BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
Complainant,	)	
v.	)	**PCB No. 07–95 (Enforcement)**
AET ENVIRONMENTAL, INC., a Colorado corporation, E.O.R. ENERGY, LLC, a Colorado limited liability company,	)	
Respondent.	)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on November 14, 2012, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, PEOPLE'S RESPONSE TO RESPONDENT E.O.R. ENERGY, LLC'S MOTION TO RECONSIDER, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
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Environmental Enforcement/Asbestos
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BY: 

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CERTIFICATE OF SERVICE

I hereby certify that I did on November 14, 2012, cause to be served by 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 PEOPLE'S RESPONSE TO RESPONDENT E.O.R. ENERGY, LLC'S MOTION TO RECONSIDER upon the persons listed on the Service List.

Michael D. Mankowski
Assistant Attorney General

This filing is submitted on recycled paper.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, LISA MADIGAN, Attorney General of the State of Illinois,	)	
Complainant,	)	
v.	)	**PCB No. 07-95 (Enforcement)**
AET ENVIRONMENTAL, INC., a Colorado corporation, E.O.R. ENERGY, LLC, a Colorado limited liability company,	)	
Respondents.	)	

PEOPLE'S RESPONSE TO RESPONDENT E.O.R. ENERGY, LLC'S MOTION TO RECONSIDER

NOW COMES the Complainant, PEOPLE OF THE STATE OF ILLINOIS, LISA MADIGAN, Attorney General of the State of Illinois, ("People"), and herein replies to Respondent's, E.O.R. ENERGY, LLC, a Colorado limited liability company ("EOR"), Motion to Reconsider. In support of this Response, the People state as follows:

I. BACKGROUND

On March 20, 2007, the State filed a five-count Complaint against Respondent, E.O.R. ENERGY, LLC ("EOR"). On June 18, 2007, Respondent filed an Answer to the Complaint. The June 18, 2007 Answer was unsworn and submitted by non-attorney James Hamilton III. On October 18, 2007, attorney David S. O'Neill filed an appearance and 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 EOR. On March 21, 2008, the People served its Request to Admit Facts on Respondent, EOR, via first-class mail. On January 20, 2009, Respondent claimed that it did not receive the People's Request to Admit Facts. The hearing officer requested that the People re-submit their Request

to Admit Facts. The People served a second copy of the Request to Admit Facts on Respondent, via first-class mail, on January 22, 2009. On February 18, 2009, Diane F. O'Neill, a licensed attorney-at-law licensed and registered to practice law, filed an appearance for EOR. On April 20, 2009, Respondent served on the People an unsigned Answer to Complainant's Request to Admit Facts. On March 15, 2010, Diane O'Neill filed a motion to withdraw her appearance on behalf of EOR. On August 17, 2010, the State filed a Motion to Deem Facts Admitted by EOR. On September 16, 2010, the Board granted the People'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). On June 27, 2012, the People filed its Motion for Summary Judgment Against EOR. EOR did not respond to the People's Motion for Summary Judgment. On September 6, 2012, the Board granted the People's unopposed Motion for Summary Judgment finding that EOR violated Sections 12(g), 21(e) and 21(f) (1) and (2) of the Act, 415 ILCS 5/12(g), 21(e) and 21(f) (1) and (2) (2010), and numerous provisions of the Board's rules as alleged in the People's Complaint. Having found that EOR violated the Act and Board regulations, the Board also found that a civil penalty of $200,000 was appropriate and directed EOR to pay that civil penalty. *People v. AET Environmental, Inc. and E.O.R. Energy LLC.*, PCB 07-95 (September 6, 2012).

The Board mailed its Order to EOR on September 6, 2012. On September 14, 2012, attorney Felipe Gomez filed an appearance on behalf of EOR. On October 18, 2012, EOR filed its Motion to Reconsider requesting that the Board reconsider its findings in the Final Order on part of Count I and all of Count V and vacate the $200,000 penalty.

II. ARGUMENT

In its Motion to Reconsider, EOR is attempting to argue to the Board unsubstantiated allegations which should have been brought in a response to the People's Motion for Summary Judgment. In an effort to circumvent the fact that it failed to timely respond to the People's

motion, EOR has crafted an unconvincing jurisdictional argument which makes allegations based on information which was previously available but was not brought to the Board's attention prior to the making its final decision. Not only does EOR attempt introduce new information, it also directly contradicts an admission made in its answer to the People's complaint. EOR's jurisdictional argument based on the Illinois DNR's authority to permit Class II UIC wells fails because Illinois DNR has no authority to regulate the injection of hazardous waste. Also, even if the wells were originally permitted as Class II, EOR's own actions converted their wells away from Class II, causing the wells to come under the Board's authority. Based on the current record, the Board clearly had proper authority to issue its September 6, 2012 Final Order. Furthermore, EOR failed to file its motion within the 35 day limit prescribed in the Board's rules. For all of these reasons, the Board should deny EOR's untimely, unsubstantiated and erroneous Motion to Reconsider.

