UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Dana Corporation-Victor Products Division	)	Docket No. V-W-90-R-14
	)	
	)	and
and	)	
	)	Docket No. V-W-90-R-15
BRC Rubber Group, et al.,	)	
	)	
	)	
Respondents	)	

ORDER DENYING REQUEST FOR INTERLOCUTORY APPEAL

By order issued June 22, 1994, the undersigned granted the Complainant's motion for partial accelerated decision with respect to the Respondent Dana Corporation. That order also denied Complainant's motion for partial accelerated decision with respect to Respondent BRC.

By pleading dated July 5, 1994, the Complainant seeks an interlocutory appeal of that portion of the June 22, 1994 order, which holds that the BRC Respondents are not liable to perform closure and financial assurance for the Churubusco, Indiana facility. The Complainant argues that the June 22 ruling that the BRC Respondents are not responsible for closure and financial assurance is contrary to the provisions contained at 320 IAC 4.1-38-4(d) and 40 C.F.R. § 270.72. The Complainant alleges that the ALJ's ruling is based upon the equitable grounds that the BRC Respondents did not have notice that the Churubusco facility was subject to RCRA regulation. Complainant further argues that BRC Respondents are liable because RCRA is a strict liability statute.

In its July 15, 1994 Response, Dana/BRC Respondents' (Dana/BRC) oppose Complainant's request. Dana/BRC argue that the Complainant's request fails to meet the requirements as set forth in 40 C.F.R. § 22.29(b) to justify an interlocutory appeal. Dana/BRC cite cases and legislative history behind comparable requirements in the federal statute, 28 U.S.C. § 1292(b), that establish that interlocutory appeals should be granted only sparingly and in extraordinary circumstances.

Dana/BRC contend that granting the interlocutory appeal will not materially advance the termination of this proceeding. They maintain that the amount of civil penalty continues to be the only outstanding issue and that there is no basis for a finding that an appeal will materially advance the termination of this matter. It is argued that even if an interlocutory appeal is granted and the EPA ultimately prevailed, the parties would be returned to the same position they are in now--negotiating over an appropriate penalty. According to Dana/BRC an interlocutory review will only serve to protract, delay, and increase the cost of these proceedings.

The June 22, 1994 order, as clarified in my separate order issued this same day, found Dana liable and responsible for meeting the requirements related to closure. In so doing, I granted the precise relief requested by the EPA in its "Second Amended Complaint Against Respondent Dana Corporation" (dated April 17, 1991) and renewed in its July 8, 1994 Motion for Clarification. The Second Amended Complaint against Dana specifically set forth what would be required of Dana if BRC Respondents were not held responsible for closure-related requirements. Thus, the June 22 order, as clarified, fixed the liability for closure and required its performance. The only issue which remains relates to the penalty associated with Dana's liability.

The requirements for an interlocutory appeal as set forth in 40 C.F.R. § 22.29(e) are as follows:

1. The order involves an important question of law or policy concerning which there is substantial grounds for difference of opinion, <u>and</u> either

2(a) An immediate appeal will materially advance the ultimate termination of the proceeding, or

2(b) Review after the final order is issued will be inadequate or ineffective.

In the circumstances of this case, the June 22 order raises more of a hypothetical with respect to BRC's liability than it does "an important question of law or policy." Nor is it clear from the pleadings how "an immediate appeal will materially advance the ultimate termination of the proceeding." Complainant has also failed to demonstrate why a review after a final order is issued in these proceedings would be "inadequate or ineffective." Indeed, grant of this appeal

would be tantamount to an invitation for an advisory opinion which would further delay the ultimate disposition of the case and needlessly increase the workload of the agency.

The Complainant is reminded that the findings in this case with respect to Respondent BRC would not constitute binding precedent in subsequent cases should the Complainant and Respondent Dana settle the penalty issue.

Jon G. Lotis
Administrative Law Judge

Dated: August 1, 1994
Washington, D.C.

IN THE MATTER OF DANA CORPORATION-VICTOR PRODUCTS DIVISION AND BRC RUBBER GROUP, Respondent,
Docket Nos. V-W-90-R-14 AND V-W-90-R-15

CERTIFICATE OF SERVICE

I certify that the foregoing Order Denying Request for Interlocutory Appeal, dated August 1, 1994, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

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Dated: August 1, 1994
Washington, D.C.