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 March 22, 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 24, 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 March 22, 2013, e-file with the Clerk, and on same date did send by e-mail and/or 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 **AET Environmental, Inc**., to the following persons by the method and at the address indicated:

SERVICE LIST

E-Filed with:

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

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

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

Respectfully submitted on March 22, 2013 By,

s/: *Felipe Gomez*
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
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STATE OF ILLINOIS Complainant,	)	
v.	)	PCB No. 07-95 (Enforcement)
AET ENVIRONMENTAL, INC. AND E.O.R. ENERGY, LLC, Respondents.	)	

AET ENVIRONMENTAL INC. MOTION FOR RECONSIDERATION

NOW COMES CO-RESPONDENT AET ENVIRONMENTAL INC, by and through undersigned counsel of record, (hereinafter "AET"), 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 24, 2013, Order ("AET Order") 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 **thereafter DENY** the Motion for Summary Judgement as to AET, and **DISMISS** this matter for lack of jurisdiction, as set forth below.

Due to the fact that, in the January 24, 2013 AET Order the IPCB elects for wholesale adoption of the positions of IPCB's September 6, 2012, Order ("EOR Order I") and the newly espoused jurisdictional basis in the January 10, 2013, Order (which in turn essentially adopts the State's 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)*, AET incorporates herein by reference, and adopts in support of this Motion, EOR's October 18, 2012, Motion to Reconsider, EOR's December 12, 2012, Reply, the February 19, 2013, EOR Motion to Reconsider, and the EOR jurisdictional arguments from the Motion contained in Attachment A hereto. *See October 18, 2012, EOR Motion to Reconsider at 1-8*; *December 12, 2012, EOR Reply at 6-28; February 19, 2013, EOR Motion to Reconsider*. In

addition, AET states the following in support of this Motion and AET's points of error set forth below.

I. Procedural Background

On March 23, 2007, the Attorney General of the State of Illinois ("Illinois" or "State"), on behalf of the Illinois Environmental Protection Agency ("IEPA") filed a five-count administrative complaint ("Complaint") with the Illinois Pollution Control Board against Colorado corporations AET Environmental, Inc. and E.O.R. Energy, LLC ("EOR") (collectively "Respondents" or "Co-Respondents") alleging waste transportation, storage and disposal violations of the Illinois Environmental Protection Act (Act) and related regulations, specifically 415 ILCS 5/ et seq., and implementing regulations found at 35 IAC 700 et seq., over a 24-31 month period from 2002 to 2005. *March 23, 2007, Complaint.*

Of the five counts, Counts 1 (Illegal transport of a waste for disposal from Colorado to Illinois) and 5 (Illegal disposal in Illinois) pertain to AET, with the State praying that the IPCB find AET liable under 415 ILCS 5/21(e) for allegedly shipping the material to Illinois (Count 1), for the purpose of subsequent illegal disposal (and incident storage) of the material at issue by co-respondent EOR at two of EOR's Illinois oilfields (Count 5). *See Complaint, Counts 1 and 5 generally, and specifically at 6, para. 31 and Prayer for Relief for Count 1.*

On October 18, 2007, Respondents each filed an answer to the Complaint through their attorney at the time, denying liability and putting the parties at issue, whereafter the filing attorney withdrew his appearance.

On March 24, 2008, the State filed and served a Request to Admit ("RTA") facts by AET, and on January 23, 2009, filed and served a request to admit facts by EOR. After EOR filed an unsigned and unsworn response to the requests and AET failed to respond through an attorney, on August 17, 2010, the State simultaneously filed motions to deem facts admitted against AET and EOR, which motions were granted on September 16, 2010.[1]

[1] The respective Requests to Admit can be found as Exhibit A to each of the respective MSJs, which Exhibits are contained in a separate pdf from the MSJ narrative. Mr. Johnson's affidavit as to the State's MSJ against AET is found at Exhibit J thereto, and as to EOR MSJ at Exhibit I thereof. References herein are to both the page number found on the document, as well as to the page number assigned by the pdf reader (e.g Mr. Johnson's AET affidavit, Exh. J. to the AET MSJ, begins at page 56

On June 27, 2012, the People simultaneously filed motions for summary judgment against AET and EOR (AET and EOR MSJ), which motions rely almost entirely on only two sources of "testimony" and evidence: 1) the requests to admit as deemed admitted; and 2) the sworn (and nearly identical) affidavits of Richard Johnson, IEPA Assistant Regional Manager, Bureau of Land, Division of Land Pollution Control, Field Operations Section.[2]

On August 6, 2012, Illinois Attorney Felipe Gomez filed his appearance on behalf of AET, and on August 13, 2012, filed a status report as to ongoing and anticipated attempted negotiations.

