



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

RECEIVED  
U.S. E.P.A.

2007 JUN 28 AM 9:35

ENVIR. APPEALS BOARD

REPLY TO THE ATTENTION OF:

June 27, 2007

BY FEDERAL EXPRESS

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

Re: Environmental Geo-Technologies Petition for Review  
Appeal No. UIC 07-01

Dear Ms. Durr:

Enclosed please find the original and five copies of the U.S. EPA's response to above-referenced petition for review, attachments, and Certificate of Service. As described in further detail in the response, no administrative record exists so the certified record index requested in your May 17, 2007, letter cannot be provided.

Please contact me if any questions arise.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Thomas J. Krueger".

Thomas J. Krueger  
Associate Regional Counsel

Enclosures

RECEIVED  
U.S. E.P.A.

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY JUN 28 AM 9:36

ENVIR. APPEALS BOARD

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

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE  
TO PETITION FOR REVIEW**

On May 14, 2007, Environmental Geo-Technologies, LLC (EGT) filed a petition with the Environmental Appeals Board (the Board) pursuant to 40 C.F.R. § 124.5(b) seeking review of what it incorrectly characterizes as a "final determination on the merits of [its permit] . . . transfer request" by the United States Environmental Protection Agency, Region 5 (U.S. EPA) on April 12, 2007. As explained below, EGT's appeal is premature and not ripe for review.

U.S. EPA's April 12, 2007 letter to EGT (Exhibit A) did not constitute a final "denial" of EGT's permit transfer request for purposes of section 124.5(b). Instead, that letter merely informed EGT that U.S. EPA was temporarily deferring consideration of the permit transfer request pending completion of related permit termination proceedings. U.S. EPA's interim decision not to "consider or process" EGT's permit transfer request "at the present time" is not a final denial of that request subject to the Board's review.

## **I. BACKGROUND**

On September 6, 2005, U.S. EPA issued Safe Drinking Water Act underground injection control (UIC) permits to Environmental Disposal Systems, Inc. (EDS) to operate two Class I commercial hazardous waste injection wells located on Citrin Drive in Romulus, Michigan. U.S. EPA Fact Sheet (Exhibit B), p.1.

On October 23, 2006, while witnessing a mechanical integrity test, a Michigan Department of Environmental Quality (MDEQ) inspector noticed a leak in the surface piping of one of the wells. On October 25, 2006, MDEQ required the facility to shut down due to the leak. U.S. EPA conducted an inspection on November 2 and 3, 2006, and identified numerous violations of the conditions of the federal UIC permits. Id.

Without notice to U.S. EPA, on November 7, 2006, EDS signed agreements purporting to transfer ownership of the facility to RDD Investment Corp. (RDD). As of that date, EDS abandoned all interest in, and operations at, the wells. Id.

On February 28, 2007, EDS and RDD applied to U.S. EPA, seeking to transfer EDS's federal UIC permits for the Romulus facility to EGT. RDD and EGT later provided supplemental information requested by U.S. EPA. EGT Petition for Review Exhibits A-C.

Meanwhile, after several months of consideration, on April 12, 2007, U.S. EPA issued a notice of intent to terminate EDS's UIC permits based on EDS's numerous UIC permit violations. (A number of those violations were caused or aggravated by EDS's abandonment of the operation.) See U.S. EPA Fact Sheet. On the same day, U.S. EPA issued a letter to EGT and RDD informing them that it would defer consideration of the permit transfer request "at the present time." U.S. EPA explained that it was deferring consideration of the permit transfer

request because, if finalized, the *proposed* permit termination “would render your permit transfer request moot.” U.S. EPA April 12, 2007 Letter (emphasis added).

It is U.S. EPA’s April 12, 2007 letter which EGT asks this Board to review, alleging that “because no further action will be taken on the transfer request, pending the outcome of the hearing on termination...[it] functions as a final determination on the merits of the transfer request and is appealable.” EGT Petition for Review, p.2.

## II. ARGUMENT

The Board should dismiss EGT’s informal appeal under 40 C.F.R. § 124.5(b) because U.S. EPA’s April 12, 2007 letter does not constitute a final “denial” of EGT’s permit transfer request. U.S. EPA’s decision to defer consideration of EGT’s permit transfer request until after completion of the pending permit termination proceeding is a reasonable course of action in light of the Agency’s limited resources.

