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ENVIR. APPEALS BOARD

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February 6, 2008

**VIA OVERNIGHT MAIL**

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

**IN Re: Environmental Disposal Systems, Inc.  
UIC Appeal No. 07-03**


Dear Clerk:

Enclosed for filing in the above entitled matter, please find the original plus five copies of Petitioners' *Motion for Leave to File a Reply to the United States Environmental Protection Agency's Response to the Petition for Review of the Termination of Underground Injection Control Permits MI-163-1 W-C007 and MI-163-1 W-C008*, Petitioners' *Reply to the Motion for Leave to File a Reply to the United States Environmental Protection Agency's Response to the Petition for Review of the Termination of Underground Injection Control Permits MI-163-1 W-C007 and MI-163-1 W-C008* and *Proof of Service* for same.

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

Very truly yours,

CLARK HILL PLC

  
Deborah M. Barclay  
Legal Secretary

Enclosures

cc: Thomas J. Krueger  
Mindy G. Nigoff

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**ENVIRONMENTAL APPEALS BOARD**

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ENVIR. APPEALS BOARD

In re: Environmental Disposal Systems, Inc.

UIC Appeal No. 07-03

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

**MOTION FOR LEAVE TO FILE A REPLY TO THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO THE PETITION FOR  
REVIEW OF THE TERMINATION OF UNDERGROUND INJECTION CONTROL  
PERMITS MI-163-1W-C007 AND MI-163-1W-C008**

By: Joseph E. Turner (MI P44135)  
Ronald A. King (MI P45088)  
Kristin B. Bellar (MI P69619)  
Clark Hill PLC  
212 East Grand River Avenue  
Lansing, Michigan 48906  
Attorneys for Petitioners

Petitioners, the Police and Fire Retirement System of the City of Detroit (“PFRS”), RDD Investment Corp. and RDD Operations, LLC (“RDD”) (collectively, “Petitioners”), by and through their attorneys, Clark Hill PLC, respectfully submit their Motion for Leave to File a Reply to the Environmental Protection Agency’s (“EPA”) Response to the Petitioners’ Petition for Review filed in these proceedings, and state as follows:

1. Pursuant to 40 CFR 124.19, Petitioners filed a Petition for Review of the EPA’s October 22, 2007 termination of the above-referenced underground injection control permits (the “UIC Permits”) on November 21, 2007.

2. The EPA filed a Response to the Petition for Review on January 16, 2008, which contained a number of erroneous findings of fact and legal conclusions, and which provided *post hoc* rationalizations for termination that were not included in the Fact Sheet accompanying the April 12, 2007 Notice of Intent to Terminate.

3. Pursuant to the Environmental Appeals Board (“EAB”) Practice Manual, Section III(D)(5), a petitioner may request leave to file a reply to the permitting authority’s response to a petition for review prior to the EAB’s decision to grant or deny review.

4. The Petitioners request leave to file a reply to the EPA’s Response to clarify their arguments relating to: (1) the EPA’s failure to consider all relevant factors, and its consideration of irrelevant factors in reaching its decision to terminate the UIC Permits; (2) the EPA’s clearly erroneous conclusion of law that RDD’s discharge of EDS’ permit obligations is irrelevant; and (3) the EPA’s mischaracterization of and misplaced emphasis on the circumstances surrounding EDS’ transfer of the facility to RDD.

5. Petitioners respectfully state that the EPA's Response did not adequately address several arguments in the Petition for Review. Clarification of those arguments will assist the EAB in determining whether to grant review.

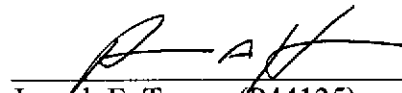
6. A copy of the Petitioners' proposed Reply is attached hereto as Exhibit A.

Wherefore, Petitioners respectfully request that the EAB allow Petitioners to file a Reply to the EPA's Response to the Petition for Review, and accept for filing the attached Reply.

