Illinois Attorney #6197210

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 MOTION AND ELECTRONIC FILING

ALL PARTIES PLEASE TAKE NOTICE that on October 18, 2012 , 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 MOTION FOR RECONSIDERATION, a** copy of which is attached hereto and herewith served upon you.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I did on October 18, 2012, 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 instrument entitled **MOTION FOR RECONSIDERATION**, as counsel for **E.O.R. Energy, LLC**, 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 *gomzfng1@netscape.net*	Hearing Officer C. Webb IPCB 1021 N. Grand Avenue East Springfield, IL 62794

Respectfully submitted,

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

E.O.R. ENERGY LLC MOTION FOR RECONSIDERATION

NOW COMES CO-RESPONDENT E.O.R. ENERGY, LLC, by and through undersigned counsel of record, (hereinafter "E.O.R."), and pursuant to 35 IAC 101.520 and 101.902, respectfully files this Motion for Reconsideration ("Motion") of the Illinois Pollution Control Board's ("IPCB") September 6, 2012, Order ("Order") granting Plaintiff's June 27, 2012, Motion for Summary Judgment ("MSJ"). As discussed below, the IPCB erred since it failed to assure it had jurisdiction for Counts I and V (alleged illegal disposal/injection) as pleaded in the March 2007 Complaint ("Complaint"), rendering the IPCB Order's assessment of liability for Counts I and V, and the entire $200,000 penalty, against E.O.R. void ab intitio, and requiring the Order be vacated and the matter remanded to IEPA.

I. Statutory and Legal Background

A. Order Bases Jurisdiction for Count I and V Liability and Penalty (Injection Without RCRA or UIC Permit), on 35 IAC 704 and 415 ILCS 5/12

The Complaint alleges in Count I that "approximately" 2200 gallons of alleged "hazardous waste acid" was injected, without a permit, into two Class II brine/gas injection wells utilized for oil and gas production at the Rink-Truax and Galloway oil fields (Rink #1 and Galloway #1, respectively).[1] *Complaint at p5, Count I, paras 24-25.*

[1]While the regulatory classification of alleged "hazardous waste acid" is not directly relevant to or determinative of the lack of jurisdiction at issue here, it remains E.O.R.'s position that the material at issue was neither a "waste", nor a "hazardous waste", but rather was exempted from regulation by RCRA

Count V of the Complaint alleges that "E.O .R. Energy violated 35 III . Adm . Code 704 .121 by injecting hazardous waste acid into wells without having a Underground Injection Control ("UIC') permit or authorization by rule and thereby violated Section 12(g) of the Act, 415 ILCS 5/12(g) (2004)". *Complaint at p18, para. 36*.

Counts I and V also allege that the remaining 65 gallons of liquid was placed into three oil production wells on the oil leases: Galloway #3, Rink #4, and Truax #3, in violation of 415 ILCS 5/12 and 35 IAC 704. *Complaint at p5, Count I, para. 25, and at p18, Count V, para. 36.*

In it's June 27, 2012, Motion for Summary Judgement, the State repeated the allegation that "Respondent injected hazardous waste into the EOR Wells in violation of Sections 704.121 and 704.202.", and also alleged that "While operating wells covered by Section 704.202, Respondent failed to comply with the requirements of Section 704.203." *6/27/12 MSJ at p51.*

Finally, the September 6, 2012, IPCB Order expressly states that the IPCB found Count I and Count V liability against E.O.R. for illegal disposal under 415 ILCS 5/12 as implemented by 35 IAC 704:

> "**Count I** ...the facts are uncontroverted that EOR directed Mr. Wake and Mr. Geary to dispose of the acid material in EOR's wells. Therefore, the Board finds that EOR transported waste into Illinois for storage and disposal...". *Order at p12.*

