UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

ROGERS CORPORATION, DOCKET NO. TSCA-I-94-1079

RESPONDENT

ORDER TO AMEND OR SUPPLEMENT
THE PREHEARING EXCHANGE AND
SCHEDULING HEARING

The file reflects that a prehearing exchange has taken place in this case pursuant to the prehearing exchange order entered by another judge, Judge Head, on April 17, 1995. A motion for discovery filed by the Respondent on June 12, 1995, prior to the filing of the prehearing exchange, was denied by Judge Head on November 8, 1996. On January 10, 1997, the undersigned was redesignated as the Administrative Law Judge to preside in this proceeding.

In the parties' respective prehearing exchange replies, the Complainant has objected to two of the Respondent's proposed witnesses and the Respondent has objected to virtually all the initial prehearing filing of the Complainant. First, I will address the Respondent's objections as raised in the August 21, 1995, Respondent's Reply To Complainant's Prehearing Memorandum and its argument for dismissal as set forth in its July 31, 1995, prehearing memorandum. The Respondent's objections to the proposed evidence are rooted primarily in its affirmative defense that it is not liable because it has not handled polychlorinated biphenyls ("PCBs") since well before February 17, 1978, when the disposal of PCBs became subject to regulation. In particular, the Respondent maintains that the Heat Transfer System Number 975 ("HTS 975") in question has not used any PCB-containing heat transfer fluids since 1972 and that the alleged spills are not due to a contemporaneous (1993) release of PCBs from HTS 975 as alleged by the Complainant in the Complaint. The Respondent further maintains that the alleged PCB spills, if any, are the residual heat transfer fluid in the concrete and/or soil underneath HTS 975 which occurred prior to the regulation of PCB spills in 1978.

Based on these allegations, the Respondent argues that the Complaint is meritless as the Toxic Substances Control Act and PCB regulations do not apply to spills occurring before February 17, 1978, and moreover that the Complaint is barred by the statute of limitations. The Respondent asserts that the matter for adjudication in this proceeding is a matter of law rather than fact. Therefore, the Respondent requests dismissal of the complaint as meritless. Similarly, the Respondent objects to the Complainant's proposed exhibits as pertaining to an unregulated spill or uncontrolled discharge thereby rendering such evidence irrelevant. While this case ultimately presents the issue of the governing statute and/or regulation, the applicability of such law turns on the determinative findings of fact; that is, whether there was an improper disposal of PCBs in 1993 as alleged in the Complaint by the Complainant. Such factual determination can only be made following a full evidentiary hearing. The Respondent's request for dismissal is therefore denied at this time. Similarly, the Respondent's objections to the proposed exhibits and witnesses on the basis of irrelevancy are also denied.

With regard to the Respondent's objection to the admissibility of certain proposed evidence as hearsay, the undersigned notes that the instant proceeding is an administrative proceeding in which the strict rules of evidence do not apply and that the "hearsay rule is not applicable to administrative hearings so long as the evidence upon which a decision is ultimately based is both substantial and has probative value." Cohen v. Perales, 412 F.2d 44, 51 (5th Cir. 1969), rev'd on other grounds sub nom. Richardson v. Perales, 402 U.S. 389 (1971). Therefore, the undersigned does not find the Respondent's hearsay objection to be persuasive.

The Respondent objects to all allegations and proposed exhibits pertaining to Heat Transfer System 985 ("HTS 985") on the ground that HTS 985 is not the subject of the Complaint. The Respondent correctly points out that the Complaint only refers to an alleged spill or uncontrolled discharge from HTS 975. The Complainant has not responded to this objection and the undersigned will reconsider the objection if renewed at the hearing. However, the undersigned notes that according to the proposed testimony of the Respondent's witness Mr. Gerry L. Langelier, HTS 975 and HTS 985 were once interconnected and HTS 975 initially used PCB-containing heat transfer fluids.

The undersigned agrees with the Respondent's objection that the expected testimony of the Complainant's proposed witness Ms. Lori Saliby as to specific facts and observations relating to the November 5, 1993, inspection of the Respondent's facility must be limited to only that of which she has personal

knowledge. The Respondent's general objection to the procedures and practices which were utilized at the Connecticut Agricultural Experiment Station in receiving, handling, maintaining, and analyzing the samples collected and submitted in connection with the November 5, 1993, and December 1, 1993, inspections without any reference to specific alleged deficiencies or errors or supporting documentation is not deemed appropriate for consideration at this time and will not be entertained at the hearing without such development of the objection having been accomplished in a timely filed prehearing exchange. The Respondent's objection to the proposed testimony of Ms. Mary Jane Mattina and Mr. Harry Pylypiw as being unduly repetitious, if renewed at the hearing, will be reconsidered in light of any action on the previously noted objection.

The Complainant has not responded to the Respondent's objections to the qualifications of Ms. Marianne Milette as an expert witness in regard to the PCB Penalty Policy. The Complainant's proposed exhibits do not include a curriculum vitae or resume for each proposed expert witness. The Complainant is directed to furnish these documents as amendments to the prehearing exchange. Also, the Respondent has not responded to the objections to the expected testimony of Ms. Milette and Dr. Mary Beth Smuts as to the hazards posed by PCBs on the ground that the testimony is irrelevant. These objections must be addressed by the Complainant in a supplement to the prehearing exchange.

