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ENVIR. APPEALS BOARD



September 12, 2007

Donald P. Gallo, Esq., P.E.  
Direct Dial: 262-951-4555  
dgallo@reinhardt.com

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Mary A. Gade, Esq.  
Regional Administrator  
U.S. Environmental Protection Agency  
Region 5  
77 West Jackson Boulevard  
Mail Code: R-19J  
Chicago, IL 60604-3507

Robert A. Kaplan, Esq.  
Acting Regional Counsel  
U.S. Environmental Protection Agency  
Region 5  
77 West Jackson Boulevard  
Mail Code: C-14J  
Chicago, IL 60604-3507

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

Dear Ms. Gade, Mr. Kaplan, and Clerk: Re: UIC Permits Nos. M1 163 C007 and M1 163 C008 (the "Permits") Issued to Environmental Disposal Systems, Inc. ("EDS"), Romulus, Michigan

I am writing on behalf of the proposed transferee of the Permits, Environmental Geo-Technologies, LLC ("EGT"), to request that EPA and EAB stay the proposed termination of the Permits (the "Termination Proceeding") and the July 11, 2007 and July 27, 2007 Orders of the Environmental Appeals Board United States Environmental Protection Agency ("EAB"), which pertain to EGT's request to transfer the Permits (the "Orders"). Additionally, the Police and Fire Retirement System of the City of Detroit, RDD Investment Corporation and RDD Operations, LLC (collectively, "RDD") have requested that EPA re-open or extend the comment period regarding the Termination Proceeding.

P.O. Box 2265, Waukesha, WI 53187-2265 • W233 N2080 Ridgeview Parkway, Waukesha, WI 53188  
Telephone: 262-951-4500 • Facsimile: 262-951-4690 • Toll Free: 800-928-5529

Madison, WI • Telephone: 608-229-2200 • Toll Free: 800-728-6239  
Milwaukee, WI • Telephone: 414-298-1000 • Toll Free: 800-553-6215  
Rockford, IL • Telephone: 815-633-5300 • Toll Free: 800-840-5420

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Robert A. Kaplan, Esq.  
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As you will recall, EGT, RDD, and EDS requested that the Permits be transferred (the "Permit Transfer Request") on February 28, 2007. EGT and RDD subsequently submitted all required documentation regarding the Permit Transfer Request. RDD also addressed various compliance issues. However, on April 12, 2007, EPA notified EGT and RDD that EPA would not consider the Permit Transfer Request due to its intention to terminate the UIC Permits. On the same date, EPA sent EDS a Notice of Intent to Terminate the UIC Permits. On June 21, 2007, EGT filed a Comment on the Termination Proceeding.

EGT also filed a May 10, 2007 informal letter of appeal of the April 12, 2007 EPA decision not to consider the Permit Transfer Request. EPA responded on June 26, 2007. On July 16, 2007, EGT motioned for leave to file a reply brief. On July 19, 2007, EGT received the EAB's July 11, 2007 Order declining to review EGT's appeal. On July 23, 2007, EGT motioned the EAB for reconsideration. The EAB's July 27, 2007 Order denied EGT's motions. EGT then filed a petition for review with the United States Court of Appeals for the Sixth Circuit.

EGT joins RDD's request that EPA re-open or extend the comment period for the Termination Proceeding. EGT also requests that EPA stay the Termination Proceeding and the Orders pending the Sixth Circuit's review of EGT's petition. Under 5 U.S.C. section 705, EPA "may postpone the effective date of action taken by it, pending judicial review." EGT believes that it would be in the best interests of all parties to allow the court of appeals to address the issues raised in EGT's petition for review before EPA proceeds with the Termination Proceedings.

However, if EPA/EAB is willing to stay the Termination Proceeding and the Orders, EGT would be amenable to staying the Sixth Circuit review in order to allow all the parties to meet and resolve this matter without further litigation. EGT believes that such a course of action would benefit everyone involved. On behalf of EGT, Mr. Francis Lyons sent a June 28, 2007 letter to EPA Region 5 requesting a meeting to facilitate a resolution of this matter that would address the concerns of all parties without litigation. Region 5 declined the request on July 18, 2007. Nevertheless, EGT's goal continues to be a resolution without litigation and believes that its August 27, 2007 meeting with Ms. Lynn Buhl at EPA headquarters in Washington D.C. was beneficial and could serve as the first step in amicably working through the various

Mary A. Gade, Esq.  
Robert A. Kaplan, Esq.  
Clerk – Environmental Appeals Board  
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issues relating to the Romulus facility. Staying the Termination Proceeding, the Orders, and the Sixth Circuit's review would facilitate a such a resolution.

