ILLINOIS POLLUTION CONTROL BOARD
January 24, 2013

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 07-95
	)	(Enforcement - Land)
AET ENVIRONMENTAL, INC., a Colorado corporation, and E.O.R. ENERGY, LLC, a Colorado limited liability company,	)	
	)	
Respondents.	)	

OPINION AND ORDER OF THE BOARD (by D. Glosser):

On March 23, 2007, the People of the State of Illinois (People) filed a five-count complaint against AET Environmental, Inc. (AET) and E.O.R. Energy, LLC (EOR) (collectively respondents). On September 16, 2010, the Board granted motions to deem facts admitted. On June 27, 2012, the People simultaneously filed individual motions for summary judgment against each respondent. On November 11, 2012, AET filed a response in opposition to the motion for summary judgment and challenged the Board's jurisdiction over the complaint.

Based on the facts admitted, the Board finds it has subject matter jurisdiction and grants the People's motion for summary judgment. Thus, the Board finds that AET violated Section 21(e) of the Environmental Protection Act (Act) (415 ILCS 5/21(e) (2010)) [1] and directs AET to pay a civil penalty of $60,000.

The Board will first summarize the procedural history and then summarize the complaint. Next the Board will recite the facts of the case. Before discussing the motion for summary judgment, the Board will address a motion filed by the People, asking that AET's response to the motion for summary judgment be stricken. After ruling on that motion, the Board will move to the motion for summary judgment. The Board then reaches its conclusions and issues its order.

PROCEDURAL HISTORY

On March 23, 2007, the People filed a five-count complaint against AET and EOR. On April 19, 2007, the Board accepted the complaint for hearing. On June 19, 2007, respondents each filed an answer to the People's complaint by non-attorneys. On October 18, 2007, respondents each re-filed an answer to the People's complaint through their attorney after a

[1] All citations to the Act will be to the 2010 compiled statutes, unless the provision at issue has been substantively amended in the 2010 compiled statutes.

hearing officer required respondents to hire an attorney. *See* Hearing Officer Order 7/16/2007. On January 24, 2008, respondents' attorney withdrew from the case.

On March 24, 2008, the People filed a request to admit facts by AET. On April 22, 2008, Lori M. DeVito, a non-attorney, filed an appearance and a response to the People's request on behalf of AET. On January 18, 2009 an attorney filed an appearance on behalf of AET and on March 17, 2010, AET's attorney withdrew from the case.

On May 27, 2008, the People filed a request to admit facts by EOR. On January 23, 2009, the People again filed their request to admit facts by EOR after a January 20 hearing officer order. *See* Hearing Officer Order 1/20/09. On February 20, 2009, EOR filed an unsigned and unsworn response to the People's request through a new attorney.

On August 17, 2010, the People simultaneously filed motions to deem facts admitted against AET and EOR. The hearing officer gave respondents until September 3, 2010 to file a response. *See* Hearing Officer Order 8/31/10. Neither AET nor EOR retained an attorney to timely respond to the People's motions. On September 16, 2010, the Board granted that motion and deemed the facts admitted.

On June 27, 2012, the People simultaneously filed motions for summary judgment against AET (AET Mot.) and EOR. Neither AET nor EOR timely responded to the People's motions; however on August 6, 2012, an attorney entered an appearance on behalf of AET. On August 13, 2012, a status report was filed by AET's attorney.

On September 6, 2012, the Board found summary judgment was appropriate as to EOR and granted the People's motion for summary judgment as to EOR. *See* People v. AET Environmental, Inc., and E.O.R. Energy, LLC, PCB 07-95 (Sept. 6. 2012). The Board reserved ruling on the motion for summary judgment against AET. *Id*. Based on the facts admitted the Board found that EOR violated Sections 12(g), 21(e) and (f)(1) and (2) of the Act (415 ILCS 5/12(g), 21(e) and (f)(1) and (2) (2010)) and multiple provisions of the Board's hazardous waste regulations and underground injection control (UIC) regulations as alleged in the complaint. *Id*. Having found that EOR violated the Act and Board regulations, the Board found that a civil penalty of $200,000 was appropriate and directed EOR to pay that civil penalty.

On September 14, 2012, AET's attorney filed an appearance on behalf of EOR and on October 18, 2012, EOR filed a motion for reconsideration. On January 10, 2013, the Board granted the motion to reconsider to address jurisdictional issues raised for the first time in the motion for reconsideration. *See* People v. AET Environmental, Inc., and E.O.R. Energy, LLC, PCB 07-95 (Jan. 10, 2013). The Board found that it had proper jurisdiction over the subject matter of the complaint and affirmed its September 6, 2012 opinion and order. *Id*.

By hearing officer order, AET was allowed to respond to the motion for summary judgment and did so, timely, on November 14, 2012 (Resp.). *See* Hearing officer Order 10/23/12. On December 4, 2012, the People filed a motion directed to the hearing officer asking that the response be stricken (Mot.S). On December 24, 2012, AET timely filed a response to the motion to strike (Resp.S).

COMPLAINT

On March 23, 2007, the People filed a five-count complaint (Comp.) against AET and EOR. *See* 415 ILCS 5/31 (2010); 35 Ill. Adm. Code 103. The complaint concerns respondents' transport, storage, treatment, and disposal of hazardous acid to and at EOR's two oil fields. The first oil field ("Rink-Truax Lease") is located north of 2050 N. Road and 400 E. Road in South Fork Township, Christian County. The second oil field ("Galloway Lease") is located along Township Road 4.25E South East of the junction with Township Road 13S in Pawnee, Cotton Hill Township, Sangamon County.

The People allege that respondents violated Section 21(e) of the Act (415 ILCS 21(e) (2010)) by transporting hazardous wastes into Illinois for storage and disposal at a site that does not meet the Act's requirements (Count I).

The remaining four counts allege violations by EOR only. Specifically, the People allege that EOR violated Sections 21(e) and (f)(1) of the Act (415 ILCS 21(e), (f)(1) (2010)) by storing, disposing, and/or abandoning hazardous wastes at a site that does not meet the Act's requirements, thereby conducting a hazardous-waste storage operation without a Resource Conservation and Recovery Act (RCRA) permit (Count II). In Count III the People allege that EOR violated 35 Ill. Adm. Code 703.121(a) and (b), 35 Ill. Adm. Code 703.150(a)(2), and Section 21(f)(2) of the Act (415 ILCS 21(f)(2) (2010)) by failing to apply for or acquire a RCRA permit before storing hazardous waste at their site.

