

CLARK HILL

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September 2, 2009

VIA OVERNIGHT MAIL

Clerk of the Court
Sixth Circuit Court of Appeals
100 E. Fifth Street
Suite 540 Potter Stewart Courthouse
Cincinnati, OH 45202

Re: *Police and Fire Retirement System of the City of Detroit, et al v. Environmental Protection Agency*
Case No. _____

Dear Clerk:

Enclosed, please find one original and four copies of a *Petition for Review of an Order of an Administrative Agency*, a check in the amount of \$450.00 for the filing fee, one original and three copies of a *Disclosure of Corporate Affiliations* for each Petitioner and a *Proof of Service* indicating that same was served upon each party admitted to participate in the agency proceedings. Pursuant to Fed R. App. 15(c), also enclosed is an additional copy of the *Petition for Review* for service on respondent, the Environmental Protection Agency.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

CLARK HILL PLC



Kristin B. Bellar

KBB:rlw
Enclosures

cc: Thomas Krueger, EPA [w/Enclosures]
Mindy G. Nigoff [w/Enclosures]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

POLICE AND FIRE RETIREMENT)
SYSTEM OF THE CITY OF DETROIT,)
RDD OPERATIONS, LLC, AND)
RDD INVESTMENT CORP.,)
)
Petitioners,)
)
v.)
)
ENVIRONMENTAL PROTECTION)
AGENCY,)
)
Respondent.)

PETITION FOR REVIEW OF AN ORDER OF AN ADMINISTRATIVE AGENCY

The Police and Fire Retirement System of the City of Detroit, RDD Operations, LLC, and RDD Investment Corp. on behalf of themselves and on behalf of Environmental Disposal Systems, Inc., pursuant to 42 U.S.C. § 300j-7 and Federal Rule of Appellate Procedure 15(a), hereby petition this Court for review of the *Notice of Decision to Terminate Permit # MI-163-1W-C00 and Permit # MI-163-1W-C008, Environmental Disposal Systems, Inc., Romulus Michigan* issued by the Environmental Protection Agency on October 22, 2007, attached as Exhibit A, which was made effective by a July 21, 2009 Order of the Environmental Appeals Board in Docket No. UIC 07-03, *In re: Environmental Disposal Systems, Inc.*, attached as Exhibit B.

Respectfully submitted,

CLARK HILL PLC

By: Kristin B. Bellar
Ronald A. King (P45088)
Joseph E. Turner (P44135)
Kristin B. Bellar (P69619)
212 East Grand River Avenue
Lansing, Michigan 48906
(517) 318-3100
Attorneys for Petitioners

Date: September 2, 2009



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

OCT 22 2007

REPLY TO THE ATTENTION OF:

CERTIFIED MAIL 7001 0320 0005 8933 7183
RETURN RECEIPT REQUESTED

WU-16J

Environmental Disposal Systems, Inc.
Douglas F. Wicklund, President
199 West Brown Street, Suite 200
Birmingham, Michigan 48009

RE: Notice of Decision to Terminate Permit # MI-163-1W-C007 and Permit # MI-163-1W-C008, Environmental Disposal Systems, Inc., Romulus, Michigan

Dear Mr. Wicklund:

The U.S. Environmental Protection Agency (EPA) has completed its review of the comments and information received concerning EPA's April 12, 2007 proposal to terminate the above referenced permits. This review did not identify any issues which would alter the basis for this proposed decision. Therefore, the permits referenced above are terminated effective 30 days from receipt of this notice.

In accordance with 40 C.F.R. § 124.19, any person who filed comments on the notice of intent to terminate the permits or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the final permit termination decision. Such a petition shall include a statement of the reasons supporting review of the decision, including a demonstration that the issue(s) being raised for review were raised during the public comment period (including the public hearing) to the extent required by those regulations. The petition should, when appropriate, show that the permit decision(s) being appealed are based on: (1) a finding of fact or conclusion of law which is clearly erroneous, or (2) an exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

If you are eligible to and wish request an administrative review, you must submit such a request by regular mail to the United States Environmental Protection Agency, Clerk of the Board, Environmental Appeals Board (MC 1103B), Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460-0001. Requests sent by express mail or hand-delivered must be sent to the United States Environmental Protection Agency, Clerk of the Board, Environmental Appeals Board, Colorado Building, 1341 G Street, NW, Suite 600, Washington, D.C. 20005.

The request must arrive at the Board's office within 30 days of service of this notice. The request

will be timely if received within this time period. For this request to be valid, it must conform to the requirements of 40 C.F.R. § 124.19. A copy of these requirements is attached to the Response to Comments. This request for review must be made prior to seeking judicial review of any permit decision.

