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September 15, 2005

VIA HAND DELIVERY

Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, NW, Suite 600
Washington, D.C. 20005

Re: In the Matter of Sunoco Partners Marketing & Terminals L.P.
UIC Permit No. MI-163-3G-A002
UIC Appeal No. 05-01

Dear Sir or Madam:

Please find enclosed for filing today one original and five copies of Sunoco Partners Marketing & Terminals L.P.'s Response to Environmental Disposal Systems' Petition for Review and Exhibits A through J. Please contact me if you would like any additional information.

Sincerely,


Elizabeth M. Richardson

Enclosures

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10/15/2005 10:10:00

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

IN THE MATTER OF

**SUNOCO PARTNERS MARKETING
& TERMINALS L.P.**

UIC PERMIT NO. MI-163-3G-A002

UIC APPEAL NO. 05-01

**RESPONSE OF SUNOCO PARTNERS MARKETING & TERMINALS L.P.'S
TO ENVIRONMENTAL DISPOSAL SYSTEMS'
PETITION FOR REVIEW**

Sunoco Partners Marketing & Terminals L.P. ("SPMT") hereby submits its response to Environmental Disposal Systems' ("Petitioner" or "EDS") Petition for Review of SPMT's Class III Underground Injection Control ("UIC") Permit No. MI-163-3G-A002 for its Sunoco Inkster Facility, Wayne County, Michigan. The Environmental Appeals Board ("EAB") of the United States Environmental Protection Agency ("EPA") granted SPMT leave to file a response to the Petition. *See* EAB Order Granting Motion to Participate, UIC Appeal No. 05-01 (August 19, 2005), attached as Exhibit A. For the reasons set forth below, SPMT requests that the Petition be denied.

STATEMENT OF FACTS

Due to the ever-increasing demand for energy, SPMT plans to expand its underground liquid petroleum gas ("LPG") storage capacity at its Transfer Terminal near Romulus, Michigan. The Transfer Terminal has been operated safely for more than fifty years.

In June 2004, SPMT submitted an application for a Class III UIC Permit (the "Permit" or "SPMT UIC Permit") to use four operating wells at the Terminal for solution mining. *See* Fact Sheet for Issuance of UIC Class III Permit--Solution Mining of Salt, Permit No. MI-163-3G-A002, Sunoco Inkster Facility, attached as Exhibit B. The wells range in age from thirty-five to fifty years and are currently used for LPG storage and removal. Under the Permit, the wells will be used to inject freshwater to expand the cavern walls through dissolution. *Id.*

EPA issued SPMT a draft Permit on March 3, 2005. *See* Letter from C. Elly, EPA Region V, to Jonathan Ojany, SPMT, regarding United States Environmental Protection Agency (USEPA) Draft Permit #MI-163-3G-A002 (March 3, 2005), attached as Exhibit C. On March 11, 2005, EPA published notice soliciting public comment on that Permit. *See* Public Notice of Class III Solution Mining Area Draft Permit #MI-163-3G-A002 (March 11, 2005), attached as Exhibit D.

EPA received two sets of comments on the draft Permit. *See* Letter from W. Fulkerson, Warner Norcross & Judd, LLP to L. Perenchio, EPA Region V, regarding EPA Permit No. MI-163-3G-A002 (April 6, 2005), attached as Exhibit E (referred to herein as "Fulkerson Letter"); Letter from D. Bower, Attorney at Law, to L. Perenchio, EPA Region V, regarding EPA Permit No. MI-163-3G-A002 (April 5, 2005) attached as Exhibit F (referred to herein as "Bower Letter"). One of the comments was from the law firm of Warner Norcross & Judd, LLP on

behalf of its client, EDS.¹ The other comment was from an attorney, David A. Bower, who did not identify his clients. Mr. Bower requested a public hearing; EDS did not.