Count IV alleges that EOR violated 35 Ill. Adm. Code 725.111, 725.113, 725.114, 725.115(a), 725.116, 725.117, 725.131, 725.132, 725.137, 725.151(a), 725.155, 725.171(c), 725.173, 725.175, 725.212(a), 725.242(a), 725.243(a), 725.274, and 725.278, thereby violating Section 21(f)(2) of the Act. 415 ILCS 5/21(f)(2) (2010). According to the complaint, EOR violated these provisions under Count IV by failing to follow proper procedures, take all necessary precautions, and keep and maintain all appropriate records regarding the management of the hazardous waste acid. Lastly, the People allege in Count V that EOR violated 35 Ill. Adm. Code 704.121 and 704.203, thereby violating Section 12(g) of the Act (415 ILCS 5/12(g) (2010)), by injecting hazardous waste acid into wells without having an Underground Injection Control (UIC) permit and failing to comply with the listed requirements of Section 704.203.

FACTS

AET is a hazardous waste broker that handles the logistics of transportation, storage, and disposal for companies that generate hazardous waste. AET Mot. Exh. A at 1. Lori Devito is the current owner of AET and was the owner of AET during the months of July and August 2002. *Id*.

In 2002, a company known as Luxury Wheels, located in Grand Junction, Colorado, was engaged in the production of custom chrome automobile wheels, and a part of Luxury Wheels' business included the chrome plating of aluminum automobile wheels. AET Mot. Exh. A at 2. On or about July 15, 2002, the Grand Junction Fire Department responded to an emergency

response incident at Luxury Wheels' business. *Id*., *see also* AET Mot. Exh. B. According to the incident report, when the Fire Department was at the Luxury Wheels site, it observed a 1500 gallon storage tank located in an attached storage building on the west side of Luxury Wheels. AET Mot. Exh. B at 5-6. The tank was full of acid material, which was fuming and producing a large orange-brown cloud. *Id*. at 6. The Fire Department stabilized the acid material using ice and pumped the material to a tank in another room. *Id*. The acid material was identified as a solution made up of phosphoric, nitric, glycolic, and fluoroboric acids that were combined with a product known as Alum Etch-G[2]. *Id*. at 7.

After the acid material was stabilized, Luxury Wheels hired AET to remove and dispose of the acid material involved in the July 15th Luxury Wheels incident. AET Mot. Exh. A at 3. AET obtained at least eight new and unused 275-gallon plastic storage containers known as totes from Greif Bros. Corporation and supplied them to Luxury Wheels. *Id*. Luxury Wheels transferred the acid material into eight of the plastic totes. *Id*.

AET shipped the eight totes of acid material to Arvada Treatment Center (ATC) in Arvada, Colorado for disposal. AET Mot Exh. A at 3. As part of the disposal process, AET created a waste profile for the acid material. *Id*. and at Exh. D. The waste profile listed the acid material as Aluminum Etch (Fluoboric Acid, Glycolic acid) that was generated by the "etching of aluminum prior to nickel plating". *Id*. at 3 and Exh. D. AET did not list the acid material as unused chemical or product on the waste profile. *Id*. AET also created a hazardous waste manifest (manifest), which listed Luxury Wheels as the Generator, SLT Express as Transporter, and ATC as the designated facility. *Id*. Exh. E. The manifest listed the acid material as corrosive hazardous waste and described the acid material as "WASTE CORROSIVE LIQUID, N.O.S., (CONTAINS FLUOROBORIC ACID COLYCOLIC[3] ACID) 8, UN1760, PGII". *Id*.

On July 18, 2002, SLT Express picked up the acid material at Luxury Wheels and transferred the acid material to AET at the AET 10-day transfer facility in Denver, Colorado. *Id*. at 5. On July 19, 2002, the acid material was shipped from the AET 10-day transfer facility for disposal at ATC in Arvada, Colorado. *Id*. The acid material was assessed by an ATC employee and upon opening one of the plastic totes containing the acid material a colored gas was released. *Id*. The ATC employee rejected the acid material because the material in the containers was reacting and off-gassing, emitting a red or orange gas. AET Mot. Exh. A at 6. After the load of acid material was rejected by ATC, the manifest was modified by AET and listed AET as Transporter 2 and Safety Kleen, in Deer Trail, Colorado as an alternative designated facility. *Id*. and Exh. F. On July 19, 2002, the acid material was transported by AET from ATC to Safety Kleen. *Id*.

AET prepared another hazardous waste profile for the acid material and submitted it to Safety Kleen. *Id*. and Exh. G. The Safety Kleen waste profile for the acid material had a Clean Harbors letterhead; Safety Kleen was previously known as Clean Harbors. AET Mot. Exh. A at 6 and Exh. G. On the Safety Kleen waste profile, AET listed the common name of the acid material as "Spent Aluminum Etchant" which was generated by the "Etching of Aluminum

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[2] Alum Etch-G is a product manufactured by Atotech USA. AET Mot. at Exhibit C.
[3] "Colycolic acid" was a misspelling of "glycolic acid"

Wheels". AET Mot. Exh. A at 7 and Exh. G. The acid material is also listed as a "Waste by-product from process" and although it had the option, AET failed to list the acid material as an unused chemical or product on the Safety Kleen waste profile. *Id*. AET did describe the acid material "as having an undisclosed or prior incident associated with it which could affect the way it should be handled." *Id*. Safety Kleen rejected the load while it was en route, and after the load was rejected, AET transported the acid material to the AET 10-day transfer facility. AET Mot. Exh. A at 8.

At the storage facility, AET placed the acid material into a semi-trailer that was left open during the daytime, while leaving the totes containing the acid material slightly open to vent the gas that was produced by the acid material. AET Mot. Exh. A at 8. AET also placed a fan in the trailer to help remove the gas escaping the totes, which was accumulating in the trailer. *Id*.

In July of 2002, AET contacted Vickery Environmental, Inc. (Vickery) to discuss the disposal of the acid material. AET Mot. Exh. A at 8. Vickery suggested the material be disposed of by deep well injection. *Id*. AET prepared a hazardous waste profile for the acid material and submitted it to Vickery. *Id*. and Exh. H. On the Vickery waste profile, AET again described the acid material as "Spent Aluminum Etchant", generated by the 'Etching of Aluminum Wheels". AET Mot. Exh. A at 9 and Exh. H. AET also described the acid material as a clear liquid that is a hazardous waste (40 C.F.R. 261). *Id*. AET never sent the acid material to Vickery for disposal.

While the material was under the control of AET:

1) An exothermic reaction occurred in one or more of the totes;
2) One or more of the totes attained a temperature sufficient to melt the tote containing the material;
3) Additional materials were added including water and acid materials. AET Mot. Exh. A at 9-10.

After dilution the acid material filled 12- 275 gallon totes. *Id*. at 10.

