UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In re	)	Docket No. TSCA (16(a))-1
Dow Chemical Company,	)	
Respondent	)	Accelerated Decision

I

This is a proceeding under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)) instituted by a complaint issued May 13, 1980 by the Director, Pesticides and Toxic Substances Enforcement Division, Office of Enforcement, United States Environmental Protection Agency, against the Respondent, Dow Chemical Company. The complaint alleges, in part, that "On a number of occasions between July 1, 1978, and August 1, 1979 Respondent, through its Midland, Michigan facility, manufactured and distributed in commerce a heat transfer fluid", with the trade name Dowtherm G which "was a mixture containing in excess of 500 parts-per-million (ppm) of polychlorinated biphenyls (PCB's)"; that Respondent's product was shipped in containers which were not marked to indicate that they contained PCB's in violation of section 15(1) of the act (15 U.S.C. 2614(1)) and section 761.20(a)(1) of the regulations issued pursuant thereto (43 F.R. 7150 and 44 F.R. 31514); that Respondent's facility at Midland, Michigan, contained more than 45 kilograms of the Dowtherm G mixture during the period involved; and that, therefore, Respondent's failure to prepare an annual document containing the information required by section 761.45 of the regulations for such facility by July 1, 1979 violated such regulation and section 15(1) of the act.

In the answer filed herein, Respondent denies that Dowtherm G Heat Transfer Fluid contained in excess of 500 ppm of polychlorinated biphenyls while avering that such product "was a mixture containing in excess of 500 parts-per-million (ppm) of monochlorinated biphenyl (monochloro biphenyl)." The answer further alleges that "Monochloro biphenyl consists of the biphenyl molecule with one chlorine atom attached. Monochloro biphenyl is not a polychlorinated biphenyl, which consists of the biphenyl molecule with two or more chlorine atoms attached."

Subsequently, Respondent filed a motion for discovery pursuant to section 22.19(f) of the rules of practice (45 F.R. 24360, 24368-9), basically for the purposes of the issue of whether its product is a polychlorinated biphenyl under the act and the regulations issued thereunder. Complainant supplied some limited information in response to Dow's motion for discovery and objected to such motion on the ground that the requested information lacked probative value in that the act and the regulations include monochlorinated biphenyls within the definition of PCBs. Simultaneous with the filing of Complainant's response to the motion for discovery on July 3, 1980, Complainant filed a motion pursuant to section 22.20 of the rules of practice[1/] for an accelerated decision as a matter

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1/ Section 22.20(a) of the rules of practice provides, in pertinent part, as follows:

> (a) General. The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. . .

of law and a brief in support thereof. [2/] Basically, Complainant contends in such motion that a partial accelerated decision in Complainant's favor be issued on the question of Respondent's violations of the act and the regulations thereunder as charged, leaving for further hearing the issues of culpability and the appropriateness of the proposed civil penalty, as Respondent has admitted the factual allegations of the complaint establishing such violations except for its affirmative defense that monochlorinated biphenyls are not polychlorinated biphenyls under the act and the regulations issued thereunder, which defense has already been decided contrary to Respondent's position in Environmental Defense Fund v. Environmental Protection Agency, 598 F.2d 62 (D.C. Cir. 1978) and Dow Chemical Company v. Costle, 484 F. Supp. 101 (D. Del. 1980), appeal pending. Respondent filed a brief in response to the motion for accelerated decision, Complainant filed a reply brief and oral argument was held on the motion for accelerated decision August 28, 1980 in Washington, D. C. Subsequently, the parties filed post oral argument briefs and Complainant also filed a supplemental response and objections to Respondent's motion for discovery with the permission and at the suggestion of the Administrative Law Judge.

