

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

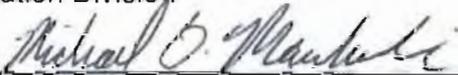
PLEASE TAKE NOTICE that on June 27, 2012, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, a MOTION FOR SUMMARY JUDGMENT AGAINST AET ENVIRONMENTAL, INC., a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,  
Attorney General of the  
State of Illinois

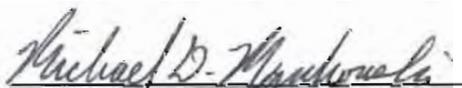
MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

BY:   
Michael D. Mankowski  
Assistant Attorney General  
Environmental Bureau

500 South Second Street  
Springfield, Illinois 62706  
217/782-9031  
Dated: June 27, 2012

**CERTIFICATE OF SERVICE**

I hereby certify that I did on June 27, 2012, cause to be served by <sup>Certified MC</sup> ~~First Class~~ Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and MOTION FOR SUMMARY JUDGMENT AGAINST AET ENVIRONMENTAL, INC., upon the persons listed on the Service List.



Michael D. Mankowski  
Assistant Attorney General

This filing is submitted on recycled paper.

**SERVICE LIST**

Lori M. Devito  
AET Environmental, Inc.  
14 Lakeside Lane  
Denver, CO 80212



October 18, 2007, David S. O'Neill filed an Answer to the Complaint on behalf of the Respondent. The October 18, 2007 Answer pleaded no affirmative defenses. On January 24, 2008, David S. O'Neill, filed a motion to withdraw his appearance on behalf of AET. On March 19, 2008, Complainant served Respondent with Complainant's Request to Admit Facts. On April 22, 2008, Lori DeVito improperly filed an appearance on behalf of Respondent. On April 22, 2008, no attorney had filed an appearance on behalf of Respondent. Therefore, Respondent was unrepresented by an attorney before the Board. On April 22, 2008, Respondent filed an unsworn Answer to the Complainant's Complaint, which was actually an attempt at answering Complainant's Request to Admit Facts. The Answer to the Complainant's Complaint was signed by Lori Devito. From January 24, 2008, through February 18, 2009, AET was not represented by an attorney. On February 18, 2009, Diane O'Neill filed an appearance on behalf of AET. On March 15, 2010, Diane O'Neill filed a motion to withdraw her appearance on behalf of AET. Respondent is currently unrepresented before the Board.

On August 17, 2010, Complainant filed a Motion to Deem Facts Admitted by AET. Complainant's Motion to Deem Facts Admitted by AET asked the Board to deem admitted all of the facts listed in Complainant's Request to Admit Facts by AET. On September 16, 2010, the Board granted Complainant's Motion to Deem Facts Admitted. *People v. AET Environmental, Inc. and E.O.R. Energy LLC.*, PCB 07-95 slip op. at 3 (September 16, 2010). As such, all of the matters of fact included in Complainant's Motion to Deem Facts Admitted are taken as admitted. *Id.* Complainant's Request to Admit Facts by AET is attached to and incorporated by reference into this motion as Exhibit A ("Exhibit A" or "Complainant's Request to Admit Facts by AET").

The Respondent's admissions, together with the affidavit and exhibits supporting this motion, contain all material facts necessary to establish liability on Count I of the Complaint and Complainant's entitlement to penalties. Accordingly, since there is no genuine issue of material fact, Complainant is entitled to judgment as a matter of law.

## **II. LEGAL STANDARD FOR SUMMARY JUDGMENT**

Section 101.516(b) of the Board's Procedural regulations, 35 Ill. Adm. Code 101.516(b), provides as follows:

- b) If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment.

Summary judgment is appropriate when the pleadings, deposition, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 35 Ill. Adm. Code 101.516(b); see *Dowd & Dowd Ltd. v. Gleason*, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). A genuine issue of material fact exists when "the material facts are disputed, or, if [they] are undisputed, reasonable persons might draw different inferences from the undisputed facts." *Adames v. Sheahan*, 233 Ill. 2d 276, 296, 909 N.E.2d 742, 754 (2009).

When ruling on a motion for summary judgment, the facts "must be construed strictly against the movant and liberally in favor of the opponent." *Id.*, 233 Ill. 2d at 295-96, 909 N.E. 2d at 754. A party opposing a motion for summary judgment may not rest on his pleadings, but must "present a factual basis which would arguably entitle [him] to judgment." *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994). However, summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to relief, based on all the evidence contained in the filings, is "clear and free from doubt." *Dowd*, 181 Ill. at 483, 693 N.E.2d at 370, citing *Purtill v. Hess*, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986).

## **III. BURDEN OF PROOF**

Section 31(e) of the Act, states the burden of proof applicable to enforcement

proceedings before the Board:

- (e) In hearings before the Board under this Title the burden shall be on the Agency or other complainant to show either that the respondent has caused or threatened to cause air or water pollution or that the respondent has violated or threatens to violate any provision of this Act or any rule or regulation of the Board or permit or term or condition thereof. If such proof has been made, the burden shall be on the respondent to show that compliance with the Board's regulations would impose an arbitrary or unreasonable hardship.

415 ILCS 5/31(e) (2010). The Board may only find in the State's favor if it has proven each element of the claim by a preponderance of the evidence. *People v. Chalmers*, PCB 96-111, slip op. at 4 (Jan. 6, 2000); *Processing and Books, Inc. v. PCB*, 64 Ill. 2d 68, 75-76, 351 N.E.2d 865 (1976); *Village of South Elgin v. Waste Management of Illinois, Inc.*, PCB 03-106 (Feb. 20, 2003); citing *People v. Fosnock*, PCB 41-1, slip op. at 19 (Sept. 15, 1994). A proposition is proved by a preponderance of the evidence when it is probably more true than not. *Village of South Elgin*, slip op. at 19; citing *Nelson v. Kane County Forest Preserve*, PCB 94-244 (July 18, 1996).

#### **IV. ISSUE**

The issue before the Board is whether AET violated Section 21(e) of the Act, 415 ILCS 5/21(e) (2004). More specifically, whether AET transported any waste into the State of Illinois for disposal, treatment, storage or abandonment, at a site or facility which does not meet the requirements of the Act and of regulations and standards thereunder.

#### **V. SUMMARY OF THE RELIEF SOUGHT BY COMPLAINANT**

Complainant seeks a finding of liability by AET on Count I of the Complaint, and assessment of a civil penalty in the amount of \$60,000. Complainant also requests that the Board order Respondent to cease and desist from future violations of the Act and Illinois Pollution Control Board regulations.

## **VI. FACTUAL BACKGROUND**

SOURCE ENVIRONMENTAL, INC., is a Colorado corporation in good standing and registered with the Colorado Secretary of State to conduct business under the trade name of AET ENVIRONMENTAL, INC. ("AET").<sup>1</sup> AET is a hazardous waste broker which handles the logistics of transportation, storage, and disposal for companies that generate hazardous waste.<sup>2</sup> Lori Devito is the current owner of AET and was the owner of AET during the months of July and August in the year 2002.<sup>3</sup>

In the year 2002, a company known as Luxury Wheels, located in Grand Junction, Colorado, was engaged in the production of custom chrome automobile wheels.<sup>4</sup> Part of Luxury Wheels' business included the chrome plating of aluminum automobile wheels.<sup>5</sup> On or about July 15, 2002, the Grand Junction Fire Department ("GJFD") responded to an emergency response incident at Luxury Wheels.<sup>6</sup> This incident was recorded in an incident report, a certified copy of which has been attached to and incorporated by reference into this motion as Exhibit B ("Exhibit B" or "Grand Junction Incident Report"). When the GJFD arrived at the Luxury Wheels site, they observed a 1500 gallon storage tank located in an attached storage building on the west side of Luxury Wheels.<sup>7</sup> The tank was full of acid material which was fuming and producing a large orange-brown cloud.<sup>8</sup> Luxury Wheels previously used the acid material to treat aluminum automobile wheels prior to the chrome plating process.<sup>9</sup> The GJFD stabilized the acid material using ice.<sup>10</sup> After stabilization, the acid material was pumped out of

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<sup>1</sup> October 18, 2007 Answer to Complaint.