At some point during July and August of 2002, AET gave the material to EOR and on August 30, 2002, AET arranged to have the load of 12 totes of acid material shipped from the AET warehouse to Kincaid P&P in Pawnee, Sangamon County (Kincaid Site). AET Mot. Exh. A at 10-11. AET paid to ship the materials to Pawnee and prepared a Bill of Lading for the materials. *Id*. at 11.

AET was hired by Luxury Wheels for its services to arrange shipment of the acid material, and AET did not ship the acid material with an accompanying Hazardous Waste Manifest. AET Mot. Exh. A at 3, 11. Instead, AET prepared a hazardous material bill of lading. *Id*. and Exh. I. The Bill of Lading was dated "8/30/02" and listed Luxury Wheels as the shipper, SLT Express as the carrier, and Kincaid P&P as the consignee. *Id*. The Bill of Lading listed the acid material as "CORROSIVE LIQUID ACID, INORGANIC, N.O.S. (PHOSPHORIC, NITRIC), 8, UN3264, PGII". *Id*. The Bill of Lading also lists Frank Gines, an AET employee as the agent for Luxury Wheels. *Id*., and AET Mot. Exh. A at 2, 11.

After the acid material arrived at the Kincaid Site, EOR stored it in a structure owned by Kincaid. AET Mot. Exh. J at 4. The structure had no electric power, was not heated, and was not entirely protected from the outside weather. *Id*. The structure incorporated no containment structures to collect the acid material in event of a spill. *Id*. The structure was not secured by a fence or any other means. *Id*. There were no signs posted on or near the structure warning that the structure contained a hazardous waste. *Id*. Neither EOR nor Kincaid P&P utilized any security or warning system for the structure. *Id*. EOR paid two Kincaid P&P employees, Rick Wake and Charles Geary to maintain the EOR Wells. People v. AET Environmental, Inc. and E.O.R. Energy, LLC, PCB 07-95 slip op. 4 (Sept. 6, 2012).

At some time between August of 2002 and November of 2004, bags of hydrated lime were stored on pallets near the plastic totes containing the acid material. People v. AET Environmental, Inc. and E.O.R. Energy, LLC, PCB 07-95 slip op. 4 (Sept. 6, 2012). Several of the bags of lime had deteriorated to the point that the paper was split, and the material fell on the ground around the bags. *Id*. Hydrated lime is a strong base that would react violently if mixed with a strong acid. *Id*. EOR did not instruct Mr. Wake and Mr. Geary to separate the acid totes and the bags of hydrated lime. *Id*.

EOR directed Mr. Wake and Mr. Geary to put the acid material into the EOR Wells. People v. AET Environmental, Inc. and E.O.R. Energy, LLC, PCB 07-95 slip op. 5 (Sept. 6, 2012). EOR did not disclose to Mr. Wake or Mr. Geary that the acid material was a hazardous waste. AET Mot. Exh. J at 3-4. EOR's only warning to Mr. Wake and Mr. Geary about the acid came from Arthur Clark, an AET employee and a principal in EOR, who told them that it was a "light grade acid" and that they should "keep it out of their eyes and wash it off if they get it on them." AET Mot. Exh. A at 1-2, 10; People v. AET Environmental, Inc. and E.O.R. Energy, LLC, PCB 07-95 slip op. 4 (Sept. 6, 2012). EOR did not provide a Material Safety Data Sheet (MSDS) or any other documentation for the acid; nor did EOR instruct Mr. Wake and Mr. Geary how to properly handle and store the acid material. *Id*.

Mr. Wake and Mr. Geary had no prior experience handling acid or applying it to oil or brine wells and EOR gave no specific instructions on how to apply the acid material to the wells. *Id*. The process to discharge the acid consisted of Mr. Wake and Mr. Geary fabricating a hose fitting to attach the 275 gallon plastic totes to various fittings on the EOR Wells. *Id*. Mr. Wake described the process used to discharge the acid more specifically. *Id*. First a tote of the acid material would be loaded on the back of a pickup truck and driven to the oil field. From the back of the truck, the tote would be connected to a valve on an aboveground pipe attached to one of the EOR wells. *Id*. Within a three to four month period, Mr. Wake and Mr. Geary placed approximately eight and a half totes of acid material down various EOR Wells. *Id*. According to Mr. Wake and Mr. Geary, acid material was discharged into the EOR wells.

MOTION TO STRIKE

Before proceeding with the arguments on the motion for summary judgment, the Board will address the People's motion asking the hearing officer to strike AET's response to the

motion for summary judgment. Today the Board will rule on the motion. The Board will briefly summarize the motion and then the response. The Board will then explain its ruling.

People's Motion to Strike

The People point out that the hearing officer waived the Board's procedural rules to allow AET to respond to the motion for summary judgment, over the People's objection. Mot.S at 2. On November 14, 2012, AET filed a document with the Board entitled "AET Response to Motion For Summary Judgment". However, the People maintain that the response seeks to dismiss the entire complaint and does not respond to the People's motion for summary judgment. *Id*. As the pleading is not responsive, the People urge the Board to strike the pleading. *Id*. Alternatively, the People argue, if the pleading is construed as a motion to dismiss, the pleading should be stricken as not timely filed. *Id*.

The People note that the Supreme Court has stated the purpose of summary judgment is to determine whether a genuine issue of material fact exists, not to try a question of fact. Mot.S at 3, citing Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd., 216 Ill.2d 294, 305, 837 N.E.2d 99 (2005); see also 35 Ill. Adm. Code 101.516(b). The People maintain that a genuine issue of material fact exists when "the material facts are disputed, or, if [they] are undisputed, reasonable persons might draw different inferences from the undisputed facts." *Id*., citing Adames v. Sheahan, 233 Ill. 2d 276, 296, 909 N.E.2d 742, 754 (2009). Furthermore, when ruling on a motion for summary judgment, the facts "must be construed strictly against the movant and liberally in favor of the opponent." *Id*., 233 Ill. 2d at 295-96, 909 N.E. 2d at 754. A party opposing a motion for summary judgment may not rest on his pleadings, but must "present a factual basis which would arguably entitle [him] to judgment." *Id*., citing Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994). Because this matter is before the Board solely on a motion for summary judgment, the People argue that the Board must determine if there is an issue of fact and, if not, determine if the People are entitled to judgment as a matter of law. *Id*.

The People opine that AET was required to address whether there is a genuine issue of material fact, and AET did not do so. Mot.S at 4. The People note that AET failed to file counter-affidavits challenging the People's evidence, did not present new evidence that would suggest an issue of material fact, and did not even ask the Board to deny summary judgment. *Id*. Instead, the People claim that AET misconstrues its response and attempts to make "piecemeal" arguments attacking the sufficiency of the complaint and the evidence that supports the motion for summary judgment. *Id*.

