Illinois Attorney #6197210

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

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

NOTICE OF MOTION AND ELECTRONIC FILING

ALL PARTIES PLEASE TAKE NOTICE that on February 19, 2013, 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 , this **Notice and Certificate of Filing and Service and MOTION FOR RECONSIDERATION OF JANUARY 10, 2013, ORDER, a** copy of which is attached hereto and herewith served upon you.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I did on February 19, 2013, e-file with the Clerk, and on same date did send by e-mail and First Class U.S. Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box, a true and correct copy of this document and the following instrument entitled **MOTION FOR RECONSIDERATION**, as counsel for **E.O.R. Energy, LLC**, to the following persons by the method and at the address indicated:

SERVICE LIST

E-Filed with:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph - Suite 11-500
Chicago, Illinois 60601

Served By U.S. Mail and E-Mail On:

State of Illinois - IEPA c/o Mr. Michael Mankowski, Esq. Assistant Attorney General 500 South Second Street Springfield, Illinois 62706	AET Environmental, Inc. c/o Felipe Gomez, Esq. 116 S. Western Ave. - # 12319 Chicago, IL 60612-2319 312-399-3966 *gomzfng1@netscape.net*	Hearing Officer C. Webb IPCB 1021 N. Grand Avenue East Springfield, IL 62794

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

E.O.R. ENERGY LLC MOTION FOR RECONSIDERATION

NOW COMES CO-RESPONDENT E.O.R. ENERGY, LLC, by and through undersigned counsel of record, (hereinafter "EOR"), and pursuant to 35 IAC 101.520 and 101.902, respectfully files this Motion for Reconsideration ("Motion") of the Illinois Pollution Control Board's ("IPCB") January 10, 2013, Order ("EOR Order II") granting Plaintiff's June 27, 2012, Motion for Summary Judgment ("MSJ"), and respectfully **MOVES** that the IPCB **VACATE** such Order for erroneously applying and violating federal and state law and, relatedly, as invalid for, *inter alia*, lack of 415 ILCS 5/ et seq. subject matter jurisdiction therefore, and that the IPCB **DENY** the Motion for Summary Judgement, as set forth below.

Due to the fact that, in addition to the EOR Order II's wholesale adoption of the position of IPCB's September 6, 2013, Order ("EOR Order I"), the IPCB adopts, wholesale, the State's newly made jurisdictional arguments contained in the State's November 14, 2012, Response to EOR's October 18, 2012, Motion to Reconsider (See *11/14/12 State Response to EOR Motion to Reconsider at 6-17)*, EOR incorporates herein by reference, and adopts in support of this Motion, EOR's October 18, 2012, Motion to Reconsider, and EOR's December 12, 2012, Reply, and the detailed arguments contained therein. *See October 18, 2012, EOR Motion to Reconsider at 1-8*; and *December 12, 2012, EOR Reply at 6-28.* In addition, EOR states the following in support of this Motion and EOR's points of error set forth below.

I. Summary of Motion

On September 6, 2012, the Illinois Pollution Control Board ("IPCB"), issued an order granting Illinois' June 27, 2012, MSJ against E.O.R. Energy LLC ("EOR Order I"). *EOR Order II at 1-2.* On October 18, 2012, EOR filed a motion to reconsider that order, followed by the State's November 14, 2012, Response and EOR's December 12, 2012, Reply.

"After considering the arguments presented", on January 10, 2013, IPCB issued its 20 page order "upholding" its prior September 6, 2012, order (received by EOR counsel on January 15, 2013). On January 24, 2013, the IPCB issued an order granting the State's motion for summary judgement against the remaining co-respondent AET Environmental, Inc., rendering the EOR Order II final as of that date. *Illinois Supreme Court Rule 304.*

Due to new errors of fact and application of law, EOR files this motion to reconsider the January 10, 2013 EOR Order. These errors include:

* a continuing lack of subject matter jurisdiction under 415 ILCS 5/ over what the IPCB has admitted were Class II wells (which are expressly excluded from regulation under that statute 415 ILCS 5/4(l));
* IPCB's total failure to discuss the impact of the bar on IEPA/IPCB jurisdiction imposed by 415 ILCS 5/4(l);
* IPCB's related ignorance of the impact of and failure to address 35 IAC 704.106(b);
* IPCB's violation of federal law by its election in EOR Order II to attempt to interpret and apply 225 ILCS 725 (Illinois Oil & Gas Act - "OGA") in relation to the EOR Class II wells and deciding what is or is not a Class II fluid (a duty formally delegated by federal and state law exclusively to IDNR on March 22, 1984, under 42 USC 300h, 225 ILCS 725 and 62 IAC 240 et seq., not to IEPA under 35 IAC 700 et seq.).
* IPCB's position that an additional IEPA Class I permit is required for injection of fluids not found to be in violation of Class II permit by IDNR (e.g where fluid is used for enhanced recovery/well maintenance rather than being disposed of without an oilfield-related use).

