



July 23, 2007

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SUBMITTED ELECTRONICALLY
AND SENT VIA FEDERAL EXPRESS

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 Clerk of the Board:

Re: In Re: Environmental Disposal
Systems, Inc., Romulus, Michigan
Permit Nos. MI-163-1W-C007 and
MI-163-1M-2008;
Appeal No. UIC 07-01

On behalf of Environmental Geo-Technologies, LLC ("EGT"), I enclose for filing one original and five copies of EGT's Motion for Reconsideration of the Environmental Appeals Board's ("EAB") Order in the above-referenced matter. On behalf of EGT, I respectfully request that the EAB grant EGT's motion. Thank you.

Yours very truly,

A handwritten signature in cursive script that reads 'Donald P. Gallo'.

Donald P. Gallo

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Enc.

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Environmental Appeals Board

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cc Thomas J. Krueger, Esq. (sent via Federal Express/with enclosure)
Mr. Dimitrios Papas (sent via First Class Mail/with enclosure)
Henry J. Brennan, III, Esq. (sent via First Class Mail/with enclosure)
Gary A. Peters, Esq. (sent via First Class Mail/with enclosure)
Francis X. Lyons, Esq. (sent via First Class Mail/with enclosure)
Mr. Richard Powals (sent via First Class Mail/with enclosure)

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

In Re:

Environmental Disposal Systems, Inc.

Romulus, Michigan

Appeal No. UIC 07-01

Permit Nos. MI-163-1W-C007 and
MI-163-1M-2008

**ENVIRONMENTAL GEO-TECHNOLOGIES, LLC'S
MOTION FOR RECONSIDERATION
OF ENVIRONMENTAL APPEALS BOARD ORDER**

Environmental Geo-Technologies, LLC ("EGT"), by its attorneys, Reinhart Boerner Van Deuren s.c., moves for reconsideration of the Environmental Appeals Board's (the "EAB") order (the "Order") declining to review EGT's appeal in the above-referenced matter.¹ The Order was dated July 11, 2007 and was received by EGT on July 19, 2007. In support of its motion, EGT states the following.

Relevant Dates and Facts

On April 12, 2007, the U.S. Environmental Protection Agency ("EPA") notified EGT that the agency would no longer consider EGT's request that two

¹ EGT is the proposed transferee of the above-referenced UIC permits, which were issued to Environmental Disposal Systems, Inc. ("EDS")

UIC permits (the "Permits") be transferred (the "Permit Transfer Request")², because EPA had decided to propose that the Permits be terminated.³ EPA's abrupt cessation of the Permit Transfer Request considerations was effectively a final denial of the Permit Transfer Request (the "Permit Transfer Request Denial").

On May 10, 2007, EGT appealed the Permit Transfer Request Denial to the EAB. On May 17, 2007, the EAB asked EPA to prepare and submit both a response to EGT's petition and a certified index of the entire administrative record. EGT received EPA's response brief to the EAB on July 2, 2007; however, EPA did not provide an administrative record to the EAB (or EGT).

On July 16, 2007, EGT submitted to the EAB a motion requesting leave to file a reply brief.⁴ On July 19, 2007, EGT received the Order, which declined to review EGT's appeal on the basis that it was prematurely filed.

Argument for Reconsideration

Although the Order is dated July 11, 2007, EGT did not receive it until July 19, 2007. In the intervening eight day period, EGT had submitted its motion for leave to file reply brief (the "Motion for Leave to File Reply Brief").

² RDD Investment Corp. and RDD Operations, LLC (collectively "RDD") are wholly-owned subsidiaries of the Police and Fire Retirement System of the City of Detroit ("PFRS"), which is the primary investor in the facility at issue. RDD is now the owner of the real property, submitted the Permit Transfer Request with EGT, and was the co-recipient of EPA's April 12, 2007 decision.

³ Also on April 12, 2007, EPA informed EDS of its intent to terminate the Permits. The termination proceedings are ongoing.

⁴ The motion was submitted electronically on July 16, 2007 and delivered by Federal Express on July 17, 2007. A copy of the July 16, 2007 motion package is attached to this motion for ease of reference.

Consequently, EGT is submitting this motion for reconsideration of the Order (the "Motion for Reconsideration"), because the EAB did not have the opportunity to consider the salient information (and references to documents) in EGT's Motion for Leave to File Reply Brief before issuing its Order.⁵ This, in turn, resulted in an Order that is erroneous, on the basis of both fact and law, because it was unable to consider the full record in this matter. The EAB should reconsider its Order (finding that EGT's appeal is premature and cannot be considered) in light of both EGT's Motion for Leave to File Reply Brief and the following:

- The Permit Transfer Request Denial is a reviewable final decision, because it marked the consummation of the EPA's decisionmaking process and because EGT's rights were determined by, and legal consequences flow from, the Permit Transfer Request Denial. This is especially relevant since 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 proceedings. EPA also implicitly acknowledged the finality of its Permit Transfer Denial when it explicitly stated 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."⁶
- The Permit Transfer Request Denial is arbitrary, erroneous, and exceeds the EPA's discretion, because EGT submitted a complete application and complied with all of the requirements for a successful permit transfer. Thus, EPA should have considered the Permit Transfer Request

⁵ 40 C.F.R. section 124.19(g) allows for motions to reconsider a final order, requiring that "[e]very such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. . . ." EGT believes that the Motion for Reconsideration is appropriate under both 40 C.F.R. section 124.19 and 40 C.F.R. section 124.5(b) (under which EGT filed its informal appeal letter). The Order states that "[a]lthough 40 C.F.R. § 124.5(b) does not require that the Board issue an order declining review of the denial of a request for permit modification or termination (i.e., pursuant to the regulation, the appeal is considered denied if the Board takes no action within 60 days of receiving it), the Board has chosen to issue this order to clarify for the parties the basis for its decision." However, it appears that the EAB's May 17, 2007 letter to EPA (directing EPA to file a response and an administrative record) constituted action by the EAB, such that the 60 day deadline is not applicable.