> **"Count V** The People maintain that EOR violated 35 Ill. Adm. Code 704.121 and 704.203, thereby violating Section 12(g) of the Act (415 ILCS 5/12(g) (2010)), by injecting hazardous waste acid into wells without having a UIC permit. The Board has found that the record establishes that EOR did not have a RCRA permit. Further, the record establishes that EOR did not have a UIC permit, but did dispose of hazardous materials in EOR's wells by underground injection. The Board's rules prohibit underground injection without a permit and require certain notifications and manifesting requirements. The record establishes that EOR did not comply with the Board's regulations before injecting the hazardous materials into its wells. Therefore, the Board finds EOR violated 35 Ill. Adm. Code 704.121 and 704.203, thereby violating Section 12(g) of the Act (415 ILCS 5/12(g) (2010)), by injecting hazardous waste acid into wells without having a UIC permit. ". *Order at p13*.

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due to its utility as an acid wash in the oil and gas industry, and due to the RCRA preference and allowances for reuse of such materials as recycled material, rather than blindly requiring or regulating their disposal as a waste.

B. Courts Are Required to Assure That Jurisdiction Exists, Sua Sponte or When Challenged; Orders Issued Without Subject Matter Jurisdiction Are Void Ab Initio

Central to this Motion is the cornerstone jurisprudential requirement that subject matter jurisdiction be clearly present in order for a court's actions to be valid under the Constitution and thus binding upon the parties. *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577, (1999))*("Jurisdiction is the 'power to declare law,' and without it the federal courts cannot proceed...Accordingly, not only may the federal courts police subject matter jurisdiction sua sponte, they must"). [2]

In instances where a court proceeds to judgement against a defendant on a claim where there was no subject matter jurisdiction, such judgment is void ab intitio, and the order is of no effect as to such claim against the defendant. *People v. Wade, 506 N.W.2d 954 (Ill. 1987)*(Judgment entered by court without subject matter jurisdiction or that lacks inherent power to make or enter particular order involved is void and of no effect as if never issued; such a judgment may be attacked at any time, either directly or collaterally).

II. Discussion - Jurisdictional Errors Render Order and Penalty Void

A. Overview-Court Must Address E.O.R. Jurisdictional Claim and Void The Order

In the case at bar, it is clear from the record that the IPCB had no jurisdiction to assess liability and penalty for the Count I and Count V alleged illegal injection violations, and thus the September 6, 2012, Order is void ab initio as to Movant E.O.R. for such Counts and penalty amounts. *Ruhrgas AG v. Marathon Oil Co.*; *35 IAC 704.102; 225 ILCS 725; 62 IAC 240*.

Furthermore, since the IEPA and IPCB Order did not distinguish or itemize what part of the $200,000 penalty was attributable to the Count I and V illegal injection allegations, the entire penalty is "tainted", and thus void in its entirety. The entire penalty must be vacated and the matter remanded to IEPA for recalculation (after subtraction of what were likely substantial assessments for the harm, gravity and other associated penalty components), prior to the IEPA re-seeking to have the IPCB re-assess a penalty for whatever counts and alleged violations remain

[2] *See Also Karazanos v. Madison Two Assoc.*, 147 F.3d 624, 625-26 (7th Cir. 1998)(Jurisdiction is raisable at any time and is subject to de novo review since courts have limited subject matter jurisdiction and may only hear cases when empowered to do so by the Constitution or an Act of Congress);

by that time.

B. Points of Error

1. **Error of Law #1 (Counts I and V): IPCB/IEPA Do Not Have Jurisdiction Over Class II Injection Wells in Illinois, State of Illinois and Illinois Department of Natural Resources/Office of Mines and Minerals, Oil and Gas Division, Regulates Class II Injection Wells Under 225 ILCS 725/62 IAC 240, Not Through IEPA or 415 ILCS 5/12(g)/35 IAC 704.**

Unfortunately for the State, and fatal to that part of the IPCB order imposing liability and penalties for Counts I and V, the two injection wells into which the majority of fluid was allegedly injected into (Rink #1 and Galloway #1) were in fact Class II UIC wells, as defined by law and as classified by the State. *35 IAC 704.106(b)* (Listing Six Classes of Wells)..