II. Motion to Reconsider - Standard of Review

As stated by the IPCB in *Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156 (3/11/93)*, "[T]he intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in

the court's previous application of the existing law." (Citing *Korogluyan v. Chicago Title & Trust Co,* 572 N.E.2d 1154, 1158 (Ill. App. 1st Dist. 1992). On reconsideration, a court may address an issue if a determination can be made from the record as it stands. *Dubey v. Abam Building Corp.*, 639 N.E.2d 215, 217 (1994).

III. Jurisdiction: Raisable and Reviewable at Any Time

As acknowledged by the IPCB Order II, subject matter jurisdiction must be clearly present in order for a court's actions to be valid under the Constitution and thus binding upon the parties. *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 577, (1999))*("Jurisdiction is the 'power to declare law,' and without it the federal courts cannot proceed...Accordingly, not only may the federal courts police subject matter jurisdiction sua sponte, they must").[1]

In instances where a court proceeds to judgement against a defendant on a claim where there was no subject matter jurisdiction, such judgment is void ab intitio, and the order is of no effect as to such claim against the defendant. *People v. Wade, 506 N.W.2d 954 (Ill. 1987)*(Judgment entered by court without subject matter jurisdiction or that lacks inherent power to make or enter particular order involved is void and of no effect as if never issued; such a judgment may be attacked at any time, either directly or collaterally). *EOR Order II at 16.*

IV. EOR Order II - Summary/Errors

The EOR Order II is comprised of four parts: procedural history (pp1-2), legal framework (pp2-6), summary of motions/responses/replies (pp6-15) and discussion (pp16-19).

A. Order Contains Minimal Discussion or Explanation of New Jurisdictional Basis Adopted from State Response

Of initial note, the IPCB in fact granted EOR's prior motion to reconsider. *EOR Order at 1.* Then, after finding E0R's arguments to "have no merit", the IPCB "upheld" the September 6, 2012 order. *Id.*

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[1] *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);

Of note, the IPCB makes absolutely no independent comments or discussions in the first 16 pages, rather the substantive "discussion" occupies only the last 3 pages of the Order, despite the extensive briefings by the parties, especially by EOR in its Reply. Further, a review of the EOR Order II reveals the IPCB not only "upheld" the prior order, but also added previously nonexistent jurisdictional support therefore (including attempting for the first time to interpret the SDWA as to what is allowed to be injected into a Class II well, and then penalizing EOR based thereon, thus "regulating" the well under the SDWA as well as RCRA), an argument belatedly adopted wholesale by IPCB from the State's November 14, 2012, Response to EOR's Motion to Reconsider (where the jurisdictional defense was raised for the first time in this matter by Illinois). *EOR Order II at 16-19; 11/14/12 State Response to EOR M/Reconsider at 6-17.*

B. "Legal Framework" Section Adds to Same Section in EOR Order, But Begs Issue of Jurisdiction

A comparison of the functionally equivalent "Statutory Background" and "Legal Framework" sections of the two orders reveals that EOR Order I made no mention of the SDWA, the Class II UIC-permitted status of the EOR wells, or the Oil and Gas Act in the "Background" Section, but rather was based solely on a brief reference to 415 ILCS 5/12(g), 5/21(e) and 5/21(f). *EOR Order I at 6-7.*

In contrast, the EOR Order II contains a much expanded "Legal Framework" Section that also cites (in much greater detail) to 415 ILCS 5/ et seq., and which relates in detail how IEPA regulates Class I, III, IV and V injection wells in Illinois. *EOR Order II at 2-6.* Pertinent to the instant Motion and the lack of jurisdiction, at the very end of that section, IPCB mentions the fact that 35 IAC 704.102 exempts Class II wells from 35 IAC 702, 704, 705, and 730 regulation, and that IDNR regulates Class II wells under 35 IAC 704.106(b) and Section 8b of the Oil & Gas Act.[2] *Id at 6.* Yet, instead of following that directive, IPCB erroneously proceeds to regulate EOR's Class II wells by way of 35 IAC 700 et seq.