⁶ See April 12, 2007 letter from EPA to RDD and EGT (emphasis added). See June 27, 2007 EPA Response [Brief] to [EGT's] Petition for Review (emphasis added).

independently from the termination proceedings and granted the Permit Transfer Request. Under 40 C.F.R. section 144.41(d), the EPA may modify a permit (without following part 124 procedures) to make certain changes, including "[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 Permit Transfer Request Denial was not made in good faith and did not accord due process, because it allows EPA to avoid considering EGT's technical and financial capabilities (in regard to both the termination proceedings and the Permit Transfer Request). EPA files contain extensive and complete documentation supporting the Permit Transfer Request. A listing of these documents and responses was attached to the Motion for Leave to File Reply Brief.⁷ Although EPA's response brief attempts to justify the Permit Transfer Request Denial by claiming that "the factual record relating to the permit transfer request was still incomplete," this claim is false. EGT/RDD responded to all of EPA's requests for information, and the documentation EPA received supported the Permit Transfer Request and constituted a complete record.

EGT's Motion for Leave to File Reply Brief and the existence of a record are important to the EAB's review, as highlighted by the Order's statement that "there is no allegation or indication **in the record** that the Region is not moving forward in a timely manner to decide the termination issue or is otherwise **using the proposed termination as a pretext to avoid deciding the transfer request.**" (Emphasis added.) The Motion for Leave to File Reply Brief explains why EPA is indeed "using the proposed termination as a pretext to avoid deciding the transfer request" and why a reply brief is necessary for EGT to explain this in more detail.

⁷ Also, in response to EPA's notice of its intention to terminate the Permit, EGT filed a Comment on June 21, 2007, including several hundred pages of documentation that EGT, RDD and/or EDS previously filed with EPA in support of the Permit Transfer Request and regarding RDD's substantial permit compliance efforts during the period from November 2006 through June 2007.

EPA is using its own internal procedures (*i.e.*, the purposeful failure to label the April 12, 2007 Permit Transfer Request Denial as "final" and its refusal to provide the EAB with a supporting record) to effectively terminate the transfer process without further review. This deliberate maneuvering and lack of good faith is especially egregious because EPA's files already contain all of the required evidence to document the fact that EGT and RDD fulfilled all the regulatory requirements for a transfer and responded to all of EPA's requests for information, including, but not limited to, financial assurance documentation. EPA should have supplied such documentation in response to the EAB's request for a record so that the EAB would have had a complete record upon which to base its Order.

The Motion for Leave to File Reply Brief attaches a listing of documents that should be in the record. Without considering the aforementioned documents and issues, the EAB cannot make an informed decision on EGT's appeal. In fact, without the benefit of this background, the EAB issued its erroneous Order.

Conclusion

Because the Order and the Motion for Leave to File Reply Brief crossed paths in the mail, the EAB was deprived of the opportunity to consider the information set forth in the motion (as well as in any future reply brief) and consequently issued an Order that is factually and legally erroneous. Furthermore, the Order gives full rein to EPA to pursue the termination, despite the fact that all the transfer requirements have been met (and transferring the Permits would render the termination proceedings unnecessary and preserve scarce agency

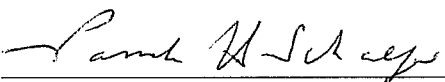
resources). Consequently, EGT requests that the EAB reconsider its Order, find that EGT's appeal is not premature and can be reviewed, and grant EGT leave to file a reply brief, including documentation, so that the EAB has all the necessary facts and legal arguments before it.

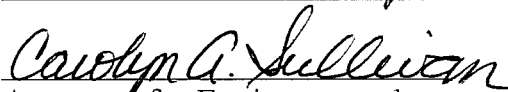
Respectfully submitted this 23rd day of July, 2007.

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BY 

BY 
Attorneys for Environmental
Geo-Technologies, LLC

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CERTIFICATE OF SERVICE

I hereby certify that I delivered a copy of the foregoing Environmental Geo-Technologies, LLC's Motion for Reconsideration of Environmental Appeals Board Order, as well as a copy of the previously-filed Motion for Leave to File Reply Brief and Exhibits and Affidavit of Carolyn A. Sullivan in Support of Motion for Leave to File Reply Brief, to the person designated below, on the date below, by Federal Express, in an envelope addressed to:

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

I have also filed the foregoing Environmental Geo-Technologies, LLC's Motion for Reconsideration of Environmental Appeals Board Order, as well as a copy of the previously-filed Motion for Leave to File Reply Brief and Exhibits and Affidavit of Carolyn A. Sullivan in Support of Motion for Leave to File Reply Brief, and this Certificate of Service with the Clerk of the Environmental Appeals Board, on the date below, by Federal Express, in an envelope addressed to:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 2005

Dated this 23rd day of July, 2007.



Joan Ohrt
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