

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

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In re: Stericycle, Inc.	)	
Utah Title V Permit	)	Appeal Number: CAA 13-01
No. 1100055002	)	
	)	
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**ENVIRONMENTAL PROTECTION AGENCY OFFICE OF AIR AND RADIATION  
MOTION (1) FOR LEAVE TO FILE MOTION TO DISMISS THE APPEAL FOR LACK  
OF JURISDICTION WITHOUT PREJUDICE TO SUBSEQUENTLY FILE A  
RESPONSE ON THE MERITS AND (2) TO EXTEND DATE FOR RESPONSE UNTIL  
45 DAYS AFTER RULING ON JURISDICTIONAL ISSUES**

The United States Environmental Protection Agency, Office of Air and Radiation (“OAR”), requests that the Environmental Appeals Board (“Board”) (1) grant OAR leave to file the attached “Motion to Dismiss the Appeal for Lack of Jurisdiction” without prejudicing OAR’s right to subsequently file a response on the merits to the appeal that has been filed in this matter, and (2) extend the date for OAR to file its response on the merits to the appeal until 45 days after the Board rules on the Motion to Dismiss the Appeal for Lack of Jurisdiction.<sup>1</sup> OAR states the following in support of this motion:

1. An appeal was filed in this matter by Greenaction for Health and Environmental Justice and Concerned Salt Lake City Residents Against Stericycle Incinerator (“Petitioners”) on August 15, 2013 (“Appeal”). The Appeal asked the Board to “expedite[] consideration” of a “Petition for Review” requesting that the Agency object to the Stericycle permit issued by the Utah Division of Air Quality to Stericycle, Inc.

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<sup>1</sup>The undersigned counsel made phone calls to both Petitioners about this motion (Petitioners are not represented by counsel in this matter); each of whom stated that they do not support this motion.

2. On September 13, 2013, the Board sent OAR a letter requesting that OAR file a response to the Appeal no later than October 15, 2013. Due to the government shutdown, OAR did not file a response by October 15, and, when the government reopened on October 17, filed a motion with the Board for a revised response date of October 31, 2013. On October 22, 2013, the Board issued an order granting OAR's motion.

3. As described in the attached Motion to Dismiss the Appeal for Lack of Jurisdiction, the Board lacks jurisdiction over this Appeal.

4. There are important policy reasons why the Board should resolve the jurisdictional issues in this matter before further briefing on the merits:

- Petitioners will benefit from learning as soon as possible if the Board lacks jurisdiction to consider these claims, so that they can take appropriate steps to pursue their claims in a proper venue(s);

- Technical and legal staff and management in both EPA Region 8 and EPA Headquarters could be involved in preparing and reviewing a response to the Appeal. If the Board lacks jurisdiction to consider the Appeal, it would not be in the public interest to require the expenditure of taxpayer-funded resources to prepare a response for the Board addressing matters that the Board lacks jurisdiction to review.

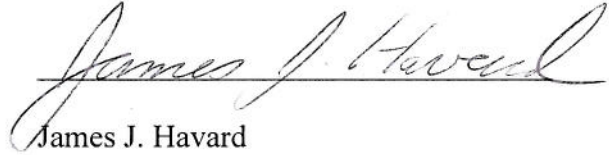
For the reasons set forth above, OAR requests that the Environmental Appeals Board (1) grant OAR leave to file the attached Motion to Dismiss the Appeal for Lack of Jurisdiction without prejudicing OAR's right to subsequently file a response on the merits to the Appeal, and (2) extend the date for OAR to file its full response on the merits to the Appeal until 45 days after the Board rules on the Motion to Dismiss the Appeal for Lack of Jurisdiction.<sup>2</sup>

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<sup>2</sup>The Board addressed a similar procedural motion, albeit unopposed, in a recent appeal under the Clean Water Act. *In re Mesabi Nugget Delaware, LLC*, NPDES Permit No. MN0067687, NPDES Appeal Nos. 13-01, 13-02, and 13-03 (EAB Order, dated February 13, 2013). In that matter, the Board stayed the deadline for a substantive response to the petitions pending a decision on the EPA Region's jurisdictional motion, and allowed 10 days for the petitioners and permittee to file a response to the jurisdictional motion. OAR does not object to such an approach in the present matter.