<sup>2</sup> Complainant's Request to Admit Facts by AET ¶¶ 1 & 2; October 18, 2007 Answer to Complaint.

<sup>3</sup> Complainant's Request to Admit Facts by AET ¶¶ 3 & 4.

<sup>4</sup> Complainant's Request to Admit Facts by AET ¶ 16.

<sup>5</sup> Complainant's Request to Admit Facts by AET ¶ 17.

<sup>6</sup> Grand Junction Incident Report pp. 5-7.

<sup>7</sup> Grand Junction Incident Report pp. 5-7.

<sup>8</sup> Grand Junction Incident Report pp. 5-7.

<sup>9</sup> Complainant's Request to Admit Facts by AET ¶¶ 37 & 77.

<sup>10</sup> Grand Junction Incident Report pp. 5-7.

the tank and transferred to a vat near the storage room.<sup>11</sup> The GJFD identified the acid material as a solution made up of phosphoric, nitric, glycolic and fluoroboric acids which were combined with a product known as Alum Etch-G.<sup>12</sup> Alum Etch-G is a product manufactured by Atotech USA, a copy of the Atotech USA material safety data sheet ("MSDS") for Alum Etch-G has been attached to and incorporated by reference into this motion as Exhibit C ("Exhibit C" or "Alum Etch-G MSDS"). After the acid material was stabilized, Luxury Wheels hired AET to remove and dispose of the acid material involved in the July 15<sup>th</sup> Luxury Wheels incident.<sup>13</sup> AET obtained at least eight (8) new and unused two hundred and seventy five (275) gallon plastic storage containers known as totes from Greif Bros. Corporation and supplied them to Luxury Wheels.<sup>14</sup> Luxury Wheels transferred the acid material into eight (8) of the plastic totes.<sup>15</sup>

AET decided to ship the eight totes of acid material to Arvada Treatment Center ("ATC") in Arvada, Colorado for disposal.<sup>16</sup> As part of the disposal process AET created a waste profile for the acid material ("ATC Hazardous Waste Profile"). The ATC Hazardous Waste Profile is attached to and incorporated by reference into this motion as Exhibit D ("Exhibit D" or "ATC Hazardous Waste Profile"). The ATC Hazardous Waste Profile submitted by AET for the acid material was signed by AET employee Chris Allred and dated 7/16/02.<sup>17</sup> On the ATC Hazardous Waste Profile, AET listed the acid material as Aluminum Etch (Fluoboric Acid, Glycolic acid) which was generated by the "etching of aluminum prior to nickel plating."<sup>18</sup> Although it had the option, AET did not list the acid material as unused chemical or product on

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<sup>11</sup> Grand Junction Incident Report p. 6.

<sup>12</sup> Grand Junction Incident Report p. 7.

<sup>13</sup> Complainant's Request to Admit Facts by AET ¶¶ 20 & 21.

<sup>14</sup> Complainant's Request to Admit Facts by AET ¶¶ 22-25 .

<sup>15</sup> Complainant's Request to Admit Facts by AET ¶ 26.

<sup>16</sup> Complainant's Request to Admit Facts by AET ¶ 28.

<sup>17</sup> Complainant's Request to Admit Facts by AET ¶¶ 11, 12, 31 & 32; ATC Hazardous Waste Profile.

<sup>18</sup> Complainant's Request to Admit Facts by AET ¶¶ 36, 37, & 40; ATC Hazardous Waste Profile.

the ATC Hazardous Waste Profile.<sup>19</sup>

AET created a Hazardous Waste Manifest ("ATC Hazardous Waste Manifest") to accompany the shipment of acid material which is attached to and incorporated by reference into this motion as Exhibit E ("Exhibit E" or ATC Hazardous Waste Manifest).<sup>20</sup> The ATC Waste Manifest listed Luxury Wheels as the Generator, SLT Express as Transporter 1, and ATC as the designated facility.<sup>21</sup> The ATC Hazardous Waste Manifest listed the acid material as D002, corrosive hazardous waste and described the acid material as "WASTE CORROSIVE LIQUID, N.O.S., (CONTAINS FLUOROBORIC ACID COLYCOLIC ACID) 8, UN1760, PGII.."<sup>22</sup> "Colycolic acid" was a misspelling of "glycolic acid."

On July 18, 2002, SLT Express picked up the acid material at Luxury Wheels.<sup>23</sup> On July 18, 2002, SLT Express transferred the acid material to AET at the AET 10-day transfer facility in Denver, Colorado.<sup>24</sup> On July 19, 2002, the acid material was shipped offsite from the AET 10-day transfer facility in Denver, Colorado, for disposal at ATC in Arvada, Colorado.<sup>25</sup>

On July 19, 2002, AET employee Dana Landagora drove the truck that transported the acid material from the AET facility to ATC.<sup>26</sup> Upon arrival of the material at ATC on July 19, 2002, the acid material was assessed by an ATC employee.<sup>27</sup> When the ATC employee opened one of the plastic totes containing the acid material a colored gas was released.<sup>28</sup> The ATC employee rejected the acid material because the material in the containers was reacting

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<sup>19</sup> Complainant's Request to Admit Facts by AET ¶¶ 38 & 41; Exhibit B.

<sup>20</sup> Complainant's Request to Admit Facts by AET ¶ 42; ATC Hazardous Waste Manifest.

<sup>21</sup> Complainant's Request to Admit Facts by AET ¶¶ 43, 44 & 48; ATC Hazardous Waste Manifest.

<sup>22</sup> Complainant's Request to Admit Facts by AET ¶¶ 45 & 46; ATC Hazardous Waste Manifest.

<sup>23</sup> Complainant's Request to Admit Facts by AET ¶ 49.

<sup>24</sup> Complainant's Request to Admit Facts by AET ¶ 53.

<sup>25</sup> Complainant's Request to Admit Facts by AET ¶ 56.

<sup>26</sup> Complainant's Request to Admit Facts by AET ¶ 57.

<sup>27</sup> Complainant's Request to Admit Facts by AET ¶¶ 58 & 59.

