IN RE ENVIRONMENTAL DISPOSAL SYSTEMS, INC.

UIC Appeal No. 07-03

ORDER DENYING REVIEW

Decided July 18, 2008

Syllabus

The Police and Fire Retirement System of the City of Detroit, RDD Investment Corporation, and RDD Operations, LLC, (together, "PFRS/RDD") petitioned the Environmental Appeals Board ("EAB" or "Board") to review the U.S. Environmental Protection Agency ("EPA" or "Agency"), Region 5 ("Region") decision to terminate two Underground Injection Control ("UIC") permits issued to Environmental Disposal Systems, Inc. ("EDS"). The Police and Fire Retirement System of the City of Detroit ("PFRS") is an investor in the wells covered by the two permits. RDD Investment Corporation and RDD Operations, LLC (together, "RDD") are wholly-owned subsidiaries of PFRS.

The permits authorized EDS to operate two existing Class I hazardous waste injection wells at a facility in Romulus, Michigan, through September 6, 2015. EDS began operation of the wells in December 2005. Within a year, EDS ran into significant financial and operational difficulties, resulting in numerous permit violations, at which point it relinquished control and operation of the wells and divested its interest in the real property to RDD. In response to these permit violations, the Region sent two letters to EDS: (1) a Notice of Noncompliance, informing EDS of several permit violations and describing actions for EDS to undertake to return the facility to compliance, and (2) an information request to "determine whether cause exists for modifying, revoking and reissuing, or terminating [EDS's] permits, or to determine compliance with [the] permits."

After sending the letters to EDS, the Region received a request to transfer the permits from EDS to Environmental Geo-Technologies, LLC, ("EGT"), a potential purchaser identified by PFRS/RDD. On April 12, 2007, the Region proposed termination of the permits under 40 C.F.R. § 144.40, and determined that, since termination would render the permit transfer moot, it would defer action on the requested transfer pending completion of the termination proceeding. The Region subsequently terminated the permits in October 2007. In explaining the basis for its termination decision, the Region cited numerous violations of the permits and EDS's "level of irresponsible behavior," primarily its "abandonment of all interest in the facility without informing [the Region] and with no intention of remaining in place to address compliance issues."

PFRS/RDD raise six issues in their petition for review. First, PFRS/RDD assert that the Region's termination decision inappropriately relied on a number of clearly erroneous factual findings. Second, PFRS/RDD assert that the Region relied on the clearly erroneous conclusion of law that corrections of violations and responses to information requests by an entity other than the permittee were irrelevant to the decision to terminate the permits. Third, PFRS/RDD contend that the decision to terminate the permits was an inappropriate

exercise of the Region's discretion because "the violations identified in the Fact Sheet * * * had been corrected." Fourth, PFRS/RDD allege that the Region's decisionmaking process was deficient because it failed to seek or allow public comment on these alleged corrections. Fifth, PFRS/RDD allege that the Region's "position that only EDS could have remedied the alleged violations" is inconsistent with the Region's actions towards the facility's new owner/operator, in this case RDD, "as if it were the 'de facto' permittee." Finally, PFRS/RDD argue that the Region should have considered the permit transfer request prior to considering whether to terminate the permits.

Held: PFRS/RDD have not demonstrated that the Region based the termination decision on any clearly erroneous finding of fact or conclusion of law or exercise of discretion warranting Board review. PFRS/RDD have failed to show any clearly erroneous findings of fact and, in fact, have conceded that a number of the violations did occur. While PFRS/RDD assert compliance with the permits at the time the Region issued the notice of intent to terminate the permits, current compliance does not negate or "correct" prior violations of the permits. Additionally, several of the statements in the Region's response to comments that PFRS/RDD alleged to be clearly erroneous are not factual findings. They are, rather, merely the Region's characterizations of the importance of regulatory provisions and permit conditions. The underlying regulations and permit conditions cannot be challenged in the termination proceeding or this appeal. Accordingly, the Board declines to review this issue.

As to the alleged erroneous conclusion of law that corrections by RDD, rather than EDS, were irrelevant to the decision to terminate, the Board notes the following. First, the Board observes that two of the regulatory causes for termination, including the one invoked in this matter, are based on a permittee's – rather than another entity's – actions or non-actions. The regulatory history of the UIC regulations also supports focus on the permittee's behavior when determining whether cause to terminate exists. Thus, the Region properly focussed on what EDS did or did not do when determining whether cause for termination exists. As such, PFRS/RDD's attempt to shift the focus to RDD's actions is misplaced.

Further, the regulations that govern UIC permit termination, 40 C.F.R. § 144.40, do not require consideration of corrected violations as part of the termination proceeding, regardless of the entity alleged to have instituted the corrections, though the record shows that the Region acknowledged the alleged corrections. PFRS/RDD failed to substantiate its statements that corrected permit violations may not form the basis of a termination decision. Once the Region has established the factual predicate that a permittee has violated a permit condition, the Region has the discretion to terminate an existing permit. Moreover, many of the violations described in this case are not those that can be truly cured or corrected. For example, submitting a required report or information after the deadline has passed does not reverse the fact that the deadline was initially missed, nor does it render the submission timely. Thus, the Region did not rely on a clearly erroneous conclusion of law when it terminated the permits for cause despite the alleged corrections of violations, and review of this issue is denied.

The Board finds that the Region did not exercise its discretion in an impermissible fashion by proceeding with the termination despite the alleged corrections, or in its decision not to reopen the public comment period to allow further public comment on the alleged corrections. The Board also declines to review the issue of whether it was an abuse of discretion to terminate the permits after allegedly granting the non-permittee facility owner "de facto permittee" status. Compliance with a UIC permit and the UIC regulations by a facility owner/operator that is not the permittee does not render the facility owner/operator a "de facto permittee," even if the non-permittee's actions are conducted

with the federal regulator's involvement to return the well operations and facility to compliance. Further, a "de facto permittee" concept contravenes the Agency's regulatory intent for permits not to be inherently assignable and to limit permit privileges to the permittee.

Finally, the Board denies review of the issue of whether the Region improperly deferred consideration of the permit transfer request until it made a determination on whether to terminate the permits. The Board finds reasonable both the Region's explanation that it determined that an appropriate response to the permit violations was to terminate the permits and the Region's conclusion that "it no longer made logical sense" to consider a transfer request for permits it was intending to terminate. Termination does not preclude submission of a new application nor does it reflect any predetermination of the new owner's ability or fitness to operate the existing wells.

Before Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, and Kathie A. Stein.

Opinion of the Board by Judge Reich:

On November 21, 2007, the Police and Fire Retirement System of the City of Detroit, RDD Investment Corporation, and RDD Operations, LLC, (together, "PFRS/RDD") filed a petition requesting that the Environmental Appeals Board ("EAB" or "Board") grant review of the U.S. Environmental Protection Agency ("EPA" or "Agency"), Region 5 ("Region") decision to terminate two Underground Injection Control ("UIC") permits issued to Environmental Disposal Systems, Inc. ("EDS"). Petition for Review of the U.S. EPA's Decision to Terminate UIC Permits MI-163-1W-C007 & MI-163-1W-C008 ("Petition"). Permits MI-163-1W-C007 and MI-163-1W-C008 (the "Permits"), which the Region issued under the Part C of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300h-300h-8, and regulations implementing the UIC program at 40 C.F.R. parts 124 and 144-148, authorized EDS to operate two existing Class I hazardous waste injection wells[1] at a facility in Romulus, Michigan ("Facility") through September 6, 2015. A.R. 1, 2, *available at* EPA Exs. N (UIC Permit MI-163-1W-C007), O (UIC Permit MI-163-1W-C008). PFRS/RDD filed their petition pursuant to 40 C.F.R. § 124.19.[2] The Petition generally asserts that the Board should (1) review the Region's decision to terminate the Permits; (2) find

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[1] Under 40 C.F.R. § 144.6, injection wells fall into five classes depending on the material being disposed of in the well. Class I wells are used to inject hazardous waste beneath the lowermost formation containing an Underground Source of Drinking Water ("USDW") within one quarter mile of the well. 40 C.F.R. § 144.6(a)(1).

[2] The Region, in its response to the Petition, states that the Petition was filed pursuant to 40 C.F.R. § 124.5(b), which provides for informal Board review of denials of requests to modify, revoke and reissue, or terminate permits. EPA's Response to Petition for Review ("EPA Br.") at 1; *see also* 40 C.F.R. § 124.5. However, the Petition seeks review of the Region's final permit decision to terminate the Permits. Therefore, 40 C.F.R. § 124.19, which provides for appeals to the Board of final permit decisions, including permit terminations, is the governing regulation. 40 C.F.R. § 124.19; *see also id.* § 124.15(a) (defining final permit decisions).

that the Region abused its discretion when deciding to terminate the Permits; and (3) remand the decision to the Region with instructions to take an alternative action, specifically, consider and approve a request to transfer the Permits to another entity. Petition at 2.

I. *BACKGROUND*

A. *Statutory and Regulatory Framework*

Under SDWA section 1421, 42 U.S.C. § 300h, the EPA Administrator is required to promulgate regulations for state underground injection control programs to protect underground sources of drinking water ("USDW"). The EPA has promulgated such implementing regulations, which are found at 40 C.F.R. parts 144 through 148.[3] The protections established by the SDWA and the UIC regulations focus exclusively on groundwater that is or may be a source of drinking water.[4] EPA administers the UIC program in those states that are not yet authorized to administer their own programs, including the State of Michigan. *See* 40 C.F.R. §§ 144.1(e), 147.1151.

The authority to terminate an existing UIC permit is provided in 40 C.F.R. § 144.40, which enumerates three causes that may lead to termination during a permit's term. The regulation provides:

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[3] Specifically, the SDWA requires the Administrator to promulgate regulations establishing "minimum requirements for effective programs to prevent underground injection which endangers drinking water sources." SDWA § 1421(b)(1), 42 U.S.C. § 300h(b)(1). The term USDW is defined as:

> [A]n aquifer or its portion:
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> > (a)(1)Which supplies any public water system; or
> > (2)Which contains a sufficient quantity of ground water to supply a public water system; and
> > (i)Currently supplies drinking water for human consumption; or
> > (ii)Contains fewer than 10,000 mg/l total dissolved solids; and
> > (b) Which is not an exempt aquifer.

40 C.F.R. § 144.3.

[4] More specifically, the UIC program focuses on the protection of underground water that "supplies or can reasonably be expected to supply any public water system * * * ." SDWA § 1421(d)(2), 42 U.S.C. § 300h(d)(2); *see In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 566 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999); *In re Envotech, L.P.*, 6 E.A.D. 260, 264 (EAB 1996); *In re Brine Disposal Well*, 4 E.A.D. 736, 742 (EAB 1993).

> (a) The Director may terminate a permit during its term, or deny a permit renewal application for the following causes:
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> > (1) Noncompliance by the permittee with any condition of the permit;
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> > (2) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time; or
> >
> > (3) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination;
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> (b) The Director shall follow the applicable procedures in part 124 in terminating any permit under this section.

40 C.F.R. § 144.40. In this case, "Director" refers to the Region 5 Regional Administrator, and the cause for termination is the permittee's alleged noncompliance with the permit. *Id.* § 144.3 (defining "Director" as the "Regional Administrator, the State director or the Tribal director as the context requires, or an authorized representative"); *id.* § 144.40(a)(1).