Unlike Class I, III, IV, V and IV injection wells, Class II wells are specifically not regulated under 35 IAC 704, by way of 35 IAC 704.102, which provides:

> "704.102 Scope of the Permit or Rule Requirement
>
> Although six classes of wells are set forth in Section 704.106, the UIC (Underground Injection Control) permit program described in 35 Ill. Adm. Code 702, 704, 705, and 730 regulates underground injection for only five classes of wells (see definition of "well injection," 35 Ill. Adm. Code 702.110). *Class II wells (Section 704.106(b)) are not subject to the requirements found in 35 Ill. Adm. Code 702, 704, 705, and 730. The UIC permit program for Class II wells is regulated by the Illinois Department of Natural Resources, Office of Mines and Minerals, Oil and Gas Division, pursuant to the Illinois Oil and Gas Act [225 ILCS 725] (see 62 Ill. Adm. Code 240).* The owner or operator of a Class I, Class III, Class IV, or Class V injection well must be authorized either by permit or by rule. (Emphasis Added).

Consequently, per 35 IAC 704.202, the IEPA did not and does not have jurisdiction over any alleged injections (permitted, illegal, or otherwise) into a Class II well in Illinois; rather, such alleged violations must be investigated and enforced by the IDNR under 225 ILCS 725 as implemented at 62 IAC 240, with attendant and independent notice and hearing procedures. *225 ILCS 725*.

To wit, similar to 35 IAC 704, Illinois SDWA Class II UIC regulations state that "no person shall drill, deepen, or convert for use as a Class II UIC well without a permit...". *62 IAC 240.310(a) [from 225 ILCS 725(b)]*. Also, the Illinois Class II UIC rules state that "no person may inject into a freshwater aquifer" unless a permit application is fully completed and "has been submitted for final approval..." or unless an exemption has been requested. *62 IAC*

240.310(b)(2) and (3); Id..

Thus, to become regulated and inject legally into a Class II well, a person must either submit a permit application for approval and be approved as a "Permittee", or request an exemption (permit by rule), under 225 ILCS 725 and 62 IAC 240. Conversely, a person can become regulated by injecting prior to submitting a permit application or obtaining an exemption (unpermitted injection). *Id.* It is the latter circumstance that it appears the State is attempting to assert against E.O.R., e.g that it was an unpermitted injector into a Class II well.

However, regardless of whether a permittee or another person is alleged to have improperly injected into a Class II well, Illinois' Class II UIC enforcement authority is expressly and exclusively provided by 225 ILCS 725/8a and 62 IAC 240.150(a), which require, as a jurisdictional prerequisite to any enforcement action, issuance of a formal written Notice of Violation to the permittee or person alleged to have engaged in conduct or activities required to be permitted (e.g illegally injecting into an unpermitted Class II well), notifying that they have been found to be in violation of their permit or other provision of 62 IAC 240.[3] *225 ILCS 725/8a and 62 IAC 240.150(a)*.

The Complaint fails to plead and the Order fails to find that the required 225 IAC 725/8a notice was issued to E.O.R. by IDNR, and instead both cite the wrong statute (415 ILCS 5/12)

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[3]225 ILCS 725 provides in relevant part:

+ (225 ILCS 725/1) (from Ch. 96 1/2, par. 5401)("Waste" means "physical waste" as that term is generally understood in the oil and gas industry, and further includes:... (3) the drowning with water of any stratum or part thereof capable of producing oil or gas, except for secondary recovery purposes;"

+ "(225 ILCS 725/8) (from Ch. 96 1/2, par. 5412) Sec. 8. The Department shall have the authority and it shall be its duty to make such inquiries as it may think proper to determine whether or not waste, over which it has jurisdiction, exists or is imminent. In the exercise of such power the Department shall have the authority to collect data; to make investigation and inspections; to examine properties, including drilling records and logs; to examine, check and test oil and gas wells; to hold hearings; and to take such action as may be reasonably necessary to enforce this Act. (Source: P.A. 85-1334.)"