<sup>28</sup> Complainant's Request to Admit Facts by AET ¶ 60.

and off-gassing, emitting a red or orange gas.<sup>29</sup>

After the load of acid material was rejected by ATC, the ATC Hazardous Waste Manifest was modified by an AET employee ("Modified ATC Hazardous Waste Manifest").<sup>30</sup> The Modified ATC Hazardous Waste Manifest is attached to and incorporated by reference into this motion as Exhibit F ("Exhibit F" or "Modified ATC Hazardous Waste Manifest"). The Modified ATC Hazardous Waste Manifest listed AET as Transporter 2 and Safety Kleen, in Deer Trail, Colorado as an alternative designated facility.<sup>31</sup>

On July 19, 2002, the acid material was transported by AET from ATC to Safety Kleen.<sup>32</sup> AET prepared a hazardous waste profile for the acid material and submitted it to Safety Kleen ("Safety Kleen Hazardous Waste Profile").<sup>33</sup> The Safety Kleen Hazardous Waste Profile is attached to and incorporated by reference into this motion as Exhibit G ("Exhibit G" or "Safety Kleen Hazardous Waste Profile"). The Safety Kleen Hazardous Waste Profile submitted to Safety Kleen for the acid material had a Clean Harbors letterhead.<sup>34</sup> Safety Kleen was previously known as Clean Harbors.<sup>35</sup>

On the Safety Kleen Hazardous Waste Profile, AET listed the common name of the acid material as "Spent Aluminum Etchant" which was generated by the "Etching of Aluminum Wheels."<sup>36</sup> The acid material is also listed as a "Waste by-product from process."<sup>37</sup> Although it had the option, AET failed to list the acid material as an unused chemical or product on the

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<sup>29</sup> Complainant's Request to Admit Facts by AET ¶¶ 61 & 62.

<sup>30</sup> Complainant's Request to Admit Facts by AET ¶¶ 63 & 65; Modified ATC Hazardous Waste Manifest.

<sup>31</sup> Complainant's Request to Admit Facts by AET ¶¶ 66 & 67; Modified ATC Hazardous Waste Manifest.

<sup>32</sup> Complainant's Request to Admit Facts by AET ¶ 68.

<sup>33</sup> Complainant's Request to Admit Facts by AET ¶ 69.

<sup>34</sup> Complainant's Request to Admit Facts by AET ¶ 71; Safety Kleen Hazardous Waste Profile.

<sup>35</sup> Complainant's Request to Admit Facts by AET ¶ 70.

<sup>36</sup> Complainant's Request to Admit Facts by AET ¶¶ 76 & 77; Safety Kleen Hazardous Waste Profile.

<sup>37</sup> Complainant's Request to Admit Facts by AET ¶ 82; Safety Kleen Hazardous Waste Profile.

Safety Kleen Hazardous Waste Profile.<sup>38</sup> AET did describe the acid material "as having an undisclosed or prior incident associated with it which could affect the way it should be handled."<sup>39</sup> AET also stated that the acid material "may form an orange cloud under extreme heat."<sup>40</sup>

Safety Kleen rejected the load while it was en route.<sup>41</sup> After the load was rejected, AET transported the acid material to the AET 10-day transfer facility in Denver, Colorado.<sup>42</sup> The acid material was creating a red or orange gas in one or more of the totes which was off-gassing when it arrived at the AET storage facility.<sup>43</sup>

Upon arrival at the AET storage facility, AET placed the acid material into a semi-trailer which was left open during the daytime.<sup>44</sup> AET left the totes containing the acid material slightly open to vent the gas which was produced by the acid material.<sup>45</sup> AET also placed a fan in the trailer to help remove the gas escaping the totes, which was accumulating in the trailer.<sup>46</sup>

In July of 2002, AET contacted Vickery Environmental, Inc. ("Vickery") located in Vickery, Ohio, to discuss the disposal of the acid material.<sup>47</sup> Vickery suggested the material be disposed of by deep well injection.<sup>48</sup> AET prepared a hazardous waste profile for the acid material and submitted it to Vickery ("Vickery Hazardous Waste Profile").<sup>49</sup> The Vickery Hazardous Waste Profile is attached to and incorporated by reference into this motion as Exhibit H ("Exhibit H" or "Vickery Hazardous Waste Profile").

On the Vickery Hazardous Waste Profile, AET described the acid material as "Spent

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<sup>38</sup> Complainant's Request to Admit Facts by AET ¶ 81; Safety Kleen Hazardous Waste Profile.

<sup>39</sup> Complainant's Request to Admit Facts by AET ¶ 83; Safety Kleen Hazardous Waste Profile.

<sup>40</sup> Complainant's Request to Admit Facts by AET ¶ 84; Safety Kleen Hazardous Waste Profile.

<sup>41</sup> Complainant's Request to Admit Facts by AET ¶ 85.

<sup>42</sup> Complainant's Request to Admit Facts by AET ¶ 86.

<sup>43</sup> Complainant's Request to Admit Facts by AET ¶¶ 87 & 88.

<sup>44</sup> Complainant's Request to Admit Facts by AET ¶¶ 89 & 90.

<sup>45</sup> Complainant's Request to Admit Facts by AET ¶ 92.

<sup>46</sup> Complainant's Request to Admit Facts by AET ¶¶ 91 & 93.

<sup>47</sup> Complainant's Request to Admit Facts by AET ¶ 94.

<sup>48</sup> Complainant's Request to Admit Facts by AET ¶ 95.

Aluminum Etchant," generated by the "Etching of Aluminum Wheels."<sup>50</sup> AET also described the acid material as "a USEPA hazardous waste (40 CFR Part 261)." The Vickery Hazardous Waste Profile was signed by AET employee Frank Virginia.<sup>51</sup> AET never sent the acid material to Vickery for disposal.

While it was under the control of AET, AET added additional materials including water and glycolic acid to the acid material.<sup>52</sup> After dilution the acid material filled twelve (12) two hundred and seventy five (275) gallon totes.<sup>53</sup>

While the acid material was under the control of AET, Arthur Clark ("Clark"), an AET employee and a principal in EOR Energy, LLC, ("EOR") asked if EOR could have the acid material.<sup>54</sup> At the time, Clark was working for both companies and EOR's office was located in the same building as AET.<sup>55</sup> EOR wanted to apply the acid material to oil and other wells ("EOR Wells") it owned which are located in Central Illinois. After the inquiry, AET gave the acid material to EOR.<sup>56</sup>

On August 30, 2002, AET arranged to have the load of twelve (12) totes of acid material shipped from the AET warehouse in Denver, Colorado, to Kincaid P&P in Pawnee, IL ("Kincaid P&P Site").<sup>57</sup> The EOR Wells are located near the Kincaid P&P Site. EOR paid two Kincaid P&P employees, Rick Wake ("Wake") and Charles Geary ("Geary") to maintain the EOR Wells. AET billed Luxury Wheels for its services to arrange shipment of the acid material to Pawnee, IL.<sup>58</sup>

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<sup>49</sup> Complainant's Request to Admit Facts by AET ¶ 96.

<sup>50</sup> Complainant's Request to Admit Facts by AET ¶¶ 100-102; Vickery Hazardous Waste Profile.

<sup>51</sup> Complainant's Request to Admit Facts by AET ¶ 104; Vickery Hazardous Waste Profile.

<sup>52</sup> Complainant's Request to Admit Facts by AET ¶¶ 111-115.

<sup>53</sup> Complainant's Request to Admit Facts by AET ¶ 116.

<sup>54</sup> Complainant's Request to Admit Facts by AET ¶ 117.

<sup>55</sup> Complainant's Request to Admit Facts by AET ¶¶ 5, 6, 118 & 119.

<sup>56</sup> Complainant's Request to Admit Facts by AET ¶ 121.

<sup>57</sup> Complainant's Request to Admit Facts by AET ¶¶ 124 & 137.

<sup>58</sup> Complainant's Request to Admit Facts by AET ¶ 127.

