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 REPLY AND ELECTRONIC FILING

ALL PARTIES PLEASE TAKE NOTICE that on December 12, 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 EOR Reply to Illinois' Response to EOR Motion to Reconsider,** a copy of which is attached hereto and herewith served upon you.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I did on December 12, 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 **REPLY**, 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

Dated: 12/12/12

Respectfully submitted,

s/: *Felipe Gomez, Esq.*
Felipe Gomez, Esq.

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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 REPLY TO ILLINOIS EPA RESPONSE TO E.O.R. MOTION TO RECONSIDER

NOW COMES CO-RESPONDENT E.O.R. ENERGY, LLC, (hereinafter "EOR") by and through undersigned counsel of record, leave having been granted pursuant to 35 IAC 101.501(e), hereby files this **Reply** to **Illinois' November 14, 2012, Response to EOR's October 18, 2012, Motion to Reconsider**. EOR states the following in reply to the Response and in support of the denial of the Motion for Summary Judgement ("MSJ") and dismissal of this matter for lack of subject matter jurisdiction.

I. SUMMARY

The State's Response raises new procedural arguments and itself requests relief, not responsive to the merits of the Motion to Reconsider, which should have made by Motion to Strike or other motion (which would have allowed EOR a response by rule), including new arguments that:

- The Board should adopt a new interpretation of the 35 IAC 101 rules for service that would render the 10/18/12 EOR Motion to Reconsider untimely. *Response at 17-20.*
- The Motion to Reconsider is inadequate because it allegedly does not provide "new information" to the IPCB, and EOR is estopped from presenting any new information anyway. *Response at 3-6.*
- The MSJ and 415 ILCS 5/ jurisdiction are supported on the record by the Complaint, EOR's Answer, the State's Requests to Admit to EOR, the Board's Order deeming the Requests admitted, and the MSJ/Affidavit attached to the MSJ; *Response at 6.*
- Illinois environmental laws require a Class II injection well operator to have dual permits, from each IEPA and IDNR, for the same injection, and IEPA can decide by fiat when and if a Class II SDWA permittee needs a Class I RCRA waste permit too, even if IDNR does not find a violation. *Response at 7-17.*
- Even if Count V is dismissed, a high penalty should still be assessed.

II. DISCUSSION

A. Timeliness of Response

1. State Position: IPCB Should Deviate From Service Rules to Find Response Tardy

Although it is a threshold issue, and while it was not an issue addressed in EOR's Response, the State asserts, at the end of its Response, that because the postal carrier who delivered the 9/6/12 Order on the MSJ to EOR in Colorado on 9/13/12 failed to have EOR date the green card when it was received, the 10/18/12 EOR Response should be considered late by the Board under the "mailbox rule" found at 35 IAC 101.300(c), despite the admitted fact that such finding would require a "deviation from the Board's rules":

> "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."

Response at 18. (*Emphasis Added By EOR*).[1] The State's logic in requesting the Board to apply the mailbox rule (presuming service complete four days after mailing)[2] to certified mail service is that:

> "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, specifically, by the close of business on October 15, 2012.....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." *Response at 18-19.*

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[1] As noted in EOR's 12/3/12 Motion for Leave to Reply, the embedding of a motion to strike within what was expected to be a merits response deprives EOR of the response to these assertions as it would have by rule in response to a motion.

[2] As correctly asserted by the State: "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. In the case of service by U.S. Mail, service is presumed complete four days after mailing. The presumption can be rebutted by proper proof." *Response at 18*.

2. EOR Reply: Receipt Is "Dated" September 13, 2012, Irrelevant Who Dated It; State Responsible for Assuring Completion of Service and Is Estopped From Objecting

The State's attempt to mute EOR's jurisdictional argument by way of a novel interpretation of the service rules fails by the face of the State's pleading and the record. As the Response clearly acknowledges, the certified mail receipt bears a "Denver postmark dated September 13, 2012.". *Response at 18.* An inspection of the copy of the receipt in the record confirms this fact. *See Attachment A hereto - 9/18/12 Certified Mail Receipt.*[3]

a. Recipient Not Required to Date Green Card

Contrary to the State's attempted inference, 35 IAC 101.300(c) does not require the recipient to date the green card, but simply states the date of service is deemed to be "the date specified on the...receipt"." *35 IAC 101.300(c).* By its structure, the paragraph also limits the rebuttable "presumption" to first class mailings, the standard for certified is "deemed". Since the only other date on the green card is the 9/18/12 IEPA in-stamp, the "date specified" in this case has to be the postmark of 9/13/12, and thus that is "deemed" the date of service.

b. State Has Burden of Service Under 35 IAC 101.304(d) and of Rebuttal

Again contrary to the State's assertion, it is the State's burden, not EOR, to refute the "deeming" of 9/13/12 as the service date (if rebuttal is even allowed), but Illinois offers nothing to indicate that EOR got the Order before 9/13/12. Furthermore, any question on the date of service should be viewed in the light most favorable to the person being served, since, under the rules, in this case IEPA was and is responsible for perfecting proof of proper service. *35 IAC 101.304(d)*(Service is the responsibility of the party filing and serving the document).

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[3]As discussed below, this double sided copy was in fact not scanned in by the State until early October 2012 after EOR pointed out to the IAG that only the undated signature side of the green card had been scanned into the record. However, the fact that the initial scan was incomplete and a later re-scan occurred is somehow not reflected in the record, making it appear that the initial 9/18/12 scan was complete, when it was not. While seeming inconsequential, such occurrence is at the leaset discomfiting as it could potentially allow the State to "backdate" documents being newly submitted to the record, making it appear that the scan occurred long before it did.

c. USPS Website Confirms Delivery At 1:19 p.m. MST, September 13, 2012

As shown in Attachment B hereto, the U.S. Postal Service website shows that the Order was received by EOR at 1:19 p.m., Thursday, September 13, 2012. *Attachment B - 10/6/12 USPS Tracking Printout.*

d. State Waived Timeliness Argument By Conduct and Agreeing to Briefing Schedule in Hearing

On or around early October 2012, EOR notified IAG of the incomplete green card scan and lack of a date on the signature side (see footnote above). During these calls, there was no doubt expressed by the State as to the fact that EOR received the Order on 9/13/12. This understanding was confirmed by both counsel of record by running the certified mail number through the USPS tracking site, and in confirming emails between counsel of record. *Attachment C (10/10/12 Mankowski email confirming receipt date of 9/13/12, with 10/15/12 Gomez reply email confirming 10/18/12 due date.)* No objection was ever received from the State as to the service issue or 10/18/12 due date.

Consistently, during the 10/23/12 status conference with Hearing Officer Webb, the State made no service-related timeliness objections and agreed to a briefing schedule that included additional time for the State's filings, for the 10/18/12 Motion to Reconsider. *See 10/23/12 Order*. The State's conduct did not indicate any issue as to timeliness, and in reliance EOR has expended significant time and funds in compiling the Response. Thus, the State waived any timeliness objection based on the date of service, and cannot attempt to avoid a jurisdictional review on the merits by interjecting a belated procedural technicality objection based on computation of time.[4]

In any event, the receipt clearly is dated 9/13/12 and there is no need for the IPCB to "deviate" from the rules or to punish EOR for perceived prior omissions, non-participation, and alleged procedural offenses.[5] It is a simple fact of record that EOR is deemed to have (and in fact did)

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[4]The interpretation being urged here is highly prejudicial, as it would have the order in EOR's hands on 9/10/12, 3 days before it was actually received and 4 days before EOR's counsel's appearance 9/14/12, thus depriving counsel and client of the full amount of time to respond due them under the rules.

[5]In fact, in jurisdictional cases, where subject matter is not perfected at the outset or it becomes evident that it is lacking, an accepted defense strategy, especially if there are multiple defendants, is to "lie in the weeds", even if it means being defaulted, thus avoiding transactional costs and fees while the record is developed by others. Subsequently, assuming the jurisdictional defect is not cured (or is incurable as is the case here), it is a relatively far more simple matter to attack the default judgment on a

receive the Order on 9/13/12, thus the Response was timely on 10/18/12. *35 IAC 101.300.(c).*

B. Standard of Review for Motion for Reconsideration and Estoppel

1. State Position: IPCB May Only Consider "New Evidence" on Motion for Reconsideration; EOR Estopped From Presenting New Information

Initially, after first stating that "EOR attempt[s] to introduce new information" (*Response at 3*), the State then contradictorily states that "In its Motion...EOR has not provided new evidence" (*Response at 4*). Putting aside the fact that the State cannot have it both ways, the State is also incorrect in inferring that the Board may only consider new information or evidence in reconsidering its decisions, as the State concedes by the very cases its cites:

> "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., 213111.App.3d 622, 627, 572 N.E.2d 1154, 1158 (1 st Dist. 1992)". (*Emphasis in State Response*).

Response at 3. The State asserts that EOR's jurisdictional claims should be ignored because, according to the State, EOR failed to enter the alleged Class II permits into the record, and relies on the "unconfirmed" allegations of its Motion, alone:

> "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...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.". *EOR MSJ at 4-5, Section II.A.*

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quasi-appeal basis with the whole record before the court. *Provident Life & Accident Insurance Co. v. Smith, 266 Ill. App. 3d 705, 639 N.E.2d 627 (1994)(*Jurisdiction can be neither stipulated to nor waived by the parties).

2. EOR Reply: Motion for Reconsideration Not Limited to "New Evidence", Jurisdiction is Issue Thus No Estoppel

a. "New Evidence" Just One Factor That May Be Considered, Record Must Stand on Own

The State simply ignores the court's language affirming that a motion to reconsider is a proper vehicle to address "errors in the court's...application of the existing law". *Id*. In our case, EOR claims that the IPCB erred in applying 415 ILCS 5/ et seq. to properly permitted SDWA Class II injection and oil and gas production wells that are expressly excluded from that statute, and IEPA regulation or enforcement by 415 ILCS 5/4(l) and 35 IAC 704.102. Thus it is precisely an "error in application of existing law" that is being claimed here, which is entirely appropriate for a motion to reconsider. *Korogluyan v. Chicago Title & Trust Co., Supra.; 35 IAC 101.902.*

It is also well established that on appeal or reconsideration a court may address an issue if a determination can be made from the record as it stands, and the record here already included the SDWA permits proving the lack of 415 ILCS 5/ jurisdiction, which were included in the State's MSJs. *Dubey v. Abam Building Corp*., 639 N.E.2d 215, 217 (1994); *EOR MSJ Exhibit I , Att. 3 (Johnson Affidavit - 2005 Inspection Report at 199-206 pdf (Permits). Also See AET MSJ Exhibit J at 187-191 pdf (Duplicate Permits).*

Further, since cases involving questions of law, such as jurisdiction, are reviewed de novo, they are generally are not impacted by the defendant's failure to include certain items in the record, since the burden is on Plaintiff to include sufficient evidence to establish jurisdiction first in order to shift the burden of production to defendant. *McNames v. Rockford Park District, 185 Ill. App. 3d 291, 293, 540 N.E.2d 1119, 1120 (1989)* (Failure of Appellant to submit trial court report of proceedings not bar to review of record below as issue was solely a question of law). Thus the State's arguments in this regard at pp 2-5 of its Response have no merit, as further discussed below in specific response to each issue raised by the State.

b. EOR Need Not Provide "New Evidence" In Form of SDWA Permits Since Permits and Other Indicia of SDWA Jurisdiction Were In Record Prior to September 6, 2012, Order.

Contrary to the State's assertion, and begging the issue of IEPA's attempt to expand its Class I RCRA waste injection jurisdiction to SDWA INDR regulated Class II, the record already contains the SDWA Class II permits and related Illinois official records proving the 415 ILCS 5/ et seq.is inapplicable to the Count V Class II SDWA injection and 225 ILCS 725 regulated production wells

at issue here, according to the terms of 415 ILCS 5/ itself.[6] *415 ILCS 5/4(l); 35 IAC 704.102.*

As pointed out in AET's 11/14/12 Response to Illinois' 6/27/12 MSJ, the record reflects that Duane Pulliam, Chief of IDNR's Class II UIC program, faxed Mr. Johnson/IEPA copies of the SDWA Class II UIC permits for the Count V wells in 2005.[7] *See Attachment D hereto - 4/5/05 IDNR Facsimile to IEPA with Class II SDWA Permits.* Specifically, Rink #1 Permit #201004 appears at page 201 (pdf pagination) of the EOR MSJ exhibits, and Galloway #1 Permit #202036 at page 202 of the exhibits.

The record is clear that IEPA and the AG were expressly informed and on notice that the EOR wells were not only not regulated by IEPA, but that the wells were not an "unpermitted facility" under 415 ILCS 5/ and 35 IAC 704, thus precluding the bringing of Count V and precluding an IEPA finding that the material was "discarded" under RCRA. *See EOR MSJ Exhibit I , Att. 3 (Johnson Affidavit - 4/5/05 Inspection Report - Permits) at 199-206 pdf. Also See AET MSJ Exhibit J at 187-191 pdf.*

As such, and given that the record was always jurisdictionally insufficient (lacking the requisite 225 ILCS 725/8a required 62 IAC 240.150 Notices of Violation giving Illinois DNR enforcement jurisdiction), EOR's claim is not "unconfirmed", and it matters not that the lack of jurisdiction is brought up now, as jurisdiction is raisable at any time. *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); *Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C.*, 402 Ill. App. 3d 961, 971 (2010)(Jurisdiction cannot be created by laches, agreement, waiver or estoppel, including prior failure of a party to point out a jurisdictional defect).