I would appreciate your prompt response. Thank you for your consideration.

Yours very truly,



Donald P. Gallo

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cc Mr. Stephen L. Johnson  
Lynn Buhl, Esq.  
Thomas J. Krueger, Esq.  
Mr. Dimitrios Papas  
Henry J. Brennan, III, Esq.  
Gary A. Peters, Esq.  
Francis X. Lyons, Esq.  
Mr. Richard J. Powals, P.E.  
Ronald A. King, Esq.

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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2007 SEP 13 AM 10:18

ENVIRONMENTAL GEO-  
TECHNOLOGIES, LLC,

ENVIR. APPEALS BOARD

Petitioner,

v.

Case No. 07-4041

UNITED STATES  
ENVIRONMENTAL  
PROTECTION AGENCY, UNITED  
STATES ENVIRONMENTAL  
PROTECTION AGENCY  
ENVIRONMENTAL APPEALS  
BOARD, STEPHEN L. JOHNSON,  
Administrator, United States  
Environmental Protection Agency,

Respondents.

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**PETITIONER ENVIRONMENTAL GEO-TECHNOLOGIES,  
LLC'S EMERGENCY MOTION AND LEGAL ARGUMENT FOR  
IMMEDIATE STAY OF ENVIRONMENTAL PROTECTION  
AGENCY ORDERS AND PERMIT TERMINATION  
PROCEEDING PENDING REVIEW**

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**MOTION**

Pursuant to Federal Rule of Appellate Procedure 18, 5 U.S.C. §705, 28 U.S.C. §2349(b), Sixth Circuit Rule 27(d) and Sixth Circuit Internal Operating Procedure 27(b), petitioner, Environmental Geo-Technologies, LLC ("EGT"), moves the court for an immediate stay of: (i) both Orders of the Environmental Appeals Board United States Environmental Protection Agency at issue in this case

(the Order Denying Motions for Leave and for Reconsideration, filed on the 27th day of July 2007, and the Order, filed on the 11th day of July, 2007, jointly referred to herein as the "Orders"); and (ii) a United States Environmental Protection Agency ("EPA") proposed underground injection control permits termination proceeding (the "Termination Proceeding"). (See Orders Ex. A & EPA's Notice of Termination Proceeding Ex. B.) This motion is based upon the above-stated rules and is supported by the following legal argument and the affidavits/declarations (of Ronald A. King, Esq., Donald P. Gallo, Esq., and Richard J. Powals, P.E.) and documents referenced herein and attached as exhibits. (See Exhibit List preceding attached exhibits.)

## **LEGAL ARGUMENT**

### **Facts**

In 1996, Environmental Disposal Systems, Inc. ("EDS") started the permitting process for a hazardous waste injection facility located at 28470 Citrin Drive in Romulus, Michigan (the "Facility").<sup>1</sup> *Sunoco Partners Mktg. & Terminals L.P. v. EPA*, 2006 WL 156394\*2 (E.D. Mich. Jan. 20, 2006). (See Case

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<sup>1</sup> "Although technically labeled 'hazardous,' the wastes received by the facility consist primarily of water . . . . The facility is prohibited from accepting flammables, ignitables, explosives, radioactives, regulated pesticides or herbicides, reactives, regulated PCBs, poisonous gases, poisons, medical wastes or concentrated chemicals." *Sunoco Partners Mktg. & Terminals L.P. v. EPA*, 2006 WL 156394\*1 (E.D. Mich. Jan. 20, 2006) (citations omitted).

Ex. C.) On September 6, 2005, the EPA issued two Safe Drinking Water Act underground injection control permits (the "Permits") for the Facility. By then, the Facility had been "thoroughly scrutinized" by numerous courts and administrative review boards, each of which approved the project and allowed it to proceed. *Id.* at \*3.

