

Signed November 25, 1997

Michael L. Rodburg, Esq.
Lowenstein, Sandler, Kohl, Fisher & Boylan
65 Livingston Avenue
Roseland, NJ 07068-1791

Re: Common Control Question -- Dupont and Dupont Dow Elastomers

Dear Mr. Rodburg:

The U.S. Environmental Protection Agency (EPA), Region 2 Office, has reviewed your September 30, 1997, letter on behalf of E.I. du Pont de Nemours & Company ("Dupont") regarding whether the operations of Dupont Dow Elastomers L.L.C. ("DDE") are considered to be part of the same major stationary source as the Dupont facility at which it is located. In particular, you have asked whether Dupont and DDE are under common control for purposes of Title V applicability.

According to your letter, DDE is a limited liability company owned under a 50-50 joint venture between Dupont and Dow Chemical Company. DDE is engaged solely in the production and sale of elastomers. DDE is governed by a Members Committee with members appointed equally by Dupont and Dow Chemical Co.; however, there is no overlap between Dupont's Board of Directors and DDE's Members Committee. DDE leases the land on which its buildings and equipment are located directly from Dupont on a portion of the Dupont Chambers Works' property. All assets, equipment, and operations of DDE are separate from that of Dupont. In addition, DDE does not sell finished product directly to Dupont nor purchase raw materials from Dupont. Based on the information provided in your letter, EPA's opinion is that Dupont and DDE are under common control for the purposes of Title V of the Clean Air Act (CAA). The reasons for this position are set forth below.

Through regulation, guidance, and individual determinations, the EPA has established several mechanisms for use by sources and permitting authorities in determining common control as used in the definition of "major source" under Title I and Title V of the Clean Air Act.¹ First, common control can be established through ownership (i.e., same parent company or a subsidiary of the parent company). Second, common control can be established if an entity such as a corporation has decision-making authority over the operations of a second entity through a contractual

¹Title V defines a "major source" as: any stationary source (or any group of stationary sources located within a contiguous area and under common control) that is either of the following: (A) a major source as defined in section 112; (B) a major stationary source as defined in section 302 or part D of title I.

agreement or a voting interest². If common control is not established by the first two mechanisms, then one should next look at whether there is a contract for service relationship between the two companies³ or if a support/dependency relationship exists between the two companies⁴ in order to determine whether a common control relationship exists.

Here, EPA agrees that DDE is not part of the same parent company as Dupont since, generally, a joint venture is not a subsidiary to either party of the joint venture. However, as discussed below, it is EPA's view, that DDE, via its contractual relationship forming the joint venture, is under common control of Dupont with the rest of the Dupont facility. The bulk of your letter attempted to explain that there is no support or dependency between Dupont and DDE (by answering the list of questions in the William Spratlin letter) as a basis for demonstrating no common control. However, because we believe that common control exists through a contractual joint venture arrangement, we do not need to address the support-dependency test elements of your letter.

In a 1980 Federal Register notice, EPA stated it will determine control on a case-by-case basis and will be guided by the general definition of control used by the Securities and Exchange Commission (SEC). (See 45 Fed. Reg. 59878). The SEC defines control in 17 CFR 240.12b-2 as "the possession, direct or indirect, of the powers to direct or cause the direction of the management and policies of a person (or organization or association) whether through the ownership of voting shares, contract, or otherwise." While you mention that EPA will be guided by the general definition of control utilized by the SEC on page 2 of your letter, you did not specifically address whether Dupont has the power to directly or indirectly "cause the direction of the management and policies" of DDE. Based on the information available to us, however, it appears that Dupont does have sufficient control of DDE.

Dupont has a contractual agreement with Dow Chemical Co. to form the joint venture, DDE. A joint venture has been defined in Goodman and Lorensen's Illustration of Accounting for Joint Ventures as:

[A]n entity that is owned, operated and jointly controlled by a small group as a separate and specific business project organized for the mutual benefit of the ownership group. Each Venturer commonly participates in overall management regardless of the percentage of ownership and significant decisions commonly require the consent of each of the

²See 45 Fed. Reg. 59874, 59878 (Sept. 11, 1980) (stating determinations of control will be made case-by-case and that the EPA will be guided by the general definition of control used by the Securities and Exchange Commission).

³See John S. Seitz Memorandum, "Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act (Act)" (Aug. 2, 1996) (available on EPA's Technology Transfer Network (TTN)).

⁴See letter by William Spratlin, Region 7 Air, RCRA and Toxics Division Director, to State and Local Air Directors (Sept. 18, 1995). Letter provides questions to ask to rebut the presumption that a company locating on another's land establishes a "control" relationship.