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[6] 415 ILCS 5/4(l) provides: "(l) The Agency is hereby designated as water pollution agency for the state for all purposes of the Federal Water Pollution Control Act, as amended; as implementing agency for the State for all purposes of the Safe Drinking Water Act, Public Law 93-523, as now or hereafter amended, *except Section 1425 of that Act [State Programs for Class II Wells Related to Oil and Gas]. (Emphasis Added).*

[7] EOR attaches hereto a copy of the entire facsimile for the convenience of the reader, given the large size of the MSJ exhibits, such attachment clearly showing the fact that the permits were attached to the 6/27/12 MSJ, and thus were part of the record at that time.

c. No Admission as to Lack of Class II Permits and No Estoppel As to Subject Matter Jurisdiction Anyway

The State Response argues that in addition to EOR's "failure" to put new evidence or the permits into the record, EOR should be estopped from raising lack of subject matter jurisdiction since EOR's 3/23/07 Answer to the Complaint allegedly admitted that EOR did not have a Class II UIC permit to inject hazardous wastes, and was not authorized by rule to do so. *Response at 5; Complaint at 18, Count V, para. 34; EOR 10/18/07 Answer to Complaint at 7, Count V, para. 34.*

i. EOR Answer to Complaint Admits Only That EOR Had No Class I, IV, or V RCRA Hazardous Waste Permit, Not That It Had No SDWA Class II Permit

The Complaint alleges, and EOR admitted para. 34 of Count V as follows:

> "34. E.O .R. Energy did not have an Underground Injection Control ("UIC") permit or authorization by rule to inject hazardous waste into the wells at the Rink-Truax or Galloway Leases." *Complaint at 18, para, 34; EOR 10/18/07 Answer to Complaint at 7, Count V, para. 34.*

At the outset, there are several problems with the phrase itself that make it nonsensical, and vague, at best, and in any event it does not support the State's attempted inference that EOR previously admitted it had no Class II UIC permits.

A. Use of Term "Hazardous Waste" Without Specifying Class of Well Renders Allegation Vague, and Excludes Class II Wells By Definition

First, para. 34 of Count V does not distinguish between the six classes of UIC permits the State intended to refer to, nor the permitting authority (IEPA or IDNR), but does use the term "inject hazardous waste". *Complaint at 18.* Since, of the six classes, Classes I, IV and V are IEPA-issued permits that deal with RCRA hazardous waste injection at non oil-related wells (*415 ILCS 5/12(g) and 5/39(a)*), and since what is injected into a Class II well is not considered a "hazardous waste" by definition (although it almost always is hazardous) it would be reasonable for EOR to have assumed, and the State could only be reasonably be inferred, to be referring to, a Class I, IV or V "hazardous waste" permit. EOR already had a Class II UIC permit regulated by IDNR. *See 40 CFR 144.6(a)-(f); 35 IAC 704.106*. Consequently, the most EOR admitted to was reality, e.g. that it did not have a Class I, IV or V permit,(a fact of public record then and now).

B. Inference That One "Permit" Would Apply to Several Wells Inconsistent with Regulatory Scheme, EOR Merely Denied Having a Single Permit for Multiple Wells

The State's requested inference is further contradicted by the fact that the phraseology employed

by the State appears to assert that EOR should have had a single "permit" [singular] that would have applied to the several "wells at the...Leases" (without singling out injection wells). *Complaint at 18. Para. 34.* However, there simply is no such thing as a single Class II UIC permit that applies to a group of "injection" wells; each Class II UIC well must have its own permit. *62 IAC 240.310.*

Similarly, the oil and gas wells on a lease are not subject to any of the UIC injection well permit requirements whatsoever, but have their own permitting and operating provisions. *See 62 IAC 240.210 and related provisions*. Finally, the operation of the lease itself is regulated by IDNR under *62 IAC 240.800* and related provisions. Thus, again, the most EOR admitted to was that it did not have any UIC permit that applied to the wells as a group or to its "Leases", since there is no such animal.

In short, the attempted inference that EOR admitted to lack of a "UIC" permit to inject "hazardous waste", means that EOR also denied having a SDWA UIC Class II permit, does not bear scrutiny when the relevant allegations of the complaint and corresponding answers are inspected. *EOR MSJ at 5; Complaint at 18, Count V, paras. 34-36; EOR Answer at 7, paras. 34-36*.

The State's choice not to specify whether it was referring to a Class I, IV or V RCRA hazardous waste UIC permit under 415 ILCS 5/12(g) (Illinois Environmental Protection Act), or a SDWA Class II UIC permit under 225 ILCS 725/8a (Oil and Gas Act), rendered the allegation vague as to which was being referred to, and thus the State's attempted inference is not supported by the record.

Given the burden on movant on motion for summary judgement, the presumption in favor of the non-moving party, and the need to show that relief is "clear and free from doubt", the State's MSJ's attempted inference that EOR admitted to not having SDWA UIC Class permits for the wells by admitting to para. 34, must be rejected.[8] *Dowd & Dowd, Ltd., 181 Ill. 2d at 483, citing Purtill v.*

[8]Consistent with its admission that it had no Class I, IV or V permits, EOR denied injecting hazardous wastes without a permit or violating 415 ILCS 5/12(g). *Complaint at 18, Count V, paras. 35 and 36; EOR Answer at 7, paras. 35 and 36.* Furthermore, and addressing footnote 4 of the State Response, EOR's answers to Count V (admitting lack of a RCRA waste injection permit but denying unpermitted disposal of a RCRA regulated hazardous waste), are also consistent with EOR's jurisdictional argument that the material EOR was found to have transported into Illinois was not determined by EOR or IDNR to be non-SDWA regulated hazardous waste subject to RCRA requirements, as would be required prior to 415 ILCS 5/ et seq. regulation. *Response at 6, fn 4; EOR 10/18/12 Motion to Reconsider at 1-2, fn1.* As noted in the EOR footnote, the threshold issue EOR addressed there was not the material itself, but rather which agency had regulatory jurisdiction over the wells in the first place, and what procedures and steps were required for enforcement jurisdiction at oil leases and Class II wells for Illinois to obtain jurisdiction. *EOR Motion.* However, if this threshold issue

Hess, 111 Ill. 2d 299 (1986)(When considering whether to grant disfavored summary relief, the court must take into account the pleadings, depositions, and affidavits, construing any contradictions, doubts or vagueness strictly against the movant and in favor of the opposing party).

ii. No Estoppel By Default On Jurisdictional Challenges, State Must Still Prove Jurisdiction

As noted above, the State in its response asserts "Because EOR failed to respond to the People's Motion, that was the entire record.", and that the record is closed because of EOR's failure to respond.[9] *Response at 6.* However, and assuming *arguendo* EOR is in fact estopped from adding to the record by prior non-participation, the law is clear that even where a named defendant has entirely defaulted, and has not defended or actively contributed anything to the record, a Plaintiff must still "prove up" her case and meet the PFC requirements for jurisdiction and liability, as well

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is resolved in favor of the State (that there is dual permitting requirements for Class II wells), then the next step in assuring jurisdiction is assuring that the material was in fact both a "hazardous waste" (e.g. actually used in a manner constituting "disposal"), and if so not exempted from regulation under RCRA, SDWA or Illinois Oil and Gas rules (as again a court cannot take the word of a party as to a jurisdictional fact, but must itself assure all requirements for jurisdiction and its authority are present). *Ruhrgas, Supra; People v Wade, Supra.* In any event, AET's Response to its MSJ addressed these issues, as they are relevant to the Count I claim that AET transported a waste for disposal into EOR's Illinois wells.

[9] The State Response at fn 4 "moves" that footnote 1 of EOR's Motion to Reconsider be stricken based on estoppel:

> "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." *Response at 6.*

As noted in the EOR Motion for Leave to Reply, the State's motion to strike this footnote and, and others embedded within in the Response (e.g. untimeliness claims), should have been made by the State by separate motion, where after EOR would be entitled to respond. *See 35 IAC 101.500(d) & (e)*.

as prove its damages before it can be afforded any relief, based on the record as is.[10] *735 ILCS 5/2-1301 et seq; Ruhrgas, Supra.; People v Wade, Supra.* A subject matter challenge is never waived, regardless of the prior actions or statements of the parties. *People v Wade, Supra; Bernstein & Grazian, P.C. v. Grazian & Volpe, Supra*.

Here, adding evidence to the record is not the same as pointing out jurisdictional defects and making supporting arguments to the Board based on the existing record, and EOR cannot be estopped from arguing lack of jurisdiction based on the record as it was before the Board on 9/6/12. *Id.* Even if EOR were deemed to have never participated at any time in this matter, the State is not relieved of its burden to plead and prove its case as to 415 ILCS 5/ et sq. jurisdiction, and to plead and prove a 415 ILCS 5/ et sq. violation as well as its damages, on the record before the Board as of 9/6/12, regardless of any input by Respondent. *Id.*

C. Non-Existence of 415 ILCS 5/ Jurisdiction Based on Current Record

1. State Response: Jurisdiction Supported Based on 5 Items of Record

Next, finally addressing the merits and jurisdictional issue of whether the "acid material" was shown by the State to be in fact a RCRA regulated waste, or whether there is any scintilla of proof it was "disposed" of as that term is defined by 415 ILCS 5/ et seq. and 225 ILCS 725, the State argues that the record as is supports jurisdiction, which it in fact incurably does not. *Response at 6.*

The State specifies reliance on the following items of record, and within those the "evidence" it relies on (in parentheses), although without citation to specific location within the record:

- The 3/27/07 Complaint;
- EOR's 10/18/07 Answer to the Complaint;

[10]Illinois is a fact-pleading jurisdiction, and a plaintiff, even the IEPA, must allege facts sufficient to bring its claim, and the defendants, within the scope of the cause of action and statute being asserted, and to do so, IEPA is required to set out ultimate facts that support a cause of action; legal conclusions unsupported by allegations of specific fact are insufficient. *Estate of Johnson v. Condell Memorial Hospital, 119 Ill.2d 496 (Ill. 1988).* While IEPA need not plead all its evidence in the Complaint, mere allegations of factual or legal conclusions are not sufficient. *Santelli v. City of Chicago, 222 Ill. App. 3d 286 (1st Dist. 1979*). For example, a general allegation that an agreement or contract exists, or that a statute was violated, without pleading of supporting facts (e.g. date, place, circumstances), is a legal conclusion. *Martin-Trigona v. Bloomington Federal Savings & Loan Assoc, 101 Ill. App. 3d 943 (Ill. App. 1981).*

- State's 1/23/09 Requests to Admit;
- IPCB 9/16/10 Order granting State's 8/17/10 Motion to Deem;
- People's 6/27/12 Motion for Summary Judgment, specifically the affidavit, with attachments, from Illinois EPA inspector Richard Johnson; *Response at 6.*

Based on that record, the State asserts that the Board had 415 ILCS 5/ jurisdiction and correctly ruled that the acid material was a hazardous waste, that EOR directed Wake and Geary to dispose of hazardous waste down EOR's wells; that EOR violated Section 12(g) of the Act and Sections 704.121 and 704.203 of the Board's Waste Disposal Regulations by injecting the hazardous waste acid into its wells; that EOR transported the acid material to Illinois for disposal, and that EOR violated Section 12(g) of the Act and Sections 704.121 and 704.203 of the Board's Waste Disposal Regulations. The State concludes "Because the record contained no evidence to the contrary, this was the only reasonable decision." *Response at 6.*

2. EOR Reply: State Has and Failed to Meet Initial Burden of Pleading Jurisdictional PFC and Then Supporting Allegations on Record

Contrary to the State's surmise that it was EOR's burden to present contradicting evidence based on the bare allegations of the State, the threshold jurisdictional issue is not whether there is "rebutting" evidence, but rather whether the State has initially pleaded and put forth sufficient supporting evidence to prove jurisdiction, let alone shift any burdens to Respondents.[11] *Ruhrgas, Supra.; People v Wade, Supra.; Estate of Johnson v. Condell Memorial Hospital, Supra.; Santelli v. City of Chicago, Supra.; Martin-Trigona v. Bloomington Federal Savings & Loan Assoc., Supra.* In other words, and as argued in detail by AET in its Response cited above, if any of the 415 ILCS 5/12(g) elements argued in the instant Response and MSJ are not both pleaded in the Complaint and then supported by facts (not factual or legal conclusions) on the present record, 415 ILCS 5/ jurisdiction is not established and triggered as to EOR and no relief can be afforded, and it is the State that is estopped from adding to the record, not EOR. *Id.*

As pointed out in detail by AET, the State's "record" is in fact entirely insufficient to support

[11] The failure of the Complaint to plead even a 415 ILCS 5/ et seq. PFC as to subject matter jurisdiction (no allegation that material was a "solid waste") and the failure of the record before the Board to establish that the material was regulated under 415 ILCS 5/ et seq. as a "solid waste", due to, among other things (in addition to the wells at issue being exempted fro 415 ILCS 5/), the sole witnesses' affidavit being based on hearsay, are discussed in AET's 11/14/12 Response to the State's MSJ against it, and the relevant portions of AET's Response are incorporated herein in support of EOR's related jurisdictional challenge, to wit *AET Response at 4-7, at 12-13, Sec. IV.B., and at 27-34, Sec. V.B.*

jurisdiction as to EOR, let alone a violation of 415 ILCS 5/ et seq. by either Respondent. *AET Response at 4-7, at 12-13, Sec. IV.B., and at 27-34, Sec. V.B.* In reply, EOR points out the following jurisdictional defects with each of the cited items of "evidence" as to EOR.

a. Complaint Pleads Insufficient Facts to Confer Jurisdiction - No "Solid Waste" Finding

First, the Complaint fails to even make the required determination and finding that the material at issue was a "solid waste" when it got to Illinois, as required by 40 CFR 261.[12] As alleged in para. 7 of the Complaint, in Illinois 415 ILCS 5/21(f) regulates hazardous wastes, and 5/21(e) regulates solid wastes. *Complaint at Count I, para. 7.*

However, Count I only alleges the material was a 5/21(f) "hazardous waste", and neither Count I or V allege or find that the material at issue was a 5/21(e) "solid waste" when it arrived in Illinois *Complaint at Count I, para. 7 and at Count V.* Rather, the Complaint only recites the statutory definition, then skips straight to the allegation that the material was hazardous waste. *Complaint at Count I, paras. 8, 9 and 14*.

