Illinois Attorney #6197210

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

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

NOTICE OF ELECTRONIC FILING

ALL PARTIES PLEASE TAKE NOTICE that on November 14, 2012 , I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601 , the following **Response** a copy of which is attached hereto and served upon you.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I did on November 14, 2012, 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 e-mailing or depositing in a United States Post Office Box, a true and correct copy of this document and the following instrument entitled **AET Response to Motion for Summary Judgment**, by counsel for **Respondent AET Environmental Inc**., to the following persons as indicated:

Service List

E-Filed with and E-Served on the Board Through:
Dorothy Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph - Suite 11-500
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By E-Mail Mr. Michael D . Mankowski, Esq. Assistant Attorney General 500 South Second Street Springfield, Illinois 62706	By E-Mail E.O.R. ENERGY, LLC 14 Lakeside Lane Denver, CO 80212
By U.S. Mail: Hearing Officer Carol Webb IPCB 1021 N. Grand Avenue East Springfield, IL 62794	

Respectfully submitted,
s/: ***Felipe Gomez, Esq.***
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STATE OF ILLINOIS Complainant,	)	
v.	)	PCB No. 07-95 (Enforcement)
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AET RESPONSE TO MOTION FOR SUMMARY JUDGEMENT

NOW COMES RESPONDENT AET ENVIRONMENTAL, INC. ("AET"), by and through undersigned counsel, and with prior leave of the Hearing Officer, and files this Response to the State's Motion for Summary Judgement against AET, and **HEREBY MOVES the IPCB to dismiss this matter in its entirety with prejudice immediately for lack of 415 ILCS 5/21(e) jurisdiction**, and for, *inter alia*, the failure of the State to establish any facts establishing jurisdiction over or any violations by AET under the statute. AET states in support as follows:

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 complaint ("Complaint") with the Illinois Pollution Control Board ("IPCB") against Colorado corporations AET Environmental, Inc. ("AET") 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 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, where after the filing attorney withdrew his appearance. On March 24, 2008, the State filed a request to admit facts by AET, and on January 23, 2009, filed 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.

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 two sources of testimony: 1) the unopposed requests to admit that were deemed admitted by the IPCB; and 2) the sworn (and quite similar) affidavits of Richard Johnson, IEPA Assistant Regional Manager, Bureau of Land, Division of Land Pollution Control, Field Operations Section.[1]

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.

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[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 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)*").

On September 14, 2012, Attorney Felipe Gomez filed his appearance for EOR. On September 17, 2012, a status conference was held with Hearing Officer Webb, during which Officer Webb sua sponte allowed leave for AET to file a response to the State's MSJ, in the event negotiations failed

On October 18, 2012, EOR filed a Motion to Reconsider the IPCB Order granting the EOR MSJ, asserting unwaivable jurisdictional challenges to Counts 1 and 5, based in the main on the IEPA's incurable lack of RCRA jurisdiction over the IDNR SDWA-regulated oil and gas wells, and related Class II injection wells at issue in Count 5, such injections and wells being the gravamen of the Complaint.

On October 23, 2012, Hearing Officer Webb set the current briefing schedule, allowing the filing of this Response over the State's objection, and setting November 14, 2012, as the due date therefor, as well as for the State's Response to EOR's Motion to Reconsider.

II. STATUTORY AND REGULATORY FRAMEWORK

A. IEPA RCRA AND IDNR SDWA JURISDICTION DERIVE FROM INDEPENDENT AUTHORITIES

1. IEPA JURISDICTION - 42 USC 6901 et seq.; 415 ILCS 5/ et seq.; 35 IAC 700 et seq.

The IEPA's jurisdiction (and funding) to regulate wastes and hazardous wastes under 415 ILCS 5/12 derives directly from federal law governing solid and hazardous wastes:

> "(l) The Agency is hereby designated as...solid waste agency for the state for all purposes of the Solid Waste Disposal Act, Public Law 89-272, approved October 20, 1965, and amended by the Resource Recovery Act of 1970, Public Law 91-512, approved October 26, 1970, as amended, and amended by the Resource Conservation and Recovery Act of 1976, (P.L. 94-580) approved October 21, 1976, as amended..." *415 ILCS 5/4*.