Prior to terminating a permit, the decisionmaker must first establish that one of these causes exists. However, the termination of a UIC permit is not required upon finding cause. We observe that the regulatory language uses the word "may," which indicates that permit termination is a permissive, rather than mandatory, response to finding cause. This construction of the UIC permit termination regulation is consistent with our earlier interpretations of the permit terminations provisions for the Resource Conservation and Recovery Act ("RCRA") and National Pollutant Discharge Elimination System ("NPDES") programs, which both share the same regulatory origin as the UIC termination provisions. *In re Waste Techs. Indus.*, 5 E.A.D. 646, 664-65 (EAB 1995) (construing the RCRA program permit termination regulations as permissive); *In re Marine Shale Processors, Inc.*, 5 E.A.D. 461, 470-71 (EAB 1994) (construing the NPDES program permit termination regulations as permissive) ("*Marine Shale I*").

The regulatory history of 40 C.F.R. § 144.40 further reveals a clear intent to afford the Region discretion when it renders a permit termination decision. EPA originally promulgated section 144.40 in part 122 as part of EPA's initiative to consolidate its permit regulations. *See* Consolidated Permit Regulations, 44 Fed.

Reg. 34,244, 34,249 (proposed June 14, 1979). Commenters on the proposed version, 40 C.F.R. § 122.10, expressed concern regarding the breadth of possible application of the causes for permit termination; EPA explained that it favored "broad[] wording [of the causes for termination] so that a basis for initiating permit termination proceedings is available when the need is present." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,316 (May 19, 1980). Later, because "[w]ording in [the existing rule] seemed to imply that a permit would automatically be terminated for any non-compliance, no matter how minor[,]" the Agency amended the section to "clarif[y] that the Director has the discretion to decide whether or not to terminate the permit." Underground Injection Control Program Criteria & Standards, 46 Fed. Reg. 43,156, 43,159 (Aug. 27, 1981). The language promulgated in the final version, 40 C.F.R. § 122.16, is otherwise substantially identical to the language in 40 C.F.R. § 144.40; the discretion is therefore reflected in the current regulation. *Compare* 45 Fed. Reg. at 33,316, 33,429-30 *with* 40 C.F.R. § 144.40.

We further observe that two of the causes for termination, including the cause involved in this case, are based on a permittee's – rather than another entity's – actions or non-actions.[5] 40 C.F.R. § 144.40(a)(1)-(2). The regulatory history of the UIC regulations also supports focus on the permittee's behavior when determining whether cause to terminate exists. Although arising from comments to the proposed permit transfer provisions, the preamble to the final rule reflects the Agency's articulation of the general relationship between permits and permittees. The Agency received public comments during the rulemaking process that the Agency characterized as reflecting an "implicit assumption * * * that a permit is a 'vested' right which should be freely and automatically transferable along with ownership of the regulated facility." 45 Fed. Reg. at 33,313. The Agency clarified that it was its "position as a matter of law that *the privileges associated with a permit attach only to the person authorized to conduct permitted activities and are not inherently assignable.*" *Id.* (emphasis added). The Agency explained:

> As a practical matter, permits in many instances contain requirements which are personal to the permittee through the explicit conditions required to be contained in the permit. This is most significantly true for * * * UIC wells injecting hazardous wastes. * * *
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[5] The pertinent regulatory provisions provide that "[n]oncompliance by the permittee with any condition of the permit" and "[t]he permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time" are both causes for termination. 40 C.F.R. § 144.40(a)(1)-(2). The Region's stated cause for terminating the Permits is the permittee's noncompliance with permit conditions.

> * * * These include such conditions of the permit as the closure and post-closure plans, the contingency plan, and provisions for financial responsibility. In addition, because some of these conditions are incorporated in the permit on the basis of information which is submitted as part of the permit application, in most of these transfers a new permit application will be necessary as well.

Id. at 33,313-14.

Thus, while the UIC regulations allow permit transfer, it is important to note that even in the processing of UIC permit transfer requests, with no associated termination proceedings based on permit violations, the Agency will address most requests by requiring and processing a new permit application. *See id.*; 40 C.F.R. § 144.38(a) (providing for permit transfer by revocation and reissuance).

B. *Factual Background*

The petitioners in this matter are the Police and Fire Retirement System of the City of Detroit ("PFRS"), a pension plan and trust, and its wholly owned subsidiaries, RDD Investment Corp. and RDD Operations, LLC (collectively, "RDD"). A.R. 59 at 3, *available at* EPA Ex. R *and* PFRS/RDD Ex. A ("PFRS/RDD Comments"). From 1993 to 2006, PFRS loaned approximately forty million dollars to EDS and two other entities for the purpose of constructing and operating the Facility and wells described in the Permits.[6] PFRS/RDD Br. at 4. As is described in greater detail below, RDD became actively involved with the operation of the Facility once EDS began to run into financial and operational difficulties in carrying out its obligations under the Permits.

1. *Permits Violation History*

The Region issued original and modified Permits to EDS on September 6, 2005, and October 5, 2006. Permits at 1. EDS began operation of the wells in December 2005. A.R. 27 at 1, *available at* EPA Ex. B ("Jan. 8, 2007 UIC Inspection Report"); EPA's Response to Petition for Review ("EPA Br.") at 2. According to the Region, within a year, EDS ran into significant financial and operational difficulties, resulting in numerous permit violations.

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[6] The other entities are the Romulus Deep Disposal Limited Partnership and Remus Joint Venture. EDS is listed as the general partner and managing partner of Romulus Deep Disposal Limited Partnership and Remus Joint Venture, respectively. *See* A.R. 31, *available at* EPA Ex. E *and* PFRS/RDD Ex. A-8 ("Jan. 22, 2007 King Letter").

During the time period from about October to December 2006, state and federal regulators observed operational deficiencies at the Facility and sought clarifying information from EDS. EPA inspected the wells described in the Permits on November 2-3, 2006, and December 14-15, 2006. A.R. 20, *available at* EPA Ex. D ("Nov. 15, 2006 UIC Inspection Report"); Jan. 8, 2007 UIC Inspection Report. These inspections followed an inspection the Michigan Department of Environmental Quality ("MDEQ") conducted in October 2006, when an MDEQ inspector observed a leak in the surface piping of a well during a mechanical integrity test. A.R. 16, *available at* EPA Ex. C.

As a result of the November 2-3, 2006 inspection, EPA sent two letters to EDS on November 20, 2006: (1) a Notice of Noncompliance, informing EDS of several permit violations and describing actions for EDS to undertake to return the Facility to compliance, and (2) an information request, pursuant to section I(E)(7) of the Permits, to "determine whether cause exists for modifying, revoking and reissuing, or terminating [EDS's] permits, or to determine compliance with [the] permits." A.R. 21, 22, *available at* EPA Exs. F, G; *see also* Jan. 8, 2007 UIC Inspection Report (describing Notice of Noncompliance letter).

RDD sent both the Region and MDEQ a letter dated November 28, 2006, essentially identifying RDD as the current operator of the wells described in the Permits and explaining that RDD was unable to provide the requested reporting information due to "a main computer malfunction." *See* A.R. 23, *available at* EPA Ex. I ("Nov. 28, 2006 Wonsock Letter") ("All data for the months of October and November [2006] are currently unretrievable."). A December 14, 2006 letter from RDD to state and federal regulators stated the following: "RDD as the present manager of the [Facility], is submitting this interim response to the * * * [Region's] November 20, 2006 Request for Information. This response is not being submitted on behalf of [EDS]." A.R. 26, *available at* PFRS/RDD Ex. A-13 at 2. Twelve numbered paragraphs in the December 14, 2006 letter purport to respond to the Region's November 20, 2006 Request for Information, but it is not apparent from the record whether the Region determined that the letter provided all the requested information. *Id.* at 6-7.

On January 12, 2007, after failing to receive a response from, or on behalf of, EDS regarding the November 20, 2006 letters, EPA sent a second letter to EDS requesting the same information. A.R. 30 at 1, *available at* EPA Ex. J *and* PFRS/RDD Ex. A-16. By letter dated January 30, 2007, RDD responded to the January 12, 2007 Request for Information. A.R. 34, *available at* EPA Ex. P *and* PFRS/RDD Ex. A-19. RDD again identified itself as the present manager of the Facility and reiterated that its response was "not submitted on behalf of" EDS. *Id.* at 1. RDD further provided some, but not all, of the information the Region had requested. *Id.* at 2-4. On February 22, 2007, the Region informed EDS of the Region's intent to file a civil administrative complaint against EDS. A.R. 39, *available at* EPA Ex. Q. The notice of intent to file a civil administrative com-

plaint informed EDS that the Region would seek civil penalties for alleged violations of at least thirteen Permits conditions.[7] *Id.* at 1-2.

2. *Assumption of Ownership and Operation by RDD*

As can be gleaned from the foregoing Permits violation history, once the violations began to surface, EDS abandoned its interest in the Facility and divested its interest in the real property. RTC at 4. PFRS/RDD state that in October 2006, PFRS began to learn of EDS's financial difficulties and initiated steps to "secure * * * PFRS'[s] investment in the Facility and to seek the orderly transfer of the Facility and the regulatory licenses and permits from EDS to * * * PFRS'[s] designee." PFRS/RDD Br. at 6. PFRS/RDD state that "EDS no longer had the capital or other resources to operate the Facility in a safe and prudent manner, and under those circumstances, * * * PFRS insisted that EDS voluntarily surrender its interest in the Facility, or [PFRS] would otherwise be forced to pursue all of its available remedies." *Id.* at 10; *see also id.* at 49 ("Petitioners, out of concern for the public health and safety and the environment, and by virtue of its rights under the loan agreements for the Facility, demanded voluntary relinquishment of control of the Facility * * * .").

By agreement dated November 7, 2006, EDS executed agreements with the intent to assign and transfer its rights, title and interest in the Permits to PFRS's designee, the RDD Investment Corp. *See* A.R. 31, *available at* EPA Ex. E *and* PFRS/RDD Ex. A-8 ("Jan. 22, 2007 King Letter"). EDS, along with the Romulus Deep Disposal Limited Partnership and Remus Joint Venture, further executed a quit claim deed transferring real property in Romulus, Michigan, to RDD. *Id.* The real property is known as "28470 Citrin Drive," where the wells described in the Permits appear to be located.[8] *Id.*

Neither EDS nor RDD made any contact with the Region at this time to initiate the legally-required Agency approval of the permit transfer. *See* 40 C.F.R. §§ 144.38, .39, .41. Indeed, the Region asserts that, at the time EDS executed the

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[7] The certified index of the administrative record for the permit termination decision reflects that the Region filed a civil administrative complaint against EDS on March 22, 2007. The record does not reflect the actual charges in the complaint or the status of the administrative proceeding, but it appears that at the time of the termination decision on October 22, 2007, the Region was still pursuing the enforcement action. *See* A.R. 56 at 2, *available at* EPA Ex. H ("Response to Comments" or "RTC") (Comment 4).