The People ask the Board to look to the Code of Civil Procedure (725 ILCS 2-1005 (2010)) for guidance in ruling on the motion to strike. The People note that Section 2-1005 of the Code (735 ILCS 2-1005 (2010)), "obligates the Board to 'draw an order specifying the major issue or issues that appear without substantial controversy, and direct such further proceedings upon the remaining undetermined issues as are just'". Mot.S at 4. The People continue noting that summary judgment motions may not be used as a substitute for a motion asserting defects in the pleadings. Mot.S at 5, citing Fox v. Heimann, 375 Ill. App. 3d 35,42, 872 N.E.2d 126 (1st Dist. 2007).

The People ask that if the entire response is not stricken, that the Board strike the portions of the response requesting dismissal of the complaint as the motion is not timely. Mot.S at 5. The People note that the Board's rules require that all motions to strike, dismiss or challenge the pleading must be filed within 30 days after the service of the documents being challenged. Mot.S at 6, citing 35 Ill. Adm. Code 101.506.

The People argue that they cannot respond to the filing by AET because the People do not know what standard of review would apply or what arguments to respond to. Mot.S at 11. The People state that they "should not be required to weed out and consolidate the Respondent's various arguments before being able to form a response." *Id*. The People argue that they are further prejudiced because the People cannot know what response they are allowed to make. Mot.S at 12. The People ask the Board to strike the response in its entirety.

The People also point out that AET cannot challenge Counts II through V of the complaint as AET is not a party to those counts. Mot.S at 12.

AET's Response

AET argues that the motion to strike should be denied as AET's response properly attacks the jurisdiction of the Board, and jurisdiction may be raised at any time. Resp.S at 1-2. AET argues that while AET is named only in Count I of the complaint, jurisdiction over AET "stems from Count V" and AET must address that count. Resp.S at 1. AET opines that arguing for dismissal of the entire complaint is appropriate as the Board lacks jurisdiction to hear the complaint. Resp.S at 2.

As to the timeliness of the arguments, AET asserts that the deadline was extended by the hearing officer and the filing was received prior to the deadline expiring. Resp.S at 3. Furthermore, AET argues a request to dismiss an action based on jurisdiction can be raised in any filing, even orally in open court. *Id*., citing Sandholm v. Kuecker, 2012 IL 111443, 962 N.E.2d 418 (2012) and Todt v. Ameritech Corp., 327 Ill. App. 3d 259, 763 N.E.2d 389 (5th Dist. 2002). AET also argues that to prevail on summary judgment the People must prove that there are no issues of material fact proving that the People are entitled to judgment as a matter of law. *Id*. at 5. AET maintains that if the Board lacks jurisdiction, the People are not entitled to judgment as a matter of law. *Id*.

AET asserts that an argument that the Board lacks subject matter jurisdiction cannot be waived as jurisdiction can be considered at any time. Resp.S at 5, citing Geise V. Phoenix Co. of Chicago, 159 Ill. 2d 507, 639 N.E.2d 1273 (1994). AET maintains that it is challenging the overall jurisdiction of the Board, an issue that comes from the pleadings. Resp.S at 9. AET asserts that dismissal of the complaint for lack of jurisdiction is based on "centuries old jurisprudence", not statutory or administrative law. Resp.S at 11.

Board Discussion

An objection to jurisdiction may be raised at any time, even by the appellate court on its own motion. Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc., 144 Ill. App. 3d 334, 339, 494 N.E.2d 180, 182 (2nd Dist. 1986). The People have made several compelling arguments. However, as the response by AET raises issues challenging the jurisdiction of the Board, the Board denies the motion to strike and will not strike the response[4]. This will allow AET the opportunity to raise its jurisdictional questions to the Board. Therefore, the Board denies the People's motion to strike the response to the motion for summary judgment.

MOTION FOR SUMMARY JUDGMENT

The Board will begin by setting forth the language of Section 21(e) of the Act (415 ILCS 5/21(e) (2010), the provision the People allege that AET violated. Next the Board will summarize the People's arguments on summary judgment against AET. The Board will then summarize AET's response. Finally, the Board will discuss its decision on summary judgment.

Section 21(e) of the Act

Section 21(e) of the Act provides that "[n]o person shall":

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

People's Motion for Summary Judgment

The People maintain that the issue before the Board is whether AET violated Section 21(e) of the Act (415 ILCS 5/21(e) (2010)) by transporting waste to Illinois for disposal, treatment, storage or abandonment at a site that does not meet the requirements of the Act or Board regulations. AET Mot. at 4. The People ask that the Board find AET liable and order a $60,000 civil penalty, as well as directing AET to cease and desist from further violations. Here, the Board will summarize the arguments seeking a finding of liability and will address the remedy below.

The People argue that they must prove that it is more likely than not that AET transported waste to Illinois for disposal, treatment, storage or abandonment at a site that does not meet the requirements of the Act or Board regulations. To prove this, the People state that they must prove that: 1) the acid material was a waste, 2) AET transported the waste to Illinois, 3) the

[4] Unlike another recent decision by the Board (*see* Chicago Coke Co. v. IEPA *et al.*, PCB 10-75 (Dec. 20, 2012), the Board is not granting the People additional time to file a reply. Here, the People have filed a motion that argues its case and AET responded. In Chicago Coke, the respondent did not fully respond to the motion so additional time was granted.

purpose of the transport was disposal, treatment, storage or abandonment, and 4) the Kincaid site and EOR's wells do not meet the requirements of the Act or Board regulations. AET Mot. at 21.

Discarded Material

The People maintain that the acid material shipped by AET was discarded material as evidenced by the record. AET Mot. at 22. The People point out that Luxury Wheels hired AET to dispose of the material, and AET made numerous attempts to dispose of the material. *Id*. The People further point out that the various hazardous waste profiles described the material as "spent aluminum etchant, a D002 corrosive hazardous waste and waste corrosive liquid that was created in an industrial process." *Id*.

Furthermore, the People argue that the record demonstrates that the material resulted from an industrial process. AET Mot. at 23. The People claim that the acid material was used by Luxury Wheels to etch aluminum wheels and was therefore generated as a direct result of a manufacturing process. *Id*. The People assert that because the acid material was a discarded liquid from industrial activities, the material meets the definition of waste in the Act. *Id*., citing 415 ILCS 5/3/535 (2010)).

The People claim that the acid material was a hazardous waste as that term is defined by Section 3.220 of the Act (415 ILCS 5/3.220 (2010)). AET Mot. at 23. The People note that United State Environmental Protection Agency (USEPA) has tested the material and found that the material exhibited the characteristics of hazardous waste of corrosivity and toxicity. AET Mot. at 24. The People maintain that under the Act, it is sufficient to exhibit the characteristics of hazardous waste to be defined as hazardous waste. AET Mot. at 24-25.

