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To: Erika Duric

Fax#: 202-233-0121

From: Thomas Ruzicka

Fax#: 312-886-7160

Date: 8-18-08

Subject: Environmental Disposal
System Inc

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

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In re:

Environmental Disposal Systems, Inc.

)
)
) Appeal No. UIC 07-03
)
)

UIC Permit Nos. MI-163-1W-C007 and
MI-163-1W-C008

RESPONSE TO PETITIONERS' MOTION FOR RECONSIDERATION
AND MOTION FOR STAY

On July 18, 2008, the Environmental Appeals Board (EAB) issued a decision denying a petition for review of EPA Region 5's (EPA's) decision to terminate two Underground Injection Control (UIC) permits issued to Environmental Disposal Systems, Inc. (EDS).

The Petitioners – RDD Investment Corporation, RDD Operations, LLC, and the Police and Fire Retirement System of the City of Detroit – filed a motion on July 30, 2008, asking the EAB to reconsider its July 18, 2008 decision. The Petitioners' motion also asked the EAB to stay its order and stay the termination of the UIC permits pending appeal.

In an August 12, 2008, Order, the EAB set an August 18, 2008, deadline for any response EPA wished to file.

1. Motion for Reconsideration

As the Petitioners' motion notes on page 3, the EAB will not grant a motion to reconsider absent a showing that there was an "obvious error, a mistake of law or fact, or a change in the applicable law." *In re DPL Energy*, PSD Appeal No. 01-02, slip op. at 2-

3 (EAB, Mar. 29, 2001) (Order Denying Reconsideration). "The reconsideration process 'should not be regarded as an opportunity to reargue the case in a more convincing fashion'" *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 0015, slip op. at 2 (EAB, April 9, 2001) (Order Denying Motion for Reconsideration), quoting *In re Southern Timber Prods., Inc.*, 3 E.A.D. 880, 889 (1992).

Petitioners' motion asserts three allegedly erroneous legal conclusions by the EAB as a basis for reconsideration. These claims are readily revealed as nothing more than a repackaging of its previous unsuccessful arguments.

First, Petitioners contend that EPA abused its discretion "in terminating the UIC Permits on the basis of irrelevant factors, while disregarding relevant factors". (Motion for Reconsideration at 2.) This contention mirrors the arguments made in pages 31-42 of Petitioners' brief and pages 3-6 of Petitioners' reply brief, down to the very subheading used to outline the arguments beginning on page 3 of the reply brief: "The EPA failed to consider all relevant factors in deciding to terminate the Permits, and abused its discretion in considering irrelevant factors."

Second, Petitioners claim that EPA abused its discretion "by refusing to properly consider Petitioners' actions as an owner of the facility at issue, because the basis for the Termination was the prior violations of the UIC Permits by EDS". (Motion for Reconsideration at 2.) Again, this section recasts arguments made in pages 6-10 of Petitioners' reply brief and pages 44-50 and 31-40 of Petitioners' brief, as evidenced by the subheading on page 31 of that brief summarizing the arguments to follow that EPA "artificially ignore[d] the efforts and actions of RDD...."

Finally, Petitioners assert that EPA did not provide a reasonable "explanation for its choice to terminate the Permits without considering a transfer request". (Motion for Reconsideration at 2.) This argument simply parrots pages 50-54 of Petitioners' brief, which were described by the heading statement that "The EPA's abuse of discretion in refusing to consider this Transfer Request merits review by the EAB."

Petitioners' motion for reconsideration does not identify any clear errors of law by the EAB; instead it simply tries to cut and paste its previous arguments into a more appealing package. Therefore Petitioners have failed to establish any reason for the EAB to reconsider its July 18, 2008, decision, which considered and rejected all of the issues now re-raised by the Petitioners.

2. Motion for Stay

EPA in no way concedes that Petitioners have any likelihood of success on the merits of their appeal. Similarly, EPA does not believe Petitioners' appeal presents difficult questions of law, although EPA concedes that there is little or no case law on termination of UIC permits.

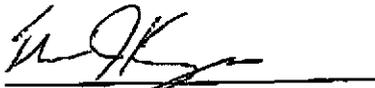
On considering Petitioners' discussion of the other factors to be analyzed when considering a stay, however, EPA does not oppose either staying the effective date of the EAB's July 18, 2008, decision or suspending this proceeding for a six month period.

EPA bases this position on the fact that another company, Environmental Geo-Technologies (EGT), has filed an application for new permits to operate the UIC wells at the former EDS facility. As of July 9, 2008, that permit application is administratively complete. EPA is therefore evaluating the permit application and will issue a draft

decision on whether or not to issue permits to EGT. That draft decision will likely be issued within the next six months.

Once EPA issues its draft decision on the new permit application, that decision will likely become the focus of all future litigation concerning the merits of the potential permitting and operation of the former EDS facility. Regardless of whether EPA proposes to issue permits to EGT or to deny EGT's application, that decision may eliminate the need to litigate the EDS permit termination decision at all. As Petitioners note, in the interim the status quo has been and will be maintained. Therefore, as a practical matter, proceeding with reconsideration of the EAB decision and/or with appellate briefing on that decision may not be a productive use of time or resources for the parties or the EAB.

Respectfully submitted,



Thomas J. Krueger
Associate Regional Counsel
U.S. Environmental Protection Agency
Region 5
77 W. Jackson Boulevard
Chicago, Illinois 60604-3590

OF COUNSEL:

Mindy G. Nigoff
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

CERTIFICATE OF SERVICE

I hereby certify that I delivered a copy of the foregoing Response to Petitioners' Motion for Reconsideration and Motion for Stay to the persons designated below, on the date below, by postage prepaid first class mail addressed to:

Joseph E. Turner
Ronald A. King
Kristin B. Bellar
Clark Hill PLC
212 East Grand River Avenue
Lansing, Michigan 48906

I have also filed the foregoing Response to Petitioners' Motion for Reconsideration and Motion for Stay and this Certificate of Service with the Clerk of the Environmental Appeals Board, on by fax and by mail 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 18th day of August, 2008.



Thomas J. Krueger
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5