On September 6, 2012, the IPCB issued an order granting the State's MSJ as to EOR on all 5 counts of the Complaint ("IPCB Order") and finding EOR liable as the transporter, storer and disposer under 451 ILCS 5/21(e) and (f). However, the IPCB held in abeyance a decision on the AET MSJ, but did not give a reason therefore. On September 14, 2012, Attorney Gomez filed

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of 197 as indicated by the pdf reader. Correspondingly, page 5 of that affidavit corresponds to page 60 of 197 of the pdf, thus the citation will be *"AET MSJ Exh. J, Johnson Affidavit at 5 (60/97 pdf)*").

As discussed in detail in both EOR and AET's pleadings and summarized below, an inspection of the Requests reveals that they contain numerous instances of conflicting requests, resulting in conflicting material facts once all the requests were deemed admitted in their entirety (the State motion did not choose or single out the requests needed for liability, but instead requested all the requests be deemed admitted), that should have at least precluded summary judgement, even without input from AET, as they have AET admitting to a set of "facts" that would lead to a lack of jurisdiction and liability. For example, the AET RTA's, as deemed admitted, have AET both paying for and being given the acid material, selling and giving away the same acid material to EOR, and transporting and not transporting the material to Illinois. If the latter set of conflicting "facts" are resolved in favor of AET (as should occur on MSJ under the correct standard), AET could not be liable as a 415 ILCS 5/ "transporter", as it was deemed a "fact" that AET did not transport anything into Illinois. EOR's RTAs, as deemed admitted, also contain similar conflicts that render MSJ inappropriate and destroy jurisdiction as to both AET and EOR.

[2]Both of the State's MSJs and Responses rely on 5 items of record for support, each of which is analyzed in EOR's 12/12/12 Reply:

- The 3/27/07 Complaint;
- EOR's 10/18/07 Answer to the Complaint;
- State's 1/23/09 Requests to Admit;
- IPCB 9/16/10 Order granting State's 8/17/10 Motion to Deem;
- People's 6/27/12 Motion for Summary Judgment, specifically the affidavit, with attachments, from Illinois EPA inspector Richard Johnson;

See e.g. 11/14/12 State Response to EOR Motion to Reconsider at 6.

his appearance for EOR.

On October 18, 2012, EOR filed a motion to reconsider the September 6, 2013, Order, followed by the State's November 14, 2012, Response and EOR's December 12, 2012, Reply. On November 14, 2013, AET filed its Response to the State MSJ, which the State moved to Strike on December 4, 2013 (despite leave having been granted for the filing of same. On December 24, 2012, AET responded to the Motion to Strike.

On January 10, 2013, IPCB issued its order "upholding" its prior September 6, 2012, order. 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 and the AET Order "final". *Illinois Supreme Court Rule 304.* The January 24, 2013 Order adopted the January 10, 2013, EOR Order's jurisdictional position and arguments in response to AET's arguments in its November 14, 2012, Response to the State MSJ.

On February 19, 2013, EOR filed a Motion to Reconsider the January 10, 2013, Order, and on February 26, 2013, the State moved to strike that motion.

* * *

Due to new errors of fact and application of law, AET files this motion to reconsider the January 24, 2013, 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 (and hence in the AET Order) 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).

* IPCB's failure to acknowledge the insufficiency of the record below in regard to the lack of pleading and facts supporting IEPA and IPCB jurisdiction, including ignoring and failing to explain away patent fatal factual and legal flaws in the Complaint, the Requests to Admit, and the single hearsay affidavit attached to the MSJs.