Despite failing to allege the material was a 5/21(e) solid waste, Count I seeks relief under 5/21(e) instead of 5/21(f). *Complaint at 6.* Count I is thus fatally jurisdictionally deficient, as neither AET or EOR are alleged to have transported a 415 ILCS 5/21(e) solid waste, and thus there is no 5/21(e) jurisdiction or relief to be had, and Count I cannot stand, and the MSJ, also seeking relief under 5/21(f), cannot be granted as to that Count.[13]

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[12]Under RCRA, USEPA regulations define "solid waste" as any discarded material *that has not been excluded under the regulations*. *40 CFR § 261.2(a)(1).* (*Emphasis Added*). A "discarded material" is any material that is abandoned, recycled, or inherently waste-like. *2(a)(2)*. Consequently, even where a material has been "discarded", it still may be exempted by other provisions of the Act, and the regulator must make a determination that the material is not excluded from regulation by an exception, prior to perfecting subject matter jurisdiction over the material. *40 CFR 261.2(f).* Illinois regulations basically adopt the federal provisions, and thus the 40 CFR 261 solid waste determination is required for initial jurisdiction under state solid waste laws (prior to making the 40 CFR 261.3 hazardous waste determination). *See 415 ILCS 5/3.470, 5/3.535 and 5.3220.*

[13]Further, the material cannot be a RCRA "hazardous waste" due to the absence of the critical "solid waste" allegation and determination by either IEPA or INDR, otherwise practically every industrial chemical would be RCRA regulated while it was in Illinois, even though it was not a "waste". *40 CFR 261.*

b. EOR Answer Does Not Admit Injection Without Permit, Only That EOR Has No "Hazardous Waste" Injection Permit

The next document relied on by the MSJ and Response to the Motion to Reconsider is EOR's 10/18/07 Answer, which the State alleges admitted that it injected with no UIC permits whatsoever. *Response at 6*. In reply, EOR incorporates herein its discussion of the Answer in connection with the Estoppel issue above. In short, it was the State's poor (or possibly intentionally ambiguous) drafting of paragraph 34, using the term "hazardous waste" permit, which by definition excludes a Class II UIC permit, that caused EOR to honestly state in its Answer that it did not have a UIC "hazardous waste" injection permit. EOR clearly did not admit to injecting anything, hazardous or otherwise, and in fact denied same in Answer to para. 35 of Count V, and again the State requires but cannot make use of any inference here as it is Plaintiff and movant.

c. EOR Requests to Admit Contain Contradictions That Cannot Support Inference That Disposal Occurred, And In Toto Describe Non-Disposal Use of Material

The third and forth items of record cited by the MSJ and Response to the Motion to Reconsider are the 1/23/09 Requests to Admit ("RTA"), and the 9/16/10 Order (granting the State's 8/17/10 Motion to Deem Facts Admitted). A further review of the Order and the EOR RTA cited as evidence by the State reveals that, since the RTA were all deemed admitted without exception or specification, the present several conflicting requests that cannot coexist, thus the RTA cannot serve as evidence that anything was injected or disposed.

i. RTA Support Inference That EOR Paid for Material for Use, Not Disposal

The RTA allege that EOR paid both AET and Luxury Wheels for the material, and yet got the material for free too:

"60. E. O. R. paid Luxury Wheels for the acid material.
61 . E.O.R. paid AET for the acid material.
62. E.O.R. paid nothing for the acid material."

EOR MSJ at Exh. A, Requests to Admit at 5. The State also alleged that somehow each EOR, AET and Luxury all paid to ship the material to Illinois:

"63. E.O.R. paid to ship the acid material from Colorado to Illinois.
64. Luxury Wheels paid to ship the acid material from Colorado to Illinois.
65 AET paid to ship the acid material from Colorado to Illinois."

Id. Notably, and as discussed further below, the term "acid material" is used by the State here (and throughout the RTA), instead of "solid" or "hazardous" waste. In any event, it cannot be inferred that these allegedly admitted actions consisted of "disposal" that somehow brought AET or EOR within 415 ILCS 5/ jurisdiction, especially since one typically does not pay someone else to take waste away, but vice versa. This inference that the alleged actions of Respondents and uses of the material at EOR's oil leases did not constitute "disposal" is supported by the RTA when taken as a whole. To wit, paras. 76-87 assert that EOR held and operated the oil leases at issue in Count V, and even acknowledge that EOR operated "brine injection wells" (as noted above, these are Class II wells by definition, and are not regulated by IEPA). *EOR MSJ Exh A - 1/23/09 RTA at paras. 86-75.*

Next, RTA 88-165 establish the inference that EOR's alleged actions are consistent with normal oilfield operations permitted under *40 CFR 144.1*, rather than constituting "disposal" under *40 CFR 261.* Based on the RTA as "admitted", EOR is deemed to have admitted that it hired Kincaid employees as independent contractors to moonlight and perform maintenance activities at EOR's oilfields (*RTA 88-93*), that it supplied them with MSDS for the material (*108-109*), informed them that it was a light grade acid (*120-123*), affirmed that Wake and Geary had experience in oil well acid washing (*132-137*), and gave them detailed and thorough training for its proper handling, use as an acid wash, as well as in health and safety measures for the material. (*110-119*).

Further, EOR is deemed to have stored the acid material in heavy duty plastic totes in a well secured storage shed. (*RTA 94-104, 107*). EOR is also deemed to have analyzed the material prior to storing it at Kincaid *(106*). EOR also is deemed to have admitted to having previously hired persons to treat its oil wells with acid, prior to 2002. (*162-163*). EOR also allegedly oversaw the storage of and kept close tabs on and directed the "use" of the material, including providing some of the equipment used to inject and gravity feed the conditionin material into the oil wells and then inject the rinsate into the Class II wells (*126-131, 140-153*).

With regard to directions, EOR allegedly specifically told Wake and Geary to "treat" certain wells, and then thereafter inquired as to which were treated and was told that the material was "placed down" production wells, and then "a brine injection well" (*154-161*). All these allegations are consistent with routine, IDNR-regulated oilfield activities, including use of the acid as an industrial oil well conditioning chemical and subsequent authorized disposal into a Class II well, not with as use constituting disposal.

ii. RTA Fail to Use Terms "Disposal", "Waste", "Hazardous Waste" and Thus Do Not Allege or Support Illegal Disposal Finding

As glaring as the absence of affidavits from the 2 alleged injectors, is the absence of the words " waste", hazardous waste" or "disposal" in the RTA when describing the material entering the wells, but rather the RTA use ""apply the acid material...down" (*149*), "transfer the acid material...to the...wells" (*151*), "treat" or "treat with the acid material" (*152-159*)", and "placed down" (*160-161*). Quite simply, as phrased, the RTA do not result in admissions to 415 ILCS 5/ jurisdiction or disposal, but rather all that is deemed admitted is the normal periodic acidization of oil wells with acid, all of which is regulated unde 225 ILCS 725 and 62 IAC 240, not 415 ILCS 5/ et seq. Once the RTA are viewed in EOR's favor (even as deemed admitted), it is clear that the MSJ and State cannot rely on them for 415 ILCS 5/ jurisdiction or the case in chief.

d. MSJ/Thompson Affidavit Fail to Present Evidence of Jurisdiction or Disposal; Thompson Affidavit Inadmissable Hearsay Thus Record Fails to Include Any Direct Evidence of Disposal of Solid or Hazardous Waste

Finally, with regard to the last item of record cited by the State's MSJ and Response, Illinois sole direct allegation as to injection is based solely on Johnson's affidavit, and is that, at EOR's alleged direction, "Within a three to four month period, Wake and Geary placed approximately eight and a half totes of acid material down various EOR wells." (citing to paragraph 9 of Mr. Johnson's affidavit). *EOR MSJ at 15, and fn 75*. The MSJ also claims that the State knows how much material was put into the various wells, but again relies only on Mr. Johnson's hearsay report as to what he claims that Wake and Geary told him in April of 2005. *EOR MSJ at 16, Chart 1, and fn76; Johnson Affidavits at paras 28-32.*

While citations are in the main to the Affidavit, the remainder of the "facts" cited by the EOR MSJ track and are based on the facts requested to be admitted in the 2009 EOR RTA cited above, which were in turn based upon Mr. Johnson's 2004-2005 inspection reports, and which are both essentially summarized in his 2012 Affidavits in support of the MSJs. *EOR MSJ at 16-21*.

Given the repeated contradictions and disputes created by the State's own pleadings, and the absence of direct testimony in the record as to what happened at EOR/Kincaid between 2002-2004, and reasonable inferences drawn in non-movant's favor, the MSJ cannot be granted. Further, given the lack of proper pleading or evidence of 415 ILCS 5/ jurisdiction, the State's claim that the record is sufficient to support jurisdiction or the MSJ must be rejected.

i. No Wake or Geary Testimony in Record, State Relies Solely On Thompson Hearsay and Double Hearsay for "Direct" Testimony As To Disposal and "Waste" Allegations

Glaring in its absence, the State inexplicably failed to obtain and include affidavits from Wake and Geary substantiating the State's (Thompson Affidavit) hearsay claims that they admitted to injecting anything into the wells, and relies instead on after the fact multi-layered hearsay, to wit Thompson's allegation that they told him that EOR told them to inject, and that they injected. Such testimony is inadmissable in Illinois. *People v Armstead 322 Ill. App.3d 1, 12 (2001)*(Investigator testimony as to non-testifying witnesses statements incriminating defendant inadmissable and should not have been considered).[14]

Obviously, under Illinois law, the absence of any testimony from the accusers (Wake and Geary), and their unavailability for cross-examination, makes Thompson's hearsay and double hearsay inadmissible to prove the accusations or to support jurisdiction. *Id.* Further, when closely examined, there are no allegations by Thompson's affidavit that either Wake or Geary ever admitted to "disposing" of the material, only that it was "injected". *Thompson Affidavit*.

Given that the inadmissible Thompson-Wake-Geary double (triple?) hearsay was the sole testimonial basis and proof for the State's 415 ILSC 5/ et seq. "disposal" allegations, and given that the most the amount to is merely an admission of their injections, the proof requires an impermissible inference, and State can never prove on this record that the material was a 40 CFR 261 "solid waste" (e.g that it was "disposed"), and 415 ILCS 5/ cannot be applied to Respondents.

ii. NEIC Data Irrelevant Inadmissable Hearsay, Thompson Not Collector or Custodian, Fact That a Material is Hazardous Does Not Subject it to RCRA Jurisdiction Without "Disposal"

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[14] The Court stated: "Hearsay is defined as testimony of an out-of-court statement offered to establish the truth of the matter asserted therein and resting for its value upon the credibility of the out-of-court asserter. People v. Lopez, 152 Ill. App. 3d 667, 672, 504 N.E.2d 862 (1987). The basis for excluding evidence under the hearsay rule lies in the fact that an opportunity to ascertain the veracity of the testimony is absent. People v. Rogers, 81 Ill. 2d 571, 577, 411 N.E.2d 223 (1980). An opportunity for cross-examination of the party whose assertions are offered to prove the truth of the matter asserted is an essential requirement of such a testimonial offering and, accordingly, testimony by a third party as to statements made by another non testifying party identifying an accused as the perpetrator of a crime constitutes hearsay testimony and is inadmissible. Lopez, 152 Ill. App. 3d at 672, citing Rogers, 81 Ill. 2d at 577-79."