[2] However, central to this Motion and the lack of IEPA jurisdiction, 35 IAC 704.102, and the statutory bar imposed by 415 ILCS 5/4(l), is not discussed again in the EOR Order II, which omission, and failure to abide by such prohibitions, is error at law by IPCB.

C. IPCB Paraphrasing of EOR Briefs Selective and Inaccurate, Avoids Specific Citation to Basis for Jurisdictional Argument - 415 ILCS 5/4(l)

1. Motion to Reconsider

A review of the IPCB's paraphrasing of the EOR Motion to Reconsider presages the IPCB Order's failure to address the specific statutory and regulatory provisions relied upon by EOR. *EOR Order II at 6-8.* While the IPCB acknowledges that EOR argues that IDNR initially regulates all injections into Class II wells, and that the EOR wells were in fact properly permitted Class II UIC wells (*EOR Order II at 7-8*), the IPCB entirely fails to mention that EOR's position relies in large part on 415 ILCS 5/4(l) and 35 IAC 704.102's bar on IEPA regulation of Class II wells, which regulatory provision is quoted by the Order (see discussion above) and in full in EOR's Motion:

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

EOR Motion to Reconsider at 4. Rather, the IPCB merely cites generally to "35 IAC 704".

Finally, the IPCB's briefing summary ignores EOR's argument that the IDNR's exclusive Class II well regulatory authorization under 62 IAC 240 and 225 ILCS 725 is in fact federally-approved (as the state statute and predecessor state regulations were codified as federal law in 1984 - See *40 CFR 147.701(b)*) under the federal Safe Drinking Water Act (42 USC 300 et seq.; *See 49 Fed. Reg. 3990*), and not merely by way of 415 ILCS 5/4(l) and 35 IAC 704.102.[3] *EOR Motion at 4, 8.*

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[3]It is a matter of public record that on March 22, 1984, USEPA specified that IDNR, not IEPA, administer the federal Class II program in Illinois under 225 ILCS 725, not 415 ILCS 5/. *Att A. - 1984 USEPA-IDMM Approval Delegation Letter.* IPCB's foray into interpretation of 225 ILSC 725 and its regulation of EOR's Class II wells under 415 ILCS 5/, under the facts of record in this case, are thus both violations of federal law.

2. State Response

A review of the IPCB paraphrasing of the State's Response shows that the IPCB's later discussion essentially adopts the State's newfound theory that IEPA can require a Class II UIC permittee to obtain a separate, additional Class I, III, IV or other UIC permit, if the IEPA determines that the injected fluid contains hazardous constituents or is a "hazardous waste" as defined under RCRA, even after an injection has occurred that was known to, and not acted upon or found to be a violation by IDNR, and regardless of a well's status as a properly-permitted Class II UIC well. *EOR Order II at 9-11; 11/14/12 State Response at 7-17.* Essential to the State and IPCB is the finding that "IEPA is the only agency that can permit the injection of hazardous waste", and that IDNR has no authority to bring an enforcement action for injection of a hazardous waste, thus "[415 ILCS 5/ et seq]....and associated regulations are the only legal means" that can be used to enforce illegal injections into a Class II well.[4] *Id.*

3. EOR Reply

Finally, the IPCB oversimplifies its paraphrasing of the EOR Reply's jurisdictional arguments, nearly totally ignoring the Reply's detailed rebuttal of the State's position in its Response , especially as to 415 ILCS 5/4(l), paraphrasing 9 pages of detailed EOR discussion into 2 short paragraphs. *EOR Order at 14; Compare to 12/12/12 EOR Reply at 6-7, 21-27.*

Significant here is the IPCB failure to note EOR's citation to 415 ILCS 5/4(l) specifically, despite the Reply having done so, as well as the ignorance of the several examples of Class II fluids used at oilfields which are initially used in oil and gas wells and thereafter legally "disposed" of in the Class II wells that are "hazardous" (acids, solvents, diesel fuel, and chemical

[4]As discussed in the EOR briefings and herein below, the IPCB is simply wrong in postulating that IDNR cannot prosecute an illegal injection of hazardous waste, since any "pure" disposal of a hazardous waste, or any non-oilfield related fluid (hazardous or not) not allowed by the Class II permit, would in fact be a violation of the Class II permit and would subject EOR to prosecution under 225 ILCS 725/8a and 62 IAC 150. As the MSJ Thompson Affidavit and other items of record reflect, IDNR was entirely aware of the IEPA allegations, had the chief of the IDNR UIC section (Duane Pulliam) personally present during the inspection that serves as the basis for this action, yet did not find any Class II permit violations by way of the alleged use of the acid material (all the INDR did was forward the Class II permits to IEPA , without comment or request for enforcement). Thus the EOR Class II permits are indeed a "shield" against further IEPA prosecution of those alleged injections under these set of facts.