[8] EDS, Romulus Deep Disposal Limited Partnership, and Remus Joint Venture executed a third document, the "Acknowledgement [sic] and Assignment," which defines the term "Facility" as follows: "The commercial liquid hazardous waste storage, treatment and disposal facility located at 28470 Citrin Drive, Romulus, Michigan * * * and all equipment, personal property, and facilities related to the operation thereof or located on or in the [property transferred in the quit claim deed]." Jan. 22, 2007 King Letter.

documents transferring its interest in the Permits to RDD, the Region did not even know of RDD's existence. EPA Br. at 17. The Region acknowledges that it learned of "RDD's role as the new owner and operator, of the [F]acility [and] of EDS's departure" upon receipt of a November 28, 2006 letter from RDD Operations, LLC, discussed *supra*; however, PFRS/RDD waited until January 22, 2007, to provide the Region with the "documents [that] evidence[d] the transfer of the real property and assets of [the Facility] to * * * RDD Investment Corp." Jan. 22, 2007 King Letter; EPA Br. at 3 (citing Nov. 28, 2006 Wonsock Letter). PFRS/RDD acknowledged their "understanding that certain permits [could] not be assigned and transferred from a regulatory standpoint until approval [wa]s provided by EPA * * * ." Jan. 22, 2007 King Letter.

3. *Request for Permit Transfer from EDS to Environmental Geo-Techologies, LLC*

By letter to the Region dated February 28, 2007, attorneys for PFRS/RDD[9] submitted a request to transfer the Permits from EDS to Environmental Geo-Technologies, LLC, ("EGT"). PFRS/RDD Ex. A-21 ("Transfer Request"). The request identified EDS as the existing permittee and RDD Investment Corp. as the surface owner. *Id.*, att. 1. The request also included a partially-executed document titled "UIC Permit Transfer Agreement," made between EDS and EGT, dated February 21, 2007. *Id.* (lacking EDS execution). The Region responded by electronic mail dated March 13, 2007, and letter dated March 16, 2007, identifying deficiencies in the Transfer Request. PFRS/RDD Ex. A-25. Attorneys for PFRS/RDD provided the Region two additional transfer-related submissions by letters dated March 26, 2007, and April 12, 2007. PFRS/RDD Exs. A-27, A-28. On April 12, 2007, the Region informed RDD and EGT of EPA's decision "to propose that the EDS permits be terminated under 40 C.F.R. § 144.40" and that "[b]ecause the proposed terminations would render [the] permit transfer request moot, [the Region would] retain the [transfer-related] information [RDD and EGT] provided, but [would] not consider or process [the] request at the present time." PFRS/RDD Ex. A-33. EPA's issuance of the Notice of Intent to Terminate the Permits ("NOI") coincided with issuance of its April 12, 2007 letter.

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[9] The same law firm, Clark Hill PLC, represents PFRS and RDD in matters concerning the Permits. PFRS/RDD Comments at 2. Because many communications with the Region have been made through the firm, which does not always specifically identify the client on whose behalf the firm is acting, it is at times unclear which entity is submitting documents to the Region. In this case, PFRS/RDD state that "[Environmental Geo-Technologies, LLC] and EDS submitted [the] request for transfer" although the cover letter accompanying the request to transfer the Permits is on PFRS/RDD's attorneys' letterhead. Petition at 50; PFRS/RDD Ex. A-21 ("Transfer Request"). We also note that EDS had previously intended to assign and transfer its rights, title and interest in the Permits to RDD by agreement dated November 7, 2006. *See* discussion at Part I.B.2, *supra.*

In May 2007, EGT alleged that the Region had denied the Transfer Request and sought the Board's review of the decision. *In re Envtl. Disposal Sys., Inc.*, UIC Appeal No. 07-01, at 1 (EAB July 11, 2007) (Order Denying Review), *appeal dismissed per stipulation sub nom. Envtl. Geo-Techs., LLC v. U.S. EPA*, No. 07-4041 (6th Cir. Nov. 19, 2007). We reviewed EGT's request for review under 40 C.F.R. § 124.5(b), which provides for informal appeals of denials of requests to modify or revoke and reissue permits. *Id.* After considering the informal appeal and the Region's arguments in opposition to the request, we held that the Region had not denied the Transfer Request and that EGT had prematurely filed the informal appeal. *Id.* at 2-3. Therefore, we declined to review the Region's treatment of the Transfer Request. *Id.* On July 27, 2007, we denied EGT's motion for reconsideration of the Board's order. *In re Envtl. Disposal Sys., Inc.*, UIC Appeal No. 07-01 at 1 (EAB July 27, 2007) (Order Denying Motions for Leave and for Reconsideration). EGT then sought federal court review, but the court dismissed the appeal pursuant to the parties' stipulation. *Envtl. Geo-Techs., LLC v. U.S. EPA*, No. 07-4041 (6th Cir. Nov. 19, 2007).

4. *Termination Proceedings*

By letter to EDS dated April 12, 2007, the Region issued the NOI and a related Fact Sheet. A.R. 53, *available at* PFRS/RDD Ex. A-34; *see also* EPA Ex. K (providing undated and unsigned version of NOI). The Region explained that its "inten[t] to terminate the [P]ermits [was] due to EDS's noncompliance with numerous provisions of the [P]ermits." The Region also noted that "[t]he specific [P]ermit[s] violations [were] described in detail in the accompanying fact sheet and [were] supported by an administrative record." NOI at 1. The Region solicited public comments on the proposed termination from April 23, 2007, to June 22, 2007. A.R. 56 at 1, *available at* EPA Ex. H ("Response to Comments" or "RTC"). The Region estimates 100 persons attended the public hearing on May 23, 2007, in which PFRS and RDD Investment Corp. participated.[10] *Id.*; EPA Br. at 23; A.R. 55 at 35-40, 56-62, *available at* EPA Ex. L ("Pub. Hr'g Tr."). PRFS/RDD submitted public comments dated June 20, 2007. PFRS/RDD Comments. On September 11, 2007, PFRS/RDD requested a reopening or extension of the comment period "to give interested persons an opportunity to comment on the new information and arguments submitted during the public comment period * * * ." A.R. 62 at 5, *available at* PFRS/RDD Ex. D ("Request to Extend/Reopen Comment Period"). The Region denied the request for the reasons articulated in the Response to Comments, which the Region issued along with the decision to termi-

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[10] An attorney from Clark Hill PLC was present at the public hearing on May 23, 2007, and identified himself as "appearing * * * on behalf of [PFRS] and its designee, RDD Investment Corporation." A.R. 55 at 35, *available at* EPA Ex. L ("Pub. Hr'g Tr."). We note that on June 20, 2007, Clark Hill PLC submitted public comments on behalf of PFRS, RDD Investment Corp., and RDD Operations, LLC. *See* PFRS/RDD Comments at 3; *see also* discussion at footnote 9, *supra.*

nate the Permits on October 22, 2007. RTC; A.R. 57, *available at* EPA Ex. M *and* PFRS/RDD Ex. G ("Notice of Decision to Terminate"). The Region's basis for termination was "EDS'[s] noncompliance with numerous provisions of the [Permits]." A.R. 48 at 2, *available at* EPA Ex. A ("Fact Sheet"); Notice of Decision to Terminate (stating that review of the comments and information concerning the proposal to terminate the Permits "did not identify any issues that would alter the basis for the proposed decision"). The Region also cited EDS's attempt to divest its interest in the Permits in November 2006 as influencing its decision to pursue a termination action rather than an enforcement action alone. RTC at 6 (Comment 13).

C. *Procedural Background*

PFRS/RDD filed their petition for review of the termination decision, with an associated request for a remand with instructions to approve the transfer request, on November 21, 2007. The Region filed its response to the Petition on January 16, 2008. On March 18, 2008, the Board granted PFRS/RDD's motion for leave to file a reply to the Region's response and accepted PFRS/RDD's proposed reply for filing. *In re Envtl. Disposal Sys., Inc.*, UIC Appeal No. 07-03 (EAB Mar. 18, 2008) (Order Granting Motion for Leave to File Reply and Accepting Reply for Filing). The Region declined to file a substantive response. *See* U.S. EPA, Region 5 Response to Petitioners' Reply Brief. The Petition now stands ready for the Board's consideration.

II. *DISCUSSION*

A. *Standard of Review*

The Board may grant review of a UIC permit decision if it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R.§ 124.19(a). This power of review is to be used sparingly, as "most permit conditions should be finally determined at the [permit issuer's] level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). "The burden of demonstrating that review is warranted rests with the petitioner, who must enunciate objections to the permit and explain why the permit issuer's response to those objections is clearly erroneous or otherwise warrants review." *In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 264 (EAB 2005). "[I]t is not enough for a petitioner to rely on previous statements of its objections, such as comments on a draft permit; a petitioner must demonstrate why the Region's response to those objections (the Region's basis for its decision) is clearly erroneous or otherwise warrants review." *In re LCP Chems. – N.Y.*, 4 EAD 661, 664 (EAB 1993).

B. *Analysis*

PFRS/RDD raise six issues in their Petition. First, PFRS/RDD identify the following statement in the Fact Sheet as a clearly erroneous factual finding upon which the termination decision was inappropriately based: "EDS'[s] failure to comply with various reporting and recordkeeping obligations required under the [P]ermits and applicable federal regulations severely handicapped the EPA in its ability to carry out its regulatory functions." Petition at 31. Second, PFRS/RDD allege that the Region's decision to terminate the Permits and the RTC relied on the clearly erroneous conclusion of law that corrections and responses by RDD, rather than EDS, were irrelevant to the decision to terminate the Permits. *Id.* at 38.

The remaining four issues all involve PFRS/RDD's contention that the decision to terminate the Permits was an inappropriate exercise of the Region's discretion. The four reasons cited for this alleged inappropriate exercise of discretion are: (1) "the violations identified in the Fact Sheet * * * had been corrected"; (2) the Region did not seek or allow public comment on these corrections; (3) the Region's "position that only EDS could have remedied the alleged violations" is inconsistent with Region's actions towards "RDD as if it were the 'de facto' permittee"; and (4) the Region did not take into account the permit Transfer Request when considering whether to terminate the Permits. Petition at 40, 44, 47, 50.

Before addressing the specifics of PFRS/RDD's petition, it is important to keep in mind the context of this proceeding. We are dealing with two underground injection wells permitted under a program designed to protect public drinking water. The Region found that the permit holder, EDS, ran into financial and operational difficulties virtually from the beginning of operation of the wells, failed to meet its permit obligations and abandoned its interest in the Permits by relinquishing control of the site operations even though it was still legally bound by the terms of the Permits. *See generally* Fact Sheet (describing alleged violations and providing Facility background); *see also* Jan. 8, 2007 UIC Inspection Report (identifying the Facility Representative on site during inspection as an "RDD Investment, L.L.C." employee); RTC at 4. According to the Region, the new owner negotiated and consummated the transfer of the wells and the Facility without first contacting the Agency about the Permits and the prospective transferee's intention to assume EDS's legal obligations.

Given the regulatory language of 40 C.F.R. § 144.40, our earlier interpretations of similar regulatory language in *In re Waste Technologies Industries*, 5 E.A.D. 646 (EAB 1995) and *Marine Shale I*, 5 E.A.D. 461 (EAB 1994), the fact that a permit is issued to a specific permittee, and the Agency's expression of a clear intent during promulgation of the rule to limit permit privileges to the permittee, it is appropriate for the decisionmaker to consider what the permittee – in this case EDS – did or did not do when determining whether cause for termination exists and whether termination is appropriate. *See* discussion at Part I.A, *supra*

(setting forth statutory and regulatory framework). As such, we believe PFRS/RDD's attempt to shift the focus from EDS's actions or non-actions to RDD's actions is misplaced.

