UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ENVIRONMENTAL APPEALS BOARD

In re: Environmental Disposal Systems, Inc. UIC Appeal No. 07-03

Underground Injection Control Permits
MI-163-1W-C007 and MI-163-1W-C008

MOTION FOR RECONSIDERATION AND MOTION FOR STAY OF ORDER DENYING PETITION FOR REVIEW AND STAY OF TERMINATION OF UIC PERMITS PENDING APPEAL

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I. INTRODUCTION AND STATEMENT OF POSITION

The Police and Fire Retirement System of the City of Detroit, RDD Investment Corp. and RDD Operations, LLC (collectively "Petitioners"), by and through their attorneys, Clark Hill PLC, respectfully move the United States Environmental Protection Agency ("EPA") Environmental Appeals Board ("EAB") for reconsideration of the EAB's July 18, 2008 Order Denying Review of the Petitioners' November 20, 2007 Petition for Review ("Petition") of the EPA's October 22, 2007 Notice of Decision to Terminate (the "Termination") Underground Injection Control Permits MI-163-1W-C007 and MI-163-1W-C008 (the "UIC Permits") issued for an underground injection control facility located in Romulus, Michigan (the "Facility"), pursuant to 40 CFR 124.19(g). [1] Petitioners move for reconsideration based on the EAB's erroneous legal conclusions that (1) the EPA did not abuse its discretion in terminating the UIC Permits on the basis of irrelevant factors, while disregarding relevant factors; (2) the EPA did not abuse its discretion by refusing to properly consider Petitioners' actions as an owner of the Facility at issue, because the basis for the Termination was the prior violations of the UIC Permits by EDS; and (3) the EPA's explanation for its choice to terminate the Permits without considering a transfer request was reasonable and not an abuse of discretion.

Petitioners also move the EAB for an order staying its Order Denying Review and an Order staying the effectiveness of the EPA decision to terminate the UIC Permits, pursuant to 5 U.S.C. § 705, 40 CFR 124.19(g) and Federal Rule of Appellate Procedure 18. Petitioners respectfully request immediate consideration of their motion for stay. A stay is requested pending Petitioners' appeal of the EAB Order Denying Review and the Termination to the Sixth

[1] Pursuant to the directives in the EAB Practice Manual, Section III(D)(7)(b), counsel for Petitioners attempted to obtain concurrence from EPA with Petitioners' Motion for Reconsideration by telephone call to Thomas J. Krueger, Associate Regional Counsel for Region 5 on July 30, 2008. Counsel for Petitioners was unable to obtain said concurrence.

Circuit Court of Appeals, pursuant to 42 U.S.C. § 300j-7, and is required in this instance to avoid the irreparable harm that will occur if the EPA's decision to terminate becomes final before Petitioners' appellate remedies are exhausted.[2]

II. MOTION FOR RECONSIDERATION

A. STANDARD OF REVIEW ON RECONSIDERATION

Under 40 CFR 124.19(g), a party may seek reconsideration and a stay of the EAB's final order. A motion for reconsideration must "set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." *Id.* Such motions will not be granted absent a showing that the EAB has made a clear error, such as a mistake of law or fact. See *In re DPL Energy*, PSD Appeal No. 01-02, slip op. at 2-3 (EAB, Mar. 29, 2001) (Order Denying Reconsideration). "The reconsideration process 'should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions.'" *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 0015, slip op. at 2 (EAB, Apr. 9, 2001) (Order Denying Motion for Reconsideration), quoting from *In re Southern Timber Prods., Inc.*, 3 E.A.D. 880, 889 (1992). A motion for reconsideration must be filed within ten days after service of the order. 40 CFR 124.19(g). An additional three days, however, are added to this deadline when the service of the order is effected by mail. 40 CFR 124.20(d).

B. ARGUMENT IN SUPPORT OF RECONSIDERATION

1. The EAB erred in finding that the EPA was not required to consider RDD's compliance actions in reaching the decision to terminate, despite the fact that,

[2] The language of Federal Rule of Appellate Procedure 18 is unclear in that it requires a petitioner to first request a stay from the "agency" prior to requesting same from the Circuit Court of Appeals, without identifying if "agency" refers to the EAB. Due to Petitioners' timely Motion for Reconsideration, the EAB retains jurisdiction over this matter, and therefore a request for a stay before this tribunal is appropriate. (See NPDES Appeal No. 07-01, *Dominion Energy Brayton Point, LLC* (formerly USGen New England, Inc.) Brayton Point Station, Docket Item No. 74).

under the law, RDD, as the "owner" of the Facility, can discharge the duties of the permittee or operator.