Next, in support of the multi-layered hearsay "injection" testimony from Wake and Geary, the State has Thompson attempt to introduce a single set of data to prove the material was "hazardous".[15] Obvious relevance issues arise from the fact the samples were admittedly not taken contemporaneously with the alleged injections, but from material that was obviously not put down a well (as it was still there in 2004). Further, there is no testimony from Wake or Geary that the material the data were allegedly obtained from in 2004 was in fact the same as what was alleged to have been put in the wells in 2002 and thereafter (which is unlikely given that the acid wash effluent would also contain hydrocarbons and other materials incorporated into the wash once it was removed from the oil wells). Also, Thompson was not an appropriate foundation witness, as the collector/custodian of the date is required to provide the affidavit thereto, and that should have been a NEIC official. Thus, the NEIC report itself, and the data, are also hearsay.

In order to attempt to assert jurisdiction, the State again requests that several consecutive inferences be made, first that the material allegedly injected into the wells was "disposed" of, and next that the "hazardous" material sampled in 2004 was the same as that allegedly injected from 2002-2004. However the State has the burden and is the movant, and as such is not entitled to such inferences in their favor. Rather, the inferences must be drawn against the State, and it cannot be assumed that the material present in 2004 was the same as what was allegedly injected, or that the NEIC data is representative of what was allegedly was placed in the wells.

The inference issue is crucial to the State's case, due to the fact that in order to be a solid waste and then a hazardous waste, federal law and 415 ILCS 5/ requires that a material be "discarded" or disposed of first. *40 CFR 261.* Thus, if the State has no direct evidence of injection of the material described in the Bill of Lading, it cannot lend itself of the inferences it seeks in its Complaint and MSJ (that the injections constituted IEPA-regulated "disposal" and that the data came from similar material as to what was injected). Since it cannot prove that the Wake and Geary disposed of anything belonging to EOR, let alone a "solid waste" it cannot make the "solid waste" demonstration required for initial 415 ILCS 5/ jurisdiction.

[15]The fact that a material may exhibit characteristics of a hazardous waste or may contain hazardous compounds does not automatically mean the material is RCRA or 415 ILCS 5 et seq. regulated, it must first be a solid waste. *40 CFR 261.*

iii. Alleged Admission that EOR Directed Kincaid Employees to Inject Is Not Admission By EOR or Any Witness that Anything was Injected or Disposed

With regard to EOR's alleged "directing" of Wake and Geary, the State MSJ cites the EOR RTA 130-131, 140-141, and paragraph 8 of the Johnson Affidavit. *EOR MSJ at 6.* However, the issue is not whether these Wake or Geary were told to do something by a 3rd party, or what allegedly they told the investigator while not under oath, but rather whether in fact the record reflects that they personally admitted they disposed of any of EOR's materials into a well. Unfortunately, in addition to the inexplicable absence even a signed statement from either alleged injector attesting to the injections, the record does not reflect that, assuming *arguendo* they occurred, that the injections were for the purpose of "disposal" of the material, as described 2nd hand by the investigator, but rather supports the opposite inference.

iv. EPA Investigator Thompson Allegations Must Be Inferred to Describe Routine Acid Treatment of Oil Wells Regulated By IDNR, Not Disposal

By the State's sole witness's testimony, the circumstances described are nothing out of the ordinary with regard to non-RCRA regulated oilfield operations, which involve the periodic injection of hazardous fluids into oil wells for maintenance and enhanced recovery purposes, and including the type of material that the State alleges was injected here.

In fact, publically available USEPA oil and gas guidance and technical documents recognize the routine Class II UIC-authorized use of "strong acids", and other hazardous liquids for both oil well finishing, maintenance/workover, and enhanced recovery, and the subsequent Class II authorized injection of the resulting wastes of commingled oil, acid and other contaminants into the Class II UIC wells. *Attachment E - USEPA Technical Manual Excerpts.*

For instance, USEPA has long included injection of acidization fluids into wells within authorized Class II well activities:

> "Workovers also use additional inputs and produce other pollutants, some of which are toxic. The compounds usually appear in the produced water when production resumes, or in the case of cleaning fluids, may be spilled from equipment at the surface. **Scale removal requires strong acids, such as hydrochloric or hydrofluoric acids. When carried to the surface in produced water, any acids not neutralized during use must be neutralized before being disposed, usually in a Class II injection well.** Scale is primarily comprised of sodium, calcium, chloride and carbonate; however, trace contaminants such as barium, strontium, and radium may be present. Also, corrosion inhibitors and stimulation compounds are flushed through the well. Corrosion-resistant compounds of concern include

zinc carbonate and aluminum bisulfate. **Stimulation may require acidic fluids.**".[16] *(Emphasis Added).*

As evident from the excerpts included in Attachment F, the process alleged by IEPA (small amounts of the acid material being periodically cycled into the oil wells, being neutralized with lime and then being put into the Class II UIC wells), in fact describes nothing more than routine oil and gas operations maintenance procedures. Consequently, the alleged actions of Wake and Geary cannot be assumed to be illegal disposal just because a non-eyewitness IEPA field investigator says he was told that they injected.*EOR MSJ Exh. I - Johnson Affidavit*.

In fact, Mr. Johnson's affidavit, and the alleged description of activities by Wake and Geary fails to find or describe the injections as "disposal" and, like the RTA, the word does not appear in any of the hearsay alleged by Mr. Johnson. An inspection of Mr. Johnson's EOR affidavit, reveals that, like his affidavit for the AET MSJ, it amounts to no more than a sworn summary of his November 2004 and April 2005 Kincaid site inspections, as well as his interpretation of the February 2004 NEIC site inspection report and data.[17] (*See EOR MSJ Exhibit I - Johnson EOR Affidavit at Attachments 1 (2004 Report), 2 (NEIC Report) and 3 (2005 Report)*.

As previously noted, the fact that Mr. Johnson and IEPA failed to obtain and include in the record any written statements from the 2 alleged injectors despite repeated opportunities , alone, should be sufficient to doom the State's attempt to establish 415 ILCS 5/ et seq. jurisdiction. As such, having failed to produce a single eye-witness as to any injection whatsoever, let alone one constituting disposal, the State has clearly failed to carry its burden of proof for jurisdiction, let alone any violations by EOR, as 415 ILCS 5/ requires that a material be discarded or disposed of for jurisdiction, and the State has not proven a single instance despite having had repeated access to the alleged injectors. As such, the State's contention that the record supports the MSJ or jurisdiction

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[16]EPA Office of Compliance Sector Notebook Project, Profile of the Oil and Gas Extraction Industry, (October 2000), Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency (*EPA/310-R-99-006 at p41*). *Att. F - Excerpts.*

[17]The 35 paragraph Affidavits in Support of both the AET and EOR MSJs appear to be identical, and the exhibits thereto are identical other than the differing respective Requests to Admit (*Exh. A* to each MSJ), and the EOR MSJs inclusion of allegedly applicable laws (*EOR MSJ Appx. A*) and a bio of Arthur Clark (*Exh. J at 209 pdf*), and the EOR MSJs omission of what is Exhibit H to the AET MSJ attachments *(Vickery Hazardous Waste Profile at 47 pdf*). Thus, the same jurisdictional defects apply to the EOR affidavit as argued by AET in its Response (*AET Response at 32-37, Secs. V.B.1.d and VI*), and those arguments are adopted here as to why the affidavit, and the overall case that relies solely thereon, is jurisdictionally and factually deficient and must be dismissed.

must be rejected.

D. Response Incorrectly Asserts That IEPA Regulates Class II wells Under 415 ILCS 5/ Based on Type of Fluid Injected

1. State Position: IEPA Has Authority to Determine What Can Be Injected Into Class II Well and to Require Class I Permit Therefore

The States' Response next asserts 415 ILCS 5/ jurisdiction exists, since, despite IDNR's admitted authority over Class II wells, the Class II UIC status is not determinative, but rather "the type of fluid injected into the wells is what matters". *Response at 7.* According to the State's Response, IDNR does not have the "authority to permit a person to inject hazardous waste into those wells. Such authority rests solely...[with IEPA and the IPCB]". *Id.* Thus, according to the IEPA, "determining whether EOR injected contaminants...without" an IEPA permit, "is clearly within the Board's authority". *Id. at 8.* Hence, the State surmises, EOR's "only chance to prevail" would be to have held an IEPA Class I permit, or show that the acid material was not a "contaminant". *Id.*

IEPA attempts to avoid the clear exclusionary language of 415 ILCS 5/4(l) and implementing regulations 35 IAC 704.102 and 105 by surmising that IDNR's authority over Class II wells is limited by 62 IAC 240.750(i) "to Class II wells that inject a specific type of fluids [sic]..." which are defined at 62 IAC 240.10. *Response at 13-14.* According to the IEPA, "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 [IEPA] permit to operate their wells under a separate class.". *Response at 15.*

Since EOR had only Class II permits, the State theorizes that EOR could only inject produced fluids or fluids injected for enhanced recovery, and since from the record "it is clear that the hazardous waste acid was not one of the fluids allowed to be injected...the acid material..cannot be authorized or regulated by the DNR...DNR had no authority to allow EOR to inject hazardous waste...EOR would be protected by its permit if [IEPA] were alleging [injection] of...authorized fluids". *Response at 15-16.*

Continuing, IEPA argues that that by injecting the acid material, EOR converted its Class II wells, and that this "readily accepted concept of "conversion" allows IEPA to overstep IDNR jurisdiction whenever IEPA chooses to, since "only Class I, Class IV and Class V UIC wells

can...accept hazardous wastes...Once hazardous waste was injected [into a Class II well]...they ceased to meet the definition of a Class II well...[and were converted to]...unpermitted Class I, IV or V injection wells."

According to IEPA, this type of "conversion" is a "typical practice...contemplated by UESPA...as far back as 1982," and is considered a major modification requiring repermitting. *Response at 17.* IEPA cites as its sole authority for its "conversion" arguments a 1981 USEPA multi-purpose well permitting guidance. *Response at 17, citing USEPA GWPG #24, 7/21/81 - See Attachment F hereto.*

In order to create jurisdiction by "conversion", the State first attempts to dismiss the existence of 35 IAC 704.102, which clearly excludes Class II wells from any IEPA or 35 IAC 704 regulation, by asserting that an agency cannot limit the scope of a statute by its rulemaking.[18] *Response at 8.* According to the State, since 415 ILCS 5/12(g) states that one cannot inject without a UIC permit, 35 IAC 704.102 cannot limit IEPA's 415 ILCS 5/ jurisdiction over Class II wells. *Id.*

2. EOR Reply: 415 ILCS 5/4(l) Restricts IEPA Jurisdiction, Guidance Supports Single Permit

a. 35 IAC 704.102 Merely Implements 415 ILCS 5/, Cannot Be Ignored

IEPA's suggestion that the Board ignore 35 IAC 704 misses the point, as it is prohibited from regulating a Class II UIC well operator by the very statute it argues applies. 415 ILCS 5/4(l) provides:

> "The Agency is hereby designated as water pollution agency for the state for all purposes of the Federal Water Pollution Control Act, as amended; as implementing agency for the State for all purposes of the Safe Drinking Water Act, Public Law 93-523, as now or hereafter amended, *except Section 1425 of that Act [State Programs for Class II Wells Related to Oil and Gas]. (Emphasis Added).*

Section 1425 of the SDWA provides the authority for the federally-approved State UIC programs for oil and gas leases and related Class II UIC wells in Illinois. *42 USC 300h.* Thus,

[18]Despite IEPA's arguments to the contrary, it acknowledges that "the General Assembly intended to remove...fluids into Class II wells for the purposes of enhanced recovery...from the definition of 'contaminant'" and that "the UIC program...divides regulatory duty between the Illinois EPA and Illinois DNR.:". *Response at 8.*

by 415 ILCS 5/'s own terms, IEPA, and the IPCB, are simply without any authority to require a Class II well to also have a Class I permit, as the injection of anything into a Class II well is regulated, and allowed or prohibited, by IDNR under the SDWA and 225 ILCS 725.[19] *40 CFR 144.1*; *415 ILS 5/4(l).* [20]

b. Cited Guidance Does Not Indicate Automatic Conversion Occurs or That UIC Permittee Required to Obtain Second Permit

An inspection of the 3 page guidance memorandum cited by IEPA's Response indicates that, contrary to calling for a second permit, it recommends that there should not be dual permits issued for dual use wells, but rather all requirements are to be included in a single permit. *USEPA GWPG #24, 7/21/81 - See Attachment G hereto.* The guidance directs that such recurring operations should occur under a single permit, rather than requiring two permits.[21]

Contrary to the State's assertions, it does not state "conversion" occurs "automatically" the instant one injects what IEPA considers a hazardous waste into a Class II well, but rather that where an operator wants to employ an oil and gas injection well for dual uses, the requirements should be included in a single amended Class II permit. As such, the guidance in fact cuts against IEPA's assertion that a Class II permittee should be required to obtain another UIC permit from a different agency to perform related injections that may involve what IEPA may consider a RCRA "hazardous waste", even if IDNR does not consider such injection to be a permit or SDWA violation, as it appears is the case here.