EDS has expended substantial efforts over the past ten years to construct its deep injection wells and hazardous waste facility, at a cost to EDS and its primary investor, The Policemen & Firemen Retirement System of the City of Detroit . . . of approximately \$40,000,000. . . . EDS has complied with every federal, state and local requirement, has received all of the necessary permits, has fully constructed and staffed its facility and has begun operations.

*Sunoco*, at \*1 (citations omitted).

However, starting in early November 2006, after EDS defaulted on loans and failed to respond to various allegations of noncompliance (mainly involving reporting and correctable operations issues), RDD Investment Corp. and RDD Operations, LLC (collectively, "RDD") stepped in to secure and manage the Facility, bring it back into compliance, and begin arranging for a transfer of the Permits to a financially and technically capable entity (EGT).<sup>2</sup> (*See Dec. of Ronald A. King Ex. D.*)

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<sup>2</sup> The RDD entities are wholly-owned subsidiaries of the Police and Fire Retirement System of the City of Detroit ("PFRS"). (*See Dec. of Ronald A. King* (footnote continued))

Since November 2006, PFRS and RDD have owned and operated the Facility, and RDD has responded to EPA's requests for information and returned the Facility to compliance. (See Dec. of Ronald A. King Ex. D.) On January 31, 2007, when RDD and EGT met with EPA to discuss compliance and transferring the Permits to EGT, EPA indicated its general satisfaction with RDD's efforts and stated that a transfer application likely would be favorably received. (See Dec. of Ronald A. King Ex. D.) On or about February 8, 2007, PFRS finalized its agreement with EGT to transfer the Facility and assets, and, on February 28, 2007, RDD, EGT, and EDS submitted to EPA a Permit transfer request (the "Permit Transfer Request"). (See Dec. of Ronald A. King Ex. D. & Permit Transfer Request Ex. E.)

The Permit Transfer Request was made based, in part, on EPA's direction and encouragement and was complete and ready for EPA's action on March 29, 2007. (See Dec. of Ronald A. King Ex. D.) However, despite working with EGT and RDD for several months to cure all alleged violations and to prepare the transfer request, without ever indicating that it would summarily refuse to consider the Permit Transfer Request, EPA did just that when it sent EGT and RDD an April 12, 2007 letter stating that the agency would not consider the Permit Transfer

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Ex. D.) (References to Declaration of Ronald A. King encompass the Exhibit attached to Mr. King's Declaration.)

Request due to EPA's intention to terminate the Permits (the "April 12, 2007 Decision"). (See Decision Ex. F & Dec. of Ronald A. King Ex. D.) On the same date, EPA informed EDS of its proposal to terminate the Permits (the "Notice"). (See Notice Letter Ex. G.)

EGT appeared at EPA's public hearing on the Notice on May 23, 2007, and EGT filed a June 21, 2007 Comment on the Termination Proceeding which attached hundreds of pages of documentation regarding both permit compliance and the Permit Transfer Request.<sup>3</sup> (See Index of Documents Ex. H.) EPA Region 5 Permit writer Dana Rzeznik has stated that EPA will conclude the Termination Proceeding by the end of September, 2007 (possibly by the end of the third week in September). (See Aff. of Richard J. Powals Ex. I.)

EGT believes that the Termination Proceeding is a pretext for EPA to avoid deciding EGT's previously and independently filed Permit Transfer Request. Furthermore, EGT views the April 12, 2007 Decision as an effective denial and final agency action on the Permit Transfer Request. Consequently, on May 10, 2007, EGT filed an informal letter of appeal of the April 12, 2007 Decision with EPA pursuant to 40 C.F.R. section 124.5(b). (See Appeal Ex. J.) On May 17, 2007, the Environmental Appeals Board (the "EAB") requested that EPA respond

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<sup>3</sup> RDD also appeared at the hearing and submitted extensive comment. The comment period ended June 22, 2007.



to EGT's appeal and provide relevant portions of the administrative record with a certified index of the entire record. (See EAB Letter Ex. K.) EPA responded with a brief on June 26, 2007 but refused to file the record, instead alleging that the matter was not ripe for review. (See EPA Br. Ex. L.)