II

Complainant, in the post oral argument brief on the motion for accelerated decision, states at page 12 thereof that "Complainant has demonstrated

2/ The parties recognized, in effect, that a ruling on Respondent's motion for discovery need await a decision on the motion for accelerated decision.

in its briefs and argument on the present motion that EPA has maintained a consistent concept of the group or class of chemicals termed 'polychlorinated biphenyls' through all of its regulations under the Clean Water Act and TSCA and that this concept includes all chlorinated biphenyl compounds individually and in any combination."[3/] Chief Judge Latchum, in a well reasoned opinion in Dow Chemical Company v. Costle, supra, so concluded. We are in agreement therewith for the reasons there stated and no useful purpose would be served by repeating the Court's reasoning here or by setting it forth in full.[4/]

3/ It seems to us that the latter part thereof patently applies in the case of section 761.2(t) of the PCB Disposal and Marking Regulations (43 F.R. 7150, 7157), issued pursuant to section 6(e) of the Toxic Substances Control Act (15 U.S.C. 2605(e)), which was in effect during most of the period of time involved in the complaint and which defined a "PCB Chemical Substance", the building block upon which all other PCB definitions in such regulations were based, to mean, "any chemical substance which is limited to the biphenyl molecule which has been chlorinated to varying degrees." "Chemical Substance," contained in section 761.2(d) of such regulations, is defined, in part, to mean "any organic or inorganic substance of a particular molecular identity, including; (i) Any combination of such substances occurring in whole or part as a result of a chemical reaction or occurring in nature . . ." It is clear that a monochlorinated biphenyl falls within such definition of "PCB Chemical Substance." "Biphenyl molecules chlorinated by successive degrees would include biphenyl molecules chlorinated to one degree" Dow Chemical Company v. Costle, supra, at p. 109. (See also p. 108). In addition, the definition of "PCB Chemical Substance" as a single or individual substance of a particular molecular identity militates against the argument advanced by Dow that "varying" degrees of chlorination relates to mixtures which contain numerous, or at least 2, homologs or congeners (e.g., some tri-s, some tetra-s, some penta-s, etc.). The subsequent adoption of the terms "PCB" and "PCBs" in section 761.2(s) of the Polycholorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions regulations (40 CFR 761.2(s)), effective July 2, 1979, during a short part of the period set forth in the complaint, does not alter and, in fact, reenforces, this conclusion. Such terms are defined therein to mean "any chemical substance that is limited to the biphenyl molecule that has been chlorinated to varying degrees or any combination of substances which contains such substance . . ."

4/ For this reason and in the interest of brevity and expedition, we have not set forth herein the background description or explanation of the technical controversy involved herein or even a definition of the technical terms utilized in this decision and refer to the Court decision for a statement of this background and for such definitions.

The pertinent portions thereof are, in effect, hereby adopted as part of this Accelerated Decision. In addition, the Court in Environmental Defense Fund v. Environmental Protection Agency, supra, at p. 78, similarly defined PCBs to include, in effect, "all chlorinated biphenyl compounds individually and in any combination."

While we expressed doubts, in effect, with respect to the claims of counsel for Complainant set forth above at the oral argument on Complainant's motion for accelerated decision, upon further consideration and in light of the brief filed by such counsel after such argument, we are in agreement therewith. The basis of our concern was the proposed definition of the term "Polychlorinated biphenyls" in the 1976 Proposed Toxic Pollutant Effluent Standards for PCBs under section 307(a) of the Clean Water Act (33 U.S.C 1317(a) (1976)), published July 23, 1976 (41 F.R. 30468, 30476), and the final version thereof (42 F.R. 6532, 6555), which both provided that "Polychlorinated biphenyls (PCBs) means a mixture of compounds composed of the biphenyl molecule which has been chlorinated to varying degrees." (Emphasis supplied). We are in agreement with the well reasoned argument advanced by counsel for Complainant that the use of the term "mixture" therein in the singular denotes a group, family or class of compounds and not mixtures of various homologs or solely the then commercially marketed PCB products, as contended by Respondent, and that PCBs are therein defined in a generic sense referring to or including all chlorinated biphenyl compounds or CBs and any combination thereof.[5/] The Court

5/ See also in this regard the 1973 proposed effluent standards for toxic pollutants including PCBs wherein such term was defined to mean "materials containing the biphenyl group which have been chlorinated to varying degrees" where the preamble explained that such substances are "mixtures of chlorinated biphenyl compounds with various percentages of chlorination" (38 F.R. 35388, 35395). (Emphasis supplied). In addition, use of the term "PCBs" itself in the singular in the 1976 proposed definition under the Clean Water Act and in the final regulation indicates its use in its generic sense.