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 in EOR 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").[3]

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

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

attacked at any time, either directly or collaterally).[4] *EOR Order II at 16.*

IV. Standard of Review/Burden of Proof: Motion for Summary Judgement

A. IPCB Agrees That the Pleadings and Affidavits Must Be Strictly Construed Against the State, Liability Must Be Clear and Free from Doubt

As correctly stated by the Board in the AET Order

> "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). *AET Order at 13.*

B. Burden on Movant to Establish Jurisdiction and PFC

The Board similarly correctly espouses the burden of proof, that being the State must plead and make a prima facie case of the violations alleged (and by inference, and law, must also first

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[4]Relatedly, and with regard to the State's December 4, 2012 Motion to Strike the AET Response , the IPCB denied the Motion in one summary paragraph:

> "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. *Order at 9 and fn 4.*

In denying the motion to strike, the IPCB essentially correctly found that the vehicle by which a jurisdictional defect is raised (and dismissal requested due thereto) is generally irrelevant and need not be done only by a 735 ILCS 5/2-615 (Illinois Code of Civil Procedure) motion to dismiss, or at an early date (30 days from service of complaint) contra to the State's arguments. It also appears to have agreed with AET that the issue of jurisdiction is relevant and a proper issue for a response to a MSJ since, even if there are no issues of material fact, a lack of jurisdiction would mean that Plaintiff was not entitled to judgment as a matter of law, and dismissal is required instead (as AET believes is required as to both co-respondents). *AET Order at 7-8.*

establish that jurisdiction exists to even enforce the violations, as well).[5] *AET Order at 13-14.*

V. AET Order: Points of Error

The January 24, 2013, Order granted Illinois' June 27, 2012, Motion for Summary Judgment against AET, specifically finding that the IPCB had subject matter jurisdiction, and ordering AET to pay a $60,000 penalty for violation of 415 ILCS 5/21(e), both of which holdings AET alleges were patent error. *AET Order at 1, 22*. The order consists of six parts: procedural history (pp1-2), summary of complaint/allegations (p3), the recitation of IPCB version of the facts of the case (pp3-6), motion to strike (pp6-9), motion for summary judgment (pp9-16), penalty (pp16-21) and payment terms (pp21-22).

A. IPCB Recitation of Facts Erroneously Relies, as Does MSJ, Nearly Exclusively on State's Conflicted Requests to Admit to AET

A reading of the Board's recitation of the "facts" reveals that it relies almost entirely on general page citations to the March 24, 2008, Requests to Admit (RTA) issued to AET *(Located at MSJ Exh. A*), as deemed admitted by the Board's September 6, 2010, Order. *AET Order at 3-6.* As discussed in detail in the AET Response to the MSJ's similar reliance on the RTAs (*See November 14, 2012, AET Response at 13-16, 18-26,* which arguments are incorporated herein*)*, the RTAs contain numerous conflicting facts, including a set of "admitted" facts, that directly contradict the facts the Board's cites and relies on for liability. *November 14, 2012, AET Response at 13-16, 18-26*. Thus, the Board's election to ignore the RTA "facts" contrary to the State's case is in fact error, as it effectively reverses the standard on MSJ by favoring movant despite "facts", also deemed admitted by the Board, that contradict the State's facts and case.[6] *Dowd & Dowd, Ltd. V. Gleason*,

[5]As discussed below, AET asserts as overarching error that the IPCB failed to properly apply these standards as to AET, and that the record, here consisting of certain pleadings relied upon by the State (Complaint, Requests to Admit and Johnson affidavit), do not support a prima facie case as to jurisdiction, let alone liability, even without construing them against movant, and that the IPCB erred in finding that the State established jurisdiction and even a PFC of the alleged violations.

[6]AET also incorporates herein by reference EOR's related arguments as to the January 23, 2009, EOR Requests to Admit, contained in EOR's December 12, 2012, Reply at 14-16, as well as in Appendix 1 hereto.

181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998).

B. Numerous Arguments Erroneously Summarized and/or Not Addressed, Especially 415 ILCS 5/4(l)

An overview of the IPCB's summary of arguments (pp9-13) indicates that the IPCB incompletely and selectively paraphrases the AET's Response, and mischaracterizes, oversimplifies and ignores numerous of AET's detailed arguments in its discussion. *AET Order at 9-13.*

For example, while the IPCB cites AET's Response's reliance on 415 ILCS 5/4(l) as a basis for lack of IEPA jurisdiction (in a section labeled "Material Not Discarded"), neither the AET or the EOR Order II discuss the provision, the distinctions between IEPA and IDNR jurisdiction (*See AET November 14, 2012, Response at 4-7*), or explain why IEPA can ignore that provision. *AET Order at 11.* Rather, it merely states that the Board has "heard similar arguments" from EOR, and that the Board already found that the fluid used at the EOR oil wells was not a Class II fluid, and that the IEPA regulates hazardous waste injection into Class II wells, not IDNR. *AET Order at 14.*

Thus, while IPCB recites the gist of AETs' arguments as to jurisdiction, it fails to even pay lip service to the majority of same in either Order. IPCB thus erred at law as it failed to abide by its own implementing statute, and by failing to interpret and apply it (let alone misinterpret it).[7] *415 ILCS 5/4(l)*.