Venturers so that no individual Venturer has unilateral control.⁵

In general, parties to a joint venture have a common interest or purpose to carry out a single business enterprise for profit.⁶ As part of the contract, each party to a joint venture has a joint or mutual right to control the venture for their common purpose. Therefore, pursuant to the SEC definition of control via a contractual arrangement and the facts provided, the EPA believes that there is common control between Dupont and DDE.⁷

Furthermore, the fact that Dupont has 50% ownership in DDE and can appoint half of DDE's Members Committee also supports the position that it exerts control over DDE. This meets the definition of control under the SEC regulations by virtue that Dupont has sufficient voting interest in DDE to direct the decisions of DDE.⁸ Lastly, because DDE is located on the same property as Dupont, DDE is contiguous to Dupont under the definition of major source.

⁵Reprinted in Edgar Herzfield and Adam Wilson, Joint Ventures, 1996.

⁶See Dupont Dow Elastomer Joint Venture Announces Start-Up (April 2, 1996) <<http://www.dupont-dow.com/start.html>> (stating that Dupont and Dow's combined strengths will make this new company a potent force in the highly competitive elastomers industry).

⁷Cf. Cytec Title V Draft Permit Language, TTN Bulletin Board, June 6, 1997 (One Title V permit issued for the manufacturing activities at the Cytec Wallingford, CT site which consists of three production departments: the manufacture of thermoset molding compounds by a joint venture between Carmel Chemical Company and Cytec Industries Inc.; the production of thermoplastic molding compounds by a joint venture between Rohm Industries and Cytec Industries Inc.; and the production of liquid and spray-dried resins by Cytec Industries Inc.).

⁸See Letter from Winston A. Smith, Region 4's Air, Pesticides and Toxics Management Division Director, to Authur Williams, Director of Air Pollution Control District of Jefferson County (March 3, 1997) (finding based on past applicability determinations in the Region, that because Dupont owns 50% of DDE, Dupont could exercise voting power over DDE to influence production levels at the facility). See also, e.g., Letter from Jewell A. Harper, Chief of Region 4's Air Enforcement Branch to Ron Methier of the Georgia Department of Natural Resources (July 20, 1995) (determining that United Technologies Corp. and Precision Components International, Inc. are one source for Title V applicability purposes in the situation where United Technologies owns 50% of Precision Components and the Wertheimer Group owns the other 50% and directs the operational management of Precision Components); 69 Am.Jur.2d, Securities Regulation-Federal, §10 (1993) ("It is recognized that the potentiality of exercising a controlling influence upon the activities of a corporation may exist in more than one person at the same time, and that a finding of control cannot be rebutted by asserting the existence of control in others.")(citing In the Matter of Moreau Manufacturing Corporation, 1941 SEC LEXIS 692 (July 9, 1941)(finding that Moreau's management and policies are subject to controlling interests by International Hydro-Electric System, Niagara Hudson Power Corporation and Finch, Pruyn and Company, Inc., where each have equal ownership control and power to vote even though day to day supervision is provided by Niagara Hudson)).

In conclusion, because Dupont and DDE are under common control (using the SEC definition of control in Title 17 of the CFR), have the same first 2-digit SIC code, are contiguous, and combined emissions exceed the major source thresholds, Dupont and DDE are one major stationary source for Title V applicability purposes. This determination pursuant to the Clean Air Act does not change the June 6, 1997 response provided by Dr. Maria J. Doa, Chief of the Toxics Release Inventory Branch, finding that Dupont and DDE are separate facilities under Section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA). The purposes for defining “facility” under EPCRA are distinguishable from the purposes for defining “major stationary source” under the CAA. In addition, while Dupont and DDE are one major stationary source for Title V applicability purposes, the EPA would like to point out that permitting authorities have discretion to issue two permits and name two responsible officials for the two facilities (if the named persons meet the definition in 40 CFR §70.2) as long as all emission units, emissions and applicable requirements are accounted for.⁹

This letter is not intended to supersede existing federal or state regulations. Because New Jersey is the Title V permitting authority for the subject facility, questions regarding New Jersey laws and regulations under the States’s Title V program should be directed in the first instance to the New Jersey Department of Environmental Protection, Operating Permits Group. Under Title V of the CAA, EPA assures compliance with the CAA, applicable implementation plans, and the requirements of part 70, in part through its 45-day review and objection opportunity, and in part through its enforcement authority. The positions set forth in this letter are intended solely as guidance and do not represent final Agency action. These guidance statements are not ripe for judicial review. Moreover, this letter is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. If you have any questions about this letter, please contact Argie Cirillo of Region 2’s Office of Regional Counsel at 212-637-3203.

Sincerely,

Steven C. Riva, Chief
Permitting Section, Air Programs Branch

cc: John Walke, OGC
Kirt Cox, OAQPS
Michele Dubow, OAQPS
Maria Doa, EPCRA
Tom Micai, NJDEP

⁹See supra note 3, John Seitz Memorandum (explaining multiple responsible officials).