Respectfully submitted,

CLARK HILL PLC

By:

  
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Attorneys for the Petitioners

Date: February 6, 2008

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**ENVIRONMENTAL APPEALS BOARD**

In re: Environmental Disposal Systems, Inc.

UIC Appeal No. 07-03

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

**REPLY TO THE ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO**  
**PETITION FOR REVIEW OF THE TERMINATION OF UNDERGROUND**  
**INJECTION CONTROL PERMITS MI-163-1W-C007 AND MI-163-1W-C008**

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## **I. Introduction**

This proceeding arises from the termination of underground injection control (“UIC”) permits MI-163-1W-C007 and MI-163-1W-C008 (the “Permits”) issued to Environmental Disposal Systems, Inc. (“EDS”) by the Environmental Protection Agency (“EPA”). Pursuant to 40 CFR 124.19, Petitioners, the Police and Fire Retirement System of the City of Detroit (“PFRS”), RDD Investment Corp. and RDD Operations, LLC (“RDD”) (collectively, the “Petitioners”) filed a Petition for Review of the EPA’s October 22, 2007 termination of the UIC Permits on November 21, 2007 (the “Petition for Review”). The EPA filed a Response to the Petition for Review on January 16, 2008. Pursuant to the Environmental Appeals Board (“EAB”) Practice Manual, Section III(D)(5), Petitioners requested leave to file a reply to the EPA’s Response prior to the EAB’s decision to grant or deny review.

Petitioners requested leave to file a reply in order to clarify the basis for their Petition for Review. This reply is necessary because the EPA failed to adequately and fairly respond to several points in the Petition for Review, particularly the arguments relating to: (1) the EPA’s failure to consider all relevant factors, and its consideration of irrelevant factors, in reaching its decision to terminate the UIC Permits; (2) the EPA’s clearly erroneous conclusion of law that RDD’s discharge of EDS’ permit obligations is irrelevant; and (3) the EPA’s mischaracterization of and misplaced emphasis on the circumstances surrounding EDS’ transfer of the facility to RDD. The inability or failure of EPA to sufficiently respond to these arguments further underscores the fact that the termination of the Permits was based on clearly erroneous findings of fact and conclusions of law, and demonstrates that the termination was a result of an inappropriate exercise of the EPA’s discretion that presents important policy questions which the EAB should, in its discretion, review.

## **II. Reply to EPA's Response to the Petition for Review**

### **A. The EPA failed to consider all relevant factors in deciding to terminate the Permits, and abused its discretion in considering irrelevant factors.**

As stated in the Petition for Review, each and every violation identified in the Fact Sheet accompanying the Notice of Intent to Terminate had been substantially remedied by RDD in the months prior to the issuance of the Notice of Intent to Terminate in April of 2007. The EPA stated that it did consider this highly relevant factor, but simultaneously denies that it was required to consider RDD's actions, attempting to relieve itself of any responsibility to substantively respond to Petitioners' argument that the EPA inappropriately discounted the significance of RDD's actions in both its Response to Comments and its Response to the Petition for Review. The EPA argues that any violation, no matter how slight or temporary, provides cause for termination, and that it was under no obligation to consider RDD's remedying of the violations, which served as the basis for EPA's termination decision, prior to issuing the Notice of Intent to Terminate. EPA, however, was under an obligation to consider this information, and to include this information in the Fact Sheet accompanying the Notice of Intent to Terminate, as the corrected status of the alleged violations unquestionably falls within "the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit" required to be addressed in the Fact Sheet. See 40 CFR 124.8. Because the EPA did not appropriately consider the highly relevant factor that the alleged violations had been resolved prior to the issuance of the Notice of Intent to Terminate, the EPA's termination was based on a clearly erroneous finding of fact.