Unlike the prior attempts to ship the acid material to ATC and Safety Kleen, AET did not ship the acid material with an accompanying Hazardous Waste Manifest.<sup>59</sup> Instead, AET prepared a Hazardous Material Bill of Lading ("Kincaid Hazardous Material Bill of Lading").<sup>60</sup> The Kincaid Hazardous Material Bill of Lading is attached to and incorporated by reference into this motion as Exhibit I ("Exhibit I" or "Kincaid Hazardous Material Bill of Lading"). The Kincaid Hazardous Material Bill of Lading was dated "8/30/02."<sup>61</sup> AET listed Luxury Wheels as the Shipper, SLT Express as the Carrier, and Kincaid P&P as the Consignee.<sup>62</sup> The Kincaid Hazardous Material Bill of Lading listed Kincaid P&P's address as "Route 104 (EAST OF PAWNEE)," Pawnee, IL 62558.<sup>63</sup> AET listed the acid material as "CORROSIVE LIQUID ACID, INORGANIC, N.O.S. (PHOSPHORIC, NITRIC), 8, UN3264, PGII."<sup>64</sup> The Kincaid Hazardous Material Bill of Lading was signed by AET employee Frank Gines.<sup>65</sup>

The Kincaid P&P Pawnee site is not a hazardous waste storage or disposal facility and has never been issued a RCRA permit granting it permission to serve as a hazardous waste management facility.<sup>66</sup>

After sending the acid material to the Kincaid P&P site, AET never refunded any money paid by Luxury Wheels to AET for the disposal of the acid material.<sup>67</sup>

On February 4, 2004, the United States Environmental Protection Agency ("USEPA")

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<sup>59</sup> Complainant's Request to Admit Facts by AET ¶ 128.

<sup>60</sup> Complainant's Request to Admit Facts by AET ¶ 129.

<sup>61</sup> Complainant's Request to Admit Facts by AET ¶ 130; Kincaid Hazardous Material Bill of Lading.

<sup>62</sup> Complainant's Request to Admit Facts by AET ¶¶ 131, 132 & 137; Kincaid Hazardous Material Bill of Lading.

<sup>63</sup> Complainant's Request to Admit Facts by AET ¶ 133; Kincaid Hazardous Material Bill of Lading.

<sup>64</sup> Complainant's Request to Admit Facts by AET ¶ 134; Kincaid Hazardous Material Bill of Lading.

<sup>65</sup> Complainant's Request to Admit Facts by AET ¶¶ 135 & 136; Kincaid Hazardous Material Bill of Lading.

<sup>66</sup> Johnson Affidavit ¶¶ 5 & 16.

<sup>67</sup> Complainant's Request to Admit Facts by AET ¶ 139.

and the National Enforcement Investigations Center ("NEIC") served a search warrant and conducted sampling activities at the Kincaid P&P Pawnee facility.<sup>68</sup> On February 4, 2004, the twelve totes were still present at the Kincaid P&P Pawnee facility. Three totes were full and one tote was partially full of acid material.<sup>69</sup> The remaining eight totes contained residue from the acid material. NEIC employees took liquid samples from the twelve (12) totes. The NEIC later performed tests on the liquid samples. The results of the testing were recorded in a report ("NEIC Report"). The NEIC Report is attached to and incorporated by reference into this motion as Attachment 2 to Exhibit J ("Attachment 2" or "NEIC Report"). The NEIC Report showed that the liquid samples from the three full and one partially full totes all contained greater than 5.0 mg/L of leachable chromium.<sup>70</sup> Results of the NEIC testing also showed that material contained in ten of the twelve totes had a pH of less than 2 standard units.

On November 17, 2004, Richard Johnson ("Johnson"), an Illinois EPA, Bureau of Land, Field Inspector, inspected the Kincaid P&P Site. Johnson's sworn affidavit ("Johnson Affidavit") has been attached to and incorporated by reference into this motion as Exhibit J ("Exhibit J" or "Johnson Affidavit"). Johnson recorded an account of his inspection in an inspection report ("Johnson November 17, 2004 Inspection Report"). Johnson's November 17, 2004 Inspection Report has been attached to and incorporated by reference into this motion as Attachment 1 to Exhibit J ("Attachment 1" or "Johnson November 17, 2004 Inspection Report"). Prior to his inspection, Johnson performed a review of Illinois EPA records.<sup>71</sup> Johnson discovered that the Kincaid P&P Site is not a hazardous waste storage or disposal facility and has never been

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<sup>68</sup> NEIC Report p. 3.

<sup>69</sup> NEIC Report pp. 12-13.

<sup>70</sup> NEIC Report pp. 22-23.

<sup>71</sup> Johnson Affidavit ¶ 5.

issued a RCRA permit granting it permission to serve as a hazardous waste management facility.<sup>72</sup>

Upon arrival at the Kincaid P&P Site, Johnson interviewed Wake.<sup>73</sup> Wake informed Johnson that he and Geary were paid by EOR to service and monitor the EOR Wells located in two nearby oil fields.<sup>74</sup> According to Wake, the twelve (12) totes of acid material were shipped to the Kincaid P&P Site in August 2002.<sup>75</sup> He also stated that EOR directed them to discharge the acid material down the EOR Wells.<sup>76</sup>

Wake described the process used to discharge the acid.<sup>77</sup> First a tote of the acid material would be loaded on the back of a pickup truck and driven to the oil field. From the back of the truck, the tote would be connected to a valve on an aboveground pipe attached to one of the EOR Wells. Wake and Geary fabricated a hose attachment to connect the plastic totes to the valves on the EOR Wells. Using the hose attachment, Wake and Geary would use gravity to feed the acid material into the well and the underground formation. Over 3 or 4 months, Wake and Geary stated that they discharged approximately eight (8) and a one-half totes of the acid material down various EOR Wells, as outlined in Chart 1.<sup>78</sup>

During his November 17, 2004, site inspection, Rich Johnson observed twelve (12) plastic totes stored in a structure at the Kincaid P&P Site.<sup>79</sup> The building was not secured. It contained no signs warning of the presence of the acid. The building's concrete floor was wet in several spots where the ceiling was leaking. The structure was not heated, had no electricity, and did not entirely keep out the outside weather. The structure also failed to include any

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<sup>72</sup> Johnson Affidavit ¶ 5.

<sup>73</sup> Johnson Affidavit ¶ 7.

<sup>74</sup> Johnson Affidavit ¶ 7.

<sup>75</sup> Johnson Affidavit ¶ 8.

<sup>76</sup> Johnson Affidavit ¶ 8.

<sup>77</sup> Johnson Affidavit ¶ 9.

<sup>78</sup> Johnson Affidavit ¶ 9.

<sup>79</sup> Johnson Affidavit ¶ 11.

containment structures to retain the acid if any of the totes leaked. There were no alarms or other warning systems to sound an alert if any of the totes failed to contain the acid.<sup>80</sup>

Three (3) of the totes were full of an aqua-colored liquid.<sup>81</sup> A fourth tote was slightly less than one-half full. Eight other totes appeared to be empty except for some residue present in the bottoms of the totes. A copy of a federal search warrant had been attached to the side of one of the totes.<sup>82</sup> The warrant was dated February 2004 and stated that the totes had been sampled at the time that the warrant had been served.

Johnson also observed pallets containing 50-pound bags of hydrated lime and soda ash-like material stored next to the totes of acid.<sup>83</sup> Several of the older bags of lime and ash had deteriorated to the point that the paper was split and a white material could be observed.