We also note that what PFRS/RDD seek by pursuing a permit transfer is essentially a change to the Permits to reflect the name of the new owner/operator of the Facility without having to start the process anew with a new permit application. But, as noted earlier, most requests to transfer permits for UIC wells injecting hazardous wastes require a new permit application. *See* Part I.A, *supra*; *see also* Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,313-14 (May 19, 1980). Further, a decision to require a new permit application does not reflect any predetermination of the new permit applicant's ability or fitness to operate an existing well but rather the Region's decision to require the new owner to undergo the full permitting process, in light of a UIC well's potential environmental impact to drinking water. As the Region explained in the RTC:

> Terminating the Permits ensures the merits of the [F]acility will be fully re-evaluated through a new permitting proceeding before the [F]acility could reopen. 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.

RTC at 3 (Comment 8) (citing 40 C.F.R. § 144.1(d)).

For the reasons discussed below, we conclude that PFRS/RDD have not demonstrated any clearly erroneous finding of fact or conclusion of law nor exercise of discretion that would warrant Board review.

1. *Alleged Clearly Erroneous Findings of Fact*

PFRS/RDD contend that the Region made several statements in the Fact Sheet that constitute clearly erroneous findings of fact. According to PFRS/RDD, the following is one such statement:

> EDS's failure to comply with the various reporting and recordkeeping obligations required under the permits and applicable federal regulations severely handicapped the EPA in its ability to carry out its regulatory functions is a clearly erroneous finding of fact, as the EPA *was* in possession of substantially all information requested of EDS necessary for it to carry out its regulatory functions, as this information was supplied by RDD.

Petition at 31; *see also* Fact Sheet at 2-3, 5. PRFS/RDD also assert that (1) there were no permit or regulatory violations because RDD corrected the permit violations prior to the NOI and upon assuming owner/operator responsibilities for the Facility and (2) the Region was not severely handicapped in its ability to regulate the Facility because "any recordkeeping and reporting failure of EDS have not affected the mechanical integrity of the wells." Petition at 31-32.

The Board has consistently held that "failure to comply with reporting or registration requirements of environmental statutes can cause significant harm to the applicable regulatory scheme and may be grounds for imposition of a substantial penalty." *See*, *e.g.*, *In re Advanced Elecs., Inc.*, 10 E.A.D. 385, 401 (EAB 2002) (quoting *In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 781 (EAB 1998)) and cases cited. The regulatory scheme may be harmed despite the lack of demonstrated actual harm to the environment, or in this case, the alleged lack of actual deterioration to the mechanical integrity of the wells due to failed recordkeeping or reporting. *Id.* Further, as discussed below, any corrections made by RDD do not negate the fact that EDS did not comply, and its failure to comply could have had serious consequences.

Finally, we also note that we do not view the statement challenged by PFRS/RDD as a "fact," let alone a "clearly erroneous finding of fact." It is, at most, a characterization of the significance the Region ascribed to some of the violations. While the significance of a violation might have some relevance in the choice of a remedy, it does not affect whether the violation in fact exists, which is the only relevant inquiry for whether the factual basis for termination exists.[11]

Similarly, PFRS/RDD allege that several other statements concerning permit conditions and the UIC regulations are "clearly erroneous findings of fact." In some of these instances, we believe PFRS/RDD's assertions are essentially challenges to the permit conditions or even the underlying UIC regulations. We discuss the relevant statements separately below, but generally, we note the following. As to challenges to permit conditions, the permit decision before the Board is the decision to terminate the Permits, and the appropriate time to have contested permit conditions was when the Region decided to *issue* the Permits. 40 C.F.R. § 124.19(a) (setting forth time period in which an appeal to the Board to review conditions in a final UIC permit decision must be filed). As to challenges to regulations, "[t]he Board * * * has repeatedly articulated a presumptive rule against reviewing challenges to the validity of final regulations in [subsequent enforcement or permit] proceedings before the Agency." *In re Envtl. Prot. Servs., Inc.*, 13 E.A.D. 506, 597 (EAB 2008). We have also previously observed that "the reg-

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[11] As is discussed more fully in Part II.B.3.a., *infra*, the Region relied primarily on EDS's "abandonment" of the Facility rather than the significance of the individual violations in deciding to terminate the Permits.

ulations governing the Board's review of permits authorizes the Board to review *conditions* of the permit decision, not statutes or regulations which are the predicates for such conditions." *In re USGen New Eng., Inc. Brayton Point Station*, 11 E.A.D. 525, 555 (EAB 2004).

We do not intend to parse every statement in the termination decision. Rather, our role is to determine whether the regulatory bases for termination set forth in 40 C.F.R. § 144.40 exist and whether the Region permissibly exercised its discretion in that respect. We begin by examining PFRS/RDD's challenges to each of the alleged violations cited in the Fact Sheet as underlying the decision to terminate the Permits.

a. *Alleged Clearly Erroneous Findings of Fact Related to the Violations Specifically Identified in the Fact Sheet*

PFRS/RDD contend that the Region relied on clearly erroneous findings of fact to conclude that the following conditions of the Permits had been violated: I.E.7; I.E.8; I.E.9; I.I.1; II.B.4; II.C.4; II.D; III.A; and III.E.

i. *Violations of Condition I.E.7*

Condition I.E.7 of the Permits provides:

> The permittee shall furnish to the Director, within a time specified, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish to the Director, upon request within a time specified, copies of records required to be kept by this permit.

Permits at 5. The Region requested, by letter to EDS dated January 12, 2007, copies of certain records the Permits required to be retained, including "the specific dates and hours each deep well operator worked at the [F]acility from December[] 2005, through November[] 2006." A.R. 30 at 2. PFRS/RDD contend that the Region's statement in the RTC that "RDD provided certain responses and records requested for EDS" is "wholly unsatisfactory and in clear error" because "the only records not submitted to the EPA were related to staffing hours at the Facility." Petition at 33; *see also* A.R. 34 at 3 ("[T]he specific dates and hours of each deep well operator worked are not available."). As PFRS/RDD conceded, EDS did not provide the Region with any of the information it requested (and, in fact, no one provided the information concerning the operator staffing hours). Thus, PRFS/RDD have not shown that the Region's termination decision, based on EDS's noncompliance, relied on a clearly erroneous finding of fact.

ii. *Violations of Conditions I.E.8 and I.E.9 on November 2-3, 2006, and Condition I.E.9 on December 14-15, 2006*

Paragraph I.E.9 of the Permits sets forth the types of records that the permittee is required to retain for certain periods of time. Permits at 6. These records include calibration and continuous monitoring records for the wells. *Id.* Paragraph I.E.8 provides that the permittee is required to allow the Director or an authorized representative to have access to and to copy, "at reasonable times, any records that must be kept under the conditions of this permit." *Id.* at 5. The Fact Sheet states that "at the time of the U.S. EPA inspection on November 2-3, 2006, a U.S. EPA inspector asked to review calibration and continuous monitoring records for the wells. EDS did not provide the requested records to the U.S. EPA inspector." Fact Sheet at 2. Additionally, "[d]uring the U.S. EPA inspection on December 14-15, 2006, U.S. EPA inspectors were provided with some continuous monitoring records * * * . Several weeks of continuous monitoring records were not provided to the U.S. EPA and were not retained by EDS."[12] *Id.* at 3.

PFRS/RDD stated in their public comments that "[c]opies of these records were not available on November 2-3, 2006, as the originals of these documents were hand-delivered to EPA staff on October 23, 2006." PFRS/RDD Comments at 36.[13] PFRS/RDD argue that "all available calibration and continuous monitoring records for the wells were hand-delivered to the EPA" on October 23, 2006, and January 31, 2007.[14] Petition at 34; *see also* PFRS/RDD Comments at 36. According to PFRS/RDD, the Fact Sheet "fails to mention that the EPA was in fact in possession of these records at the time the Region issued its [NOI]" and thus, it is "clearly erroneous for the EPA to state that EDS'[s] failure to provide these

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[12] The Fact Sheet is not specific as to what weeks of continuous monitoring records EDS failed to provide or retain. However, the January 8, 2007 inspection report prepared by the Region describes the December 14 and 15, 2006 inspection and states that EPA inspectors spoke with Paul Wonsack, Interim Facility Manager, RDD, on December 15 and informed him that the inspectors were "unable to locate * * * [t]he continuous monitoring records (circle charts) for Charts #1 and #2 for the week of October 2, 2006 [and t]he continuous monitoring records (circle charts) for Charts #1, #2, and #3 for the week of October 23, 2006, and all dates thereafter[.]" Jan. 8, 2007 UIC Inspection Report at 5.

[13] PFRS/RDD's public comments do not elaborate on the circumstances that led to the provision of the original records to the Region in October 2006. However, a letter dated December 14, 2006, from RDD to state and federal regulators explained that after copies of the records were provided "to the EPA contractor and MDEQ representative on October 23, 2006[,]" RDD was unable to locate the original documents during the November 2-3, 2006 site visit/inspection. A.R. 26 at 7. RDD then obtained from MDEQ copies of the documents that had been provided to MDEQ, and RDD provided MDEQ and the Region with the records by letter dated December 14, 2007. *Id.* PFRS/RDD further state that RDD provided the Region with all of the requested records by January 30, 2007. PFRS/RDD Comments at 36.

[14] PFRS/RDD's petition provides January 31, 2007, as the date of the submission while the public comments state January 30, 2007. The actual letter is dated January 30, 2007. *See* A.R. 34.

records severely handicapped its ability to carry out its regulatory functions." Petition at 34.

The termination decision relies on statements in the Fact Sheet that the Region was unable to obtain the requested records at the time of the November 2-3, 2006 and December 14-15, 2006 inspections, which reflected the permittee's failure to allow an authorized Region official "access to and [to] copy, at reasonable times, any records that must be kept under the conditions" of the Permits and to "retain records of all monitoring information * * * ." Fact Sheet at 2 (quoting Permit Conditions I.E.8 and I.E.9). PFRS/RDD do not dispute that EDS did not provide the records at the times they were requested, and PFRS/RDD also concede that EDS failed to retain all the necessary records (as, in fact, did RDD.) As identified in the January 8, 2007 UIC Inspection Report, which covers the December 14 and 15 inspection, the missing records included those from October 23, 2006 and all dates thereafter, so those records could not have been ones hand-delivered to EPA on October 23, 2006. As such, PFRS/RDD have not demonstrated that the Region, in determining that EDS failed to comply with this provision, relied on a clearly erroneous finding of fact.

iii. *Violations of Condition I.I.1*

Condition I.I.1 of the Permits requires the permittee to adjust the cost estimate of well closure and post-closure for inflation within thirty calendar days after each anniversary of the first estimate. Permits at 13-14 (citing 40 C.F.R. §§ 146.10, .72, .73). EPA's Fact Sheet states:

> EDS provided the first cost estimate for closure on May 5, 2004, and the first cost estimate for post-closure on January 21, 2003. The adjusted cost estimates were due June 4, 2005, and February 20, 2004. EDS did not adjust either cost estimate. EDS's failure to adjust the cost estimates for closure and post-closure for inflation compromises the assurances that funds will be available for the proper plugging, abandonment and post-closure care of the wells.

