectfully submitted,

Richard J. Wertheimer

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Counsel for the National Forest
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February 5, 1982

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4 Telephone: 503-344-5044

5 Intervenor

6
7
8 BEFORE THE ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY
9 OF THE UNITED STATES OF AMERICA

10 In Re:)
) FIFRA Docket
11 THE DOW CHEMICAL COMPANY,) Nos. 415, et al.
et al.)
12

13 NCAP RESPONSE TO EPA MOTION
FOR EXTENSION OF TIME

14 1. Intervenor Northwest Coalition for Alternatives to Pesticides has
15 filed a motion for referral of pertinent scientific questions to a standing committee
16 of the National Academy of Sciences. Respondent U.S. Environmental Protection Agency
17 filed a motion dated January 21, 1982 for an extension of time, through and including
18 February 8, 1982, to respond to the NCAP motion.

19 2. Intervenor NCAP does not object to EPA's requested extension in this
20 instance only. NCAP reserves the right to argue that a stronger showing of necessity
21 is necessary should any party seek further delay in disposition of the NCAP motion.

22 3. NCAP is concerned that their motion not be further delayed.

23 DATED this 30th day of January, 1982.

24 Respectfully submitted,

25
26
27 STEVENS VAN STRUM
Authorized Representative
28 Northwest Coalition for
Alternatives to Pesticides

29 CERTIFICATE OF SERVICE

30 I CERTIFY that copies of this Response were mailed first class postage prepaid on
January 30, 1982 to the persons on the attached list.

31
32 STEVENS VAN STRUM

ACTIVE SERVICE LIST

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In re:

The Dow Chemical Company, Et. al.

Fifra Docket Nos. 415, et. al.

MOTION FOR EXTENSION OF TIME

Respondent Environmental Protection Agency requests a 14 day extension of time to respond to Intervenor NCAP's Motion to Refer Questions to the National Academy of Sciences, received by Respondent on January 18, 1982. The additional time is necessary because of reductions in the trial staff assigned to this case and the press of activities relating to the ongoing settlement negotiations. The requested extension would move the filing deadline for Respondent's response to February 8, 1981.

Respectfully submitted,

Dorothy E. Patton by Kevin Lee
Dorothy E. Patton
Kevin Lee

Counsel for Respondent
Environmental Protection Agency
401 M Street, S.W.
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January 21, 1982

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Extension of Time were hand delivered or mailed first class postage prepaid on January 21 1982 to the following persons.

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January 21, 1982

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7 Telephone: 503-344-5044

8 Intervenor

9 BEFORE THE ADMINISTRATOR
10 ENVIRONMENTAL PROTECTION AGENCY
11 OF THE UNITED STATES OF AMERICA

12 In Re:

13 THE DOW CHEMICAL COMPANY,
14 et al.

15 FIFRA Docket
16 Nos. 415, et al.

17 INTERVENOR NCAP'S MOTION TO REFER QUESTIONS TO
18 THE NATIONAL ACADEMY OF SCIENCES

19 Pursuant to the Federal Insecticide, Fungicide, & Rodenticide
20 Act §6(d) and 40 CFR §164.50(e), Intervenor Northwest Coalition for
21 Alternatives to Pesticides moves the Administrative Law Judge to
22 determine that there is an affirmative intent of the parties to refer
23 questions of scientific fact to a committee designated by the National
24 Academy of Sciences.

25 The subject referral is justified because: (1). The referral
26 will not in any way unreasonably delay the proceedings; (2). The infor-
27 mation to be obtained is not otherwise obtainable; and (3). Such infor-
28 mation has significant probative value.

29 This motion is based on its accompanying memorandum of points
30 and authorities.

31 DATED this 11th day of January, 1982.

32 Respectfully submitted,

33 STEVENS VAN STRUM
34 Authorized Representative
35 NCAP

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8 Intervenor

9 BEFORE THE ADMINISTRATOR
10 ENVIRONMENTAL PROTECTION AGENCY
11 OF THE UNITED STATES OF AMERICA

12 In Re:

13 THE DOW CHEMICAL COMPANY,
14 et al.

)
)
) FIFRA Docket .
) Nos. 415, et al.