Under RCRA, USEPA regulations define "solid waste" as any discarded material *that has not been excluded under the regulations*. *40 CFR § 261.2(a)(1).* (Emphasis Added). A "discarded material" is any material that is abandoned, recycled, or inherently waste-like. *40 CFR*

§261.2(a)(2). Consequently, even where a material has been "discarded", it still may be exempted by other provisions of the Act, and the regulator must make a determination that the material is not excluded from regulation by an exception, prior to perfecting subject matter jurisdiction over the material. *40 CFR 261.2(f).*

Illinois regulations basically adopt the federal provisions, and thus the 40 CFR 261 solid waste determination is required for initial jurisdiction under state solid waste laws (prior to making the 40 CFR 261.3 hazardous waste determination). *See 415 ILCS 5/3.470, 5/3.535 and 5.3220.*

Under Illinois law, and notwithstanding and prior to needing to rely on any exemptions, a material cannot be a regulated "waste", otherwise known as a "solid waste", unless it is shown by the State to have been "discarded" (e.g. "disposed") at an unpermitted facility. *415 ILCS 5/21(e).* With regard to a waste from another state, the Act prohibits transport of solid waste into Illinois for TSD or abandonment at an unpermitted facility.[2] *Id.* 415 ILCS 5/21(f) similarly prohibits hazardous waste disposal anywhere but at a permitted facility. *415 ILCS 5/21(f).*

Finally, under Illinois RCRA law, any facility that is regulated as a SDWA Class II injection well, including associated oil and gas production wells, which are regulated under 225 ILCS 725 and 62 IAC 240 (both of which were adopted by USEPA as Illinois' federally-approved SDWA UIC program), is exempt from any RCRA regulation by IEPA, including 415 ILCS 5/21(e) or (f). *See 35 IAC 704.102 and 35 IAC 704.106(b)(Exempting Class II wells from RCRA and IEPA regulation).*

Consequently, if the material at issue in this case was not illegally "discarded" as alleged in Count 5 (e.g. if the "facility" had a RCRA or SDWA permit) or if Count 5 cannot be litigated for lack of jurisdiction, or if it cannot be proven for lack of evidence, or all three, as is the case here,

[2] The Act does not allow any person to "(e) Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.". *Id.*

the material was never a "solid waste" because it was never shown to be "discarded" as defined and required under Illinois law. *415 ILCS 5/ et seq*. Any material that was transported into Illinois that cannot be shown to have been "discarded" at an unpermitted facility is not a "solid waste" and is not subject to Illinois RCRA regulations regarding transport, storage, treatment or disposal under either Subtitle C or D, and neither are Respondents.

2. INDR JURISDICTION - 42 USC 300h (SDWA Section 1421); 40 CFR 145.21-145.34 and 146.21-146.24; 225 ILCS 725; 62 IAC 240.

Central to this case, and to the State's ability to show that the material at issue was illegally "discarded", necessary for it to be a regulated "solid waste" under 415 ILCS 5/21(e), is the fact that the "illegal disposal" alleged to have occurred at EOR's wells is not subject to IEPA or RCRA jurisdiction, but rather is a SDWA matter under IDNR's purview. *35 IAC 704.202.* Consequently, as argued by EOR in its Motion to Reconsider, the IEPA has no jurisdiction to bring Count 5, and such Count must be dismissed. Given that Count 5 is the vehicle by which the State attempts to classify the material as a discarded "solid waste", the entire Complaint must then fail, as there was no material subject to regulation disposed of.

