

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

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

NOTICE OF RESPONSE AND ELECTRONIC FILING

**ALL PARTIES PLEASE TAKE NOTICE** that on December 24, 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 AET Response to Illinois' Motion to Strike AET Response to Motion for Summary Judgment**, 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 24, 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 **RESPONSE**, as counsel for **AET Environmental Inc.**, 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	EOR Energy LLC. c/o Felipe Gomez, Esq. 116 S. Western Ave. - # 12319 Chicago, IL 60612-2319 312-399-3966 <a href="mailto:gomezfg1@netscape.net">gomezfg1@netscape.net</a>	Hearing Officer C. Webb IPCB 1021 N. Grand Avenue East Springfield, IL 62794
---	--	---

Dated: 12/24/12

Respectfully submitted,

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

LAW OFFICE OF FELIPE GOMEZ, ESQ.  
116 S. Western Ave. - # 12319  
Chicago, IL 60612-2319  
312-399-3966  
[gomezfg1@netscape.net](mailto:gomezfg1@netscape.net)

**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.	)	
	)	

**AET ENVIRONMENTAL INC RESPONSE TO ILLINOIS EPA MOTION TO STRIKE  
AET RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

**NOW COMES CO-RESPONDENT AET ENVIRONMENTAL INC.,** (hereinafter "AET") by and through undersigned counsel of record, hereby files this **Response to Illinois' December 4, 2012, Motion to Strike AET's November 14, 2012, Response to Illinois' June 27, 2012, Motion for Summary Judgment.** AET states the following in response to the Motion to Strike and in support of the denial of the Motion for Summary Judgement ("MSJ") and the dismissal of this matter for lack of subject matter jurisdiction. Due to the State's disjointed and repetitive presentation of its Motion, AET responds to only relevant selected paragraphs as numbered therein (State's assertion first in Courier, and AET's Response in Times New Roman), however these responses are also applicable to several other sections as indicated.

1. On March 20, 2007, the State filed a five-count Complaint against Respondents, AET ENVIRONMENTAL, INC. ("AET") and E.O.R. ENERGY, LLC ("EOR"). Of the five counts, AET is named only in Count I, which alleges illegal transport of a waste from Colorado for storage and disposal in Illinois.

**RESPONSE:**

While AET is "named" by IEPA only in Count I for alleged illegal transport for disposal, the State's alleged 415 ILCS 5/21(e) jurisdiction over AET stems from Count V's alleged 415 LCS 5/12(g) illegal disposal by injection and assumed IEPA jurisdiction over EOR's INDR-permitted Class II UIC wells. Thus, AET is forced to address the lack of jurisdiction over EOR under Count V to show the lack of Count I jurisdiction over AET by way of 415 ILCS 5/4(l), which explicitly excludes EOR's properly IDNR-permitted 225 ILCS 725-regulated Class II Underground Injection

Control wells from 415 ILCS 5/ regulation by IEPA.

5. During an October 23, 2012 status call, the Hearing Officer waived Rules 101.500(d) and 101.516, over the People's objection, and granted AET an extension to file a response to the People's Motion for Summary Judgment by November 14, 2012. The Hearing Officer also granted the People the right to file a reply by December 5, 2012.

**RESPONSE:**

AET disagrees that 35 IAC 101.500(d) and 101.516 were waived by Officer Webb. First, 35 IAC 101.500(d) does not apply here, since motions for summary judgment are specifically addressed at 35 IAC 516, and thus there was no 101.500(d) "waiver". Also, 35 IAC 516(a) specifically allows the hearing officer to extend the 14 day response deadline, without requiring an assertion or finding of prejudice or other limitation, thus the Officer waived nothing as the extension was consistent with the rule.

7. Instead of filing a responsive pleading addressing the question of whether there exists a genuine issue of material fact, as expected of a response to a motion for summary judgment, in its Response, the Respondent only requests that the Board dismiss the People's entire five-count Complaint against AET and EOR, including the counts to which Respondent is not a party, and in the alternative dismiss the action against AET alone. The Response does not request that the Board deny the People's Motion for Summary Judgment.

**RESPONSE:**

Requesting that a matter be dismissed in its entirety, as does the Response, by logical inference also encompasses an underlying request that the complaint be dismissed. Where the same flawed jurisdictional basis is used for the other Respondent, it follows that the entire complaint must be dismissed as to all Respondents.