+ "(225 ILCS 725/8a) (from Ch. 96 1/2, par. 5413) Sec. 8a. When an inspector or other authorized employee or agent of the Department determines that any permittee, or any person engaged in conduct or activities required to be permitted under this Act, is in violation of any requirement of this Act or the rules adopted hereunder or any permit condition, or has falsified or otherwise misstated any information on or relative to the permit application, a notice of violation shall be completed and delivered to the Director or his designee."

and regulation (35 IAC 704) for the non-existent IEPA and IPCB jurisdiction for Counts I and V.. As such, there was no 225 ILCS 725 jurisdiction for IEPA, IDNR or Illinois to bring the illegal injection claims in Counts I and V of the Complaint in the first place, or for the IPCB to hear or adjudicate same, and the imposition of liability and penalty for Counts I and V illegal injection violations against E.O.R. by the IPCB Order is void, and must be reversed/vacated. *Ruhrgas AG v. Marathon Oil Co., Supra; People v. Wade, Supra*.

Further, since the assessed penalty (and any theoretical and actual harm) is based in large part upon the void Count I and V allegations of illegal disposal by injection, this matter must be remanded to IEPA for amendment of the complaint and recalculation of the whatever penalty remains absent the Count I and V liability and penalty assessment against E.O.R.[4] This amendment, recalculation, and reduction of the gravity, harm and related components (logically resulting in a substantial reduction in the $200,000 penalty), is also mandated and supported by the fact that the E.O.R. UIC wells were in fact properly permitted Class II wells.

2. Error of Law #2: No Jurisdiction Because Class II UIC Wells Properly Permitted

As to Counts I and V, the IPCB Order also errs at law, and is further without basis thereunder, since the E.O.R. injection wells at issue, Rink #1 (Rink-Truax Lease, Christian County) and Galloway #1 (Galloway Lease, Sangamon County) were in fact properly and legally permitted by the IDNR.

As inquiry to the INDR/OMM quickly confirms, E.O.R.'s Rink #1 was issued permit number 201004 (API 1202101869) in 1993, and Galloway #1 permit number 202036 (API 1216723505) in 1999. Hence, contrary to the assertions of the Complaint, Motion, Order and other filings, the E.O.R. wells were in fact properly permitted for injection as Class II UIC wells, under Illinois law, and the IPCB and IEPA have no jurisdiction over such wells or injections.

Consistent with the applicable law as discussed above, any civil allegation by Illinois of illegal disposal violations (now over 5 years old) at these E.O.R. wells would had to have been

[4]The IPCB Order states: "Analysis of the Section 33(c) and 42(h) factors illustrates that there are few mitigating factors against a substantial penalty. Furthermore, the violations found by the Board against EOR are very serious. EOR placed hazardous waste in wells at an unpermitted site. Given the seriousness of these violations a substantial penalty is warranted. *Order at p19*.

in the form of an IDNR NOV asserting a permit violation or other 62 IAC 240 violation against E.O.R., in order for Illinois and IDNR to obtain enforcement jurisdiction and assess liability and penalty against E.O.R. *725 ILCS 225/8a; 62 IAC 240.150.*

3. Error of Law #3: E.O.R. Production Wells Also Regulated By IDNR Under 225 ILCS 725/62 IAC 240, Not By IEPA Under 415 ILCS 5/12 and 35 IAC 704.

Counts I and V also allege that the remaining 65 gallons of liquid was placed into three oil production wells on the oil leases: Galloway #3, Rink #4, and Truax #3, in violation of 415 ILCS 5/12 and 35 IAC 704. *Complaint at p5, Count I, para. 25, and at p18, Count V, para. 36.* However, along with Class II injection wells, in Illinois all oil and gas production wells are also regulated under 225 ILCS 725 and 62 IAC 240, and not 415 ILCS 5/12, thus there is no jurisdiction underlying this final allegation of Counts I and V, either, as it is IDNR who must issue notice of and pursue any such violations. *225 ILCS 725 and 62 IAC 240*.