Pursuant to the Board's procedural rules, "Any motion for reconsideration or modification of a final Board order must be filed within 35 days after the receipt of the order." 35 Ill. Adm. Code 101.520. "In ruling on a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." 35 Ill. Adm. Code 101.902. In *Citizens Against Regional Landfill v. County Board of Whiteside*, PCB 93-156 (Mar. 11, 1993), the Board observed that "the intended purpose of a motion for reconsideration is to bring to the court's attention *newly discovered* evidence which was *not available at the time of hearing*, changes in the law or errors in "the court's previous application of the existing law." *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill.App.3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992) (Emphasis added). The Board's rules and previous decisions make it clear that in order to prevail on a motion to reconsider, a party must: provide *new information* which was *not available* at the time of a Board decision and which shows that the Board's decision was in error; show that there has been a change in law which puts the Board's

decision in error or prove that the Board misapplied the law when making its decision.

In its Motion to Reconsider, EOR has not provided any new law which contradicts the Board's decision. Therefore, EOR has to either provide new evidence which was not available at the time the Board made its decision or make a showing that the Board misapplied the law when making its decision.

A. EOR Has Provided No New Evidence

Respondent's basic argument is that the Rink #1 and Galloway #1 wells were permitted by the Illinois Department of Natural Resources ("Illinois DNR") as Class II Underground Injection Wells ("UIC"). According to EOR, since the Illinois DNR permitted the wells for Class II injection, the Board had no authority to find that EOR injected hazardous waste into the Rink #1 and Galloway #1 wells in violation of Section 12(g) of the Act and also injected hazardous waste in violation of various Board regulations. To support this claim, EOR simply cites two permit numbers purported to be provided by the Illinois DNR's Office of Mines and Minerals, one in 1993 and one in 1999. EOR provides no other information to support its claim. EOR did not even attempt to provide copies of the permits or any affidavits asserting, under oath, that EOR was issued such permits. As such, EOR has entered nothing into the record as evidence that the Rink #1 and Galloway #1 wells are Class II wells. Because EOR has added nothing to the record, there is nothing new for the Board to reconsider. EOR's whole argument is based on an unconfirmed claim that the wells in question were permitted by Illinois DNR.

Furthermore, in making its claim, EOR has not provided any new information which was unavailable at the time the Board made its decision. If in fact EOR was issued Class II permits by Illinois DNR in 1993 and 1999, respectively, then those permits were available to be added to the record prior to the Board's September 6, 2012, Final Order. The permits were not in the record because EOR failed to respond to the People's Motion for Summary Judgment. Thus, the Board should not reward EOR for failing to respond to the People's motion by allowing it a new

opportunity to argue that it was issued permits by the Illinois DNR.

Even more concerning than EOR's attempt to bring in evidence which was previously available, but absent from the record due to EOR's nonparticipation, is the fact that in its answer to the People's complaint, EOR clearly admitted that it was not authorized by rule to inject hazardous waste into the EOR Wells and did not have any UIC permits granting it authority to inject hazardous waste into any of the EOR Wells.[1] Notwithstanding this admission, the Respondent has chosen, at this late date, to argue that it was issued UIC permits by the Illinois DNR. "[O]nce having affirmed under oath that a particular state of facts exists, a party may not later assert that the contrary is true." *DeWitt County Public Bldg. Com'n v. DeWitt County*, 128 Ill.App.3d 11, 25, 469 N.E.2d 689 (Ill. App. 4 Dist., 1984). Because EOR has already admitted that it neither held UIC permits for the wells in question nor had authorization by rule to inject hazardous waste into the EOR Wells it should therefore be estopped from now making the argument that it was granted such permits or had authority to inject hazardous waste into the EOR Wells.[2] The general rule is that lack of subject matter jurisdiction cannot be waived, nor may a party be deemed estopped to raise the issue.[3] However, for the reasons outlined below, EOR's jurisdiction is incorrect, which means that the Board is well within its authority to hold that EOR's latest argument is barred by estoppel.

Since EOR is barred by the doctrine of estoppel to now argue that it was granted Class II UIC permits, it should be evident to the Board that EOR's Motion to Reconsider has provided no new information which can form the basis for a motion to reconsider. Therefore, the Board should deny EOR's motion and uphold the decisions made in its September 6, 2012 Final Order.

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[1] EOR Answer, Count V, paragraph 34.
[2] EOR Answer, Count V paragraph 34.
[3] *People v. Stevenson*, 960 N.E.2d 739, 749, 2011 IL App (1st) 093413.