additives), and that the brine itself contains numerous hazardous substances. *EOR Reply at 24-25.*

Further, IPCB's paraphrasing severely understates the Reply's treatment of the overarching federal RCRA-SDWA statutory, regulatory and guidance framework which results in the jurisdictional bifurcation that prohibits IEPA/IPCB from regulating a Class II, IDNR regulated well under its RCRA hazardous waste authorities, and forms EOR's rebuttal to the State's reliance on its "conversion/dual use" theory.[5] *EOR Reply at 22-24.*

Notable is the IPCB mis-characterization that, as to the State position that IEPA can require a separate permit as it sees fit (based on guidance cited in support of dual permits by the State itself in its Response), "EOR believes that the requirements should be included in a single permit". *EOR Order II at 14.* In fact, as clearly stated in the Reply and as evident from the copy of the State-cited guidance provided by EOR (*Reply at Att. G*) it is the guidance itself that states such dual permitting is not appropriate, but rather that IDNR should typically include any requirements therefor in the Class II permit, and not in a separate IEPA Class I permit.[6] *EOR*

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[5]To be clear, EOR is not arguing that a Class II permit allows an oilfield operator to go into business as a RCRA TSD, as that would be a violation of the Class II permit that IDNR would not allow, and would subject EOR to possible criminal liability (which aspect was investigated and not pursued, which is why this matter was delayed prior the IEPA being allowed to file its MSJ). Rather, EOR's point is that it is IDNR, not IEPA, that has the jurisdiction to determine when the SDWA Class II regulated entity steps over the line and illegally injects in violation of its Class II permit (which EOR also argues did not happen here, ipso facto the lack of criminal or IDNR civil enforcement). It is also important to step back, remember the burden is on movant, and observe that the allegations are not that EOR was an illegal RCRA TSD disposing of truckloads of wastes for numerous clients as if it were Chemical Waste Management, but rather that (with clearly no profit motive), EOR elected to be an illegal RCRA TSD in order to illegally dispose of a single shipment, almost literally a gallon at a time, over a period of 2 years, when it could have easily been dumped overnight. The allegations themselves, lacking motive or logic, simply do not reasonably support a finding of any sort of illegal disposal, similar to the requests to admit and MSJ.

[6]40 CFR 144.1 provides that the UIC regulations implement both SDWA and RCRA requirements for hazardous waste injection, and as such, there should only be one permit for each well that embodies all UIC requirements:

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

Reply at 23.

Also, IPCB's summary of the Reply omits mention of EOR's argument that the IEPA/IPCB attempted regulation of a Class II fluid as a RCRA "hazardous waste" at Class II wells (in addition and without regard to IDNR's regulation of the process of injection of oilfield fluids under the Class II permit) was specifically rejected by USEPA in promulgating the 40 CFR 144 regulations, which draw a bright line between RCRA and SDWA jurisdiction:

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

D. IPCB Discussion: IPCB (Erroneously) Interprets 225 ILCS 725 For First Time

1. IPCB Ignores that 225 ILCS 725 Regulates Injections, Not "Wastes" or "Fluids"

Inconsistent with the EOR Order I's sole reliance on 415 ILCS 5/ et seq. for jurisdiction, and that order's lack of mention of IDNR, EOR Order II defends its jurisdiction based on IPCB's adoption of IEPA's narrow interpretation of the Illinois Oil and Gas Act ("OGA"), and what IEPA?IPCB believes IDNR's limited role is thereunder, rather than relying solely on 415 ILCS 5/

It is notable that IEPA fails to point to even one "dually permitted" Class I/Class II well in Illinois, and a quick survey shows that they are a rare breed, even in Texas, which has the most Class II wells of all states. See e.g.: Please Pass The Salt: Using Oil Fields For The Disposal of Concentrate From Desalination Plants, Texas Water Development Board and Bureau of Economic Geology, Agreement No. 03-FC-81-0846, Desalination and Water Purification Research and Development, Program Report No. XX (June 2005)(U.S. Department of the Interior Bureau of Reclamation Denver Office Technical Service Center Environmental Services) at 72-77. This is likely due to the fact that oil and gas operators typically do not need such wells to dispose of their own fluids, and where one is needed it is more efficient, and far less disruptive to the normal function of a Class II well, to construct a separate Class I well.