It is disconcerting that the EPA supported its Notice of Intent to Terminate with a Fact Sheet that contained inaccurate and incomplete information and which created the impression that the violations remained uncured. The EPA argues that Petitioners had an opportunity to



comment on the inaccuracies and omissions during the public comment period. While Petitioners did have an opportunity to provide public comments on this issue, the public was not provided accurate information from the EPA as to the status of the alleged violations during the entirety of the public comment period.<sup>1</sup> Further, for RDD and EGT, the only commenters that were able to substantively address the status of the alleged violations, the EPA's Response to Comments and its arguments in the Response to the Petition for Review are unsatisfactory in that the EPA continues to refuse to consider the impact RDD's actions had on the physical security of the Facility, and on the general compliance of the Facility with the conditions of the Permits.

As argued in the Petition for Review, the Fact Sheet contained inaccurate and misleading information that omitted any mention or reference to RDD's substantial remedying of each and every violation identified by the EPA. The EPA argues that it has discretion to terminate for violations of the Permits, whether or not such violations are later remedied. Be that as it may, the EPA's discretion certainly does not (or should not) extend to termination for violations of permits that no longer exist, without proffering any reasonable basis for termination above and beyond the since-remedied violations. Petitioners are unable to find an example in published decisions of the EAB or the federal courts of EPA termination of a permit based on primarily record-keeping and reporting violations that were subsequently and immediately cured, where the security and safety of the permitted facility and the environment were not affected.<sup>2</sup> The

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<sup>1</sup> The EPA's subjective impression that RDD and EGT's public comments at the public hearing "did not have any impact on the view of those commenters present to speak in support of permit termination" does not relieve the EPA from its responsibility to provide the public with information that allowed commenters the ability to raise all reasonably ascertainable issues during the public comment period. (See EPA Response to Petition for Review, p. 23). The EPA may not selectively provide information to the public based on its belief of how the public will react or not react to that information.

<sup>2</sup> The EPA cites to a decision of the EAB and a decision of a United States District Court for the proposition that failure to perform monitoring and reporting requirements are grounds for "significant sanctions," effectively implying that termination is appropriate. (See EPA Response to Petition for Review, p.13). However, those two decisions merely uphold penalty assessments for monitoring and reporting requirements, and do not stand for the

EPA has provided no authority for its disproportionate action of terminating the Permits, rather than effecting a revocation and reissuance, or a minor or major permit modification, aside from its assertions of the “broad discretion” of the EPA to terminate permits. Petitioners respectfully submit that there must be some limits on this discretion, and that this case provides an opportunity for the EAB to clarify and provide guidance on the breadth of the EPA’s discretion in unique circumstances where the EPA has terminated permits based on violations that no longer exist, prior to attempting any other remedial or enforcement actions.

Further, instead of considering the relevant factors highlighted above, the EPA considered factors **not** relevant to a determination of a permitting decision for an underground injection control facility. “[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). A decision to terminate likewise must therefore only be based on a consideration of the provisions of the Safe Drinking Water Act, 42 U.S.C. §300, *et seq.*, and the rules promulgated thereunder. As stated in the Petition for Review, the EPA’s Response to Comments refers to re-evaluating the “merits” of the Facility and the EPA’s “serious doubts” regarding the “viability of the Facility,” while at the same time not contesting Petitioners’ statements that the physical security of the Facility and the environment was never compromised. Especially troubling is the EPA’s assertion that the “merits” of an underground injection control facility would be evaluated. The “merits” of a facility, including need for the facility, the value of a facility, the business decisions and funding sources of the owner of a facility, and the facility location are expressly not considered by the EPA in making

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proposition that cured violations of monitoring and reporting requirements provide appropriate grounds for termination.

permitting decisions.<sup>3</sup> Petitioners have been unable to locate a regulatory basis for the consideration of EPA's subjective opinions regarding the Facility's "merits" or "viability" in the SDWA or the corresponding regulations in reaching a permitting decision. To the extent that no such basis exists, the EPA's termination of the Permits was based on irrelevant factors, and truly relevant and significant factors were either ignored or inappropriately dismissed. Where the EPA terminates a permit based on a clearly erroneous finding of fact that permit violations were not cured, and a clearly erroneous conclusion of law that cured violations provide cause for termination, the EPA has exceeded its discretion.