Fact Sheet at 3. PFRS/RDD state that RDD provided the adjusted cost estimate "for closure of the wells" to the Region on February 28, 2007, and yet neither the Fact Sheet nor the RTC address this. Petition at 34. Based on this, PFRS/RDD claim that "it is clearly erroneous for the EPA to state that EDS'[s] failure to adjust the cost estimate 'compromises the assurance that funds will be available for the proper plugging, abandonment and post-closure care of the wells.'" *Id.*

PFRS/RDD argue that the statement "EDS'[s] failure to adjust the cost estimate[s] 'compromises the assurance that funds will be available for the proper plugging, abandonment and post-closure care of the wells'" is a clearly erroneous

finding of fact because, according to PFRS/RDD, "RDD provided this assurance [by providing adjusted cost estimates on February 28, 2007], and at no time was the Facility without the requisite financial insurance for plugging, abandoning and providing post-closure care for the wells." *Id.* at 34-35. PFRS/RDD disregard the fact that, based on the dates of the initial estimates, the Permits required adjusted cost estimates on June 4, 2005, and February 20, 2004. PFRS/RDD do not deny that EDS failed to provide the necessary cost estimates to the Region on those dates.

Unlike PFRS/RDD, the Board does not construe the Region's statement that "failure to adjust the cost estimate[s] 'compromises the assurance that funds will be available for the proper plugging, abandonment and post-closure care of the wells'" as a finding of fact. We view the statement as the Region's characterization of the consequences of failing to abide by the Permits and a reflection of an Agency policy decision to require annual submission of cost estimates so that the Region may be assured that adequate funds exist to properly cease operations of UIC wells when necessary. Permit condition I.I.1, including the requirement to submit cost estimates, is regulatory-based. *See* Permits at 13-14 (citing 40 C.F.R. §§ 144.52, .60-.70,.73). PFRS/RDD do not assert that timely updates were submitted. To the extent that they argue that such updates were unnecessary and of no significance, that argument would essentially be a challenge to the regulations and the permit condition requiring annual submission of cost estimates. Therefore, the appropriate time to have challenged the relevant regulation was during its promulgation, not in this Petition. *See* Part II.B.1, *supra* (citing *Envtl. Prot. Servs.*, 13 E.A.D. at 597 n.113 and *USGen New Eng.*, 11 E.A.D. at 555). To the extent that PFRS/RDD challenge condition I.I.1's requirement for annual submissions of adjusted cost estimates, the appropriate time to have contested the condition was when the Region decided to issue the Permits and not in this petition to review the termination decision. *Id.* (citing 40 C.F.R. § 124.19(a)).

Therefore, we are not persuaded that the statement "EDS'[s] failure to adjust the cost estimate[s] 'compromises the assurance that funds will be available for the proper plugging, abandonment and post-closure care of the wells'" is a clearly erroneous factual finding. Of more significance, PFRS/RDD do not rebut the allegations of violation in any way, or show any other clearly erroneous finding of fact in this regard.

iv. *Violations of Condition II.B.4*

Condition II.B.4 requires the permittee to install an automatic warning and automatic shut-off system prior to the commencement of injection.[15] It further provides that:

> The permittee must test the warning system and shut-off system prior to receiving authorization to inject, and at least once every twelfth month after the last approved demonstration. These tests must involve subjecting the system to simulated failure conditions and must be witnessed by the Director or his or her representative.

Permits at 20. EPA stated in the Fact Sheet that federal "inspectors observed a successful demonstration of the automatic warning and shut-off system on June 30, 2004. The next demonstration was on June 8, 2006."[16] Fact Sheet at 4. According to EPA, "EDS did not test the system within 12 months of the June 30, 2004 demonstration. This conduct circumvents the safety precautions that are required by the permits." *Id.* PFRS/RDD's comments restated the violation as "EDS did not demonstrate the automatic warning and shut-off system by June 30, 2006." PFRS/RDD Comments at 37. PFRS/RDD then stated that "RDD successfully demonstrated the automatic warning and shut-off system to EPA inspectors, on site, on March 21, 2007," and that the Region's "finding of fact that the automatic warning and shut-off system was not tested by EDS within the required time frame" is clearly erroneous. Petition at 35-36; PFRS/RDD Comments at 37. Despite incorrectly restating the system test deadline as June 30, 2006, PFRS/RDD do not demonstrate that a system test was not required within twelve months after June 30, 2004, or that EDS (or RDD, for that matter) conducted an appropriate system test before June 30, 2005. Therefore, PFRS/RDD have not shown that the

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[15] The termination also relied on the Fact Sheet statement that EDS violated condition II.B.4 by failing to have a trained deep well operator on site during well operation on October 22-23, 2006. Fact Sheet at 3-4; *see also* Permits at 20 ("A trained operator must be on site at all times during operation of the well."). PFRS/RDD do not specifically argue that the Region relied on a clearly erroneous finding of fact to support the claim, and PFRS/RDD do not rebut this allegation as stated in the Fact Sheet or otherwise demonstrate that EDS provided a trained well operator who was present at that time. Rather, PFRS/RDD dispute the significance of the violation. *See* Petition at 35 ("EDS'[s] purported failure to have a well operator on site during injection on one occasion in 2006 has no bearing whatsoever on the integrity of the wells, protection of ground water or the viability of the Facility."). Therefore, if PFRS/RDD intend to assert the Region clearly erred in its finding that EDS failed to have a trained deep well operator on site during well operation, the Board disagrees that the Region clearly erred.

[16] The June 30, 2004 demonstration was, presumably, the initial demonstration prior to receiving authorization to inject as the Permits were not effective until September 6, 2005.

Region's factual finding that the automatic warning and shut-off system was not tested by EDS within the required time frame is clearly erroneous.

PFRS/RDD also challenge the statement that the failure to conduct timely demonstrations of the warning and shut-off system circumvents the Permits' safety precautions as a clearly erroneous finding of fact.[17] PFRS/RDD do not deny that EDS did not conduct timely demonstrations at the Facility, but they support their claim by stating that RDD conducted a successful system test prior to the issuance of the NOI, on March 12, 2007. Petition at 35-36. We observe that the termination was based on a violation of a permit condition requiring timely systems tests. Therefore, the relevant finding concerns the timeliness of systems tests, not the circumvention of safety precautions. Consequently, the Region termination decision, based on EDS's noncompliance, was not based on a clearly erroneous finding of fact.

v. *Violations of Condition II.C.4*

Condition II.C.4 requires the permittee to annually monitor pressure buildup and submit plans for this testing at least thirty days prior to the anticipated test date. Permits at 21. The test may not be performed without written approval from EPA. The termination decision relies on the statement in the Fact Sheet that provides:

> The first 12-month period after the issuance of the [P]ermits ended on September 5, 2006. EDS did not conduct an ambient reservoir pressure test, nor [sic] submit testing procedures to the U.S. EPA for approval, within 12 months of the issuance of the [P]ermits. EDS's failure to test for reservoir pressure prevents U.S. EPA from anticipating the initiation or propagation of fractures in the confining formations that, if present, may act as conduits for waste to migrate to and contaminate an underground source of drinking water.

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[17] This argument is similar to PFRS/RDD's argument in Part II.B.1.a.iii that the Region relied on a clearly erroneous finding of fact when it based the termination on the statement in the Fact Sheet that "EDS'[s] failure to adjust the cost estimate[s] 'compromises the assurance that funds will be available * * * .'" We do not view the Region's statement regarding timely warning and shut-off systems demonstrations as a finding of fact but rather as an explanation of what the Region believes will result if timely demonstrations are not conducted and why the permit condition requires an annual demonstration of the warning and shut-off system. Thus, to the extent that PFRS/RDD are challenging the permit condition itself, we reiterate that the appropriate time to have contested the condition was when the Region *issued* the Permits. 40 C.F.R. § 124.19(a).

Fact Sheet at 4. PFRS/RDD argue that RDD conducted the appropriate test on February 23, 2007, and submitted the results to EPA, and thus, "it [wa]s a clear error for the EPA to state on April 12, 2007 that it was prevented from anticipating fractures in the confining formations when it was provided the results of the test over a month prior." Petition at 36.

The Region's termination decision is based on a violation of condition II.C.4, not on the inability to "anticipat[e] fractures in the confining formations." PFRS/RDD do not dispute the Region's assertion that the first twelve-month period after the issuance of the Permits ended on September 5, 2006, or that prior to that date, the permittee was required to conduct an ambient reservoir pressure test and submit procedures for such a test. Nor do PFRS/RDD refute the Region's finding that EDS failed to provide testing procedures to the Region for approval and failed to conduct the appropriate tests prior to September 5, 2006. These are the findings of fact upon which the Region relied to find a violation of condition II.C.4, and PFRS/RDD have not demonstrated that the Region's termination decision relied on a clearly erroneous finding of fact.

vi. *Violations of Conditions II.D, III.A, and III.E*

These conditions require the permittee to submit reports to the Region on quarterly and annual bases, documenting specified analyses and testing results. The Fact Sheet states:

> EDS was late in submitting a quarterly report for the quarter ending March 31, 2006 and did not submit a quarterly report for the quarter ending September 30, 2006. In addition, EDS did not submit an annual report for the period of September 6, 2005, through September 5, 2006, which was due October 6, 2006. EDS's lack of cooperation severely handicaps U.S. EPA's ability to carry out its regulatory function.

Fact Sheet at 5. PFRS/RDD assert that the statement "EDS's lack of cooperation severely handicaps U.S. EPA's ability to carry out its regulatory function" is a clearly erroneous finding of fact upon which the Region relied because RDD "provided [the reports] to EPA in EDS'[s] stead" and the Region, according to PFRS/RDD, was not handicapped. Petition at 37.

Again, the termination decision was based on the finding that EDS violated permit conditions II.D, III.A, and III.E, not a finding that EDS's failure to cooperate severely handicapped the Region's ability to execute its regulatory functions. Therefore, the relevant findings of fact pertain to the deadlines to submit the reports and whether the submissions that did occur met those deadlines. PFRS/RDD's comments did not address or otherwise dispute these deadlines, nor

did PFRS/RDD state that EDS (or RDD) provided the aforementioned reports in a timely manner. *See* PFRS/RDD Comments at 37. In fact, PFRS/RDD conceded in their comments that "the purported non-compliance on the part of EDS * * * has been related almost exclusively to lack of recordkeeping and/or failure to respond to EPA requests for information." *Id*. PFRS/RDD's comments reflect that RDD's submissions to EPA did not meet the deadlines. *Id.* (stating that RDD submitted "all available reports and data" to EPA on December 14, 2006, and January 30, 2007, and as part of the February 28, 2007 Transfer Request). Moreover, we view the Region's statements such as "EDS's lack of cooperation severely handicaps U.S. EPA's ability to carry out its regulatory function" as characterizations of the perceived effects of the regulatory violation rather than findings of fact. Accordingly, we conclude that PFRS/RDD have not shown that the factual findings upon which the violations of conditions II.D, III.A and III.E are based are clearly erroneous.

2. *Applicable Law Regarding the Consideration of Corrections Instituted by RDD*

PFRS/RDD argue that the Region based the termination decision on the clearly erroneous legal conclusion that UIC permit violations may not be corrected by an entity other than the permittee. Petition at 39; Reply to the Environmental Protection Agency's Response to the Petition for Review ("PFRS/RDD Reply") at 6. PFRS/RDD state that RDD complied with the regulatory obligations of the "owner or operator"[18] of the Facility and also fully discharged EDS's obligations under the Permit. Petition at 38-39 (citing 40 C.F.R pt. 144, §§ 146.61-.73). Because "there were no substantive violations of the regulations or the Permits when EPA issued the [NOI]," PFRS/RDD assert that the Region relied on a clearly erroneous legal conclusion when it concluded that "RDD's recordkeeping and reporting and otherwise compliant operation of the Facility in the place of EDS did not satisfy the conditions of the Permits." *Id.* PFRS/RDD's perception of the applicable law appears to be that compliant behavior *after* having violated permit conditions has the effect of curing past permit violations, and that entities other than the permittee may institute those corrections. We disagree that this is the applicable law.