As argued by EOR, the guidance requires that there be a single "decider" as to what is or is

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[19]EOR also incorporates herein AET's Responses related arguments as to the lack of IPCB and IEPA statutory authority as EOR's view of the statutory framework for the case, and for objections to jurisdiction for the EOR MSJ as well. *AET Response at 4-7, Section II.*

[20]40 CFR 144.1 provides that the UIC regulations implement both SDWA and RCRA requirements for hazardous waste:

> (a) Contents of part 144. The regulations in this part set forth requirements for the Underground Injection Control (UIC) program promulgated under Part C of the Safe Drinking Water Act (SDWA) (Pub. L. 93–523, as amended; 42 U.S.C. 300f et seq.) *and, to the extent that they deal with hazardous waste, the Resource Conservation and Recovery Act (RCRA) (Pub. L. 94–580 as amended; 42 U.S.C. 6901 et seq.)*. (*Emphasis Added*).

[21]The example in the guidance involved a well that was alternately used as a Class III water injection well (to dissolve a salt dome) and then was used as a Class II well to inject oil into the dissolved dome.

not a "Class II fluid" when issuing a permit and dealing with an injection involving oilfield operations, which in this case is the IDNR 415 ILCS 5/4(l); 225 ILCS 725. Further, the guidance, logic, and the law suggests that if IEPA had a concern with what was being put into a Class II well, it would request that the IDNR determine if the injection violated the permit, and prosecute violations thereof, if warranted.

Conversely, where IDNR declines to prosecute an oilfield-related injection on behalf of the State, a Class II operator cannot face exposure to double jeopardy by way of IEPA ignoring the State's deference and post-facto attempting to require a second UIC permit for the same, Class II authorized, injection, given that the Class II permit represents both RCRA and SDWA requirements for that well, as determined by IDNR.

c. SDWA and Other USEPA Guidance Indicates Class II Fluid Determinations Are to be Made by IDNR under SDWA, not by IEPA Under RCRA, Since Numerous Class II Fluids Are Hazardous and Would Require Class I UIC Permit if Class II Permit Not Obtained

The IEPA argument that it can determine what should or should not go into a Class II well, and require a second UIC permit, simply ignores 40 CFR 144.1, 415 ILCS 5/4(l), 35 IAC 704.102 and 704.105, 42 USC 300h, 225 ILCS 725 and 62 IAC 240. *Response at 16.* Taken along its logical path, IEPA is asserting that IEPA may regulate anything hazardous that goes into a Class II well as long as the material is not brine, oil, gas, or "recovery fluids", regardless of whether a Class II permit exists for that well.

However, it was the very fact that nearly everything coming out of an oil well is "hazardous" and potentially CWA/RCRA/CERCLA/TSCA regulated, that caused the Congress and the General Assembly to bifurcate jurisdiction, giving IDNR total, and sole, authority over the injection of hazardous materials into a Class II well, and IEPA jurisdiction over what is injected into the 5 other classes. *40 CFR 144.1; 415 ILCS 5/4(l)*

d. Presence of Compounds Regulated By Other Statutes Does Not Remove SDWA UIC Authority: Brine Contains Numerous Hazardous Constituents

Contrary to IEPA's assertions, the SDWA and EPA do not regulate Class II UIC wells based on the injectate, but rather based on ensuring the practice of injection itself is safe, and thus numerous substances are allowed to be put into a Class II well that are extremely hazardous, starting with the brine that is extracted with the oil. As noted by EPA, brine is always mixed

with some hydrocarbons when re-injected, and contains numerous contaminants regulated under and well in excess of action levels set forth in CERCLA, RCRA and the CWA, and which brine would otherwise be regulated if not being disposed of in a Class II well, as noted by the USEPA Class II UIC well website:

> "When oil and gas are extracted, large amounts of brine are typically brought to the surface. Often saltier than seawater, this brine can also contain toxic metals and radioactive substances. It can be very damaging to the environment and public health if it is discharged to surface water or the land surface. By injecting the brine deep underground, Class II wells prevent surface contamination of soil and water. ***http://water.epa.gov/type/groundwater/uic/class2/.***

Thus, a primary purpose of a Class II well includes safe "hazardous waste" disposal, the same function as served by a Class I well. Central to the State's misunderstanding is that "enhancement" fluids are also typically quite hazardous, yet they are also allowed in a Class II well without needing a Class I permit.

e. Fluids For Enhanced Recovery Can Be Hazardous Without RCRA Regulation: Diesel Fuel Injection Is Not RCRA Regulated

Fluids injected into Class II wells include numerous regulated substances that would otherwise cause the fluid, and contaminants contained therein, to be regulated under other statutes, but for Sec. 1425 of the SDWA (42 USC 300h), even including diesel fuel:

> "Diesel fuels may be used in hydraulic fracturing operations as a primary base (or carrier) fluid, or added to hydraulic fracturing fluids as a component of a chemical additive to adjust fluid properties (e.g., viscosity and lubricity) or act as a solvent to aid in the delivery of gelling agents. Some chemicals of concern often occur in diesel fuels as impurities or additives. Benzene, toluene, ethylbenzene, and xylene compounds (BTEX) are highly mobile in ground water and are regulated under national primary drinking water regulations because of the risks they pose to human health." *Fact Sheet: UIC Permitting Guidance for Oil and Gas Hydraulic Fracturing Using Diesel Fuels: http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/upload/hfdieselfuelsfs.pdf*

f. SDWA Regulates Practice of Injection to Ensure Safety, Dual Regulation By Way of Injectate Not Required

The regulatory scheme noted above, regulating the practice of injection instead of the fluid being injected, is echoed by the draft diesel fracturing guidance which the Fact Sheet was summarizing:

> "The approach taken for all underground injection in the UIC Program...is designed to ensure that underground injection practices—as opposed to the components of specific injectates—do not endanger drinking water sources." *Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels –Draft: Underground Injection Control Program Guidance #84, at 10.*

A further reading of that guidance makes clear that an DNR Class II permit writer, and not an IEPA enforcement staffer, is authorized to make the determination of how to deal with any injection into a Class II well.

In sum, what the IEPA proposes, regulating the injectate under RCRA in addition to regulating the process of injection under the SDWA, was specifically rejected by USEPA in promulgating the 40 CFR 144 regulations, which drew a bright line between RCRA and SDWA UIC jurisdiction:

> *"Control of UIC Wells Injecting Hazardous Wastes.* The RCRA hazardous waste permit program regulates the treatment, storage, .and disposal of hazardous wastes. The UIC permit program, governed by Subpart C of this Part and Part 123, governs State programs regulating injection wells, including those which dispose of hazardous wastes by underground injection. The two programs therefore potentially overlap, and could result in duplicative regulation of the same practices. In order to avoid this, in the proposed consolidated permit regulations EPA sought to set clear jurisdictional boundaries for the two programs so that each would regulate the practices it was specifically designed to control, and duplication could be eliminated."
>
> *45 Fed. Reg. 33326.*

Here, EOR's practices in regard to its Class II wells are regulated by IDNR under the Class II permits, and thus IEPA is mandated by federal and state law to leave permitting, and enforcement of the Class II permits to the jurisdiction of IDNR. *40 CFR 144.1; 415 ILCS 5/4(l).*

As such, IEPA's conversion argument is not based in law or fact and must be rejected, and, given the entirety of AETs and EOR's arguments and the numerous jurisdictional defects pointed out herein and in the AET's Response and EOR's Motion to Reconsider, the MSJ and entire matter must be dismissed as being without initial subject matter jurisdiction.

E. Penalty Unwarranted Since EOR Did Nothing Wrong, Storage Was Not Improper

Finally, the State argues that even if Count V is dismissed for lack of jurisdiction, there is a "wealth of evidence" that EOR handled and stored hazardous waste in an improper manner, disregarding the people and "especially the workers tasked with disposing of the acid". *Response at 20.* As noted above and in the AET Response, if the illegal disposal Count V is dismissed there can be no jurisdiction whatsoever, since in order to be a hazardous waste it has to first be a solid waste, and to be a solid waste the State must show it was "discarded", then

"hazardous" , and then stored and disposed of without a UIC permit. *415 ILCS 5/ et seq.; 40 CFR 261.*

Here, since EOR had Class II UIC permits for the wells, and there was no illegal disposal found by IDNR, by definition there was no illegal storage or transport for disposal of the acid wash cleaner either, and thus the MSJ cannot be granted and the entire matter must be dismissed. *415 ILCS 5/12(g); 415 ILCS 5/4(l); 225 ILCS 725.* Further, it would appear IDNR had no issues with the storage of the materials, Mr. Pulliam having inspected the facility alongside Mr. Thompson.

As evident from the photos attached to Mr. Johnson's Affidavit *(MSJ Exh. I, Att. 1 - 11/17/04 Inspection Report at pp115-117 pdf ; Also See Att. H hereto - Photos*). the storage facility EOR allegedly utilized at USACoal did not appear to be in any way haphazard, there is no evidence of spillage, leaking drums, fuming vats, or smoking caldrons of toxic chemicals, or the other usual indicia of improper storage and illegal disposal.

Even if so, as noted previously and central to the lack of IEPA and IPCB jurisdiction here, if there were a problem with EOR's injections or the storage of the industrial acid wash, it would be IDNR, and only IDNR, that could do something about it, as IDNR, not IEPA regulate such injections. *415 ILCS 5/4(l)*.

F. MSJ Cannot Be Considered and Must Be Denied Since No Jurisdiction, Inference Of Disposal Not Warranted

The inference, for purposes of the MSJ and for proof of jurisdiction (the burden always being on plaintiff), cannot be that "illegal disposal" occurred, but rather must be that the "acid material" was being used as an industrial cleaning/enhancing agent for EOR's wells, and such use and any "disposal" thereafter was subject only to 225 ILCS 725 and 62 IAC 240 requirements, not IEPA or 415 ILCS 5/ et seq.

As such, the MSJ cannot be granted or even considered, as the State has not shown how it has 415 ILCS 5/ jurisdiction. Why the IEPA pursued this matter, for so long, after supposedly knowing that IDNR regulates the activities alleged in the Complaint, begs the issue of how soon can the Board dismiss it. *Rurghas, Supra, People v Wade, Supra., et al.*

III. CONCLUSION

The overarching issue in this case is the IEPA attempt to have the Board create 415 ILCS 5/ jurisdiction where it cannot exist under Federal and State law. IEPA, and this Board, are limited by the Constitution and the laws created by the legislature thereunder, and cannot confer subject matter jurisdiction and power upon themselves where it is not provided by statute. *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988)*. As stated by our Supreme Court:

> "The distinction between subject matter jurisdiction and waivable defenses is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power. The courts, no less than the political branches of the government, must respect the limits of their authority." *Id.*

The IEPA and IPCB simply cannot avoid the very same jurisdictional rules that apply to federal courts:

> "It is axiomatic that federal courts are courts of limited jurisdiction and may not decide cases over which they lack subject matter jurisdiction. Unlike failure of personal jurisdiction, failure of subject matter jurisdiction is not waivable and may be raised at any time by a party or by the court sua sponte. If subject matter jurisdiction is lacking, the action must be dismissed. See Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986); United Food & Commercial Workers Union, Local 919 v. Centermark Properties Meriden Square, Inc., 30 F.3d 298, 301 (2d Cir. 1994)..."
>
> *Lyndonville Savings Bank & Trust Company v Lussier, et al., 211 F.3d 697 (2nd Cir. 2000).*

Further, even if 415 ILCS 5/ jurisdiction existed, the State has failed to create a record proving illegal disposal occurred, or that a solid waste was ever handled by EOR. Consequently, the Board, having no 415 ILCS 5/ jurisdiction over the Class II wells and associated oil wells, cannot even rule on the MSJ, and must dismiss this matter at first opportunity. *Id.*

WHEREFORE EOR REQUESTS THE MSJ BE DENIED AND THIS MATTER BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION, WITH PREJUDICE, and that the Board award EOR its costs and fees.

Dated: **12/12/12**

Respectfully submitted For EOR By:

s/: *Felipe Gomez, Esq.*

Felipe Gomez, Esq.

ATTACHMENTS TO 12/12/12 EOR REPLY

Attachment A - 9/18/12 Certified Mail Receipt (Green Card)

Attachment B - 10/6/12 USPS Tracking Printout

Attachment C - 10/10/12 Mankowski email; 0/15/12 Gomez reply email

Attachment D - 4/5/05 IDNR Facsimile to IEPA with Class II SDWA Permits

Attachment E - USEPA Technical Manual Excerpts

Attachment F - USEPA Groundwater Protection Guidance #24 (7/21/81)

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 ELECTRONIC FILING OF ATTACHMENTS TO EOR REPLY

ALL PARTIES PLEASE TAKE NOTICE that on December 12, 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 the Attachments to EOR's Reply to Illinois' Response to EOR Motion to Reconsider,** a copy of which is attached hereto and herewith served upon you.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I did on December 12, 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 **Attachments to EOR Reply**, 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

Dated: 12/12/12

Respectfully submitted,

s/: *Felipe Gomez, Esq.*
Felipe Gomez, Esq.