Following the November 17, 2004 inspection, Johnson received a copy of the NEIC Report detailing the results of testing performed by the NEIC on samples of acid material which were taken on February 4, 2004.<sup>84</sup>

On February 25, 2005, the Illinois EPA sent a Violation Notice ("VN") to AET concerning the transport of the acid material from Colorado to Pawnee, Illinois. AET responded to the VN on March 18, 2005. On July 13, 2005, the Illinois EPA sent AET a Notice of Intent to Pursue Legal Action ("NIPLA") concerning the August 2002 transportation of the acid material from Colorado to Pawnee, Illinois, as required by Section 31(b) of the Act.

On April 19, 2005, Johnson re-inspected the Kincaid P&P Site. Johnson recorded an account of his inspection in an inspection report ("Johnson April 19, 2005 Inspection Report"). Johnson's April 19, 2005 Inspection Report has been attached to and incorporated by reference into this motion as Attachment 3 to Exhibit J ("Attachment 3" or "Johnson April 19, 2005

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<sup>80</sup> Johnson Affidavit ¶ 11.

<sup>81</sup> Johnson Affidavit ¶ 12.

<sup>82</sup> Johnson Affidavit ¶ 13.

<sup>83</sup> Johnson Affidavit ¶ 14.

Inspection Report"). He once again met with Wake.<sup>85</sup> During the April 19, 2005 inspection, all 12 plastic totes of acid material were gone.<sup>86</sup> Wake provided Johnson with a uniform hazardous waste manifest which indicating that 1000 gallons of corrosive and toxic hazardous waste was shipped from the Kincaid P&P Site to SET Environmental, Inc. in Huston, Texas on April 14, 2005.<sup>87</sup> The manifest identified the waste as containing nitric and phosphoric acid. A Land Disposal Restriction notice accompanied the manifest. The Land Disposal Restriction notice indicated that the waste exhibited the hazardous waste characteristic for TCLP chrome, D007.<sup>88</sup> The SET Environmental Hazardous Waste Manifest and the Land Disposal Restriction Notice are both included in the Johnson April 19, 2005 Inspection Report.

During the April 19, 2005 inspection, Wake agreed to take Johnson to the various EOR Wells where he and Geary discharged the waste acid.<sup>89</sup> Two of the wells were located on the Galloway Lease property.<sup>90</sup> Three wells were located on the Rinx-Truax Lease property.<sup>91</sup>

Wake led Johnson to the Galloway Lease property.<sup>92</sup> Upon arrival at the Galloway Lease property they met the property owner and made him aware of the investigation.<sup>93</sup> Geary was also present at the Galloway Lease property.<sup>94</sup> Geary accompanied Johnson and Wake on the rest of the inspection.<sup>95</sup>

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<sup>84</sup> Johnson Affidavit ¶ 19

<sup>85</sup> Johnson Affidavit ¶ 23.

<sup>86</sup> Johnson Affidavit ¶ 24.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Johnson Affidavit ¶ 26.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Johnson Affidavit ¶ 27.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

They first inspected an oil production well known as Galloway #3.<sup>96</sup> At Galloway #3, Wake and Geary stated that they discharged approximately 15 gallons of waste acid into the wellhead.<sup>97</sup>

After inspecting Galloway #3, they moved on to a gas injection well known as Galloway #1.<sup>98</sup> Wake and Geary explained that they discharged a full tote (approximately 275 gallons) of waste acid into Galloway #1.<sup>99</sup> They stated that it took awhile to gravity-feed the waste acid down the well.<sup>100</sup> They also stated that they noticed very strong odors from the waste acid.<sup>101</sup>

Their next stop was an oil production well known as Rink #4.<sup>102</sup> At Rink #4, Wake and Geary stated that they discharged approximately 25 gallons of waste acid into the wellhead.<sup>103</sup>

Following Rink #4, they inspected a salt water disposal well known as Rink #1.<sup>104</sup> Wake and Geary stated that they discharged seven full totes (approximately 1925 gallons) of waste acid into Rink #1.<sup>105</sup>

Finally, they inspected an oil production well known as Truax #3.<sup>106</sup> Wake and Geary stated that they discharged approximately 25 gallons of waste acid into Truax #3.<sup>107</sup>

## VII. APPLICABLE STATUES AND REGULATIONS

### A. Illinois Statutes

Section 21(e) of the Act, 415 ILCS 5/21 (2004)

No person shall:

\* \* \*

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<sup>96</sup> Johnson Affidavit ¶ 28.

<sup>97</sup> *Id.*

<sup>98</sup> Johnson Affidavit ¶ 29.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Johnson Affidavit ¶ 30.

<sup>103</sup> *Id.*

<sup>104</sup> Johnson Affidavit ¶ 31.

<sup>105</sup> *Id.*

<sup>106</sup> Johnson Affidavit ¶ 32.

<sup>107</sup> *Id.*

- (e) Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

\* \* \*

Section 3.185 of the Act, 415 ILCS 5/3.185 (2004)

"DISPOSAL" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

Section 3.205 of the Act, 415 ILCS 5/3.205 (2004)

"GENERATOR" means any person whose act or process produces waste.

Section 3.220 of the Act, 415 ILCS 5/3.220 (2004)

"HAZARDOUS WASTE" means a waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible, illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed, and which has been identified, by characteristics or listing, as hazardous pursuant to Section 3001 of the Resource Conservation and Recovery Act of 1976, P.L. 94-580, or pursuant to Board regulations.

Section 3.235 of the Act, 415 ILCS 5/3.235 (2004)

"INDUSTRIAL PROCESS WASTE" means any liquid, solid, semi-solid, or gaseous waste generated as a direct or indirect result of the manufacture of a product or the performance of a service. Any such waste which would pose a present or potential threat to human health or to the environment or with inherent properties which make the disposal of such waste in a landfill difficult to manage by normal means is an industrial process waste. "Industrial Process Waste" includes but is not limited to spent pickling liquors, cutting oils, chemical catalysts, distillation bottoms, etching acids, equipment cleanings, paint sludges, incinerator ashes (including but not limited to ash resulting from the incineration of potentially infectious medical waste), core sands, metallic dust sweepings, asbestos dust, and off-specification, contaminated or recalled wholesale or retail products. Specifically excluded are uncontaminated packaging materials, uncontaminated machinery components, general household waste, landscape waste and construction or demolition debris.

Section 3.315 of the Act, 415 ILCS 5/3.315 (2004)

"PERSON" is any individual, partnership, copartnership, firm, company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agency or assigns.

Section 3.470 of the Act, 415 ILCS 5/3.470 (2004)

"SOLID WASTE" means waste.

Section 3.480 of the Act, 415 ILCS 5/3.480 (2004)

"STORAGE" means the containment of waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal.

Section 3.505 of the Act, 415 ILCS 5/3.505 (2004)

"TREATMENT" means any method, technique or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any waste so as to neutralize it or render it nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

Section 3.535 of the Act, 415 ILCS 5/3.535 (2004)

"WASTE" means any garbage . . . or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities...

**B. Federal Law**

42 U.S.C. § 6903(5)

- (5) The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may--
- (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
  - (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

40 C.F.R. § 261.2

(a) (1) A solid waste is any discarded material that is not excluded under § 261.4(a) or that is not excluded by a variance granted under §§ 260.30 and 260.31 or that is not excluded by a non-waste determination under §§ 260.30 and 260.34.

