

3/2/94

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 )

CERTIFICATION FOR INTERLOCUTORY APPEAL

This certification is made pursuant to 40 C.F.R. § 22.29. Stated briefly, the history of this matter is as follows: In a pleading received by the Office of Administrative Law Judges (OALJ) on July 29, 1993,<sup>1</sup> respondent moved to dismiss, or in the alternative, for an accelerated decision, pursuant to 40 C.F.R. § 22.20, in its favor. In a pleading received by the OALJ on August 6, complainant opposed respondent's submission, and in a cross motion also sought an accelerated decision on the question of liability. A reply was received from respondent on August 25. On August 31, complainant served a sur-response (reply). Respondent opposed the latter pleading in its submission of September 9.

The undersigned ALJ issued his order concerning the cross motions on November 16, which is the core of contention in this interlocutory appeal. On December 6, respondent served its motion

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

to certify the order on interlocutory appeal to the Environmental Appeals Board (EAB). Complainant opposed the appeal in its submission of December 17 on the grounds that the appeal was not filed timely as required by 40 C.F.R. § 22.29, and for the reason that respondent did not meet the requirements of the aforementioned section of the Consolidated Rules of Practice. Respondent's reply was served on December 22; complainant's sur-response on January 5, 1994; and respondent's sur-reply on January 7, 1994. For the reasons stated in the order of February 8, 1994, the respondent's motion for an interlocutory appeal was granted.

Returning to the November 16 order, the issue was whether respondent, ICI Americas, Inc. (renamed Zeneca, Inc.), sold or distributed a pesticide that was adulterated and misbranded, in violation of section 12(a)(1)(E) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 36j(a)(1)(E). The parties base much of their argument on a policy document, dated July 11, 1977 (1977 Policy) which is an enforcement statement applicable to bulk shipments of pesticides. The central issue is whether, on the facts of the case, the registrant-manufacturer of a pesticide is liable for a products adulteration and misbranding found at the point of sale from a distributor. Complainant perceives the 1977 Policy as an enabling provision which permits the distributor or repackager to forego registration of the pesticide product and operate under the manufacturer's product registration if certain conditions are met, so that the manufacturer remains responsible for pesticide integrity and

labeling. Complainant opines that because ICI and Dodge City Corp., the repackager, took advantage of the policy and met the criteria, the former retains accountability and is liable for any adulteration or misbranding. (Dodge City Coop and the complainant have reached a settlement.) ICI interprets the 1977 Policy to retain the manufacturer's accountability only in certain relationships between the registrant manufacturer and distributor or repackager, and not in the situation in which the repackager is an independent entity from the manufacturer. (Order, November 16, at 5.) For the reasons stated in the November 16 order, it was concluded that under the 1977 Policy, the language of FIFRA, the law of agency, and because FIFRA is a strict liability statute, Zeneca could not escape liability for misbranding and adulteration of the pesticide.

The ALJ is of the opinion that the requirements of 40 C.F.R. § 22.29(b) have been met and the November 16 order is certified for decision on interlocutory appeal.<sup>2</sup>



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Frank W. Vanderheyden  
Administrative Law Judge

Dated: March 3, 1994

<sup>2</sup> Attached hereto is a list of the documents that are being forwarded to the EAB. Following a decision, or if no action is taken within the prescribed period of time set forth in 40 C.F.R. § 22.29(c), it is requested that the attached documents be returned to the ALJ.

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 Certification for Interlocutory Appeal, dated 3/1/94, was sent this day in the following manner to the below addressees:

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Dated: March 1, 1994