

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:

Howmet Corporation,)	
)	RCRA 02-2004-7102
)	
Respondent)	RCRA 06-2003-0912
)	
)	

ORDER ON RESPONDENT’S MOTION FOR INTERLOCUTORY APPEAL

In these consolidated actions¹ under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (“RCRA” or “Act”), Respondent, Howmet, has filed a motion pursuant to 40 C.F.R. § 22.29(a), seeking the Court’s (Presiding Officer’s) forwarding of this matter to the Environmental Appeals Board (“EAB”) for interlocutory review. Complainants, EPA Regions II and VI, have filed a joint response to the motion. Upon consideration, Howmet’s Motion is DENIED.

Background

Pursuant to the Consolidated Rules of Practice governing this proceeding, the “Presiding Officer *may* recommend any order or ruling for review by the Environmental Appeals Board when: (1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and (2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.” 40 C.F.R. §22.29(b). (emphasis added). The Rules also provide that “[w]hen the Presiding Officer declines to recommend review of an order or ruling, it may be reviewed by the [EAB] only upon appeal from the initial decision, except when the [EAB] determines, upon motion of a party *and in exceptional circumstances*, that to delay review would be contrary to the public interest. Such motion shall be filed within 10 days of service of an order of the Presiding Officer refusing to recommend such order or ruling for interlocutory review.” 40 C.F.R. §22.29(c). (emphasis added).

¹The Complaint in RCRA 06-2003-0912 was filed on September 26, 2003, and an unopposed motion to amend that complaint was filed on August 26, 2004. The Complaint in RCRA 02-2004-7102 was filed on October 31, 2003. The cases were consolidated on September 16, 2004. Although for convenience this Order references EPA regulations, both Texas and New Jersey have authorized hazardous waste programs. The state provisions cited in each Complaint are hereby incorporated by reference.

As grounds for its Motion, Howmet notes that the Court's Order described the issues as involving "fundamental questions involving the scope of EPA's enforcement authority to regulate waste." It adds that there are "substantial grounds for differing opinions as to these fundamental questions." Howmet Motion at 1- 2. Howmet contends that because "the determinative facts upon which the Order is based are not in dispute" this will materially advance the ultimate termination of the proceeding. Waiting until an initial decision is issued will mean that any appeal could include "mixed questions of law and fact arising from the application of EPA's penalty policy and the assessment of a penalty." Howmet believes this inclusion of penalty matters would be likely to "slow the appellate process" particularly if it prevails on the liability question. *Id.* at 3.

In its joint response, EPA, while noting that it does not formally object to the Motion, adds that it "does not fully agree with Howmet's arguments in support of [it]." EPA notes that the granting of such a request for interlocutory appeal requires that "the order or ruling involves an important question of law or policy concerning which there is *substantial grounds for difference of opinion.*" However, EPA, citing the Order and the judicial and regulatory authority noted in that Order, contends that no such substantial grounds exist for a difference of opinion. EPA Response at 1. (emphasis added).

Discussion.

Although the Court's Order does observe that "fundamental questions involving the scope of EPA's enforcement authority to regulate waste have been raised," it does not follow that by raising such questions a party establishes that "substantial grounds for difference of opinion" exist. This Court was obligated to treat the questions raised by Howmet seriously, and it did so, as reflected by the twenty-one page Order it issued, discussing the various arguments made by the Respondent. This does not equate however with an implication that Howmet's arguments, once analyzed, had any merit. Indeed, the Court concluded that this was not in any sense a close call but nevertheless required a complete discussion of the basis for reaching that conclusion.

The Court concludes that because there is no substantial ground for a difference of opinion, interlocutory review is clearly inappropriate. While that and the fact that the Court's decision to recommend interlocutory review is permissive, not mandatory, even where a substantial question does exist, puts an end to the matter, the Court also notes that the second element in establishing grounds for interlocutory appeal is in the conjunctive. Howmet has not contended that review after a final order would be inadequate or ineffective, but it has submitted that interlocutory review would "materially advance the ultimate termination of the proceeding." As the Court has determined that the legal questions addressed by its Order do not present substantial ground for a difference of opinion, interlocutory review would only serve to further delay, not advance, the ultimate termination of the proceeding.

Accordingly, Howmet's Motion for Interlocutory Appeal is DENIED.

So Ordered

William B. Moran
United States Administrative Law Judge

May 16, 2005
Washington, D.C.