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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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In re: Environmental Disposal Systems, Inc.

UIC Appeal No.

Underground Injection Control Permits  
MI-163-1W-C007 and MI-163-1W-C008

**PETITION FOR REVIEW**

**PETITION FOR REVIEW OF THE UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY'S DECISION TO TERMINATE UNDERGROUND  
INJECTION CONTROL PERMITS MI-163-1W-C007 AND MI-163-1W-C008**

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## **TABLE OF CONTENTS**

- I. Introduction and Statement of Position
- II. Statement of Facts and Procedural History
- III. Standard of Review
- IV. Law and Argument
  - A. The Decision to Terminate is based on clearly erroneous findings of fact and conclusions of law.
    - 1. EPA's Decision to Terminate the UIC Permits is based on clearly erroneous findings of fact that the violations identified by the EPA were not corrected prior to EPA's issuance of the Notice of Intent to Terminate and artificially ignores the efforts and actions of RDD as the assignee of the Permits.
    - 2. EPA's Decision to Terminate the UIC Permits is based on a clearly erroneous conclusion of law that RDD's responses to the EPA and corrections of the violations bear no significance on the Termination of the Permits or the viability of the Facility.
  - B. The Decision to Terminate is based on an inappropriate exercise of discretion by the EPA, and important policy questions are involved which the EAB, in its discretion, should review.
    - 1. The EPA abused its discretion in basing Termination of the Permits on violations that had been corrected, and considered inappropriate and irrelevant facts, while ignoring the relevant facts, in reaching its decision.
    - 2. The EPA's Decision to Terminate the UIC Permits was issued without a full and fair opportunity for public comment on all relevant factors, and the EPA's refusal to provide the public with all relevant information, after multiple requests by Petitioners to do so, is an inappropriate exercise of discretion that the EAB should review.
    - 3. The EPA's Decision to Terminate was an inappropriate exercise of discretion in light of the EPA's previous actions and conduct relating to RDD's role at the Facility prior to Termination.
    - 4. The EPA's Decision to Terminate was issued without consideration of the completed UIC Permit Transfer Request submitted on February 28, 2007. The EPA's abuse of discretion in refusing to consider this Transfer Request merits review by the EAB.
- IV. Conclusion and Relief Requested

Petitioners, the Police and Fire Retirement System of the City of Detroit, RDD Investment Corp. and RDD Operations, LLC ("Petitioners"), by and through their attorneys, Clark Hill PLC, respectfully submit to the United States Environmental Protection Agency ("EPA") Environmental Appeals Board ("EAB") this Petition for Review of the EPA's October 22, 2007 Notice of Decision to Terminate (the "Termination") Underground Injection Control Permits MI-163-1W-C007 and MI-163-1W-C008 (the "UIC Permits").

## **I. INTRODUCTION AND STATEMENT OF POSITION**

On October 22, 2007, the EPA submitted its Notice of Decision to Terminate the UIC Permits issued to Environmental Disposal Systems, Inc. ("EDS") on October 18, 2004, for the operation of two Class I Hazardous Waste deep injection wells in Romulus, Michigan. Pursuant to 40 CFR 124.19, the Petitioners respectfully petition the EAB to: (1) review the Termination of the UIC Permits, (2) find that the Termination was based on clearly erroneous findings of fact and conclusions of law, and that the EPA abused its discretion in terminating the Permits; and (3) remand the Termination to the EPA with instructions to take an alternative action, including consideration and approval of a February 28, 2007 UIC Permit Transfer Request submitted by RDD Operations, LLC ("RDD"), EDS and Environmental Geo-Technologies, LLC ("EGT") and a minor permit modification transferring the UIC Permits to EGT, or a revocation and reissuance of the UIC Permits to EGT.

The Petitioners submit this Petition for Review because the EPA's Termination and the EPA's Response to the Public Comments submitted by Petitioners were based on clearly erroneous findings of fact and conclusions of law, were the result of an inappropriate exercise of discretion by the EPA, and because there are important policy considerations relating to the Termination which the EAB should, in its discretion, review.

First, the EPA's purported basis for the Termination is premised on clearly erroneous findings of fact and conclusions of law that the permit violations identified by the EPA were not corrected prior to EPA's issuance of the Notice of Intent to Terminate, and ignores the unrefuted fact that RDD fully discharged EDS' obligations under the Permits and applicable law. Second, the EPA abused its discretion in basing the Termination of the Permits on violations that had been corrected, and the agency considered inappropriate and irrelevant facts, while ignoring the relevant facts, in reaching its decision. Third, the EPA's refusal to provide the public with all relevant information for purposes of seeking full and fair public participation, after multiple requests by Petitioners to do so, is an inappropriate exercise of discretion that the EAB should review. Fourth, the EPA's Decision to Terminate was issued without consideration of the completed Transfer Request filed on February 28, 2007 by RDD, EDS and EGT. The EPA's inconsistent conduct and abuses of discretion in refusing to consider this Transfer Request merits review of the Termination by the EAB. Lastly, the EPA's abuses of its discretion in this instance highlight important policy considerations relating to the underground injection control permitting process.

## **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

1. The Police and Fire Retirement System of the City of Detroit is a pension plan and trust established by the Charter and Municipal Code of the City of Detroit ("PFRS"). The Board of Trustees of the PFRS oversees the pension funds of the police and fire departments of the City of Detroit, which secure retirement and disability benefits for all City of Detroit Police and Fire personnel.

2. In 1993, EDS approached the PFRS with an investment opportunity related to construction and operation of a commercial Class I Hazardous Waste underground injection well and hazardous waste treatment and storage facility ("Facility" or "Project").

3. From 1993 to 2006, the PFRS loaned approximately \$40,000,000.00 to EDS, Romulus Deep Disposal Limited Partnership ("Romulus") and Remus Joint Venture, ("RJV") for construction and completion of the Project which is located at 28470 Citrin Drive in Romulus, Michigan.

4. As lender, the PFRS took a security interest in the real property on which the Facility is located and in all assets related to the Project.

5. The PFRS, through its advisors and representatives, monitored the progress of the Project solely in its capacity as a lender. Otherwise, the PFRS had no direct or indirect involvement in the construction or operations of the Facility.

6. On October 18, 2004, the EPA Region 5 Administrator issued the UIC Permits at issue in this matter to EDS which authorized use of the two deep injection disposal wells located at the Facility.

7. On December 27, 2005, the Michigan Department of Environmental Quality ("MDEQ") issued a final Hazardous Waste Management Facility operating license (Part 111 License) to EDS for the storage and treatment of hazardous wastes at the Facility.

8. As of December 27, 2005, EDS had received all of the necessary regulatory permits and licenses required for operation of the Facility, including the Resource Conservation and Recovery Act ("RCRA") Land Ban Exemption, the UIC Permits, the MDEQ Part 111 Hazardous Waste Management Facility construction permit and operating license, the MDEQ Part 625 well permit, the MDEQ National Pollutant Discharge Elimination System ("NPDES") permit, the MDEQ storage tank registrations, certifications, permits and licenses, the MDEQ Wetlands Protection permit, the Wayne County Storm Water System permit, and the City of Romulus Soil Erosion permit.

9. On or about December 27, 2005, EDS commenced operations at the Facility and began receiving and treating hazardous waste and injecting the hazardous waste in the wells.

10. Throughout the first nine months of 2006, the PFRS received intermittent updates regarding the operations at the Facility through its business advisor. During this time, the PFRS had no direct involvement in the Project, had no day to day access to the Facility and was not involved in the management or operations of the Facility in any manner.

11. Under the various loan agreements between the PFRS, EDS, Romulus and RJV, the PFRS had no specific right to possession of the Facility, provided EDS, Romulus and RJV were not in default under the agreements.

12. Additionally, during this period the PFRS had no indication or reason to suspect that operations at the Facility were not being conducted in full compliance with all license and permit conditions.

13. In early October of 2006, EDS approached the PFRS and requested additional capital to fund operations at the Facility. While unaware of the full scope of EDS' financial condition at that time, the PFRS was receiving the first indications that EDS was not capable of operating the Facility in manner consistent with the PFRS' expectations or EDS' obligations under the various loan agreements.

14. It later became apparent that EDS' management of the Facility and declining financial condition were adversely affecting day to day operations at the Facility.

15. On October 13, 2006, personnel from the MDEQ conducted an inspection of the Facility and noted staffing changes which were not consistent with EDS' Part 111 license application. The PFRS later learned that several of the staffing changes noted by MDEQ were the direct result of qualified and competent employees resigning from EDS due to disagreements with the operational decisions of EDS' management.

16. On October 19, 2006, the PFRS Board, after reviewing the status of the Project, passed a resolution authorizing special legal counsel to take steps to secure the PFRS' investment in the Facility and to seek the orderly transfer of the Facility and the regulatory licenses and permits from EDS to the PFRS' designee in accordance with applicable federal and state regulations. (Exhibit A, Petitioners' Public Comment, Exhibit 1, Resolution of PFRS Board).

17. The initial objective of the PFRS' action at that time was to complete the orderly transfer of the Facility and the licenses and permits without disrupting on-going operation of the Facility by, among other things, requesting a minor modification of the permits and licenses, as appropriate, under applicable federal and state law.

18. PFRS' objective was to be executed by identifying a qualified successor owner and/or operator and securing EDS' cooperation in facilitating an orderly transfer of operations to the new operator.

19. In correspondence to EDS dated October 20, 2006, the MDEQ outlined its concerns related to staffing issues at the Facility and requested specific information related to personnel and employee training. (Exhibit A, Petitioners' Public Comment, Exhibit 2, October 20, 2006 Correspondence from MDEQ to EDS).

20. In correspondence to the PFRS dated October 23, 2006, EDS advised the PFRS for the first time that the Facility was about to close due to lack of operating capital. (Exhibit A, Petitioners' Public Comment, Exhibit 3, October 23, 2006 Letter from EDS to PFRS). At this time, the PFRS was unaware of the full scope of EDS' financial situation. However, it was apparent that EDS was unable to meet any of its obligations with respect to Facility operations at that time, including, but not limited to, payroll for employees and contracted security at the Facility.