EPA issued a final Permit to SPMT in June that became effective on July 6, 2005. *See* United States Environmental Protection Agency (USEPA) Underground Injection Control Class III Permit, Sunoco Inkster Facility, MI-163-3G-A002 (June 6, 2005), attached as Exhibit G (referred to herein as "Permit"). EPA responded in writing to both comments as well. *See* Letter from L. Perenchio, EPA Region V, to W. Fulkerson, Warner Norcross, & Judd, LLP, regarding Public Comments on United States Environmental Protection Agency (USEPA) Underground Injection Control (UIC) Draft Permit #MI-163-3G-A002 (May 10, 2005), attached as Exhibit H; *See* Letter from L. Perenchio, EPA Region V, to D. Boyer [sic], Attorney at Law, regarding Public Comments on United States Environmental Protection Agency (USEPA) Underground Injection Control (UIC) Draft Permit #MI-163-3G-A002 (May 10, 2005), attached as Exhibit I. EPA did not hold a public hearing. On July 1, 2005, EDS filed a Petition for Administrative Review with EAB. *See* EDS Petition for Administrative Review (July 1, 2005), attached as Exhibit J (referred to herein as "EDS Petition").

EDS' Petition makes four arguments. First, EDS argues that EPA should have held a public hearing to receive comments. EDS Petition at 1. Its remaining three arguments, which are interrelated and technical in nature, allege that the final Permit is flawed because it does not include provisions EDS believes necessary to ensure the integrity of the wells and the storage cavern. EDS Petition at 2-3.

¹ As the EAB is aware, EDS has business interests that may conflict with SPMT's. *See In re EDS, Inc.*, UIC Appeal Nos. 04-01 & 04-02, slip op. at 18 (EAB, Sept. 6, 2005).

ARGUMENT

The EAB should deny EDS' Petition. EPA did not abuse its discretion when it did not convene a public hearing because there was not enough public interest in SPMT's Permit to warrant a hearing. EDS' three technical arguments should be denied because they were not preserved for appeal and were not specifically pled. If they were preserved, none of them raises an issue that warrants the EAB's review.

I. EPA DID NOT ABUSE ITS DISCRETION ON WHETHER TO HOLD A PUBLIC HEARING.

Even though EDS did not request a public hearing in its comments, EDS now claims that EPA abused its discretion because it did not hold one. EDS Petition at 1. EDS is wrong.

There was minimal public interest in SPMT's draft Permit during the public comment period. EPA received only two comments on the draft Permit, only one of which requested a public hearing. *See* Bower Letter and Fulkerson Letter.

As the EAB has noted, EPA's decision to hold a public hearing is largely discretionary. *In re Osage (Pawhuska, Oklahoma)*, 4 E.A.D. 395, 399 (EAB 1992). EPA will hold a public hearing if the Director determines that there is a "significant degree" of public interest in a draft permit. 40 C.F.R. § 124.12(a).²

The two comments that EPA received on the Permit do not constitute a "significant degree" of public interest. In a similar case, the EAB held that EPA did not abuse its discretion by not holding a public hearing on a UIC Permit when the Agency received only two comments, including one request for hearing. *Osage*, 4 E.A.D. at 399. The EAB decided that because EPA

² Petitioner cites to 40 C.F.R. § 25.3(c)(1) as the basis for its claim that EPA should have held a public hearing in this case. That Section governs the policies and objectives of EPA's public hearings requirements but does not set a standard for when such a hearing is required.

considered and responded to the comments, the Petitioners were afforded “ample opportunity” for participation in the permit process. *Id.*

Here, EDS was given ample opportunity to participate in the Permit process. EPA considered EDS’ comments and responded to them. See Exhibits H and I. EDS’ belated request for a public hearing should be denied.

II. EDS’ TECHNICAL ARGUMENTS SHOULD BE DENIED BECAUSE THEY WERE NOT PRESERVED FOR APPEAL, ARE NOT SPECIFICALLY PLED AND LACK MERIT.