The EAB erroneously dismissed Petitioners' argument that RDD's actions should have been considered by the EPA (beyond a passing "acknowledgment"), stating that Petitioners' "attempt to shift the focus from EDS's actions or non-actions to RDD's actions is misplaced." (Order, p. 18). The EAB erred in reaching this conclusion because it failed to consider that the applicable regulations upon which the Permit conditions are based require the "owner **or** operator" of the Facility provide information and keep certain records relating to the operation of the Facility, as well as maintain financial assurances and implement the required well testing.[3] The use of the word "or" means that either the operator or the owner, but not both, need to comply with the applicable requirements.[4] As such, EDS's failure to comply with the applicable requirements is not dispositive in evaluating the existence of violations; if RDD complied with the applicable requirements, such compliance discharged EDS's duties.

While the EAB found that it is appropriate that the EPA "consider what the permittee – in this case EDS – did or did not do" in deciding to terminate the Permits, the EPA should also have been required to consider what the owner of the Facility did or did not do. (Order, p. 18). Indeed, the EAB accepted EPA's argument that it "had no choice but to deal with the legal owner of the site." (Order, p. 44 fn. 26). If the EPA had no choice but to deal with the legal owner of the site, then it should have had no choice but to consider the legal owner's actions in reaching the decision to terminate. The EAB, finding that the EPA did not abuse its discretion in

[3] An additional error of the EAB is its unexplained emphasis on the fact that RDD responded to EPA's requests for information without explicitly stating it was doing so on behalf of EDS. EAB's emphasis seems to infer that had RDD responded on behalf of EDS, RDD's responses to EPA's requests for information may have been relevant. However, the EAB erred in failing to realize that RDD was responding as the owner of the Facility. 40 CFR 144.17 authorizes the EPA to require "an owner or operator of an injection well to establish and maintain records, make reports, conduct monitoring, and provide other information as is deemed necessary." Under the applicable regulations, the owner of a facility can discharge the operator's duty to provide this information.

[4] The EAB refers to RDD as the operator in its Order. It is unclear why actions of the owner or operator of a facility would be irrelevant to a decision to terminate permits for that facility. (Order, p. 47, fn. 29).

failing to consider RDD's actions in terminating the permits, rests this conclusion on the EPA's assertion that it did consider RDD's actions, without citation to any support in the record that this assertion is in fact true. (Order, p. 35). Where the EPA's alleged "consideration" of RDD's actions cannot be found in the administrative record, and where the EPA never explained how it considered RDD's actions, the EAB's finding of no abuse of discretion is clear error.

Even if, as the EAB found, RDD's actions were irrelevant (and thus did not require consideration) because the EPA has the discretion to terminate the Permits for any reason whatsoever, including the most minor and subsequently remedied violations, RDD's conduct should have been considered in the selection of the enforcement mechanism used in this case. As acknowledged by the EAB, "the institution of corrections [of permit violations] may influence, at most, the Agency discretion to choose permit termination as a response to the violations." (Order, p. 41). As further acknowledged by the EAB (presumably as an analogy to the EPA's discretion to select an enforcement mechanism for permit violations), upon consideration of a penalty amount for violations of the Safe Drinking Water Act, the EPA is **instructed** to:

> take into account appropriate factors, (i) the seriousness of the violation; (ii) the economic benefit (if any) resulting from the violation; (iii) any history of such violations; (iv) any good-faith efforts to comply with the applicable requirements; (v) the economic impact of the penalty on the violator; and (vi) such other matters as justice may require.

42 U.S.C. § 300h-2(c)(4)(B). (Opinion, p. 32). Although this statutory provision is not directly relevant, it acknowledges an EPA policy of using discretion in considering various factors before settling on the severity of an enforcement mechanism. Further, the EPA recommends adjusting any settlement penalty amounts based on the "level of effort put forth by the violator to correct the violation." (Opinion, p. 32) (citation omitted). If consideration of

factors such as preemptive remediation, good faith efforts to comply, and "such other factors as justice may require" is obligatory in assessing penalties (arguably the EPA's most common enforcement mechanism), then no reason exists to not apply the same requirement to a permit decision.[5] This case presents an excellent example in which the EPA's discretion in selecting an enforcement mechanism should have involved a full consideration of the unique factual circumstances, RDD's good faith compliance actions, and the seriousness of EDS's identified violations. A downward adjustment of the severity of the enforcement mechanism would have been appropriate had the EPA seriously considered RDD's actions.