AET Transported the Waste to Illinois

The People point out that AET is a hazardous waste broker, whom Luxury Wheels hired to facilitate the disposal of the waste acid. AET Mot. at 25. The People argue that after having been rejected by two hazardous waste disposal sites, AET arranged to have the load of 12 totes shipped from the AET warehouse to the site, and instead of creating a hazardous waste manifest, shipped the material under a bill of lading. *Id*. An AET employee signed the bill of lading as an agent for Luxury Wheels. *Id*. AET did not inform the carrier that the material was a hazardous waste. *Id*. The People opine that by shipping the waste acid from its warehouse in Denver, Colorado to the two oil well sites, AET caused the waste acid to be transported to Illinois. AET Mot. at 26.

Waste Was Transported to Illinois for Storage and Disposal

The People argue that once the material arrived at the site, EOR stored the material in a structure until April 14, 2005, when the remaining totes were shipped to Texas for disposal. AET Mot. at 26. The People assert that the material transported by AET was stored at the site from August 30, 2002 until April 12, 2005. *Id*. Furthermore, the People maintain that while the material was onsite, two individuals directed by EOR, Mr. Wake and Mr. Geary, disposed of

some of the material down wells owned by EOR. Therefore, the People opine AET transported the waste for storage and disposal in Illinois. *Id*.

EOR Wells and the Site do not Meet Requirements for Storage and Disposal of Hazardous Waste

The People note that the site does not have a RCRA permit for storage, and EOR does not have a permit to dispose of hazardous waste. AET Mot. at 26-27. Therefore, the People assert the storage and disposal of the waste did not meet the requirements of the Act or Board regulations.

AET Response

In its response, AET sets forth arguments challenging the Board's jurisdiction because the facts and the law do not support a finding that the material was discarded, as well as arguing the facts of the case do not support a finding that AET's involvement with the material at issue extended into Illinois. AET further argues that the facts are insufficient to establish that AET was liable for the alleged violations. The Board will summarize each of those arguments below.

Material Not Discarded

AET asserts that the authority for the Illinois Environmental Protection Agency (IEPA) to regulate wastes and hazardous waste pursuant to "415 ILCS 5/12 derives directly from federal law governing solid and hazardous waste." Resp. at 4, citing 415 ILCS 5/4 (2010). AET notes that Section 4(l) of the Act (415 ILCS 5/4 (2010)) designates the IEPA as the "solid waste agency for the state for all purposes of the Solid Waste Disposal Act, Public Law 89-272, approved October 20, 1965, and amended by the Resource Recovery Act of 1970, Public Law 91-512, approved October 26, 1970, as amended, and amended by the Resource Conservation and Recovery Act of 1976, (P.L. 94-580)." *Id*.

AET asserts that under RCRA, USEPA defines "solid waste" as any discarded material "that has not been excluded under the regulations." Resp. at 4, citing 40 C.F.R. § 261.2(a)(1). AET opines that even where material is discarded, the material may still be exempted from the definition of waste by other provision in the federal rules. AET notes that Illinois has adopted the federal provisions, and therefore, a material cannot be regulated as a waste unless the material is found to be discarded. Resp. at 5. Furthermore, AET argues:

> under Illinois RCRA [Resource Conservation and Recovery Act] law, any facility that is regulated as a SDWA [Safe Drinking Water Act] Class II injection well, including associated oil and gas production wells, which are regulated under 225 ILCS 725 and 62 IAC 240 (both of which were adopted by USEPA as Illinois' federally-approved SDWA UIC program), is exempt from any RCRA regulation by IEPA, including 415 ILCS 5/21(e) or (f). *See* 35 IAC [Ill. Adm. Code] 704.102 and 35 IAC [Ill. Adm. Code] 704.106(b)(Exempting Class II wells from RCRA and IEPA regulation). Resp. at 6.

AET maintains that as a result of the above laws and regulations, the material at issue in this case was not illegally discarded as alleged in Count V of the complaint. Resp. at 5. Since the material was not discarded, the Board lacks jurisdiction to hear the allegation in Count V. *Id.* AET opines that because Count V "is the vehicle by which" the People "classify the material as a discarded 'solid waste'", the entire complaint must fail." Resp. at 6.

IEPA Lacks Jurisdiction

AET argues that IEPA has no jurisdiction because the Illinois Department of Natural Resources (IDNR) has purview over EOR's wells. AET expounds on its argument noting that the Class II UIC permit program was adopted under the Illinois Oil & Gas Act (225 ILCS 725 *et seq.* (2010)). Permits and permit holders are regulated by the rules adopted by IDNR pursuant to the Oil & Gas Act (62 Ill. Adm. Code 240). Resp. at 6. AET maintains that the EOR wells were permitted under IDNR, and thus enforcement authority falls to IDNR, not IEPA. Resp. at 6-7.

Facts do not Support Board's Jurisdiction

AET argues that before proceeding on the merits, the Board must assure that the complaint pleads *prima facie* facts sufficient to confer jurisdiction. Resp. at 9. AET maintains that the complaint fails to plead sufficient jurisdictional facts and therefore AET cannot be liable as pled in the complaint. *Id*., citing Estate of Johnson v. Condell Memorial Hospital, 119 Ill.2d 496, 520 N.E.2d 37 (Ill. 1988); Martin-Trigona v. Bloomington Federal Savings & Loan Assoc, 101 Ill. App. 3d 943 (Ill. App. 1981). Specifically, AET asserts that a review of the complaint establishes that the People pled only that EOR allegedly was responsible for shipment of the material to Illinois and also pled only that AET was responsible for shipments in Colorado. Resp. at 10-11. This lack of proper pleading establishes that the complaint is jurisdictionally deficient according to AET. Resp. at 11.

Furthermore, AET argues that the complaint fails to allege that AET transported or discarded a "waste". AET notes that the samples used to support this conclusion were taken two years after the material was shipped to Illinois and argues that the complaint does not allege AET discarded the material, merely that EOR arranged shipment. Resp. at 12-13. AET asserts that the admitted facts also do not support that the Board has jurisdiction under Section 21(e) of the Act (415 ILCS 5/21(e) (2010)). Resp. at 13. Rather, AET opines that the allegations make clear that AET was not involved in the transfer of the material to Illinois, but rather EOR was solely responsible. Resp. at 13-14.

AET maintains that the material was transferred to EOR in Colorado prior to shipment and the admitted facts "appear to be alleged in the alternative" and all the facts cannot be true "in reality". Resp. at 15. AET opines that the fact that a person pays for shipment of someone else's waste does not impose liability as only the "transporter" of the waste is liable. *Id.*

AET claims that the motions filed by the People and the Board's own order support a finding that AET is not liable under Section 21(e) of the Act (415 ILCS 5/21(e) (2010)). Resp. at 17-18. AET maintains that nowhere is there a claim that EOR and AET were "co-transporters" of the material and thus if EOR is liable, AET is not. *Id.* AET relies on the Board's September

6, 2012 opinion and order finding EOR liable to bolster this argument, noting that the Board did not state that AET was the shipper or transporter of the material. Resp. at 19. AET argues that as a result of the Board's finding that EOR is liable under Section 21(e) of the Act (415 ILCS 5/21(e) (2010)), AET cannot also be held liable. Resp. at 20.