B. The Board Correctly Applied the Law

In its September 6, 2012 Final Order the Board correctly ruled that the acid material was a hazardous waste[4], that it was uncontroverted that EOR directed Wake and Geary to dispose of hazardous waste down EOR's wells and that EOR violated Section 12(g) of the Act[5] and Sections 704.121 and 704.203 of the Board's Waste Disposal Regulations[6] by injecting the hazardous waste acid into its wells. The Board based this decision on the record available at the time of decision. This record included the People's Complaint, EOR's Answer, admissions by EOR which were deemed admitted, the People's Motion for Summary Judgment and a sworn Affidavit, with attachments, from Illinois EPA inspector Richard Johnson. Because EOR failed to respond to the People's Motion, that was the entire record.

The record contains a detailed chemical analysis of the acid material injected into the EOR Wells. This analysis proves, and the Board agreed, that the material was an acidic and characteristic hazardous waste. EOR's answer includes an admission that it held no UIC permits authorizing it to inject hazardous waste into its wells. EOR's admissions show that EOR instructed Wake and Geary to inject the acid material into EOR's wells. Based on this evidence, the Board held that EOR transported the acid material to Illinois for disposal, and violated Section 12(g) of the Act and Sections 704.121 and 704.203 of the Board's Waste Disposal Regulations. Because the record contained no evidence to the contrary, this was the only reasonable decision

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[4] Even in its Motion to Reconsider, EOR does not make a substantiated allegation that the acid material was a hazardous waste, or that it was injected into the EOR Wells. They are only arguing that the wells in question were outside of the Board or Illinois EPA's authority. On pages 1 and 2, EOR does slip in a footnote representing that "...it remains E.O.R.'s position that the material at issue is neither a "waste", nor a "hazardous waste", but rather was exempted from regulation by RCRA due to its utility as an acid wash in the oil and gas industry, and due to the RCRA preference and allowances for the reuse of such materials as recycled material, rather than blindly requiring or regulating their disposal as a waste." An examination of the record shows that this claim has never been made by EOR in the past. With this footnote, EOR is attempting to put forth a new argument which was not made prior to the Board's September 6th Order. The proper time to make such an argument was in its answer, in a response to the People's Motion for Summary Judgment or in some other filing, not after the Board has issued a final decision. Therefore the Board should strike this footnote.

[5] 415 ILCS 5/12(g).

[6] 35 Ill. Adm. Code 704.121 and 704.203.

that the Board could have made.

C. Board Authority

EOR's motion challenges the Board's authority to make the decision outline in Section II.B above. In its argument, EOR focuses on the status of the wells, but the status of the wells is not controlling, the type of fluid injected into the wells is what matters. Illinois DNR may have the authority to regulate Class II UIC wells, however, they do not have the authority to permit a person to inject hazardous waste into those wells. Such authority rests solely in the Illinois EPA and the Board.

When ruling on its motion, the Board must recognize that EOR failed to respond to the People's motion for summary judgment and therefore cannot challenge the record used by the Board to make its decision. Because of its non-responsiveness, in order to avoid a $200,000 penalty, a jurisdictional argument is EOR 's only opportunity to challenge the Board's decision. EOR's motion is an obvious attempt to reargue the facts of the case characterized as a challenge to the Board's jurisdiction.

Unfortunately for EOR, whether or not its motion is a proper motion to reconsider is inconsequential because EOR's argument regarding the Board's authority is flawed. The Board clearly had authority to rule upon the sections of the People's motion for summary judgment related to Counts I and V of the People's Complaint. According to the Act, the Board has authority to conduct proceedings upon complaints charging violations of the Act, any rule or regulation adopted under the Act, any permit or term or condition of a permit, or any Board order.[7] In the instant case, the People have alleged that EOR violated Section 12(g) of the Act, which prohibits causing, threatening or allowing the underground injection of contaminants without a UIC permit issued by the Illinois EPA under Section 39(d) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any regulations or standards adopted by the

[7] 415 ILCS 5/5(d) (2010).

Board or of any order adopted by the Board with respect to the UIC program. The People also alleged violations of regulations promulgated under Section 12(g). When drafting Section 12(g), the General Assembly clearly intended to prohibit the underground injection of contaminants without a UIC permit issued by the Illinois EPA. According to Sections 5(d) and 12(g) of the Act, determining whether EOR injected contaminants into underground wells without a permit issued by the Illinois EPA is clearly within the Board's authority. EOR's only chance to prevail would be to successfully show that they either held a UIC permit issued by the Illinois EPA or that the acid material was not a contaminant. As stated earlier, EOR has not successfully challenged the Board's determination that the acid material was a contaminant and a hazardous waste. EOR's allegation that it was issued a proper UIC permit is also flawed.