The EAB found no abuse of discretion where the EPA did not find RDD's actions to be "critical to its termination decision." (Order, p. 40). For policy reasons, the EPA should have considered RDD's actions "critical," or at least important enough to be considered prior to selecting an enforcement mechanism. The EAB erred in determining that no important policy question is raised by EPA's failure to consider RDD's actions – the EPA should advance a policy that encourages voluntary compliance and rewards responsible behavior from a party that, as has been argued many times, had no obligation prior to November 7, 2006 to take any action with respect to securing the Facility or remedying past noncompliance caused by an entirely different entity for which RDD was not responsible.

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[5] The EPA has considered these factors recently in another UIC enforcement case. On September 10, 2007, the Regional Administrator signed a Final Order resolving alleged violations of its UIC permit by Mosaic USA, LLC, where Mosaic failed to demonstrate mechanical integrity for 19 of its underground injection wells at its potash mining facility in Hersey, Michigan. The complaint proposed the statutory maximum administrative penalty of $157,500. As stated by the EPA, "Based on Mosaic's immediate cooperation in remedying these violations, the lack of potential contamination of underground sources of drinking water due to the violations, and other factors consistent with the Safe Drinking Water Act and the Interim Final UIC Program Judicial and Administrative Order Settlement Penalty Policy, the Region agreed to mitigate the penalty to $50,000. Mosaic has returned to compliance with its permit and the UIC regulations." See http://www.epa.gov/Region5/orc/enfactions/enfactions2007/week-0907.htm.

To the extent that the EAB found that the EPA did not abuse its discretion in failing to adequately weight RDD's actions (stating that EPA's consideration of RDD's actions is "permissive"), this represents a clear error of law, as the EPA was required to consider the actions of RDD, as the owner of the Facility, in discharging the operator's obligations. As Petitioners argued in their Petition for Review, an agency action constitutes an abuse of discretion where the agency failed to consider an important aspect of the problem. *Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5th Cir. 1998). Petitioners respectfully submit that the EAB erred in finding that the EPA did not abuse its discretion in failing to appropriately consider a highly relevant and important aspect of the events prior to its decision to terminate the UIC Permits.

2. *The EAB erred in finding that the omission of the "primary" reason for termination from the Fact Sheet and Notice of Intent to Terminate did not result in Termination that was a product of the EPA's abuse of discretion.*

The EAB, possibly based on a misunderstanding of Petitioners' arguments, erroneously concluded that the EPA was permitted to rely upon one primary reason for termination that was not found in the Fact Sheet, but rather appeared for the first time as a post-hoc rationalization for termination in the Response to Comments accompanying the Termination. The EAB noted that "the Region relied primarily on EDS's "abandonment" of the Facility rather than the significance of the individual violations in deciding to terminate the Permits." *See* Order, p. 20 fn. 11; *see also* p. 34-5; fn. 21. Although the EAB acknowledges that the EPA relied "primarily" on EDS's "abandonment," the EAB fails to explain why the EPA was not required to include this "primary" reason for termination in the Fact Sheet supporting its Notice of Intent to Terminate. To the extent that this "primary" reason supports the EPA's use of discretion in terminating the UIC Permits, such reason was not enunciated until the final decision to terminate was issued on

October 22, 2007. As such, neither the public nor Petitioners were able to fully comment on and respond to the EPA's emphasis on EDS's alleged abandonment of the Facility.[6]

The EAB acknowledged that the Fact Sheet is required to set forth the "principal" facts and the "significant factual, legal, methodological and policy questions considered" and that the Fact Sheet should contain information "proportional to the importance of the issues involved and the degree of controversy surrounding them." (Opinion, p. 40) (citations omitted). If, in fact, EDS's "abandonment" of the Facility was the **most important** factor weighing in favor of termination at the time the Notice of Intent to Terminate and the Fact Sheet were issued, the EAB should have critically analyzed the EPA's omission of this "primary" factor at the outset of the termination process. The failure to include what now appears to be a "principal" and "significant" issue in the Fact Sheet is contrary to the applicable regulations and the supporting policy.

