

Environmental Appeals Board (EAB), when:

"(1) the order or ruling involves an important question or policy concerning which there is substantial grounds for difference of opinion,

and

(2) either (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after final order is issued will be inadequate or ineffective."

In considering such motion, 40 C.F.R. 22.29(a) also requires that a motion for interlocutory appeal "shall state briefly the grounds to be relied upon on appeal." In its Motion, Respondent has set forth sufficient grounds to justify certification of its interlocutory appeal. Complainant failed to file a timely response to Respondent's Motion, but filed, on March 26, 1999, a Motion For Leave To File Response Out of Time and Complainant's Response to Respondent's Motion For Interlocutory Appeal.

Specifically, the February 18, 1999, Order involves important questions of law or policy affecting the Department of Defense nationwide, because it defines the legal relationship of the military services and its military members residing in military housing as that of lessor and lessee in the context of the requirements of the Lead Based Paint Hazard Reduction Act (LBPHRA), 42 U.S.C. 4852d. As such, the Order concludes that federal agencies are subject to the requirements of LBPHRA and the Disclosure Rule, 40 C.F.R. Part 745, Subpart F, and it finds that the sovereign immunity of the federal government from civil administrative penalties has been waived for violations of the LBPHRA and Disclosure Rule.

Granting Respondent's Motion for Interlocutory Appeal will materially advance the ultimate termination of the proceeding because it will serve to identify any controlling law. See, Beaumont Company, EPA Docket No. RCRA-III-238, December 15, 1994. Denial of the motion for interlocutory appeal, and, thus, postponing review until after the final order is issued, will be inadequate and/or ineffective, given the threshold nature of the issues involved herein. See, SCA Chemical Services, Inc. & CWM Chemical Services, Inc., EPA Docket Nos. II-TSCA-PCB-88-0205:II- TSCA-PCB-88-0204 (consolidated), October 19, 1994.

This case represents one of the first enforcement actions brought by Complainant under the LBPHRA and Disclosure Rule, the first involving a federal agency, and the first involving the assignment of military housing. As such, important questions of law exist for which there are substantial grounds for difference of opinion and an immediate appeal from the February 18, 1999, Order, will materially advance the ultimate disposition of the proceeding. Thus, the requirements of 40 C.F.R. 22.29(b), for certification of an interlocutory appeal have been satisfied.

ORDER

Accordingly, for the reasons stated, Respondent's Motion for Interlocutory Appeal is **GRANTED**, and the Order at issue is **CERTIFIED** to the Environmental Appeals Board for hearing. Further proceedings on this matter are stayed pursuant to 40 C.F.R. 22.29(d), until the Environmental Appeals Board issues a decision. Respondent further requests that it be permitted to brief and provide oral argument to the Environmental Appeals Board pursuant to 40 C.F.R. 22.29(c)..

Stephen J. McGuire
Administrative Law Judge

Date: March 29, 1999
Washington, D.C.

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