LAW OFFICE OF FELIPE GOMEZ, ESQ.
116 S. Western Ave. - # 12319
Chicago, IL 60612-2319
312-399-3966
gomzfng1@netscape.net

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.	)	
	)	

ATTACHMENTS TO 12/12/12 EOR ENERGY LLC REPLY

Attachment A - 9/18/12 Certified Mail Receipt (Green Card)

Attachment B - 10/6/12 USPS Tracking Printout

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Attachment D - 4/5/05 IDNR Facsimile to IEPA with Class II SDWA Permits

Attachment E - USEPA OSW 1987 Technical Manual Excerpts

Attachment F - USEPA OECA 2000 Guidance Excerpts

Attachment G - USEPA Groundwater Protection Guidance #24 (7/21/81)

Attachment H - Photos

Attachment A

9/18/12 Certified Mail Receipt (Green Card)

SENDER: *COMPLETE THIS SECTION*

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to: 9/6/12 B.M.
PCB 2007-095
James Hamilton, R.A.
E.O.R. Energy, LLC
14 Lakeside Lane
Denver, CO 80212

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by *(Printed Name)* | C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☑ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? *(Extra Fee)* ☐ Yes

2. Article Number
(Transfer from service label) 7011 0110 0001 8270 1741

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

DENVER CO
UNITED STATES POSTAL SERVICE
13 SEP 2012 PM

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4 in this box •

STATE OF ILLINOIS
POLLUTION CONTROL BOARD
JAMES R. THOMPSON CENTER
100 W. RANDOLPH ST.
SUITE 11-500
CHICAGO, ILLINOIS 60601

RECEIVED
CLERK'S OFFICE
SEP 18 2012
STATE OF ILLINOIS
Pollution Control Board

Attachment B

10/6/12 USPS Tracking Printout

Track & Confirm

GET EMAIL UPDATES PRINT DETAILS

YOUR LABEL NUMBER	SERVICE	STATUS OF YOUR ITEM	DATE & TIME	LOCATION	FEATURES
70110110000162701741		Delivered	September 13, 2012, 1:19 pm	DENVER, CO 80212	Certified Mail™
		Arrival at Unit	September 13, 2012, 6:35 am	DENVER, CO 80212	

Check on Another Item

What's your label (or receipt) number?

Find

Attachment C

10/10/12 Mankowski email; 10/15/12 Gomez reply email

Re: EOR Certified Mail Recipt

From: gomzfng1 <gomzfng1@netscape.net>
To: mmankowski <mmankowski@atg.state.il.us>
Bcc: arthurclark <arthurclark@aetenvironmental.com>
Date: Mon, Oct 15, 2012 8:47 am

Mike: Thank you for your note, based on which the 35 day period for appeal or reconsideration of the EOR order runs 10/18. I willl get back to you in a couple days, prior to any filing. Felipe.

-----Original Message-----
From: Mankowski, Michael <mmankowski@atg.state.il.us>
To: 'gomzfng1@netscape.net' <gomzfng1@netscape.net>
Sent: Wed, Oct 10, 2012 11:35 am
Subject: EOR Certified Mail Recipt

Felipe,

I sent an email to the Board's Clerk and they rescanned the "green card." Now both sides are posted on the Board's website: http://www.ipcb.state.il.us/documents/dsweb/Get/Document-77464
The postmark on the back of the card says Sept 13, 2012, which is consistent with the USPS website.

Michael D. Mankowski

Assistant Attorney General
Illinois Attorney General's Office
Environmental Bureau Springfield
500 South Second Street
Springfield, Illinois 62706
Phone: (217) 557-0586
mmankowski@atg.state.il.us

Attachment D

4/5/05 IDNR Facsimile to IEPA with Class II SDWA Permits

Historical File
South Fork Twp. / Kincaid P & P
Compliance File

ILLINOIS DEPARTMENT OF NATURAL RESOURCES
OFFICE OF MINES AND MINERALS
DIVISION OF OIL AND GAS
ONE NATURAL RESOURCES WAY
SPRINGFIELD, ILLINOIS 62702-1271
(217) 524-6570 - PHONE
(217) 524-4819- FAX

FAX COVER SHEET

FAX NUMBER TRANSMITTED TO: (217) 786-6355

To: Rich Johnson IEPA

From: Duane Pulliam

Client/Matter: E. O. R. Energy, LLC

Date: 4/5/05

4:20 p.m.

DOCUMENTS	NUMBER OF PAGES*
	1 of 7

COMMENTS:

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CONTACT JAN @ (217)524-6570 or @ <Jfitzpatrick@dnrmail.state.il.us>.

Tuesday, April 05, 2005 Wells permitted to E.O.R. Energy, LLC

REF #	OPER #	WELL NAME	LOCATION	SEC	TWN	RGE	TYPE	STAT	COUNTY
10358	3869	GALLOWAY #2 SWD	1002S 0978E NWc NE SW	32	14N	04W	SWD	A	SANGAMON
141017	3869	GALLOWAY #1 INJECTION	0330S 0386W NEc SE SW	32	14N	04W	GI	A	SANGAMON
141019	3869	GALLOWAY #3	0330N 0355E SWc SE SW	32	14N	04W	O	A	SANGAMON
141020	3869	GALLOWAY #4	0660N 1320E SWc SE SW	32	14N	04W	O	A	SANGAMON
142929	3869	RINK #1 DISPOSAL	0330S 0330E NWc	20	14N	03W	SWD	A	CHRISTIAN
142930	3869	RINK #3	0330N 0330E SWc SE SW	17	14N	03W	O	A	CHRISTIAN
142931	3869	RINK #4	0330S 0330E NWc SW NW	20	14N	03W	O	A	CHRISTIAN
142932	3869	RINK #6	0348N 0330E SWc NW NW	20	14N	03W	O	A	CHRISTIAN
142933	3869	TRUAX #1	0330S 0330W NEc	19	14N	03W	O	A	CHRISTIAN
142934	3869	G. TRUAX #3	0330N 0330W SEc NE NE	19	14N	03W	O	A	CHRISTIAN

142929

1 2

STATE OF ILLINOIS

Nº 201004

DEPARTMENT OF MINES AND MINERALS

DIVISION OF OIL AND GAS

SALT WATER DISPOSAL

AUTHORITY TO CONSTRUCT AND OPERATE AN ~~INJECTION~~ WELL

E & B McEndree Corp.
P.O. Box 484
Benton, IL 62812

CONVERSION - PERMIT #2133 ISSUED 9-21-60 TO JACK ROBINSON.

RINK #1 DISPOSAL
Sec. 20 Twp. 14N Rge. 3W
County CHRISTIAN

January 22, 1993
Springfield, Ill.

This is your authority under the Illinois Oil and Gas Act to construct and operate an injection well on the above-described premises. Exact location to be 330'S and 330'E of the NW corner.

Injection interval(s) as follows: Silurian 1688'-1714'

Surface elevation GL589 feet (MSL) Drilling Contractor

This permit expires one year from date issued unless operations commence prior thereto.

This permit is issued subject to the following conditions:

1. Install tubing and packer under supervision of division well inspector.
2. Prior to injection, conduct a mechanical integrity test at a minimum of 300 PSI for 30 minutes under supervision of a division well inspector.
3. Maximum injection rate and pressure: 20 BBLS/DAY 500 PSI
4. Set a minimum of of surface casing and circulate cement under supervision of well inspector.
5. INJECTION ALLOWED ONLY WHILE PRODUCING WELLS ON LEASE ARE PUMPING.

DIVISION OF OIL AND GAS

A legible copy of this permit shall be posted at Wellsite before drilling commences. If necessary to plug this well contact:

Springfield District, 217-524-1496 Gary Buzzard 217-676-2126

DIVISION WELL INSPECTOR

DIVISION SUPERVISOR

XEROX® 1M SHTS 1-91

STATE OF ILLINOIS
DEPARTMENT OF NATURAL RESOURCES
Office of Mines and Minerals
Division of Oil and Gas

No. 202036
Date Issued: 9/9/99
Reference #: 141017

PERMIT TO DRILL AND/OR OPERATE A WELL FOR: [redacted] GAS
INJECTION

PERMITTEE:
PERMITTEE NO. 3869
R.O.R. ENERGY, LLC
5915 N. BROADWAY
DENVER, CO 80216

WELL NAME: GALLOWAY #1 INJECTION
LOCATION: 0330S 0386W NEc SE SW
SEC: 32 TWP: 14N RGE: 04W COUNTY: SANGAMON
INJECTION INTERVAL(S) AS FOLLOWS:
SILURIAN 1729'-1744',

This permit expires one year from date of issuance unless drilling or conversion operation are commenced prior thereto

PERMIT CONDITIONS:
1. INSTALL TUBING AND PACKER UNDER SUPERVISION OF DIVISION WELL INSPECTOR
2.PRIOR TO INJECTION, CONDUCT A MECHANICAL INTEGRITY TEST A MINIMUM OF 300 PSI FOR 30 MINUTES UNDER SUPERVISION OF A DIVISION WELL INSPECTOR.
3. MAXIMUM INJECTION RATE AND PRESSURE: 700 BBLS/DAY; 700 PSI.
4. SET AND CEMENT AT LEAST NONE FT. OF SURFACE CASING, OR WITH APPROVAL OF DISTRICT MANAGER, SET AND CEMENT SURFACE CASING TO TOP OF BEDROCK AND CIRCULATE CEMENT TO SURFACE BEHIND LONGSTRING FROM CEMENT BASKET SET AT NONE FT. UNDER SUPERVISION OF WELL INSPECTOR.
5 CONVERSION - PERMIT #025640 ISSUED 8-10-83 TO OIL, GAS & MINERALS, INC
6 INJECTION ALLOWED ONLY WHILE PRODUCING WELLS ON LEASE ARE PUMPING

This permit or a legible photocopy shall be posted at the wellsite before drilling commences. If necessary, to plug this well, notify

SPRINGFIELD (217) 524-1673
District Office

This permit is conditioned upon compliance with the requirements of the Illinois Oil and Gas Act and the implementing regulations and authorizes the drilling and operation of the above described well

Division of Oil and Gas

Division Supervisor

TE OF ILLINOIS

X BV

№ 28255
10358

ENT OF MINES AND MINERALS

DIVISION OF OIL AND GAS

AUTHORITY TO DRILL AND OPERATE A WELL

Oil, Gas & Minerals, Inc.
Box 209
Taylorville, IL 62568

CONVERSION PERMIT #27331 Dated 10-26-83

GALLOWAY #2 SWD
Sec. 32 Twp. 14N Rge. 4W
County Sangamon

Springfield, Ill. December 15, 1983

SET AND CEMENT A MINIMUM OF _____ OF SURFACE CASING.

This is your authority under the State Oil and Gas Conservation Act, effective July 29, 1941, as amended, and the Rules and Regulations of this Division, to drill and operate a well for SALT WATER DISPOSAL on the above described premises.

Exact location of well to be 1002'S and 978'E of the NW corner of the NE quarter of the SW quarter of the above described section.

Said well is to be drilled with Rotary tools to a contemplated depth of Burlington

Elevation G.L. 594 Ft. Drilling Contractor Taylor Drilling Olney, Ill.

This permit expires one year from date of issuance unless drilling operations have commenced, prior thereto, or on completion of work specified herein.

Instructions for cuttings from this well are outlined in Paragraph _____ on reverse side of this permit.

This permit or legible photostatic copy must be posted at the well site before drilling commences. If necessary to plug this well, notify

Gary Buzzard 217-623-4012
Inspector

DIVISION OF OIL AND GAS

George R. Lane
Petroleum Engineer

The issuance of this permit by this Department and by the acceptance of this permit by the permittee, the permittee agrees that this shall constitute action as required in Section 8f of Chapter 104, Illinois Revised Statutes.

SIGN ON SETS 2-83

SUBPART A: GENERAL PROVISIONS

Section 240.10 Definitions

"Act"--means the Illinois Oil and Gas Act [225 ILCS 725].

"Annular or casing injection/disposal well"--means a well into which fluids are injected between the surface casing and the well bore, the surface casing and the production casing, and/or the production casing and the tubing, or a well into which fluids are injected which does not have production casing, tubing and packer.

"Cement"--means all petroleum industry cements meeting the requirements set forth in "Specifications for Oil Well Cements and Cement Additives", API Standard 10A, January, 1974, published by the American Petroleum Institute, 1220 L Street, Northwest, Washington, D.C. 20005 (this incorporation does not include any later publications or editions), except as provided in Subpart K of this Part.

"Class II fluids" means:

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, which 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;

chemically treated or altered to the extent necessary to make them usable for 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;

Freshwater from groundwater or surface water sources which 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) which are an integral part of oil and gas production operations; and waste fluids from gas dehydration plants (including glycol-based compounds and filter backwash) which are an integral part of natural gas storage operations, unless the gas plant or gas dehydration plant wastes are classified as hazardous under the federal Resource Conservation and Recovery Act.