On July 16, 2007, EGT moved for leave to file a reply brief. (See Motion for Reply Ex. M.) On July 19, 2007, EGT received the EAB's July 11, 2007 Order declining to review EGT's appeal. (See Orders Ex. A.) On July 23, 2007, EGT moved the EAB for reconsideration. (See Mot. for Recons. Ex. N.<sup>4</sup>) The July 27, 2007 Order denied EGT's motions for leave to file a reply brief and for reconsideration. (See Orders Ex. A.) EGT then filed an August 17, 2007 petition for review of the Orders with this court. (See Pet. Ex. O.)

**EGT is requesting an immediate stay of the Orders and the Termination Proceeding. The Orders are the immediate subject of EGT's petition for review to this court. The Termination Proceeding has a direct impact on the petition for review, because if EPA decides to terminate the Permits, EPA will regard the Permit Transfer Request to be moot. (See Decision Ex. F, stating "the proposed terminations would render your permit transfer request moot . . . .") Although the Permit Transfer Request should**

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<sup>4</sup> EGT's July 23, 2007 motion attached a copy of its July 16, 2007 motion. However, because the July 16 motion is already included at Ex. M, the copy of the July 23 motion at Ex. N hereto does not include the July 16 motion.

**be considered independently of the Termination Proceeding, the culmination of the Termination Proceeding will, in fact, substantially affect the Permit Transfer Request and the petition for review before this Court. Thus, though EGT does not concede that a decision to terminate the Permits would render the Permit Transfer Request moot, EGT recognizes the danger posed by EPA's position that termination would render the transfer moot. Consequently, to preserve the status quo, it is necessary for this Court to stay the Termination Proceeding, as well as the Orders.**

The Orders also place EGT (and RDD) in the untenable position of having to wait for EPA's determination on the Termination Proceeding prior to a determination on the Permit Transfer Request, despite the fact that: EGT and RDD had submitted all the necessary documentation to effectuate the Permit Transfer Request prior to EPA's proposal to terminate the UIC Permits (such that the Permit Transfer Request should be fully considered prior to any permit termination determination); EPA refused to provide the EAB with the record of the documents supplied by EGT and RDD to EPA; and, the EAB should have decided the Permit Transfer Request issues in EGT's favor. **Therefore, an immediate stay of the Orders and the Permit Termination is necessary to allow EGT to pursue this petition for review and ultimately effectuate the transfer of the UIC permits without the specter of the Termination Proceeding subsuming the Permit**

**Transfer Request. In fact, granting the Permit Transfer Request would render unnecessary the Termination Proceeding. Therefore, the Orders and the Termination Proceeding should be stayed pending resolution of EGT's petition for review to this court.**

**RDD Joins in this Motion**

RDD has advised EGT of its intent to file a motion to intervene in this matter. RDD has also requested that EPA extend or re-open the Termination Proceeding public comment period. EGT joins in both RDD's motion to intervene and RDD's request to extend/re-open. Furthermore, because such extension/re-opening is complementary to this motion for immediate stay, EGT requests that this court also order EPA to extend/re-open the comment period prior to staying the Termination Proceeding. Finally, EGT is authorized to state that RDD joins this motion for immediate stay.

**Federal Rule of Appellate Procedure 18 Requirements**

Federal Rule of Appellate Procedure 18(a) provides for a stay pending review.<sup>5</sup> Although subsection (1) requires that a petitioner must ordinarily move first before the agency for a stay pending review of its decision or order, subsection

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<sup>5</sup> Federal Rule of Appellate Procedure 18(b) provides that the court may condition relief on the filing of a bond or other appropriate security. EGT is prepared to file a bond or other security, if required to do so, but believes that no bond is necessary in this matter.

(2) provides that a motion for a stay may be made to the court of appeals or one of its judges. Fed. R. App. P. 18(a). A motion to the court of appeals must "show that moving first before the agency would be impracticable." Fed. R. App. P. 18(a)(2)(A)(i). Alternatively, the motion must "state that, a motion having been made, the agency denied the motion or failed to afford the relief requested and state any reasons given by the agency for its action." Fed. R. App. P. 18(a)(2)(A)(ii). *See also Commonwealth-Lord Joint Venture v. Donovan*, 724 F.2d 67, 68 (7th Cir. 1983) (requirement of first applying to agency is stated "in flexible terms" and is not intended to apply where application would be "exercise of futility").