21. On the same day (October 23, 2006), MDEQ inspectors were on-site at the Facility and observed a leak at the well head of well 2-12 during performance of a mechanical integrity test. It was ultimately determined that the leak was caused by a failed gasket resulting in the release of brine (salt) water which had been injected into the well to achieve sufficient head pressure to perform the mechanical integrity tests. The salt water leak was later determined to not contain any hazardous waste.

22. Notably, both wells demonstrated internal mechanical integrity during these tests.

23. In correspondence to EDS dated October 25, 2006, the MDEQ described the October 23, 2006 leak and requested information regarding the source of the leak, staffing and employee



training. (Exhibit A, Petitioners' Public Comment, Exhibit 4, October 25, 2006 Correspondence from MDEQ to EDS).

24. While steps were being taken to obtain the orderly transfer of the Facility operations from EDS to the PFRS designee, the PFRS was unaware of the operational issues occurring at the Facility.

25. In correspondence to EDS dated October 25, 2006, special counsel to the PFRS advised EDS that it was in default on its agreements with the PFRS due to, among other things, its failure to meet its on-going obligations, and special counsel requested a meeting with EDS to implement a procedure for an orderly transfer of the Facility.

26. On October 26, 2006, the MDEQ was on-site at the Facility and observed a leak of brine water at the well head of well 1-12. It was later determined that this leak was caused by the use of a replacement bolt at the well head. The original bolt was used to make the repair of the gasket leak on well 2-12.

27. In correspondence to EDS dated October 27, 2006, the MDEQ requested a report regarding the leak at well 1-12 and suspended use of the wells. (Exhibit A, Petitioners' Public Comment, Exhibit 5, October 27, 2006 Correspondence from MDEQ to EDS).

28. On or about October 27, 2006, representatives of the PFRS learned for the first time of the leaks at the respective wellheads and the suspension of operations.

29. In correspondence to EDS dated October 27, 2006, special counsel to the PFRS again requested EDS' cooperation in the orderly transfer of the Facility, including transfer of the regulatory permits and licenses, to the PFRS' designee. (Exhibit A, Petitioners' Public Comment, Exhibit 6, October 27, 2006 Correspondence from PFRS to EDS regarding transfer of operations).

30. Given the immediate and substantial concern about: 1) the overall safety and security of the Facility in light of the leaks at the wellheads; 2) the potential environmental risks associated with EDS' continued operation of the Facility; 3) appropriate staffing of Facility operations; and 4) the financial condition of EDS, the PFRS determined that it must move as expeditiously as possible to gain physical possession of the Facility.

31. At that time, the PFRS had no affirmative obligation of any manner or kind to take possession of the Facility or to take any action with respect to the Facility. The PFRS could have let EDS abandon the Facility, leaving any required clean-up and closure action to the appropriate governmental agencies.

32. Instead, the PFRS, through its designee, took immediate action, at a significant cost, to secure control of the Facility in order to fully and completely address any health and safety risks and to abate any risks of future leaks. This was not necessarily the desired course of action. However, the PFRS felt it had little choice under the exigent circumstances but to take immediate action.

33. In many respects, the PFRS was performing the monitoring and oversight obligations of the various federal and state regulators at that time. However, rather than waiting for EDS to comply with its obligations under the licenses and permits, the PFRS believed that immediate action was required.

34. On or about November 1, 2006, representatives of the PFRS met with the owner of EDS to negotiate terms of a transfer of ownership/operation of the Facility. In the absence of a court order or agreement with EDS, the PFRS or its designees had no legal right to entry at the Facility and no right to interfere with EDS' business relationships or expectancies.

35. At or about the same time, the PFRS directed the formation of RDD Investment Corp. and RDD Operations, LLC as its designees to take an assignment of EDS' interest in the permits and licenses of the Facility, and to assume control over the Facility.

36. In correspondence to EDS dated November 2, 2006, the MDEQ cited numerous permit and license compliance issues and suspended EDS' license to operate the hazardous waste storage and treatment facility. (Exhibit A, Petitioners' Public Comment, Exhibit 7, November 2, 2006 Correspondence from MDEQ to EDS).

37. On November 2 and 3, 2006, EPA staff conducted an inspection of the Facility. This was the very first time the EPA had any direct involvement with the Facility in the Fall of 2006.

38. On or about November 7, 2006, EDS executed a Quit Claim deed transferring ownership of the real property to RDD, an Acknowledgement and Assignment Agreement, assigning the assets of the Facility to RDD and conferring on RDD various rights with respect to the licenses and permits, and an Assignment of Permits. EDS also surrendered physical possession of the Facility to RDD at or near the same time. (Exhibit A, Petitioners' Public Comment, Exhibit 8, Transfer Documents, submitted by RDD under cover of letter to EPA).

39. Contrary to the EPA's assertion in its Response to Comments related to the Termination, EDS did not "abandon" the Facility in early November 2006. Rather, EDS no longer had the capital or other resources to operate the Facility in a safe and prudent manner and, under those circumstances, the PFRS insisted that EDS voluntarily surrender its interest in the Facility so that PFRS could secure the Facility, or the Board would otherwise be forced to pursue all of its available remedies.

40. At no time was the Facility unsecured. RDD immediately began working to address compliance issues that may have posed a risk to the environment or to public health and safety.

41. RDD immediately took steps to retain key employees of EDS for purposes of providing sufficient staff to secure the Facility.

42. Given the considerable uncertainty at the time regarding the extent of EDS' liabilities and the condition of the Facility, the Acknowledgment and Assignment Agreement expressly stated that RDD was not assuming any liabilities of EDS. However, the Agreement did provide that RDD could act on behalf of EDS with respect to the licenses and permits. The EPA was provided with this Agreement.

43. At the time RDD took possession of the Facility, RDD did not have the required staff and/or qualifications necessary to seek formal regulatory approval of the transfer of the licenses and permits from EDS directly to RDD. Additionally, RDD never intended to operate the Facility. Rather, RDD's role was to secure the Facility, address regulatory concerns and assist in identifying a qualified owner and operator for the Facility.

44. In early November 2006, RDD moved to immediately address the pressing regulatory concerns of the EPA and the MDEQ as set forth in the various correspondence from October and November 2006 to EDS.

45. RDD also abated any potential environmental contamination or public health risk by immediately making the necessary repairs of the well heads, implementing cleanup procedures related to the October 23, 2006 brine water leak at well 2-12, making appropriate staffing changes, retaining twenty-four hour security service for the Facility, installing the required monitoring technologies, and formulating a plan to address any compliance issues resulting from EDS' past operation of the Facility.

46. Throughout the month of November, the PFRS and RDD began working to provide the MDEQ and the EPA with all information requested from EDS which RDD could locate and/or had in its possession or control.

47. At the time of the transfer of control of the Facility from EDS to RDD in November of 2006, most of the insurance policies for the Facility were in arrears and/or near expiration. In order to avoid any lapses in coverage, RDD paid all outstanding premiums and took steps to have all of the policies reissued in its name.

48. Concurrent with the on-site work at the Facility, the PFRS and RDD began searching for a qualified, fully capitalized owner and/or operator to replace EDS. RDD's role was to function as an interim manager of the Facility until such time as a qualified owner and/or operator could be identified and the Facility and permits and licenses could be legally transferred to the new operator.

49. On or about November 16, 2006, the PFRS and RDD identified Environmental Geo-Technologies, LLC ("EGT") as a candidate to operate the Facility. RDD and the PFRS performed due diligence on the credentials and financial condition of EGT and its officers and staff, and chose EGT because of the expertise of its staff and its financial capabilities to operate the Facility in full compliance with federal and state regulations, permits and licenses.

50. In late November and early December of 2006, RDD and EGT began negotiations for the transfer of the Facility and the eventual transfer of the licenses and permits to EGT.

51. RDD and EGT also addressed specific staffing concerns related to maintaining compliance with the various permits and licenses for the Facility.

52. EDS, having been removed from the Facility, did not submit a response to the October and November 2006 MDEQ letters within the time frame set forth by the MDEQ, nor

did it provide any of the information requested by the MDEQ to bring the Facility back into regulatory compliance. However, RDD did respond to the MDEQ's correspondence in place of EDS, on November 28, 2006, December 7, 2006 and December 14, 2006, and in subsequent correspondence and meetings.

53. Shortly after removal from the Facility, EDS closed its office in Birmingham, Michigan and further communication with EDS became very sporadic.

54. On November 20, 2006, the EPA submitted a Notice of Noncompliance and a Request for Information to EDS, as a result of issues identified during EPA staff inspections of the Facility in early November. (Exhibit A, Petitioners' Public Comment, Exhibit 9, EPA Notice of Noncompliance and Request for Information). The EPA cited EDS for administrative and staffing violations of its UIC Permits, and required EDS to submit a compliance schedule within ten days of its receipt of the Notice of Noncompliance, which would set forth the dates by which EDS would complete required staff training, update staff training records and calibrate all gauges that measured certain operations of the Facility.

55. The MDEQ issued a Second Letter of Warning and Notice of Noncompliance to EDS dated November 28, 2006, which required EDS to provide information regarding the causes of the past violations, and explain how it planned to resolve each violation that resulted in the suspension of the operations. (Exhibit A, Petitioners' Public Comment, Exhibit 10, November 28, 2006 Correspondence from MDEQ to EDS).

56. On November 28, 2006, RDD sent a letter to the EPA and the MDEQ stating that, due to a computer malfunction, RDD would be unable to submit the monthly Operating Reports and monthly Mineral Well Injection Reports for October and November of 2006 as requested of EDS by the MDEQ. RDD retained a consultant in an effort to retrieve the lost data. (Exhibit A,

Petitioners' Public Comment, Exhibit 11, November 28, 2006 Correspondence to MDEQ and EPA regarding computer failure).

57. On December 7, 2006, RDD met with staff of the MDEQ in Lansing, Michigan to discuss the status of operations, the role of RDD and the MDEQ's Notice of Noncompliance and Warning Letters. (Exhibit A, Petitioners' Public Comment, Exhibit 12, Email Correspondence between MDEQ and counsel for RDD).

58. On December 14, 2006, RDD provided the EPA and the MDEQ with a detailed Interim Response to the various regulatory correspondence, addressing all issues raised in the Letters of Warning and Notice of Noncompliance to the best of its ability. This response included detailed incident reports describing the circumstances and response efforts related to the leaks observed on October 23, 2006 and October 26, 2006. (Exhibit A, Petitioners' Public Comment, Exhibit 13, December 14, 2006 Interim Response of RDD). As the assignee of the permits and licenses, and the owner of the Facility, RDD made certain to address all of the regulatory compliance issues which had been directed to EDS in the various correspondence.