The EAB found that the EPA's explanation for the heavy weight it accorded EDS's "abandonment" of the Facility (in sharp contrast to the little to no weight given to RDD's corrective actions, an equally important factor) "does not reflect an abuse of discretion," without explaining exactly how the EPA's omission from the Fact Sheet of what it later identified as a highly influential consideration supporting its decision to terminate was proper, or supported by law. Petitioners respectfully disagree, and argue that the EAB's failure to critically analyze the EPA's omission of EDS's alleged "abandonment" of the Facility from the Fact Sheet was in error. Had the EPA presented this as the primary reason for termination, Petitioners would have

[6] In fact, EDS did not "abandon" the Facility. Rather, EDS was required to surrender the Facility, its interest in the permits and licenses and other assets to RDD because it was in default on various obligations and was no longer financially able to operate the Facility in a manner consistent with its obligations. RDD took over operational control in order to ensure the Facility remained compliant with permit requirements and was operated in a manner protective of public health, safety, welfare and the environment. EDS did not "abandon" the Facility or its permits and licenses.

had a fair opportunity to fully comment on this issue prior to the EPA's reliance on it in issuing its Decision to Terminate. As EPA failed to do so, Petitioners respectfully submit that the EAB erred in finding that the EPA did not abuse its discretion in relying primarily on a factor that was not included in the Fact Sheet or Notice of Intent to Terminate.

3. *The EAB erred in accepting the EPA's explanation for its choice to terminate the Permits without considering a transfer request, as evidence in the administrative record contradicts the EPA's explanation, and the EPA has not acted consistently when faced with similar situations.*

The EAB erred in accepting EPA's "reasonable explanation" for its exercise of discretion in terminating the Permits before considering the transfer request submitted by EDS, RDD and Environmental Geo-Technologies, LLC ("EGT"), as the explanation contradicted EPA's position on the transfer request set forth in a memorandum from Jo Lynn Traub of the EPA to the Region 5 Administrator on February 15, 2007. (See Administrative Record, No. 37). In that memorandum, Ms. Traub recommended that the EPA defer a final decision on termination until the EPA reviewed the transfer request. The memorandum discussed various enforcement options that could be taken by the EPA in response to the regulatory issues at the Facility. Ms. Traub notes that "it may be difficult to ignore the transfer request and proceed to terminate without appearing arbitrary." Noting that "none of the developments at the facility have called into question the suitability of the site geology or about the integrity of the wells," Ms. Traub emphasizes the importance of treating the transfer request "as we would any other similar submittal." Importantly, as of February 15, 2007, no internal decision had been reached on termination of the permits as opposed to consideration of the transfer request, undercutting the EPA's assertion that it had been working towards termination in the months leading up to termination. Further, the memorandum may indicate that as of February, 2007, the decision-making process was still in the relatively early stages, undercutting the EAB's interpretation of

EPA's decision-making process as "sequential," rather than as a choice between termination and transfer.

In a similar case, the EAB upheld EPA's decision to take less drastic measures under similar circumstances. In *In re Waste Technologies*, 5 E.A.D. 646; 1995 EPA App. LEXIS 8 (1995), a permittee transferred ownership of a hazardous waste incinerator without regulatory approval, and the EPA decided to modify the permit to allow the *post hoc* change, as opposed to revoking and reissuing or terminating the permit. In support of this decision, the Regional Administrator stated that a unapproved transfer of ownership was a technical change in operational control that:

> does not warrant reopening the entire WTI permit and processing an entirely new permit application, as would be the case in a revocation and reissuance proceeding. Nothing in U.S. EPA's regulations requires the Agency to initiate time- and resource-intensive procedures that are unnecessary given the narrow scope of issues raised by the change in question.

Id. at *36. The EAB held that the Regional Administrator adequately justified his decision to utilize the modification procedure instead of the revocation and reissuance procedure. In this case, no circumstances exists that are drastically different than the situation presented in *In re Waste Technologies,* and the EAB erred in accepting the EPA's infirm explanation of why it chose to terminate the Permits when there was a transfer request pending.