62 IAC Section 240.200 provides:

> "The provisions of this Subpart apply to production wells. As used in this Subpart "production well" means a well drilled for the production of oil or gas, or a well drilled for a water supply for use in connection with an enhanced oil recovery project."

Thus, as with the Class II UIC wells, the IEPA and IPCB do not have jurisdiction over the alleged injection/secondary recovery violations at the oil production wells, (e.g. alleged injection of what appears to likely have been mere diluted, mildly acidic water, into oil and gas production and wells for enhanced oil recovery purposes) under 415 ILCS 5/12 or otherwise.

4. Error of Law #4: Count I of Complaint Also Relies in Part on Alleged Illegal Injection for Liability Assessment and Penalty, And Must Be Amended and Recalculated

Finally, the Count I allegations and the IPCB finding of liability and penalty assessment, to the extent they find E.O.R. is liable and was should be penalized under Count 1 in part for "arranging for disposal" by way of any allegedly "illegal injection" are similarly bereft of any legal or jurisdictional basis due to the fact that any such alleged "injection" or "disposal" is regulated, and determined legal or illegal, by IDNR, not IEPA.

Consequently, upon remand, the IEPA must also subtract any penalty assessment based upon such alleged illegal injection into unpermitted wells related to Count I, in addition to removing

Count V and any other allegations of unpermitted wells or illegal disposal contained in Count 1 or elsewhere in the complaint.

III Conclusion - Vacation of Order, Remand, Recalculation of Penalty Required

The IEPA and IPCB simply have no power to enforce the violations alleged in Count V, or the illegal injection allegations of Count I, on behalf of the State of Illinois against a 225 ILCS 725 oil and gas producer or a SDWA UIC Permittee. It was thus error for the IPCB to assess liability and penalty against Respondent as set forth in the Order, and the Order is void ab initio, as a matter of law. *Ruhrgas AG v. Marathon Oil Co., Supra; People v. Wade, Supra*.

The issues of the effect of the State's requests to admit and potential waivers or deemed admissions do not obviate the lack of jurisdiction for Counts I and V, as subject matter jurisdiction may not be created, or penalties assessed, even by agreement of the parties, where jurisdiction does not exist in law and fact. *Id.* Similarly, no RCRA permit is required for injections into such wells, since allowable injections, and permits, are determined and issued by the IDNR under 62 IAC 240 and 225 ILCS 725, as approved under the federal SDWA (42 USC 300 et seq.).

Thus, the September 6, 21012, Order is without jurisdiction and incorrect at law, and void, as to the Count I and Count V liability and penalty assessment for alleged illegal injections, and such defect voids the entire penalty assessment of $200,000. *Ruhrgas AG v. Marathon Oil Co., Supra; People v. Wade, Supra; 35 IAC 704.102; 225 ILCS 725; 62 IAC 240.*

IV Relief Requested

WHEREFORE, Respondent respectfully **MOVES** the Board to:

A. Vacate its September 6, 2012, Order, in its entirety, due to the erroneous, jurisdiction-less imposition of liability and penalty against E.O.R. for illegal injection in Counts I and V, and due to the resulting combined assessment of the $200,000 penalty for Counts I-V
B. Remand the matter back to IEPA for amendment of the complaint and recalculation of the requested penalty absent the Count I and V illegal injection/disposal allegations;
C. Suspend or stay operation of the Order, to the extent required under 35 IAC 101.904(b)(3) and 101.904(c), if and as applicable;
D. Issue any additional relief in Respondent's favor deemed appropriate under the circumstances or as justice or equity requires.

Respectfully submitted For E.O.R. By:

s/: *Felipe Gomez, Esq.*

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