On August 27, 2007, EGT's counsel verbally informed EPA Deputy Administrator Lynn Buhl that EGT would seek a stay. (*See* Aff. of Donald P. Gallo Ex. P.) Concurrently with this motion, EGT is requesting that EPA Region 5 (and the EAB) stay the Orders and Termination Proceeding to give the parties time to negotiate.<sup>6</sup> (*See* Request Letter Ex. Q which also offers to stay this matter.) EGT is also requesting a stay from this Court, because EPA Region 5's past unwillingness to meet with EGT makes it impracticable for EGT to wait for a response from EPA Region 5. (*See* Letter from Acting Regional Counsel Robert

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<sup>6</sup> Additionally, RDD's request to extend/re-open the public comment period effectively acts as a motion to stay at the agency level.

Kaplan to Francis Lyons declining request for meeting Ex. R, July 18, 2007.)

Time is of the essence, because EPA intends to conclude the Termination Proceeding by the end of September, 2007 (possibly by the end of the third week in September). (*See* Aff. of Richard J. Powals Ex. I.) Consequently, the timing and impracticability of waiting for EPA's response to EGT's stay request allow EGT to file this motion for stay. If EPA in fact grants EGT's stay request, EGT will immediately withdraw this motion.

Federal Rule of Appellate Procedure 18 also requires that the motion include: "(i) the reasons for granting the relief requested and the facts relied on; (ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and (iii) relevant parts of the record." Fed. R. App. P. 18(a)(2)(B). *See also State of Ohio ex. rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987) (must provide supporting facts and affidavits). Reasons and supporting facts are set forth in this motion and legal argument, and supporting documentation and affidavits are attached as exhibits.

Finally, the rule requires that the moving party give reasonable notice of the motion to all parties, and the motion must be filed with the circuit clerk. Fed. R. App. P. 18(a)(2)(C), (D). Concurrently with filing this motion with the court, EGT is providing notice of this motion by serving this motion on all parties. EGT also

previously notified EPA Deputy Administrator Buhl of EGT's intent to request a stay. (*See* Aff. of Donald P. Gallo Ex. P.)

### **Standard of Review**

The determination of whether a stay of an agency's order is warranted must be based on a balancing of four factors:

(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.

*Celebrezze*, 812 F.2d at 290 (citations omitted).

These considerations are factors to be balanced and not prerequisites to be met. *Id.* (stay may be granted with either a high probability of success and some injury or *vice versa*).

### **Argument**

A balancing of the *Celebrezze* factors warrants an immediate stay of the Orders and the Termination Proceeding, because it is highly likely EGT will prevail on the merits of its appeal of the April 12, 2007 Decision and its petition for review and because EGT will be irreparably harmed absent a stay, there is little prospect that others will be harmed if a stay is granted, and the public interest favors granting a stay.

I. IT IS LIKELY THAT EGT WILL PREVAIL ON THE MERITS OF ITS APPEAL (PETITION FOR REVIEW)

There is a high probability that EGT will succeed on the merits of its appeal, because the Orders and the April 12, 2007 Decision were arbitrary, capricious and erroneous, were outside the agency's discretion, were not supported by the facts, did not provide due process, and the EAB refused to consider EPA's failure to produce a record.

A. The April 12, 2007 Decision is Final and Reviewable.

The April 12, 2007 Decision is a reviewable final decision, because it marked the consummation of EPA's decision making process with regard to the Permit Transfer Request and because EGT's rights were determined by, and legal consequences flow from, the April 12, 2007 Decision. *See Bennett v. Spear*, 520 U.S. 154 (1997). When EPA refused to consider the Permit Transfer Request and instead decided to pursue the Termination Proceeding, despite the fact that the request was complete and ready for action, EPA consummated its decision on the Permit Transfer Request and abrogated EGT's legal right to have its complete Permit Transfer Request decided. This is especially relevant since, as presently postured, EPA may not be required to consider all of the underlying factual and legal bases supporting the Permit Transfer Request in the context of the Termination Proceeding. EPA even implicitly acknowledged the finality of the April 12, 2007 Decision when it stated (with emphasis added) that EGT "may

**reapply** in the event that U.S. EPA does ultimately terminate EDS's permits" and that it could "**reopen** its consideration of the permit transfer request." (See Decision Ex. F & EPA Br. Ex L.)