EOR merely argues that certain Board and Illinois DNR regulations limit the authority of the Board to rule on Count I and Count V of the People's Complaint.[8] Illinois courts have specifically held that, "An agency cannot, through its rulemaking, limit the scope of the statute." *Hadley v. Illinois Dept. of Correction*, 224 Ill.2d 365, 864 N.E.2d 162 (2007). Since Section 12(g) clearly states that it is a violation to inject contaminants without a UIC permit issued by the Illinois EPA, the Board regulations cited by Respondent simply cannot limit the authority which was clearly created by the General Assembly when it enacted Section 12(g) of the Act. EOR has not entered any evidence that it had a UIC permit issued by the Illinois EPA, and therefore the Board must find that it has jurisdiction and uphold its September 6 2012 Final Order.

The People are aware that the UIC program, as administered in Illinois, divides regulatory duty between the Illinois EPA and Illinois DNR. Therefore, if the Board is not convinced that Section 12(g) is enough to grant it jurisdiction in this matter, a more comprehensive analysis of the UIC program will show that the Board properly exercised its powers when ruling on the People's motion for summary judgment.

[8] EOR Motion to Reconsider p. 4.

1) Illinois DNR UIC Obligations Not Controlling

Analysis of the UIC program in Illinois shows that while Illinois DNR may have authority to permit Class II UIC wells, this Illinois DNR authority in no way bars the Board from making a determination that EOR injected hazardous waste into its wells without the proper permit. A careful examination of the law shows that the Illinois EPA is the only state agency given the authority to permit the injection of hazardous waste into underground wells. This authority is not superseded or affected by the limited authority granted to the Illinois DNR.

a. UIC Program Background

Congress enacted the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300(f) et seq., in order to protect the nation's drinking water by ensuring public water supply systems meet certain minimum national standards. *Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765, 768-69 (D.C.Cir.1992). Specifically, the SDWA was passed to prevent "underground injection which endangers drinking water sources." 42 U.S.C. § 300h(b)(1); *W. Neb. Res. Council v. EPA*, 943 F.2d 867, 870 (8th Cir.1991) ("The principle legislative history explains that the statute was primarily aimed at controlling underground injections of *waste*") (emphasis in original). Part C of the SDWA, 42 U.S.C. §§ 300h-300h-8, created the UIC program. The United States Environmental Protection Agency ("USEPA") oversees the UIC program, which may be implemented in part by the states, who can create their own UIC program subject to USEPA approval. The regulations establishing the minimum requirements for UIC programs are codified at 40 C.F.R. Part 144. Under the UIC program, all injection wells require a permit. State plans must require that the applicant for the injection well permit demonstrate that the proposed injection will not endanger drinking water sources. 42 U.S.C. § 300h(b)(1)(A)-(B).

As part of the UIC program, the state must also classify injection wells in conformance with the classification system set forth by USEPA in 40 C.F.R. §§ 144.6, 145.11(a)(2), 146.5.

b. Illinois EPA Authority

Authority for Illinois' UIC program is established under 40 CFR § 147.700 and 40 CFR § 147.701. Under this authority, the Illinois General Assembly created Section 12(g) of the Act which prohibits the underground injection of contaminants without a permit issued by the Illinois EPA. Illinois EPA and the Board, in turn, promulgated UIC regulations found in section 702, 704, 705 and 730 of the Board's Waste Disposal Regulations.[9] According to Section 702.101, the permit regulations of 35 Ill. Adm. Code 702 through 705 include provisions for the UIC permit program pursuant to Title III and Title X of the Act, 415 ILCS 5/Title III and Title X.[10] The regulations of 35 Ill. Adm. Code 702 through 705 are derived from 40 CFR 124, 144, and 270.[11]

According to Section 702.120(a), any person that is required to have a permit must complete, sign, and submit an application to the Agency as described in this Section and in 35 Ill. Adm. Code 704.161.[12] Any person that is currently authorized with UIC authorization by rule (Subpart C of 35 Ill. Adm. Code 704) must apply for a permit when required to do so by the Agency.[13] The procedure for application, issuance, and administration of an emergency permit is found exclusively in 35 Ill. Adm. Code 704.163.[14]

Section 704.106 provides six well classes.[15] Only four of which may be at issue in this matter.[16] It must be noted that 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.[17]

For the purposes of this case, Class I injection wells include any well used by a generator of hazardous waste or the owner or operator of a hazardous waste management facility to inject