Sincerely,

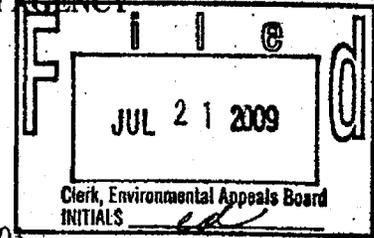


Kevin Pierard
Acting Director, Water Division

Enclosure

cc: Steven Chester, Michigan Department of Environmental Quality
Lawrence Scott, Esq., O'Reilly Rancilio PC, 12900 Hall Road, Suite 350, Sterling
Heights, MI 48313-1151 (by fax and Certified Mail)
Ronald King, Clark Hill PLC

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC



_____))
In re:))
))
Environmental Disposal Systems, Inc.))
))
UIC Permit Nos. MI-163-1W-C007 and))
MI-163-1W-C008))
_____)

UIC Appeal No. 07-03

ORDER DECLINING TO EXTEND STAY

In a joint status report dated June 17, 2009, the Police and Fire Retirement System of the City of Detroit, RDD Investment Corporation, and RDD Operations, LLC, (collectively, "PFRS/RDD") requested an additional four-month stay, through October 19, 2009, of the effective date of the Environmental Appeals Board's ("Board") order denying review of U.S. Environmental Protection Agency ("EPA"), Region 5's ("Region") decision to terminate the above-captioned permits. Joint Status Report (June 17, 2009); *see In re Env'tl. Disposal Sys., Inc.*, UIC Appeal No. 07-03, slip op. (EAB July 18, 2008), 14 E.A.D. ____ ("Order Denying Review"). The Region did not oppose the request, and the parties represented that the Region's decision on a third-party's – Environmental Geo-Technologies, LLC – application for permits to operate the wells at issue in this case was "unavoidably delayed [but that] EPA * * * expect[ed] to issue a decision on the permit application in the very near future." Joint Status Report at 2. The extension of the stay was sought to "allow the EPA to complete its review of the permit application and issue a decision that may affect [the above-captioned] proceedings." *Id.* On

June 24, 2009, the Board granted a one-month stay, through July 19, 2009, and requested that the Region file a status report regarding the projected timing of the aforementioned permit application review and decision. Order Granting Third Stay and Requesting Region 5 to File Status Report (June 24, 2009). The Board further stated that it would determine whether an additional stay and of what duration would be appropriate upon receipt of the Region's status report. *Id.* at 2.

The Region's July 9, 2009 status report states that "[i]t is no longer clear whether U.S. EPA will be in a position to issue a proposed decision on the pending permit applications from Environmental Geo-Technologies, LLC in the near future. As a result, there is no reason to further extend the stay of the effective date of the EAB's July 18, 2008 Order Denying Review based on the potential impact of such a proposed decision on this matter." Region 5 Status Report (July 9, 2009). PFRS/RDD responded to the Region's status report on July 13, 2009, and stated "EPA provided no information explaining its statement that it may not issue a proposed decision on [Environmental Geo-Technologies, LLC's] complete UIC permit application in the near future. * * * Should the EPA grant complete [sic] [Environmental Geo-Technologies, LLC's] UIC permit application, this appeal may be rendered moot." PFRS/RDD Response to Region 5 Status Report 2 (July 13, 2009). PFRS/RDD then requested an extension of the stay beyond the date requested in the Joint Status Report, through November 19, 2009. *Id.* at 2-3.

Upon consideration of the Region's status report and PFRS/RDD's response, the Board determines that PFRS/RDD have not demonstrated good cause to further extend the stay of the

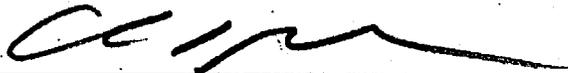
effective date of the Order Denying Review. The sole basis for the stay was the expectation that a decision on the permit application from Environmental Geo-Technologies, LLC would be made shortly. While the Region does not explain its change in position from that set forth in the Joint Status Report, the Board has no choice but to accept the Region's current characterization of the state of the permit proceedings. Accordingly, the Board declines to extend the current stay beyond July 20, 2009,¹ and the effective date of the Order Denying Review is July 21, 2009.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: July 21, 2009

By: _____


Edward E. Reich
Environmental Appeals Judge

¹ The Board's June 24, 2009 order extended the stay to July 19, 2009; however, when, as here, "the final day of any time period falls on a weekend * * *, the time period shall be extended to the next working day." 40 C.F.R. § 124.20(c).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Declining to Extend Stay in *Environmental Disposal Systems, Inc.*, UIC Appeal No. 07-03, were sent to the following persons in the manner indicated:

**By Certified U.S. Mail,
Return Receipt Requested (and facsimile):**

Joseph E. Turner
Ronald A. King
Kristin B. Bellar
Clark Hill PLC
212 East Grand River Avenue
Lansing, MI 48906
Facsimile: (517) 318-3099

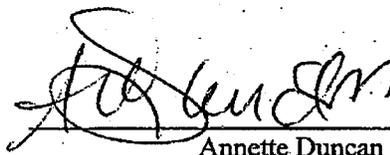
By EPA Pouch Mail (and facsimile):

Thomas J. Kreuger
Associate Regional Counsel
U.S. EPA, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604
Facsimile: (312) 886-0747