"Class II UIC well"--means an Injection, Disposal or Commercial Disposal well into which fluids are injected:

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

For enhanced recovery of oil or natural gas; and

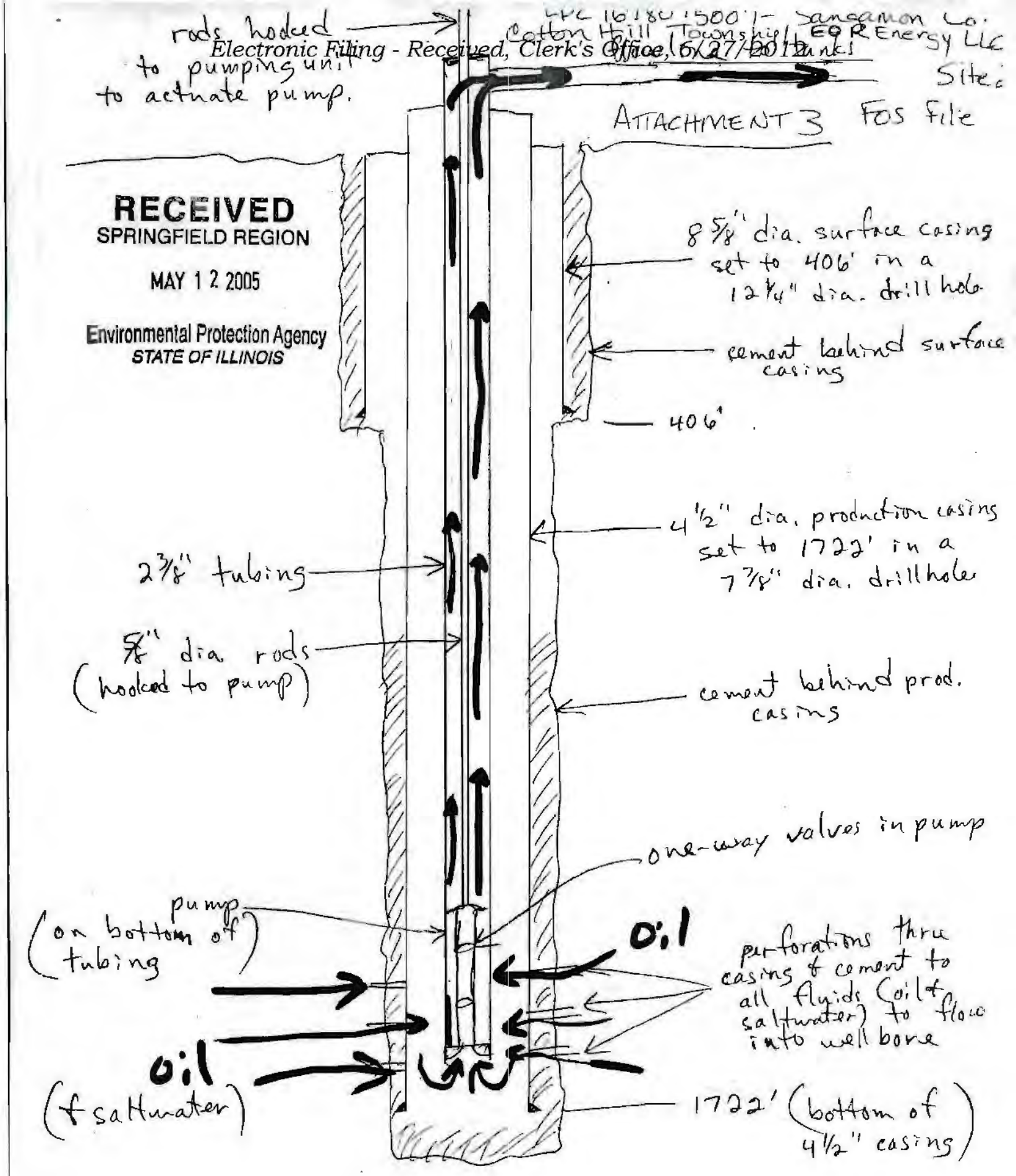
For storage of hydrocarbons which are liquid at standard temperature and pressure.

"Commercial Disposal Well"--means a permitted Class II well for which the permittee receives deliveries of Class II fluids by tank truck and charges a fee for the specific purpose of disposal of Class II fluids.

"Convert"--means to change an oil, gas, Class II UIC, water supply, observation or gas storage well to another of those types of wells, requiring the issuance of a new permit.

"Department"--means *the Department of Natural Resources, Office of Mines and Minerals of the State of Illinois.* (Section 1 of the Act)

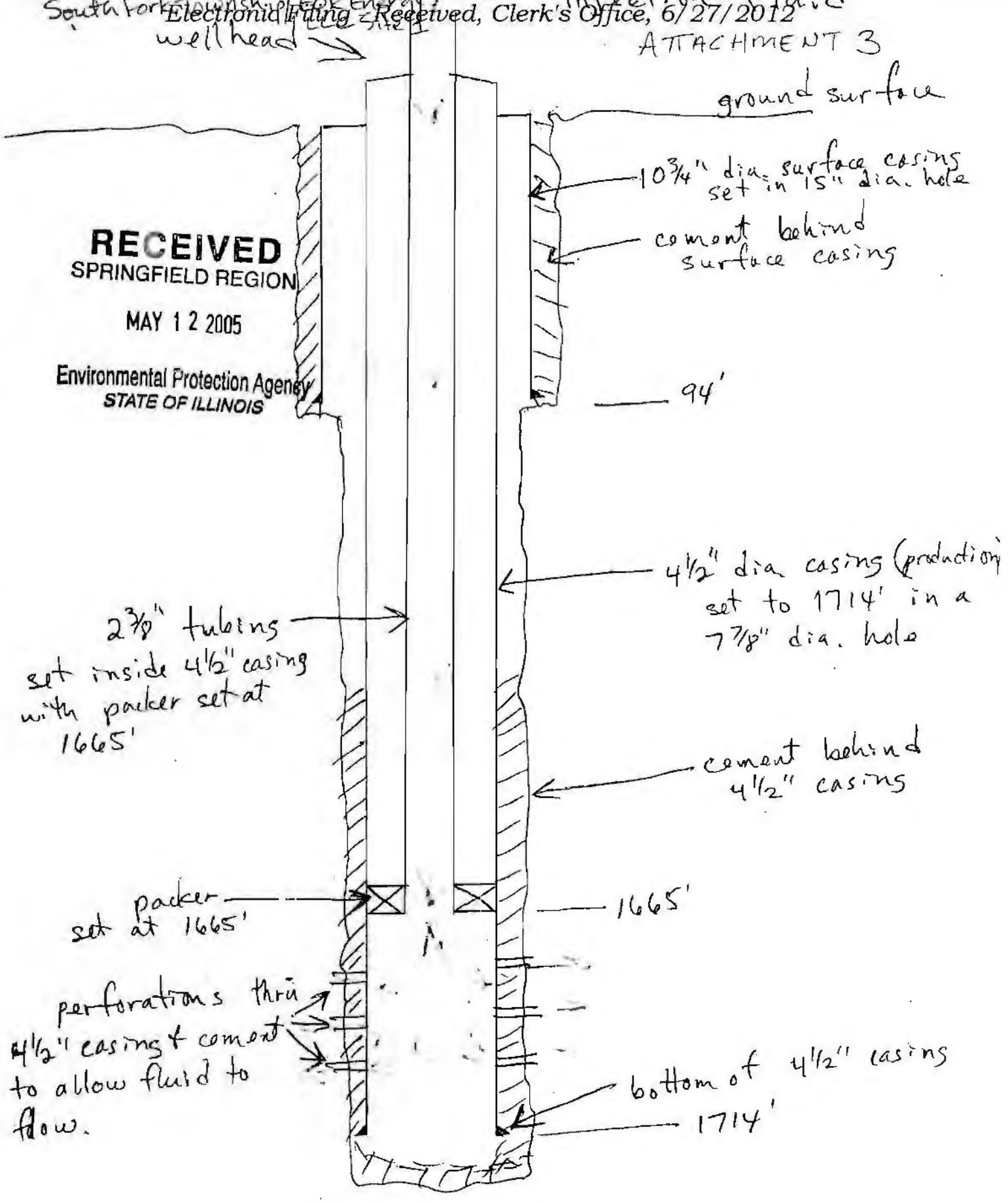
"Directional Drilling"--means the controlled directional drilling when the bottom of the well bore is directed away from the vertical position.



Galloway #3
well construction

API 0218145010 - Christian Co.
South Fork Township / EOR Energy / Rink #1

ATTACHMENT 3



Rink #1 Disposal well construction

Above are the GPS data I obtained with BOL/FOS Springfield Region's Garmin GPSMAP 76S on 4/19/05.

The accuracy numbers are reported in feet, so each waypoint is accurate to plus or minus XX.X feet. The site number is the waypoint assigned by the GPS unit. The only 2 waypoints that were not recorded near a well were the waypoints collected near the Kincaid P & P shed, and the Galloway diesel engine shed. The Rink 6 and Rink 3 wells listed also include the correct IL DNR designations for the wells. "SWD" stands for "salt water disposal". The waypoints are listed in reverse chronological order.

David C. Jansen
Springfield Region Manager
Field Operations Section
Division of Land Pollution Control

Attachment E

USEPA Technical Manual Excerpts

906R87101

WASTES FROM THE EXPLORATION, DEVELOPMENT AND PRODUCTION OF CRUDE OIL, NATURAL GAS AND GEOTHERMAL ENERGY

INTERIM REPORT

April 30, 1987

Contractors' Reports Submitted to
U.S. Environmental Protection Agency
Office of Solid Waste
Washington, D.C.

Friction reducers - to minimize pumping energy. Usually these are organic polymers added to the stimulation fluids (guar, cellulose, fatty acids).

Acid flow-loss additives - Composed of solid particles that enter formation pores, and a gelatinous material to plug pores, silica fluor, calcium carbonate, polyvinyl alcohol, polyacrylamide.

Diverting agents - to direct stimulation fluids.

Complexing agents - to solubilize iron and other pipe or metal corrosion products which might precipitate. Ethylene diamine tetracetic acid (EDTA) is commonly used.

Cleanup additives - After acid treatment, the well must be cleansed of the reactor products and unusual reagents. They are flushed with water, and removed by use of nitrogen gas. Alcohols and wetting agents are added to ease these tasks (Williams, et al, 1979).

Although the formation may retain some of these fluids, most water-soluble reagents, sludges, and organic residue are eventually pumped from the well to the surface. In general, these wastes are displaced into onsite tanks or into holding ponds for treatment and disposal.

Hydraulic Fracturing

In hydraulic fracturing, fluid is pumped into a well under enough pressure to create actual breaks in the formation. This procedure allows more area for hydrocarbon flow into the well by extending fractures further into the formation. Types of fracturing fluids may be oil-base, water-base, or acid-base. Gases, especially nitrogen, are also used as fracturing fluids.

Hydraulically fractured formations tend to lose fluid-carrying capacity with time unless "propping agents" are used to hold the

Both practices are also routinely used to restore productivity of existing wells.

Acidizing

The first and by far the most successful well stimulation technique uses hydrochloric acid introduced into the petroleum-bearing formation (hence, "acidizing"). Hydrochloric acid stimulation is used in dolomite and limestone formations. When these acids are introduced into the formation, they react quickly to enlarge existing channels by dissolving rock. This treatment can produce carbon dioxide, calcium chloride, and/or magnesium chloride.

Another acid treatment uses a solution of hydrochloric and hydrofluoric acids to stimulate wells in sandstone formations. In this instance, sodium fluoride is an additional reaction product. Other acidizing systems include:

Organic acids - formic and acetic acid (usually used in combination with hydrochloric or hydrofluoric acid)

Powdered acids - sulfamic acid, chloroacetic acid

Retarded acid systems - gelled acids, chemical retarded acids, emulsified acids

Other chemical agents that are added to petroleum wells to maintain well productivity and integrity are the following:

Corrosion inhibitors - to reduce the destruction of metal through electrochemical action.

Surfactants - to prevent emulsification, to reduce interfacial tension, alter formation wettability, speed clean-up, prevent sludge formation.

Attachment F

USEPA OECA 2000 Guidance Excerpts

EPA/310-R-99-006

EPA Office of Compliance Sector Notebook Project

Profile of the Oil and Gas Extraction Industry

October 2000

Office of Compliance
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
401 M St., SW
Washington, DC 20460

and a resistivity log may help to determine what percentage of that liquid is oil. Certain types of logs may be conducted during drilling with a special tool located on the drillstring above the bit.

Drill stem testing may be the most important and definitive test. Equipment attached to the bottom of a drill string traps a sample of formation fluid. Measuring the pressure at which the fluid enters the chamber and the pressure required to expel that fluid back into the formation yields an estimate of the flow rate of formation fluid to be expected during production. If the flow rate is expected to be too low, procedures such as stimulation (see below) may be required to increase the flow before production equipment is installed.