B. The April 12, 2007 Decision is Arbitrary, Erroneous, and Exceeds EPA's Discretion.

The April 12, 2007 Decision is arbitrary, erroneous, and exceeds the EPA's discretion, because EGT/RDD submitted a complete application and met the requirements for a successful permit transfer. (See Index of Documents Ex. H & Dec. of Ronald A. King Ex. D.) Thus, EPA should have considered the Permit Transfer Request independently from the Termination Proceeding and granted the request in normal course.<sup>7</sup>

C. The April 12, 2007 Decision was not made in good faith and did not accord due process.

On January 31, 2007, EPA indicated its general satisfaction with RDD's compliance efforts and stated that it likely would favorably view a transfer application. EPA encouraged submittal of a request for transfer, and EGT and RDD submitted the Permit Transfer Request on February 28, 2007 and completed

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<sup>7</sup> Under 40 C.F.R. section 144.41(d), EPA may modify a permit to "[a]llow for a change in ownership or operational control of a facility where the Director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Director."



the request (including submitting EGT's financial assurances) by March 29, 2007. Throughout this time, EGT and RDD worked cooperatively with EPA, and EPA never indicated that it would pursue a Termination Proceeding rather than transferring the Permits. (*See* Dec. of Ronald A. King Ex. D.) EPA files contain extensive and complete documentation of EGT's and RDD's efforts, all of which support the Permit Transfer Request. (*See* Index of Documents Ex. H & Dec. of Ronald A. King Ex. D.) The documentation EPA received constitutes a complete record.<sup>8</sup> In light of the extensive and complete documentation supporting the Permit Transfer Request and EGT's and RDD's collaboration with EPA in the months preceding the April 12, 2007 Decision, EPA's decision to end the permit transfer process and initiate the Termination Proceeding lacks good faith and fails to accord EGT (and RDD) with due process.<sup>9</sup>

## II. IT IS HIGHLY LIKELY THAT EGT WILL BE IRREPARABLY HARMED IF THE STAY IS *NOT* GRANTED

If the stay is not granted and EPA terminates the Permits, then EGT will be irreparably harmed, because there will be nothing to transfer. Arguably, then,

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<sup>8</sup> EPA's response brief falsely claims that "the factual record relating to the permit transfer request was still incomplete." (*See* EPA Br. Ex. L.)

<sup>9</sup> Moreover, the April 12, 2007 Decision allows EPA to avoid considering EGT's technical and financial capabilities in regard to both the Termination Proceeding and the Permit Transfer Request.

EGT's petition for review will be moot.<sup>10</sup>

This court evaluates alleged harm "in terms of its substantiality, the likelihood of its occurrence, and the proof provided. . . ." *Celebrezze*, 812 F.2d at 291 (to substantiate claim that irreparable injury is likely, must provide some evidence that harm has occurred in past and is likely to occur again). Though economic loss does not, in and of itself, constitute irreparable harm, "[r]ecoverable monetary loss may constitute irreparable harm . . . where the loss threatens the very existence of the movant's business." *Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C.Cir. 1985). Moreover, "the Sixth Circuit has held that 'the loss of [a] business [] is precisely the type of harm which necessitates the granting of preliminary injunctive relief . . .'" *Sunoco*, at \*16 (citations omitted).<sup>11</sup> The 2006 *Sunoco* decision recognized that jeopardizing the business would cause substantial harm and cause the Facility to fold:

EDS has spent years and \$40,000,000 constructing its facilities and obtaining all of the necessary permits. EDS's facility is now operating, and an injunction would cause it to breach pending customer commitments, and irretrievably lose industry good will. Most significantly, it will likely

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<sup>10</sup> In the April 12, 2007 Decision, EPA argued that the proposed terminations would render the Permit Transfer Request moot. (*See* Decision Ex. F.)

<sup>11</sup> The factors considered in determining whether a stay of an agency's order is warranted are the same factors considered in evaluating the granting of a preliminary injunction. *State of Ohio ex. rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987).

cause its primary investor, [PFRS], to pull out of the project, and the facility would be shut down. This would result in the loss of the \$40,000,000 business and the lay-off of EDS's employees and contractors.