C. IPCB Errs In Mis-paraphrasing Response and Finding That "Admitted" Facts Are Uncontested

Underlying the IPCB error in its prior rendition of the "facts", and again ignoring AET's assertion that the State's poorly drafted Requests to Admit themselves, as deemed admitted, create disputed issues of material fact that preclude summary judgment and destroy jurisdiction, the IPCB ignores several pages of argument and condenses another seven pages into one sentence:

[7] *Hall v Denn, 208 Ill. 2d 325* (2003)(Defendant's MSJ denied "as a matter of law" because indemnity provided by Recreational Use of Land And Water Areas Act, 745 ILCS 65/1 (West 2002), expressly applied only to general public users, where plaintiff's use of defendant's ski slope was for private purposes.)

> "AET points to other admitted facts and claims that those facts also failed to establish AET's liability. Resp. at 21 – 27.". *Order at 13.*

This is an incorrect paraphrasing, as the "other admitted facts" are cited by AET as materially contradicting the IEPA version of the facts, thus precluding summary judgement.

For example, the IPCB ignores that the very same Requests include conflicting "admissions" as to who was paid by Luxury (a basis cited by IPCB for liability):[8]

> "Finally, Requests Numbers 125-127 (alleging sequentially that all each AET, EOR, and then Luxury "paid" for the shipment) do not establish AET, or anyone else, as the shipper, since, as in other instances, they appear to be alleged in the alternative given that they all three cannot be true in reality, and in any event are grounds for denial of the MSJ as these circumstances are material and the multiple "admissions" render the issue disputed, and thus summary judgment must be denied. *35 IAC 101.516; Dowd & Dowd, Supra.*
>
> As the State is movant, and given the conflicting facts, it cannot be inferred that AET in fact paid anything, or was thereby the responsible party, rather it must be assumed that AET did not pay for the shipment, and in any event payment is"...[not]..."coextant with being the transporter under 415 ILCS 5/21(e). Also, the allegation in No. 125 as to AET paying for the shipment is further contradicted by Request Nos. 120-123 (stating EOR was in control), and paragraphs 19-21 of the Complaint (alleging EOR as the sole arranger/shipper). *AET Response at 15.***"**

D. IPCB Reverses Standard on MSJ by Ignoring Numerous Other Conflicting Material Facts

There are numerous other instances where it appears that the IPCB ignores the conflicting admissions of material fact and elects to give credence to the State's version, despite the rule on MSJ being that conflicts must be resolved against the movant (e.g. it must be assumed that AET was not paid, and that the other conflicting admissions of "fact" support another potential theory of liability that does not implicate AET, thus precluding MSJ and requiring the conflicts to be resolved at trial and/or after additional discovery.).

The IPCB's apparent reversal of the standard of review for MSJ is error that is independent of the substance of the admissions/facts were that were misconstrued, which should be reversed

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[8]The IPCB based both its liability and penalty findings in great part on the assertion that AET got and did not return payment from Luxury: "Luxury Wheels paid AET"; "AET did benefit economically"; "an economic benefit did accrue"; "AET was able to keep all the money". *Order at 15, 19, 20, and 18, respectively.*

on reconsideration, along with whatever other errors or ignorance of AET's other substantive objections and arguments.[9] With regard to the findings, a quick review of the discussion portion of the order reveals several points of note and error.