Also, as pointed out by the Response and discussed further below, if there is no subject matter jurisdiction there is no need, or authority, to hear or proceed to the merits of the MSJ. *River Park*,

*Inc. v. City of Highland Park, 184 Ill. 2d 290, 302 (1998)*(Where a court finds subject matter jurisdiction to be lacking it has no power to conduct a review or assess the sufficiency of plaintiffs' allegations or require further action, a court's only function thereafter is to announce the fact that it lacks jurisdiction and dismiss the cause).

Finally, contrary to the State's assertion, the AET Response requests that the MSJ cannot be granted and must be denied in several places (see e.g second paragraph of p15 of 11/14/12 AET Response: "summary judgment must be denied").

8. Accordingly, the Hearing Officer should strike the Respondent's Response because it is the improper pleading under which to request a dismissal of the People's Complaint. In the alternative, even if the Response can be construed as a motion and not a responsive pleading, it should still be stricken because it is untimely and drafted in such a manner so as to violate the Board's Rules and the Illinois Code of Civil Procedure ("Code").

**RESPONSE:**

A request for dismissal of an action based on a lack of subject matter jurisdiction can be raised in any filing, or even orally in open court, including in a response to a MSJ. *Sandholm v. Kuecker, 962 N.E.2d 418 (2012)*(Jurisdictional argument raised for first time in defendant's reply brief must be addressed by court since issue of lack of subject matter jurisdiction is raisable at any time); *Todt v. Ameritech Corp., 763 N.E.2d 389 (Ill. App. Ct. 2002)*(Motion to strike portions of reply raising jurisdictional challenge for first time on appeal denied, statement in reply brief that the reply brief argument "should properly be viewed as a challenge to subject matter jurisdiction." sufficient to have issue determined).

Second, the filing is not untimely as the deadline was extended on 10/23/12 by the HO as provided in 35 IAC 101.516(a) and the Response was filed within that extension. *See discussion below.*

9. Pursuant to Section 101.516(a) of the Board's General Rules, 35 Ill. Adm. Code 101.516(a), "Any time after the opposing party has appeared, but no fewer than 30 days prior to the regularly scheduled Board meeting before the noticed hearing date, a party may move the Board for summary judgment for all or any part of the relief sought." "Any response to a motion for summary judgment must be filed within 14 days after service of the motion for summary judgment." /d. "If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment." 35 Ill. Adm. Code 101.516(b); see also 735 ILCS 5/2-1005 (2010).

**RESPONSE:**

As previously noted above and conveniently omitted by the State's quotation, 35 IAC 101.516(a) also provides that "The hearing officer may extend the filing and response deadlines contained in this subsection upon written motion by a party, consistent with any statutory deadlines." 35 IAC 101.516(a).

12. This matter is before the Board because the People filed a motion for summary judgment against AET.

**RESPONSE:**

The State's assertion minimizes the State's long delay in prosecuting this 2007 case. This matter is "before the Board" because the State filed a complaint in 2007 on behalf of IEPA regarding violations alleged to have occurred in 2002-2003, followed five years later by the MSJ in 2012, nearly a decade after the alleged occurrence of the violations. The State's unexplained and lengthy delay in filing the MSJ negates the State's assertions that AET's promptly filed responsive pleading was untimely or prejudicial to the State.

13. As a result, the sole purpose of this instant action is to determine whether genuine issues of material fact exist and thereby determine whether the People are entitled to a judgment as a matter of law. Appropriate relief is for the

Board to either grant or deny the People's Motion in whole or in part.

**RESPONSE:**

As with the failure to acknowledge the entire text of 35 IAC 516(a), the State ignores the fact that there are two prongs to prevailing on MSJ required by 35 IAC 516(b): 1) proving the absence of issues of material fact, and 2) proving that the movant is entitled to summary judgement "as a matter of law." 35 IAC 516(b). As correctly stated by the State in its Motion, a court entertaining an MSJ must review the entire record to assure both lack of existence of material issues of fact and the movant's entitlement to judgment as a matter of law, and judgment cannot be based on the MSJ alone. *See Motion to Strike at paras. 9-11, 13.*

The standard of review for the entry of summary judgment is de novo. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998). As review is de novo, review must include the face of the complaint, the Requests to Admit, the Johnson Affidavit, and 415 ILCS 5/4(l), and any defects in jurisdiction found therein renders the MSJ moot and requires immediate dismissal of the cause. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577, (1999)("Jurisdiction is the 'power to declare law,' and without it the...courts cannot proceed...Accordingly, not only may the...courts police subject matter jurisdiction sua sponte, they must").<sup>1</sup>

The AET Response merely asserts that, regardless of any issues of material fact, the State is not entitled to judgment as a matter of law based on jurisdictional defects apparent from a de novo review of both the record as it existed on June 27, 2012, and of the applicable law as it existed in 2002, 2007 and 2012.