Perforation

When the production casing is cemented in the wellbore, the casing is sealed between the casing and the walls of the well. For formation fluid (oil, gas, and water) to enter the well, the casing must be perforated. The depth of the producing zone is determined by analyzing the logging data; small, directed explosive charges are detonated at this depth, thereby perforating the casing, cement, and formation. The result is that formation fluid enters the well, yet the rest of the well's casing remains intact.

Stimulation

Some formations may have a large amount of oil as indicated by coring and logging, but may have a poor flow rate. This may be because the production zone is not have sufficient permeability, or because the formation was damaged or clogged during drilling operations. In these cases, pores are opened in the formation to allow fluid to flow more easily into the well. The hydraulic fracturing method involves inttoducing liquid at high pressure into the formation, thereby causing the formation to crack. Sand or a similar porous substance is then emplaced into the cracks to prop the fractures open. Another method, acidizing, involves pumping acid, most frequently hydrochloric acid, to the formation, which dissolves soluble material so that pores open and fluid flows more quickly into the well. Both fracturing and acidizing may be performed simultaneously if desired, in an acid fracture treatment. Stimulation may be performed during well completion, or later during maintenance, or *workover*, operations, if the oil-carrying channels become clogged with time (EPA, 1992).

Production equipment installation

When drilling, casing, and testing operations are completed, the drilling rig is removed and the production rig is installed. In most cases, tubing is installed in the well which carries the liquids and gas to the surface. At the surface, a series of valves, collectively called the Christmas tree because of its appearance, is installed to control the flow of fluid from the well. Pumps are

Sweetening is the procedure in which H_2S and sometimes CO_2 are removed from the gas stream. The most common method is amine treatment. In this process, the gas stream is exposed to an amine solution, which will react with the H_2S and separate them from the natural gas. The contaminant gas solution is then heated, thereby separating the gases and regenerating the amine. The sulfur gas may be disposed of by flaring, incinerating, or when a market exists, sending it to a sulfur-recovery facility to generate elemental sulfur as a salable product. Another method of sweetening involves the use of iron sponge, which reacts with H_2S to form iron sulfide and later is oxidized, then buried or incinerated (EPA, 1992).

III.A.4. Maintenance

Production wells periodically require significant maintenance sessions, called *workovers*. During a workover, several tasks may be undertaken: repairing leaks in the casing or tubing, replacing motors or other downhole equipment, stimulating the well, perforating a different section of casing to produce from a different formation in the well, and painting and cleaning the equipment. The procedure often requires bringing in a rig for the downhole work. This rig can be smaller than those used for initially drilling a well.

Two procedures performed to improve the flow of fluid during workovers are removing accumulated salts (called *scale*) and paraffin, and treating production tubing, gathering lines, and valves for corrosion with corrosion-prevention compounds. As fluids are withdrawn from the formation, the salts that are dissolved in the produced water precipitate out of solution as the solution approaches the surface and cools. The resulting scale buildup can significantly reduce the flow of fluid through the tubing, gathering lines, and valves. Examples of scale removal chemicals are hydrochloric and hydrofluoric acids, organic acids, and phosphates (EPA, 1994). These solvents are added to the bottom of the wellbore and pumped through the tubing through which extracted fluid passes. In a similar fashion, corrosion inhibitors may be passed through the system to mitigate and prevent the effects of acidic components of the formation fluid, such as H_2S and CO_2. These corrosion inhibitors, such as ammonium bisulfite or several forms of zinc, may serve to neutralize acid or form a corrosion-resistant coating along the production tubing and gathering lines. Corrosion control activities can be continuous, not just at workover.

III.B. Raw Material Inputs and Pollution Outputs

This section describes the impacts that individual steps in the extraction process may have on adding contaminants to the environment. Relevant inputs and significant output wastes are presented, with outputs summarized in Table 2. The management techniques used to handle the wastes are discussed in Section III.C, and more information on the magnitude and qualities of the releases are found in Section IV.

Oil and gas extraction generates a substantial volume of byproducts and wastes that must be managed. Relatively small volumes of chemicals may be used as additives to facilitate drilling and alter the characteristics of the hydrocarbon flow. For example, acids may be used to increase rock permeability, or biocides may be added to wells to prevent the growth of harmful bacteria. The industry also contends with many naturally occurring chemical substances. Byproducts and wastes result from the separation of impurities found in the extracted hydrocarbons or from accidents when oil is spilled. In addition, most processes involving machinery will produce relatively small quantities of waste lubricating oils and emissions from fossil fuel combustion, and inhabited facilities will produce sanitary wastes. Finally, formation oil contamination may be present in the spent drilling fluids and cuttings.

Drilling

There are a number of possible environmental impacts from the wastes generated during the well drilling and completion/stimulation processes. In the drilling process, rock fragments (cuttings) are brought to the surface in the drilling fluid. These cuttings pose a problem both in the large volume produced and the muds that coat the cuttings as they are extracted. Oil-based fluids have the added stigma of having oil frequently coating the cuttings. The volume of rock cuttings produced from drilling is primarily a function of the depth of the well and the diameter of the wellbore. It has been estimated that between 0.2 barrels and 2.0 barrels (8.4 and 84.0 gallons) of total drilling waste are produced for each vertical foot drilled (EPA, 1987).

Drilling mud disposal generally becomes an issue at the end of the drilling process. However, sometimes drilling mud is disposed of during the drilling process when the mud viscosity or density needs to be changed to meet the demands of formation pressures. This can create special concerns for offshore operations where the disposal of a large volume of mud over a short period can create a mud blanket on the seafloor that can have an impact on benthic organisms. Industry is limited to using barite stock for the making of drilling mud, which passes 40 CFR 435 requirements (less than or equal to 1 ug/kg dry weight maximum mercury and 3 mg/kg dry weight maximum cadmium).

hydrocarbon storage tanks, tank bottoms are likely to contain oil and smaller amounts of other constituents (see Section IV for an example of concentrations of contaminants in these sediments.)

Maintenance

The workover process requires many of the same inputs and produces similar outputs as the drilling process. In particular, workover fluid, which is similar to drilling fluid, is required to control downhole pressure. Also, emissions will result from the combustion of fuels to power the rig.

Workovers also use additional inputs and produce other pollutants, some of which are toxic. The compounds usually appear in the produced water when production resumes, or in the case of cleaning fluids, may be spilled from equipment at the surface.

Scale removal requires strong acids, such as hydrochloric or hydrofluoric acids. When carried to the surface in produced water, any acids not neutralized during use must be neutralized before being disposed, usually in a Class II injection well. Scale is primarily comprised of sodium, calcium, chloride and carbonate; however, trace contaminants such as barium, strontium, and radium may be present.

Also, corrosion inhibitors and stimulation compounds are flushed through the well. Corrosion-resistant compounds of concern include zinc carbonate and aluminum bisulfate. Stimulation may require acidic fluids.

In addition, painting- and cleaning-related wastes may be generated during workovers. Paint fumes and cleaning solvent vapor may produce gaseous emissions, paint and cleaning solvents with suspended oil and grease must be disposed of properly, and paint containers will require disposal as a solid.

Collectively, wastes produced by the industry other than drilling wastes and produced water are called associated wastes. The volume is usually small, about one barrel per well per year (DOE, 1993). Because associated wastes are those associated with chemical treatment or wells or produced fluids, post-treatment materials, and residual waste streams, they are more likely to have higher hydrocarbon or chemical constituent content than produced water or waste drilling fluids.

In 1985, API estimated that approximately 12 billion barrels of associated wastes were generated annually (Wakim, 1987). API estimates that in 1995, the annual volume of associated wastes is 22 millions barrels (API, 1997). The higher volume is attributed primarily to a difference in definitions between the two studies (i.e., the 1995 study includes wastes form gas plants that

regulation as hazardous wastes under Subtitle C was not warranted and that these wastes could be controlled under other federal and state regulatory programs including a tailored RCRA Subtitle D program.

Specifically, EPA's regulatory determination for exploration and production (E&P) wastes found that the following wastes are exempt from RCRA hazardous waste management requirements. The list below identifies many, but not all, exempt wastes. In general, E&P exempt wastes are generated in "primary field operations," and not as a result of maintenance or transportation activities. Exempt wastes are typically limited to those that are intrinsically related to the production of oil or natural gas.

- Produced water;
- Drilling fluids;
- Drill cuttings;
- Rigwash;
- Drilling fluids and cuttings from offshore operations disposed of onshore;
- Well completion, treatment, and stimulation fluids;
- Basic sediment and water, and other tank bottoms from storage facilities that hold product and exempt waste;
- Accumulated materials such as hydrocarbons, solids, sand, and emulsion from production separators, fluid treating vessels, and production impoundments;
- Pit sludges and contaminated bottoms from storage or disposal of exempt wastes;
- Workover wastes;
- Gas plant sweetening wastes for sulfur removal, including amine, amine filters, amine filter media, backwash, precipitated amine sludge, iron sponge, and hydrogen sulfide scrubber liquid and sludge;
- Cooling tower blowdown;
- Spent filters, filter media, and backwash (assuming the filter itself is not hazardous and the residue in it is from an exempt waste stream);
- Packing fluids;
- Produced sand;
- Pipe scale, hydrocarbon solids, hydrates, and other deposits removed from piping and equipment prior to transportation;
- Hydrocarbon-bearing soil;
- Pigging wastes from gathering lines;
- Wastes from subsurface gas storage and retrieval, except for the listed non-exempt wastes;
- Constituents removed from produced water before it is injected or otherwise disposed of;
- Liquid hydrocarbons removed from the production stream but not from oil refining;

Attachment G

USEPA Groundwater Protection Guidance #24
(7/21/81)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATE: JUL 27 1981

SUBJECT: Permitting Multi-purpose Wells. Ground-Water Program Guidance No. 24 (GWPG #24) UIC

FROM: Victor J. Kimm, Deputy Assistant Administrator
Office of Drinking Water (WH-550)

TO: Water Division Directors Regions I - X
Water Supply Branch Chiefs
UIC Representatives

PURPOSE

The litigants have requested clarification of the appropriate procedures for handling wells which may be classified in more than one class during their useful life.

BACKGROUND

Wells used in certain practices, particularly storage of hydrocarbons in salt domes, may fall under various classifications, as defined in section 122.32, during their useful life. For example, a well used to inject fresh water to dissolve parts of a salt dome to form a storage cavern is a Class III well. However, when such a well is used to inject liquid hydrocarbons for storage, it is a Class II well. This cycle may be repeated several times during the life of the well.

GUIDANCE

The procedures for regulating these wells should be streamlined and a single permit covering all phases of the life of a well should be issued.

The permit should specify which classes the well may be operated under, set construction requirements using the requirements of the class with the strictest standards and impose operating, monitoring and reporting requirements that reflect the use of the wells at any given time.

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 repermitting.

IMPLEMENTATION

Regional offices are instructed to use this guidance in operating UIC programs where EPA has primary enforcement responsibility. They are further instructed to make this guidance available to States working towards primacy and to advise the State Director that these interpretations represent EPA policy.

FILING INSTRUCTIONS

This guidance should be filed as Ground-Water Program Guidance No. 24.

ACTION RESPONSIBILITY

For further information on this guidance contact:

John Atcheson
U.S., Environmental Protection Agency
Office of Drinking Water
401 M Street, SW
Washington, DC 20460
(202) 426-3983

Attachment H

Photos

DIGITAL PHOTOGRAPHS

Date: 11/17/2004
Time: 10:57 am
Direction: Northeast
Photo by: Rich Johnson
Exposure #: 001
Comments: Photograph shows the warehouse used to store the totes of spent acid at USA CoalGas property. The property is located south of Illinois Route 104 and southwest of Dominion Kincaid Generation Plant.

Date: 11/17/2004
Time: 11:01 am
Direction: East
Photo by: Rich Johnson
Exposure #: 002
Comments: Photo shows empty plastic totes in the warehouse located at USA CoalGas property. The totes had been used to store the spent acid.

File Names: 0218145007~11172004-[Exp. #].jpg

DIGITAL PHOTOGRAPHS

Date: 11/17/2004
Time: 11:03 am
Direction: South
Photo by: Rich Johnson
Exposure #: 003
Comments: Photo shows 3 full and one partially full plastic totes for the spent acid stored in the warehouse located at USA CoalGas property.

Date: 11/17/2004
Time: 11:03 am
Direction: South
Photo by: Rich Johnson
Exposure #: 004
Comments: Photo shows a partially full plastic tote for the spent acid stored in the warehouse located at USA CoalGas property.

File Names: 0218145007~11172004-[Exp. #].jpg

DIGITAL PHOTOGRAPHS

Date: 11/17/2004
Time: 11:04 am
Direction: Southwest
Photo by: Rich Johnson
Exposure #: 005
Comments: Photo shows 3 full and one partially full plastic totes for the spent acid stored in the warehouse located at USA CoalGas property.

Date: 11/17/2004
Time: 11:36 am
Direction: Southwest
Photo by: Rich Johnson
Exposure #: 006
Comments: Photo shows a lockable gate located at the entrance to the USA CoalGas property. Note the sign posted at the entrance. The photo also shows the warehouse where the spent acid was being stored.

File Names: 0218145007~11172004-[Exp. #].jpg