We are unable to find legal support for PFRS/RDD's unsubstantiated statements that corrected permit violations may not form the basis of a termination

[18] The "owner or operator" is the "owner or operator of any 'facility or activity' subject to regulation under the UIC program." 40 C.F.R. § 144.3; *see also id.* § 146.3 (defining "owner or operator").

decision.[19] As the Region points out, "[n]either the regulations nor the [P]ermits state that termination is limited to current or ongoing violations." EPA Br. at 14. The pertinent regulatory language provides that the Region "may terminate a permit during its term * * * [if there is n]oncompliance by the permittee with any condition of the permit[.]." 40 C.F.R. § 144.40(a)(1). As we discussed in Part I.A, once the Region has established the factual predicate that the permittee has violated a permit condition, the Region has the discretion to terminate an existing permit. The regulations pertaining to the termination of EPA-issued UIC permits are silent as to the extent, if any, to which the Region must take into account during the decisionmaking process measures undertaken to correct permit violations when the proposed termination is based on past violations that have allegedly been subsequently cured. *See id.* § 144.40.

Moreover, in this case, we are not convinced that many of EDS's violations can be truly corrected or cured, either by EDS or another entity. The Region found that EDS failed to comply with several permit conditions requiring the submission of reports and other information by certain dates. Submitting the required report or information after the deadline has passed does not reverse the fact that the deadline was initially missed, nor does it render the submission timely. Similarly, in response to the Region's charge that EDS failed to have a deep well operator on site on a specific date in October 2006, PFRS/RDD argue that RDD corrected the violation by hiring a deep well operator one month later. However, the operator's presence at the Facility in November does not refute the absence of an operator during well operation on the specified date in October.

In arguing that corrected permit violations may not be a basis for termination, PFRS/RDD attempt to distinguish permit violations that give rise to terminations from permit violations that give rise to administrative complaints and subsequent penalty assessments. *See* PFRS/RDD Reply at 4-5 & n.2 (citing EPA Br. at 13). However, the Agency has made it clear that both termination and penalty assessments are enforcement mechanisms available to the Agency. Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,316 (May 19, 1980) ("[T]ermination is essentially an enforcement mechanism.") (quoting Consolidated Permit Regulations, 44 Fed. Reg. 34,244, 34,249 (proposed June 14, 1979)).

We note that in the penalty context, a violation of the SDWA does not disappear simply because it has been corrected; rather, a penalty may still be assessed. The statute instructs the Agency to "take into account appropriate factors,

[19] We are also not persuaded by PFRS/RDD's arguments that the Region failed to consider the alleged corrective actions performed by RDD, rather than EDS. As we explained in Part I.A, it is only appropriate to consider the actions of the entity authorized to conduct permitted activities, or lack thereof, and their effect on permit compliance. Thus, only the actions of EDS, as permittee, are relevant.

including * * * any good-faith efforts to comply with the applicable requirements" when assessing an administrative civil penalty. SDWA § 1423(c)(4)(B), 42 U.S.C. § 300h-2(c)(4)(B). Further, although a set Agency policy or procedure for assessing administrative penalties for violations of UIC program requirements does not exist, there is a penalty policy for settlement purposes. In the settlement context, rather than nullifying a violation in its entirety, the Agency recommends an upward or downward adjustment of the gravity component of a proposed penalty assessment based on "the level of effort put forth by the violator to correct the violation" before the enforcement action has commenced. Office of Ground Water & Drinking Water, U.S. EPA, *UIC Program Judicial and Administrative Order Settlement Penalty Policy* 11 & n.4 (Interim Final Sept. 1993). Liability remains for a violation despite its having been corrected. Analogously, where termination is chosen as the most appropriate response to past permit violations, these violations may be the bases of a termination decision even if those violations were later corrected.

PFRS/RDD do not provide any legal or regulatory authority supporting their contention that the Region must consider violation corrections and that correction of the violations negates the bases for termination. In the absence of a statutory or regulatory mandate that the Region consider purported cures of permit violations during a permit termination proceeding, the Region is not bound to do so.[20] This interpretation of the termination regulations is consistent with the regulatory intent to ensure the Region "has the discretion to decide whether or not to terminate [a] permit." Underground Injection Control Program Criteria & Standards, 46 Fed. Reg. 43,156, 43,159 (Aug. 27, 1981). Accordingly, the Board concludes that the Region's conclusion of law that the consideration of corrected permit violations is discretionary is not clearly erroneous.

3. *Considerations in a Termination Proceeding*

In addition to challenging whether the Region had a permissible basis for termination, PFRS/RDD object to the decision to choose termination as a response to the alleged violations. More particularly, PFRS/RDD allege that (1) the Region abused its discretion by basing the termination on EDS's actions, rather than crediting RDD's actions to bring the Facility and well operations into compliance (and consequently determining not to terminate the Permits), Petition at 41; (2) the Region's decision "was based on factors that Congress did not intend the [A]gency to consider[,]" *id.* at 42 (suggesting that the termination decision "may have resulted more from political pressure than from a serious consideration of all the relevant facts"); and (3) the Region abused its discretion when it terminated

[20] In this case, the Region did note the corrections. *See* discussion at Part II.B.3.a, *infra.* The Region's RTC stated that "many of the violations that were the basis for the proposed termination [were] resolved, [but] that does not remove the regulatory basis for the termination." RTC at 3.

the Permits despite the fact that someone, in this case RDD, took steps to ensure the "technical and physical security and compliance of the Facility" by instituting corrections. *Id.* at 41-42. We consider PFRS/RDD's allegations below.

a. *Failure to Consider Corrections That RDD Instituted*

PFRS/RDD argue that the Region abused its discretion when it terminated the Permits despite the corrective measures RDD instituted to comply with the Permits and regulations. We disagree. First, as previously discussed, the applicable law with respect to the Region's consideration of corrective measures that have been instituted is that such consideration is permissive. *See* discussion at Part II.B.2, *supra*. Second, not all of the infractions alleged against EDS were, or even could be, corrected. *Id.*

Finally, the record reflects that the Region acknowledged RDD's efforts and explained why it would terminate the Permits despite RDD's attempted corrective measures. In response to a comment from PFRS/RDD that the Region's termination decision "ignore[d] the fact that * * * RDD has responded to all the inquiries [from the Region], information requests and permit requirements, and has resolved the operating violations[,]" the Region stated that "RDD provided certain responses and records requested of EDS." RTC at 3 (Comment 8). The Region further explained that "RDD's comments also concede that it wasn't able to provide some information that U.S. EPA requested to address its concerns * * * ." *Id.* at 4. Therefore, the Region concluded that there was an incomplete response to the inquiry and that EDS had violated a permit condition. The Region further stated that "the level of irresponsible behavior exhibited by the permittee" – primarily its "abandonment of all interest in the [F]acility without informing [the Region] and with no intention of remaining in place to address compliance issues" – set this case apart from situations where the permittee remained in control of the facility and capable of addressing compliance issues. *Id.* at 6 (Comment 13). To the extent that PFRS/RDD argue that RDD stepped in and addressed those compliance issues in lieu of EDS, the Region explained in the RTC that the Region "worked with RDD on compliance issues because as the current owner of the [F]acility, [it] had an obligation to comply with various laws and regulations concerning [F]acility operation." *Id.* (Comment 14). Whatever role RDD may have assumed, the record clearly supports the Region's statements that EDS relinquished any interest in the wells and made no attempt to remain on-site to remedy the violations and assure future compliance, notwithstanding that it was still legally bound by the terms of the Permits.[21]

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[21] In its reply, PFRS/RDD argue that the Region relied on the permittee's abandonment of the Facility as a post-hoc reason for termination. PFRS/RDD Reply at 7 ("Only after the EPA terminated the Permits did it identify EDS'[s] 'abandonment' as a (if not *the*) major cause for termination of the Permits."). While the termination was triggered by a finding that EDS had violated several permit
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The Region considered the corrective measures RDD conducted in addition to other factors, such as the permittee's "significant financial and operational problems at the [F]acility within less than 10 months of operation" and the decision "to abandon all interest in the [F]acility and in [EDS's] permit obligations without any notice to U.S. EPA." *Id.* at 5-6 (Comment 12); *see also* Petition at 10 ("EDS no longer had the capital or other resources to operate the Facility in a safe and prudent manner * * * ."). The Region's explanation for doing so does not reflect an abuse of discretion.

b. *Consideration of Factors Irrelevant to Termination Decisions*

PFRS/RDD also assert that "EPA considered factors not relevant to a determination of a permitting decision for a [UIC] facility[,]" in contravention of the Board's earlier holding that the SDWA and UIC regulations "establish the *only* criteria that EPA may use in deciding whether to grant or deny an application for a UIC permit * * * [,]" and consequently, decisions to terminate must also be based only on the Act and UIC regulations. PFRS/RDD Reply at 5 (quoting *In re Envotech, L.P.*, 6 E.A.D. 260, 264 (EAB 1996)); *see also* Petition at 39. PFRS/RDD argue that the Region improperly considered the "merits" and "viability" of the Facility. Petition at 39, 42-43; PFRS/RDD Reply at 5. Also in this context, PFRS/RDD allege that the decision to terminate resulted from political pressure, specifically from U.S. Congressman John Dingell. Petition at 42-44.

With respect to the allegation that the Region improperly considered the Facility's "merits" and "viability," PFRS/RDD identify the Region's response to Comment 8 in the RTC as an indication that the Region inappropriately considered factors not set forth in the statute or regulation.[22] *Id.* at 39; PFRS/RDD Reply

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conditions, the RTC is abundantly clear that the abandonment influenced the Region's decision to pursue a termination action, rather than (or in addition to) a penalty action. RTC at 6 (Comment 13). The Region stated:

> The level of irresponsible behavior exhibited by the permittee distinguishes this matter from other cases where the U.S. EPA has addressed regulatory violations through penalty actions rather than through permit termination. In those other cases where permit violations did not lead to termination, the permittees remained in place – accountable and responsive to regulatory compliance issues and continuing to operate under the permit.

Id. The "irresponsible behavior" the Region refers to is the permittee's abandonment. *Id.* Thus, the Region's concern clearly influenced its decision to terminate rather than served as a post-hoc rationalization of that decision.

[22] Specifically, PFRS/RDD make the following argument:
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at 5. The Region's response describes the broad discretion afforded to the Region when deciding whether to terminate a permit and provides, in relevant part:

> EDS's non-compliance is well-documented. Later efforts at damage control do not eliminate concerns that those violations, and EDS's abandonment of the [F]acility create[s] serious doubts about the viability of the [F]acility.
>
> Terminating the [P]ermits ensures that the merits of the [F]acility will be fully re-evaluated through a new permitting proceeding before the [F]acility could reopen.

RTC at 3 (Comment 8). PFRS/RDD infer from this response that the Region took into account the Facility's "viability" and "merits" during the termination proceedings. *See* PRFS/RDD Reply at 5.