14. Respondent titled its pleading as a "Response to Motion for Summary Judgment." Such a title is supposed to alert the People and the Board that the Respondent is making a

---

<sup>1</sup>See Also *Karazanos v. Madison Two Assoc.*, 147 F.3d 624, 625-26 (7th Cir. 1998)(Jurisdiction is raisable at any time and is subject to de novo review since courts have limited subject matter jurisdiction and may only hear cases when empowered to do so by the Constitution or an Act of Congress).

responsive pleading to the People's Motion for Summary Judgment.

**RESPONSE:**

See response to para. #13 above. In Illinois, the caption of a document is not controlling, the character of the pleading is determined from its content, not its label *Barnes v. Southern Ry. Co.*, 116 Ill. 2d 236 (1987); See Also *Padilla v. Vazquez*, 223 Ill. App. 3d 1018, (1991)(When analyzing a pleading a court must look to the content of the pleading rather than its label).

Here, regardless of how the State characterizes the Response, AET's filing is clearly responsive to the request for MSJ, asserting that MSJ is not warranted since there is no IEPA jurisdiction under 415 ILCS 5/ and related federal and state law to support the State's cause, and thus the State cannot prevail on MSJ or otherwise.

15. Respondent was required to address whether there is a genuine issue of material fact, given that the only purpose of summary judgment is to determine whether a genuine issue of material fact exists.

**RESPONSE:**

See response to paras. 13 and 14 above. Again, the State is incorrect that there is only one MSJ prong, it must also be entitled to judgment as a matter of law even where no material issue of fact exists. *35 IAC 516(b)*. Consequently, even where all material facts are deemed or are admitted, the Court must still examine the letter of the statute under which jurisdiction is asserted and relief is sought, in order to assure the facts as admitted are within the ambit of that law, thus entitling Movant to relief "as a matter of law". *Hall v Denn*, 208 Ill. 2d 325 (2003)(Defendant's MSJ denied "as a matter of law" because indemnity provided by Recreational Use of Land And Water Areas Act, 745 ILCS 65/1 (West 2002), expressly applied only to general public users, where plaintiff's use of defendant's ski slope was for private purposes.).

AET's Response appropriately responds to the MSJ that the State is not so entitled as a matter of law under, inter alia, 415 ILCS 5/4(l), as well as pointing out several issues of disputed material

fact to boot.<sup>2</sup>

16. Contrary to its title, Respondent's Response fails to address the sole question before the Board: *whether there is a genuine issue of material fact*. Respondent failed to file counter affidavits challenging the People's evidence. Respondent failed to allege new evidence which would suggest an issue of material fact. The Response does not even request that the Board deny the People's Motion for Summary Judgment. Respondent's failures constitute waiver and support a finding in favor of the People's Motion for Summary Judgment.

**RESPONSE:**

See responses to paras. 7, 13, 14 and 15 above. As to “new evidence”, given that the record as is proves the lack of 415 ILCS 5/ jurisdiction, there is no need for “additional evidence”, and in any event it is the State’s burden to plead facts and submit the evidence proving its claim first, not Respondent’s. *Estate of Johnson v. Condell Memorial Hospital*, 119 Ill.2d 496 (Ill. 1988)(Illinois is fact-pleading jurisdiction.). In fact, the primary evidence evidencing lack of IEPA subject matter jurisdiction, the IDNR-issued Class II permits themselves, were introduced into the record by way of the State’s MSJs, and there is no need for AET to resubmit same. *See AET MSJ, Exhibit J at 187-194 pdf - Permits*.

As to “waiver”, asserting a lack of subject matter jurisdiction underlying an MSJ cannot be construed as a waiver of objection to the relief sought therein, and in any event waiver is a limitation on the parties, not on the court, thus in the interest of justice a court may consider an issue that a party has waived. *Geise v. Phoenix Co. of Chicago, Inc.*, 159 Ill. 2d 507, 514 (1994). Here, there clearly is no waiver, and in any event challenges to subject matter jurisdiction cannot be waived. *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

---

<sup>2</sup>See e.g 11/14/12 AET Response: Triple hearsay issues with the single set of data relied upon by the State (*AET Response at 12*), and double hearsay issues with regard to the State’s allegations as to what Wake and Geary told the IEPA investigator as to the fate of the alleged acid material (*AET Response at 32*).



point out a jurisdictional defect).

