

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
PEOPLE OF THE STATE OF ILLINOIS**

STATE OF ILLINOIS)	
Complainant,)	
v.)	PCB No. 07-95
)	(Enforcement)
AET ENVIRONMENTAL, INC., and)	
E.O.R. ENERGY, LLC,)	
Respondents.)	

NOTICE OF RESPONSE AND ELECTRONIC FILING

ALL PARTIES PLEASE TAKE NOTICE that on March 18, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, the following **Certificate of Filing and Service and EOR's Response to Illinois' Motion to Strike EOR's Motion to Reconsider**, a copy of which is attached hereto and herewith served upon you.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I did on March 18, 2013, e-file with the Clerk, and on same date did send by e-mail and First Class U.S. Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box, a true and correct copy of this document and the following **RESPONSE**, as counsel for **EOR Energy**, to the following persons by the method and at the address indicated:

SERVICE LIST

E-Filed with:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph - Suite 11-500
Chicago, Illinois 60601

Served By U.S. Mail and E-Mail On:

State of Illinois - IEPA c/o Mr. Michael Mankowski, Esq. Assistant Attorney General 500 South Second Street Springfield, Illinois 62706	AET Environmental, Inc. c/o Felipe Gomez, Esq. 116 S. Western Ave. - # 12319 Chicago, IL 60612-2319 312-399-3966 <i>gomzfngl@netscape.net</i>	Hearing Officer C. Webb IPCB 1021 N. Grand Avenue East Springfield, IL 62794
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Dated: 3/18/13

Respectfully submitted,

s/: *Felipe Gomez, Esq.*

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EOR ENERGY LLC RESPONSE TO ILLINOIS' MOTION TO STRIKE
FEBRUARY 19, 2013, EOR MOTION FOR RECONSIDERATION

NOW COMES CO-RESPONDENT E.O.R. ENERGY, LLC, (hereinafter "EOR") by and through undersigned counsel of record, hereby files this **Response to Illinois' February 26, 2013, Motion to Strike EOR's February 19, 2013, Motion to Reconsider the Illinois Pollution Control Board's ("Board" or "IPCB") January 10, 2013, Order**. EOR states the following in response to the Motion to Strike and requests that the Motion be denied.

I. Summary of Motion to Strike

Paragraphs 1 through 6 of the February 26, 2013, Motion to Strike accurately recite a brief procedural history, from the March 20, 2007, complaint to the October 18, 2012 EOR Motion to Reconsider the September 6, 2012 IPCB Order granting the June 27, 2012, Motion for Summary Judgment. *2/26/13 Motion at 1-2, paras. 1-6.*

Next, while paragraph 7 correctly reflects that the IPCB made (new) jurisdictional findings on January 10, 2013, the Motion neglects to mention that the January 10, 2013, IPCB Order in fact granted the October 18, 2012 EOR Motion to Reconsider (which, as discussed below, is one primary reason the motion to strike is inappropriate and must be denied).¹ *Id. at para. 7; 1/10/13 IPCB Order at 1.*

Finally, getting to the State's argument, despite expressly acknowledging that the February 19, 2013 EOR Motion is directed at the January 10, 2013 Order, the State nonetheless alleges the

¹The IPCB stated "After analyzing all filings, the Board grants EOR's motion to reconsider...". *1/10/13 IPCB Order at 1.*

Motion is an “improper...second post judgment motion” that must be stricken. *2/26/12 Motion at 2, paras. 8-9.*

In support, the State first asserts that asserts that the IPCB should apply Illinois Supreme Court Rule (“SCR”) 274 as the basis for striking the Motion, despite acknowledging that 35 IAC 101.100 specifically provides that the Illinois Supreme Court rules do not apply to IPCB proceedings, but are optional guidance for the Board where there is no procedure as to the issue at hand. *Id. at 2, para. 10.*

Next, after reciting SCR 274, the State asserts that the September 6, 2012, Order was a “final order”, and (again) acknowledges that EOR's first October 18, 2012, Motion to Reconsider was directed at that order. *Id. at 3, paras. 11-13.* The State then claims that the January 10, 2013, Order only “reaffirmed” its September 6, 2012, Order, and that it “did not modify” the prior order in any way (other than adjusting the penalty payment schedule and attempting (unsuccessfully) to create a new due date). *Id. at para. 14.*