59. RDD's Interim Response also provided detailed reports of the remedial actions taken to date, and, with respect to unresolved issues, set forth the steps being taken to develop and implement an appropriate plan of response. RDD affirmatively communicated to MDEQ and EPA that RDD remained committed to securing the safe and compliant operation of the Facility and would meet all of the regulatory obligations imposed by the various licenses and permits.

60. On December 14 and 15, 2006, the EPA conducted additional inspections of the Facility.

61. On December 27, 2006 RDD submitted calibration settings for the chart recorders to the EPA. (Exhibit A, Petitioners' Public Comment, Exhibit 14, December 27, 2006 Electronic Mail from RDD to EPA).

62. During the months of December 2006 and January 2007, RDD was in constant contact with representatives of MDEQ and the EPA, keeping the agencies apprised of developments and completion of certain actions, and responding to requests for information.

63. On January 3 and 4, 2007, Baker Atlas performed EPA-required mechanical integrity testing of the wells. This testing was contracted by RDD at the direction of EPA, and performed pursuant to a work plan submitted by RDD and approved by the EPA. This was the first of many instances where the EPA worked directly with RDD, and through their communications and conduct, acknowledged RDD's role as a "de facto" permittee of the UIC Permits.

64. On January 8, 2007, RDD submitted another Interim Status Report and a Notice of Proposed Operating License Transfer to the MDEQ, pursuant to Michigan Administrative Rules 299.9519 and 299.9522. (Exhibit A, Petitioners' Public Comment, Exhibit 15, January 8, 2007 Interim Status Report and Notice). Included in the Status Report was a summary of recent work performed at the Facility to address the issues identified by the MDEQ in their correspondence of October and November of 2006, including details of the repair work to wells 1-12 and 2-12 in response to the issues noted by the MDEQ during the October inspections.

65. On January 12, 2007, EPA requested additional information from EDS to determine whether cause existed to revoke and re-issue, modify or terminate the UIC Permits. (Exhibit A, Petitioners' Public Comment, Exhibit 16, January 12, 2007 Request for Information from EPA to EDS). The EPA required EDS to submit its records of injection pressure, calibration, monitoring of flow rate and injectate pH, a legend of the continuous monitoring charts, information



regarding the hours worked by the well operators, and the causes of the failure of the automatic warning system. EDS did not respond to this Request. RDD, however, immediately began working to compile the information requested by the EPA in the place of EDS.

66. In early January, RDD performed the EPA-required mechanical integrity testing, as stated above, and removed and properly disposed of roll-off boxes of hazardous waste left on-site from EDS' operations, developed and implemented a soil remediation plan, developed and implemented a well pump monitoring system, performed monitoring and testing of the wells, and extensively cleaned the Facility. (Exhibit A, Petitioners' Public Comment, Exhibit 17, January 4, 2007 Electronic Mail from RDD to EPA enclosing temperature log data and January 12, 2007 Facsimile to EPA enclosing results of mechanical integrity testing).

67. On January 26, 2007, the MDEQ issued a Notice of Violation to EDS as the licensee and permit holder, and to RDD as owner of the Facility and land upon which the Facility is located. (Exhibit A, Petitioners' Public Comment, Exhibit 18, Notice of Violation). The Notice of Violation required certain actions to be taken before the MDEQ would approve transfer of either the Part 111 license or the Part 625 permit, including submission to the MDEQ of written verification of the approval of the transfer of the EPA UIC Permits.

68. RDD scheduled a meeting with the MDEQ to discuss the implementation of the actions required by the January 26, 2007 Notice of Violation, and began compiling the information requested by the MDEQ for submission.

69. Concurrent with its efforts to respond to MDEQ, RDD hand delivered to EPA staff a response to all of the information requested in its January 12, 2007 Request for Information at a meeting in Chicago, Illinois on January 31, 2007. (Exhibit A, Petitioners' Public Comment, Exhibit 19, January 30, 2007 Response to Request for Information to the EPA).

70. Included in this response was detailed information regarding the causes of the November 2, 2006 leak, all injection pressure, calibration and monitoring records requested and available (to the extent that EDS maintained these records), a legend of the continuous monitoring charts, and an initial response regarding the cause of the failure of the automatic warning system. The only information RDD was unable to provide in response to EPA's January 12, 2007 Request for Information was information regarding the hours worked by the well operators, as such records were maintained by EDS and were not turned over to RDD at the time of transfer of the Facility.

71. This response fully and comprehensively addressed the January 12, 2007 Request for Information and demonstrated that there was no cause to terminate the UIC Permits.

72. At the January 31, 2007 meeting in Chicago at the Region 5 EPA offices, RDD and a representative of EGT discussed the status of the Facility with EPA staff, the status of the transfer of the licenses and permits, and the efforts of RDD in addressing EPA's concerns.

73. Throughout RDD's efforts to respond to EPA's concerns, EPA never took the position that EDS had to be the entity actually taking the compliance actions instead of RDD.

74. At the same meeting, RDD communicated to the EPA that it was in the process of developing plans for transfer of the permits/licenses to EGT.

75. RDD affirmatively stated its intention to supplement its response as it received additional information, and also confirmed that it was aware of the order to suspend operations, and that it would continue to ensure that the Facility was not operated until appropriate authorization was received from EPA and MDEQ.

76. Also at the meeting, the EPA indicated that it was generally satisfied with RDD's progress in ensuring Facility compliance, and that a transfer application would likely be

favorably received. This meeting, at which EPA affirmatively acknowledged the actions of RDD, was yet another instance in which the EPA acknowledged the status of RDD as the “de facto” permittee.

77. In reliance, in part, on the positive feedback received during the January 31, 2007 meeting, RDD and EGT continued with their efforts to maintain compliance with permit requirements and to move forward with the formal request for transfer of the UIC Permits.

78. In correspondence to the Honorable John D. Dingell dated February 8, 2007, EPA Region 5 Administrator, Mary A. Gade, acknowledged that RDD had provided recent calibration records for the pH meter and copies of the majority of requested circle charts. Ms. Gade acknowledged that both wells demonstrated internal mechanical integrity during testing in October of 2006.

79. On or about February 8, 2007, the PFRS finalized its agreement to transfer the Facility and assets to EGT upon regulatory approval of the transfer of all required permits and licenses.

80. On February 15, 2007, RDD and EGT met with the MDEQ (in person) and the EPA (by phone) to discuss the January 26, 2007 Notice of Violation issued by the MDEQ and to address and update EPA and MDEQ on the status of the various licenses and permits under each agencies’ jurisdiction.

81. On or about February 15, 2007, RDD began communications with EDS, seeking its assistance in executing the UIC Transfer Agreement required by 40 CFR 144.41 for a minor modification of the permits.

82. Concurrent with its meeting and communication with EPA and the MDEQ, RDD and EGT were completing the appropriate documentation for formally requesting a transfer of the

UIC Permits to EGT, including, but not limited to, preparing and obtaining insurance coverage and a closure bond for the Facility, and preparing a demonstration of financial responsibility.

83. On February 12 and 13, 2007, RDD submitted a replacement Letter of Credit to the MDEQ and an insurance policy summary for purposes of demonstrating financial responsibility for the Facility. (Exhibit A, Petitioners' Public Comment, Exhibit 20, Letter of Credit and Insurance Policy Summary).

84. On February 28, 2007, RDD, EGT and EDS submitted their UIC Permit Transfer Request to the EPA, pursuant to 40 CFR 144.41. (Exhibit A, Petitioners' Public Comment, Exhibit 21, Transfer Application Package).

85. At the time of this submission, RDD was in continuous contact with counsel for EDS in order to complete the execution of the UIC Transfer Agreement.

86. As of March 7, 2007, RDD had completed a number of critical tasks for purposes of finalizing the request for transfer of the Part 111 Hazardous Waste Management Facility Operating License, the Part 625 Mineral Wells Permits, and the EPA UIC Permits, including, but not limited to:

- RDD coordinated with the Michigan Attorney General's office to finalize the form of the Part 111 transfer request, pursuant to the Part 111 administrative rules, and discussed the timing and content of the submittal in detail with staff of the Hazardous Waste and Materials Department.
- RDD outlined steps to obtain information regarding the leak at well 2-12 in October, at the request of the MDEQ.
- EGT prepared written qualifications of its staff and management team, including a summary of the training and experience of the well operators.

- RDD and EGT met on March 5, 2007 regarding the transfer of the NPDES and air quality permits, and finalized the content of the request for the license transfer to be submitted to the MDEQ.
- RDD hired Stantec Consulting Michigan, Inc., the original Facility design engineering company, which performed an engineering review of the Facility to certify repairs to the Facility and recertify the Facility's capability for treating, storing and disposing of hazardous waste in compliance with applicable federal and state laws and administrative rules. (Exhibit A, Petitioners' Public Comment, Exhibit 22, February 26, 2007 Certification).
- EGT continued, during this time period, to identify qualified personnel, including a Facility Manager, an Environmental Control Manager and a trained Well Operator, and identified and/or retained additional staff to fill positions required when the Facility returns to operational status.

87. On March 9, 2007, RDD and EGT submitted a draft request for transfer of the Part 111 license to the MDEQ, pursuant to Michigan Administrative Rules 299.9519 and 299.9522, including numerous exhibits and attachments addressing the MDEQ's January 26, 2007 Notice of Violation. (Exhibit A, Petitioners' Public Comment, Exhibit 23, Draft Request for Transfer of Part 111 License).

88. During this time, RDD and EGT made progress in moving towards compliance with and transfer of the Part 625 permit including, obtaining the conformance bonds for each of the wells, completing an application for transfer of the permit, preparing statements regarding the qualifications of the well operator and an organizational chart of EGT, and coordinating with MDEQ Office of Geological Survey ("OGS") staff on the transfer process.

89. On March 9, 2007, RDD submitted results from a Bottom Hole Pressure Survey of the wells to EPA as required under the UIC Permits. (Exhibit A, Petitioners' Public Comment, Exhibit 24, March 9, 2007 facsimile from RDD to EPA enclosing testing results).