17. Respondent misconstrues its Response and attempts to make piecemeal arguments which attack the sufficiency of the People's Complaint and of the evidence relied upon by the People in support of their Motion for Summary Judgment. Respondent asks the Board to dismiss the People's Complaint either in whole or in part instead of asking the Board to deny the People's motion.

**RESPONSE:**

See response to para. 7 above. The 11/14/12 Response does not merely request that the be dismissed, but that the matter “be dismissed in its entirety”. AET Response at 37. Also, contrary to the State’s assertions in paragraph 16 (that the Response fails to address issues of material fact), the State now appears to admit that AET’s Response also attacked the sufficiency of the underlying evidence cited in the MSJ as proving jurisdiction and the alleged violations.

18. The Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent. 35 Ill. Adm. Code 101.100(b).

**RESPONSE:**

It is unclear what the State believes the “rules are silent” about that requires additional guidance, and the additional guidance cited in Paragraph 19 merely restates that applicable standard of review for MSJs discussed previously.

20. "A summary judgment motion may not be used as a substitute for a section 2-615 motion asserting defects appearing on the face of the pleading ... Objections to the sufficiency of the complaint must be made specifically under section 2-615." *Fox v. Heimann*, 375 Ill.App.3d 35, 42, 872 N.E.2d 126 (Ill. App. 1 Dist., 2007) (internal citations omitted).

**RESPONSE:**

AET is not using an MSJ, or the Response, as a substitute for a 2-615 Motion to attack the complaint, as it is not the complaint that is being attacked. The Response attacks overall jurisdiction, which flows from the pleading, including the complaint, thus requiring a review and discussion thereof. Additionally, the MSJ specifically cites the complaint as support for its requested MSJ 415 ILCS 5/ relief. Finally, the review of both jurisdiction and the MSJ is de novo on the entire record, of which the complaint is part.

Also, as indicated by the State's motion to strike at para. 27, a 2-615 motion is unnecessary where the jurisdictional defects are not curable by amendment of the :

"The purpose of requiring that defects in pleadings be attacked by [2-615] motion [ ... ] is to point out the defects in the pleadings so that the complainant will have an opportunity to cure them before trial." *Knox College v. Celotex Corp.*, 88 111.2d 407, 422 430 N.E.2d 976 (1981).

*Motion to Strike at para. 27.* Here, no amount of amendment or repleading can change the fact that the Count V wells were regulated and UIC permitted by INDR under 225 ILCS 725, and excluded from IEPA and IPCB regulation by 415 ILCS 5/4(l). As a result, IEPA cannot bring any of the counts as there was no illegal disposal even if it is assumed that there was in fact "disposal" as the end result of the use of the acid wash in the oil wells, and the entire matter must be dismissed with prejudice (not merely the complaint).

*(Applies to para. 32, also).*

21. Respondent falls to address whether there is an issue of material fact and merely asks the Board to dismiss the People's Complaint. The relief requested can only be addressed through a proper and timely filed motion to dismiss, not a response to a motion for summary judgment.

**RESPONSE:**

Again, the MSJ requests dismissal of the cause, not just the . As to the proper vehicle for alerting the Court as to the lack of subject matter jurisdiction, it should be noted that the court can raise the issue sua sponte, and must consider it regardless of how or when it is raised. *Sandholm v. Kuecker*, 962 N.E.2d 418 (2012)(Jurisdictional argument raised for first time in defendant's reply brief must

be addressed by court since issue of lack of subject matter jurisdiction is raisable at any time); *Todt v. Ameritech Corp.*, 763 N.E.2d 389 (Ill. App. Ct. 2002)(Motion to strike portions of reply raising jurisdictional challenge for first time on appeal denied, statement in reply brief that the reply brief argument "should properly be viewed as a challenge to subject matter jurisdiction." sufficient to have issue determined); *Perry v Illinois Industrial Commission*, No. 2-98-0761WC (2nd Dist 1999)(While raising the issue of jurisdiction upon motion is preferable to raising it for the first time in a response brief, it must be entertained by the reviewing court once raised).