a. EPA Adopted Illinois Oil and Gas Act, 225 ILCS 725, as Illinois' UIC Program

Like Illinois as to Class I - IV and XI RCRA injection wells (35 IAC 704.202), Section 1421 of the SDWA requires that state SDWA Underground Injection Control ("UIC") programs require persons to obtain permits for any underground injection by way of a Class II SDWA well. *SDWA Section 1421(b)(1)(A)*. Under Section 1421 and 40 CFR 145.21-145.34 and 146.21-146.24, Illinois promulgated and administered its own Class II UIC permit program, and EPA adopted by rule the Illinois Oil & Gas Act, 225 ILCS 725, et seq. and its implementing regulation 62 Illinois Administrative Code Sec. 240, et. seq, ("62 IAC 240") as the Illinois UIC program. *See 40 CFR 147.701; 35 IAC 704.202.* As such, 62 IAC 240 et seq., represents the federal Class II UIC program's requirements applicable to injection wells and their permit holders under the SDWA in Illinois. (Respondents refer to 62 IAC 240 as promulgated in 1995-1996).

b. Count 5 Wells Are Class II UIC Wells Properly Permitted By IDNR Under SDWA

As required by law, the EOR. injection wells at issue, Rink #1 (Rink-Truax Lease, Christian County) and Galloway #1 (Galloway Lease, Sangamon County) were in fact properly and legally permitted by the IDNR. As inquiry to the INDR/OMM quickly confirmed, E.O.R.'s Rink #1 was issued permit number 201004 (API 1202101869) in 1993, and Galloway #1 permit number 202036 (API 1216723505) in 1999. Hence, contrary to the assertions of the Complaint, Motion, Order and other filings, the EOR. wells were in fact properly permitted for injection as Class II UIC wells, under Illinois law, and the IPCB and IEPA have no jurisdiction over such wells or injections.[3]

c. Enforcement Jurisdiction Limited- IDNR, NOV Must Be Issued For Jurisdiction

Illinois' Class II UIC enforcement authority is provided by 225 ILCS 725/8a, which states that an action may be taken only against a"permittee, or any person engaged in conduct or activities required to be permitted under this Act.". Consistent with its authorizing statute, 62 IAC 240.150(a) mandates issuance of a notice of violation to "any permittee" or when "any person engaged in conduct or activities required to be permitted..[is]...in violation of any requirement. Consequently, any illegal disposal at any injection or production well in Illinois is subject to IDNR, not IEPA, jurisdiction, and there are no NOV's against EOR present in the record.

III. PROCEDURAL POSTURE

A. MOTION FOR SUMMARY JUDGEMENT

This matter is now before the IPCB the State's Motion for Summary Judgment against AET as to Count 1 of the Complaint, seeking a $60,000 penalty for AET's alleged transport of a waste into Illinois for illegal unpermitted disposal at EOR's Illinois oil and gas wells. *Complaint at*

[3]Incredibly, Duane Pilliam of IDNR faxed Mr. Johnson and the IEPA copies of the SDWA UIC permits for these wells in 2005, thus IEPA and the AG were expressly informed and aware that the EOR wells were not only not regulated by themselves, but that the wells were not an "unpermitted facility" under 415 ILCS 5/21(e) and 35 IAC 704.202, thus precluding the bringing of Count 5 and precluding an IEPA finding that the material was "discarded". *See AET MSJ Exhibit J at 187-191 pdf.*.

Count 1; AET MSJ. As noted above, the AET MSJ relies for the most part on the Requests to Admit and Mr. Johnson's affidavit to attempt to establish jurisdiction over and prove violations by AET of 415 ILCS 5/21(e).[4] *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, citing Purtill v. Hess, 111 Ill. 2d 299 (1986)*. When considering whether to grant the disfavored summary relief, the IPCB must take into account the pleadings, depositions, and affidavits, construing any contradictions, doubts or vagueness strictly against the movant and in favor of the opposing party. *Id.* If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board may enter summary judgment. *35 IAC 101.516(b).*

B. JURISDICTION - FACT PLEADING REQUIRED IN ILLINOIS

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

[4]Of 107 factual citations in the MSJ, approximately 36 rely solely on the State's 3/24/08 Requests to Admit (deemed admitted by the 9/16/10 IPCB Order), and another approximately 25 rely on the RTAs plus another foundationless document.