Respectfully Submitted,

Date: October 28, 2013



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BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
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In re: Stericycle, Inc. Utah Title V Permit No. 1100055002	) ) ) ) )	Appeal Number: CAA 13-01
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**ENVIRONMENTAL PROTECTION AGENCY OFFICE OF AIR AND RADIATION  
MOTION TO DISMISS THE APPEAL FOR LACK OF JURISDICTION**

The Environmental Appeals Board (“Board” or “EAB”) received an appeal (“Appeal”) on August 15, 2013 from Greenaction for Health and Environmental Justice and Concerned Salt Lake City Area Residents Against Stericycle (“Petitioners”) asking the Board to “expedite[] consideration” of a “Petition for Review” filed with the Environmental Protection Agency (“EPA”) requesting that EPA object to a Clean Air Act (“CAA” or “Act”) title V permit issued by the Utah Division of Air Quality to Stericycle, Inc. The underlying petition, dated March 16, 2009, purports to be a petition under section 505(b)(2) of the Act, which authorizes petitions for EPA to object to state-issued title V permits issued under EPA-approved programs. The EPA Office of Air and Radiation (OAR) moves to dismiss this Appeal for lack of jurisdiction.

**Statutory and Regulatory Background**

Title V of the Act requires that certain sources of air pollution, including major stationary sources, apply for, and operate consistent with, comprehensive operating permits to assure compliance with the requirements of the Act. 42 U.S.C. §§ 7661a(a), 7661b(c), 7661c(a). The Act contemplates that these operating permit programs will be administered primarily by state and local air pollution control agencies. 42 U.S.C. § 7661a(b). Each state must develop and



submit to EPA a permit program to meet the requirements of title V and the applicable regulations. 42 U.S.C. § 7661a(b), (d)(1). EPA's 40 C.F.R. part 70 regulations set forth minimum requirements for *state* title V permit programs and the procedures by which the Administrator will approve and oversee implementation of the state title V permit programs.

The Act provides EPA broad authority to oversee the operating permits issued by approved states. States must provide EPA with the opportunity to review permit applications and proposed permits (including for permit renewals), *see* 42 U.S.C. § 7661d(a)(1), and EPA “shall object” to any permit it “determine[s]” contains “provisions that are . . . not in compliance” with requirements of the Act. *Id.* § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c). Title V requires states to provide the public with notice of and an opportunity to comment on draft operating permits. *See* 42 U.S.C. § 7661a(b)(6); 40 C.F.R. § 70.7(h). Then, if the Administrator does not object to the issuance of a proposed permit, “any person may petition the Administrator” to do so. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). The Administrator shall issue an objection “if the petitioner demonstrates to the Administrator that the permit is not in compliance” with the requirements of the Act. 42 U.S.C. § 7661d(b)(2). The Act provides that EPA must respond to such petitions within 60 days. *Id.* In addition, by statute, the Administrator may not delegate the requirement to respond to title V petitions under CAA section 505(b)(2). *Id.*

EPA's 40 C.F.R. part 71 regulations set forth a comprehensive *federal* permit program, consistent with the requirements of title V. The part 71 program applies where there is no approved part 70 program, and in certain other circumstances, such as where a federal program is imposed due to inadequate implementation by a part 70 permitting authority, and where part 71 permits are issued to satisfy an EPA objection. 40 C.F.R. § 71.4. The part 71 regulations also

establish criteria and procedures under which EPA may delegate authority to administer, in whole or in part, that federal permit program to a state, eligible tribe, or local government. 40 C.F.R. § 71.10. Permits issued under part 71 may be appealed to the EAB. 40 C.F.R. § 71.11(l).

### **Factual Background**

The Utah Department of Environmental Quality, Division of Air Quality (“UDAQ”) adopted its own title V program, which EPA approved under part 70. *See* 40 C.F.R. Part 70, App’x A; 60 Fed. Reg. 30,192 (June 8, 1995). On February 19, 2009, UDAQ issued a title V renewal permit (“Permit”), Number 1100055002, for a source in North Salt Lake operated by Stericycle, Inc. Ex. 1 at 1, 3. “The primary emission unit at the source is a hospital/medical/infectious waste incinerator (HMIWI).” *Id.* at 2.

On March 16, 2009, Petitioners sent to Carol Rushin, Acting Regional Administrator, EPA Region 8, a document (the “underlying Petition”) captioned “Appeal of Title V Permit Issued by Utah Division of Air Quality to Stericycle Inc.” Ex. 2 at 1. Invoking section 505(b)(2) of the Act, the underlying Petition asked the Administrator “to object to the Title V operating permit issued by [UDAQ] for the Stericycle Medical Waste Incinerator.” *Id.* The underlying Petition also requested Region 8 to “assume oversight and deny the approval order of” the Permit. *Id.* at 2 (referencing “Permit No. 1100055002”); *see also id.* at 20 (specifying remedies requested of Region 8). EPA has not made a determination regarding the underlying Petition.<sup>1</sup>

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<sup>1</sup>On May 23, 2013, the OAR Office of Air Quality Planning and Standards sent Petitioners a letter explaining that:

The Agency has reviewed your petition on Stericycle’s title V permit, submitted under Section 505(b)(2) of the [Act]. We have also reviewed the supporting information that you submitted, along with multiple other pieces of complex information that are part of the record for Stericycle’s title V permit. While progress has been made in response to your petition, at this time the Administrator has not made a final determination. We will continue to work on your permit petition and the EPA will issue a response as soon as practicable.