1. EDS Did Not Preserve Its Technical Issues for Appeal.

The EAB should deny review of EDS’ remaining three technical arguments because they were not preserved for appeal. A petitioner must demonstrate that its issues were raised during the public comment period or at the public hearing to the extent those issues were “reasonably ascertainable.” 40 C.F.R. § 124.13; *In re Envotech, L.P.*, 6 E.A.D. 260, 265-69 (EAB 1996); *In re Renkiewicz SWD-18*, 4 E.A.D. 61, 63-64 (EAB 1992). The EAB will deny review of “reasonably ascertainable” issues raised on appeal (as well as any “reasonably available” arguments in support of those issues) if they were not raised during the public comment period. *Osage*, 4 E.A.D. at 400; 40 C.F.R. § 124.19(a).³

EDS’ public comments did not identify the issues it now seeks to appeal. In its comment letter, EDS speculated that SPMT’s wells were old and therefore, there may be issues related to well integrity, cavern spalling and corrosion. The entire relevant portion of EDS’ public comment was:

³ The EAB has explained that:

[T]he purpose of these regulations is to ensure that all matters are first raised with the permit issuer. In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary. As explained in the preamble to the regulations, “[t]he later stages [of the permit proceedings] are appellate in nature and new issues should not be raised on appeal.” *In Re Avery Lake Property Owners Ass’n*, 4 E.A.D. 251, 253-54 (EAB 1992).

Based on the information available to us we understand the wells to be used are nearly 50 years old and constructed well before modern completion techniques were employed and the UIC casing and sealing requirements were developed. The historic, long-term use of the caverns can lead to spalling of the cavern roof. This can cause caving in some places. If the caving occurs near the casing it can threaten the integrity of the cement sealing the casing string. What measures have been taken to ensure the integrity of the cavern ceiling? We also have a concern about corrosion. These wells have been exposed to saturated brine for decades which could cause corrosion and threaten the integrity of the wells. What efforts will be made to monitor strata above the injection zone to ensure that LPG has not migrated behind the casing cement upward?

EDS' Petition attempts to use this broad speculation as the basis for requesting that specific provisions of the Permit be added. In its first technical point, EDS claims that the Permit should include requirements for the inspection of casing, tubing, and repair and replacement of wellhead equipment. EDS Petition at 2. In its second technical point, EDS claims that the Permit fails to include specific requirements for cavern integrity monitoring. *Id.* In its final technical point, EDS claims that the Permit should include specific well construction requirements for equipment such as packers and tubing to prevent corrosion. *Id.* at 3.

All of these proposed provisions that EDS now says EPA should have included in the Permit were reasonably ascertainable during the public comment period. To preserve them for appeal, EDS should have identified them then. EDS failed to do so. Accordingly, the EAB should deny EDS' technical challenges to the Petition.

2. EDS' Petition Lacks Specificity.

EDS' Petition also fails to contain fundamental information required for EAB review. *In re Beckman Production Services*, 5 E.A.D. 10, 18 (EAB 1994). A petition must contain: (1) clear identification of the conditions in the permit at issue and (2) argument that the conditions warrant review. *Envotech*, 6 E.A.D. at 268 *citing Beckman*, 5 E.A.D. at 18. EDS does not identify the conditions in the Permit for which it seeks to review. EDS also fails to provide arguments supporting its allegations. The Petition is void of legal argument or reference to EPA

regulations, EAB opinions, or caselaw and does not provide any technical data that would demonstrate that EPA's response to comments or final decision to issue the Permit were clearly erroneous. Thus, the Petition is "so lacking in specificity" that EAB must reject it. *Envotech*, 6 E.A.D. at 268.⁴

3. EDS' Petition Fails to Raise Any Issues that Warrant EAB Review.

If EDS' three technical points were preserved for appeal and specifically plead, all fail on their merits. The Permit complies with the UIC regulations. EDS does not raise any important matter of policy or exercise of discretion nor has it shown that EPA's decision to issue a Permit was clearly erroneous. 40 C.F.R. § 124.19(a).

The burden of demonstrating that review of a UIC Permit decision by the EAB is warranted is on the Petitioner. *In re American Soda, LLP*, 9 E.A.D. 280, 286 (EAB 2000). A UIC Permit decision will not be reviewed by EAB unless it is based on a clearly erroneous finding of fact or conclusion of law or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a); *In re Brine Disposal Well, Montmorency County, Michigan*, 4 E.A.D. 736, 739 (EAB 1993).⁵ The EAB has also consistently noted in its UIC decisions that the EAB's power of review "should be only sparingly exercised" and that "most permit conditions should be finally determined at the Regional level." *Id.* at 739-40; *American Soda*, 9 E.A.D. at 286; *In re NE HUB Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998).