E. IPCB Incorrectly Finds MSJ Based on "Uncontested Facts" - Johnson Affidavit Contradicted By "Facts" of Record

Relevant to the foregoing discussion, the Board finds that there were no issues of material fact based upon the failure of AET to respond to the States' Requests to Admit or to the Motion to Deem to have the facts stated therein admitted, and the September 16, 2010 IPCB order deeming (all) the Requests admitted. *Order at 14*. Additionally, the board found that AET did not "include any affidavits or *challenge to the facts admitted*" in its Response to the MSJ, thus apparently, according to the board, failing to raise disputed issues of material fact. *Id.*

The board is wrong on at least two interrelated points in regard to the "material fact" prong of MSJ analysis. While correct that there was no affidavit appended to the AET Response, such affidavits are only necessary where the movant's affidavit asserts relevant material facts that could be entered in evidence at trial, that which, if uncontradicted, would entitle movant to judgment.[10] However, even admissible "facts" asserted in an movant's affidavit may be contradicted or contested by items already of record without the need for a counter-affidavit. The existence of contradictory facts of record precludes MSJ and requires a court to decide if the testimony at issue is relevant, credible, and material, and then what weight to give it (if any), in view of the contradictory matters of record and the record as a whole.[11]

As pointed out in AET's response (pp12, 32) as well as in EOR's briefings, the State's

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[9]While this is the first time the IPCB makes the error as to AET, it misapplied the standard a second time as to EOR, even after having the same error pointed out in EOR's motion to reconsider.

[10]*See AET Response at 32-34.*

[11]AET's Response points out that the board is required to assure that the RTAs and Johnson Affidavit evinces "undisputed or uncontradicted facts" that support the assertion of jurisdiction, let alone liability and penalty for the asserted violations. *AET Response at 9.* The IPCB Order fails to do so, simply ignoring the contradictory admissions and mis-stating/glossing over AET's arguments, rather than explaining why the are "unpersuasive".

Johnson Affidavit consists almost entirely of hearsay and secondhand observations made after the admitted cessation of alleged disposal activities, and thus does not contain "evidentiary facts" that would require contradictory sworn testimony by an opponent to MSJ. Rather, the Johnson affidavit amounts to mere second hand allegations as to the circumstances and statements of others contained therein, and the State's reliance thereon begs the issue of why the State failed to obtain affidavits from the alleged eyewitnesses/perpetrators. In any event, there simply is no eyewitness testimony or documentation of disposal in Illinois or testimony as to AET's actions in Colorado, to contradict by counter-affidavit.

Relatedly, the board is incorrect in asserting that the AET Response failed to contain a "challenge to the facts admitted", since, as excerpted in part above, the Response in fact clearly identifies several conflicting "admissions" of material fact and related inconsistencies between the RTA's state on their face and what the MSJ claims they say admit to, all of which that preclude several of the IPCBs findings and the granting of the MSJ. *Order at 14.* In fact, pages 13-27 of the AET Response categorically discuss how the RTA's simply do not state the "facts" as asserted by the MSJ (and now the IPCB), to which the IPCB essentially gave a one sentence review and ignores in its findings here, all of which will be a basis for reconsideration and then appeal.

F. IPCB Relies Only RTA's For Violation, IPCB Ignores Bulk of AET Arguments

As with its "Facts" section , and as does the MSJ, the Board cites almost exclusively to the AET RTAs to find facts constituting a violation of 5/21(e) by AET. *Order at 15.* Again, the IPCB "discussion" here entirely ignores AET's arguments relating to the contradictory RTAs and Johnson Affidavit challenged by both EOR and AET. The IPCB reliance on the RTA's without addressing the RTA conflict and the Johnson Affidavit inadequacies is again error, as these facts are relevant to both jurisdiction and liability, and the conflicts and lack of evidence cannot be ignored. *AET Response at 10–20, 32-34.* Furthermore, the IPCB ignores AET's detailed dissection of the MSJ's playing fast and loose with what the RTA's themselves state, and the many instances where the MSJ narrative itself attempts to "fill in" the missing elements and facts not present in the RTAs' or elsewhere in the record. *AET Response at 20-27.*

G. Board Errs By Ignoring Argument that Complaint/RTAs Plead AET Out of Case, and that EOR was Already Found to be 5/21(e) Transporter to Exclusion of AET

Similarly, the IPCB ignores the AET arguments that the State's Complaint is jurisdictionally and factually inadequate as to AET, and that the Complaint, EOR and AET RTAs, and the September 6, 2012, Order (and now the January 10, 2013, Order) plead AET out of the case as they establish that EOR is solely responsible (if anyone). *AET Response at 10-20.* The Board avoids a discussion of these merits by merely stating that its January 10, 2013 Order applies only to EOR (which is false, as IPCB adopted that Order's jurisdictional discussion as its response to AET's arguments), and that IPCB had reserved ruling on AET. *AET Order at 15.*