90. On March 13, 2007, the EPA requested additional information from RDD and EGT for the processing of its UIC Permit Transfer Request. (Exhibit A, Petitioners' Public Comment, Exhibit 25, March 13, 2007 Electronic Mail from EPA to RDD and March 16, 2007 Correspondence from EPA to RDD and EGT).

91. In electronic mail to EPA dated March 15, 2007, counsel for RDD provided an update on the UIC Permit Transfer Request of RDD and EGT, and indicated that the UIC Transfer Agreement had been revised consistent with the EPA's suggestions. (Exhibit A, Petitioners' Public Comment, Exhibit 26, March 15, 2007, March 19, 2007 and March 23, 2007 Electronic Mail from counsel for RDD to the EPA).

92. On March 19, 2007, counsel for RDD submitted an update to EPA on the information requested on March 13, 2007 via electronic mail. (Exhibit A, Petitioners' Public Comment, Exhibit 26).

93. On March 21, 2007, EPA staff conducted an inspection of the Facility (Exhibit A, Petitioners' Public Comment, Exhibit 29, March 21, 2007 Inspection Results). The Facility Manager for RDD was on-site for this inspection, and RDD demonstrated a successful test of the annulus pressure alarm system as requested by EPA (acknowledged by Charles Brown of the EPA). This instance provides another example of the EPA acknowledging, by its words and actions, RDD's status as the "de facto" permittee of the wells.

94. In a letter dated March 22, 2007, after a delay in communications from EDS, counsel for the PFRS demanded the immediate cooperation of EDS in executing the UIC Transfer

Agreement and other documents consistent with the November 7, 2006 Acknowledgment and Assignment Agreement. (Exhibit A, Petitioners' Public Comment, Exhibit 40, March 22, 2007 Correspondence from counsel for PFRS to counsel for EDS).

95. On March 23, 2007, RDD submitted to the EPA, via electronic mail, copies of the Standby Letter of Credit and Standby Trust Agreement executed by the PFRS Board in favor of RDD and EDS, pursuant to EPA's directions. (Exhibit A, Petitioners' Public Comment, Exhibit 26, March 23 Electronic Mail from counsel for RDD to the EPA).

96. In a letter dated March 26, 2007, RDD provided hard copies of the Standby Trust Agreement between RDD and the PFRS and Standby Letter of Credit for the account of RDD and EDS. (Exhibit A, Petitioners' Public Comment, Exhibit 27, March 26, 2007 Letter from RDD to the EPA).

97. On March 29, 2007, final copies of the UIC Permit Transfer Agreement, executed by RDD, EGT and EDS, were transmitted to EPA, via electronic mail, and by April 12, 2007, hard copies of all of the original documents related to the UIC Permit Transfer Request were submitted to EPA. (Exhibit A, Petitioners' Public Comment, Exhibit 26, March 15, 2007, March 19, 2007 and March 23, 2007 Electronic Mail from counsel for RDD to the EPA); (Exhibit A, Petitioners' Public Comment, Exhibit 28, April 12, 2007 Letter from RDD to the EPA).

98. In a letter dated March 27, 2007, the MDEQ acknowledged the February 15, 2007 meeting between MDEQ, RDD and EGT and the completion by RDD of a number of the required actions set forth in the Notice of Violation. The MDEQ correspondence identified additional issues to be remedied before the Part 111 license and Part 625 permits could be transferred. (Exhibit A, Petitioners' Public Comment, Exhibit 30, March 27, 2007 Letter from MDEQ to RDD).

99. Pursuant to the March 27, 2007 letter from the MDEQ, on April 6, 2007, RDD submitted to the MDEQ a work plan and schedule to address issues related to removal of waste from storage tanks on-site dating back to EDS' operations, including a plan for decontamination and re-certification of the Facility to bring the Facility into compliance with the conditions of the Part 111 license. (Exhibit A, Petitioners' Public Comment, Exhibit 31, Work Plan).

100. On April 11, 2007, RDD and EGT again met with the MDEQ to discuss the transfer of the Part 111 license and the Part 625 permit. MDEQ indicated that it had performed only a preliminary review of RDD's and EGT's draft Part 111 license transfer request submission because the EPA approval of the transfer of UIC Permits was still pending.

101. At that meeting, the MDEQ also requested that EDS' previous violations of the financial assurance requirements be remedied. In response to this request, RDD and EGT immediately undertook to ensure that the Facility closure bond remained in place. RDD and EGT further agreed to continue to develop the work plan to address the remaining waste stored at the Facility, and confirmed that an amended work plan would be submitted based on MDEQ's comments to the April 6, 2007 work plan. (Exhibit A, Petitioners' Public Comment, Exhibit 32, April 17, 2007 Electronic Mail from MDEQ to RDD summarizing April 11, 2007 Meeting).

102. On April 12, 2007, RDD and EGT received notice from the EPA that, while it had received the supplemental information requested in order to process the Transfer Request, the EPA had decided instead to terminate EDS' permits. (Exhibit A, Petitioners' Public Comment, Exhibit 33, April 12, 2007 Correspondence to RDD and EGT from the EPA).

103. At no time prior to April 12, 2007, in the many communications and meetings between EPA, RDD and/or EGT, was there ever any mention or indication whatsoever that EPA intended to terminate the UIC Permits. In fact, there was virtually no expression of



dissatisfaction with the actions of RDD related to the Facility, or indication of any unaddressed compliance issues from the EPA.

104. Also, on April 12, 2007, the EPA indicated for the first time that it would not consider or process the RDD/EGT UIC Transfer Request, as the termination would render the Transfer Request moot.

105. Up until April 12, 2007, RDD and EGT were under the impression that the request for transfer of the UIC Permits was being duly processed and considered by EPA.

106. On that same date, the EPA issued a Notice of Intent to Terminate the UIC Permits to EDS, pursuant to 40 CFR 124.5 and 40 CFR 144.40, due to “EDS’ noncompliance with numerous provisions of the permits,” referring to EDS’ historical violations and compliance issues occurring prior to November 2006. (Exhibit A, Petitioners’ Public Comment, Exhibit 34, Notice of Intent to Terminate).

107. Nearly all of EDS’ compliance issues identified by the EPA in the Fact Sheet that accompanied the Notice of Intent to Terminate were remedied in full by RDD in the months leading up to the February 28, 2007 Transfer Request of RDD and EGT, including the submission of responses to EPA (and MDEQ) requests for information, providing calibration and continuous monitoring records, providing an adjusted cost estimate for closure, maintaining a trained operator on site when the wells were in operation, testing and maintaining an emergency warning system, conducting the test for reservoir pressure, and provision of EPA-required reports.

108. As of April 12, 2007, the PFRS and RDD had complied with the EPA’s and the MDEQ’s requests for information, remedied the staffing concerns, implemented testing and

provided results of same to the MDEQ and EPA, and made necessary repairs to the Facility to prevent leaks or other unsafe conditions.

109. Importantly, RDD had taken specific steps and actions to ensure the mechanical integrity of the deep disposal wells at the Facility.

110. Additionally, RDD and EGT submitted financial assurance documentation, securing an irrevocable Letter of Credit and closure bond related to the wells. (Exhibit A, Petitioners' Public Comment, Exhibit 28, April 12, 2007 Correspondence Enclosing Financial Documents from RDD to EPA).

111. As of April 12, 2007, there were no unaddressed issues which would have precluded transfer of the UIC Permits to EGT.

112. On April 25, 2007, EDS filed a Certificate of Dissolution with the Michigan Department of Labor and Economic Growth. (Exhibit A, Petitioners' Public Comment, Exhibit 35, Certificate of Dissolution).

113. On or about the same time, the MDEQ issued notice to RDD that it would table consideration of RDD's request to transfer the Part 111 permit, pending a decision by the EPA on the UIC Permits.

114. On May 7, 2007, RDD submitted to the MDEQ an updated work plan and detailed schedule regarding waste removal, decontamination and re-certification of the Facility, implementing the "First In – First Out" plan to remove EDS' waste material from the Facility safely and in compliance with all applicable laws and regulations. (Exhibit A, Petitioners' Public Comment, Exhibit 36, May 7, 2007 Work Plan and Schedule, and May 24, 2007 Correspondence from MDEQ to RDD approving Work Plan).

115. In correspondence dated May 8, 2007, MDEQ issued a “no further action” letter in response to RDD’s efforts and remedial actions addressing the October 23, 2006 leak at well 2-12. (Exhibit A, Petitioners’ Public Comment, Exhibit 38, May 8, 2007 Correspondence from MDEQ to RDD).

116. On May 23, 2007, the public hearing on the EPA’s Notice of Intent to Terminate the UIC Permits was held in Romulus at which the PFRS, RDD and EGT stated their opposition to EPA’s intent to terminate the UIC Permits.

117. On June 20, 2007, Petitioners submitted their Public Comment to the EPA, opposing the Notice of Intent to Terminate and requesting that, as an alternative to termination of the UIC Permits, that the EPA either consider the February 28, 2007 Transfer Request and effect a minor modification transferring the Permits to EGT, or revoke and reissue the Permits to EGT. (Exhibit A, Petitioners’ Public Comment).

118. On or about June 18, 2007, RDD reported to the EPA that wellhead 1-12 had a small leak or drip.

119. On June 21, 2007, the EPA took samples of the liquid that was “weeping” from the wellhead.

120. On or before June 25, 2007, Petrotek Engineering Corporation, at RDD’s direction, contacted the EPA with regard to its recommendation that brine should be pumped into both well bores for wells 1-12 and 2-12 to force static fluid level below the ground level in the wells, a procedure known as “well-killing.” The well-killing procedure was done to make necessary inspections and repairs to the wellheads and to ensure the safety of the wells and facility operation, pursuant to the conditions of the Permits and the requirements set forth by the MDEQ.

121. In response to this communication from Petrotek, on July 10, 2007, the EPA asked RDD, as the recognized permittee and party in interest, to provide them with a written request for approval of the well-killing procedure on behalf of either EDS or RDD. The EPA further requested that if the approval was to be requested by RDD, that it provide its basis for requesting approval on behalf or in the stead of EDS. The EPA's request was based on its recognition of RDD as the "de facto" permittee for all practical purposes.