According to the State, since the Board's January 10, 2013 Order, was not a “modified final judgment” under the “plain language” of SCR 274, EOR could not file a post judgment motion claiming that the IPCB erred at law and asking that the IPCB reconsider the subsequent order. *Id. at para. 15.* The State cites *People v Petco Petroleum Corp.*, 363 Ill App 3d 613 (4th Dist. 2006) for its sole case in support of its plea that, since the February 19, 2012 is “a second attempt to file a post judgment motion challenging the Board's September 6, 2012, final order”, the Motion “is void as a matter of law and must be stricken” per 35 IAC 520 and SCR 274. *2/26/13 Motion at 3, paras. 15-18.*

II. EOR Response

A. 35 IAC 520: Does Not Prohibit or Allow Striking of Motion to Reconsider, Not Basis for Relief Requested

Initially, EOR notes that 35 IAC 520 only provides a deadline for filing of motions to reconsider within 35 days of a “final” order, but does not provide for motions to strike, or set any bar on filing,

successive motions to reconsider by a party directed against successive and distinct rulings.² Thus, given that the State does not claim the Motion to Reconsider was untimely, this provision on its face does not support the State's argument or request for relief, leaving the State to rely solely on SCR 274 and the single case cited in support of the Motion to Strike.

B. SCR 274: State Ignores Plain Language Allowing One Motion For Each Order

SCR 274 states:

"Rule 274. Multiple Final Orders and Postjudgment Motions: A party may make only one postjudgment motion directed at a judgment order that is otherwise final. If a final judgment order is modified pursuant to a postjudgment motion, or if a different final judgment or order is subsequently entered, any party affected by the order may make one postjudgment motion directed at the superseding judgment or order. Until disposed, each timely postjudgment motion shall toll the finality and appealability of the judgment or order at which it is directed. The pendency of a Rule 137 claim does not affect the time in which postjudgment motions directed at final underlying judgments or orders must be filed, but may toll the appealability of the judgment under Rule 303(a)(1). A postjudgment motion directed at a final order on a Rule 137 claim is also subject to this rule." (Adopted October 14, 2005). (Emphasis Added)

The Committee Comments add:

"New Rule 274 clarifies the status of successive (superseding) final judgments, and of postjudgment motions directed at each final judgment, allowing one such motion per party per final judgment. Rule 274 further clarifies that a timely postjudgment motion directed at any final judgment, including a later superseding judgment, tolls the appeal time. See Rule 303. Rule 274 codifies Gibson v. Belvidere National Bank & Trust Co., 326 Ill. App. 3d 45 (2002), appeal denied, 198 Ill.2d 614 (2002)..." (January 1, 2006). (Emphasis Added)

Based on the plain reading of SCR 274 (see underlined text above) in conjunction with the Notes thereto, a party is allowed one motion per each "different...order subsequently entered", regardless of whether the subsequent order "modified" the prior order or not.³ SCR 274. There is no dispute

²EOR notes that, assuming SCR 304 applied here in addition to SCR 274, there would be a potentially major issue as to whether either of the two EOR orders were "final" for purposes of appeal (and thus also for reconsideration), given that SCR 304 and the Illinois Supreme Court, with few exceptions, prohibit appeals and considers preceding orders "interlocutory" (and appealable only with permission of both trial and appellate courts), until judgment has been entered against all parties resolving all issues, thus rendering the matter and orders therein "final". SCR 304.

³"Modify" is defined by Websters' as either: "to make minor changes in" or "to make basic or fundamental changes...". <http://www.merriam-webster.com/dictionary/modify>. Thus, even the change in payment terms (from one date certain in the first order to no date certain in the second), would qualify as

that there are two “different” orders here, thus according to SCR 274 (and assuming that SCR 274 applied here), EOR’s February 19, 2013, Motion, directed at the subsequent, and decidedly different, 2013 Order, is entirely appropriate, and the Motion is without basis and must be denied based on the very provision it cites in support.