Insufficient Fact to Establish Liability

AET argues that the motion for summary judgment "embellishes" the evidence against AET. Resp. at 21. AET argues that even if AET was hired to remove and dispose of the material by Luxury Wheels, it was EOR that took control of the material prior to AET being able to dispose of the material. *Id*. EOR then transported the material to Illinois, and thus AET asserts it is removed from any possible liability. *Id*. AET points to other admitted facts and claims that those facts also fail to establish AET's liability. Resp. at 21-27. For example, AET claims that the admissions that AET "arranged" to have the material shipped omits the mention of who "shipped" the material. Also, the admitted facts do not mention what EOR's intent was when AET gave the material to EOR.

AET maintains that the facts do not establish that the material was "discarded" in Illinois or that AET is liable for "discarding" the material in Illinois. Resp. at 28-30.

Discussion On Motion For Summary Judgment

The Board will first set forth the standard of review for motion for summary judgment and the burden of proof. The Board then makes a determination that summary judgment is appropriate. The Board next addresses the arguments raised and will provide a brief conclusion.

Standard of review for summary judgment

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. V. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to relief "is clear and free from doubt." Dowd & Dowd, Ltd., 181 Ill. 2d at 483, 693 N.E. 2d at 370, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on the pleadings, but must "present a factual basis which would arguably entitle [it] to judgment." Gauthier v. Westfall, 266 Ill. App. -3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Burden of Proof

In an enforcement proceeding before the Board, the burden of proof is by a preponderance of the evidence. Lefton Iron & Metal Company, Inc. v. City of East St. Louis, PCB 89-53 at 3, (Apr. 12, 1990); Bachert v. Village of Toledo Illinois, *et al.*, PCB 85-80 at 3,

(Nov. 7, 1985); Industrial Salvage Inc. v. County of Marion, PCB 83-173 at 3-4, (Aug. 2, 1984), *citing* Arrington v. Water E. Heller International Corp., 30 Ill. App. 3d 631, 333 N.E.2d 50,58, (1st Dist. 1975). A proposition is proved by a preponderance of the evidence when it is more probably true than not. Industrial Salvage at 4, *citing* Estate of Ragen, 79 Ill. App. 3d 8, 198 N.E.2d 198, 203, (1st Dist. 1979). A complainant in an enforcement proceeding has the burden of proving violations of the Act by a preponderance of the evidence. Lake County Forest Preserve District v. Neil Ostro, PCB 92-80, (Mar. 31, 1994). Once the complainant presents sufficient evidence to make a prima facie case, the burden of going forward shifts to the respondent to disprove the propositions (Illinois Environmental Protection Agency v. Bliss, PCB 83-17, (Aug. 2, 1984)). *See* Nelson v. Kane County Forest Preserve, *et. al.*, PCB 94-244 (July 18, 1996); People v. Chalmers, PCB 96-111 (Jan. 6, 2000).

Uncontested Facts

The Board's rules require respondents to respond to a request to admit within 28 days after receipt of the People's request. 35 Ill. Adm. Code 101.618(f). Respondents are to file a response denying or explaining the matters of which admission was requested. *Id*. In the absence of any denial or explanation, these matters are deemed to be admitted. *Id.* The People served requests to admit on AET on or around March 19, 2008. On August 17, 2010, the People filed simultaneous motions to deem facts admitted by respondents. Respondents were given until September 3, 2010, to respond to the People's motions. *See* Hearing Officer Order 8/31/10. Respondents did not timely respond to the People's motions. Respondents had 14 days to respond to the People's motions: "If no response is filed, the party will be deemed to have waived objection to the granting of the motion." 35 Ill. Adm. Code 101.500(d). Thus any objection to granting the motions was waived.

On September 16, 2010, the Board found that respondents failed to timely respond by an attorney-at-law to the request to admit. As a result, the Board found that matters of fact included in the People's Request to Admit Facts were admitted. *See* 35 Ill. Adm. Code 101.618.

AET did respond to the motion for summary judgment, however, the response did not include any affidavits or challenge to the facts admitted. Therefore, the Board finds there are no issues of material fact, and summary judgment is appropriate.

Jurisdiction

On the issue of jurisdiction, the Board heard similar arguments in EOR's motion to reconsider. The Board found that under the Act, the Board and IEPA regulate hazardous waste, not IDNR. *See generally* 415 ILCS 5/4, 5, 12, 21 (2010)). The Board further found that IDNR does not regulate the injection of hazardous waste, and the Oil & Gas Act does not regulate the waste disposed of in EOR's wells. People v. AET Environmental, Inc. and E.O.R. Energy, LLC, PCB 07-95 slip op. 16-18 (Jan. 10, 2013). None of the arguments raised concerning IDNR's purview raised by AET convince the Board to alter its previous finding. Therefore, the Board finds that IDNR does not regulate the disposal of hazardous wastes into the wells at issue in this proceeding, and the Board has jurisdiction over the subject matter of the complaint.

Facts Establish a Violation of Section 21(e) of the Act

For the Board to find a violation of Section 21(e) of the Act (415 ILCS 5/21(e) (2010)), the Board must find that AET disposed, treated, stored, or abandoned waste, or that AET transported waste for disposal, treatment, storage or abandonment. While AET attempts to argue that the facts do not support a finding of violation, by asserting that the facts are contradictory and that EOR is solely responsible, the Board disagrees.

AET is a hazardous waste broker that handles the logistics of transportation, storage and disposal for companies that generate hazardous material. *See* AET Mot. Exh. A at 1. Luxury Wheels, the generator of the waste, hired AET to handle the waste, and Luxury Wheels paid AET for that service. AET did not refund any money to Luxury Wheels for that service. *See generally* AET Mot. Exh. A at 3, 12. AET shipped the material to several entities in Colorado for disposal, each of which rejected the material. *Id*. at 3-7. Furthermore, AET identified the material as a hazardous waste on manifests prepared for these shipments in Colorado. AET Mot. Exh. A at 4.

AET employed Mr. Clark, a principal in EOR. *Id*. at 1-2, 10. AET gave the material to EOR, and the material was shipped from AET's warehouse in Denver, Colorado, to sites in Illinois. *See Id*. at 10. AET paid to ship the material to the site (*Id*.), and AET prepared a Bill of Lading for the shipment of the material to Illinois from its warehouse. AET Mot. at Exh. I.