122. On July 13, 2007, RDD submitted a written request for the EPA's approval of the well-killing procedure, on behalf of RDD as the assignee of all of EDS' rights and interests in the Permits and the Facility. (Exhibit B, July 13, 2007 Correspondence to EPA). On July 17, 2007, the EPA approved RDD's request to perform the well-killing procedure. (Exhibit C, July 17, 2007 Correspondence to RDD).

123. The well-killing procedure was successfully conducted on August 2, 2007 in the presence of officials from the EPA and the MDEQ.

124. Due, in part, to the continuing affirmative action by the EPA indicating it considered RDD the "de facto" permittee, and due to Petitioners' belief that the EPA did not properly provide the public a full and fair opportunity to comment on all relevant facts leading up to the Notice of Intent to Terminate, Petitioners submitted a Request to Re-Open and/or Extend the Public Comment Period (the "Request") to the EPA on September 11, 2007, pursuant to 40 CFR 124.14. (Exhibit D, Request to Re-Open and/or Extent the Public Comment Period, exhibits omitted).

125. The basis for the Request was that substantial new questions had arisen during and after the close of the comment period concerning the Notice of Intent to Terminate that conflicted with the information provided in the Fact Sheet accompanying the Notice of Intent to

Terminate (Exhibit E, Fact Sheet). Specifically, the Fact Sheet completely ignored RDD's involvement in the Facility and RDD's responses to EPA's requests for information and records, which rendered the permit violations identified in the Fact Sheet, as a practical matter, moot.

126. Further, RDD asserted that the EPA's conduct in July of 2007 as it related to RDD as the "de facto" permittee created substantial new questions of the propriety of the Termination, as RDD had otherwise complied with all conditions of the UIC Permits and all applicable laws and regulations.

127. Finally, the EPA's omission of the relevant facts relating to RDD's involvement in the Facility in the Fact Sheet resulted in the public being denied a full and fair opportunity to comment on all reasonably ascertainable issues relating to the Notice of Intent to Terminate. Petitioners did not receive a response to this Request from the EPA until October 22, 2007, as part of EPA's Decision to Terminate the UIC Permits.

128. As of October, 2007, RDD has completed implementation of the waste removal work plan, at an approximate cost of \$500,000.00. Approximately 285,000 gallons of hazardous waste were removed from the Facility, and the tanks and lines were triple-rinsed. Currently, the Facility is empty of all hazardous waste, and has been decontaminated and emptied to RCRA standards. (Exhibit F, Certification of Facility).

129. From November 2006 through April of 2007, RDD and the PFRS provided approximately \$1,500,000.00 in capital for operation, maintenance, and repair costs for the Facility, including over \$450,000.00 in expenditures related to compliance with the MDEQ's and the EPA's directives related to compliance, and have budgeted at least an additional \$1,000,000.00 for Facility operations through the end of 2007.

130. From November 2006 through October of 2007, RDD and/or EGT have addressed virtually every compliance or regulatory issue raised by EPA or MDEQ, whether directed to RDD, EGT or EDS.

131. On October 22, 2007, the EPA issued its Notice of Decision to Terminate the UIC Permits. Accompanying this Notice of Decision was the EPA's Response to Comments, including a response to the Request to Re-Open and/or Extend the Public Comment Period filed by Petitioners. (Exhibit G, Notice of Decision to Terminate and EPA's Response to Comments).

132. Petitioners now file this Petition seeking review of the EPA's Termination of the UIC Permits.

### **III. STANDARD OF REVIEW**

This Petition is submitted under 40 CFR 124.19(a), which provides for an appeal to the Environmental Appeals Board of any UIC permit decision made by the EPA. In proceedings under 40 CFR 124.19(a), the EAB will grant review of a decision of the EPA if the petition for review establishes that the permit condition in question is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that the Board determines warrants review. 40 CFR 124.19(a); *In re Amerada Hess Corp.*, 12 E.A.D. 1 (EAB 2005); *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 743-44 (EAB 2001). The petitioner bears the burden of demonstrating that review is warranted. 40 CFR 124.19(a)(1-2); *In re Amerada Hess Corp.*, *supra*. In order to establish that review of a permit decision is warranted, a petitioner must state both the objections to the permit that are being raised for review and explain why the permit decision maker's previous response to those objections (i.e., the decision maker's basis for the decision) is clearly erroneous or otherwise warrants review. *In re Amerada Hess Corp.*, *supra*; *In re Steel Dynamics, Inc.*, *supra*.

Where the EPA's explanation for a permit decision lacks sufficient support in the administrative record, or where the EPA provides only a cursory explanation for a decision that is not supported by a detailed explanation or clear rationale, the EAB will remand the permit decision back to the EPA. *In re Beckman Prof. Servs.*, 8 E.A.D. 302, 311 (EAB 1999); *In re Chem. Waste Mgmt. of Ind., Inc.*, 6 E.A.D. 144, 154 (EAB 1995).

#### IV. LAW AND ARGUMENT

##### **A. THE DECISION TO TERMINATE IS BASED ON CLEARLY ERRONEOUS FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

- 1. EPA's decision to Terminate the UIC Permits is based on clearly erroneous findings of fact that the Permit violations identified by the EPA were not corrected prior to the Notice of Intent to Terminate and artificially ignores the efforts and actions of RDD as the assignee of the Permits.**

The primary stated basis for EPA's Decision to Terminate the UIC Permits is grounded upon findings of fact which are clearly erroneous; namely, EPA's assertion of the ongoing existence and the effect of the alleged permit violations identified in the Fact Sheet accompanying the Notice of Intent to Terminate. EPA alleges that EDS' permit violations "severely handicap[] U.S. EPA's ability to carry out its regulatory functions," and that the failure to carry out certain tests "prevents U.S. EPA from anticipating the initiation or propagation (sic) 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. (Exhibit E, EPA Fact Sheet). These statements are clearly erroneous findings of fact because substantially all of the Permit violations identified in the Fact Sheet accompanying the EPA's Notice of Intent to Terminate, addressed individually below, had been resolved prior to the issuance of the Notice of Intent to Terminate. (Exhibit A, Petitioners' Public Comment, Section III, Chart of Requests and Responses).

The EPA's statement that EDS' 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. (Exhibit E, EPA Fact Sheet). This statement made by the EPA is therefore patently untrue and



in clear error. In taking this position, the EPA inappropriately ignored the well-known and documented fact that RDD has responded to all inquiries and requests for information sent by EPA to EDS, and that the EPA, at all times, had substantially complete information that allowed EPA to carry out its regulatory functions. In fact, prior to the April 12, 2007 Notice of Intent to Terminate, EPA conducted at least three physical inspections of the Facility, observed well testing procedures and interviewed RDD personnel regarding operations. To suggest that the EPA's regulatory functions were being hampered in any way by the conduct of EDS is simply untrue. RDD has responded to every EPA inquiry related to the operations of the Facility directed to EDS, and EPA has acknowledged that any recordkeeping and reporting failures of EDS have not impacted the mechanical integrity of the wells at the Facility. Therefore, the purported factual and legal basis on which EPA made its Decision to Terminate is erroneous, entirely one of form over substance, which ignores relevant factors and the record before the agency.

Further, this position is inconsistent with the general guiding principle of the UIC program, which is to prevent the endangerment of drinking water sources or public health. (Exhibit G, Response to Comments, Comment 27). See also 40 CFR 141.1(d). At no time during EDS' or RDD's ownership and operation of the Facility were drinking water sources or the public health endangered. RDD, to the best of its ability, fully complied with recordkeeping and reporting obligations under federal law. The EPA's omission of these relevant facts that would otherwise remove the very basis cited for termination of the Permits demonstrates that the Termination and the subsequent Response to Comments were based on clearly erroneous findings of fact.

As addressed individually below, each violation identified in the Fact Sheet was addressed by RDD prior to the issuance of the Notice of Intent to Terminate.

A. Failure to respond to EPA's January 12, 2007 Request for Information

On January 31, 2007, and in subsequent submissions, RDD responded fully to all requests in the January 12, 2007 Request for Information. (Exhibit A, Petitioners' Public Comment, Exhibit 19, January 30, 2007 Response to Request for Information to the EPA). The EPA, in its Response to Comments, acknowledged that RDD provided "certain responses and records requested of EDS." (Exhibit G, Comment 8). This Response to Petitioners' Comment regarding RDD's satisfaction of the January 12, 2007 Request for Information is wholly unsatisfactory and in clear error. (Exhibit A, Petitioners' Comment, p. 35) (Exhibit G, Comment 8). The only records EPA can point to that RDD was unable to provide were monthly operating and mineral well injection reports for October and November of 2006 and information regarding staffing hours at the Facility. However, the EPA's January 12, 2007 Request for Information did not actually request the monthly operating and mineral well injection reports. (Exhibit A, Petitioners' Public Comment, Exhibit 16, January 12, 2007 Request for Information from EPA to EDS). Rather, the *MDEQ* had requested this information; the fact that RDD could not provide the reports (which were not requested by the EPA and are not required by federal law or the Permits) to the MDEQ provides little support for the EPA to claim that it did not have sufficient information or records to carry out its regulatory function. Therefore, the only records not submitted to the EPA were relating to staffing hours at the Facility. The EPA's assertion that failure to provide this information severely handicapped the EPA's ability to carry out its regulatory functions is imply untrue, and

therefore in clear error. Thus, the EPA's Termination was based on the clearly erroneous finding of fact that the EPA did not receive a response to its January 12, 2007 Request for Information.

B. Failure to provide calibration and continuous monitoring records for the wells.

On October 23, 2006 and later, on January 31, 2007, all available calibration and continuous monitoring records for the wells were hand-delivered to the EPA. The EPA's Fact Sheet issued with the Notice of Intent to Terminate fails to mention that the EPA was in fact in possession of these records at the time the agency issued its Notice of Intent to Terminate. Further, the EPA's Response to Comments does not address this point, as set forth in Petitioners' Public Comment. (Exhibit A, Petitioners' Comment, p. 36). Therefore, it is clearly erroneous for the EPA to state that EDS' failure to provide these records severely handicapped its ability to carry out its regulatory functions, when the EPA had and has these reports in its possession.