In sum, regardless of the vehicle or type of filing, once jurisdiction is raised in any format, it must be reviewed by the court. *Id.* If found by the court to be absent, jurisprudence is clear that once a court becomes aware that it lacks jurisdiction, it can only dismiss the cause, and must do so immediately and without need for further motion practice. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998)(Where a court finds subject matter jurisdiction to be lacking it has no power to conduct a review or assess the sufficiency of plaintiffs' allegations or require further action, a court's only function thereafter is to announce the fact that it lacks jurisdiction and dismiss the cause).<sup>3</sup>

22. Therefore, Respondent's Response fails to respond to the People's motion, and also fails to bring the Board any closer to identifying the major issues that appear without substantial controversy. As a result the People respectfully request that the Hearing Officer strike the entire Response, under the authority of Rules 101.500, 101.502 and 101.506, as guided by Section 2-615 of the Code, because it is nonresponsive to the People's Motion for Summary Judgment.

#### **RESPONSE:**

As previously stated, the 11/14/12 AET Response responds to the MSJ by challenging subject matter jurisdiction, clearly identifying the interaction of 415 ILCS 5/4(l) and 225 ILCS 725 as the

---

<sup>3</sup>Citing *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1012 (1998)("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause", quoting *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514, 19 L. Ed. 264, 265 (1869).)

primary “major issue”, as well as addressing and objecting to the MSJ’s specified jurisdictional and evidentiary basis and defects. Subject matter jurisdiction is raisable at any time, and once raised must be addressed once raised. *Rurhgas, et al, Supra*.

In fact, it is the State’s filing that is not responsive to the merits. Despite being given an extended amount of time to respond on the merits of AET’s jurisdictional challenge, the State failed to address it entirely, electing to pursue alleged technical defects of form instead of addressing the substance of the attack. As such, it is the State, not AET, that has waived its right to defend its case further on jurisdictional grounds, and the State has not provided sufficient basis on which to strike the entire timely-filed 11/14/12 Response, and this request must be denied.

23. Furthermore, there is no provision in Section 101.516(b) of the Board's Rules that provides for dismissal of the Complaint; as such, if the Hearing Officer chooses not to strike the entire Response, because the instant action is before the Board on a motion for summary judgment, the People respectfully request that the Hearing Officer, under the authority of Rules 101.500, 101.502 and 101.506, as guided by Section 2-615 of the Code, strike the portions of Respondent's Response requesting dismissal of the People's Complaint because such sections are beyond the relief available to Respondent at this juncture.

**RESPONSE:**

As shown above, dismissal of a complaint for lack of subject matter jurisdiction is not driven by the Illinois Administrative Code, but rather is required by centuries old jurisprudence once jurisdiction is discovered to be absent. *Rurhgas, Supra; River Park, Inc, Supra*. The AET Response clearly requests dismissal of the entire cause, not merely the complaint, and in any event, dismissal of the cause subsumes dismissal of the complaint, thus whether or not the rules provide for dismissal of the complaint is irrelevant.

Finally, the State fails to specifically identify the offending portions of the Response it requests be stricken and the reason each is insufficient, contrary to the requirements of 735 ILCS 5/2-615(b), thus the requested relief cannot be granted. *735 ILCS 5/2-615(b)*.

24. In the alternative, if the Response is actually a motion, it should be stricken as untimely.

**RESPONSE:**

As previously noted, the Response was timely filed by the due date of 11/14/12 set under 35 IAC 101.516(a), thus it was timely regardless of how characterized.

26. Section 101.506 of the Board's General Rules, 35 Ill. Adm. Code 101.506 states as follows: "All motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document, unless the Board determines that material prejudice would result.".

**RESPONSE:**

As clear from the foregoing discussion and cases, the Response does not attack the complaint, per se, but attacks the entire record as failing to establish 415 ILCS 5/ jurisdiction, and such challenge can be brought at any time. *Ruhrigas, Supra*. In this case, while the complaint's deficiencies in relation to the MSJ are also in fact addressed by AET's Response (for the record), such does not change the nature of the jurisdictional attack, and thus the 30 day limit does not apply here.

*(Applies to para. 27, also.)*

28. Section 2-619 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619 states as follows: "(a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit: (1) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction ... " "A section 2-619 motion to dismiss admits the sufficiency of the complaint, but asserts a defense outside the complaint that defeats it." *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148 , -r 31, 976 N.E.2d 318 (2012) (internal

citations omitted).