H. $60,000 Penalty Assessment Erroneously Relies on Same "Uncontested Facts" From RTAs

While the Board finds that AET failed to respond to the MSJ's penalty arguments, an inspection of the MSJ penalty arguments reveals the State uses same facts used to support liability as the basis for the penalty arguments *AET Order at 18; MSJ at 27-31.* In fact, the IPCB did not base the penalty on the alleged lack of objection to penalty in AET's response, but rather on the "uncontested facts" outlined in the MSJ and earlier in the Order. *Order at 18-21.*

In any event, it is clear that AET objected to the penalty by attacking jurisdiction and the facts underlying the penalty, and requesting dismissal of the entire matter, and cannot be held to have conceded it. AET's Response does in fact attack the penalty by way of attacking the facts that underlie it, in conjunction with contesting liability.

VI. Conclusions

A. 415 ILCS 5/21(e) Does Not Hold "Arrangers" Liable, Only Persons Who Transport

Central to the Board's decision was its finding that "AET actions prior to the shipment to Illinois establish that AET was responsible for transporting the waste to Illinois...and the evidence is uncontroverted that the material...was ultimately disposed of in wells owned by EOR". *Order at 16.*

Erring at law, it appears that the Board is attempting to impose CERCLA-like "arranger" liability on AET, equating "transporting" under 5/21(e) as being the same as "responsible for transporting", even though 5/21(e) does not expressly include "arrangers" or "shippers", but only the entity that actually is responsible for transporting the waste into the state, here EOR. Concomitantly, such finding is also an error in fact, as the IPCB has already found, twice, that EOR was the 5/21(e) "transporter". *EOR Orders I and II.* Tellingly, neither the State MSJ or IPCB orders cite any caselaw supporting the expansive interpretation of 5/21(e) impart CERCLA-like joint and several liability.

This is clear error, as an agency, or court, simply cannot interpretatively "write-in" provisions that expand the jurisdictional scope of a statute, or even its own regulations, beyond what appears in black and white, and that is exactly what the IEPA, IAG and IPCB are attempting to do here. *Legal Environmental Assist. Foundation v. U.S. EPA*, *276 F. 2d 1253 (11th Cir. 2001)*("Agency deference aside, EPA cannot rewrite legislation through interpretation, it must abide by enabling statutes and regulations until they are amended). Further, the IEPA's mere assertion that AET was somehow also the transporter in addition to EOR is insufficient to convey jurisdiction, without pleading and proving sufficient facts. *Dixon v. Coburg Dairy, 2004 U.S. App. LEXIS 10233 (4th Cir 2004)*(Conclusory assertion that defendant was subject to and violated statute not sufficient to demonstrate subject matter jurisdiction), *Roche v. Lincoln Property Co, 373 F.3d 610; 2004 U.S. App. LEXIS 13488 (4th Cir 2004*)(courts with limited jurisdiction must presume the absence of jurisdiction and must ignore mere conclusory allegations of jurisdiction), *NHL Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 468 (6th Cir. 2005)(*Sufficient pleading requires more than bare assertion of legal conclusions, complaint must contain either direct or inferential allegations respecting all the material elements and state a viable legal theory).

B. One Paragraph Jurisdictional Finding Relies Entirely on 1/10/13 EOR Order, Again Ignores 415 ILCS 5/4(l) Prohibition on IEPA Regulation of Class II Wells

As with the 1/10/13 EOR Order, another major point of error appears to be the IPCB's continuing belief that "IDNR does not regulate the disposal of hazardous wastes into the wells at issue...and the Board has subject matter jurisdiction.". *Order at 14.* Despite the importance of

jurisdiction, the IPCB spends only one buried paragraph on the jurisdictional issue, and cites entirely to its prior 1/10/13 Order for support for its rejection of AET's jurisdictional arguments, again without bothering to provide even a scintilla of explanation as to why 415 ILS 5/4(l) does not apply or why it is silent as to the types of fluid injected and rather bans any sort of IEPA regulation of a Class II well, without exception. *Id; 415 ILCS 5/4(l).*