By EPA Interoffice Mail:

Mindy G. Nigoff
Office of General Counsel
U.S. EPA
1200 Pennsylvania Ave., NW
Washington, DC 20460

Date: JUL 21 2009



Annette Duncan
Secretary

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**Disclosure of Corporate Affiliations
and Financial Interest**

Sixth Circuit

Case Number: _____

Case Name: PFRS, et al. v Env'tl Protection Agency

Name of counsel: Kristin B. Bellar, Clark Hill PLC

Pursuant to 6th Cir. R. 26.1, Police and Fire Retirement System of the City of Detroit

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on September 2, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

si Kristin B. Bellar

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**Disclosure of Corporate Affiliations
and Financial Interest**

Sixth Circuit

Case Number: _____

Case Name: PFRS, et al. v Env'tl Protection Agency

Name of counsel: Kristin B. Bellar, Clark Hill PLC

Pursuant to 6th Cir. R. 26.1, RDD Investment Corp.

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on September 2, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

sl. Kristin B. Bellar

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: _____

Case Name: PFRS, et al. v Env'tl Protection Agency

Name of counsel: Kristin B. Bellar, Clark Hill PLC

Pursuant to 6th Cir. R. 26.1, RDD Operations, LLC

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

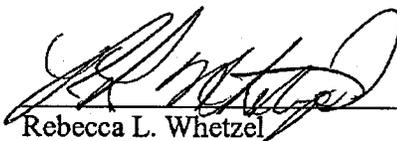
No.

CERTIFICATE OF SERVICE

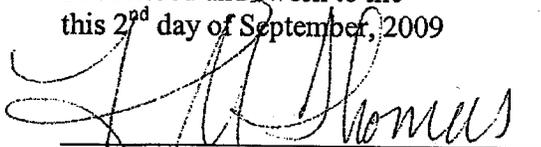
I certify that on September 2, 2009 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

sl. Kristin B. Bellar

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.


Rebecca L. Whetzel

Subscribed and sworn to me
this 2nd day of September, 2009



K M Thomas, Notary Public
Ingham County, State of Michigan.
Acting in Ingham County, Michigan.
My Commission Expires: September 25, 2015.

Case No. 09-4090

In The
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**POLICE and FIRE RETIREMENT SYSTEM
OF THE CITY OF DETROIT, RDD OPERATIONS, LLC,
and RDD INVESTMENT CORP.**

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

**PETITIONERS' MOTION FOR STAY OF EFFECTIVE DATE OF
ENVIRONMENTAL PROTECTION AGENCY'S TERMINATION OF
UNDERGROUND INJECTION CONTROL PERMITS**

Ronald A. King (P45088)
Joseph E. Turner (P44135)
Kristin B. Bellar (P69619)
CLARK HILL PLC
212 East Grand River Avenue
Lansing, MI 48906
(517) 318-3100

The Police and Fire Retirement System of the City of Detroit, RDD Operations, LLC, and RDD Investment Corp., on their own behalf and on behalf of Environmental Disposal Systems, Inc. (“EDS”) (collectively, “Petitioners”), pursuant to Fed. R. App. P. 18, move for an order staying the effective date of the Environmental Protection Agency’s (“EPA”) Decision (“Termination”) (Ex. 1) terminating underground injection control permits MI-163-1W-C007 and MI-163-1W-C008 (“UIC Permits”) pending this Court’s review pursuant to the Safe Drinking Water Act (“SDWA”), 42 U.S.C. § 300j-7(a)(2).¹

A stay of the Termination is appropriate because Petitioners are likely to succeed on the merits of this appeal, and a stay will preserve the status quo while preventing the irreparable harm that will occur to Petitioners should the Termination be reversed or modified as a result of this appeal. The stay will not result in any harm to EPA, the public or the environment, and will serve the public interest by conserving resources and preserving a valuable disposal facility.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The UIC Permits authorize the operation of a Class I commercial hazardous waste underground injection control facility located in Romulus, Michigan (the “Facility”) (Ex. 3). The Facility consists of two underground injection disposal wells (the “Wells”), permitted under the SDWA, and an aboveground hazardous

¹ The Termination was made effective on July 21, 2009, by order of the Environmental Appeals Board (“EAB”) (Ex. 2).

waste treatment and storage facility, licensed under the Michigan Natural Resources and Environmental Protection Act, M.C.L. § 324.11101 *et seq.* (“Part 111”). From 1993 to 2006, the PFRS, a public employee pension plan, loaned approximately \$40,000,000 to EDS for the development of the Facility. The PFRS took a security interest in the Facility as a condition of its investment.

On December 27, 2005, after 15 years of applications, modifications, public hearings, appeals and lawsuits, EDS had received all permits required for operation of the Facility and began receiving, treating and disposing of hazardous waste. From December 2005 through October 2006, EDS received approximately 2.4 million gallons of hazardous and non-hazardous waste (Ex. 10).