### A. There is no final U.S. EPA “denial” that is ripe for review

U.S. EPA’s April 12, 2007 letter to RDD and EGT is clearly not a final “denial” of EGT’s permit transfer request. EGT admits as much in its petition for review: “The EPA letter of April 12<sup>th</sup> does not state that it is a final action.” EGT Petition for Review, p.2. Instead, the letter merely informs EGT of the decisionmaking process the Agency will follow in ultimately addressing that request:

Because the proposed terminations would render your permit transfer request moot, U.S. EPA will retain the information you provided, but will not consider or process your request *at the present time.*” (emphasis added)

U.S. EPA April 12, 2007 Letter.

This language specifically contemplates that U.S. EPA will take further action concerning the permit transfer request once the proposed permit termination is resolved. That matter is still pending. Once U.S. EPA decides (after considering and responding to public comments) whether to terminate the EDS permits, it will revisit the pending permit transfer request. If U.S. EPA decides to terminate the permits, the Agency would then decide whether to deny the permit transfer request as moot. While EGT may fear such an outcome, that outcome is neither fore-ordained nor effectuated by U.S. EPA's April 12, 2007 letter. On the other hand, if U.S. EPA decides not to terminate the EDS permits, it would then complete its substantive review of the pending transfer request.

RDD and EGT sought to transfer the permits through modification of the existing permits held by EDS, as provided in 40 CFR §§ 144.38, 144.39 and 144.41. U.S. EPA's April 12, 2007, letter temporarily deferring review of that request is not a final denial of the request on the merits that would trigger review under the relevant regulation:

If the Director decides the request is not justified, he or she shall send the requester a brief written response giving a reason for the decision. Denials of requests for modification ... are not subject to public notice, comment, or hearings. Denials by the Regional Administrator may be informally appealed to the Environmental Appeals Board by a letter briefly setting forth the relevant facts. The Environmental Appeals Board may direct the Regional Administrator to begin modification, revocation and reissuance, or termination proceedings under paragraph (c) of this section. The appeal shall be considered denied if the Environmental Appeals Board takes no action on the letter within 60 days after receiving it. This informal appeal is, under 5 U.S.C. 704, a prerequisite to seeking judicial review of EPA action in denying a request for modification, revocation and reissuance, or termination.

40 C.F.R. §124.5(b). Indeed, nothing has been decided here – U.S. EPA could still ultimately choose the very permit transfer option sought by EGT. Rather than wait until U.S. EPA makes its decision, EGT is attempting to prematurely interpose this Board into U.S. EPA's pending consideration of permitting options. This is improper.

As is evident from the April 12, 2007 letter, U.S. EPA had not “decide[d] the [transfer] request is not justified,” “sen[t] the requester a brief written response giving a reason for the decision,” or “denied” the request for modification triggering application of 40 C.F.R. §124.5(b). While EGT asserts that U.S. EPA’s action is “in effect final,” the petition itself undercuts that claim by recognizing the interim nature of the Agency’s determination: “. . . no further action will be taken on the transfer request, pending the outcome of the hearing on termination scheduled for May 23.”<sup>1</sup> EGT Petition for Review, p.2 (emphasis added).

The ripeness doctrine provides that reviewing courts will avoid “premature adjudication” and resist “entangling themselves in abstract disagreements over administrative policies.” Pacific Gas & Elec. Co. v. Energy Resources Conservation and Dev. Comm’n, 461 U.S. 190, 200 (1983) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967)). These principles insulate Agency decisionmakers from judicial intervention “until an administrative decision has been formalized and its effects felt in a concrete way by the challenging part[y]” Id. See also Ohio Forestry Ass’n. v. Sierra Club, 523 U.S. 726 (1998); Lujan v. National Wildlife Fed’n, 497 U.S. 871 (1990). The same principles apply here before the Board. See, e.g., In re Arizona Municipal Storm Water NPDES Permits, 7.E.A.D. 646, 651 (EAB 1998).

Accordingly, until U.S. EPA takes final action denying the pending transfer request following completion of the permit termination proceeding, review of that request by this Board is not ripe. See Ash Creek Mining Co. v. Lujan, 934 F.2d 240 (10<sup>th</sup> Cir. 1991) (Department of the Interior’s interim decision to withhold a tract from its coal leasing program pending a final decision on a proposed exchange of that tract for other lands for which the Department had solicited public comments ); Eastern Connecticut Citizens Action Group v. Dole, 638 F. Supp.

---

<sup>1</sup> The referenced public hearing was held on May 23, 2007, and the public comment period ended on June 23, 2007. The Agency has not yet made a final decision regarding termination of the EDS permits.

1297 (D. Conn. 1986) (State Department of Transportation's environmental assessments were not ripe for review because the results of other pending permit processes -- in which the plaintiffs were participating -- might require revisions to the assessments and/or the underlying plans.)