The Bill of Lading included the address of the site in Illinois. AET Mot. at Exh. I. Although the Bill of Lading lists Luxury Wheels as the shipper, it also lists an AET employee as an agent for the Luxury Wheels. AET Exh. A at 2, 11, and Exh. I.

The Board finds that these facts establish the actions taken by AET prior to shipment of the waste to Illinois demonstrate that AET was responsible for the shipment of the material to Illinois and thus, transported the waste to Illinois.

The facts are clear that EOR stored the material until disposal in wells owned by EOR. *See generally* AET Mot. Exh. J at 3-5; *see also* People v. AET Environmental, Inc., and E.O.R. Energy, LLC, PCB 07-95 (Sept. 6. 2012). The site where the materials were stored is not a permitted hazardous waste storage site, nor is EOR permitted to dispose of hazardous waste. Therefore, the Board finds that the facts establish that the material was stored and disposed of in a manner not allowed by the Act or Board regulations.

The Board notes that AET also argues that the Board's September 6, 2012 order supports a finding that EOR was solely responsible. AET has overstated the Board's findings of September 6, 2012. The Board stated at the outset of its September 6, 2012 order that the decisions made in that order were only to EOR and the Board specifically reserved ruling on the AET motion for summary judgment. *See* People v. AET Environmental, Inc. and E.O.R. Energy, LLC, PCB 07-95 slip op. 1 (Sept. 6, 2012).

Conclusion on the Motion for Summary Judgment

Based on AET's admissions and the affidavit of IEPA's inspector, the Board finds that a preponderance of the evidence supports a finding that AET transported waste into Illinois for disposal and storage. AET actions prior to shipment to Illinois establish that AET was responsible for transporting the waste to Illinois. Furthermore, the evidence is uncontroverted that the material was stored at the site and ultimately disposed of in wells owned by EOR. Therefore, the Board finds that AET violated Section 21(e) of the Act (415 ILCS 5/21(e) (2010)) by transporting a waste to Illinois for storage and disposal.

REMEDY

The Board finds that AET violated Section 21(e) of the Act (415 ILCS 5/21(e) (2010)). The Board must now determine appropriate penalties in this case. In evaluating the record to determine the appropriate penalty, the Board considers the factors of Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2010)).

Statutory Provisions Relating To Penalties

Section 33(c) of the Act provides as follows:

> In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:
>
> (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> (ii) the social and economic value of the pollution source;
>
> (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
>
> (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges, or deposits resulting from such pollution source; and
>
> (v) any subsequent compliance. 415 ILCS 5/33(c) (2010).

Section 42(h) of the Act provides as follows:

> In determining the appropriate penalty to be imposed . . . the Board is authorized to consider any matters of record in mitigation or aggravation of penalty, including but not limited to the following factors:

(1) the duration and gravity of the violation;

(2) the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;

(3) any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;

(4) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;

(5) the number, proximity in time, and gravity of previously adjudicated violations of the Act by the respondent;

(6) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency; and

(7) whether the respondent has agreed to undertake a "supplemental environmental project," which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform.

(8) whether the respondent has successfully completed a Compliance Commitment Agreement under subsection (a) of Section 31 of this Act to remedy the violations that are the subject of the complaint. 415 ILCS 5/42(h) (2010).

People's Argument

Section 33(c) Factors

Regarding Section 33(c)(1) of the Act (415 ILCS 5/33(c)(1) (2010)), the People maintain that AET's action severely threatened human health and the environment. AET Mot. at 28. The People assert that the hazardous waste exhibited characteristics of both toxicity and corrosivity. AET Mot. at 27. The People claim that despite these characteristics, AET failed to ensure the proper shipment and storage of the hazardous waste. The People opine that these actions put the health, general welfare, and physical property around the Kincaid site in danger as well as endangering those persons along the route from Colorado to the Kincaid site. AET Mot. at 28. Furthermore, the People point out that AET is a licensed hazardous waste broker and "should know better". *Id*. The People argue that AET severely threatened the human health and environment by failing to comply with the Act. *Id*.

Discussing the remaining 33(c) factors, the People argue that there was no social or economic value in the hazardous waste, and the waste was unsuitable for shipping to a site not permitted for hazardous waste. AET Mot. at 28, *see also* 415 ILCS 5/33(c)(ii) and (c)(iii) (2010). Furthermore, the People maintain that proper disposal at a permitted facility was economically reasonable and technically feasible. AET Mot. at 29, 415 ILCS 5/33(c)(iv) (2010). The People note that EOR did not self-report the violations. *Id*.

Section 42(h) Factors

Regarding Section 42(h)(1) of the Act (415 ILCS 5/42(h)(1) (2010)), the People reiterate the instability of the hazardous waste and the failure to properly handle, store or dispose of the hazardous waste. AET Mot. at 30. The People note that even though the material was unstable, EOR did not properly ship the materials, endangering the health, general welfare, and personal property of persons along the shipping route and near the Kincaid site. *Id*. at 30-31. Furthermore, the waste was shipped to a facility not properly permitted to accept or store the waste. *Id*. at 31. The People point out that AET is a licensed hazardous waste broker and "should know better". *Id*. Thus, the People argue that the gravity of the violations was extremely high. *Id*.

In arguing the remaining Section 42(h) factors, the People maintain that AET was not diligent in attempting to come into compliance. AET Mot. at 31, *see also* 415 ILCS 5/42(h)(2) (2010). The People argue there was an economic benefit from AET's noncompliance, as AET was able to keep all the money Luxury Wheels paid them for handling the waste. *Id*. However, the People cannot ascertain the exact amount of money Luxury Wheels paid AET to dispose of the hazardous waste. AET Mot. at 31-32, *see also* 415 ILCS 5/42(h)(2) and (h)(3) (2010). The People opine that based on the specific facts of this matter, a penalty of $60,000 will serve to deter further violations. *Id*.

The People have no information of previous adjudicated violations, but note that AET did not self-report the violations. AET Mot. at 32, *see also* 415 ILCS 5/42(h)(5) and (h)(6) (2010). There is no supplemental environmental project and no compliance commitment agreement in place. *Id*., *see also* 415 ILCS 5/42(h)(7) and (h)(8)(2010).

AET Response

In its response, AET did not respond to the People's requested penalty or the Section 33(c) and 42(h) factors. The hearing officer extended AET's time to respond to the motion for summary judgment on October 23, 2012 (*see* Hearing Officer Order 10/23/12). The Board rules state "[i]f no response is filed, the party will be deemed to have waived objection to the granting of the motion." 35 Ill. Adm. Code 101.500(d). The Board finds that AET's failure to respond to the People's arguments regarding a civil penalty results in AET waiving objection to the Board's granting of the requested penalty. *See e.g.* People v. Phipps, 238 Ill.2d 54, 62, 933 N.E.2d 1186, 1191 (2010); *see also* People v. Blair, 212 Ill.2d 427, 443, 831 N.E. 2d 604 (2005).