We disagree with PFRS/RDD's interpretation of the Agency's response to Comment 8 and do not view it as a statement that the Region based the Permits' termination on the Facility's "viability" and "merits." Rather, we view the response to Comment 8 as the Region's characterization of the significance of EDS's abandonment and the perceived effect termination would have on any future regulation of the Facility. We further note that PRFS/RDD argue that the only criteria the Region may consider during the termination process are found in the regulations. *Id.* They rely on *In re Envotech*, which concerned an application for permits to construct and operate Class I hazardous waste injection wells. 6 E.A.D. at 261, 264. The regulations set forth an extensive list of information the Agency must evaluate when considering such a permit application. 40 C.F.R. § 146.70. In contrast, the regulations authorizing UIC permit termination do not require the consideration of specific information and only require that the administrative record support the Region's findings of cause to terminate. 40 C.F.R. § 144.40; *see also Marine Shale I*, 5 E.A.D. 461, 471 n.15 (EAB 1994) ("[O]nce a Region has articulated a basis for its [termination] decision, it must ensure that basis is supported by the record."). PFRS/RDD have not persuaded us that the Region either improp-

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> If the only causes for termination of the Permits were the violations identified in the Fact Sheet, and RDD had previously remedied those violations, then the EPA is hard-pressed to find cause for the [t]ermination; perhaps this explains the vague statements regarding its "serious doubts" about the "viability of the [F]acility," and the need for the "merits of the [F]acility" to be re-evaluated, considerations which are irrelevant under the applicable regulatory scheme.

Petition at 39.

erly considered factors it should not have considered or based the termination on the "viability" and "merits" of the Facility.

PFRS/RDD also assert that the Region's "inconsistent conduct and its failure or refusal to consider all relevant facts before reaching its [d]ecision, coupled with [Congressman] Dingell's position of influence [as the chairman of the House Committee on Energy and Commerce], repeated communications, press releases and other public statements opposing the Facility, raises an appearance of impropriety and calls into question the impartiality of the EPA's decision-making process." Petition at 43. In support, PFRS/RDD rely on an EPA press release from 2001, correspondence from Congressman Dingell to the Region dated June 11, 2003, and press releases issued by Congressman Dingell between January 2003 and October 2007. *See* PFRS/RDD Ex. I. In particular, PFRS/RDD claim that the Region was not impartial because it was "unable to articulate a rational basis for its [d]ecision," and that this inability is coupled with "other considerations [that] may have played an improper role in shaping the EPA's ultimate action." Petition at 43.

The Region responds by pointing out that this allegation was never raised during the comment period, and thus was not preserved for Board review. EPA Br. at 20; *see also* 40 C.F.R. §§ 124.13, .19 (requiring petitioner to raise reasonably ascertainable issues during the comment period on the draft permit); *e.g., In re Christian County Generation, LLC*, 13 E.A.D. 449, 457-60 (EAB 2008); *In re D.C. Water & Sewer Auth.*, 13 E.A.D. 714, 727 (EAB 2008). The Region further indicates that the allegation that it was swayed by political pressure is "disingenuous" because, in addition to Congressman Dingell's letter supporting termination of the Permits, the Region also received a letter from Congressman John Conyers, Jr., supporting a contrary viewpoint, that of transfer rather than termination. EPA Br. at 20 (citing EPA Ex. S). The Region terms the PFRS/RDD claim as "unfounded and untimely speculation." *Id.* at 21.

We agree with the Region that this allegation was not preserved for review. Even if it were, demonstration of a decisionmaker's bias during the permitting – and by extension, permit termination – process requires establishing that the decisionmaker was "'so psychologically wedded to [his opinions that he] would consciously or unconsciously avoid the appearance of having erred or changed position,' and that such opinions 'as a practical or legal matter foreclosed fair and effective consideration' of the evidence presented during the permitting process." *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 788 (EAB 1995) (quoting *Withrow v. Larkin*, 421 U.S. 35, 57-58 (1975)), *aff'd*, 81 F.3d 1371 (5th Cir. 1996), *cert. denied*, 513 U.S. 1148 (1995) ("*Marine Shale II*"); *accord In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 532 (EAB 2006) ("*Dominion I*"); *In re Jett Black, Inc.*, 8 E.A.D. 353, 375 (EAB 1999). PFRS/RDD's speculation comes nowhere close to meeting this high standard. While it may be true that Congressman Dingell has over the course of years expressed opposition to the

presence of the wells, without more, this information does not demonstrate that the Region's action was improper. In other words, the evidence in the record falls short of demonstrating that PFRS/RDD have "overcom[e] the presumption of honesty and integrity attaching to the actions of government decisionmakers." *Marine Shale II*, 5 E.A.D. at 788-89, *cited in Dominion I*, 12 E.A.D. at 532. We also disagree with PFRS/RDD's characterization that the Region was "unable to articulate a rational basis for its [d]ecision." Petition at 43. Therefore, even if the issue had been preserved for review, PFRS/RDD have not shown that the Region was biased when determining to terminate the Permits.

4. *Public Participation*

PFRS/RDD claim that the Region abused its discretion when it did not include information in the Fact Sheet regarding the violations that RDD had corrected. Petition at 44. According to PFRS/RDD, EPA further abused its discretion when it denied PFRS/RDD's request to reopen the comment period. PFRS/RDD argue that because the Fact Sheet did not provide the public with information regarding RDD's corrections, "the public was not granted a full and fair opportunity to comment." *Id.* at 45. In fact, PFRS/RDD contend that "[t]he EPA allowed the public to believe [the] false information [in the Fact Sheet and NOI] and continued to propagate this false information by refusing to allow the public to comment on all relevant facts, and by later refusing to re-open or extent [sic] the public comment period." *Id.* at 46.

a. *Fact Sheet*

Pursuant to the relevant regulation, "[t]he fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit." 40 C.F.R. § 124.8.[23] The Agency stated in the preamble to the proposed rule that the fact sheet must "ex-

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[23] The regulations further provide that the fact sheet is to include, when applicable, the following information that is pertinent is this case:

> (1) A brief description of the type of facility or activity which is the subject of the draft permit;
>
> (2) The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being treated, stored, disposed of, injected, emitted, or discharged[;]
>
> * * *
>
> (4) A brief summary of the basis for the draft permit conditions including references to applicable statutory or regulatory provisions and appropriate supporting references to the administrative record required by § 124.9 (for EPA-issued permits);

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plain[] the basis for the draft permit in some detail * * * ." Consolidated Permit Regulations, 44 Fed. Reg. 34,244, 34,264 (proposed June 14, 1979). However, the Agency clarified that "[b]ecause there are practical limits to EPA's ability to explain each of the permits it issues in comprehensive detail, the discussion in the fact sheet * * * should be proportional to the importance of the issues involved and the degree of controversy surrounding them." *Id.*

In this case, the stated reason for the proposed termination was the permittee's "noncompliance with numerous provisions of the permits." Fact Sheet at 2. The Region then set forth and described eight categories of permit violations that EDS had allegedly committed. *Id.* at 2-5. PFRS/RDD do not dispute that the non-compliance occurred. Rather, they believe that the corrections RDD instituted to return the well operations to compliance and the subsequent submission of monitoring, test, and report results cure the violations and were required to be stated in the Fact Sheet because "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' * * * ." PFRS/RDD Reply at 3 (quoting 40 C.F.R. § 124.8). PFRS/RDD argue, but do not explain why, the corrections are a "highly relevant factor" in the termination decision.[24] *Id.*

PFRS/RDD's argument fails to recognize that, despite RDD's compliance with the permit terms since its occupation of the Facility, "[n]oncompliance by the permittee with any condition of the permit" may trigger permit termination proceedings even if subsequently corrected. 40 C.F.R. § 144.40; *see also* discussion at Part II.B.2, *supra*. The institution of corrections may influence, at most, the Agency discretion to choose permit termination as a response to the violations. In this case, the Region did in fact respond to comments concerning RDD's alleged corrections, though the Region did not find the corrections to be critical to its termination decision, and they were not "principal facts" required by section 124.8 to be included in the Fact Sheet.[25] We, therefore, conclude that it was not an abuse of discretion or clear error for the Region to have omitted discussion of RDD's cures of the violations in the Fact Sheet.

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> (5) Reasons why any requested variances or alternatives to required standards do or do not appear justified[.]

40 C.F.R. § 124.8.

[24] PFRS/RDD add that because the corrections are not mentioned in the Fact Sheet, the termination decision was "based on a clearly erroneous finding of fact." PFRS/RDD Reply at 3.

[25] Moreover, the Region acknowledged in the RTC that "while it [wa]s not the permittee, RDD [took] steps to address operational issues at the [F]acility." RTC at 4 (Comment 9).

b. *Reopening or Extension of Comment Period*

Nearly three months after the public comment period closed, but prior to the Region's release of the RTC, PFRS/RDD requested that the Region reopen or extend the comment period under 40 C.F.R. § 124.14 so that members of the public could be "made aware that the very violations on which EPA rested its Notice of Intent to Terminate had in fact been corrected." Petition at 45-46; *see generally* Request to Extend/Reopen Comment Period; RTC at 9-10. PFRS/RDD argue that the Region's denial of the request was an abuse of discretion because the Fact Sheet did not contain information regarding any of RDD's corrections and the Region "allowed the public to believe th[e] false information [in the Fact Sheet] and continued to propagate this false information by refusing to allow the public to comment on all relevant facts * * * ." Petition at 46. According to PFRS/RDD, a reopening of the comment period was necessary for the public to obtain accurate information concerning the corrected violations.

The Region argues that PFRS/RDD did "not demonstrate[] that [their] comments raised any new questions so substantial as to compel further consideration by other commentors. The facts [PFRS/RDD] raised about [RDD's] role and actions at the [F]acility * * * were already well known during the comment period." EPA Br. at 23.

The permitting regulations provide that "[i]f any data[,] information[,] or arguments submitted during the public comment period * * * appear to raise substantial new questions concerning a permit, the Regional Administrator may * * * [r]eopen or extend the comment period * * * to give interested persons an opportunity to comment on the information or arguments submitted." 40 C.F.R. § 124.14(b); *see Dominion I*, 12 E.A.D. at 695. It is well settled that "the decision to reopen the public comment period is largely discretionary" upon the Regional Administrator's finding that the new questions are "substantial." *Dominion I*, 12 E.A.D. at 695 (citing *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 585 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999) and *In re Amoco Oil Co.*, 4 E.A.D. 954, 980 (EAB 1993)). "Information does not necessarily give rise to a substantial new question simply because the information is supplied by a permittee." *NE Hub Partners*, 7 E.A.D. at 586 ("[T]he standard for reopening the public comment period turns on whether a substantial new question has arisen and not the genesis of information that may be added to the record."). Consequently, the Board reviews a decision not to reopen the comment period under an abuse of discretion standard. *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 416 (EAB 2007) ("*Dominion II*").

The Region stated in the RTC that public comments from PFRS/RDD and EGT raised issues concerning RDD's actions and legal interest in the Facility. RTC at 10. The Region pointed out that its responses to those comments demonstrated that the Region had carefully considered the facts and issues PFRS/RDD

and EGT raised. *Id.* The Region stated that it did "not believe [extending the public comment period was] necessary to expedite or improve the decisionmaking process." *Id.* It explained:

> These issues were also raised at the public hearing. A number of comments both at that hearing and in writing indicate awareness of both RDD's ongoing role at the [F]acility and its desire to transfer the [P]ermits rather than have them be terminated. * * * It therefore appears unlikely that soliciting further comment on the information submitted by RDD and EGT would add to the quality or comprehensiveness of the record or decisionmaking process.