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[9] 35 Ill. Adm. Code 702, 704, 705 and 730.
[10] 35 Ill. Adm. Code 702.101.
[11] *Id.*
[12] 35 Ill. Adm. Code 702.120(a).
[13] *Id.*
[14] *Id.*
[15] 35 Ill. Adm. Code 704.106.
[16] Classes I, II, VI and V.
[17] *Id.*

hazardous waste beneath the lowermost formation containing an underground source of drinking water ("USDW") within 402 meters (one-quarter mile) of the well bore.[18]

Class II injection wells are any well that injects any of the following fluids:

- fluids that are brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production, and which may be commingled with waste waters from gas plants that are an integral part of production operations, unless those waters are classified as a hazardous waste at the time of injection;
- fluids injected for enhanced recovery of oil or natural gas; and
- fluids injected for storage of hydrocarbons that are liquid at standard temperature and pressure.[19]

Class IV injection wells include the following:

- A well used by a generator of hazardous waste or of radioactive waste, by the owner or operator of a hazardous waste management facility or by the owner or operator of a radioactive waste disposal site to dispose of hazardous wastes or radioactive wastes into a formation that contains a USDW within 402 meters (one-quarter mile) of the well;
- a well used by a generator of hazardous waste or of radioactive waste, by the owner or operator of a hazardous waste management facility, or by the owner or operator of a radioactive waste disposal site to dispose of hazardous waste or radioactive waste above a formation that contains a USDW within 402 meters (one-quarter mile) of the well; or
- a well used by a generator of hazardous waste or the owner or operator of a hazardous waste management facility to dispose of hazardous waste that cannot be classified under any of subsections (a)(1), (d)(1), or (d)(2) of this Section (e.g., a well that is used to dispose of hazardous waste into or above a formation that contains an aquifer that has been exempted pursuant to 35 Ill. Adm. Code 730.104).[20]

Class V injection wells are any injection well that is not classified as a Class I, II, III, IV, or VI injection well.[21]

EOR is correct that according to Section 704.102, the permit program described in 35 Ill.

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[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*

Adm. Code 702, 704, 705, and 730 regulates underground injection for only five classes of wells.[22] Class II wells are not subject to the requirements found in 35 Ill. Adm. Code 702, 704, 705, and 730.[23] 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).[24]

Section 704.105 lists wells which are specifically included or excluded from the state's UIC regulations.[25] Of importance to the present matter, Section 704.105 clearly states that any wells used by generators of hazardous waste, or by owners or operators of hazardous waste management facilities, to dispose of fluids containing hazardous waste are expressly included.[26] Class II wells are expressly excluded.[27]

Section 704.121 expressly prohibits any underground injection, except into a well authorized by permit or rule issued pursuant to this Part and 35 Ill. Adm. Code 705.[28] Section 704.202 states that the owner or operator of any well that is used to inject hazardous wastes accompanied by a manifest or delivery document was required to apply for authorization to inject, as specified in Section 704.161(b)(1)(B), before August 2, 1984.[29]

c. Illinois DNR Authority

Illinois DNR's authority over Class II UIC wells follows from Section 8b of the Illinois Oil and Gas Act.[30] Section 8b states that: "No person shall drill, convert or deepen a well for the purpose of disposing of oil field brine or for using any enhanced recovery method in any underground formation or strata without first securing a permit therefor. Such permit shall be

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[22] 35 Ill. Adm. Code 704.102.
[23] *Id.*
[24] *Id.*
[25] 35 Ill. Adm. Code 704.105.
[26] *Id.*
[27] *Id.*
[28] 35 Ill. Adm. Code 704.121.
[29] 35 Ill. Adm. Code 704.202.
[30] 225 ILCS 725/8b (2010).

obtained as provided in clause (2) of Section 6..." Section 6 of the Oil and Gas Act states, in pertinent part, that the Department shall have the authority to conduct hearings and to make such reasonable rules as may be necessary from time to time in the proper administration and enforcement of this Act, including the adoption of rules and the holding of hearings for the following purposes:

* * *

(2) To require the person desiring or proposing to drill, deepen or convert any well for the exploration or production of oil or gas, for injection or water supply in connection with enhanced recovery projects, for the disposal of salt water, brine, or other oil or gas field wastes, or for input, withdrawal, or observation in connection with the storage of natural gas or other liquid or gaseous hydrocarbons before commencing the drilling, deepening or conversion of any such well, to make application to the Department upon such form as the Department may prescribe and to comply with the provisions of this Section. The drilling, deepening or conversion of any well is hereby prohibited until such application is made and the applicant is issued a permit therefor as provided by this Act...

* * *

(17) To regulate the disposal of salt or sulphur-bearing water and any oil field waste produced in the operation of any oil or gas well.