in Environmental Defense Fund v. Environmental Protection Agency, supra, at p. 78, in construing, in effect, this definition of PCBs and the term "mixture" contained therein, in reality, similarly so concluded. In addition, to conclude otherwise is to create at the least a potential loophole in the regulatory scheme by failing to include within the ambit of regulation a single PCB isomer or, perhaps, a single PCB homolog, even with a high degree of chlorination. Such a result is not favored and, in fact, in the framework in which presented, is unthinkable. Moreover, the regulation of PCBs under TSCA and the Clean Water Act was intended to cover or include that which then existed and that which might occur. Also, the same substance or class of substances were regulated under both statutes and the regulations issued thereunder and the construction advanced by Respondent would violate and be contrary to such result.

It is significant, it seems to us, that the Congress, in the enactment of section 6(e) of the Toxic Substances Control Act, was cognizant of the 1976 proposed effluent standards for PCBs under the Clean Water Act and, in effect, the proposed coverage thereunder or definition of polychlorinated biphenyls. See Legislative History of the Toxic Substances Control Act, pp. 581 and 584 (1976). It is clear that the Congress intended to encompass in section 6(e) of TSCA a family or class of chemical substances. As stated by counsel for Complainant at the oral argument herein, "The point is that they [Congress] were concerned with the substance which was before the agency and they wanted to do more about the class of substances and the class was already established as including mono" (Transcript of oral argument, p. 47). The statutory meaning of the terms PCBs and PCB, stated both in the plural and the singular in section 6(e), need be construed to effectuate such Congressional awareness and purpose. Cf. e.g., Mobil Oil Corporation v. Federal

Energy Administration, 556 F. 2d 87 (Temp. Emer. Ct. App. 1977) and cases cited therein; Independent Meat Packers Association v. Butz, 526 F.2d 228 (8th Cir. 1975), cert. denied 424 U.S. 966 (1976). The technical understanding of chemists, for example, is not controlling. Mobil Oil Corporation v. Federal Energy Administration, supra. In addition, such construction is the same as the regulatory definition of polychlorinated biphenyls under the Clean Water Act and in keeping with long standing Agency construction. Environmental Defense Fund v. Environmental Protection Agency, supra, at p. 78; Dow Chemical Company v. Costle, supra, at p. 109.[6/] Section 6(e) of the Toxic Substances Control Act was intended to give the Agency additional statutory authority over the same class of substances which were being regulated under the Clean Water Act. Environmental Defense Fund v. Environmental Protection Agency, supra, at pp. 76-78.

Nor do we see a lack of adequate findings with respect to the treatment accorded monochlorinated biphenyls, as contented by Respondent. The findings issued in connection with the promulgation of the toxic pollutant effluent

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6/ As stated by Complainant, in the brief in support of the motion for accelerated decision, at pp. 10-11 thereof:

> The federal courts give great deference to the construction of a statute by the agency charged with its administration. E.I. duPont de Nemours and Co. v. Train, 430 U.S. 112, 134-35 (1977); Train v. NRDC, 421 U.S. 60, 75, 87; 7 ERC 1735 (1975); EDF v. EPA, 598 F.2d 62. This is particularly true where the agency's construction is contemporaneous with the enactment of a new statute, Udall v. Tallman, 380 U.S. 1, 16 (1965), and where the agency itself suggested the enactment of the provision to Congress during hearings, United States v. American Trucking Ass'n, 310 U.S. 534, 548-49 (1939); American Power & Light v. SEC, 329 U.S. 90 (1946).

standards under section 307(a) of the Clean Water Act were, in effect, adopted and incorporated into the record of the regulation of PCBs under TSCA. Those findings dealt, of course, with the general issue of the properties and the treatment of "more chlorinated PCBs" and "less chlorinated PCBs." Monochlorinated biphenyls were included in the class of "less chlorinated PCBs" in such findings and the extended discussions with respect thereto. Admittedly, MCBs were not dealt with separately and in detail, but were considered as a member of a larger group of compounds. The failure of the Agency to distinguish between these 2 larger groups of compounds was upheld in Environmental Defense Fund v. Environmental Protection Agency, supra, and the attention that Respondent would now apply to or demand for separate consideration of MCBs was not then apparent or warranted. We are not aware of any PCB product which then only contained the one PCB homolog, monochlorinated biphenyls, as apparently is the case with Dowtherm G Heat Transfer Fluid. We surmise that such product was manufactured in response to the regulation of PCBs under the Toxic Substances Control Act and, perhaps, the Clean Water Act as well.[7/]