(2) (i) A discarded material is any material which is:

(A) Abandoned, as explained in paragraph (b) of this section; or

(B) Recycled, as explained in paragraph (c) of this section; or

\* \* \*

(b) Materials are solid waste if they are abandoned by being:

(1) Disposed of; or

\* \* \*

(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.

(c) Materials are solid wastes if they are recycled--or accumulated, stored, or treated before recycling--as specified in paragraphs (c)(1) through (4) of this section.

(1) Used in a manner constituting disposal.

\* \* \*

40 C.F.R. § 261.3

(a) A solid waste, as defined in § 261.2, is a hazardous waste if:

(1) It is not excluded from regulation as a hazardous waste under § 261.4(b); and

(2) It meets any of the following criteria:

(i) It exhibits any of the characteristics of hazardous waste identified in subpart C of this part...

40 C.F.R. § 261.20 "Subpart C"

- (a) A solid waste, as defined in § 261.2, which is not excluded from regulation as a hazardous waste under § 261.4(b), is a hazardous waste if it exhibits any of the characteristics identified in this subpart.

\* \* \*

40 C.F.R. § 261.22 Characteristic of Corrosivity

- (a) A solid waste exhibits the characteristic of corrosivity if a representative sample of the waste has either of the following properties:
  - (1) It is aqueous and has a pH less than or equal to 2 or greater than or equal to 12.5, as determined by a pH meter using Method 9040C in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in § 260.11 of this chapter.

\* \* \*

- (b) A solid waste that exhibits the characteristic of corrosivity has the EPA Hazardous Waste Number of D002.

40 C.F.R. § 261.24 Characteristic of Toxicity

- (a) A solid waste (except manufactured gas plant waste) exhibits the characteristic of toxicity if, using the Toxicity Characteristic Leaching Procedure, test Method 1311 in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in § 260.11 of this chapter, the extract from a representative sample of the waste contains any of the contaminants listed in table 1 at the concentration equal to or greater than the respective value given in that table. Where the waste contains less than 0.5 percent filterable solids, the waste itself, after filtering using the methodology outlined in Method 1311, is considered to be the extract for the purpose of this section.
- (b) A solid waste that exhibits the characteristic of toxicity has the EPA Hazardous Waste Number specified in Table 1 which corresponds to the toxic contaminant causing it to be hazardous.

Table 1-Maximum Concentration of Contaminants for the Toxicity Characteristic

EPA HW No.	Contaminant	CAS No.	Regulatory Level (mg/L)
***	***	***	***
D007	Chromium	7440-47-3	5.0
***	***	***	***

**VIII. ARGUMENT AND ANALYSIS**

There exists no genuine issue of material fact. The evidence present in the Record, including Respondent's admissions, supporting affidavits, and the NEIC report all show that it is more likely than not that Respondent caused twelve 275 gallon plastic totes of hazardous waste acid, containing greater than 5.0 mg/L of chromium and a pH lower than 2 to be transported to a site near Pawnee, Illinois, which does not meet the requirements of the Act and of regulations and standards thereunder.

**A. Elements of Section 21(e) Violation**

In order to prevail in this matter, the State must prove that it is more likely than not that the Respondent transported a waste into the State of Illinois for disposal, treatment, storage or abandonment, at a site or facility which did not meet the requirements of the Act and of regulations and standards thereunder. Therefore the State must prove the following:

- The acid material was a waste;
- Respondent transported the acid material to Illinois;
- The acid material was transported to Illinois for disposal, treatment, storage or abandonment;
- The Kincaid P&P Site and EOR's leased wells do not meet the requirements of the Act and of regulations and standards thereunder.

**B. The Acid Material Was A Waste**

In order for the acid material shipped by AET to be considered a "waste," it must be garbage or other *discarded material*, including solid, *liquid*, semi-solid, or contained gaseous material resulting from *industrial activities*.<sup>108</sup> According to the evidence present in the Record, the acid material shipped to the Kincaid P&P Pawnee site was spent aluminum etchant used by Luxury Wheels to etch aluminum wheels prior to treating them with a chrome plating process.

Luxury Wheels stored the material at its facility in Junction City, Colorado. On July 15, 2002, the acid material was involved in an emergency incident where it became unstable, reaching a high temperature, subsequently producing a large quantity of hazardous gas and requiring emergency response by the Junction City Fire Department. After the material was temporarily stabilized, Luxury Wheels hired AET to dispose of the acid material. AET made numerous attempts to dispose of the material at various hazardous waste disposal sites. When characterizing the material on hazardous waste profiles, AET described the material as spent aluminum etchant, a D002 corrosive hazardous waste and waste corrosive liquid that was created in an industrial process. An AET employee signed the hazardous waste profiles and certified that all the information contained in them was correct. The material was rejected by ATC and Safety Kleen, due to the fact that it was in an unstable state and producing an orange colored gas inside its storage containers.

*1. The Acid Material Was Discarded*

There is no question that Luxury Wheels discarded the material. They were unable to safely store the material, had no use for it and hired AET to dispose of it at a properly permitted hazardous waste disposal site. This is exactly what AET attempted to do. It was only after

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<sup>108</sup> Section 3.535 of the Act, 415 ILCS 5/3.535 (2004), Section 3.470 of the Act, 415 ILCS 5/3.470 (2004).

rejections by ATC and Safety Kleen, that AET decided to ship the acid material to the Kincaid P&P Site to be injected into wells owned by EOR. Luxury Wheels paid AET to dispose of the material and expected AET to dispose of it. Instead, AET gave the material to EOR, free of charge. After the material was sent to the Kincaid P&P Pawnee site, AET never refunded any money to Luxury Wheels. If the material had any value, Luxury Wheels would not have paid AET to take it away and AET would not have given it away to EOR for nothing in return.

The acid material was discarded by Luxury Wheels and given away for free by AET. For all of these reasons, the acid material should be considered a discarded liquid.

2. *The Acid Material Resulted from an Industrial Process*

Section 3.235 of the Act, 415 ILCS 5/3.235 defines "industrial process waste" as "any liquid...waste generated as a direct or indirect result of the manufacture of a product..." "Industrial Process Waste" includes but is not limited to...etching acids..."

Luxury Wheels manufactured custom chrome automobile wheels which it chrome plated at its facility in Grand Junction, CO. As part of the plating process, the wheels were treated with an acid solution which etched the aluminum. The acid material which was shipped to the Kincaid P&P Pawnee Site was used by Luxury Wheels to etch aluminum wheels. Therefore, the acid material was an "etching acid" generated as the direct result of the manufacturing of a product, aluminum automobile wheels. As a result the acid material is an industrial process waste.

Because the acid material was a *discarded liquid* material resulting from *industrial activities*, it was a "waste" as defined under Section 3.535 of the Act, 415 ILCS 5/3.535 (2004).

3. *The Waste Acid was also a Hazardous Waste*

Furthermore, the waste acid was also a hazardous waste. Section 3.220 of the Act, 415 ILCS 5/3.220 (2004), defines "hazardous waste" as a waste, or combination of wastes, which

because of its quantity, concentration, or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible, illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed, and which has been identified, by characteristics or listing, as hazardous pursuant to Section 3001 of the Resource Conservation and Recovery Act ("RCRA") of 1976, P.L. 94-580, or pursuant to Board regulations.