Under the authority given to by the General Assembly in the Oil and Gas Act, Illinois DNR promulgated the rules found in 62 Ill. Adm. Code 240. Subpart G of Section 240 provides the well construction, operating and reporting requirements for Class II UIC wells.[31] According to Section 240.750(i), only Class II Fluids can be injected into a Class II well.[32] "Class II Fluids" are defined in Section 240.10, as:

> Produced water and/or other fluids brought to the surface in connection with drilling, completion, workover and plugging of oil and natural gas wells; enhanced recovery operations; or natural gas storage operations; Produced water and/or other fluids from above, that prior to re-injection have been:
>
> > used on site for purposes integrally associated to oil and natural gas well drilling, completion, workover and plugging, oil and gas production, enhanced recovery operations or natural gas storage;
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> > chemically treated or altered to the extent necessary to make them usable for

[31] 62 Ill. Adm. Code 240.700.
[32] 62 Ill. Adm. Code 240.250(i).

purposes integrally related to oil and natural gas well drilling, completion, workover and plugging, oil and gas production, enhanced recovery operations, or natural gas storage operations;

commingled with fluid wastes resulting from fluid treatments outlined above, provided the commingled fluid wastes do not constitute a hazardous waste under the Resource Conservation and Recovery Act (42 USC 6901 et seq. (RCRA));

Fresh water from groundwater or surface water sources that is used for purposes integrally related or associated with oil and natural gas well drilling, completion, workover and plugging, oil and gas production, enhanced recovery operations or natural gas storage;

Waste fluids from gas plants (including filter backwash, precipitated sludge, iron sponge, hydrogen sulfide and scrubber liquid) that are an integral part of oil and gas production operations; and waste fluids from gas dehydration plants (including glycol-based compounds and filter backwash) that are an integral part of natural gas storage operations, unless the gas plant or gas dehydration plant wastes are classified as hazardous under RCRA.[33]

Section 240.10 also defines Class II UIC Well. The definition is substantially similar as the definition found in the Board's regulations.[34]

2) Illinois DNR Authority Has No Affect Upon The Board's Decision

According to EOR, the Illinois Oil and Gas Act, its associated regulations and the Section 704 regulations related to Class II wells are fatal to the People's argument. This is not true. Illinois DNR's authority notwithstanding, the Board still had the authority to rule upon the People's Motion for Summary Judgment.

As previously outlined, the General Assembly has created a system of regulating UIC wells that involves both the Illinois EPA and the Illinois DNR. As can be seen in the Oil and Gas Act and its associated regulations, the Illinois DNR has been granted very limited authority to regulate only Class II wells. Both the Board and Illinois DNR regulations are consistent in stating that Class II wells are limited to UIC wells that inject a specific type of fluids, that is, fluids which are:

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[33] 62 Ill. Adm. Code 240.10.
[34] 62 Ill. Adm. Code 240.10, 35 Ill. Adm. Code 704.106.

- brought to the surface in connection with natural gas storage operations, or conventional oil or natural gas production, and which may be commingled with waste waters from gas plants that are an integral part of production operations ("produced fluids"), unless those waters are classified as a hazardous waste at the time of injection;

- Fluids injected for enhanced recovery of oil or natural gas; and
- Fluids injected for storage of hydrocarbons that are liquid at standard temperature and pressure.

Since the Office of Mines and Minerals, currently a part of Illinois DNR, has historically regulated the oil and gas industry, it makes sense that the General Assembly gave the Illinois DNR authority over Class II wells. It is apparent that by carving out Class II wells and putting them under the control of Illinois DNR, the General Assembly intended to remove produced fluids and fluids injected into Class II wells for the purposes of enhanced recovery and the storage of hydrocarbons from the definition of "contaminant." It also makes sense that since such fluids are not contaminants, an Illinois EPA issued permit is not required and therefore injection of properly permitted Class II fluids is not a violation of Section 12(g) of the Act.

According to EOR's unsubstantiated allegations, it was granted Class II UIC permits by the Illinois DNR. If this is true, then those permits only grant EOR the authority to inject into its Class II wells: produced fluids, fluids injected for enhanced recovery and fluids injected for the storage of hydrocarbons. From the record, it is clear that the hazardous waste acid injected into EOR's wells not one of the fluids allowed to be injected into a Class II well.

In order to inject anything other than the typical Class II fluids, contaminants, it stands to reason that EOR would need to apply for an Illinois EPA permit to operate the wells under a separate class. The record is clear that the acid material EOR injected into its wells was a hazardous waste, a contaminant, and not a Class II fluid. Therefore, the acid material does not fall into the limited category of fluids allowed to be injected into a Class II UIC well and cannot be authorized or regulated by the Illinois DNR.