Letters from Stephen D. Page to Ms. Cindy King and Mr. Bradley Angel, dated May 23, 2013. Ex. 3.

## The Scope of the Board's Jurisdiction

“The Board’s jurisdiction is circumscribed by its governing regulations.” *In re Mesabi Nugget Del., LLC*, NPDES Appeal Nos. 13-01, 13-02, and 13-03, slip op. at 3 (EAB Mar 19, 2013) (citing 40 C.F.R. § 1.25(e)(2)). “The [Board] shall exercise any authority expressly delegated to it in [title 40 of the Code of Federal Regulations].” 40 C.F.R. § 1.25(e)(2).<sup>2</sup> Conversely, the Board must dismiss a matter that is outside the Board’s authority. *See, e.g. Mesabi Nugget* at 6.

Within title 40 of the Code of Federal Regulations, numerous provisions expressly delegate authority to the Board. For example, part 124 of title 40 expressly delegates authority to the Board to consider petitions for review of federal Resource Conservation and Recovery Act, Underground Injection Control, National Pollution Discharge Elimination System, and Prevention of Significant Deterioration permits. 40 C.F.R. § 124.19(a). However, “[a]dditional bases for the Board’s jurisdiction exist.” *Mesabi Nugget* at 3 n.2 (citing examples). In the preamble for the 1992 rule establishing the Board, EPA set out a list of matters for which the Board has been expressly delegated authority. *See* 57 Fed. Reg. 5,320, 5,320-21 (Feb. 13, 1992). The matters arise under various statutes. *See id.*

In particular, several regulations expressly delegate authority to the Board with regard to certain matters under the CAA.<sup>3</sup> At the time of the 1992 rulemaking, the matters under the Clean Air Act for which the Board had authority were:

- Appeals of civil penalty cases arising under section 211 of the Clean Air Act (CAA), as amended, which are governed by the procedures set out in part 22; ...

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<sup>2</sup> In addition, the Administrator may direct the Board to exercise authority (as the Administrator deems appropriate) over matters for which the Board is not expressly delegated authority. 40 C.F.R. § 1.25(e)(2).

<sup>3</sup> As mentioned in the underlying Petition, Stericycle Inc. also has a solid waste permit for the facility. Ex. 2 at 15. The permit was issued by the Utah Solid and Hazardous Waste Control Board. Ex. 4. The solid waste permit is not at issue in the underlying Petition or in the Appeal and therefore does not provide any potential source of jurisdiction for the Board.



- Appeals of determinations under § 60.539, which deals with standards of performance for new residential wood heaters promulgated under the Clean Air Act[;]
- Appeals of Clean Air Act section 120 noncompliance penalty cases, which are governed by the procedures set out in part 66;
- Appeals of cases arising under the Clean Air Act involving control of air pollution from motor vehicles and motor vehicle engines, which are governed by the procedures set out in part 85;
- Appeals of cases arising under the Clean Air Act involving control of air pollution from new motor vehicles and new motor vehicle engines and certification and test procedures, which are governed by the procedures set out in part 86; ... [and]
- Appeals from permit decisions made by Regional Administrators and delegated States under the Clean Air Act (PSD permits), which are governed by the procedures set out in part 124[.]

*Id.* Since the promulgation of the 1992 rule establishing the Board, the Board has also been expressly delegated authority over appeals of certain decisions of the Administrator under the acid rain program in title IV of the Act, *see* 58 Fed. Reg. 3,590 (Jan. 11, 1993); appeals of the initial decisions of a Presiding Officer for assessment of civil penalties under sections 113(d), 205(c), 211(d), and 213(d) of the CAA, *see* 64 Fed. Reg. 40,138 (July 23, 1999); and petitions to review new source review (“NSR”) permits issued by EPA or a delegate Tribal agency in Indian country, *see* 76 Fed. Reg. 38,748 (July 1, 2011). The Stericycle Appeal does not fall into any of the above categories of matters; therefore none of the rules expressly delegating authority to the Board over those matters provides authority for the Board to hear this Appeal.

Finally, the Board has also been expressly delegated authority to hear petitions to review CAA title V permits issued under the part 71 federal operating permits program. 61 Fed. Reg. 34,202 (July 1, 1996). We turn to considering the Board’s jurisdiction over CAA title V permits.



## **The Board Does Not Have Jurisdiction over this Appeal**

Petitioners do not attempt to identify any source of jurisdiction for the Board to hear this Appeal. There is no general, cross-cutting regulation, or more specific regulation, that provides the Board jurisdiction over the Appeal.<sup>4</sup> While part 71 provides the Board with jurisdiction to review conditions of title V permits issued under part 71, it provides no jurisdiction over permits issued under part 70, or related EPA actions taken under part 70.