III

To summarize, we have found herein that monochlorinated biphenyls and, consequently, Dowtherm G Heat Transfer Fluid, are included within the pertinent statutory and regulatory coverage of polychlorinated biphenyls under the Toxic Substances Control Act. By reason thereof, a partial accelerated decision, as requested by Complainant, is appropriate without further

7/ Of course, as pointed out by the Court in Dow Chemical Company v. Costle, supra, at footnote 11, p. 111, Respondent can now "petition the EPA for an amendment or repeal of the regulation pursuant to 15 U.S.C. §2620."

procedure. Cf. e.g., Mobil Oil Corporation v. Federal Energy Administration, supra, and cases cited therein.[8/] Complainant is entitled to judgment as a matter of law on the issue of Respondent's violations of the act and regulations as charged in the complaint and no genuine issue of material fact exists in that regard.[9/] Nor does footnote 11, at page 111 of Dow Chemical Company v. Costle, supra, where the Court stated that "if an enforcement proceeding should be brought, Dow could press the very points it is seeking to have adjudicated here," alter this conclusion. Dow did press in this proceeding "the very points" not considered by the Court and such language does not infer that Dow could raise matters herein in any form it desired or that it could raise matters outside the scope of this proceeding. In other words, the Respondent was enabled herein to litigate fully its position within the legal confines of this proceeding.

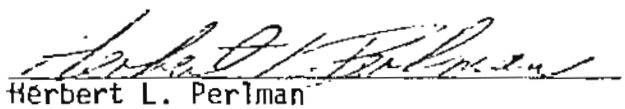
Accordingly, Respondent is hereby found to have violated the act and the regulations issued thereunder as charged in the complaint and there remains for consideration in this proceeding the appropriateness of the proposed civil penalty contained therein. The factual allegations of the complaint setting forth the violations of the act and regulations are adopted herein as the facts which are uncontroverted pursuant to section 22.20(b)(2) of the rules of practice and shall be recited in full in the Initial Decision to be issued herein subsequent to the hearing in this proceeding.

8/ In this connection, we make the observation that Respondent's proposed procedure herein would, in part, introduce into this proceeding the very thing the Congress intended to avoid or bypass in the enactment of section 6(e) of the act. (Compare with section 6(a) of the act).

9/ We see, however, minor technical gaps in the allegations of the complaint and an ambiguity in the answer which do not, under the circumstances and with the need for expedition, prevent the issuance of this Accelerated Decision. These matters will be addressed at a prehearing conference to be held shortly herein.

In addition, by reason of the foregoing, Respondent's motion for discovery is hereby denied in the form in which it is presented as the information requested therein and contested by Complainant is irrevelant and lacking in probative value. In this connection, Respondent, in its brief in response to the motion for accelerated decision, alleges that the information which it seeks to elicit in its motion for discovery is relevant, in any event, as to the extent of the civil penalty to be assessed herein. At the oral argument, counsel for Complainant, at the request of the Administrative Law Judge, responded to such contention by objecting to the relevancy of the requested information for such purpose and to the scope of the request. We do not now rule on the contention raised by Respondent in its brief as this issue would be better served and answered by the filing of a new motion for discovery addressed specifically to the relevancy of the desired information to the issue of the civil penalty herein.

All contentions of the parties presented for the record have been considered and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this Accelerated Decision are denied.



Herbert L. Perlman
Chief Administrative Law Judge

September 22, 1980

CERTIFICATION

I hereby certify that the original of this Accelerated Decision was hand delivered to the Hearing Clerk and a copy was hand delivered to counsel for Complainant and sent by U.S. mail to counsel for Respondent in this proceeding on September 22, 1980.

Shirley G. Clifford
Secretary to CALJ Perlman

September 22, 1980