**RESPONSE:**

Again, the subject matter jurisdiction challenge here does not attack the face of the complaint, per se, and in this case AET's Response clearly does not admit that the complaint is sufficient, for 2-619 purposes or otherwise. Lack of subject matter jurisdiction is not an affirmative defense outside the pleading that must be pleaded in a 2-619 or in an answer, but rather is a defect in the plaintiff's case that precludes the filing thereof or need for a defense. *Ruhrgas, Supra; River Park, Inc., Supra*. Thus 2-615 and 2-619 are inapplicable here, and the Response is neither a "hybrid" or other 615 or 619 motion.

As to timeliness, and assuming, *arguendo*, that the Response were a hybrid or 2-619 motion, the record does not reflect a dispositive motion cut-off date was ever requested by the State or set by the Board in this matter, thus the "time for pleading" and filing of dispositive motions has yet to expire, and the Response was timely even if it were held to be a dispositive motion.

*(Applies to paras. 29-33, also).*

36. On October 23, 2012, the Hearing Officer granted Respondent an extension to file a response to the People's motion for summary judgment. This should be considered an extension of the deadline created by Rules 101.500(d) and 101.516.

**RESPONSE:**

As noted in response to para. 8 above, the Response's unwaivable jurisdictional challenge does not attack the complaint as would a 2-615 motion, and is not untimely as the 14-day MSJ response deadline was extended by the HO as provided in 35 IAC 101.516(a), which requires no showing of prejudice, and the Response was filed within that extension.

The State here appears to agree that an extension was granted, within the Board's authority under 35 IAC 516(a). Thus, 35 IAC 101.506 is admittedly inapplicable to the Response, and any alleged lack of Board authority must be pursued by way of appeal, not in a motion to strike.

*(Applies to paras. 37-43, 47, also).*

44. The Respondent may argue that its Response challenges the Board's jurisdiction over this matter and therefore the Response can be filed at any time during the proceedings.

**RESPONSE:**

As evidenced above, this statement is true. Furthermore, in addition to the jurisdictional challenge, AET's Response also timely addressed non-jurisdictional issues, as allowed by the 35 IAC 101.516 and the 516(a) extension of time, and as required for purposes of completeness and a full record in the event of appeal. Thus, there is no basis to strike any portion of either the jurisdictional or other arguments and points made therein as both were timely and properly filed and put before the Board.

*(Applies to paras. 45-46, 48, Also).*

49.- 57, 63. [Response is Improper Hybrid Motion]

**RESPONSE:**

See responses to paragraphs 26, 28 and 36 above. The State's paragraphs 49 - 57, and 63 repeat the State's prior arguments as to 2-615, 2-619 and hybrid motions as made previously, of which the Response is none of the above.

58. This confusion also makes it impossible for the People to formulate a response or reply.

**RESPONSE:**

There is nothing confusing about the fact that the State was required to reply to the Response by 12/5/12, and that the State elected to attempt to strike the Response instead of replying on the merits as to assert how 415 ILCS 5 applies in view of the Class II permits, 415 ILCS 5/4(l), and AET's clearly delineated arguments and support therefore.

Its claims of “confusion” as to the deadlines and standards of review are meritless: the reply in support of its MSJ was due by 12/5/12, and the standard of review for MSJ’s was and is de novo. Consequently, the State should not be allowed a further chance to respond, having the burden of jurisdiction in the first place and failing to defend same in the end by waiving its chance to do so.

*(Applies to paras. 59-66, also).*

67. As a final matter, in its Response, Respondent requests that the Board dismiss all five counts of the People's Complaint.

**RESPONSE:**

See response to para. 1, above. The dismissal of the entire cause subsumes the dismissal of the complaint and all counts therein. An inspection of the complaint and 415 ILCS 5/ indisputably establishes that without the illegal disposal allegations of Count V, Count I and the other counts must fail, as there was no waste transport, storage or disposal for IEPA to regulate (and thus no subject matter jurisdiction).

Thus, it is merely a function of the State’s pleading structure, under the applicable laws (415 ILCS 5/4(l) and 225 ILCS 725), that an attack on jurisdiction over AET under Count I requires an attack on jurisdiction over EOR under Count V, and the fall of the other counts as a consequence of a failure of Count V.

*(Applies to paras. 68-74, also).*

\* \* \*

**WHEREFORE AET REQUESTS THE MOTION TO STRIKE BE DENIED AND THIS MATTER BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION, WITH PREJUDICE, and that the Board award AET its costs and fees.**

Dated: **12/24/12**

Respectfully submitted For AET By:

s/: *Felipe Gomez, Esq.*

**Felipe Gomez, Esq.**