Given the adoption of the EOR Order's jurisdictional findings as to AET, it is assumed that IPCB also reviewed the briefings underlying that Order, which explain Respondents' assertion that 415 ILCS 5/4(l) prohibits regulation, including this action. *12/12/12 EOR Reply at 6-7, 21-28.* However, and tellingly, while the IPCB cites generally to 415 ILCS 5/4 for its jurisdictional authority, it again entirely ignores 415 ILCS 5/4(l)'s prohibition as to IEPA regulating Class II wells, despite it being repeatedly referenced as a primary reason for lack of jurisdiction in EOR's 12/12/12 Reply to the State's Response to EOR's Motion to Reconsider, as well as in AET's Response to the MSJ and again in AET's Response to the State's Motion to Strike.[12] *12/12/12 EOR Reply at 6-7, 21-28.*

Such omission and ignorance of the bar on IEPA regulation is clear, since the IPCB has already admitted/found that EOR wells at issue were in fact Class II UIC wells:

> "EOR, by failing to respond to the complaint, the request to admit, or even the motion for summary judgment, admits that the material being injected in the Class II UIC wells is a hazardous waste. *See generally* People v. AET Environmental, Inc. and E.O.R. Energy, LLC, PCB 07-95 (Sept. 16, 2010). 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)." *EOR Order at 18.*

As such, IPCB has no authority to hear IEPA's illegal transport/storage/injection complaint as there is no subject matter jurisdiction, that residing with IDNR, not IEPA.[13]

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[12] While the 1/10/13 Order (selectively) paraphrases the 12/12/12 Reply, and mentions EOR's assertions that the wells at issue are Class II wells not regulated by IEPA, it fails to mention that the basis for the argument is 415 ILCS 5/4(l), and fails to explain how IEPA can still regulate the wells in view of that provision. Rather, IEPA appears to simply pretend that provision does not exist, and that it can regulate Class II wells regardless of the IDNR's apparently admitted authority over the wells.

[13] EOR and AET's point is drilled home by a review of the Fracking legislation now pending in the Illinois legislature (House Bill 2615/Senate Bill B3280) requiring that the owner or operator of an oil

C. MSJ Cannot Be Considered and Must Be Denied Since No Jurisdiction, Inference Of Illegal Disposal Not Warranted Since Alternate Inference Exists

The inference, for purposes of the MSJ and for proof of jurisdiction (the burden always being on plaintiff), cannot be that "illegal disposal" occurred, but rather must be that the "acid material" was being used as an industrial cleaning/enhancing agent for EOR's wells, and such use and any "disposal" thereafter was subject only to 225 ILCS 725 and 62 IAC 240 requirements, not IEPA or 415 ILCS 5/ et seq. If there was no "illegal disposal" then AET cannot be liable under Counts 1 or 5.

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

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

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

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or Class II well must provide information to the IDNR as to the amounts, handling, and, if necessary, disposal at an identified appropriate disposal facility, or reuse of the well stimulation fluid load recovered during flow back, swabbing, or recovery from production facility vessels. *See Proposed 225 ILCS 725 5/6.8* Thus, and even though the new legislation is being held up by fracking opponents, it is clear that the legislature intended, and continues to intend, that IDNR, nor IEPA, regulate all activities at both production and Class II wells (into which fracking fluids, such as the acid material at issue in the case, can be legally injected without first being circulated through and oil well), including determining whether whatever is injected into them is a Class II fluid, or not. *415 ILCS 5/4(l), et al.* Again, this is why IDNR and Mr. Pilliam did not pursue EOR and AET, as there were no SDWA violations of the Class II permits observed.

of their authority." *Id.*

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

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

Lyndonville Savings Bank & Trust Company v Lussier, et al., 211 F.3d 697 (2nd Cir. 2000).

Further, even if 415 ILCS 5/ jurisdiction existed, the State has failed to create a record proving illegal disposal occurred, or that a solid or hazardous waste was ever handled by AET or EOR, as the record indicates it was used as a Class II fluid, exempt from IEPA regulation. *415 ILCS 5/4(l).* Consequently, the Board, having no 415 ILCS 5/ jurisdiction over the Class II fluid, the Class II wells and the associated oil wells, cannot even rule on either of the MSJs.