*Sunoco*, at \*16.

EPA's termination of the Permits would (arguably) render EGT's transfer request useless and obliterate the ability of EGT, or anyone else, to operate the Facility. The loss, thus, would be irreparable.

EGT and RDD have already suffered irreparable harm from EPA's abandonment of the transfer process in favor of pursuing the Termination Proceeding. In addition to RDD's original \$40 million investment in the Facility, since October 2006, RDD and/or EGT have spent between \$1.5 and \$2 million, including to: obtain financial assurances for the Permit Transfer Request; close the wells and remediate the Facility after the Michigan Department of Environmental Quality requested that the Facility cease operations pending resolution of certain alleged regulatory noncompliance; maintain the Facility ready for operation, including performing process integrity testing and employing staff; and, pay legal and professional fees. These costs cannot be recouped. (*See* Aff. of Richard J. Powals Ex. I & Chart of Costs at Ex. B to Motion for Reply Ex. M.)

Furthermore, if RDD and/or EGT must begin the permit process anew, RDD's \$40,000,000 investment in the Facility will significantly deteriorate due to the Facility's lack of use. (*See* Aff. of Richard J. Powals Ex. I.) Moreover, the

Permits originally took more than ten years to obtain, and given the amount of public controversy surrounding the Facility, starting anew is unlikely to yield new permits in substantially less time and may result in a total denial which would permanently close the Facility. Consequently, irreparable harm will accompany a completely new attempt at permitting the Facility.

If a stay is not issued, the entire Permit Transfer Request will be in peril. Allowing EPA to pursue termination of the Permits, rather than transferring them to EGT, will irreparably harm EGT (and RDD).

### III. THERE WILL BE NO HARM TO ANY OTHER ENTITY IF THE COURT GRANTS THE STAY

Neither EPA nor any other entity will be harmed by a stay of the Orders and the Termination Proceeding. In fact, granting the stay is in the public interest (*see also* Section IV., below), and EPA will benefit from a stay, because it will conserve scarce agency resources to hold off on the Termination Proceeding while this court hears EGT's petition for review.

### IV. GRANTING THE STAY IS IN THE PUBLIC INTEREST

It is in the public interest for the Facility to be permitted and operating. EPA recognizes that "[w]hen wells are properly sited, constructed, and operated, underground injection is an effective and environmentally safe method to dispose

of wastes."<sup>12</sup> EDS submitted "extensive amounts of information on the geologic siting, injection well engineering, and operating and monitoring requirements for the two wells," thus Region V "determined that EDS had fulfilled all prerequisites for obtaining renewals of its UIC permits." *In re Env'tl. Disposal Sys., Inc.*, 2005 WL 2206804 (EPA Sept. 6, 2005) (EPA also determined that there would be no impact to drinking water supplies or the surrounding area as a result of injection into the wells). (*See Case Ex. S.*) Furthermore,

Given that EDS's **facility will safely dispose of the hazardous wastes already present in our environment**, a preliminary injunction, which will likely **kill EDS's project, certainly does not advance the public interest**. The facility has already passed every applicable safety and technical requirement imposed by EPA and MDEQ. As EPA found in its decision, 'EDS's **proposed injection is protective of human health and the environment**.'

*Sunoco*, at \*16 (emphasis added).<sup>13</sup>

It is in the public interest to grant EGT's stay request, and ultimately its Permit Transfer Request, because the public will benefit from safe waste disposal at the Facility. Safe disposal is assured, because RDD substantially corrected the

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<sup>12</sup> U.S. Env't'l Prot. Agency, What is the UIC Program?  
<http://www.epa.gov/safewater/uic/whatis.html> (last visited Sept. 11, 2007).

<sup>13</sup> The court also admonished that "[w]hile there will always be those who will oppose waste facilities in their community . . . 'public interest cannot be determined simply by a community which would prefer that the wastes in question be disposed of elsewhere.'" *Sunoco*, at \*16 (citations omitted).

noncompliance issues caused by EDS late in its tenure at the Facility, and EGT is technically and financially able operate the Facility to ensure that wastes are safely injected and contained. (See Dec. of Ronald A. King Ex. D & Aff. of Richard J. Powals Ex. I.)

Moreover, if the stay is denied and the Permits are terminated, the public interest would suffer.

