

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

In the Matter of:)
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)
The Geon Company) CAA Appeal No. 00-7
ID No. NJ0008)
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)

ORDER DISMISSING PETITION FOR REVIEW

On May 18, 2000, the Geon Company ("Petitioner") filed this Petition for Review with the U.S. Environmental Protection Agency's Environmental Appeals Board ("Board"), citing 40 C.F.R. § 71.11(l) as the jurisdictional basis for the petition. Petitioner seeks review of a New Jersey Department of Environmental Protection ("NJDEP") determination that Petitioner "had 'common control' of a joint venture" and that Petitioner was required to file a single operating permit application covering both Geon's and the joint venture's facilities. See Petition for Review ("Petition") at 1. For the reasons discussed below, the Petition for Review is dismissed.

I. BACKGROUND

Petitioner is a manufacturer of synthetic resins, more specifically, dispersion resins. Petition, att. J, at 2. Petitioner's manufacturing facility is located in an industrial park in Pedricktown, New Jersey. *Id.*, att. L. Petitioner was issued a facility-wide permit by the NJDEP on January 30, 1997.

In accordance with Title V of the federal Clean Air Act, 42 U.S.C. §§ 7661-7661f, Petitioner sought to obtain a Title V operating permit on or about January 1998. *Id.*, att. A. NJDEP informed Petitioner that its facility-wide permit could serve as its Title V permit application. *Id.* Petitioner submitted its Title V operating permit application on March 16, 1998, and NJDEP informed Petitioner that its application was administratively complete by letter dated May 18, 1998. *Id.* NJDEP also informed Petitioner that copies of Parts A and B of its permit application, and certain forms, should be sent to the U.S. Environmental Protection Agency Region II ("Region II"). *Id.*

In early 1999, Petitioner entered into a joint venture, named Oxy Vinyl, L.P. ("Oxy Vinyl"), with Occidental Chemical Corporation ("Occidental"). *Id.*, atts. C and D. Oxy Vinyl was to operate a

portion of the Geon facility at Pedricktown, New Jersey. Petitioner then sought to obtain separate Title V operating permits -- one for Petitioner's portion of the facility, and one for Oxy Vinyl's facility. *Id.* However, NJDEP, in consultation with Region II, determined that Petitioner "had 'common control' of a joint venture" and that Petitioner was thus required to file a single operating permit application covering both Petitioner's and Oxy Vinyl's facilities. *Id.*, att. G.

Petitioner sought reconsideration by NJDEP, but NJDEP declined to change its decision. *Id.*, att. K. The contested determination was memorialized in a final letter from NJDEP to Petitioner dated April 11, 2000. *Id.* This Petition for Review followed.

II. DISCUSSION

A. Statutory and Regulatory Framework

The U.S. Environmental Protection Agency ("EPA") implements the federal Title V operating permits program pursuant to Title V of the Clean Air Act ("CAA"). 42 U.S.C. §§ 7661 - 7661f. The CAA requires that the EPA promulgate regulations governing the minimum elements of a Title V operating permit program. See 42 U.S.C. § 7661a(b). The

regulations establishing these requirements are found at 40 C.F.R. parts 70 and 71. The part 70 regulations establish requirements for approval of state operating permits programs implementing the Title V permit program requirements. Part 71 establishes the federal operating permits program administered in the absence of an approved State program for the area in which the source is located.

B. *The Board Lacks Jurisdiction to Consider the Petition*

This Petition must be dismissed because the Board lacks jurisdiction to consider the determination by NJDEP that Petitioner had "common control" of Oxy Vinyl and thus was required to submit a single Title V operating permit application covering both Petitioner's and Oxy Vinyl's facilities. Petitioner seeks review under 40 C.F.R. section 71.11(1) which provides in pertinent part:

- (1) Within 30 days after a final permit decision has been issued, any person who filed comments on the draft permit or participated in the public hearing may petition the [Board] to review any condition of the permit decision.

40 C.F.R. § 71.11(1).

Petitioner relies upon a provision contained within 40 C.F.R. part 71, which part is entitled "Federal Operating Permit Program." Part 71 applies only to Title V operating permits issued by EPA, see 40 C.F.R. §§ 71.1(a), 71.4, and State, local, tribal, and other non-State agencies that have been delegated federal authority pursuant to 40 C.F.R. § 71.10. NJDEP is not a delegated State agency; rather, it has been granted interim authority to conduct a State Title V operating permit program under 40 C.F.R. part 70. See 40 C.F.R. part 70, app. A (Approval Status of State and Local Operating Permits Programs). Thus, section 71.11(l) is inapplicable because NJDEP is not a delegated State implementing a federal Title V operating permits program, but rather conducts its own State Title V operating permits program under part 70 in accordance with the interim authorization from EPA. The Board lacks jurisdiction to review permits issued by authorized State permit programs. See *In re Kawaihae Cogeneration Proj.*, 7 E.A.D. 108, 110 n.5 (EAB 1997) (Where a single CAA permit contains requirements implementing both an approved State Title V Program and the federal Prevention of Significant Deterioration Program, the Board's jurisdiction extends only to review of the part of the combined permit implementing the federal program).¹

¹We note that even if NJDEP were a delegated agency and section 71.11(l) applied, the Board would still lack jurisdiction at this time because NJDEP has not yet issued a final permit decision in this

Accordingly, the Petition for Review is dismissed.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 6/1/00

By: _____ /s/
Edward E. Reich
Environmental Appeals Judge

case. As outlined above, a petition may be filed only "after a final permit decision has been issued." 40 C.F.R. § 71.1(l)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Petition for Review in the matter of the Geon Corporation, CAA Appeal No. 00-7, were sent to the following persons in the manner indicated:

Certified Mail
Return Receipt
Requested:

James Stewart, Esq.
Lowenstein Sandler PC
65 Livingston Avenue
Roseland, New Jersey 07068

Dated: 6/1/00

/s/
Annette Duncan
Secretary