Relatedly, as noted therein, an otherwise potentially RCRA-regulated fluid may be used at an oilfield for enhanced recovery, thereby rendering it disposable in a Class II well as a Class II fluid, without a Class I permit, which, EOR alleges, can just as reasonably be inferred from the record to have occurred here as the State's version of illegal disposal, thus rendering summary judgment inappropriate. *Id. at 77* ("Concentrate could be injected directly into a Class II well with no additional permits if the concentrate was used in enhanced oil recovery.").

et seq. *Order at 16-17.* The IPCB states:

> "The Board has reviewed the provisions of the Oil and Gas Act as well as IDNR's regulations promulgated under that Act. After reviewing the law, the Board finds that EOR's arguments are without merit. The Oil and Gas Act does not address the injection of hazardous waste into Class II UIC wells. The only references to waste are to waste as it is defined in the Oil and Gas Act at Section 1 (225 ILCS 725/1 (20101)) which states: "Waste" means "physical waste" as that term is generally understood in the oil and gas industry...". *EOR Order II at 16.*

IPCB apparently believes that, since the term "waste" as defined at 225 ILCS 725/1 only means "physical waste" (including, but not limited to, unnecessary 'wasting' of oil or natural resources), the IDNR's regulatory role is restricted to limiting such inefficiency, and does not include regulation of the injection of what IEPA may consider a hazardous waste: "Clearly, the definition of waste in the [OGA] does not include hazardous waste...[or] the waste disposed of by EOR in the wells...".[7] *EOR Order II at 17.*

Continuing its (mis)interpretation of the OGA and its opinion as to IDNR's role thereunder, the IPCB next mixes apples and oranges by confusing, or equating, *disposal* of oil field brine with *use* of an enhanced recovery method:

> "The Oil and Gas Act addresses disposal of "oil field brine or for using any enhanced recovery method in any underground formation or strata" without a permit. 225 ILCS 725/8b (2010)). The Oil and Gas Act also gives IDNR the authority "to conduct hearings and to make such reasonable rules as

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[7]The IPCB reproduces the "waste" definition, which upon inspection, in fact confirms the IDNR's authority to prohibit "*unreasonable* damage to underground...water supply"as part of its mandate to prevent "waste". This definition also makes it clear that it is IDNR that is to determine what is "unreasonable damage" to underground water supplies protected by the UIC program under the OGA, balancing the need for production against the resultant impacts to the environment. *225 ILS 725/1.* Thus, preventing "waste" under the OGA, specifically includes preventing threats and damage to underground water supplies by way of the Class II UIC permit, including determining what may be injected into the Class II wells relative to oilfield operations. *Att. A - March 22, 1984 Delegation.*

Further, IDNR's jurisdictional ambit is set forth at 225 ILCS 725/6, not at 225 ILCS 725/1, and the mandate to prevent "physical waste" as defined in the OGA is only one of many responsibilities placed on IDNR by that section. *225 ILCS 725/6.* Among the numerous authorities therein conferred are: "(10) To regulate the... the issuance of permits, and the establishment of drilling units.... (15) To prohibit waste, as defined in this Act...17) To regulate the disposal of.... any oil field waste produced in the operation of any oil or gas well." *Id.* As is made further clear from the latter authority, it is the IDNR, not IEPA, that is to regulate disposal of oilfield wastes, which includes the disposal of fluids used in maintenance and acidization of the wells, including any effluent, which is what the record reasonably can be inferred to indicate occurred here, precluding summary judgement.

> may be necessary . . .[quoting from OGA] 'To require the person desiring or proposing to drill, deepen or convert any well for the exploration or production of oil or gas, for injection or water supply in connection with enhanced recovery projects, for the disposal of salt water, brine, or other oil or gas field wastes, or for input, withdrawal, or observation in connection with the storage of natural gas or other liquid or gaseous hydrocarbons before commencing the drilling, deepening or conversion of any such well, to make application to the Department upon such form as the Department may prescribe and to comply with the provisions of this Section.' 225 ILCS 725/6(2) (2010)).
>
> IDNR may also adopt rules to regulate the "disposal of salt or sulphur-bearing water and any oil field waste produced in the operation of any oil or gas well." 225 ILCS 725/6(17) (2010)). The Oil and Gas Act contains no reference to allowing IDNR to regulate the injection of hazardous waste into a Class II UIC well." *EOR Order II at 17.*