The public interest would also be harmed if a company . . . is allowed to come in at the eleventh hour and challenge a project that is fully permitted, fully constructed and has even begun operations. . . . A company like EDS, which has played by the rules for over ten years, gone through a number of permitting processes, done everything asked of it by every applicable governmental entity, and in the process has expended approximately \$40,000,000, must be allowed now to do business.

*Sunoco*, at \*17.

Despite EDS's subsequent alleged noncompliance, the reasoning behind the *Sunoco* court's statement still applies, because EDS's purported actions took place only during the waning hours of its decade-plus tenure at the Facility, RDD has returned the Facility to compliance, and EGT stands ready to operate the Facility in a safe and compliant manner. Thus, the public interest would be harmed if the fully constructed and permitted Facility is permanently forced out of operation by the Termination Proceeding.

It is in the public interest to have wastes injected into the Facility's permitted UIC wells, thus it is also in the public interest to impose a stay to facilitate transfer, rather than termination, of the Permits.

### Conclusion

For the reasons set forth above, EGT requests that this court order EPA to re-open/extend the Termination Proceeding comment period and stay the Orders and the Termination Proceeding. Without a stay, EPA can terminate the Permits, arguably rendering meaningless both the Permit Transfer Request and EGT's petition for review to this court. **A stay is necessary to preserve the status quo during this court's review of the matter.**

Respectfully submitted, this 12th day of September, 2007.



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Donald P. Gallo  
Pamela H. Schaefer  
Carolyn A. Sullivan  
Attorneys for Petitioner  
Environmental Geo-Technologies,  
LLC

Reinhart Boerner Van Deuren s.c.  
W233 N2080 Ridgeview Parkway  
Waukesha, WI 53188  
Telephone: 262-951-4500  
Facsimile: 262-951-4690

Mailing Address:  
P.O. Box 2265  
Waukesha, WI 53187-2265

CERTIFICATE OF SERVICE

This will certify that on September 12, 2007, the undersigned caused the foregoing Emergency Motion, and Exhibits thereto (and Exhibit List), to be served, by Federal Express, on:

Stephen L. Johnson  
Administrator  
United States Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 1101A  
Washington, DC 20460

Thomas J. Krueger  
Associate Regional Counsel  
United States Environmental Protection Agency, Region 5  
77 W. Jackson Boulevard  
Chicago, IL 60604

United States Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board  
Colorado Building  
1341 G Street, N.W., Suite 600  
Washington, DC 20005

Ronald A. King, Esq.  
Clark Hill PLC  
212 East Grand River Avenue  
Lansing, MI 48906-4328



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Donald P. Gallo



## EXHIBIT LIST

- Exhibit A July 11, 2007 EAB Order and July 27, 2007 EAB Order Denying Motions for Leave and for Reconsideration
- Exhibit B EPA Notice of Termination Proceeding
- Exhibit C *Sunoco Partners Mktg. and Terminals L.P. v. EPA*, 2006 WL 156394 (E.D. Mich. Jan. 20, 2006)
- Exhibit D Dec. of Ronald A. King, Esq.
- Exhibit E February 28, 2007 Permit Transfer Request
- Exhibit F April 12, 2007 EPA Decision
- Exhibit G April 12, 2007 EPA Letter regarding Notice of Intent to Terminate
- Exhibit H Index of Documents provided with EGT's comment on the Termination Proceedings
- Exhibit I Aff. of Richard J. Powals, P.E.
- Exhibit J May 10, 2007 EGT Appeal of April 12, 2007 EPA Decision
- Exhibit K May 17, 2007 EAB Letter to EPA
- Exhibit L June 26, 2007 EPA Response Brief
- Exhibit M July 16, 2007 EGT Motion for Leave to File Reply Brief
- Exhibit N July 23, 2007 EGT Motion for Reconsideration
- Exhibit O August 17, 2007 EGT Petition for Review
- Exhibit P Aff. of Donald P. Gallo, Esq.
- Exhibit Q September 12, 2007 EGT Letter to EPA Requesting Stay
- Exhibit R July 18, 2007 EPA Letter to Francis Lyons
- Exhibit S *In re Env't'l Disposal Sys.*, 2005 WL 2206804 (EPA Sept. 6, 2005)