C. Failure to adjust the cost estimate for closure of the wells.

RDD adjusted the cost estimate for closure of the wells to account for inflation, and provided this cost estimate to the EPA on February 28, 2007. The EPA's Fact Sheet issued with the Notice of Intent to Terminate fails to mention that the closure cost estimate was in fact adjusted by RDD. Further, the EPA's Response to Comments does not address this point, as set forth in Petitioners' Public Comment. (Exhibit A, Petitioners' Comment, p. 36). Therefore, it is clearly erroneous for the EPA to state that EDS' 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." (Exhibit E, EPA Fact Sheet). RDD provided this assurance, and at no time was the

Facility without the requisite financial insurance for plugging, abandoning and providing post-closure care for the wells. Thus, the EPA's Termination was based on a clearly erroneous finding of fact.

D. Failure to have a trained deep well operator on site during injection.

This alleged action occurred prior to RDD acquiring physical possession of the Facility. However, a trained deep well operator has been employed full-time since November of 2006, despite the fact that the Facility is not in operation, and all hazardous waste and materials have been removed and properly disposed. Moreover, EDS' 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, as acknowledged by the Region 5 Administrator in correspondence to Rep. John Dingell.

E. Failure to test and successfully demonstrate that automatic warning and shut-off system.

RDD successfully demonstrated the automatic warning and shut-off system to EPA inspectors, on site, on March 21, 2007. (Exhibit A, Petitioners' Public Comment, Exhibit 29, Inspection Results). The EPA asserts that the failure of EDS to perform these tests "circumvents the safety precautions that are required by the permits." (Exhibit E, Fact Sheet). This statement that the automatic warning and shut-off system was not tested by EDS and that this action circumvents safety precautions is clearly erroneous in light of RDD's successful testing of the system (observed by EPA) weeks before the EPA issued its Notice of Intent to Terminate. Further, the EPA's Response to Comments does not address this point, as set forth in Petitioners' Public Comment. (Exhibit A, Petitioners' Comment, p. 37). Thus, the EPA's Termination was based on the clearly erroneous

finding of fact that the automatic warning and shut-off system was not tested within the required time frames.

F. Failure to test for ambient reservoir pressure.

On February 23, 2007, RDD performed an ambient reservoir pressure test, the results of which were submitted to the EPA by the testing consultant, Baker Hughes. The EPA asserts that EDS' failure to test the 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. (Exhibit E, EPA Fact Sheet). On the contrary, and as recognized by the Region 5 Administrator in correspondence to the Hon. John Dingell, the physical integrity of the wells was at no time compromised. It is 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 month prior. Further, the EPA's Response to Comments does not address this point, as set forth in Petitioners' Public Comment. (Exhibit A, Petitioners' Comment, p. 37). Thus, the EPA's Termination was based on a clearly erroneous finding of fact.

G. Delay in submission of a quarterly report, failure to submit one quarterly report, and failure to submit an annual report.

RDD has prepared and submitted the applicable reports where required. Given that the wells have not been used since late October 2006, no reports were required for 2007. Moreover, all available reports and data were submitted to EPA as part of the RDD December 14, 2006 and January 30, 2007 submittals and the February 28, 2007 Transfer Request. The EPA asserts that EDS' failure to provide these reports severely handicaps the EPA's ability to carry out its regulatory functions. (Exhibit E, Fact Sheet). This

statement is a clear error; the EPA was not, in fact, handicapped by EDS' alleged failure to provide these reports, because RDD provided them to the EPA in EDS' stead. Further, the EPA's Response to Comments does not address this point, as set forth in Petitioners' Public Comment. (Exhibit A, Petitioners' Comment, p. 37). Thus, the EPA's Termination was based on a clearly erroneous finding of fact.

Consequently, RDD addressed every violation upon which EPA based the proposed termination prior to EPA's Notice of Intent to Terminate. It is disingenuous and unreasonable for the EPA to continue asserting that the Facility, or the EPA's regulatory abilities, were compromised in any manner by EDS' alleged violations. The EPA has been provided with requested testing and information, and the agency has unlimited and unfettered access to inspect the Facility. Since December of 2006, the EPA has inspected the Facility a number of times, with RDD's full cooperation. These site visits have allowed the EPA to fully avail itself of any and all information it could need to assist it in carrying out its regulatory functions. Finally, the EPA's statements regarding concerns over the safety of the Facility are clearly erroneous. In this situation, many of the alleged violations cited as a basis for the Termination, relate to recordkeeping and reporting, which violations had no impact on the safety of the Facility. Furthermore, all of the alleged violations that could be remedied were corrected prior to the institution of the Termination proceedings.

The EPA's Response to Petitioners' Comments regarding RDD's actions in correcting the alleged violations and otherwise contesting EPA's stated basis for termination are wholly insufficient, as they do not address the facts set forth in Petitioners' Public Comment. Instead of directly responding to the facts set forth in Petitioners' Comments, the EPA states that "although many of the violations that were the basis for the proposed termination have since been resolved

... 40 CFR 144.40 gives U.S. EPA broad discretion to terminate a permit.” It appears that the EPA had difficulty appropriately and specifically responding to Petitioners’ Comments; instead it chose to make vague statements regarding “discretion.” (Exhibit G, Comment 8). Perhaps the EPA was unable to specifically address Petitioners’ Comments because the relevant facts leading to the Termination were either not considered, or considered by the EPA in a manner that is clearly erroneous.

In summary, the EPA’s Decision to Terminate and Response to Comments are based on a clearly erroneous finding of fact that violations existed at the Facility to justify termination of the Permits. More troubling, the EPA issued its Notice of Intent to Terminate the Permits with a Fact Sheet that contained mischaracterizations of the relevant information underlying the nature, status and effect of EDS’ alleged violations. The EPA’s clear error in proceeding with Termination on unsubstantiated allegations of “fact,” despite clear evidence from RDD and EGT that all noncompliance had been previously corrected, render its decision, and its subsequent Response to Comments, as based on clearly erroneous findings of fact.

**2. EPA’s Decision to Terminate the UIC Permits is based on a clearly erroneous conclusion of law that RDD’s responses to the EPA and corrections of the alleged violations bear no significance on the Termination of the Permits or the viability of the Facility.**

The primary stated basis for the EPA’s Decision to Terminate the UIC Permits and the Response to Comments is also based on a conclusion of law which is clearly erroneous. The applicable federal regulations governing operation of the Facility, namely Section 144 and Subpart G of Section 146 of the Code of Federal Regulations, require the “owner or operator” of the Facility, to *inter alia*, provide information and keep certain records relating to the operation of the Facility, as well as maintain financial assurances and implement the required well testing. As EDS’ obligations under the Permit were, as required by regulation, discharged fully by RDD,

the owner of the Facility, then there were no substantive violations of the regulations or the Permits. While the Permits mandate that EDS discharge these obligations, the fact that the EPA ignored RDD's satisfaction of EDS' obligations in reaching its legal conclusion that cause existed to terminate the Permits demonstrates not only an inconsistency with the guiding principles of the underground injection control program, but also a clearly erroneous conclusion of law that if the Permittee itself did not meet the requirements of law, then the Facility should be shut down without regard for the owner's discharge of those requirements. This erroneous conclusion of law 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 is an artificially limited interpretation of the law surrounding the regulatory structure applied to the Facility, and is a clearly erroneous conclusion of law.

The Response to Comments provides little insight or legal support for the EPA's position that EDS' alleged violations provide cause for termination of the Permits. The Response to Petitioners' Comments regarding RDD's correction of the previous violations consisted of a general statement that EDS' past violations cast doubt on the "viability" of the Facility. (Exhibit G, Comment 8). As discussed more fully herein, the only considerations in permitting decisions are contained within 40 CFR 144 and 146, which address technical, operational and financial requirements for an underground injection facility. 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 Termination; perhaps this explains the vague statements regarding its "serious doubts" about the "viability of the facility," and the need for the "merits of the facility" to be re-evaluated, considerations which are irrelevant under the applicable regulatory scheme. (Exhibit G, Comment 8).



These overbroad statements find no basis in the applicable regulations related to the Termination decision. In fact, this language strongly suggests that the EPA considered matters and yielded to pressures well outside the legal framework set forth by the regulations for rendering its decision to terminate the Permits. For that reason, Petitioners' assert that the EPA's Termination was based on irrelevant factors that are not appropriate considerations under the relevant statutory framework, without due consideration to relevant factors, and therefore the Termination was based on a clearly erroneous conclusion of law.

**B. THE DECISION TO TERMINATE IS BASED ON AN INAPPROPRIATE EXERCISE OF DISCRETION BY THE EPA, AND IMPORTANT POLICY QUESTIONS ARE INVOLVED WHICH THE EAB, IN ITS DISCRETION, SHOULD REVIEW.**

- 1. The EPA abused its discretion in basing Termination of the Permits on violations that had been corrected, and considered inappropriate and irrelevant facts, while ignoring the relevant facts, in reaching its decision.**

The EPA's Decision to Terminate the Permits was an inappropriate exercise of discretion and a serious case of overreaching by the agency, as the violations identified in the Fact Sheet issued with the Notice of Intent to Terminate the Permits had been corrected in the months prior to the EPA issuing its Notice of Intent to Terminate Permits, as discussed in Petitioners' Public Comments. The EPA's use of its discretion to terminate the Permits despite the fact that any violations had been resolved should be reviewed by the EAB. The EPA's Response to Comments indicate a troubling abuse of its discretion. The EPA responds to Petitioners' argument by stating that "later efforts at damage control do not eliminate concerns that those violations, and EDS' abandonment of the facility create serious doubts about the viability of the facility." (Exhibit G, Comment 8). The EPA's "serious doubts" about the viability of the Facility, allegedly arising from EDS' abandonment of the Facility, are wholly subjective and

extra-discretionary, and are not issues of fact or law that are to be considered under the regulatory scheme for the underground injection control program.

In fact, the EPA has previously stated, in response to concerns about EDS' former principle's past history of environmental compliance, that:

EPA regulations at 40 C.F.R. Parts 144 and 146 state the requirements and standards that a permit applicant must meet to have a UIC permit application approved. These regulations deal primarily with the geologic siting, well engineering, operating, and monitoring standards for deep injection wells. The owner's background and the enforcement history of another site are not addressed by the UIC regulations. These issues do not impact any technical or operational requirements of the wells being permitted here.