15 MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF
16 INTERVENOR NCAP'S MOTION TO REFER QUESTIONS TO
17 THE NATIONAL ACADEMY OF SCIENCES

18 1. Intervenor Northwest Coalition for Alternatives to Pesticides
19 in a motion filed concurrently with this memorandum has moved the
20 Administrative Law Judge to determine that there is an affirmative
21 intent of the parties to refer questions of scientific fact to a commit-
22 tee designated by the National Academy of Sciences. This memorandum
23 of points and authorities is intended to support that motion.

24 I. STATEMENT OF THE CASE:

25 2. This is an administrative proceeding called to examine the
26 action taken by the Administrator of the U.S. Environmental Protection
27 Agency in issuing an emergency suspension of certain registered uses
28 of the herbicides 2,4,5-T and silvex and to review the Administrator's
29 notice of intent to cancel registrations for all remaining registered
30 uses of those herbicides. Major portions of the risk hearings have
31 been completed, following which the proceedings have been indefinitely
32 recessed while the parties explore the possibilities of a negotiated
33 settlement.

1 II. STATEMENT OF MATERIAL FACTS:

2 3. Intervenor NCAP believes that the statement of facts made
3 in this memorandum are not genuinely in dispute. NCAP believes there
4 is no genuine dispute as to the authenticity of exhibited documents.
5 NCAP believes that where remarks or positions are attributed to parties
6 in the exhibited documents, those remarks or positions represent the
7 parties' opinions as to material facts, application of facts to law,
8 the conclusions of law.

9 4. These proceedings have been surrounded by controversy on the
10 effects of the dioxin-contaminated herbicides 2,4,5-T and silvex on
11 humans and the human environment. [Exhibit 1, ¶1.] This controversy
12 has created concern on the part of citizens who live in areas where
13 those herbicides are used or have been used. [Exhibit 1, ¶1.] The
14 various epidemiological studies entered in the record of this proceed-
15 ing have been particularly controversial, notably the Alsea II study of
16 the coincidence of "spontaneous" abortions and the use of 2,4,5-T and
17 silvex in the Coast Range of Oregon. [Exhibit 1.]

18 III. ARGUMENT:

19 5. A referral of questions to the National Academy of Sciences
20 is proper under 40 CFR §164.50(e)(2) if the Administrative Law Judge
21 determines that such referral is "necessary or desirable."
22

23 A. The requested referral will not in any way
24 unreasonably delay the proceedings:

25 6. Because the hearings are in recess and the date for resumption
26 is unknown if not nebulous, the short period provided by regulation for
27 referral of questions to the National Academy of Sciences will not in
28 any way unreasonably delay the proceedings. Even if the hearings should
29 resume, there remain months of benefits hearings which could proceed
30 without causing any delay in the risk proceedings.

1 B. Information to be obtained
2 is not otherwise obtainable:

3 7. Contrary to the claim of Dow Chemical Company's director of
4 regulatory and legislative issues [Exhibit 1, ¶4], NCAP believes that
5 the EPA has not called the Alsea II study invalid. There has been no
6 agreement among the parties on the scientific validity of the various
7 human epidemiological studies proffered in evidence, nor is there
8 agreement on the risk to humans elicited from other evidence. While
9 a number of witnesses have supported the validity of the Alsea II study
10 and other epidemiologic studies, it is true that:

11 [n]o scientific group that has made a
12 study of the situation has supported
 that report [the Alsea II study].
 [Exhibit 1, ¶5.]

13 There is no evidence in these proceedings which was not entered by
14 parties advocating a position. It may be that no scientific group has
15 supported the Alsea II study, but NCAP believes that no scientific group
16 has been asked to make such an evaluation by parties opposing registra-
17 tion. The parties, the Administrative Law Judge, the Administrator
18 (and ultimately the courts) would benefit from inclusion of an open
19 opinion by a prestigious body such as the National Academy of Sciences.
20 Such a report would aid the parties and the Administrative Law Judge
21 in separating matters of fact from matters of law, and would likely
22 help in simplifying the proceedings. At the same time, no other inde-
23 pendent scientific body is in the position of the N.A.S. to bring to
24 the record of these proceedings scientific opinion which is free from
25 the bias of the parties.