C. Caselaw: *People v Petco Petroleum*, 641 N.E. 2d 1065, Does Not Support Motion

Only a single case is cited by the State for proposition that under SCR 274, the January 10, 2013, Order was “not modified final judgement” in relation to the prior order. *People v Petco Petroleum*, 641 N.E. 2d 1065 (4th Dist. 2006)(SDWA 62 IAC 240 Oil Spill Case). *Motion at para. 15*. However, that case did not involve a motion to strike a motion to reconsider under SCR 274, but rather affirmatively found that SCR 274 applied retroactively to toll the time to appeal where there are a succession of orders and motions to reconsider, and thus does not support the State’s proposition. Furthermore, as noted by the Committee Notes, SCR 274 codified the *Gibson* case cited by the *Petco* court (*Gibson v. Belvidere Nat’l Bank and Trust Co.*, 326 Ill. App. 3d 45, 759 N.E.2d 991 (2d Dist. 2002)) and, unfortunately for the State, that case clearly indicates that SCR 274 was not violated here.

D. *Gibson v. Belvidere Nat’l Bank and Trust Co.*, 326 Ill. App. 3d 45, 759 N.E.2d 991 (2d Dist. 2002), Supports EOR’s Filing of Motion to Reconsider

According to the Illinois Supreme Court, per the Second District Appellate Court in *Gibson*, since the IPCB in fact granted EOR’s October 18, 2012, Motion to Reconsider the initial September 6, 2012, Order, the IPCB itself rendered that order “non-final”.⁴ *Gibson v. Belvidere Nat’l Bank and Trust Co.*, 326 Ill. App. 3d 45, 759 N.E.2d 991 (2d Dist. 2002). The legal and procedural effects of the *Gibson* case, the granting of a motion to reconsider, and SCR 274, were discussed in the

a “modification” under the plain English test, let alone the fact that the second order contains jurisdictional rationale and findings under the SDWA/225 ILSC 725 not espoused in the first order.

⁴The *Gibson* Court stated: “There are at least three alternative dispositions that can arise when the court rules upon a postjudgment motion under Supreme Court Rule 303. First, the motion may be denied and the final judgment remains intact. Second, the motion may be granted and the final judgment ceases to exist and a new final judgment arises. Third, the motion may be granted and the judgment is vacated and a new trial is ordered. (Emphasis Added). *Gibson* at

following excerpt from a 2008 article from Attorney Michael Otto of Jenner & Block:

“Before 2001, Illinois reviewing courts had consistently held that a successive post judgment motion would not toll the period within which a notice of appeal must be filed. See, e.g., *Sears v. Sears*, 85 Ill. 2d 253, 422 N.E.2d 610 (1981); *Bernhauser v. Glen Ellyn Dodge, Inc.*, 288 Ill. App. 3d 984, 683 N.E.2d 1194 (2d Dist. 1997). This rule was based on concerns of finality and the equitable consideration that a party could not be permitted to stave off an appeal indefinitely by filing repeated post-trial motions. *Sears*, 85 Ill. 2d at 259, 422 N.E. 2d at 613.

Several decisions by the Illinois appellate court recognized a limited exception to this rule when an order disposing of a post judgment motion granted new or additional relief against a party. The appellate court reasoned that if the trial court changed its result or its rationale in disposing of a post judgment motion, the parties should be permitted to file post judgment motions raising arguments that they could not previously have raised—thus permitting successive post judgment motions to challenge a new result or new rationale. See, e.g., *Jeanblanc v. Mellott*, 152 Ill. App.3d 801, 809-10, 504 N.E.2d 990, 995-96 (2d Dist. 1987); *Aetna Life Insurance Co. v. H.W. Stout & Associates, Inc.*, 112 Ill. App.3d 570, 575-76, 445 N.E.2d 1288, 1292 (5th Dist. 1983); *In re Marriage of Viehman*, 91 Ill. App. 3d 315, 317-20, 414 N.E.2d 853, 855-57 (5th Dist. 1980).