VII. Relief Requested

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

A. Vacate its January 24, 2013, Order, in its entirety;

B. Deny Summary Judgement as to AET;

C. Dismiss AET 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 AET on March 22, 2013, By:

s/: *Felipe Gomez*

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ATTACHMENT A

ATTACHMENT A
TO
AET MOTION TO RECONSIDER

E.O.R. Jurisdictional Arguments Adopted By AET

As discussed above, AET argues on reconsideration that the Orders against AET, including the January 24, 2013, IPCB Order, are invalid, *inter alia*, as a consequence of the lack of jurisdiction over EOR's activities and the oil well acidization material AET is accused of transporting for disposal, and because EOR's use of the material was regulated by IEPA under 225 ILCS 725, not IEPA 415 ILCS 5/, and in any event was not illegal storage or "disposal" since EOR in fact had UIC permits, contrary to the Complaint's allegations. *415 ILCS 5/4(l); 40 CFR 144.1.*

Since the material was not destined for "disposal" and was utilized for acidization of EOR's wells, it was an oilfield Class II fluid, and not a RCRA "solid waste" at the time of transport or thereafter, and AET (and EOR) never handled a "solid waste" or "hazardous waste" or arranged for/performed any transportation or " IEPA regulated disposal" of any waste. Since, the IPCB relied entirely on the January 13, 2013, EOR Order II for the jurisdictional support for the AET Order, AET presents and adopts the following EOR arguments for reconsideration and lack of jurisdiction, as support for AET's argument that the IPCB lacks jurisdiction over it as well.

I. 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*.

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.[14] *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.

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

1. EOR 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

[14] 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.

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.[15] *EOR Motion at 4, 8.*

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

[15]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.

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.[16] *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 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.[17] *EOR Reply at 22-24.*

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[16]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.

[17]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

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.[18] *EOR 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

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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.

[18]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)".

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.").

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/ 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...".[19] *EOR Order II at 17.*

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[19]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

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 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

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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.

Finally, EOR and AET's point is drilled home by a review of the Fracking legislation now pending in the Illinois legislature (House Bill 2615/Senate Bill B3280) requiring that the owner or operator of an oil or Class II well must provide information to the IDNR as to the amounts, handling, and, if necessary, disposal at an identified appropriate disposal facility, or reuse of the well stimulation fluid load recovered during flow back, swabbing, or recovery from production facility vessels. *See Proposed 225 ILCS 725 5/6.8* Thus, and even though the new legislation is being held up by fracking opponents, it is clear that the legislature intended, and continues to intend, that IDNR, nor IEPA, regulate all activities at both production and Class II wells (into which fracking fluids, such as the acid material at issue in the case, can be legally injected without first being circulated through and oil well), including determining whether whatever is injected into them is a Class II fluid, or not. *415 ILCS 5/4(l), et al.* Again, this is why IDNR and Mr. Pilliam did not pursue EOR and AET, as there were no SDWA violations of the Class II permits observed.

Injected

Now having "established", as a matter of law, what the OGA's and IDNR's jurisdiction is limited to, and formally finding 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 fluid at issue being a characteristic 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".[20] *EOR Order II at 18.*

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[20]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

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

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wastes, and 5/21(e) regulates solid wastes: Count 1 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.

[21]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".

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.*

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.[22] *Id.*

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 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

[22]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).

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 AET or any 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 Respondents as set forth in the Orders, and the Orders are 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*

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

The inference, for purposes of the MSJ and for proof of jurisdiction (the burden always being on plaintiff), cannot be that "illegal disposal" occurred, but rather must be that the "acid material" was being used as an industrial cleaning/enhancing agent for EOR's wells, and such use and any "disposal" thereafter was subject only to 225 ILCS 725 and 62 IAC 240 requirements, not IEPA or 415 ILCS 5/ et seq. If there was no "illegal disposal" then AET cannot be liable under Counts 1 or 5.

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

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

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

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

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

Further, even if 415 ILCS 5/ jurisdiction existed, the State has failed to create a record proving illegal disposal occurred, or that a solid or hazardous waste was ever handled by AET or

EOR, as the record indicates it was used as a Class II fluid, exempt from IEPA regulation. *415 ILCS 5/4(l).*

Consequently, the Board, having no 415 ILCS 5/ jurisdiction over the Class II wells and associated oil wells, cannot even rule on the MSJ, and must dismiss this matter at first opportunity. *Id.*