It is obvious that the Illinois DNR had no authority to allow EOR to inject hazardous waste

into any of the EOR Wells. The Illinois DNR's own regulations make it clear that only "Class II Fluids" may be injected into Class II wells. Therefore EOR's Class II UIC permits did not authorize EOR's hazardous waste injection activities. Since EOR's activities were unauthorized, they cannot use their purported Class II UIC permits as a shield from violations of the Act and associated regulations. The case would be completely different if the People were alleging that EOR injected produced fluids or one of the other authorized fluids into the EOR Wells. In that hypothetical case, EOR would be protected by its permit and the Board would lack jurisdiction. Unfortunately for the Respondent that is not the case.

Without the protection of a Class II permit, it is entirely reasonable for the Board to determine that EOR injected hazardous waste acid into the EOR Wells in violation of the Act and associated regulations. This in no way causes a conflict with the authority given to Illinois DNR because Illinois DNR has no authority over the injection of hazardous waste.

Furthermore, EOR's argument that Illinois DNR is the only agency that could bring an enforcement action against EOR for injection into the EOR Wells is baseless. Illinois DNR's statutory and regulatory authority is based on the idea that regulated oil and gas producers must prevent waste of the oil and gas resources.[35] Although the regulations promulgated under the Oil and Gas Act state that only Class II fluids may be injected into Class II wells[36], this does not give Illinois DNR authority to bring an enforcement action for the injection of hazardous waste. It merely restates the authority granted by a Class II permit; only Class II fluids can be injected into Class II wells because those are the only fluids Illinois DNR can legally authorize a person to inject. Illinois EPA is the only agency that can permit the injection of hazardous waste and therefore, the Act and associated regulations are the only legal means that can be used to enforce the improper injection of hazardous waste.

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[35] 225 ILCS 725/1 and 1.1 (2010).
[36] 62 Ill. Adm. Code 240.750

The readily accepted concept of conversion, further bolsters the notion that Illinois DNR's Class II UIC authority in no way affects the Board's September 6, 201 Final Order. When it injected hazardous waste into its wells, EOR disregarded the limited Class II designation granted by the Illinois DNR. According to federal and state law, only Class I, Class VI and Class V UIC wells can be authorized to accept hazardous waste. Once hazardous waste was injected into Rink #1 and Galloway #1, they ceased to meet the definition of a Class II well. Whether it intended them to or not, EOR's actions converted the Rink #1 and Galloway #1 wells from Class II wells into unpermitted Class I, IV or V injection wells. Conversion from one class to another is a typical practice which was contemplated by the USEPA at least as far back as 1982.[37] According to the USEPA, conversion from a Class II well to a Class I, VI or V well should be considered a major modification requiring EOR to apply for a new permit under Sections 702, 704, 705 and 730 of the Board's Regulations.[38] As a result of its actions, EOR converted the wells, prior to applying for a proper permit as required by Section 12(g) of the Act and associated Board regulations. Therefore, the Board was clearly within its authority when it ruled on the People's Motion for Summary Judgment which was based on its Complaint made pursuant to the Act and associated regulations.

III. EOR's Motion is Untimely

EOR's motion to reconsider was filed three days after the expiration of the deadline set forth in the Board's rules and should therefore be considered untimely. The Board mailed its Final Order to EOR on September 6, 2012. On September 14, 2012, attorney Felipe Gomez filed an appearance on behalf of EOR. On October 18, 2012, EOR filed its motion to reconsider requesting that the Board reconsider its findings in the Final Order on part of Count I and all of

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[37] "It should be noted that conversion of a well from a Class II or Class III well to a Class I well will be considered a major modification which will require re-permitting." *Permitting Multi-Purpose Wells*, USEPA Ground-Water Program Guidance No. 24 (GWPG #24), July 27, 1981.

[38] *Id.*

Count V and vacate the $200,000 penalty.

According to Section 101.520 of the Board's Rules, EOR was required to file its motion within 35 days after the receipt of the Board's September 6th Final Order.[39] Section 101.300(a) of the Board's Rules states that computation of any period of time prescribed in the Board's Rules will begin with the first calendar day on which the act, event or development occurs and will run until the close of business on the last day, or the next business day if the last day is a Saturday, Sunday or national or State legal holiday.[40] Section 101.300(c) of the Board's Rules states that in the case of service by registered or certified mail, or by messenger service, service is deemed complete on the date specified on the registered or certified mail receipt or the messenger service receipt.[41] In the case of service by U.S. Mail, service is presumed complete four days after mailing.[42] The presumption can be rebutted by proper proof.[43]