⁴ The EAB has noted that it will broadly construe petitions filed by persons unrepresented by counsel. See *Envotech*, 6 E.A.D. at 268, quoting *Beckman*, 5 E.A.D. at 19. Such deference need not be accorded EDS. EDS is well-represented by counsel and could have laid the proper predicate during the public comment period to preserve its issues on appeal and met the pleading requirements of the EAB.

⁵ The EAB has noted that federal courts describe comparable "clear error" standards as "requiring a definite and firm conviction that a mistake has been made." *In re Amerada Hess Corporation Port Reading Refinery*, 2 E.A.D. 910 (EAB 1989).

In addition, the EAB has noted that it “traditionally assigns a heavy burden to persons seeking review of issues that are quintessentially technical.” *NE HUB*, 7 E.A.D. at 567.⁶ Absent “compelling circumstances,” the EAB will generally defer to the technical decisions of the Regions. *Envotech*, 6 E.A.D. at 284. On this basis, EAB has rejected claims that a Permit should have included additional well monitoring and cavern integrity requirements that otherwise comply with the UIC regulations. *Osage*, 4 E.A.D. at 400-401 n.8 (upholding Permit with mechanical integrity (“MI”) requirements that were consistent with UIC rules); *Renkiewicz*, 4 E.A.D. at 65-66 (upholding terms of Permit where Permit injection rate was set to avoid fracture pressure of the confining zone); *Envotech*, 6 E.A.D. at 298-299 (upholding Permit where petitioner had failed to demonstrate permit requirements were insufficient to control corrosion).

None of EDS’ technical issues raises the kind of issue that warrants EAB review. In its first technical point, EDS claims that the Permit relies on voluntary well monitoring inspections and fails to ensure the inspection of casing and tubing and repair and replacement of wellhead equipment. EDS Petition at 2. EDS is wrong. The Permit requires SPMT to comply with EPA’s mechanical integrity standards before injecting begins and every five years during the life of the wells. Permit at I.E.10(c); I.E.18; 40 C.F.R. §§ 146.8(a), 146.33(b)(3). The first part of the MI test requires a demonstration that there be “no significant leaks in the casing, tubing or packer.” 40 C.F.R. § 146.8(a). The Permit also requires SPMT to cease injection if MI is ever lost during operations; SPMT may not resume operations until the Director gives approval. Permit at I.E.18(d). Finally, the Permit allows EPA to inspect the wells at any time to ensure compliance. Permit at I.E.7. These procedures comply with the UIC rules and provide for an

⁶ In doing so, the EAB noted that “When issues raised on appeal challenge a Region’s technical judgments, clear error or a reviewable exercise of discretion is not established simply because petitioners document a difference of opinion or an alternative theory regarding a technical matter. In cases where the views of the Region and the petitioner indicate bona fide differences of expert opinion or judgment on a technical issue, the Board typically will defer to the Region.” *NE HUB*, 7 E.A.D. at 567-8.

adequate well monitoring program. *See Osage*, 4 E.A.D. at 400 n.8. Accordingly, the EAB should dismiss EDS' first technical point.

In its second technical point, EDS claims that the Permit fails to require monitoring to ensure the integrity of the storage caverns. EDS Petition at 2.⁷ Again, EDS is wrong. The Permit provides a maximum injection pressure that was set "to prevent injection formation fracturing." Permit at III.A-1; 40 C.F.R. § 146.33(a)(1) (requiring injection pressure to be calculated to prevent new fractures or propagate existing fractures in the injection zone). This maximum limit was calculated using specific conditions of the storage cavern. Permit at III.A-1. In addition, the Permit requires SPMT to monitor the injection semi-monthly and report to EPA quarterly. *Id.* The Permit also establishes an injection procedure that requires constant monitoring of cavern characteristics, including pressure to "facilitate safe cavern operations." Permit at III.D-3.⁸ All of these Permit requirements and practices ensure cavern integrity in accordance with the UIC rules. *See Renkiewicz*, 4 E.A.D. at 65-66. Accordingly, the EAB should dismiss EDS' claims that the Permit is inadequate to protect cavern fracturing.⁹