26 C. Such information has
27 significant probative value:

28 8. Simply stated, these proceedings are examining questions of
29 life and death: the potential for a commonly-used pesticide to cause
30 cancer, birth defects, "spontaneous" abortions, shortened life spans,
31 and other serious effects. The decision to be reached then, must not
32 only be proper as a matter of law, but also as a matter of fact. As

1 a matter of law, the Administrator is required to take a "hard look"
2 at the consequences of her decision in this matter under provisions
3 of the National Environmental Policy Act of 1969, 42 U.S.C. §4321 et
4 sequitor. Kleppe v. Sierra Club, 96 S.Ct. 2718, 2731 n.21 (1976).
5 The mere fact that a program involves use of substances registered
6 under FIFRA does not exempt the program from the requirements of
7 NEPA. CATS v. Bergland (USDC Oregon) Civil.No. 76-438, Opinion of
8 March 7, 1977 at 33, with citation to Environmental Defense Fund v.
9 Hardin, 325 F. Supp. 1401, 1407 (D. D.C. 1971). An Agency is required
10 under NEPA to undertake research adequate to expose the potential
11 environmental impact. Environmental Defense Fund v. Hardin, ibid,
12 17 ALR Fed 33 §4 at 82.

13 9. The question of the validity of the human epidemiological
14 studies, the risk models, and other evidence on the effects of 2,4,5-T,
15 silvex, and TCDD deserves a disinterested viewpoint. It appears likely
16 that the requested referral would be supported by at least one other
17 party to this proceeding:

18 There is a growing feeling among a
19 number of people in this country ...
20 that we should try to move toward the
21 science experts, trying to size up a
22 risk at the start of a regulatory
proceeding, then let the regulatory
proceeding focus more on what should
be done about it. [Exhibit 1, ¶7.]

23 If they are confident of their positions, no parties should object to
24 referring questions on the scientific validity of those positions to
25 the National Academy of Sciences. As a matter of law, the Administrator
26 of the USEPA is required to undertake research adequate to expose the
27 potential environmental impact and must assure herself that the risks
28 are not understated should any uses of the herbicides not be canceled.

29 D. Granting the referral
30 is in the public interest:

31 10. There is public concern about the effects of the subject
32 herbicides. [Statement of Facts, ¶4, supra.] That public concern will

1 likely be ameliorated by a referral of relevant questions to a body
2 perceived by the public as disinterested. Such a referral will likely
3 lead to wider public acceptance of the Administrator's decision in this
4 proceeding. Such acceptance is in the public interest.

5
6 IV. CONCLUSION:

7 11. For grounds stated in this memorandum and its accompanying
8 motion, Intervenor NCAP respectfully requests that its motion be granted
9 in its entirety, and that the parties be instructed to submit their
10 proposed questions of scientific fact for referral to the National
11 Academy of Sciences.

12 DATED this 11th day of January, 1982.

13 Respectfully submitted,

14
15 STEVENS VAN STRUM
16 Authorized Representative
17 Northwest Coalition for
18 Alternatives to Pesticides

19 CERTIFICATE OF SERVICE

20 I CERTIFY that copies of this memorandum of points and authori-
21 ties, its accompanying motion, and proposed order were mailed first
22 class postage prepaid on January ____, 1982 to the persons on the attached
23 list.

24
25 STEVENS VAN STRUM
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32

Dow official says 2,4,5-T not harmful

By ANN SULLIVAN
of The Oregonian staff

An official of the Dow Chemical Co. says research into a herbicide made by Dow has not shown it is harmful to humans, and the controversy surrounding it shows the need to "get science up front at the start of a regulatory proceeding."