On October 23 and 26, 2006 the Michigan Department of Environmental Quality (“MDEQ”), during routine inspections, observed two minor leaks from the aboveground portions of the Wells (Exs. 4-5).² Although neither leak presented any threat to public health or the environment, (Ex. 6-8), MDEQ nonetheless alleged that EDS had failed to comply with certain conditions contained in its operating license issued under Part 111 (“Part 111 License”) and directed EDS to suspend the operation of the Wells (Ex. 9). EDS complied with MDEQ’s direction and ceased all operations at the Facility. Since November 2, 2006, no waste has

² The October 23, 2006 leak involved a small discharge of brine water used to put the well under pressure during required mechanical integrity testing. Both wells passed their respective mechanical integrity tests at that time.

been received or injected at the Facility, and as of October 2007, all waste remaining onsite was removed from the Facility. (Ex. 10).

Beginning in October 2006, the PFRS became increasingly concerned about EDS's financial position and its ability to operate the Facility consistent with its obligations. Upon learning of the leaks at the wellheads, and because EDS had previously defaulted on its loan agreement with PFRS, PFRS took possession of the Facility in lieu of foreclosure as a necessary action to protect PFRS's investment, as well as the public health, safety and the environment (Ex. 11). PFRS took this action despite not knowing the extent of the operational condition of the Facility or the full circumstances surrounding the leaks. However, under the circumstances, the PFRS deemed this action to be the most prudent and expeditious manner by which to protect its investment and to avoid potential risk to the environment. In order to effect the transfer of the Facility in a prompt and orderly manner, on November 7, 2006, EDS executed: (1) a Quit Claim deed transferring ownership of the real property to RDD Investment Corp.,³ (2) an Acknowledgement and Assignment Agreement, assigning the assets of the Facility to RDD Investment Corp. and conferring on RDD Operations, LLC all of EDS's rights and interests with respect to the Facility, the licenses and permits, and (3) an

³ PFRS formed RDD Investment Corp. and RDD Operations, LLC (collectively, "RDD") in November of 2006 as its designees to take assignment of EDS's interests in the Facility and its permits/licenses, and to assume ownership and control over the Facility. RDD Investment Corp. holds title to the real property. RDD Operations, LLC is the interim operator of the Facility.

Assignment of Permits to RDD Investment Corp. (Ex. 12). EDS simultaneously relinquished possession of the Facility to RDD.

In November 2006, RDD immediately took action to prevent any potential environmental or health risk by making necessary repairs to the wellheads, implementing cleanup of the brine leak, making staffing changes, performing required monitoring, securing required financial assurance, and addressing compliance issues. RDD also identified a potential permanent owner/operator for the Facility, Environmental Geo-Technologies, LLC ("EGT"), who intends to acquire and resume operations at the Facility upon receipt of all required permits. In February 2007, PFRS finalized an agreement to transfer the Facility to EGT. Since that time, both parties have diligently pursued the transfer of EDS's permits and, after the Termination, applications for new UIC permits to be issued to EGT.

On November 2 and 3, 2006, prior to RDD taking possession of the Facility, EPA performed an onsite inspection. On November 20, 2006, EPA issued a Notice of Non-Compliance and Request for Information to EDS, alleging violations of certain conditions of the UIC Permits that occurred prior to the transfer of the Facility to RDD (Ex. 13). EPA cited EDS for primarily administrative or recordkeeping violations of the UIC Permits, and required EDS to submit certain information and take specified actions to remedy the administrative violations. In response, RDD provided EPA with all available

information requested on December 14, 2006 (Ex. 14), and in subsequent submissions (Ex. 15).

On January 12, 2007, EPA issued a second Request for Information to EDS, seeking information to determine whether cause existed to revoke and re-issue, modify or terminate the UIC Permits (Ex. 16). On January 22, 2007, RDD provided EPA information regarding its authority to act on behalf of EDS with respect to the Facility (Ex. 12). On January 31, 2007, RDD provided a full response to the Request at a meeting held at EPA Region 5 headquarters (Ex. 17, exhibits omitted), demonstrating that no cause existed for Termination. At the January 31, 2007 meeting, EPA, RDD and EGT discussed the status of the Facility, its permits, and RDD's efforts in addressing EPA's concerns. Notably, EPA never objected to RDD's interim operation of the Facility in the place of EDS nor RDD's actions in remedying EDS's past violations. To the contrary, EPA indicated that it was generally satisfied with RDD's actions, and that a request to transfer the UIC Permits to EGT ("Transfer Request") would likely be favorably received. In fact, EPA staff recommended review of the Transfer Request before consideration of any other enforcement action. A February 15, 2007 memorandum from the former Director of the Water Division to the then-acting Region 5 Administrator set forth EPA's options for proceeding with respect to EDS's UIC Permits, and recommended that, given the imminent submission of the Transfer Request by

RDD and EGT, any final decision on a course of action with respect to EDS's permits should be deferred pending review of the Transfer Request (Ex. 18). The memorandum also suggested that termination of the UIC Permits prior to consideration of the Transfer Request may appear to be arbitrary.