(Exhibit H, EPA Response to Comments on EDS' Renewal Permits, dated October 18, 2004). Similarly, it is a serious abuse of the discretion vested in the EPA for the agency to now consider the actions and prior history of the former owner of the Facility, while discounting the technical and physical security and compliance of the Facility. The EPA itself admits that an individual's background or enforcement history bears no relevance to the technical or operational requirements of the wells. Therefore, the EPA's statement that EDS' actions in "abandoning" the Facility somehow raise "serious doubts" about the viability of the Facility is entirely disconnected from and is irrelevant to any issues set forth in the Fact Sheet, and demonstrates a clear abuse of discretion.

Courts will find an agency action to be an abuse of discretion and/or arbitrary and capricious

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 934 (5<sup>th</sup> Cir. 1998). The EPA's abuse of discretion in this case raises an important policy consideration regarding the level of deference accorded to the EPA's decision to terminate the Permits. A judgment or decision of an administrative agency in interpreting a regulation or statute by delegation of the Legislature is generally accorded deference by the courts. See *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This deference, however, is subject to and based on an assumption that the administrative agency uses its expertise, fully considers all relevant facts in reaching its decision or interpretation, and interprets statutes and regulations consistently. The fair measure of deference to an agency decision varies depending on the circumstances, and courts consider the degree of the agency's care, the thoroughness of the agency's consideration, its consistency, formality, and relative expertness, and the persuasiveness of the agency's position. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Further,

[t]he weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

*Id.* Importantly, while the court's deference to the agency's expertise is "significant, we may not defer to an agency decision that "is without substantial basis in fact." *Fed. Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972) (citation omitted). Petitioners respectfully submit that the EPA's Decision to Terminate was based on factors that Congress did not intend the agency to consider, and that the agency's action was inconsistent with its earlier conduct and was without a substantial basis in fact.

In this case, it appears that the EPA's Decision may have resulted more from political pressure than from a serious consideration of all relevant facts. The Honorable Representative John Dingell has waged a relentless campaign against the presence of the Facility in his

Congressional District. (Exhibit I, Correspondence and Press Releases relating to the Facility). Rep. Dingell's very public opposition to the Facility was and is not based in fact, but on a generalized discomfort with an otherwise viable and safe hazardous waste facility being located within his district. Importantly, at the time of the Termination, Rep. Dingell chaired the United States House of Representatives Committee on Energy and Commerce, which is the committee responsible for recommending certain funding for the EPA. Although Rep. Dingell's opposition has been consistent over the past several years, his new and enhanced role imparts substantial influence and pressure on the EPA. The EPA's inconsistent conduct and its failure or refusal to consider all relevant facts before reaching its Decision, coupled with Rep. Dingell's position of influence, 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. Where the EPA is unable to articulate a rational basis for its Decision, and instead rests on its discretionary powers to justify the improper Termination, the EPA's decision should not be accorded the deference normally granted by the courts, especially, as is the case here, where other considerations may have played an improper role in shaping the EPA's ultimate action.

The abuses of EPA's discretionary powers and its improper decision-making procedure, as discussed above, raise serious policy considerations that the EAB should review. While the EPA does have discretion in making permit decisions, this discretion is not unfettered, and must be exercised within the confines of the applicable regulatory scheme. The EPA's actions in this case call into question the objectivity of the EPA's procedures, and render useless the regulations and laws that empower EPA to regulate underground injection control programs. If the EPA chooses to consider issues that are not relevant to permitting under the federal regulations in this

instance, but not in others, it is improperly implementing the regulations by which the EPA is required to abide. The public has a serious interest in the consistent and objective implementation of the government's laws and regulations. The EPA's sidestepping of its responsibilities under the regulations in favor of the more politically attractive choice in this situation is an abuse of discretion that raises a serious policy consideration which the EAB should review closely.

- 2. The EPA's Decision to Terminate the UIC Permits was issued without a full and fair opportunity for public comment on all relevant factors, and the EPA's refusal to provide the public with all relevant information, after multiple requests by Petitioners to do so, is an inappropriate exercise of discretion that the EAB should review.**

The EPA failed to allow for public comment on the highly relevant fact that EDS' noncompliance issues with the conditions of the UIC Permits were rectified fully and promptly by RDD prior to the issuance of the Notice of Intent to Terminate. The EPA is required to provide a fact sheet stating the basis for the termination to the public for comment. The fact sheet was required to "briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit." 40 CFR 124.8. In this instance, the Fact Sheet omitted relevant facts directly affecting the stated basis for termination, namely that the violations identified had previously been corrected by RDD. (Exhibit E, Fact Sheet). Due to this significant omission, the public was not granted a full and fair opportunity to comment. Pursuant to 40 CFR 124.13, during the public comment period, all persons who believed that any condition of the Notice of Intent to Terminate the Permits was inappropriate were required to raise all "reasonably ascertainable issues and arguments" in support of their positions. As the Notice of Intent to Terminate the Permits was based on clearly erroneous facts, and did not address RDD's actions and interests as related to the Permits and the

Facility, the public was not given an opportunity to fully and fairly comment on and address all reasonably ascertainable issues surrounding the EPA's decision to terminate the Permits, including the fact that the violations identified in the Fact Sheet had been corrected.

EPA's Notice of Intent to Terminate the Permits artificially avoided consideration of the actual and thoroughly documented efforts of RDD in responding to the EPA's requests for information by narrowly propounding a technical legal position, namely, that EDS is the permittee for all purposes until EPA approves a transfer or takes other action with respect to the permit. This position incorrectly permitted the EPA (and forced the public) to review EDS' conduct in a vacuum, and to ignore the reality of the unique and difficult circumstances surrounding transfer of the Facility's operations to RDD and the subsequent efforts of RDD at the Facility. Therefore, the public was not provided an opportunity to raise all reasonably ascertainable issues and arguments in support of their positions as required by 40 CFR 124.13. Due to the EPA's failure to follow the applicable regulatory procedures for public participation, the EPA's Decision to Terminate was based on an inappropriate exercise of discretion that involves the important policy consideration of public participation in the administrative process.

In light of EPA's continued misrepresentation that EDS' violations had not been corrected, and Petitioners' concerns that all relevant facts were not being considered, Petitioners submitted a request to the EPA to re-open or extend the comment period under 40 CFR 124.14 on September 11, 2007. (Exhibit D, Request to Re-Open and/or Extend the Public Comment Period, exhibits omitted). On October 22, 2007, the EPA denied Petitioners' Request, stating that it did not "believe this is necessary to expedite or improve the decisionmaking process." (Exhibit G, p. 9-10). The EPA stated that "a number" of public comments indicate awareness of RDD's role at the Facility, but that the comments nonetheless supported termination of the

Permits. This "belief" that it was unnecessary to provide the public with the factual information relating to RDD's correction of the violations identified in the Fact Sheet is an inappropriate exercise of discretion. Whether or not the public was aware of RDD's "role," they were not made aware that the very violations on which EPA rested its Notice of Intent to Terminate had in fact been corrected. The EPA allowed the public to believe this false information 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 extend the public comment period. Instead of allowing the public a full and fair opportunity to comment on all relevant facts relating to termination, the EPA refused, merely stating that "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 the decisionmaking process." (Exhibit G, p.10).

It is difficult to understand the EPA's discretionary decision that providing the public with corrected information relating to the violations described in the Fact Sheet issued to the public would not add to the quality or comprehensiveness of the decision-making process. This response "offers no insight into the Region's thinking," and appears to be an attempt to gloss over serious inconsistencies and inaccuracies in the information the public was provided on the Notice of Intent to Terminate. *In re: Chem. Waste Mgmt. of Ind., Inc.*, 1995 EPA App. Lexis 31, 25-26 (EAB 1995). Not only was this refusal violative of the regulatory structure surrounding public participation in permitting decisions, but it once again demonstrates how the EPA's mandate to serve the public and appropriately implement the federal regulations was trumped by its desire to make the more politically attractive choice of termination.

In sum, this exercise of discretion circumvented the regulatory structure relating to public participation in the permitting process. The EPA received a number of comments prior to the

expiration of the comment period on June 22, 2007, the vast majority of which did not address RDD's role at the Facility, and none of which addressed the fact that RDD had discharged EDS' obligations under the Permits (excepting Petitioners' and EGT's comments). The limited nature of these comments are due to the very limited facts set forth in the EPA's Notice of Intent to Terminate the Permits and the supporting Fact Sheet. (Exhibit J, Public Comments). In light of the strong policy towards full and fair public participation in the permitting process, the EPA's exercise of discretion in circumventing this policy should be reviewed closely by the EAB.

**3. The EPA's Decision to Terminate was an inappropriate exercise of discretion in light of the EPA's previous actions and conduct relating to RDD's role at the Facility prior to Termination.**

The EPA's questionable exercise of discretion in terminating the Permits after months of conduct directly inconsistent with the statements set forth in the Fact Sheet and the Response to Comments should be reviewed by the EAB. Petitioners argued in their Public Comment that the EPA has consistently acted toward RDD as if it were the "de facto" permittee, and that the EPA's position supporting its Termination decision that only EDS could have remedied the alleged violations is inconsistent with the manner in which the EPA has conducted itself over the past eleven months. The EPA repeatedly and continuously communicated directly with RDD regarding RDD's discharge of permit specific requirements and obligations and permit compliance, treating RDD, in all respects, as the "de facto" permittee. Then, without warning or a clear rationale, the EPA issued a Notice of Intent to Terminate the very same Permits because **EDS** did not perform the work EPA coordinated with **RDD**. The EPA argues that it was well within its discretion to terminate the Permits without consideration of RDD's role as the "de facto" permittee, because, without factual support and despite knowledge to the contrary, EDS "abandoned" the Facility. This position of the EPA is wholly inconsistent with its actions and



statements over the past ten months, and the EPA's selective ignorance of relevant facts is an exercise of discretion that the EAB should review.