2. IPCB Ignores Bulk of EOR Arguments as to Flaws in Jurisdictional Facts, Determines it Can Regulate Class II Well Based on Nature of Fluid Injected

Now having "established", as a matter of law, what the OGA's and IDNR's jurisdiction is limited to, and that IDNR does not have exclusive jurisdiction over the EOR Class II wells under the OGA, IPCB next finds that IPCB has 415 ILCS 5/ jurisdiction based on the material at issue being a RCRA "hazardous waste". *EOR Order II at 18.* As with its prior Order I, the finding is again based upon EOR's alleged "admissions" (by way of the Answer and the Requests to Admit having been deemed admitted), as well as "the record":

> "In addition to the admissions by EOR, the record establishes that the material shipped into Illinois and disposed of in UIC wells exhibited traits of hazardous materials. *See generally* People v. AET Environmental, Inc. and E.O.R. Energy, LLC, PCB 07-95 slip op. 3-4 (Sept. 6, 2012). Under the Act, the Board and the IEPA regulate hazardous waste, not IDNR. *See generally* 415 ILCS 5/4, 5, 12, 21 (2010)). Thus, the People properly prosecuted EOR for improper disposal of hazardous waste under the Act and the Board has the authority to make findings of violation. The Board finds that it had jurisdiction over the proceeding." *Id.*

Hence, the IPCB in fact asserts (incorrectly) that it may regulate what is injected into a Class II well as long as the fluid exhibits the "traits" of a hazardous waste, without regard to the INDR or the Class II permit, and ignoring that the IDNR-regulated brine itself is highly contaminated and is in fact is a "hazardous waste" under RCRA (if defined by its "traits"). *See 12/12/12 EOR Reply at 24-25.*

3. IPCB Addresses Only Single Issue of Defective Pleading, and Admits Complaint Lacks 40 CFR 261 "Solid Waste" Determination or Allegation

Addressing the EOR Reply's attack on jurisdiction (which is multi-pronged and based on

insufficient pleadings, conflicting material facts, and lack of a "confession" or even an eyewitness to the alleged disposal or the chemical composition of the material)(*EOR Reply at 11-20*), the IPCB selects only a single issue for discussion, "as one example of the many arguments put forth by EOR that attempt to argue the facts of this case".[8] *EOR Order II at 18.*

With regard to that issue, the IPCB in fact concedes that the Complaint does not contain this crucial jurisdictional pleading element: "Based on the plain language of the Act...the Complaint need not allege that the waste was a 'solid' waste to establish a violation of Section 21(e) of the Act.". *EOR Order II at 18.* Rather, the IPCB appears to opine that it is enough to plead the material was a "waste" as defined at 415 ILCS 5/3.535, in order to regulate it as a hazardous

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[8]However, EOR's issue is clearly jurisdictional, that being EOR's position that the Complaint, on its face, fails to make the required determination and finding that the material at issue was a "solid waste" when it got to Illinois, as required by 40 CFR 261 and 415 ILCS 5/21(e). The essence of the argument is that federal and conforming state law require that a material be discarded, and thus a "solid waste", before it can be a regulated RCRA Subtitle D solid waste. *40 CFR 261; 415 ILCS 5/21(e).* Thereafter, the solid waste cannot be regulated as a 415 ILCS 5/21(f) and 5/12(g) "hazardous waste" under Subtitle C of RCRA unless, as required by 415 ILCS 5/3.220 and 40 CFR 261, the solid waste is either listed or characteristic under Section 3001 of RCRA. *40 CFR 261.*

As alleged in para. 7 of the Complaint, in Illinois 415 ILCS 5/21(f) regulates hazardous wastes, and 5/21(e) regulates solid wastes: Count I seeks relief under 5/21(e) applicable to solid wastes. *Complaint at Count I, para. 7 and Complaint at 6.* However, Count I alleges only that material was a 5/21(f) "hazardous waste", reciting the statutory definitions for waste, then skipping straight to the allegation that the material was a "hazardous waste". *Complaint at Count I, paras. 8, 9 and 14.* Thus, the Count is insufficient to confer jurisdiction, or allow relief, under 5/21(e)'s solid waste requirements as requested, as it is 5/21(f) that applies to hazardous wastes.