The Board served its Final Order upon EOR via certified mail. The certified mail receipt was returned to the Board on September 18, 2012 with a Denver postmark dated September 13, 2012. Respondent signed the receipt, but failed to record the date it was received. According to Section 101.300(c), service of the Board's Final Order should be deemed complete on the date specified on the certified mail receipt. However, since the Respondent failed to date the receipt, the Board should use the default mailbox rule found in Section 101.300(c) and hold that the Final Order should be presumed served on September 10, 2012, four days after it was mailed. Because the Respondent did not date the certified mail receipt or include a properly executed affidavit stating that it received the Order on a date later that September 10, 2012, it has not rebutted the presumption that it received the Order on September 10, 2012. Therefore, EOR was required to file its Motion to Reconsider 35 days after September 10, 2012, or more

[39] 35 Ill. Adm. Code 101.520.
[40] 35 Ill. Adm. Code 101.300(a).
[41] 35 Ill. Adm. Code 101.300(c).
[42] *Id.*
[43] *Id.*

specifically, by the close of business on October 15, 2012. The Respondent filed its motion to reconsider on October 18, 2012, three days after the deadline prescribed in the Board's Rules. If Respondent needed more time to file its motion, Section 101.522 of the Board's Rules clearly outlines the proper procedure for asking for an extension.[44] Respondent made no attempt to ask for an extension and therefore should not be allowed to file an untimely motion. For these reasons, according to Section 101.520, the Board should rule that the Respondent's motion to reconsider was not filed on time and should deny the motion.

While the Board occasionally strays from the strict deadlines found in its own rules, the Board should take particular note of this matter's procedural history when deciding whether to deviate from its own rules. This matter has been on the Board's docket for over five years and has required thirty status conferences. Much of this delay has been caused by EOR's disregard for the Board's procedural rules and the People's attempts to give EOR time to retain counsel in an effort to bring this matter to resolution. In multiple orders, the hearing officer instructed EOR that they must be represented by an attorney. However, from March 15, 2010 until September 14, 2012 (eight days after the Board issued its Final Order) EOR failed to retain representation and participate in the scheduled status conferences. EOR was served with a Request to Produce Documents on January 11, 2008, and has made no attempt to answer. When EOR was served with Requests to Admit Facts, they failed to properly respond and the Board eventually deemed all of the People's requests admitted. When faced with a Motion for Summary Judgment, EOR failed to respond. EOR has been given many opportunities to participate in this enforcement action, but has failed time and time again to abide by the Board's most basic rules. Now they are asking the Board to accept an untimely Motion to Reconsider.

EOR has ignored the Board's rules for years, causing delay in the resolution of this matter.

[44] "The Board or hearing officer, for good cause shown on a motion after notice to the opposite party, may extend the time for filing any document or doing any act which is required by these rules to be done within a limited period, either before or after the expiration of time." 35 Ill. Adm. Code 100.522.

Accordingly, this Board should not allow EOR to flaunt the rules by accepting their untimely Motion to Reconsider after the Board's deadline has passed. The People have abided by the Board's Rules throughout this proceeding and would be greatly prejudiced if the Board accepts Respondent's untimely Motion to Reconsider. Therefore, the Boards should deny Respondent's motion as untimely.

IV. PENALTY

If the Board is swayed by the Respondent's argument and holds that it was unauthorized to make a decision regarding Count V and the challenged paragraphs of Count I, the remaining violations still justify the award of a substantial penalty.

In its Complaint, the People alleged five separate counts. Count I alleged hazardous waste transportation violations. Count II alleged hazardous waste storage and disposal violations. Count III alleged operation without a hazardous waste permit. Count IV alleged numerous hazardous waste management violations. EOR's Motion to Reconsider in no way addresses the Board's decisions on the part of Count I and all of Counts II, III and VI of the People's Complaint. Those four counts show numerous violations and a wealth of evidence that EOR brought hazardous waste to the State of Illinois and handled and stored it in a manner which showed substantial disregard for the people and the environment of the State of Illinois and especially the workers tasked with disposing of the acid. The violations alleged in Count V, while serious, were only a small subset of the many violations which were caused, threatened or allowed by the Respondent.

Consequently, any new penalty calculated by the Board should take into account the seriousness of the remaining violations, the duration of the violations, and need to deter other similarly situated entities from causing the same types of violations.

V. CONCLUSION

Respondent's Motion to Reconsider is untimely, relies on evidence which it should have brought before the Board prior to the Board's decision and relies on an improper argument which should be barred under the doctrine of estoppel. Furthermore, the Respondent misconstrues Illinois EPA and Illinois DNR's UIC authority and consequently wrongfully argues that the Board did not have proper authority when it ruled on Counts I and V of the People's Motion for Summary Judgment. The Board has authority over the matters argued in the People's Motion for Summary Judgment and correctly ruled in favor of the People on their unopposed motion.

Accordingly, the Board should deny the Respondent's Motion to Reconsider and uphold the ruling it made in its September 6th, 2012 Final Order.

Respectfully submitted,

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