In reliance on the feedback RDD received from EPA during the January 2007 meeting and in subsequent communications, RDD continued its efforts to maintain the Facility (at a total cost of over \$3,000,000), and pursue the transfer of the UIC Permits to EGT. To that end, in February 2007, RDD and EDS submitted the Transfer Request, along with subsequent submissions of information at the request of EPA (Exs. 19 and 20). Although EPA acknowledged that it received all of the supplemental materials EPA requested for consideration of the Transfer Request, EPA announced on April 12, 2007 that it intended to terminate EDS's UIC Permits rather than transfer them to EGT (Ex. 21). That same day, EPA issued a Notice of Intent to Terminate the UIC Permits ("NOI") (Ex. 22) and a Fact Sheet (Ex. 23) which cited only to EDS's violations that predated November 2006 (when RDD took possession of the Facility), and made no mention of RDD's actions that returned the Facility to compliance or the pending Transfer Request. This turn of events was surprising; prior to April 12, 2007, EPA never stated it intended to terminate the UIC Permits and had not expressed any dissatisfaction with RDD's actions in remedying compliance issues.

During the public comment period on the NOI, Petitioners and EGT submitted public comments urging EPA to transfer or to revoke and reissue the UIC Permits to EGT (Ex. 24, exhibits omitted and Ex. 25). Due to factual omissions in the Fact Sheet, namely RDD's remedying of the violations set forth in the Fact Sheet, Petitioners submitted a Request to Re-Open/Extend the Public Comment Period to allow for comment on these facts (Ex. 26). EPA did not respond to this request prior to proceeding with the Termination (Ex. 27).

On October 22, 2007, EPA issued its Notice of Decision to Terminate the UIC Permits (Ex. 1) and Response to Comments (Ex. 28). The Termination was predicated upon EPA's assertion of the ongoing existence of the permit violations alleged in the Fact Sheet issued with the NOI. These alleged violations, however, predated the transfer of the Facility to RDD, and had since been remedied by RDD. Notably, although the Fact Sheet (Ex. 23) did *not* cite EDS's transfer of the Facility to RDD as a basis for termination, in its Notice of Decision, for the first time, EPA supported the Termination with an argument that, because EDS "abandoned" the Facility, termination as a heightened enforcement mechanism was required⁴ (Ex. 28, Response Nos. 9, 12-13, 27). Presumably, EPA recognized that some justification for its disproportionate enforcement action was required, given

⁴ Petitioners deny that EDS "abandoned" of the Facility because there was an orderly transfer of the Facility to RDD.

that almost all of the violations providing the purported basis for the Termination were related to routine recordkeeping matters that had been remedied by RDD.

On November 20, 2007, RDD filed a Petition for Review of EPA's Termination with the EAB (Ex. 29, exhibits omitted), and subsequently filed a reply brief in support (Ex. 30). While the Petition was pending before the EAB, on December 7, 2007, EGT submitted an application for new UIC Permits for the Facility (Ex. 31). EPA notified EGT that its application was complete on February 19, 2008 (Ex. 32) and, on information and belief, until July 10, 2009, EPA was prepared to act favorably on EGT's application by issuing a draft permit (Ex. 33).

On July 18, 2008, the EAB denied RDD's Petition for Review (Ex. 34), largely and erroneously deferring to EPA's discretion in making permitting decisions. The EAB subsequently denied RDD's motion for reconsideration, but granted RDD's motion for a stay of that decision (Exs. 35-36). EPA did not contest the motion for stay, noting that a stay would maintain the status quo at the Facility, and that, due to EGT's pending UIC permit application, an appeal of EPA's action would not be a productive use of resources (Ex. 37, p. 5). Subsequently, by stipulation of the parties, and upon order of the EAB, the stay was extended through June 19, 2009 (Ex. 38). On June 18, 2009, EPA again agreed to continue the stay through October 19, 2009 to allow for the completion of review of EGT's UIC permit application (Ex. 39). Each time EPA agreed to a

stay, it indicated that a decision on EGT's application was imminent. During the Termination proceedings, the EAB appeal and the stay period, RDD continued to maintain the Facility and comply with permit requirements. These actions were taken, in part, in anticipation of EPA's issuance of new UIC Permits to EGT.

In lieu of granting the stay agreed upon by EPA and RDD through October 19, 2009, however, the EAB only granted a stay through July 19, 2009 and requested that EPA provide a status report on its review of EGT's UIC permit application (Ex. 40). In yet another surprising turn of events, EPA's July 10, 2009 status report indicated, for the first time, that EPA was *not* prepared to act on EGT's UIC permit application, and that a stay was no longer appropriate (Ex. 41). Upon information and belief, in the days prior to July 10, 2009, EPA was prepared to issue draft UIC permits to EGT (Ex. 33). EPA provided no basis whatsoever for its change in position (Ex. 42). However, on September 9, 2009, EPA expressly asserted that its change in position was based on events that occurred *subsequent* to the July 10, 2009 EPA report, namely MDEQ's July 20, 2009 notice that it was proceeding to revoke EDS's Part 111 License. (Ex. 53).