Apparently, a motivating factor in the EPA's decision to terminate after receiving the transfer request may have been self-interest. Noting the length of the revocation and reissuance proceedings, the EPA expressed concern that this length of time may have led RDD and EGT to abandon efforts to resume operations at the Facility, and stated that if this occurred, the EPA would have to plug and abandon the wells, given questions regarding EDS's financial assurance mechanism. (Administrative Record No. 37, pp. 4, 6). These comments, coupled with the EPA's

insistence on new financial assurance mechanisms from EGT and RDD prior to consideration of the transfer request, may provide the true reason why EPA induced EGT and RDD to rely upon EPA's expressed intention to consider the transfer request. The EPA did not want to pay to plug and abandon the wells, and it saw a benefit in persuading RDD and EGT to post a bond to cover these costs. As argued in the Petition for Review, RDD and EGT relied on the conduct of and positive feedback from EPA in continuing to press forward with the transfer request and expending capital to meet all permit conditions.

Accordingly, because the arguments proffered by the EPA in explanation of its decision to terminate the Permits rather than considering the transfer request contradict prior conduct of the EPA in a similar situation and the EPA's own internal documentation regarding the choice between the various enforcement mechanisms available to it, the EAB erred in accepting EPA's "explanation" without a rigorous inquiry into the EPA's actual decision-making process.

C. CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the Petitioners respectfully request that the EAB grant their Motion for Reconsideration, and on reconsideration, remand the Termination to the EPA for alternative action, including consideration of EDS, RDD and EGT's Transfer Request and a minor modification transferring the UIC Permits to EGT, or a revocation and reissuance of the UIC Permits to EGT, with additional or alternative conditions as the EPA finds appropriate.

II. MOTION FOR STAY

A. STANDARD OF REVIEW ON MOTION FOR STAY

Under 40 CFR 124.19(g), a party may seek a stay of the EAB's order or other agency action. "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705. The determination of whether a stay

of an agency's order is warranted must be based on a balancing of four factors. These factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Ohio ex rel. Celebrezze v. Nuclear Regulatory Com.*, 812 F.2d 288, 290 (6th Cir 1987) "With regard to the first prong of the *Celebrezze* test, the movant must only establish that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear and the interests of the other parties and the public are not harmed substantially." *Evans v. Buchanan*, 435 F. Supp. 832, 844 (D. Del. 1977); *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp 144 (D. Mass. 1998).

B. ARGUMENT IN SUPPORT OF STAY

1. Petitioners' Appeal will raise serious and difficult questions of law in an area where the law is somewhat unclear.

Recognizing that it is often futile to convince an agency to stay its own decision based on the probability that the agency's decision will be overturned on appeal, a petitioner need not demonstrate a likelihood of success on appeal to the court or agency that issued the unfavorable decision. In lieu of requiring a petitioner to make this demonstration, courts have only required a showing of serious and difficult questions of law in an area where the law is somewhat unclear and the interests of the other parties and the public are not harmed substantially. *Evans v. Buchanan, supra* at 844. In so holding, the *Evans* court explained the logic behind this interpretation:

> A more reasonable interpretation can be developed by analyzing the policy underlying its inclusion as a criterion for issuance of a stay. In a case where the movant will suffer irreparable injury in the absence of a stay, consideration of the merits of the movant's appeal permits an evaluation of whether that injury is likely to occur in any event. It seems illogical, however, to require that the

> court in effect conclude that its original decision in the matter was wrong before a stay can be issued. Rather, a stay may be appropriate in a case where the threat of irreparable injury to the applicant is immediate and substantial, the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear and the interests of the other parties and the public are not harmed substantially.

Id.; see also Mamula v. Satralloy, Inc., 578 F. Supp. 563 (S.D. Ohio 1983) (holding that questions of first impression will satisfy the first factor, and noting the minimal showing required to find that a movant has satisfied the factor). Accordingly, agencies may properly stay their own orders when "they have ruled on a difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Washington Metropolitan Area Transit Com. v. Holiday Tours, Inc.*, 182 U.S. App. D.C. 220 (D.C. Cir. 1977). Finally, as the factors in deciding to issue a stay are to be balanced, where "the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay." *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir.1979).