Pursuant to RCRA, Congress requires the USEPA to identify and list "solid wastes" which meet the statutory definition of "hazardous waste." Determining whether a material is a RCRA hazardous waste is therefore a two-step process. The material must first come within the definition of *solid waste*, and then meet the definition of *hazardous waste*. Both terms are defined in 40 CFR Part 261.

The EPA regulations define "solid waste" as any *discarded material* that has not been excluded under the regulations. 40 CFR § 261.2(a)(1). A "discarded material" is any material that is *abandoned, recycled, or inherently waste-like*. 40 CFR § 261.2(a)(2). As was stated earlier, the waste acid at issue was a waste under Illinois law. For the same reasons, under the RCRA definition, it was also a solid waste.<sup>109</sup>

If a material can be classified as a solid waste, it is considered a hazardous waste if it either (1) exhibits one of four characteristics (ignitability, corrosivity, reactivity, or toxicity) (known as "characteristic" hazardous waste); or (2) is specifically listed as a hazardous waste in the regulations (known as "listed" hazardous waste). 40 CFR § 261.3. The waste material at issue in this matter was generated by a company that produces chrome plated automotive

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<sup>109</sup> Section 3.470 of the Act, 415 ILCS 5/3.470 (2004), provides as follows: "SOLID WASTE" means waste.

wheels. The USEPA has sampled and tested the waste at issue and found that it exhibited the hazardous characteristics of corrosivity and toxicity.

A solid waste exhibits the characteristic of corrosivity if, among other things, a representative sample of the waste is aqueous and has a pH less than or equal to 2. 40 CFR § 261.22. 10 of 12 samples of the waste acid gathered from the Kincaid P&P Site on February 22, 2004, had pH levels less than 2 standard units.

A solid waste exhibits the characteristic of toxicity if, using the Toxicity Characteristic Leaching Procedure ("TCLP"), test Method 1311 in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in 40 CFR § 260.11, the extract from a representative sample of the waste contains greater than 5.0 mg/L of leachable chromium. 40 CFR § 261.2(a). Samples from the three full totes and the one half full tote gathered on February 22, 2004, all contained greater than 5.0 mg/L of leachable chromium when tested by the NEIC using TCLP.

Since the waste acid at issue in this matter exhibited the characteristics of *corrosivity* and *toxicity*, the wastes acid was a characteristic hazardous waste.

**C. AET Transported the Waste Acid to Illinois**

AET is, among other things, a hazardous waste broker. After being hired by Luxury Wheels to facilitate the disposal of the waste acid, on August 30, 2002, AET arranged to have the load of twelve (12) totes of waste acid shipped from the AET warehouse in Denver, Colorado, to Kincaid P&P in Pawnee, Illinois. Instead of creating a hazardous waste manifest to accompany the waste acid, as it did when attempting to ship the acid to ATC and Saftey Kleen, AET shipped the material under a hazardous materials bill of lading. AET created the hazardous materials bill of lading which was signed by AET employee Frank Gines who was listed on the form as an agent for Luxury Wheels. AET did not inform the carrier that the material was actually a hazardous waste. Without AET's actions, the hazardous waste acid

would not have been transported by the carrier to Illinois.

By shipping the waste acid from its warehouse in Denver, Colorado, to Kincaid P&P in Pawnee, Illinois under a hazardous materials bill of lading instead of a hazardous waste manifest, AET caused the waste acid to be transported to the State of Illinois.

**D. The Waste Acid was Transported to Illinois for Storage and Disposal**

After the hazardous waste acid arrived at the Kincaid P&P Site, EOR stored it in a shed until April 14, 2005, when the remaining totes were taken to Houston, Texas for disposal. The Act defines "storage" as the containment of waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal.<sup>110</sup> The hazardous waste acid transported by AET was contained at the Kincaid P&P Site from August 30, 2002 until April 12, 2005. Therefore it was transported to the Kincaid P&P Site for storage by EOR.

While the hazardous waste acid was onsite, Wake and Geary disposed of it by discharging it into the EOR Wells. Wake and Geary also spilled part of the hazardous waste at various locations near the Kincaid P&P Site. The Act defines "disposal" as the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.<sup>111</sup> Therefore, the waste acid was transported to Illinois for disposal by EOR.

**E. The Kincaid P&P Site and EOR's Leased Wells do not Meet the Requirements of the Act and of Regulations and Standards Thereunder**

The Kincaid P&P Site has neither RCRA interim status nor a RCRA permit to store hazardous waste onsite. EOR does not have RCRA interim status nor a RCRA permit to

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<sup>110</sup> Section 3.480 of the Act, 415 ILCS 5/3.480 (2004).

<sup>111</sup> Section 3.185 of the Act, 415 ILCS 5/3.185 (2004).

dispose of hazardous waste in its leased oil wells located near the Kincaid P&P Site. Therefore, neither the Kincaid P&P Site nor EOR's wells meet the requirements of the Act and of the regulations and standards thereunder.

**IX. AET VIOLATED SECTION 21(e) OF THE ACT**

It is clear that AET transported hazardous waste acid, an industrial process waste, into the State of Illinois for storage and disposal at the Kincaid P&P Site and surrounding wells, sites which do not meet the requirements of the Act and of regulations and standards thereunder and therefore violated Section 21(e) of the Act, 415 ILCS 5/21(e) (2004).

**X. IMPACT ON THE PUBLIC RESULTING FROM ALLEGED NON-COMPLIANCE**

After the Board finds a violation, the Board considers the factors set forth in Section 33(c) of the Act, 415 ILCS 5/33(c) (2010), to create an appropriate remedy. Those factors are:

1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
2. the social and economic value of the pollution source;
3. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
5. any subsequent compliance.

In response to these factors, the Complainant states the following:

1. The acid material contained greater than 5.0 mg/L of chromium and had a pH lower than 2 standard units. As such it was hazardous waste which exhibited the characteristics of both toxicity and corrosivity. The hazardous waste acid had been involved in an emergency situation where it became unstable, reaching a high temperature and creating a cloud of hazardous gas. Due to the fact that the acid appeared to be in a reactive state and continued to

produce hazardous gasses, the acid was rejected by multiple hazardous waste disposal facilities located in Colorado. AET took the acid back to one of its facilities where it continued to emit hazardous gas until it was diluted by AET employees.

Despite these characteristics, AET failed to ship the hazardous waste acid in a manner consistent with the Act and associated regulations. They did not notify the carrier that the material was a hazardous waste. AET shipped the hazardous waste acid under a hazardous materials bill of lading as opposed to the required hazardous waste manifest. Consequently, the hazardous waste acid was not marked as a hazardous waste and was not handled as such during its transport from Colorado to the State of Illinois. Further compounding matters, AET also shipped the hazardous waste acid to a facility which was not properly permitted to accept or store hazardous waste. The hazardous waste acid was improperly handled and stored while at the Kincaid P&P Site and was illegally disposed of in the surrounding oil fields. AET's actions showed a disregard for the environment of the State of Illinois as well as the health, general welfare and physical property of the people located along the acid's route from Colorado to Illinois. These actions also put the health, general welfare, and physical property of all people within the area surrounding the Kincaid P&P Site in jeopardy by allowing the improper storage and disposal of a highly corrosive and toxic hazardous waste.

AET is a licensed hazardous waste broker. Even with years of experience, AET decided to improperly ship the hazardous waste acid to a site which was not designed to adequately store or handle it. They are a company that should know better. AET's actions have a significant adverse effect on the implementation of the RCRA program.