Fred D. Hoerger, Dow's director of regulatory and legislative issues in the health and environment sciences division, referred to concerns raised by residents around Alsea about the herbicide 2,4,5-T.

The herbicide figured in a 1977-78 study, originally done by the U.S. Environmental Protection Agency on research from the University of Florida, which was an effort to determine if a series of miscarriages in the Alsea area were more than usual and could be linked to use of the herbicide in nearby forests.

The EPA, Hoerger said in an interview Wednesday, calls the report invalid "and does not show what its authors said it did. They basically had raw data and they drew conclusions that have been entirely discredited."

"No scientific group that has made a study of the situation has supported that original report," he said.

"Two things are important there," he continued. "The first is that the general incidence of miscarriages in the population is perhaps 25 to 30 percent of pregnancies. . . . The second factor in the Alsea area, where I believe eight miscarriages were reported, is that the incidence for that population area is no greater than for other comparable population areas."

"There is a growing feeling among a number of people in this country," he said, "that we should try to move toward the science experts, trying to size up a risk at the start of a regulatory proceeding, then let the regulatory pro-



FRED D. HOERGER

ceeding focus more on what should be done about it."

Hoerger, who holds a Ph.D. in organic chemistry and has been with Dow for 26 years, said that in his opinion, 2,4,5-T "is definitely not a human carcinogen."

He said that in extensive studies on animals, a few have suggested that there might be a light carcinogenic (cancer-causing) response. But the herbicide does contain an impurity, TCDD (tetrachlorodioxin) that has caused fetal defects in animals.

It used to be present in several parts per million, but today the specification is 1/10th of one part per million, he said.

"That is definitely not a hazard to humans under the conditions used, based on all the information we have," he said.

Dow has spent \$10 million to \$15 million on research into the health effects of 2,4,5-T and TCDD, he said, and many universities and government agencies around the world also have done research on it.

tious completion of the remedies provided by that paragraph and the issuance of a final order on suspension, and (iii) no party other than the registrant and the Agency shall participate except that any person adversely affected may file briefs within the time allotted by the Agency's rules. Any person so filing briefs shall be considered a party to such proceeding for the purpose of section 16(b).

"(4) JUDICIAL REVIEW.—A final order on the question of suspension following a hearing shall be reviewable in accordance with Section 16 of this Act, notwithstanding the fact that any related cancellation proceedings have not been completed. Petitions to review orders on the issue of suspension shall be advanced on the docket of the courts of appeals. Any order of suspension entered prior to a hearing before the Administrator shall be subject to immediate review in an action by the registrant or other interested person with the concurrence of the registrant in an appropriate district court, solely to determine whether the order of suspension was arbitrary, capricious or an abuse of discretion, or whether the order was issued in accordance with the procedures established by law. The effect of any order of the court will be only to stay the effectiveness of the suspension order, pending the Administrator's final decision with respect to cancellation or change in classification. This action may be maintained simultaneously with any administrative review proceeding under this section. The commencement of proceedings under this paragraph shall not operate as a stay of order, unless ordered by the court.