Based on EPA's statements in its status report, EAB issued an Order declining to extend the stay, rendering the Termination effective as of July 21, 2009 (Ex. 2). The lifting of EAB's stay and the resulting final agency action of the Termination has set off a chain reaction of events that, if allowed to continue, will

almost certainly end with the Petitioners' complete loss of use of the Facility, which was designed, constructed and permitted at a cost of over \$40,000,000. This chain reaction includes the automatic termination of EDS's "license by rule" for operation of the wells under Mich. Admin. Code R. 299.9503(3), exposing RDD to criminal sanctions and civil penalties. Additionally, after the EAB denied the Petition for Review, MDEQ issued a Notice of Intent to Revoke EDS's Part 111 License (Ex. 43). On July 20, 2009, MDEQ issued notice that it was proceeding to revoke EDS's Part 111 License (Ex. 44). This action was then immediately followed by EPA's announcement that it would not act on EGT's UIC permit application, primarily based on MDEQ's revocation proceedings (Exs. 45 and 53). All of these events lead directly to the closure of the Facility.

Pursuant to Fed. R. App. 18(a)(1) and 5 U.S.C § 705, Petitioners requested that EPA stay the effective date of the Termination prior to bringing this motion for stay (Ex. 46). Petitioners and EGT attempted, without success, to discuss this matter with EPA officials on several occasions (Ex. 47). On September 9, 2009, EPA sent Petitioners' counsel a letter denying the request for stay (Ex. 53).

LAW AND ARGUMENT

Whether a stay of an agency's order is warranted is determined by the balancing of four factors: (1) the likelihood that the moving party 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). These factors are to be balanced, such that “[t]he probability of success that must be shown is inversely proportional to the degree of irreparable injury the plaintiffs will suffer absent an injunction,” and a “stay may be granted with either a high probability of success and some injury or vice versa.” *Id.* While “[o]rdinarily the party seeking a stay must show a strong or substantial likelihood of success ... at a minimum the movant must show serious questions going to the merits and irreparable harm which decidedly out-weighs any potential harm to the defendant if a [stay] is issued.” *Id.* (internal citations and quotations omitted).

A. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS.

This Court has jurisdiction to review the Termination, a final agency action by EPA, under the SDWA, 42 U.S.C. § 300j7(a)(2) and 40 CFR § 124.19. The Termination should be reversed because it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); *Leblanc v. EPA*, 310 Fed. Appx. 770, 773-774 (6th Cir. 2009) (Ex. 48); *W.R. Grace & Co. v. EPA*, 261 F.3d 330, 338 (3rd Cir. 2001). At a minimum, EPA’s ruling should be remanded if “the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply

cannot evaluate the challenged agency action on the basis of the record before it.” *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). In this case, EPA relied on impermissible factors, utterly failed to consider highly relevant factors and acted contrary to law in reaching its decision to terminate the UIC Permits.⁵

First, the Termination was arbitrary, capricious and constituted an abuse of discretion because each violation identified in the Fact Sheet as a basis for termination had been substantially remedied by RDD prior to commencement of termination proceedings (Ex. 29, pp. 31-38). EPA’s discretion can not extend to termination based on *de minimis* permit violations that no longer exist, as such unbridled discretion leads to arbitrary and capricious EPA decisions.

Second, the Termination was improperly premised on the conclusions that only *EDS* could remedy the alleged violations and that *RDD*’s actions could not be considered in determining the Facility’s compliance (Ex. 29, pp. 38-40). EPA’s position in this regard is illogical. EPA simultaneously argued that RDD’s discharge of *EDS*’s permit obligations had no effect on the status of the violations, while asserting that RDD was *required* to discharge those obligations as the owner of the Facility (Ex. 28, Response Nos. 8, 9, 11, 14). The regulatory purpose of requiring RDD (as the owner) to perform *EDS*’s obligations (as the permittee)

⁵ Due to page limitations, Petitioners incorporate by reference their arguments before the EAB in their Petition for Review, Reply Brief and Motion for Reconsideration and Motion for Stay (Exhibits 29, 30 and 35). Petitioners respectfully request the opportunity to supplement this Motion if additional briefing would aid the decisional process.

would be mooted if, as is the case here, the resulting actions taken by RDD are not considered in evaluating the compliance of the Facility. This circular reasoning could justify termination of a permit where no violation has occurred, but where the *owner* of the facility (as opposed to the permittee *operator*) had discharged the permit obligations. This is not a reasonable interpretation of the UIC regulations. EPA's refusal to consider RDD's actions in remedying EDS's compliance issues resulted in a decision that was arbitrary, capricious and not in accordance with law.

