

By order dated July 28, 1982, amended August 17, 1982, the Judicial Officer, on behalf of the Administrator, vacated Judge Perlman's ruling "to the extent that it involves consideration of Dow's attack on the validity of the regulation." The Judicial Officer held that the validity of the regulation was not open to challenge in this civil penalty proceeding. The Judicial Officer did not review the ruling that Dow had violated the EPA regulations and TSCA.

There remains to be determined in this proceeding the amount of penalty for which Dow is liable. Until that amount is determined, Judge Perlman's ruling remains interlocutory and there is no final order which can be appealed to the federal courts.

The parties have submitted a stipulation agreeing that any penalty assessed in this case shall be in the amount of

EPA and Dow have agreed to this amount on the basis that Dow reserves its right to appeal on the issue of liability, but will not contest the amount of the penalty in the event that liability is ultimately upheld.

FINDINGS OF FACT

1. 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 which it trade-named "Dowtherm G."

2. The "Dowtherm G" described in paragraph 1 was a mixture containing in excess of 500 parts per million (ppm) of monochlorinated biphenyls.

3. Section 6(e)(1)(B) of TSCA (15 U.S.C. 2605(e)) required the Administrator of EPA to promulgate rules requiring PCBs "to be marked with clean and adequate warnings, and instructions with respect to their processing, distribution in commerce, use, or disposal or with respect to any combination of such activities." These rules (hereinafter the "PCB Regulations") were signed by the Administrator on February 8, 1978, (43 Federal Register 7150, February 17, 1978); and were repromulgated with changes not relevant to this action on May 31, 1979, (44 Federal Register 31514). Section 761.20(a)(1) of the PCB regulation (40 CFR 5761.20(a)(1)) requires all containers of mixtures having 500 ppm or greater of PCBs in existence on or after July 1, 1978, to be marked with a PCB label specified in Annex V, Section 761.44(a) of the regulation.

4. The "Dowtherm G" described in paragraph 1 was shipped in containers which were not marked in any manner to indicate that they contained PCBs.

5. The Midland, Michigan facility of Respondent contained more than 45 kilograms (99.4 pounds) of the Dowtherm G mixture described above in containers between July 1, 1978, and August 1, 1979.

6. Section 761.45 of the PCB regulation (40 CFR 761.45) requires owners of facilities which contain more than 45 kilograms (99.4 pounds) of PCB chemical substances or PCB mixtures in PCB containers to keep records concerning the quantity and disposition of the PCBs in such containers, and to use these records as the basis for an annual

document containing specified information which must be prepared for each facility by July 1 of each year.

7. Respondent did not prepare an annual document containing the information set forth by Section 761.45 of the PCB regulations for its Midland, Michigan facility by July 1, 1979, with regard to "Dowtherm G."

CONCLUSIONS OF LAW

1. On the basis of Judge Perlman's ruling of September 22, 1980, and Judicial Officer McCallum's ruling of July 28, 1982, and August 17, 1982, I conclude that a monochlorinated biphenyl is a polychlorinated biphenyl (PCB) within the meaning of the PCB regulations.

2. I conclude that Dow has violated Sections 761.20(a)(1) and 761.45 of the EPA regulation, 40 CFR § § 761.20(a)(1) and 761.45, and TSCA. Accordingly, Dow is liable to pay a penalty under Section 16 of TSCA.

3. On the basis of the foregoing and the parties' stipulation, I impose a penalty of

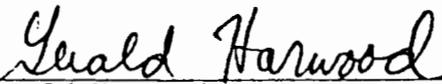
PROPOSED FINAL ORDER

It is ordered that the Dow Chemical Company shall pay to EPA a penalty of . . . , subject to the agreement in paragraph three of the stipulation of the parties dated September 30, 1982. Payment of the penalty shall be stayed pending completion of the case, including all appeals, as provided in paragraph two of the stipulation of the parties dated September 30, 1982.

Paragraph 5 of the stipulation of the parties dated September 30, 1982, sets forth the record in this case.

In accordance with the Consolidated Rules of Practice, 40 CFR 22.27(c), this initial decision becomes the final order of the Administrator within 45 days after its service upon the parties, unless an appeal is taken to the Administrator or the Administrator determines to review the decision sua sponte.

This decision is to be accorded confidential treatment pending determination by the appropriate EPA legal office as to whether it is to be treated as TSCA confidential business information.



Gerald Harwood
Administrative Law Judge

October 4, 1982