"(d) PUBLIC HEARINGS AND SCIENTIFIC REVIEW.—In the event a hearing is requested pursuant to subsection (b) or determined upon by the Administrator pursuant to subsection (b), such hearing shall be held, after due notice for the purpose of receiving evidence relevant and material to the issues raised by the objections filed by the applicant or other interested parties, or to the issues stated by the Administrator, if the hearing is called by the Administrator rather than by the filing of objections. Upon a showing of relevance and reasonable scope of evidence sought by any party to a public hearing, the Hearing Examiner shall issue a subpoena to compel testimony or production of documents from any person. The Hearing Examiner shall be guided by the principles of the Federal Rules of Civil Procedure in making any order for the protection of the witness or the content of documents produced and shall order the payment of reasonable fees and expenses as a condition to requiring testimony of the witness. On contest, the subpoena may be enforced by an appropriate United States district court in accordance with the principles stated herein. Upon the request of any party to a public hearing and when in the Hearing Examiner's judgment it is necessary or desirable, the Hearing Examiner shall at any time before the hearing record is closed refer to a Committee of the National Academy of Sciences the relevant questions of scientific fact involved in the public hearing. No member of any committee of the National Academy of Sciences established to carry out the functions of this section shall have a financial or other conflict of interest with respect to any matter considered by such committee. The Committee of the National Academy of Sciences shall report in writing to the Hearing Examiner within 60 days after such referral on these questions of scientific fact. The report shall be made public and shall be considered as part of the hearing record. The Administrator shall enter into appropriate arrangements with the National Academy of Sciences to assure an objective and competent scientific review of the questions presented to Committees of the Academy and to provide such other scientific advisory services as may be required by the Administrator for carrying out the purposes of this Act. As soon as practicable after completion of the hearing (including the report of the Academy) but not later than 90 days thereafter, the Administrator shall evaluate the data and reports before him and issue an order either revoking his notice of intention issued pursuant to this section, or shall issue an order either canceling the registration, changing the classification, denying the registration, or requiring modification of the labeling or packaging of the article. Such order shall be based only on substantial evidence of record of such hearing and shall set forth detailed findings of fact upon which the order is based.

"(e) CONDITIONAL REGISTRATION.—

"(1) The Administrator shall issue a notice of intent to cancel a registration issued under section 3 (c) (7) of this Act if (A) the Administrator, at any time during the period provided for satisfaction of any condition imposed, determines that the registrant has failed to initiate and pursue appropriate action toward fulfilling any condition imposed, or (B) at the end of the period provided for satisfaction of any condition imposed, that condition has not been met: *Provided*, That the Administrator may permit the continued sale and use of existing stocks of a pesticide whose conditional registration has been canceled under this subsection to such extent, under such conditions, and

Subpena.

28 USC app.

Report.

7 USC 136d.

Notice.

Ante, p. 825.

Thereafter, witnesses, documents, or exhibits may be added and narrative summaries of expected testimony amended upon motion by a party.

(c) *Record of the prehearing conference.* No transcript of any prehearing conference shall be made unless a request therefor by one of the parties is granted by the Administrative Law Judge. Such party shall bear the cost of the taking of the transcript unless otherwise ordered by the Administrative Law Judge. The Administrative Law Judge shall prepare and file for the record a written report of the action taken at each conference, which shall incorporate any stipulations or agreements made by the parties at or as a result of such conference, all rulings upon matters considered at such conference and appropriate orders.

(d) *Unavailability of a prehearing conference.* Upon a finding that circumstances render a prehearing conference unnecessary, or impracticable, or upon a finding that a prehearing conference would serve primarily to delay the proceedings rather than to expedite them, the Administrative Law Judge, on motion or sua sponte, may order that the prehearing conference not be held. In these circumstances he may request the parties to correspond with him for the purpose of accomplishing any of the objectives set forth in this section. Such correspondence shall not be made a part of the record, but the Administrative Law Judge shall submit a written summary for the record if any action is taken.

(e) *Submission of questions to an advisory committee.*—(1) *General.* At any prehearing conference, or if none is held prior to the public hearing, except as herein provided, the Administrative Law Judge shall determine whether any party desires that questions of scientific fact be referred to a committee designated by the National Academy of Sciences.

(2) *Preparation of questions.* On determining an affirmative intent, the Administrative Law Judge shall direct all parties to file and serve, within a time period subject to his discretion, proposed questions of scientific fact accompanied by reasons supporting their submission to said committee. Within 10 days of the service of such proposed questions, together with their supporting reasons, any party may respond in writing to the proposed submission of the questions to the said committee. The Administrative Law Judge shall determine whether or not a reference of questions of scientific fact to said committee is necessary or desirable. In the event he decides such reference is necessary or desirable, he shall so inform the National Academy in writing, and shall prepare in his discretion appropriate questions. If any of the questions prepared are not in substance based upon the submissions of the parties, the Administrative Law Judge shall permit any party 10 days after their preparation to respond in writing to the proposed submission of said question or questions. He shall then determine whether such questions should be referred to the committee.