**B. The EPA's decision to terminate was based on a clearly erroneous conclusion of law that while RDD was required to discharge EDS' obligations under the permits, its efforts in doing so are not required to be considered by the EPA.**

The EPA's Response to the Petition to Review also highlights the EPA's clearly erroneous legal conclusion that RDD's discharge of EDS' regulatory obligations under the Permits was somehow inadequate to demonstrate compliance with the Permits, because EDS was not the party who discharged the Permit obligations. The EPA's argument is logically inconsistent, and based on a clearly erroneous conclusion of law. The EPA stated, in its Response to Comments, that "Although [RDD] is not the permittee, as the current owner of the facility, RDD must comply with various laws and regulations concerning facility operation." (See Exhibit G to Petition to Review, Response to Comment No. 8). EPA simultaneously argues that RDD's discharge of EDS' permit obligations had no effect on the status of the alleged violations set forth in the Fact Sheet, while arguing that RDD was required to discharge EDS' permit violations. The regulatory purpose of requiring RDD (as the owner) to perform EDS' obligations (as the permittee) would be mooted if, as is the case here, the resulting action taken

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<sup>3</sup> See October 18, 2004 EPA Response to Comments regarding renewal of the UIC Permits at issue, specifically, responses to Comments 4, 13, 15, 16, 17, 19, 35, 42, 47 and 50. (See Exhibit H to Petition for Review).

by RDD is not considered in evaluating the compliance of the Facility. This circular reasoning could be therefore be extended to allow for termination of a permit where no violations have occurred, but where the owner of the facility (as opposed to the permittee and operator) had discharged the permit obligations. Clearly, this is not the intent of the regulatory structure surrounding UIC permitting. As such, the conclusion of law that RDD's correction of the alleged permit violations had no legal effect in remedying EDS' compliance issues is clearly erroneous, and should be reviewed by the EAB.

**C. The EPA's reliance on EDS' purported "abandonment" of the Facility is inappropriate, as the EPA based its termination on facts that were outside of the administrative record and not included on the Fact Sheet required by 40 CFR 124.8**

The regulatory structure surrounding UIC permits sets forth certain procedural requirements that must be met prior to the EPA issuing a final permit decision. 40 CFR 124.8 requires that a draft permit for a UIC permit for a major facility 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 issued with the Notice of Intent to Terminate the UIC Permits enumerated eight permit violations as the reasons for the proposed termination. The violations listed did not include any reference to EDS' "abandonment" of the Facility.<sup>4</sup> Only after the EPA terminated the Permits did it identify EDS' "abandonment" as a (if not the) major cause for termination of the Permits. In fact, in the EPA Response to Comments, the EPA repeatedly evaded the arguments of Petitioners regarding the merits of the alleged violations by relying primarily on the circumstances surrounding the transfer of the Facility to RDD as cause for termination. If, as the EPA now

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<sup>4</sup> The Fact Sheet did, however, briefly state that EDS transferred ownership of the Facility without notice to EPA and "abandoned all interests in, and operations at the wells" in the "Facility Background and Operation" introductory section. This, however, was not mentioned in the violations section or identified as an aggravating factor for the violations.

claims, EDS' transfer of the Facility to RDD was the most significant factor in reaching the decision to terminate the Permits, then the EPA was obligated to provide such a statement or identify a permit violation for such conduct in the Fact Sheet, and to allow for public comment on this issue. This was not done. Where the EPA's purported basis for termination appears to change after the public comment period, remand for further consideration of the later-identified basis for termination is appropriate. *In re: Marine Shale Processors, Inc.* 5 E.A.D. 461 at Lexis \*24-25 (EAB 1994). *Post hoc* rationalizations for agency actions will not be accepted by a court reviewing an agency decision. *Id.*; *In re: The Port Authority of New York and New Jersey*, 10 E.A.D. 61, 94 (EAB 2001); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

