

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

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| In re: |) | |
| Environmental Disposal |) | UIC Appeal No. 07-03 |
| Systems, Inc. |) | |
| |) | |
| Underground Injection Control |) | |
| Permits MI-163-1W-C007 and |) | |
| MI-163-1W-C008 |) | |
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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 5
OPPOSITION TO PETITIONERS' MOTION FOR LEAVE TO
FILE A REPLY BRIEF**

At the request of this Board, on January 16, 2008, the United States Environmental Protection Agency, Region 5 (U.S. EPA) filed a response to the Petition for Review of the U.S. EPA's decision to terminate two Underground Injection Control (UIC) permits issued to Environmental Disposal Systems, Inc. (EDS). The U.S. EPA's response explained why the Petition for Review did not raise any issues of fact, law or policy meriting review by the Board.

Section III(D)(5) of the Board's Practice Manual clearly states:

After the permitting authority's response has been filed, the EAB normally does not require further briefing before issuing a decision whether to grant review. On occasion, however, petitioners who believe that the permitting authority's response requires a reply may, upon motion explaining why a reply brief is necessary, be granted leave to file a reply brief.

EAB Practice Manual at 36 (emphasis added). Petitioners nonetheless filed a Motion for Leave to File a Reply on February 7, 2008. As explained briefly below, the reply that Petitioners seek to file merely summarizes (or as Petitioners put it, "clarifies") three arguments made in detail in their Petition for Review. Petitioners have not shown any reason why the Board should deviate from its standard practice by accepting this duplicative and unnecessary pleading.

First, Petitioners' proposed reply brief reasserts that the U.S. EPA failed to consider all relevant factors and considered irrelevant factors in deciding to terminate the permits. (See Petition at 40-44.) In particular Petitioners restate their complaint that the U.S. EPA's Fact Sheet did not mention Petitioners' efforts to correct the numerous permit violations committed by EDS.

Second, Petitioners' proposed reply brief repeats the argument that the U.S. EPA erroneously concluded that Petitioners' efforts to correct EDS's permit violations were irrelevant. (See Petition at 38-40.)

Finally, Petitioners' proposed reply brief restates their complaint that the U.S. EPA inappropriately characterized and relied on EDS's abandonment of its responsibilities under the permits. (See Petition at 47-50.)

These arguments in the proposed reply brief merely reiterate arguments in the Petition for Review which fail to establish any basis for review.

As the U.S. EPA explained in its response, 40 C.F.R. §144.40 provides that the U.S. EPA may terminate a permit for noncompliance by the permittee with any condition of the permit. The U.S. EPA's Fact Sheet described EDS's numerous permit violations, which established the factual and legal basis for termination.

The U.S. EPA's findings, and the basis for its decision to terminate the permits, however, extend well beyond the initial Fact Sheet on which Petitioners focus. Petitioners filed extensive public comments describing their efforts to correct EDS's violations and operating problems, and arguing against termination of the permits. As the Response to Comments shows, the U.S. EPA discussed and considered all of the factual and legal issues raised by Petitioners before deciding to terminate EDS's permits.

Petitioners simply repeat their request that the Board read an “opportunity to cure” the violations into the regulatory standard even though no such provision exists in the regulations or caselaw. Neither the regulations nor the permits state that termination is limited to current or ongoing violations. Moreover, inventing an “opportunity to cure” would undermine the U.S. EPA’s enforcement program, allowing permittees to avoid the consequences of their actions merely by returning to compliance before the Agency could complete termination proceedings. Indeed, Petitioners should get no special credit for their efforts because as soon as they took over as the owners the EDS facility (without prior notice to the U.S. EPA), Petitioners had a legal obligation to comply with UIC regulations.

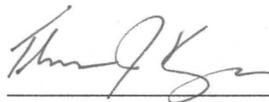
As the U.S. EPA’s Fact Sheet and Response to Comments note, EDS abandoned all interest in the facility, and in its permit obligations, without any notice to the U.S. EPA. EDS’s total disregard for its regulatory obligations distinguished this matter from other cases where the U.S. EPA has addressed regulatory violations through penalty actions rather than through permit termination. In light of these circumstances, the U.S. EPA concluded – in an exercise of its broad discretion – that by terminating the permits it would ensure that careful and extensive scrutiny under the permitting process would accompany any future request to reopen the facility. This is consistent with the general guiding principle of the UIC program – that underground injection of hazardous wastes is prohibited until it can be shown that the injection will not endanger drinking water sources or public health. See 40 C.F.R. § 144.1(d). Terminating the EDS permits for EDS’s irresponsible and unprecedented behavior demonstrates the U.S. EPA’s seriousness of purpose in upholding that principle.

In sum, the purpose of the Petitioners’ request is merely to repeat and refine arguments it

already made at length in its Petition for Review. That is not a sufficient reason to justify granting Petitioners' request.

For the above stated reasons, the U.S. EPA requests that the Board deny Petitioners' Motion. If the Board decides to grant the Respondent's Motion then the Complainant requests that the Board provide U.S. EPA with an opportunity to file a sureply brief, if necessary, within 21 days.

Respectfully submitted,



Thomas J. Krueger
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Dated: February 14, 2008

CERTIFICATE OF SERVICE

I hereby certify that I delivered a copy of the foregoing United States Environmental Protection Agency, Region 5 Response to Petitioners' Motion for Leave to File a Reply Brief and this Certificate of Service 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 United States Environmental Protection Agency, Region 5 Response to Petitioners' Motion for Leave to File a Reply Brief and this Certificate of Service with the Clerk of the Environmental Appeals Board, on the date below, by regular mail, in an envelope addressed to:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

An additional copy of the United States Environmental Protection Agency, Region 5 Response to Petitioners' Motion for Leave to File a Reply Brief was filed with the Environmental Appeals Board through its electronic submission process.

Dated this 14th day of February, 2008.



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