(3) *Reference and report.* Not less than 30 days after he has informed the National Academy that questions of scientific fact will be referred to it, the Administrative Law Judge shall refer the questions of scientific fact as prepared. The committee shall report in writing to the Administrative Law Judge within 60 days after such referral on these questions of scientific fact and the report, its record and any other matter transmitted as provided for by the Administrator's agreement with the National Academy of Sciences shall be made public and considered as part of the hearing record.

(4) *Request and submission subsequent to prehearing conference.* At any time before the hearing is closed, the Administrative Law Judge or a party by motion may request that questions of scientific fact not previously referred be referred, or that questions previously referred be amended or expanded.

[39 FR 11884, April 1, 1974]

§ 164.51 Other discovery.

(a) *General.* Except as so provided by § 164.50(b) *supra*, further discovery, under this subpart, shall be permitted only upon determination by the Administrative Law Judge (1) that such discovery shall not in any way unreasonably delay the proceeding, (2) that the information to be obtained is not otherwise obtainable and (3) that such information has significant probative value. The Administrative Law Judge shall be guided by the procedures set forth in the Federal Rules of Civil Procedure, where practicable, and the precedents thereunder, except that no discovery shall be undertaken except upon order of the Administrative Law Judge or upon agreement of the parties.

(b) *Depositions upon oral questions.* The Administrative Law Judge shall order depositions upon oral questions only upon a showing of good cause and upon a finding that (1) the information sought cannot be obtained by alternative methods, or (2) there is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(c) *Procedure.* (1) Any party to the proceeding desiring discovery shall make a motion or motions therefor. Such a motion shall set forth (i) the circumstances warranting the taking of the discovery, (ii) the nature of the information expected to be discovered and (iii) the proposed time and place where it will be taken.

(2) If the Administrative Law Judge determines the motion should be granted, he shall issue an order and appropriate subpoenas, if necessary, for the taking of such discovery together with the conditions and terms thereof.

MOTIONS

§ 164.60 Motions.

(a) *General.* All motions, except those made orally during the course of a public

hearing or as otherwise provided by this part, shall be in writing and shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be filed with the hearing clerk and served on all parties.

(b) *Response to motions.* Within 10 days after service of any motion filed pursuant to this part, or within such other time as may be fixed by the Administrator, his designee, or the Administrative Law Judge, any party may serve and file an answer to the motion. The movant shall, if requested by the Administrator, his designee, or the Administrative Law Judge, serve and file reply papers within the time set by the request.

(c) *Decision.* The Administrative Law Judge shall rule upon all motions filed or made prior to the filing of his initial or accelerated decision at the time of filing on ex parte motions or where the movant has stated that no party objects to the granting of such motion. Otherwise, such decision shall await the answering papers and reply papers if permitted. The Administrator or the Judicial Officer shall rule upon all motions filed after the filing of the initial or accelerated decision. Oral argument of motions will be permitted only if the Administrative Law Judge or Administrator or the judicial officer deems it necessary.

SUBPOENAS AND WITNESS FEES

§ 164.70 Subpoenas.

(a) The attendance of witnesses or the production of documentary evidence may, by subpoena, be required at any designated place of hearing or place of discovery. Subpoenas may be issued by the Administrative Law Judge sua sponte or upon a showing by an applicant that evidence sought for hearing is relevant and material to the issues involved in the hearing or that the sought discovery pursuant to § 164.51 meets the standards set forth therein. The Administrative Law Judge shall be guided by the principles of the Federal Rules of Civil Procedure in making any order for the production of a witness or the content of the documents produced.

(b) *Motion for subpoena duces tecum.* Subpoenas for the production of documentary evidence, unless issued by the Administrative Law Judge sua sponte, shall be issued only upon a written motion. Such motion shall specify, as exactly as possible, the documents desired.

(c) *Service of subpoenas.* Subpoenas shall be served as provided by the Federal Rules of Civil Procedure.

§ 164.71 Fees of witnesses.

Witnesses summoned before the Administrative Law Judge shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and persons whose depositions are taken, and the persons taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears or the deposition is taken.