The undersigned reiterates Judge Head's mandate that if the Respondent intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business the Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns.

The Respondent, without any stated ground, objects to the possible testimony of its employees, representatives, and agents called by the Complainant. However such objection is premature in that the Complainant may not call any witnesses whose names have not been exchanged without permission of the undersigned. Such permission will not be granted in the absence of extraordinary circumstances and undue prejudice. Of course, witnesses called by the Respondent are subject to cross-examination within the scope of their testimony. Additional objections to the Complainant's proposed exhibits and witnesses raised by the Respondent are not considered persuasive at this time but may be renewed at the hearing.

With regard to the Complainant's objections to the Respondent calling an unnamed individual as a proposed witness to testify as to a proposed rule that deals with pre-1978 PCB spills, the undersigned agrees that the Respondent has

failed to demonstrate adequately the relevancy of this proposed testimony, even if I were to assume that the alleged spill occurred before the regulation of PCB spills or disposal. Similarly, the proposed testimony of Mr. Lawrence M. Goldman which is summarized by the Respondent as pertaining to "the general policy and practice of EPA Region I not to assess penalties under TSCA and the PCB regulations in regard to preexisting PCB spills" is not shown to be relevant to this proceeding. In other words, the Complaint does not contain any allegations that any pre-regulated spills or disposal occurred or would be subject to later regulation, and the Complaint fails if the Complainant does not establish that an improper disposal occurred in 1993 as alleged.

Both parties, in their prehearing memorandums, state that they reserve the right to supplement their prehearing exchanges with additional names of witnesses and documentary evidence. Both parties are reminded that this proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.01 et seq. Section 22.19(b) of the Rules of Practice provides that documents that have not been exchanged and witnesses whose names have not been exchanged shall not be introduced into evidence or allowed to testify without permission of the undersigned. Both parties are hereby notified that the undersigned will not entertain last minute motions to amend or supplement the prehearing exchanges absent extraordinary circumstances. The amendments specified above or any desired supplements to the prehearing exchanges shall be filed on or before **April 18, 1997.**

Further, the parties are advised that every motion filed in this proceeding must be served in sufficient time to permit the filing of a response by the other party and to permit the issuance of an order on the motion before the deadlines set by this order or any subsequent order. Section 22.16(b) of the Rules of Practice allows a 10-day period for responses to motions and Section 22.07(c) provides for an additional 5 days to be added thereto when the motion is served by mail.

The file reflects that the last settlement status report was filed on June 15, 1995. United States Environmental Protection Agency ("EPA") policy, found in the Rules of Practice at Section 22.18(a), encourages settlement of a proceeding without the necessity of a formal hearing. The benefits of a negotiated settlement may far outweigh the uncertainty, time, and expense associated with a litigated proceeding. However, the pursuit of settlement negotiations or an averment that a settlement in principle has been reached

will not constitute good cause for failure to comply with the requirements or schedule set forth in this Order. The parties are hereby directed to hold a settlement conference on this matter on or before **May 9, 1997,** and attempt to reach an amicable resolution of this matter. See Section 22.04(c)(8) of the Rules of Practice. The Complainant shall file a status report regarding such conference and the status of settlement on or before **May 23, 1997.**

In the event the parties have failed to reach a settlement by that date, they shall strictly comply with the requirements of this order and prepare for a hearing. In connection therewith, on or before **June 20, 1997,** the parties shall file a joint set of stipulated facts, exhibits, and testimony. The time allotted for the hearing is limited. Therefore, the parties must make a good faith effort to stipulate, as much as possible, to matters which cannot reasonably be contested so that the hearing can be concise and focused solely on those matters which can only be resolved after a hearing.

The Hearing in this matter will be held beginning at 9:30 a.m. on Wednesday, **July 16, 1997,** in Boston, Massachusetts, continuing if necessary on July 17 - 18, 1997. The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

IF EITHER PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.

Barbara A. Gunning
Administrative Law Judge

Dated: 2/27/97
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that the original of this **ORDER TO AMEND OR SUPPLEMENT THE PREHEARING EXCHANGE AND SCHEDULING HEARING,** dated February 27, 1997, **in re: ROGERS CORPORATION, Dkt. No. TSCA-I-94-1079,** was mailed to the Regional Hearing Clerk, Reg. I, and a copy was mailed by certified mail, return receipt requested to Respondent and Complainant (see list of addressees).

Helen F. Handon

Legal Staff Assistant

Date: February 27, 1997

ADDRESSEES:

CERTIFIED MAIL-RETURN RECEIPT REOUESTED

Kenneth A. Reich, Esq.
Day, Berry & Howard
260 Franklin St.
Boston, MA 02110

CERTIFIED MAIL-RETURN RECEIPT REOUESTED

Gregory M. Kennan, Esq.
Senior Litigation Counsel
U.S. EPA, Region I
J.F. Kennedy Fed. Bldg.
Boston, MA 02203

REGULAR MAIL

Ms. Mary Anne Gavin
Regional Hearing Clerk
U.S. EPA, Region I
JF. Kennedy Fed. Bldg.
Boston, MA 02203