As set forth in detail in its Petition for Review, Petitioners have made a strong showing that they will likely prevail on the merits in an appeal to the 6th Circuit Court of Appeals. At a minimum, Petitioners' legal arguments and the issues presented by this case raise serious and difficult questions of law and contain at least one matter of first impression before the EAB. (Opinion, p. 48). First, the question of proportionality of enforcement mechanisms (where the violations alleged had been corrected) and the level of discretion afforded to the EPA in absence of any policy or guidance documents raise serious issues on appeal. Where there are no written policy or regulations pertaining to the exercise of discretion in terminating UIC Permits, the EPA could essentially terminate any UIC permit for the most minor of violations. For example, without guidelines to direct EPA or educate the public, the submission of a required report one

day late due to illness or unforeseen emergency could result in a permit termination that would be upheld by the EAB. The EPA's discretion must have some bounds in order for businesses to have a reliable and predictable enforcement scheme after receiving a permit that is necessary to its operations. Petitioners' arguments regarding the EPA's discretion and the manner in which the EPA effectuated the termination raise serious issues that deserve further deliberation and study on appeal.

Second, whether a permittee (or member of the public) must anticipate and address in its comments every argument and issue that could be raised as a result of the EPA's subsequent explanation for termination (after the comment period is closed) in order to preserve the argument for appeal is a serious legal issue that must be resolved. In this case, Petitioners were not aware that the EPA placed so much emphasis on EDS's alleged "abandonment" of the Facility, as it was not identified as a violation, and it was not mentioned in the Fact Sheet. If a party is barred on appeal from advancing an argument that it did not address during the public comment period, then the EPA must be required to include all pertinent information that it reasonably expects to rely upon in terminating permits. Interpretation of the applicable regulations setting forth the requirements for fact sheets that accompany draft permit decisions is an important issue bearing heavily on public participation procedures and due process requirements. No court has directly addressed this issue and, upon information and belief, this issue has not been decided by the EAB in a manner that could be applied to these circumstances.

Third, the issue of whether the EPA was required to act on the transfer request before proceeding with termination is a matter of first impression before the EAB. (Order, p. 48). While the EAB deferred to the EPA's decision to not process the transfer request submitted prior to the termination decision, it seems apparent that there are no regulations or other guidance

available to support the EPA's decision. In the event that these factual circumstances are presented again to the EPA, a full legal analysis of the EPA's obligations upon receipt of a transfer request for permits that it is considering terminating is important for ensuring consistent decisions from the EPA to those who are similarly situated. Otherwise, the EPA's discretion could be boundless. For example, the EPA could require the proposed transferee to perform significant corrective action or take other burdensome and expensive actions as conditions for a pending transfer of the permit (including the securing of updated financial assurance mechanisms) and then terminate the permit once the transferee has met the EPA's conditions. While the public trust placed in the EPA would militate against such behavior, the lack of a guideline or rule directing the EPA's decision-making process on this issue presents a serious issue of law in an area where the law is totally unclear.

In this case, as explained in more detail below, the status quo should be maintained, as the EAB has ruled on difficult legal questions, and providing Petitioners with an opportunity to fully litigate these issues on appeal prior to termination of the Permits is necessary to avoid unjustified and irreparable injury.

2. Irreparable injury will occur if the motion for stay is denied.

Termination of the UIC Permits will set off a chain reaction of events that will end with Petitioners' loss of use of the Facility in the manner which it was designed and constructed, constituting irreparable injury to Petitioners. At the risk of improperly imposing such grave harm on Petitioners, a stay must be entered to allow Petitioners the opportunity exhaust their appellate remedies prior to the Termination becoming a final agency decision.

EDS began the permit and licensing application process for the Facility in 1990. On December 27, 2005, EDS was issued the last necessary license required for the full operation of

the Facility. The Facility cannot be operated as intended without all of the necessary licenses and permits, which took more than 15 years of applications, inspections, modifications, public hearings, appeals and lawsuits to obtain. The facility is designed solely as a state-of-the-art commercial hazardous waste treatment, storage and disposal facility. Equipment has been exclusively designed and installed for use at the Facility which has no other value. If a stay of the Termination pending judicial review is not granted, Petitioners will the suffer irreparable injury of losing all value or use of the Facility.