EPA's part 71 regulations provide that a petition may be submitted to the EAB "[w]ithin 30 days after a final permit decision has been issued . . . to review any condition of the permit decision." 40 C.F.R. § 71.11(l)(1). Under 40 C.F.R. section 71.2, the term "*permit* (unless the context suggests otherwise) means any permit or group of permits covering a part 71 source that has been issued, renewed, amended or revised pursuant to this part." There is no indication that the term "permit" in 40 C.F.R. section 71.11(l)(1) means anything other than as specified in the definition in 40 C.F.R. section 71.2: a permit covering a part 71 source. The Permit at issue in this Appeal is, without dispute, a part 70 permit, issued by an approved part 70 permitting authority, to a part 70 source. As such, this Permit is not subject to the Board's review under section 71.11(l)(1).

This conclusion is consistent with the Board's statement in its Practice Manual that "a permit issued by a state with an EPA-authorized state program may not be appealed to the EAB."<sup>5</sup> Environmental Appeals Board, *Practice Manual*, 59 (March 26, 2013) (specifically

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<sup>4</sup>While, as noted above, the Administrator may direct the Board to exercise authority (as the Administrator deems appropriate) over matters for which the Board is not expressly delegated authority, 40 C.F.R. § 1.25(e)(2), in this instance, the Administrator has not directed the Board to exercise authority over petitions to object to title V permits issued by approved states as a general matter, nor over this Appeal in particular. In fact, section 505(b)(2) of the Act provides that the requirement to respond to petitions to object to state-issued title V permits may not be delegated by the Administrator.

<sup>5</sup>In the *Practice Manual*, the Board notes that: "Section 71.10(i) provides for an appeal to the EAB from a Title V operating permit that was issued by a state, tribal, local, or other authority pursuant to a delegation of authority from EPA." *Practice Manual* at 59 (citing *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 27-29 (EAB 2005)). Importantly,

discussing appeals of title V permits); *see also, In the re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 135 (April 28, 1997) (“The permit condition in question relates to Title V operating permit requirements, and the Board does not have jurisdiction to review the non-PSD Title V portion of this permit, since that portion of the permit is a State permit.”); *In the Matter of Kawaihae Co-generation Project*, Order on Petition at 2 (March 10, 1997) (title V order of the Administrator noting that issues regarding prevention of significant deterioration permits issued by approved states may be reviewed by the Administrator in response to title V petitions, but issues regarding federal prevention of significant deterioration permits issued by delegated states will not because these permits are subject to EAB jurisdiction), Ex.5.

Petitioners ask the Board to expedite consideration of the underlying Petition on the Permit. Procedures for EPA’s response to petitions to object to title V permits issued by approved state permitting authorities are provided in part 70, 40 C.F.R. section 70.8(d), and not part 71, and thus EPA’s response to such petitions is not a permit-related decision under part 71 appealable to the EAB under 40 C.F.R. section 71.11(l)(1).<sup>6</sup>

The conclusion that the Board lacks authority over this Appeal is buttressed by section 505(b)(2) of the Act. The Act provides that the Administrator may not delegate the requirements of section 505(b)(2), which includes the requirement to respond to title V petitions. 42 U.S.C. § 7661d(b)(2). Thus, to the extent that the Appeal is requesting that the Board itself, on an expedited basis, issue an order addressing the merits of the underlying Petition, such relief would be precluded by CAA section 505(b)(2).

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the Permit underlying this Appeal is a part 70 permit issued by UDAQ, a permitting authority that is approved under part 70, not delegated under part 71.

<sup>6</sup> EPA’s authorities under part 71 can come into play *if* the Administrator does object to a state-issued permit. *See, e.g.*, 40 C.F.R. §§ 70.7(g)(4) & (5), 70.8(d), and 71.4(e). However, those authorities would be implicated only *if* EPA *actually objects* to a state permit, and the state does not respond. Part 71 provisions do not come into play where, as here, the Administrator is determining whether to object in response to a title V petition under part 70.

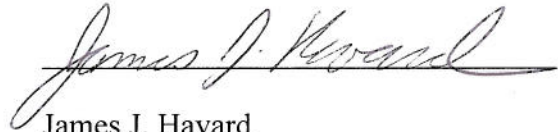
Nor does the Board have jurisdiction to direct EPA to respond to a title V petition submitted under CAA section 505(b)(2) and 40 C.F.R § 70.8(d). Section 304 of the CAA grants to the United States District Courts jurisdiction over claims that EPA has failed to meet a mandatory duty under the CAA. 42 U.S.C. § 7604.

**Conclusion**

For the forgoing reasons, OAR requests that the Appeal be dismissed for lack of jurisdiction.

Respectfully Submitted,

Date: October 28, 2013



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