A related jurisdictional problem not addressed by the IPCB is that while Count V is based on 415 ILCS 5/12(g) hazardous waste jurisdiction, the lack of a "solid waste" finding in either case means that the IEPA failed to establish that the material allegedly disposed of was "discarded" (e.g a solid waste) prior to shipment to Illinois and injection, thus it could not have been a "waste" of any kind when shipped or injected, and Count V is similarly jurisdictionally flawed. *40 CFR 261.*

Quite simply, neither Count I or V allege or find that the material at issue was a 5/21(e) "solid waste" (discarded) prior to its arrival in Illinois, and thus Count I is thus fatally jurisdictionally deficient, as neither AET or EOR are alleged to have transported a RCRA 40 CFR 261/415 ILCS 5/21(e) solid waste, but a 5/21(f) hazardous waste. Similarly, there was no illegal disposal in Illinois, since EOR's alleged use was consistent with normal oil well maintenance, and any ultimate disposal was allowed by the Class II permit and provisions reviewed above. Thus, the material was never regulated as either a Subtitle C or D waste, and this matter is without jurisdiction.

waste under 415 ILCS 5/21(e) and Count 1 of the Complaint.[9] *Id.*

Relatedly, consistent with its prior cursory dismissive tenor, the IPCB in one sentence dismisses the federal RCRA statutory and regulatory framework that requires the solid waste determination be made prior to a material being subject to RCRA regulation/enforcement: "The Board has reviewed the sections of the federal regulations that EOR also relies on...and is not persuaded that those federal regulations support EOR's arguments.". *EOR Order II at 18; EOR Reply at 13.*

Similarly, the Board entirely ignores EOR's detailed, request by request arguments as to the fact that, as deemed admitted in their entirety, the Requests to Admit can reasonably be construed so as to present a set of "admitted" facts which, if proven, would result in either a lack of jurisdiction, the Complaint being mooted, and/or the violations in fact having never occurred, thus preventing summary judgement. *EOR Reply at 14-16.*

The IPCB also ignores that the Requests carefully avoided use of the terms "waste", "hazardous waste" or even "disposal" when referring to the "acid material" and the injections, thus EOR could not have admitted to such alleged "facts" (e.g that EOR disposed of a waste or a hazardous waste), by default, deemed or otherwise. *Id.* The MSJ assertions to the contrary are simply baseless, as discussed in EOR's Reply. *EOR Reply at 14-16.*

Similarly entirely ignored are EOR's detailed arguments as to the uselessness (to the IEPA/IPCB) of the nearly entirely hearsay MSJ Thompson Affidavit, which does not contain even an unsworn statement from either Mssrs. Wake or Geary as to exactly what they did with the acid material, and which attempts to utilize a hearsay summary of 3rd party-generated data (with no chain of custody or other requisite evidentiary foundations) to "prove" the material had the hazardous traits relied upon by IEPA and IPCB for jurisdiction. *EOR Reply at 14-20.*

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[9]Unfortunately, even if true, the IPCB apparently ignores the fact that the Complaint does not plead the "acid material" to be either a "waste" or "solid waste", but states only that it was a "hazardous waste". Consequently, the IPCB has in fact determined Count 1 to be deficient as to jurisdiction over the material under 5/21(e), as the material was never pleaded to be subject to same by way of being a solid waste, but rather is only alleged to be a 5/21(f) regulated "hazardous waste".

Rather, IPCB summarily concludes that it has subject matter jurisdiction, and could rule on the MSJ in the first place. *EOR Order II at 19.* Then IPCB, again selectively mis-quoting and narrowing the standard of review, concludes that "because EOR fails to raise 'new evidence or a change in the law, to conclude that the Board's decision was in error" the prior order is affirmed.[10] *Id.*

E. Terms of Order: Error - No Date Certain for Payment of Penalty

Like the first order, the EOR Order II requires EOR to pay a $200,000 penalty, but revises the due date to

> "no later than January 22, 2013 which is the first business day following the 30th day after the date of this order.". *EOR Order at 19.*

The payment terms are in obvious conflict, since January 22 was only 12 days after issuance of the order, not 30, and this is an error of fact. Other than the "revised" payment dates, the "order" portion of the September 6, 2012, order is copied verbatim by the January 10, 2013 order, including requiring EOR to "cease and desist" from the "alleged violations.", despite the Complaint not seeking such relief.[11] EOR asserts that these are errors of fact and law.