Even if it were acceptable for the EPA to disguise its true reasons for termination until after the public comment period, termination of the Permits based upon the circumstances surrounding the transfer of the Facility to RDD involved clearly erroneous findings of fact. The EPA places unprecedented and disproportionate emphasis on its claim that EDS "deserted<sup>5</sup>" the Facility and "abandoned" its interest in the Facility, stating that "this level of disregard for [EDS'] regulatory obligations warrants severe sanctions against the permittee." (See Exhibit G to Petition for Review, Response to Comment No. 12). This position is continued in the EPA's Response to the Petition for Review, despite the EPA's knowledge that the Facility was never left unsecured. The statement that EDS "abandoned" the Facility is disingenuous in light of EPA's knowledge of the actual circumstances under which RDD took control of the Facility. The EPA's representations that EDS abandoned the Facility over dramatizes what was simply an orderly transfer of ownership of the Facility to RDD based on EDS' financial inability to continue operations. EDS did not leave the key under the doormat and walk off, leaving the Facility unsecured, but rather relinquished control, at the request of a secured creditor, to an

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<sup>5</sup> See EPA Response to Petition for Review, p. 17.

entity with more than adequate resources to properly operate the Facility at a time when EDS could not do so in a compliant manner. At RDD's insistence, EDS remained involved in the tasks necessary for the proper transfer of control of the Facility, and worked with RDD to facilitate a permit transfer under the applicable regulations.

In yet another *post hoc* rationalization for termination, the EPA places great weight on its assertion that it was not provided notice prior to the transfer of the Facility to RDD, an allegation that was not identified in the Fact Sheet as a basis for termination. Even if it had been identified, EPA's characterization of EDS' and RDD's actions in transferring ownership of the Facility without notice is a misrepresentation of the facts and circumstances that occurred in early November of 2006. Prior to November 7, 2006, RDD had no physical access to the Facility, and thus was unable to provide any substantive information to the EPA, as it was unaware of the status of the Facility. It was impossible for RDD to provide any significant notice to the EPA under these circumstances. Once RDD took possession of the Facility on November 7, 2006, it immediately took steps to ascertain any compliance issues and secure the Facility. After addressing exigent circumstances relating to the safe operation of the Facility, RDD provided notice to the EPA of the transfer of ownership as soon as it was practical. Had RDD not taken responsibility for the Facility and had not prioritized immediate action to secure the Facility, it is possible that environmental, safety and health issues would have arisen.

Under these circumstances, the EPA's characterization of EDS' action in transferring ownership of the Facility without prior notice to preserve the security of the Facility as "abandonment" is misleading, inaccurate and appears to be a *post hoc* rationalization for termination that was not identified as a violation giving cause for termination in the Fact Sheet. As such, termination on the basis identified by the EPA in the Response to Comments and the

Response to Petition for Review should be reviewed by the EAB, as it was based on clearly erroneous findings of fact and conclusions of law, and was an inappropriate exercise of discretion which the EAB should carefully review.

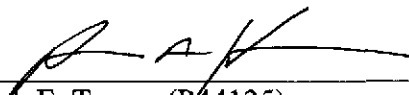
**CONCLUSION AND RELIEF REQUESTED**

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

Respectfully submitted,

CLARK HILL PLC

By:

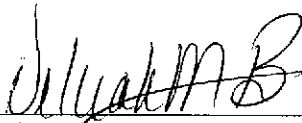
  
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Date: February 6, 2008

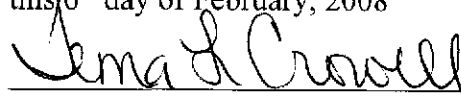




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United States Environmental Protection Agency  
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Deborah M. Barclay

Subscribed and sworn to me  
this 6<sup>th</sup> day of February, 2008

  
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Tema L. Crowell  
Notary Public, State of Michigan, County of Gratiot  
My Commission Expires: November 16, 2012  
Acting in the County of Ingham