However, the validity of this exception was unclear. The issue involved interpretation and application of Illinois Supreme Court Rule 303, and the Illinois Supreme Court—which has sole and exclusive rulemaking authority regarding the Illinois judicial system (see Ill. Const. 1970 art. VI sec. 16; *Best v. Taylor Mach. Works*, 179 Ill.2d 367, 438 (1997)) – never recognized or endorsed this doctrine. See J. Torshen & A. Spreyer, *Post-Trial Motions in Illinois Civil Practice* § 14.29, at 14–11 (Ill. Inst. For Cont. Legal Educ. 1997).

...The appellate court changed direction in *Gibson v. Belvidere National Bank and Trust Company*, 326 Ill. App. 3d 45, 759 N.E.2d 991 (2d Dist. 2001). There, the trial court entered judgment on April 25, 2000. Both parties filed timely post judgment motions, and the court disposed of all pending post judgment motions on May 12 (granting both motions in part). On May 18, the defendants filed a motion to reconsider the May 12 order, which the trial court denied on June 19. The defendants filed their notice of appeal on June 26—well within 30 days after the June 19 denial of the motion to reconsider, but more than 30 days after the May 12 ruling on the initial post judgment motions. *Gibson*, 326 Ill. App. 3d at 47, 759 N.E.2d at 993-94.

Gibson did not fall within the exception previously recognized when successive post judgment motions raised arguments that could not previously have been raised. According to the court, the issues raised by the defendants in their second post trial motion could have been raised in their first post trial motion—and in fact one issue was raised in both post trial motions. *Gibson*, 326 Ill. App.3d at 49-50, 759 N.E.2d at 995.

However, the court nonetheless found that it had jurisdiction, reasoning that when a trial court grants a post judgment motion, the previous “final judgment” ceases to exist and a new “final judgment” comes into being. Thus, on May 12, the final judgment entered on April 25 ceased to be, and the May 12 order became a new “final judgment.” Consequently, “because the second post judgment motion addressed a new final judgment, the clock was reset and the time to file a notice of appeal started again.” *Gibson*, 326 Ill. App. 3d at 48-49, 759 N.E.2d at 994-95...The Illinois Supreme Court...later adopted the *Gibson* majority’s holding as Illinois Supreme Court Rule 274. See 202 Ill. 2d. R. 274, Committee Comments (Jan 1, 2006).” (Emphasis Added). *Protecting the Right to Appeal, Successive Post Judgment Motions Under Rules 274 & 303 By Michael F. Otto (Jenner & Block) 34 June/July 2008.*

In our case, the IPCB expressly granted the motion to reconsider, stating “After analyzing all filings, the Board grants EOR’s motion to reconsider... “. *1/10/13 IPCB Order at 1*. Consequently, under *Gibson* and SCR 274, the September 6, 2012, Order was in fact superseded by the January 10, 2013, and the February 19, 2013, EOR Motion to Reconsider the January 10, 2013, Order is in fact consistent with SCR 274 and Illinois’ rules of civil procedure.

E. Orders Are Obviously Different

Finally, as noted above, the 2 orders are obviously quite different, and the second order contains additional jurisdictional rationale not present in the prior order, as there is no mention of the SDWA, the Class II-UIC SDWA permitted status of the EOR wells, or Class II fluids in the first order. Thus, it is consistent with SCR 274 to request, for the first time, that the IPCB reconsider, *inter alia*, its newly expressed (but statutorily prohibited) January 10, 2013 foray into interpretation of the SDWA, and the IPCB’s erroneous and prohibited determination of what is, or is not, a Class II fluid under the SDWA (as codified at 225 ILCS 725).

III. Conclusion

In summary, according to *Gibson* and SCR 274, EOR is entitled to one motion per order, there are 2 quite different orders, the IPCB granted EOR’s first Motion, thus the instant Motion to Reconsider is consistent with *Gibson* and SCR 274 as well as 35 IAC 100 et seq.

* * *

WHEREFORE EOR REQUESTS THE MOTION TO STRIKE BE DENIED, and that the Board award AET its costs and fees.

Dated: **3/18/13**

Respectfully submitted For AET By:

s/: *Felipe Gomez, Esq.*

Felipe Gomez, Esq.