The Decision to Terminate and Response to Comments completely discounts RDD's actions and direct involvement with the EPA, and EPA's own conduct toward RDD during the months leading up to the Termination. The EPA acknowledges only that "RDD has taken steps to address operational issues at the Facility," without identifying or giving due consideration to the depth and extent of RDD's involvement. (Exhibit G, Comment 9). It is an inappropriate exercise of discretion for the EPA to discount its own conduct that led RDD, in part, to expend over \$2,000,000.00 in reliance on the EPA's treatment of RDD as the "de facto permittee." That conduct included the EPA requiring RDD to provide information and take actions on behalf of EDS, using as a carrot the possibility of a permit transfer. RDD relied, to its clear detriment, on the EPA's conduct and statements, and worked to satisfy all requests for information and other actions. The EPA continued this course of conduct throughout June, July and August of 2007, taking actions that affirmatively communicated that the EPA considered RDD as the "de facto" permittee, including requiring RDD to seek approval for and perform the well-killing procedure, on-site visits during which the EPA engaged RDD as if it were the permittee, and the acceptance of information updates required under the Permits. The EPA did not object to the receipt of this information and never once objected to RDD's actions and expenditures at the Facility in the stead of EDS. After the Termination of the Permits, the EPA merely acknowledged that RDD "provided certain responses and records" and "has taken steps to address operational issues at the facility," and yet cites its "broad discretion" to terminate the Permits anyway. The EPA does not respond to RDD's assertion that the EPA's actions toward RDD as the "de facto" permittee were wholly inconsistent with the termination of the Permits and the selective ignorance of RDD's

discharge of EDS' obligations on which the Termination was based. (Exhibit G. Comment 8 and 9).

The EPA's "selective memory" is also apparent as it relates to the circumstances surrounding the transfer of the Facility to RDD. The EPA places emphasis on its claim that EDS "abandoned" its interest in the Facility, stating that "this level of disregard for [EDS'] regulatory obligations warrants severe sanctions against the permittee." (Exhibit G, Comment 12). The statement that EDS "abandoned" the Facility is disingenuous in light of EPA's knowledge of the actual circumstances under which RDD took control of the Facility. Contrary to the EPA's assertion that EDS "abandoned" the Facility, Petitioners, out of a 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 from EDS and essentially performed 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. The EPA was fully aware of RDD's role at the Facility, and there is no basis for the statement that EDS "abandoned" the Facility. At no time was the Facility left unsecured. Indeed, RDD should be applauded and rewarded for stepping in promptly and at a significant cost to remedy the very compliance issues EPA now claim impaired its ability to discharge its regulated functions. 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.

Moreover, termination of the UIC Permits does not "severely sanction" EDS in any manner. EDS has been removed as the operator of the Facility, and has had no role at the Facility whatsoever for over a year. Termination of the UIC Permits does not punish EDS at all.

Rather, the Termination works a hardship on the PFRS, the men and women who are beneficiaries of the PFRS and the very people who took immediate and decisive action to secure the Facility when EDS could no longer do so.

The EPA's inconsistent conduct, selective emphasis on some facts and ignorance of others, and failure to follow the applicable regulatory scheme calls into question the objectivity of the agency. Therefore, Termination of the Permits on the EPA's stated basis was a clear abuse of discretion that should be reviewed by the EAB.

**4. The EPA's Decision to Terminate was issued without consideration of the completed Transfer Request filed on February 28, 2007. The EPA's abuse of discretion in refusing to consider this Transfer Request merits review by the EAB.**

As argued in Petitioners' Public Comment (Exhibit A, pp. 40-43), the EPA abused its discretion in refusing to consider EDS, EGT and RDD's request to the EPA to transfer the Permits to EGT prior to the Termination of the Permits. EPA's decision to hold the Transfer Request in abeyance is entirely arbitrary, contrary to law, places RDD and EGT in an untenable position with respect to continued permit compliance and underscores the need for the EAB to review this matter.

On February 28, 2007, and through subsequent submissions at the direction of the EPA, RDD, EGT and EDS submitted a request for transfer of the UIC Permits from EDS to EGT (the "Transfer Request") to the EPA, pursuant to 40 CFR 144.41. (Exhibit A, Petitioners' Public Comments, Exhibit 21, Transfer Application Package, Exhibit 26, March 19, 2007 Electronic Mail from counsel for RDD to the EPA, Exhibit 27, March 26, 2007 Letter from RDD to the EPA, Exhibit 28, April 12, 2007 Letter from RDD to the EPA). In all material respects, RDD and EGT provided the documentation necessary for EPA to review the Transfer Request, including the provision of documents which were specifically drafted or modified at the direction

of EPA. During the entire period that RDD and EGT were working with the EPA to finalize the permit Transfer Request (even within two weeks of the Notice of Intent to Terminate), there was never any mention or indication that EPA would not promptly act on this request and/or take any action with respect to the Permits. In fact, RDD and EGT were relying on the conduct of and positive feedback from EPA in continuing to press forward with the Transfer Request and expending capital to meet all permit conditions. However, on April 12, 2007 and by correspondence of the same date, RDD and EGT were informed that EPA would not consider or process the Transfer Request in light of EPA's intent to terminate the UIC Permits. (Exhibit A, Petitioners' Public Comment, Exhibit 33, EPA Correspondence to RDD and EGT).

EPA's decision not to act on the Transfer Request is not supported by relevant factors related to operation of the facility and ignores the completeness of the Transfer Request. First, since November of 2006, RDD has complied with all of the applicable Permit conditions. Specifically, RDD has conducted temperature log testing, mechanical integrity testing, ambient reservoir pressure testing and ensured the operation of the continuous monitoring system, all of which confirmed the mechanical integrity of the wells. EGT has, among other things, provided required staffing, including the hiring of a highly qualified deep well operator who is on site on a full time basis. Second, EGT is a highly capable and qualified operator. EGT provided the EPA with significant information regarding its qualifications to operate the facility. Additionally, EGT provided a complete demonstration of financial responsibility as required by the applicable regulations. Third, RDD and EGT have demonstrated a financial and operational commitment to ensuring the safe operation of the wells. Given that the mechanical integrity of the wells has never been brought into question, the wells remain structurally and functionally sound and pose no risk to public health or the environment, and that EGT stands ready, willing and able to

assume operations of the Facility, there was no basis for terminating the permits or delaying the processing of the permit Transfer Request.

The EPA's decision to delay the processing of the Transfer Request involved an inappropriate exercise of discretion, ignoring the guiding principles of the underground injection control program and leaving RDD in limbo with respect to on-going operations at the Facility. The EPA's response to this assertion set forth in the Petitioners' Public Comment merely states that it considered this action to be an "appropriate exercise of discretion," and that it considers its approach to be "logical." Further, the EPA states that it gave Petitioners' Comments on this issue "serious consideration." Demonstration of this "serious consideration," however, is lacking in the administrative record. The administrative record must reflect the "considered judgment" necessary to support the EPA's permit determination. *In re GSX Services of South Carolina, Inc.*, 4 E.A.D. 451, 454 (EAB 1992). The EPA did not consider the effect of its conduct and the importance it had placed on the submission of the Transfer Request throughout the months leading to termination in reaching this decision. Furthermore, it failed to consider how its actions placed RDD in the untenable position of being required to continue to meet the permit obligations, in some cases at the direction of EPA, despite the fact that the Permits were in fact terminated. Moreover, the delay in acting on the Transfer Request cost RDD considerable funds in meeting the on-going and necessary operating expenses of the Facility. The EPA had a valid request to transfer the Permits which was submitted in compliance with applicable law, and it was incumbent on EPA to act on this request. Instead of following the applicable regulatory procedures for consideration of transfer requests, the EPA opted for the most drastic option, essentially denying RDD and EGT's request without giving it due consideration. The exercise of its discretion to Terminate is abusive in light of the EPA's conduct toward RDD in the months

prior to the termination, and demonstrates a lack of serious consideration of the more viable alternative of transferring the Permits.

Finally, the EPA's decision to terminate instead of considering the Transfer Request lacks evidence of "serious consideration," because acting on the Transfer Request would have been more consistent with the regulatory scheme set forth in the federal rules than termination, as argued in Petitioners' Public Comments. EPA chose instead to take the more politically attractive option by terminating the permits and ignoring the lawful and complete request to transfer the UIC Permits to EGT. In this case, termination of the UIC Permits was the most costly and inefficient option, and it placed an unfair risk and burden on the Petitioners. Instead of focusing on punishing EDS, and especially in light of RDD's correction of the violations identified in the Fact Sheet, the EPA's inquiry should have been focused on ensuring that a qualified operator was in place at the Facility. It is always within the EPA's discretion to conclude that a less drastic permit action would be more appropriate than the most severe. *See In re Waste Technologies Industries*, 1995 EPA App. Lexis 8 (EAB 1995). Further, "less resource-intensive enforcement mechanisms would often make more sense than a full scale effort to close down a permitted facility." *Id.*, at 39-40. Importantly, the EAB has warned against inappropriate use of scarce enforcement resources by the EPA, stating that scarce resources alone in most cases should prevent the Director from reading the termination causes too broadly, particularly in cases where the violations are "trivial." *In re Waste Technologies Industries*, *supra*. In this situation, many of the alleged violations related to recordkeeping and reporting, while not "trivial," had little to no impact on the safety of the Facility. Furthermore, the alleged violations were corrected prior to the institution of the termination proceedings. In light of the circumstances surrounding the Notice of Intent to Terminate (with the request for transfer by a

new operator currently pending before the Administrator), it was an inappropriate exercise of this discretion to place undue consideration on past (and rectified) violations of a prior operator in processing the request for transfer.

Rather than Termination, the EPA should have focused on the end goal of securing an appropriate operator for the Facility in a manner consistent with the general principles underlying the regulatory scheme for the underground injection control program. To that end, it was an abuse of discretion for the EPA to refuse consideration of the valid Transfer Request prior to terminating the Permits. This abuse of discretion highlights important policy considerations relating to the EPA's ability to properly administer the underground injection control program. Unfortunately, in this instance, the guiding principles of the underground injection control program and the EPA's mandate to protect the health and safety of the public were rendered subservient to the EPA's goal of reaching a politically attractive outcome at Petitioners,' and the public's expense.

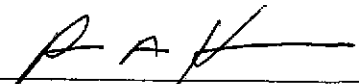
**CONCLUSION AND RELIEF REQUESTED**

For the reasons stated above, the Petitioners respectfully request that the EAB grant review of the Decision to Terminate and remand the Termination to the EPA for alternative action, including consideration of EDS, RDD and EGT's Transfer Request and a minor modification transferring the UIC Permits to EGT, or a revocation and reissuance of the UIC Permits to EGT, with additional or alternative conditions as the EPA finds appropriate.

Respectfully submitted,

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