Upon termination of the UIC permits, it is more likely than not that RDD will be responsible for the cost of closing the Facility, pending an order from the EPA to commence plugging and abandonment of the Facility. Further, the Michigan Department of Environmental Quality ("MDEQ") has suggested that if the Termination becomes a final agency decision, EDS's hazardous waste treatment, storage and disposal operating license issued under Part 111 of the Natural Resources and Environmental Protection Act, Mich. Comp. Laws. 324.1101, et seq. (the "Operating License") will be terminated.

If the Operating License is revoked, Michigan Administrative Code Rule 299.9520(4) provides that the Director of the MDEQ "shall order the owner or operator to carry out closure procedures," which includes the plugging and abandonment of the deep injection wells, pursuant to EDS's closure plan submitted to the EPA and MDEQ as part of its UIC Permit and Operating License applications. The plugging and abandonment of wells permanently and irreversibly closes the wells and renders the entire Facility and the real property on which the Facility is located useless for its intended purpose. Plugging and abandoning the wells prior to exhausting all of Petitioners' appellate remedies will result in an irreparable injury that cannot be reversed if Petitioners are successful on appeal.

Additionally, if the status quo is not maintained pending appeal, RDD will suffer the irreparable harm of loss of its valuable and site-specific trained employees. These employees are specifically trained as to the unique aspects of the Facility and they are intimately familiar with the special equipment and operations. If RDD is required to shut down the Facility, even if it may be reopened later, the loss of valuable personnel who will necessarily find new employment, constitutes additional irreversible harm.

3. No harm to the EPA or the public will occur if a stay is granted.

As to the final two factors relevant to the decision to grant a stay of an agency decision, Petitioners cannot identify any harm that will occur to the EPA or the public if a stay is granted.

There is no risk to the public or the environment in maintaining the status quo. As discussed in the Petition for Review, all operations at the Facility were suspended on November 2, 2006. (See Petition for Review, Exhibit A-7). Since November of 2006, no waste has been received at the Facility, and a comprehensive Security Plan has been implemented to ensure no waste is received. Further, all waste that remained on site at that time has been completely removed and disposed in accordance with applicable law and regulations. The Facility is completely empty, clean and decontaminated to Resource Conservation and Recovery Act standards, pursuant to 40 CFR 261.7. (See Petition for Review, Exhibit F). Additionally, on August 2, 2007, with EPA officials on site, the underground injection wells were successfully put under neutral pressure by injecting brine into the wells in order to prevent the flow of reservoir fluids and to ensure proper pressurization. As such, the wells are secure, and no hazardous waste or materials remain onsite in any form.

A stay will merely continue the status quo, which has been in place since November 2006 while allowing Petitioners to appeal the decision of the EPA. The public and the EPA will suffer

no harm and, in fact, the interests of the public will in fact be served by allowing a full and fair review of the serious and important legal issues presented in this case.

C. CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the Petitioners respectfully request that the EAB grant their Motion for Stay pending resolution of Petitioners' appeal of the EPA's termination to the Sixth Circuit Court of Appeals, pursuant to 42 U.S.C. 300j-7, and the exhaustion of all of Petitioners' appellate remedies under the law.

Respectfully submitted,

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Date: July 30, 2008

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MI-163-1W-C007 and MI-163-1W-C008

PROOF OF SERVICE

STATE OF MICHIGAN }
} ss
COUNTY OF INGHAM }

I, Kinneitha M. Thomas, being duly sworn, depose and say that on July 30, 2008, I served the original Petitioners' *Motion for Reconsideration and Motion for Stay of Order Denying Petition for Review and Stay of Termination of UIC Permits Pending Appeal,* along with this *Proof of Service* upon:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

via overnight mail, and electronically filed same with the Environmental Appeals Board at www.epa.gov/eab.

Service of same was also accomplished by placing same in a United States mail depository, enclosed in envelopes bearing postage fully prepaid and addressed properly upon:

Thomas J. Krueger, Associate Regional Counsel
United States Environmental Protection Agency
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77 West Jackson Blvd.
Chicago, IL 60604-3590

Mindy G. Nigoff
Office of General Counsel
United States Environmental Protection Agency
1200 Pennsylvania Ave, N.W.
Washington, D.C. 60604-3590

Kinnetha M. Thomas

Subscribed and sworn to me
this 30th day of July, 2008.

Lori S. Smith, Notary Public
Eaton County, State of Michigan.
Acting in Ingham County, Michigan.
My Commission Expires: 08/30/2013.