**B. U.S. EPA's letter describes a reasonable approach in which EGT can fully participate**

If the Board nonetheless elects to consider the merits of EGT's petition, it must still decline review unless it finds that U.S. EPA's decision was based on a "clearly erroneous" finding of fact or conclusion of law, or "an exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review." 40 C.F.R. § 124.19(a). The preamble to section 124.19 states that "this power of review should only be sparingly exercised." 45 Fed. Reg. 33,412 (1980). See In re Rohm and Haas Company, 9 E.A.D. 499, 503-04 (EAB 2000). The burden of proving that review is warranted falls on the petitioner. 40 C.F.R. § 124.19(a). See also In re Johnson Atoll Chemical Agent Disposal System, 6 E.A.D. 174, 178 (EAB 1995); In re Rohm and Haas Company, 9 E.A.D. at 504.

U.S. EPA's decision to temporarily defer consideration of EGT's transfer request, as outlined in its April 12, 2007 letter, is a reasonable accommodation to limited Agency resources and does not raise any important policy considerations requiring review by this Board. At the time U.S. EPA issued its notice of intent to terminate EDS's permits, RDD and EGT were still submitting further information to the Agency in support of their pending request to transfer those permits. See EGT Petition for Review Exhibits C and D. Thus, while U.S. EPA had already developed, compiled and indexed a full record in support of its decision to issue a notice of proposed permit termination, the factual record relating to the permit transfer request was still

incomplete. Faced with a choice of which administrative action to pursue, U.S. EPA reasonably chose the one for which it had the most complete record – the proposed permit termination.

By issuing its notice of intent to terminate the EDS permits for cause pursuant to 40 C.F.R. § 144.40, U.S. EPA initiated the termination process described in 40 C.F.R. Part 124. That process requires that U.S. EPA take public comments on its proposed action, consider and respond to all comments received, and issue a final decision based on the administrative record. See 40 C.F.R. Part 124, Subpart A.

The public comment period for the proposed permit termination expired on June 23, 2007. EGT participated in the public comment period and submitted comments in support of permit transfer as an alternative to permit termination. EGT comments on proposed permit termination (Exhibit C). Under 40 C.F.R. § 124.17, U.S. EPA must consider and respond to EGT's comments before making its final decision on permit termination. U.S. EPA could decide, based on the record before it, to adopt the approach EGT advocates. In that case, U.S. EPA would reopen its consideration of the permit transfer request. Or, U.S. EPA could reject EGT's suggested approach and explain that decision in its response to comments.

For that reason, U.S. EPA's decision to initiate permit termination and defer taking final action on the transfer request has not deprived RDD and EGT of a full opportunity to advocate for permit transfer. Moreover, as noted above, the approach U.S. EPA has taken may help conserve the Agency's limited resources because there would be no need to further consider the permit transfer request if the permits were terminated.



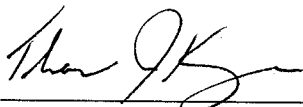
**III. ADMINISTRATIVE RECORD ISSUES**

Because there is no appealable final U.S. EPA decision regarding the requested permit transfer, a certified index of the entire administrative record for EGT's petition does not exist. If the Board determines that this matter is ripe for review, U.S. EPA requests the opportunity to consider what documents should be compiled and submitted as the "administrative record."

**IV. CONCLUSION**

For the reasons stated above, EGT's petition does not present any issues that are ripe or appropriate for review by this Board. U.S. EPA respectfully requests that the Board deny EGT's request for review.

Respectfully submitted,



---

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

OF COUNSEL:  
James H. Curtin  
Office of General Counsel  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

**CERTIFICATE OF SERVICE**

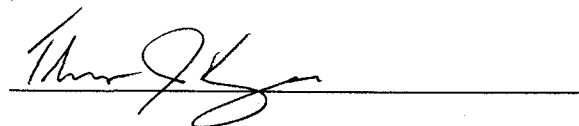
I hereby certify that I delivered a copy of the foregoing United States Environmental Protection Agency's Response to Petition for Review and this Certificate of Service to the persons designated below, on the date below, by postage prepaid first class mail, in envelopes addressed to:

Donald P. Gallo  
Pamela H. Schaefer  
Reinhart Boerner VanDeuren SC  
P.O. Box 2265  
Waukesha, WI 53187-2265

I have also filed the foregoing United States Environmental Protection Agency's Response to Petition for Review and this Certificate of Service with the Clerk of the Environmental Appeals Board, on the date below, by FedEx, 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. 20005

Dated this 27th day of June, 2007.



Thomas J. Krueger  
Associate Regional Counsel  
Office of Regional Counsel  
U.S. EPA, Region 5