V. Conclusion

A. Violation of Law and Error for IPCB to Interpret 225 ILCS 725, Which Is De Facto Federal Statute Under IDNR Purview, By Doing So IPCB si Erroneously "Regulating" a Class II Well Contrary to Federal and State Law

By the very fact of interpreting the Oil and Gas Act and ignoring 415 ILCS 5/4(l), the IPCB

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[10]As correctly stated by the IPCB in *Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156 (3/11/93)*, the full standard is three pronged, not two: "[T]he intended purpose of a motion for reconsideration is to [1] bring to the court's attention newly discovered evidence which was not available at the time of hearing, [2] changes in the law *or* [3] *errors in the court's previous application of the existing law*." (Emphasis added).

[11] The IEPA complaint does not allege a continuing violation, but specifically alleges the period of violation to be either 1) the entire period of August 30, 2002, to February 24, 2004, or 2) "three or four months" during that period. *Compare Complaint paras. 23 and 24.* It was the MSJ which requested the injunctive relief, which is unwarranted and must be vacated as well.

has made yet another crucial and patent error, as IEPA/IPCB is clearly prohibited under both federal and state law from making any determination as to what is "reasonable waste", a "Class II fluid" or an "oilfield waste" when an Oil, Gas, or Class II well is involved, period, such determination being solely within IDNR's SDWA use-based authority, not IEPA's RCRA constituent-based jurisdiction.

Since 225 ILCS 725 was in fact adopted as federal law under the SDWA, the IPCB is in fact attempting to determine what is regulated under the SDWA as to EOR's Class II wells, and is making an election to apply RCRA, rather than defer to the SDWA and IDNR. IPCB also errs in opining that IEPA can require a second permit for a Class II well for injections that do not violate the Class II permit, such overlap having been specifically rejected by USEPA as early as 1984, and as recently as this year.

B. Class II Permit is a Shield and Prevents IEPA Enforcement

Given that the IDNR inspected the facilities at issue at the same time IEPA did, and given the lack of any indicia that the IDNR found an injection or any other violation of EOR's permits, EOR's SDWA UIC Class II permit is in fact a shield against IEPA enforcement that bars this action, and IPCB erred by failing to honor the permit and IDNR authority and by not dismissing this matter for lack of jurisdiction.

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

C. Summary Judgement Precluded Since, Inter Alia, Legal Class II Use is as Reasonably Inferred as Illegal RCRA Disposal

The issues of the effect of the State's requests to admit and potential waivers or deemed admissions do not obviate the lack of jurisdiction for Counts I and V, as subject matter jurisdiction may not be created, or penalties assessed, even by agreement of the parties, where jurisdiction does not exist in law and fact. *Id.* However, upon inspection, the record is clear that

the Movant has not met its burden, as there exists a set of "facts" that can reasonably be inferred to obviate jurisdiction and liability. Thus, the September 6, 2012, and January 10, 2013, Orders are without jurisdiction, incorrect in fact and at law, and are void. *Ruhrgas AG v. Marathon Oil Co., Supra; People v. Wade, Supra; 35 IAC 704.102; 225 ILCS 725; 62 IAC 240; 35 IAC 101.520 and 101.902*

VI. Relief Requested

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

A. Vacate its September 6, 2012, and January 10, 2013, Orders, in their entirety;

B. Deny Summary Judgement;

C. Dismiss EOR from this matter with prejudice, with leave to seek fees and costs;

D. Issue any additional relief in Respondent's favor deemed appropriate under the circumstances or as justice or equity requires.

Respectfully submitted For E.O.R. on February 19, 2013, By:

s/: *Felipe Gomez, Esq.*

Felipe Gomez, Esq.

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ATTACHMENT A

MAR 2 2 1984

5WD-12

Mr. George R. Lane, Chief
Division of Oil and Gas
Illinois Department of Mines and Minerals
704 State Office Building
Springfield, Illinois 62706

Dear Mr. Lane:

Your agency submitted an application under Section 1425 of the Safe Drinking Water Act (SDWA) on January 14, 1982, for the approval of an Underground Injection Control (UIC) program governing Class II injection wells. After careful review of the State's application, Regional and Headquarters review teams have determined that the State's injection well program meets the requirements of Section 1425 of the SDWA. The program was approved by the Administrator on February 1, 1984, and was effective immediately.

I have signed and am returning a copy of the Memorandum of Agreement which you signed and submitted as part of your application, for your files. A copy will also be forwarded to EPA Headquarters.

We look forward to working with you and your staff in the future.

Sincerely yours,

Original Signed by
Valdas V. Adamkus

Valdas V. Adamkus
Regional Administrator

Enclosure

bcc: Mary Canavan, 5RA

5WD-12:B.ORENSTEIN:sj:3/22/84

3/23/84

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