Third, serious procedural defects resulted in the Termination being issued not in accordance with law (Ex. 29, pp. 44-47). EPA regulations contain procedural requirements for the issuance of a final permit decision. 40 CFR § 124.8 requires that a draft UIC permit⁶ must be accompanied by a Fact Sheet, which "shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit." The Fact Sheet accompanying the NOI listed eight permit violations as the basis for the proposed termination. The violations did not include any reference to EDS's alleged "abandonment" of the Facility⁷ (Ex. 23). Only *after* EPA terminated the Permits did the agency identify EDS's alleged "abandonment" as a (if not *the*) major cause for the Termination. In fact, the EAB noted that "the Region relied

⁶ A NOI is a type of draft permit. See 40 CFR § 124.5(d).

⁷ The Fact Sheet did, however, state in an *introductory* section that EDS transferred ownership of the Facility without notice to EPA and "abandoned all interests in, and operations at the wells," but was not a cited violations section or identified as an aggravating factor for the violations.

primarily on EDS's 'abandonment' of the Facility rather than the significance of the individual violations in deciding to terminate the Permits." (Ex. 33, p. 20, fn. 11). If, as EPA claimed after the Termination, that EDS's transfer of the Facility to RDD was the most significant factor in the Termination, then EPA was obligated, under 40 CFR § 124.8, to state that factor in the Fact Sheet and to allow for public comment on this issue. This was not done. EPA's basis for the Termination changed after the public comment period, and remand for further consideration of this later-identified basis for Termination is appropriate, because a court will not accept *post hoc* rationalizations for agency actions. *W.R. Grace*, 261 F.3d at 338; *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

Fourth, EPA considered factors irrelevant to a UIC permitting decision in reaching its decision to Terminate (Ex. 29, pp. 40-44). "[T]he SDWA ... and the UIC regulations... establish the *only* criteria that EPA may use in deciding whether to grant or deny an application for a UIC permit, and in establishing the conditions under which deep well injection is authorized." *In re Envotech, L.P.*, 6 E.A.D. 260, 264 (EAB 1996) (emphasis in original). EPA's assertion of the need to re-evaluate the "merits" of the Facility (i.e., its intrinsic value as a waste disposal facility) and EPA's "serious doubts" regarding the "viability of the Facility," (Ex. 28, Response Nos. 8, 27), are not enumerated factors in the SDWA or UIC regulations, and thus could not be considered in reaching a permit decision.

Moreover, the required showing of likelihood of success on the merits may be satisfied by the existence of serious and difficult questions of law, including a question of first impression. *Simon Prop. Group, Inc. v. Taubman Ctrs., Inc.*, 262 F. Supp. 2d 794, 797 (E.D. Mich. 2003). The issues to be presented to this Court raise such serious questions of law. First, the question of the proportionality of EPA's use of termination as a sanction, and the level of discretion afforded to EPA in the absence of any policy or guidance raise serious issues on appeal (Ex. 35, pp. 5-6). A sanction must be rationally related to the offense. *R & W Technical Servs. Ltd. V. CFTC*, 205 F.3d 165, 177 (5th Cir. 2000). A sanction disproportionate to the violation will be reversed where more proportionate remedies are available, *Gulf Power Co. v. FERC*, 983 F.2d 1095 (Fed. Cir. 1993), and where less severe sanctions were imposed in other cases for similar violations. *Morall v. DEA*, 412 F.3d 165, (Fed. Cir. 2005). EPA has generally used monetary penalties as an enforcement mechanism for more serious UIC permit violations (Ex. 49). Here, EPA imposed the extraordinary penalty of Termination even though the cited violations were minor, substantially corrected, and posed no threat to the environment or public health.

Second, this appeal presents the serious questions of what information EPA was required to place in the Fact Sheet for the Termination, and whether EPA may base the Termination decision on facts not identified as violations in the Fact Sheet

(Ex. 29, pp. 44-47). Upon information and belief, these questions have not been addressed by any court. In this case, the public and Petitioners could not have foreseen that EPA would almost entirely base the Termination on EDS's alleged "abandonment" of the Facility, as it was not identified as a violation in the Fact Sheet, and the public was not informed that the violations cited in the Fact Sheet had been substantially corrected. EPA must specify the information that it reasonably expects to rely upon in terminating permits, so that the public has fair notice to preserve its objections (or risk waiving said objections on appeal), and to prevent EPA from rendering arbitrary rulings based on *post hoc* rationalizations.

Third, whether EPA was required to act on the Transfer Request before proceeding with termination is a matter of first impression (Ex. 34, p. 48). The EAB deferred to EPA's decision to not process the Transfer Request; however, there are no regulations or guidance to support EPA's decision, and, as evidenced by the February 2007 EPA Memorandum, termination was not recommended by EPA staff because it would appear "arbitrary" in light of the expected Transfer Request. (Ex. 18). Absent any guidance from the UIC regulations or the courts, EPA can exercise unfettered discretion to ignore transfer requests, leading to inconsistent and arbitrary decisions (Ex. 29, pp. 51-54). This result is against the public interest and presents a serious issue of law.