AET severely threatened human health and the environment by failing to comply with the applicable statutory and regulatory requirements.

2. There was no social or economic value of the acid waste which was transported by AET. The acid was a spent industrial process waste and a hazardous waste. Luxury

Wheels paid AET to dispose of the waste. The hazardous waste acid was rejected by multiple hazardous waste disposal sites. AET ultimately transferred the waste acid, for free, to EOR Energy, LLC, showing that it had no value.

3. The hazardous waste acid was unsuitable for shipping to a site which was not permitted or designed to accept or store hazardous waste. This hazardous waste should have been properly disposed of at a hazardous waste disposal site permitted and designed to accept such waste. There is no justification for AET's shipping of the acid to the Kincaid P&P Site.

4. Disposing of the hazardous waste acid at a properly permitted hazardous waste disposal site was both economically and technically feasible. AET was paid by Luxury Wheels to properly dispose of the hazardous waste acid. AET had an opportunity to dispose of the hazardous waste acid at Vickery but decided to give the acid to EOR instead. Eventually the remaining acid was disposed of in Houston, Texas, which shows that there were facilities willing to and capable of properly disposing of the acid. AET failed to properly dispose of the acid, yet did not refund any money to Luxury Wheels. AET's actions were unreasonable and impractical.

5. AET did not self report its violations to the State. By the time the State became involved, the damage was already done. AET had already shipped the acid to the Kincaid P & P Site. AET no longer had any control over the acid and therefore had no ability to perform subsequent compliance.

#### **XI. CONSIDERATION OF SECTION 42(h) FACTORS**

To impose a civil penalty, the Board must consider the factors contained within Section 42(h) of the Act, 415 ILCS 5/42(h) (2012). Those factors are:

1. the duration and gravity of the violation;
2. the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
3. any economic benefits accrued by the respondent because of delay in

- compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;
4. the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;
  5. the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent;
  6. whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and
  7. whether the respondent has agreed to undertake a "supplemental environmental project," which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform.
  8. whether the respondent has successfully completed a Compliance Commitment Agreement under subsection (a) of Section 31 of this Act to remedy the violations that are the subject of the complaint.

In response to these factors, the Complainant states as follows:

1. The acid material contained greater than 5.0 mg/L of chromium and had a pH lower than 2 standard units. As such it was hazardous waste which exhibited the characteristics of both toxicity and corrosivity. The hazardous waste acid had been involved in an emergency situation where it became unstable, reaching a high temperature and creating a cloud of hazardous gas. Due to the fact that the acid appeared to be in a reactive state and continued to produce hazardous gasses, the acid was rejected by multiple hazardous waste disposal facilities located in Colorado. AET took the acid back to one of its facilities where it continued to emit hazardous gas until it was diluted by AET employees.

Despite these characteristics, AET failed to ship the hazardous waste acid in a manner consistent with the Act and associated regulations. They did not notify the carrier that the material was a hazardous waste. AET shipped the hazardous waste acid under a hazardous materials bill of lading as opposed to the required hazardous waste manifest. Consequently,

the hazardous waste acid was not marked as a hazardous waste and was not handled as such during its transport from Colorado to the State of Illinois. Further compounding matters, AET also shipped the hazardous waste acid to a facility which was not properly permitted to accept or store hazardous waste. The hazardous waste acid was improperly handled and stored while at the Kincaid P&P Site and was illegally disposed of in the surrounding oil fields. AET's actions showed a disregard for the environment, health, general welfare and physical property of the people located along the acid's route from Colorado to Illinois. These actions also put the health, general welfare, and physical property of all people within the area surrounding the Kincaid P&P Site in jeopardy by allowing the improper storage and disposal of a highly corrosive and toxic hazardous waste.

AET is a licensed hazardous waste broker. Even with years of experience, AET decided to improperly ship the hazardous waste acid to a site which was not designed to adequately store or handle it. They are a company that should know better. AET's actions have a significant adverse effect on the implementation of the RCRA program.

AET severely threatened human health and the environment by failing to comply with the applicable statutory and regulatory requirements.

For all of these reasons, the gravity of the Respondent's violations is extremely high.

2. Respondent was not diligent in attempting to come back into compliance with the Act, Board regulations and applicable federal regulations.

3. There was an economic benefit to AET resulting from its noncompliance. AET was paid by Luxury Wheels to dispose of the hazardous waste acid. Instead of sending the material to a permitted hazardous waste disposal site, AET shipped the material to the Kincaid P&P Pawnee Site. AET did not refund any money to Luxury Wheels. As such, AET was able to keep all of the money paid to it by Luxury Wheels which was supposed to pay for the proper disposal of the hazardous waste acid. AET has refused to answer the State's discovery

requests, therefore the State has been unable to ascertain the exact amount of money Luxury Wheels paid AET to dispose of the hazardous waste acid.

4. Complainant has determined, based upon the specific facts of this matter, that a penalty of Sixty Thousand Dollars (\$60,000) will serve to deter further violations and aid in future voluntary compliance with the Act and Board regulations.

5. To Complainant's knowledge, Respondent has no previously adjudicated violations of the Act.

6. The Respondent did self report the alleged violations.

7. The Respondent has not agreed to perform a supplemental environmental project.

8. The Respondent did not complete a Compliance Commitment Agreement related to the alleged violations.

## **XII. CONCLUSION**

The record clearly shows that it is more likely than not that AET transported hazardous waste acid, an industrial process waste, from Colorado to the Kincaid P&P Site. The hazardous waste acid was stored and disposed of at the Kincaid P&P Site and surrounding oil fields, sites which do not meet the requirements of the Act and of regulations and standards thereunder. Therefore the Board should find that AET violated Section 21(e) of the Act, 415 ILCS 5/21(e) (2004).

WHEREFORE, Complainant, People of the State of Illinois, respectfully requests that the Board enter a final order:

- A) Granting Complainant's motion for summary judgment;
- B) Finding that the Respondent, AET ENVIRONMENTAL, INC., violated Section 21(e) of the Act, 415 ILCS 5/21(e) (2004);
- C) Ordering the Respondent, AET ENVIRONMENTAL, INC., to cease and desist

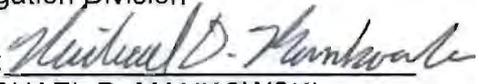
from any further violations of the Act and associated regulations;

- D) Awarding the Complainant a penalty of \$60,000 for the violations of the Act;
- E) Granting such other relief as the Board deems appropriate.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS  
LISA MADIGAN  
ATTORNEY GENERAL

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

BY:   
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(217) 782-9031

Dated: 6/26/2012

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- Exhibit A:** Request to Admit Facts by AET
  - Exhibit B:** Grand Junction Fire Department Report
  - Exhibit C:** Alum Etch-G MSDS
  - Exhibit D:** ATC Hazardous Waste Profile
  - Exhibit E:** ATC Hazardous Waste Manifest
  - Exhibit F:** Modified ATC Hazardous Waste Manifest
  - Exhibit G:** Safety Kleen Hazardous Waste Profile
  - Exhibit H:** Vickery Hazardous Waste Profile
  - Exhibit I:** Kincaid Hazardous Material Bill of Lading
  - Exhibit J:** Rich Johnson Affidavit
- Attachment 1:** Johnson November 17, 2004 Inspection Report
- Attachment 2:** NEIC Report
- Attachment 3:** Johnson April 19, 2005 Inspection Report