Id. Thus, the Region explained why it did not find that PFRS/RDD and EGT's information raised "substantial new questions" warranting reopening or extension of the comment period. On this record, the Board concludes that the Region did not abuse its discretion when it declined to reopen or extend the comment period.

5. *Inconsistent Conduct Towards RDD*

PFRS/RDD argue that it was an abuse of the Region's discretion to terminate the Permits despite the Region's involvement and interactions with RDD to return the well operations to compliance. According to PFRS/RDD, the Region abused its discretion to terminate the Permits because the Region behaved towards RDD as though it were the "'de facto' permittee," and RDD expended over two million dollars "in reliance of EPA's treatment of RDD as the de facto permittee."[26] Petition at 48. Yet, PFRS/RDD argue that during the termination proceed-

[26] To the extent that PFRS/RDD are advancing an equitable estoppel argument, i.e., that because RDD reasonably relied upon the Region's actions when bringing the Facility and well operations into compliance, there cannot be cause for the Region to terminate the Permits, we note that equitable estoppel is usually invoked as an affirmative defense to an enforcement action. We have not heretofore considered whether equitable estoppel is appropriately raised as an affirmative defense to a finding of cause to terminate a permit and need not decide the issue today. However, we observe that the Board has consistently held that a party asserting equitable estoppel against the Government "bear[s] an especially heavy burden" and must show that "it reasonably relied upon its adversary's action to its detriment" and that the Government "engaged in some affirmative misconduct." *In re Envtl. Prot. Servs., Inc.*, 13 E.A.D. 506, 541-42 (EAB 2008); *In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 196-200 (EAB 1997). Thus, even assuming without deciding that equitable estoppel can be an appropriate "defense" to a finding of cause for a permit termination, PFRS/RDD would fail to meet this heavy burden. To the extent that PFRS/RDD allege that the Region's behavior towards RDD as it brought the Facility and well operation into compliance, followed by termination of the Permits, constituted "affirmative misconduct," the Board is unpersuaded. As the Board discusses and explains in this section, RDD's regulatory responsibilities regarding the Facility and well operation arose out of assuming title to the Facility and were not induced by the Region's behavior. Indeed, the Region had no choice but to deal with the legal owner of the site.

ing, the Region did not consider RDD's role as the "de facto permittee," and instead, the Region's termination decision was based on EDS'[s] failure to "perform the work EPA coordinated with RDD." *Id.* at 47. PFRS/RDD essentially argue that RDD's "perform[ance] of the function of the EPA in monitoring and remedying compliance issues at the Facility at a time when EDS did not have the capital or resources to operate the Facility" outweighs the reasons for terminating the Permits and supports an argument for transferring, rather than terminating, the Permits. *Id.* at 49.

PFRS/RDD do not provide any legal support for a "de facto permittee" concept, and our review of the regulatory history of the UIC permit transfer regulations reveals that such a concept is strongly discouraged. As there is no basis in law for this novel theory, the Region should not be compelled to adopt it. Further, inherent in the concept of a "de facto permittee" is the alleged authority for a permittee to essentially transfer its permits to another entity without a regulator's approval. This clearly contravenes the Agency's regulatory intent. *See* discussion at Part I.A, *supra*.

PFRS/RDD emphasize that RDD "acted as an exemplary permittee and went above and beyond regulatory requirements to insure the Facility was in a safe condition and that EPA had sufficient assurances that all permit obligations were being met." Petition at 49. In making such a statement and insisting that a basis for termination no longer exists, PFRS/RDD fail to distinguish between EDS's responsibilities as a permittee prior to RDD's occupation of the Facility and the responsibilities RDD assumed following its ownership and operation. Even if it were true that RDD went "above and beyond regulatory requirements to insure the Facility was in a safe condition" since assuming ownership and operation of the Facility, the termination decision was based on alleged violations that occurred prior to RDD's assumption of ownership and operation, during EDS's occupation and control of the Facility. PFRS/RDD may believe that RDD's actions were "above and beyond" and deserve to be lauded;[27] however, as the Region points out, even though RDD did not become a permittee through the appropriate transfer process, "once RDD assumed ownership of the [F]acility, it was legally required to work with [EPA] to comply with regulatory requirements under 40 C.F.R. [parts] 144 and 146 that apply to all facility owners." EPA Br. at 24; *see*, *e.g.*, 40 C.F.R. § 144.12(a) ("No owner or operator shall construct, operate, maintain, convert * * * ."); *id.* § 144.14(a) ("The regulations in this section apply * * * to the owners and operators of all hazardous waste management facilities

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[27] The Board also observes that although PFRS/RDD claim that they acted "out of a concern for the public health and safety and the environment," PFRS's relationship with EDS is that of a lender, and PFRS/RDD's actions were likely more driven in an effort to protect PFRS's investment. Petition at 49 (stating that RDD's "rights under the loan agreements for the Facility" were a factor in it demanding that EDS voluntarily relinquish control of the Facility).

* * * ."); *id.* § 144.62 (a) ("The owner or operator must prepare a written estimate * * * .").[28] Consequently, to the extent that RDD brought the Facility into regulatory compliance, we agree with the Region that RDD "assumed most, if not all, of that obligation once it took title to the [F]acility." EPA Br. at 25. The Region's actions towards RDD, which PFRS/RDD construe as treatment as a "de facto permittee," appear to be consistent with those of a federal regulator facilitating or overseeing the restoration of compliance with the UIC program and permit requirements. Therefore, the Board is not persuaded that the Region's actions somehow rendered RDD a "de facto permittee." The Board finds that EPA did not abuse its discretion when it terminated the Permits despite the Region's efforts to work with RDD to bring the facilities into compliance.

6. *Consideration of the Transfer Request*

The Region decided to consider the request to transfer the Permits from EDS to EGT separate from and only subsequent to making a determination on the termination. PFRS/RDD assert that this was an abuse of the Region's discretion, and that the Region should have considered the Transfer Request prior to rendering the decision to terminate the Permits. According to PFRS/RDD, "[t]he EPA's decision to delay the processing of the Transfer Request involved an inappropriate exercise of discretion" because "a valid request to transfer the Permits" had been submitted, the Region gave no indication that it would not promptly process the Transfer Request, and the parties submitting the request "rel[ied] on the conduct of and positive feedback from EPA in continuing to press forward with the Transfer Request and expend[ed] capital to meet all permit conditions."[29] Petition at 51-52. They assert that the administrative record is silent as to the "considered judgment" the Region was required to undertake in its decision not to render a determination on the Transfer Request prior to the termination decision, and had the Region seriously considered whether to process the Transfer Request, the Region would have concluded that permit transfer would have been more consistent with the regulatory scheme than permit termination. *Id.* at 52-53 (citing *In re GSX Servs. of S.C., Inc.*, 4 E.A.D. 451, 454 (EAB 1992)). According to PFRS/RDD, "less resource-intensive enforcement mechanisms [other than permit termination] would often make more sense than a full scale effort to close down a

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[28] Moreover, the Region did not learn until after the fact that EDS no longer owned an operated the Facility, and the Region's requests for information were directed to EDS. EDS did not respond to these requests, and RDD – which responded – made it abundantly clear that it was not doing so on behalf of EDS. A.R. 26, 34.

[29] We are unpersuaded by this argument, as the capital expenditures that PFRS/RDD describe merely brought well operations at the Facility into compliance or maintained compliance and would have been required outside of the transfer context because RDD became the owner and operator. *See* Petition at 51.

permitted facility." *Id.* at 53 (quoting *In re Waste Tech. Indus.*, 5 E.A.D. 646, 665 (E.A.B. 1995)) (internal quotations omitted).

The Region argues that administrative agencies are granted broad discretion when "establishing their resource allocation and priorities." EPA Br. at 26 (citing *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007)). According to the Region,"[o]nce [it] made the decision * * * to propose termination of the [P]ermits, it no longer made logical sense to process transfer of those permits." *Id.* In the RTC, the Region stated the following in response to a comment regarding postponement of the transfer decision:

> U.S. EPA's decision to put EGT's permit transfer request on hold while [the Region] considered whether to terminate those permits is an appropriate exercise of U.S. EPA's discretion. U.S. EPA decided to approach the proceedings in this logical order because: (1) there would be no need to further consider the permit transfer request if the underlying permits were terminated; and (2) the permit termination proceeding would give EGT and [PFRS/RDD] full opportunity to present arguments opposing permit termination and supporting permit transfer.

RTC at 5 (responding to Comment 10 from PFRS/RDD); *see also id.* at 7 (responding to Comment 15 from EGT).

PFRS/RDD's challenge to the order in which the Region chose to address termination of the Permits and the Transfer Request is an issue of first impression before the Board. In this case, although the Region formally proposed termination on April 12, 2007, the Region's inquiry into compliance with the Permits began in November 2006 with site inspections, a Notice of Noncompliance, and requests for information sent to the permittee for the purpose of "determin[ing] whether cause exists for modifying, revoking and reissuing, or terminating the Permits." A.R. 22; *see also* A.R. 20, 21, 27, 30. Prior to the proposed termination, the Region initiated steps towards enforcement by issuing a notice of intent to file an administrative complaint against EDS on February 22, 2007. *See* A.R. 39. The notice of intent to file an administrative complaint stated that the complaint would allege violations of fourteen conditions of the Permits. *Id.* A transfer request was submitted six days later, but it is unclear whether it was complete at the time. Petition at 50 (stating both that "EPA's Decision to Terminate was issued without consideration of the completed Transfer Request filed on February 28, 2007" and that "On February 28, 2007, *and through subsequent submissions* at the direction of EPA, RDD, EGT and EDS submitted a request for transfer of the [Permits] * * * .") (emphasis added); *see also* RTC at 7 ("It should be noted that U.S. EPA has not reviewed EGT's [Transfer Request] for completeness") (Comment 8). The Region also adds that "[a]t the time the U.S. EPA issued its [NOI], RDD and

EGT were still submitting further information to the Region in support of their pending request to transfer those permits." EPA Br. at 26. The Region states that "while the [Region] 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." *Id*. The Region explained its rationale for choosing to pursue the termination action, rather than the transfer: it "chose the option for which it had the most complete record – the proposed permit termination." *Id.*

While the language just quoted seems to frame the issue as a choice between transfer and termination options, the quote from the RTC makes clear that the Region's decision process was sequential. First, it determined that the appropriate response to the violations was to terminate the Permits, a decision we have found to be an appropriate exercise of discretion. Having determined that it would initiate termination proceedings, the Region then determined that "it no longer made logical sense to process transfer of those permits." *Id.*; RTC at 5. The correctness of that proposition, that it made no sense to hold proceedings to transfer permits that are proposed for termination, is self-evident.[30]

Thus, the Region provided a reasonable explanation in the RTC of why it opted to defer action on the Transfer Request while it pursued the termination process. We decline to second-guess the Region's decision in this regard. Accordingly, we find no reason to remand the termination decision on this ground, and review is denied.

III. *CONCLUSION*

For the foregoing reasons, the petition for review of the decision to terminate UIC Permit Nos. MI-163-1W-C007 and MI-163-1W-C008 is denied.

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[30] Moreover, there is no indication that the Region did not move expeditiously during the termination proceeding or otherwise held the Transfer Request – now moot – in abeyance for a longer duration than necessary.