Finally, EDS claims that the Permit does not specify well construction materials and equipment (such as packers and tubing) to prevent corrosion. Such specificity is unnecessary. All wells have been in operation for at least thirty-five years and all are in good operating condition and evidence no corrosion. SPMT's initial and periodic MI testing – which requires demonstration that no significant leaks in the casing, tubing or packer of a well exists, for any reason – will detect corrosion if it were to occur. Permit at I.E.18(a); 40 C.F.R. § 146.8(a). The

⁷ EDS' Petition does not identify what it means by "integrity." We assume, based on its public comments, that it relates to potential fracturing of the cavern walls.

⁸ SPMT has a business interest in ensuring that the caverns maintain their integrity. The caverns are used to store LPG product. If spalling or fracturing occurs, SPMT could lose valuable product.

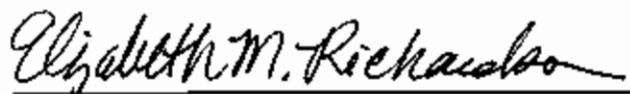
⁹ EDS claims that the well monitoring should be increased to annual intervals. The EAB has rejected requests for monitoring at more frequent intervals than required by the UIC rules. *Osage*, 4 E.A.D. at 400, n.8.

UIC rules do not require the specificity in materials and equipment that EDS claims is necessary. EDS has not provided any information to support its position that additional Permit conditions to prevent corrosion must be included. Accordingly, the EAB should dismiss EDS' request for additional Permit conditions addressing corrosion.

CONCLUSION

For the reasons above, SPMT respectfully requests that EDS' Petition be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing RESPONSE OF SUNOCO PARTNERS MARKETING & TERMINALS L.P. TO ENVIRONMENTAL DISPOSAL SYSTEMS' PETITION FOR REVIEW were transmitted to the following persons in the manner indicated on September 15, 2005:

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Elizabeth M. Richardson

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
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TO ENVIRONMENTAL DISPOSAL SYSTEMS'
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LIST OF EXHIBITS

- A. EAB Order Granting Motion to Participate, UIC Appeal No. 05-01 (August 19, 2005)
- B. Fact Sheet for Issuance of UIC Class III Permit--Solution Mining of Salt, Permit No. MI-163-3G-A002, Sunoco Inkster Facility
- C. Letter from C. Elly, EPA Region V, to Jonathan Ojany, SPMT, regarding United States Environmental Protection Agency (USEPA) Draft Permit #MI-163-3G-A002 (March 3, 2005)
- D. Public Notice of Class III Solution Mining Area Draft Permit #MI-163-3G-A002 (March 11, 2005)
- E. Letter from W. Fulkerson, Warner Norcross & Judd, LLP, to L. Perenchio, EPA Region V, regarding EPA Permit No. MI-163-3G-A002 (April 6, 2005)
- F. Letter from D. Bower, Attorney at Law, to L. Perenchio, EPA Region V, regarding EPA Permit No. MI-163-3G-A002 (April 5, 2005)
- G. United States Environmental Protection Agency (USEPA) Underground Injection Control Class III Permit, Sunoco Inkster Facility, MI-163-3G-A002 (June 6, 2005)

- H. Letter from L. Perenchio, EPA Region V, to W. Fulkerson, Warner Norcross, & Judd, LLP, regarding Public Comments on United States Environmental Protection Agency (USEPA) Underground Injection Control (UIC) Draft Permit #MI-163-3G-A002 (May 10, 2005)
- I. Letter from L. Perenchio, EPA Region V, to D. Boyer [sic], Attorney at Law, regarding Public Comments on United States Environmental Protection Agency (USEPA) Underground Injection Control (UIC) Draft Permit #MI-163-3G-A002 (May 10, 2005)
- J. EDS Petition for Administrative Review (July 1, 2005)