Discussion on Remedy

The Board will discuss each of the Section 33(c) and 42(h) factors below. The Board will then explain the reasoning for the civil penalty being assessed.

Section 33(c) Factors

The Character and Degree of Injury to, or Interference With the Protection of the Health, General Welfare and Physical Property of the People

The Board has found that AET transported for storage and disposal a hazardous waste without following the statutory and regulatory requirements. Such actions endanger the health, general welfare, and physical property of the people. Therefore, The Board finds that this factor weighs against AET.

The Social and Economic Value of the Pollution Source

The Board agrees with the People that a hazardous waste that is improperly disposed of has no social or economic value. Therefore, the Board finds that this factor weighs against AET.

The Suitability or Unsuitability of the Pollution Source to the Area in Which it is Located, Including the Question of Priority of Location in the Area Involved

The People assert that the disposal of the acid material was unsuitable for a property not properly permitted. The Board agrees and finds that this factor must be weighed against AET.

The Technical Practicability and Economic Reasonableness of Reducing or Eliminating the Emissions, Discharges or Deposits Resulting from Such Pollution Source

The People argue and the Board agrees that compliance with the Act and Board is technically practical and economically reasonable. Therefore, this factor must be weighed against AET.

Any Subsequent Compliance

The People note that AET did not self report the violations. The record contains no evidence of self reporting by AET; therefore, the Board will weigh this factor against AET.

Finding on Section 33(c) factors

The Board finds that factors in Sections 33(c) justify requiring AET to pay a civil penalty.

Section 42(h) Factors

Duration and Gravity of the Violation

AET, a licensed hazardous waste broker, improperly transported a hazardous waste from Colorado to Illinois. The potential harm from the improper transport, storage, and disposal of hazardous waste is grave. AET's actions endangered the citizens of Illinois and those persons along the route from Illinois to Colorado. The Board finds that consideration of this factor aggravates the assessment of a penalty.

Due Diligence

The People argue that the AET was not diligent. The record contains no evidence that the AET made any attempt to properly comply with the requirements of the Act. The Board finds that consideration of this factor aggravates the assessment of a penalty.

Economic Benefits Accrued

The People were unable to establish evidence of a specific economic benefit; although there is evidence that AET did benefit economically. Therefore, the Board finds that consideration of this factor aggravates the assessment of penalty.

Penalty Which Will Serve To Deter Further Violations

The People argue that a total civil penalty of $60,000 will help to deter future violations. The Board finds that the record contains insufficient evidence to determine if this penalty will deter future violations. Therefore, consideration of this factor neither mitigates nor aggravates assessment of a substantial penalty.

The Number, Proximity In Time, And Gravity Of Previously Adjudicated Violations Of This Act By The Violator

The record contains no evidence of prior adjudicated violations, and the People indicate that they are unaware of any previous violations. The Board finds that consideration of this factor mitigates against a substantial penalty.

Self-Disclosure

AET did not self-disclose the violations. The Board finds that consideration of this factor aggravates the assessment of a penalty.

Supplemental Environmental Project

A supplemental environmental project is not at issue in this proceeding, so this factor neither aggravates nor mitigates the assessment of a penalty.

Compliance Commitment Agreement

A compliance commitment agreement has not been signed, so this factor neither aggravates nor mitigates the assessment of a penalty.

Appropriate Civil Penalty

In determining the appropriate civil penalty, the Board considers the factors set forth in Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h) (2010)). People v. Gilmer, PCB 99-27 (Aug. 24, 2000). The Board must take into account factors outlined in Section 33(c) of the Act in determining the unreasonableness of the alleged pollution. Wells Manufacturing Company v. Pollution Control Board, 73 Ill. 2d 226, 383 N.E.2d 148 (1978). The Board is expressly authorized by statute to consider the factors in Section 42(h) of the Act in determining an appropriate penalty. In addition, the Board must bear in mind that no formula exists, and all facts and circumstances must be reviewed. Gilmer, PCB 99-27, slip. op. at 8.

The Board has stated that the statutory maximum penalty "is a natural or logical benchmark from which to begin considering factors in aggravation and mitigation of the penalty amounts." Gilmer, PCB 99-27, slip. op. at 8, citing IEPA v. Allen Barry, individually and d/b/a Allen Barry Livestock, PCB 88-71 (May 10, 1990), slip. op. at 72. The basis for calculating the maximum penalty is contained in Section 42(a) and (b) of the Act. *See* 415 ILCS 5/42(a) and (b) (2010). Section 42(a) provides for a civil penalty not to exceed $50,000 for violating a provision of the Act and an additional civil penalty not to exceed $10,000 for each day during which the violation continues.

The Board has found that AET violated one provision of the Act and that the violation continued during the transport of the waste material from Colorado to Illinois. Analysis of the Section 33(c) and 42(h) factors illustrates that there is only one mitigating factor. However, an economic benefit did accrue and the threat to human health and safety was substantial. Based on the record before the Board, the Board finds a penalty of $60,000 is appropriate.

CONCLUSION

The Board denies the People's motion to strike AET's response to the motion for summary judgment. After considering the arguments, the Board finds that it has subject matter jurisdiction and grants the People's motion for summary judgment and finds that AET violated Section 21(e) of the Act (415 ILCS 5/21(e) (2010)) by transporting waste into Illinois for improper storage and disposal. Having found that AET violated the Act, the Board finds that a civil penalty of $60,000 is appropriate and directs AET to pay that civil penalty.

ORDER

1. The Board finds that AET Environmental, Inc. (AET) violated Section 21(e) of the Environmental Protection Act (415 ILCS 5/21(e) (2010)).

2. The Board hereby assesses a penalty of sixty thousand dollars ($60,000) against AET. AET must pay this penalty no later than February 25, 2013, which is the first business day following the 30th day after the date of this order. AET must pay the civil penalty by certified check or money order, payable to the Environmental Protection Trust Fund. The case number, case name, and AET's federal employer identification numbers must be included on the certified check or money order.

3. AET must send the certified check or money order to:

Illinois Environmental Protection Agency
Fiscal Services Division
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

4. Penalties unpaid within the time prescribed will accrue interest under Section 42(g) of the Environmental Protection Act (415 ILCS 5/42(g) (2010)) at the rate set forth in Section 1003(a) of the Illinois Income Tax Act (35 ILCS 5/1003(a) (2010)).

5. AET must cease and desist from the alleged violations.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 24, 2013, by a vote of 5-0.

John Therriault, Assistant Clerk
Illinois Pollution Control Board