B. IRREPARABLE INJURY WILL OCCUR IF THE MOTION FOR STAY IS DENIED.

Termination of the UIC Permits will set off a chain reaction that will end with Petitioners' complete loss of use of the Facility and PFRS's \$40,000,000 investment. The Facility cannot be properly operated without all of the necessary federal and state licenses and permits, which were acquired by EDS after 15 years of efforts. The Facility is designed solely as a state-of-the-art commercial hazardous waste disposal facility, and the Facility equipment has been exclusively designed and installed for use at the Facility, and has no other value. If a stay is not granted, Petitioners will be faced with the imminent risk of losing all value in and use of the Facility without an opportunity for review of EPA's action.

EPA stated that it intends to plug and abandon the Wells at the Facility upon Termination (Ex. 28, Response No. 25). Plugging and abandonment of the Wells is required for closure of the Facility, pursuant to UIC Permit Conditions I(F) and 40 CFR § 146.71. Plugging and abandonment permanently closes the Wells, rendering the Facility permanently unable to be used for its intended purpose (Ex. 10) The irreversible closure of the Wells resulting in a complete loss of the use of the Facility as designed constitutes irreparable harm. The loss of use of property or a likelihood that a business will fail is sufficient irreparable harm for the purposes of an injunction or other equitable relief. *See Warren v. City of Athens*, 411 F.3d 697, 711-712 (6th Cir. 2005) (irreparable harm existed where loss of drive-through window would cause petitioner to "likely go out of business").

Termination of the UIC Permits will also cause automatic noncompliance with Part 111, potentially subjecting Petitioners to significant civil and criminal sanctions. M.C.L. § 324.11151. Part 111 prohibits “managing or maintaining” a hazardous waste facility without a license. M.C.L. § 325.11123. Although the Facility’s aboveground units are licensed under Part 111, the Wells themselves are *not* covered by that license. Rather, the Wells are “deemed to have an operating license” so long as the UIC Permits remain in effect. Mich. Admin. Code R. 299.9503(3)(a). This license-by-rule terminates with the termination of the UIC Permits. Absent a stay, Petitioners will be impaled on Morton’s Fork, forced to choose between maintaining the Wells in violation of Part 111 and subject to substantial sanctions, or immediately closing the Wells. Either alternative constitutes irreparable harm. Further, MDEQ has taken the position that UIC Permits are required by EDS’s Part 111 License for the aboveground portion of the Facility (Ex. 50), and has commenced proceedings to revoke the Part 111 License based, in part, on the Termination (Exs. 43, 44, p. 13 and 51). Upon revocation of a Part 111 license, MDEQ “shall order the owner or operator to carry out closure procedures,” Mich. Admin. Code R. 299.9520(4), including the complete decommissioning of the aboveground portion of the Facility (Ex. 10).

Finally, if the status quo is not maintained, RDD will suffer irreparable harm by loss of its employees that are specifically trained as to the unique aspects of the

Facility. If the Facility is shut down, the loss of valuable personnel who will necessarily find new employment constitutes irreversible harm, particularly if RDD prevails in this appeal and is later unable to rehire its personnel.

C. NO HARM TO EPA OR THE PUBLIC WILL OCCUR IF A STAY IS GRANTED.

No harm will occur to EPA or to the public by continuing the previous thirteen month stay of the Termination by the EAB. There is no risk to the environment or public health in maintaining the status quo, which has been in place for nearly 3 years. All operations at the Facility were suspended on November 2, 2006, and no waste remains at the Facility. The Facility is completely empty, clean and decontaminated pursuant to 40 CFR § 261.7 (Ex. 10). On August 2, 2007, brine was injected into the Wells, putting them under neutral pressure to prevent the flow of reservoir fluids (Ex. 10). The Facility has onsite security and maintains required and properly trained staff (Ex. 10). The Wells are secure, and no hazardous waste remains onsite, eliminating any risk of endangerment to the public or the environment. A stay will merely continue the status quo, and neither the public nor EPA will suffer any harm from a stay.

D. THE PUBLIC INTEREST SUPPORTS GRANTING A STAY.

The public interest favors granting a stay because it would prevent “wasteful and repetitive proceedings.” *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). The “final agency action” in this matter, though subject

to judicial review, has triggered related administrative actions affecting EDS's other licenses, as well as EGT's applications for UIC Permits. (Exs. 44-45). If this appeal is successful, these administrative actions will likely become moot. Moreover, the public interest also favors "fostering competition and preserving the economic viability of existing public services," *id.*, including the development and operation of waste disposal facilities. *See Mich. Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 155 (6th Cir. 1991). Finally, EPA has found that injection into Class I wells is safer than "virtually any other waste disposal practice." (Ex. 52, p. 32, fn. 35). Thus, ensuring the continued viability of the Facility as a waste disposal facility also serves the public interest.

CONCLUSION AND RELIEF REQUESTED

Wherefore, Petitioners respectfully request that this Court enter an order staying the effective date of the Termination pending judicial review.

Respectfully submitted,

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