

2/9/94

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ICI AMERICAS, INC.	)	IF&R Docket No. VII-1191C-92P
and	)	
DODGE CITY COOPERATIVE	)	
EXCHANGE,	)	
Respondents	)	

ORDER ON MOTION FOR INTERLOCUTORY APPEAL

On November 16, 1993,<sup>1</sup> the undersigned Administrative Law Judge (ALJ) issued an order granting complainant's motion for a partial accelerated decision on the issue of liability, and denying a similar motion of respondent. Respondent submitted a request for an extension of time up to and including December 6, to file a request, pursuant to 40 C.F.R. § 22.29(a), for an interlocutory appeal. This submission was dated November 23. In a telephone conference call of the same date, an oral order was issued granting respondent's motion. Respondent served its request for an interlocutory appeal on December 6; complainant submitted its opposition to the motion on December 17. On December 22, respondent served a motion, with argument, for leave to file a reply to complainant's response. Complainant served a motion, with argument, for leave to file a sur-response (misdesignated sur-reply) on January 5, 1994. Respondent served a motion, with argument, on January 7, 1994, for leave to file a sur-reply.

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<sup>1</sup> Unless otherwise shown, all dates are for the year 1993.

IT IS ORDERED that respondent's motion of December 22 and January 7, 1994 and complainant's motion of January 5, 1994 be GRANTED.

I

The ALJ has assessed the arguments advanced by the parties concerning whether respondent's motion was filed timely. They will be repeated only to the extent deemed necessary for this order. Respondent makes trenchant and persuasive arguments to establish that its motion for an interlocutory appeal was delivered to the Regional Office of the Environmental Protection Agency (EPA) on December 6, 1993. Of great significance is the Mercury Courier Service record showing delivery at 3:16 p.m. on December 6, 1993, with receipt acknowledged by Louis Clearman, who apparently is an employee of the security staff in the Region VII building. As understood, the security procedures, which were instituted by Region VII, prevent direct delivery to the Office of the Hearing Clerk. There are at least two reasonable scenarios to be drawn from the pleadings, both of which favor respondent. One of these is that security did not deliver the document before the close of business on December 6, but rather on December 7. The second possibility was that security delivered the document before the close of business on December 6, but the Hearing Clerk, for whatever reason, did not stamp it until December 7. In any event, under the facts presented, there is an agency relationship between Region VII and the security employees. In light of the security arrangements, which prevented direct delivery, it is found that the

delivery of the document to security, an agent, was tantamount to delivery and filing with the principal, Region VII's Hearing Clerk. Respondent should not have to bear any burden other than showing, as it has, that delivery was made to security. It is concluded that respondent's motion to certify the ALJ's order issued November 16 was filed in a timely manner in accordance with the requirements of 40 C.F.R. § 22.29 (Rule).

## II

The principal question to be resolved, however, concerns respondent's request that the ALJ's order issued November 16 be certified to the Environmental Appeals Board (EAB) pursuant to the Rule. In pertinent part, this provides:

(b) Availability of interlocutory appeal. The Presiding Officer may certify any ruling for appeal to 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 (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective. (Emphasis supplied.)

Respondent has made a compelling argument for certification. The order involves an "important question of law . . . where there is substantial grounds for differences of opinion" notwithstanding complainant's view that such is not the case "[s]ince the Agency's

interpretation of the Bulk Repackaging Policy has been consistent<sup>2</sup> since it was issued in 1977 [and] there should be no grounds for differing opinions." (Resp. at 2.) Assuming arguendo that EPA has had a consistent interpretation, it does not follow that this or other respondents cannot demonstrate a substantial grounds for an opinion at variance with that of EPA. Overwhelmingly, that is what litigation is all about. The issue involved is, indeed, of import, and one that is likely to arise at the ALJ level not infrequently in the future. In this regard, and to the ALJ's knowledge, there are other matters pending currently in the Office of Administrative Law Judges (OALJ), having a similar question in contention. A resolution of the threshold issue involved in this appeal would obviate conflicts of like cases in the future.

Further, an immediate appeal would "materially advance the ultimate termination of the proceeding." (It could also have a salutary effect upon similar cases in the OALJ.) The ALJ concurs in respondent's assessment that once the central legal issue is resolved on appeal the proceeding will be expedited. Either respondent prevails because the EAB agrees in the former's thinking, or, if same is rejected, the penalty issue can be reached as soon as practicable, either by hearing or settlement.

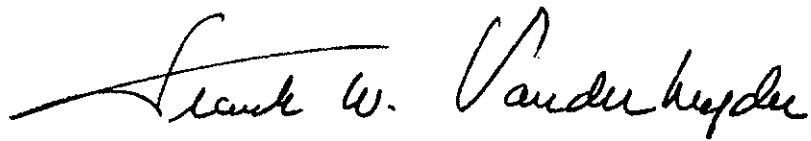
It is concluded that respondent is entitled to have the order of November 16 certified to the EAB for review.

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<sup>2</sup> "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and devines." Emerson, R. W., Self-Reliance.

Complainant requests that if the ALJ certifies the appeal it be given an opportunity "to fully brief the grounds for this appeal." (Resp. at 3.) The granting of this request is within the jurisdiction of the EAB. In this regard, the attention of the parties is invited to the last sentence in 40 C.F.R. § 22.29(c).

IT IS ORDERED that respondent's motion for an interlocutory appeal be GRANTED.



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Frank W. Vanderheyden  
Administrative Law Judge

Dated: \_\_\_\_\_

February 9, 1994

IN THE MATTER OF ICI AMERICAS, INC. AND DODGE CITY COOPERATIVE EXCHANGE, Respondents,  
IF&R Docket No. VII-1191C-92P

Certificate of Service

I certify that the foregoing Order, dated 2/9/94, was sent this day in the following manner to the below addressees:

Original by Regular Mail to: Ms. Venessa Cobbs  
Regional Hearing Clerk  
U.S. Environmental Protection  
Agency, Region VII  
726 Minnesota Avenue  
Kansas City, KS 66101

Copy by Regular Mail to:  
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Marion Walzel  
Marion Walzel  
Legal Staff Assistant

Dated: Feb. 9, 1994