When reviewing a complaint and record on summary judgment, and especially where there is a claim that subject matter jurisdiction is lacking (as is made here), it is incumbent on a court to assure that the complaint is sufficiently pleaded to confer subject matter jurisdiction on the court for each defendant, since initial jurisdiction must be clearly present in order for a court's actions and orders 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...courts cannot proceed...Accordingly, not only may the...courts police subject matter jurisdiction sua sponte, they must"). [5]

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 initio, 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).

Thus, prior to proceeding to the merits of the motion, the IPCB must first assure the Complaint in fact pleads prima facie facts sufficient to confer jurisdiction upon the Board to even hear the motion as to AET, and, assuming so, that the record thereafter (e.g. the RTAs and Johnson Affidavit) evinces undisputed or uncontradicted facts that support such assertion of jurisdiction and violations. *Ruhrgas AG v. Marathon Oil Co., Supra; People v. Wade, Supra; Karazanos v. Madison Two Assoc. Supra*.

In this case, the Complaint fails to plead sufficient jurisdictional facts against AET, and in fact pleads AET out of the case under Illinois law, on its face. Thereafter, the State fails to create a record that supports jurisdiction or liability against AET, and in fact the record establishes that AET cannot be liable in this matter as pleaded and evidenced by the State. *Estate of Johnson v.*

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[5] *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);

Condell Memorial Hospital, 119 Ill.2d 496 (Ill. 1988); Santelli v. City of Chicago, 222 Ill. App. 3d 286 (1st Dist. 1979); Martin-Trigona v. Bloomington Federal Savings & Loan Assoc, 101 Ill. App. 3d 943 (Ill. App. 1981).

IV. STATE FAILS TO PLEAD AND ESTABLISH JURISDICTIONAL FACTS ON THE PLEADINGS

A. COMPLAINT PLEADS AET OUT OF CASE BY ALLEGING THAT EOR WAS SOLE ENTITY RESPONSIBLE FOR TRANSPORT OF MATERIAL TO ILLINOIS

Count I of the complaint, the only Count of the alleging direct liability against AET, seeks that the IPCB find that AET and EOR violated 415 ILCS 5/21(e) (2004)". *Complaint at 1- 6*. However, the operative paragraphs of the complaint as to AET establish jurisdiction over only EOR, and plead AET out of the case, to wit:

> "13. On a date prior to July 19, 2002, and better known to the Respondents, AET Environmental, an authorized transporter of hazardous waste, was retained to arrange for the disposal of eight (8) two hundred and seventy five (275) gallon plastic totes full of acid generated by an electroplating company in Grand Junction, Colorado.";
>
> "17 . On information and belief, AET Environmental transported the hazardous waste acid to its transfer facility in Commerce City, Colorado where it was stored for approximately one to two weeks...";.
>
> "19. On information and belief, *E .O .R. Energy* inquired about the acid and then *arranged to have it shipped to a site near the old Peabody Coal Company Mine # 10* located along Route 104 approximately three and a half (3.5) miles east of Pawnee, Sangamon County, Illinois ("storage site") .". (Emphasis Added);
>
> "20. AET Environmental created a hazardous materials shipping order identifying the acid as "CORROSIVE LIQUID ACID, INORGANIC, N .O .S. (PHOSPHORIC NITRIC), 8, -4-UN2364, PGII .";
>
> "21. On August 30, 2002 or a date better known to the Respondents, *the hazardous waste acid was shipped*, without a hazardous waste manifest, from the AET Environmental transfer station in Commerce City, Colorado to the storage site located near Pawnee, Illinois." (Emphasis Added);
>
> "22. After arriving in Pawnee, Illinois, E .O.R. Energy stored the twelve (12) totes of acid in a warehouse located at the storage site.".

An inspection of the foregoing operative paragraphs reveals that only EOR is alleged to be

responsible for the shipment to Illinois, and AET's involvement terminates prior to the material leaving Colorado. Specifically:

- Paras. 15 and 17 allege only AET involvement in shipments of the material within Colorado;
- Para. 19 alleges that EOR "arranged to have it shipped" to Illinois, AET is omitted from mention;
- Para. 21 fails to allege that AET (or anyone else) shipped or arranged to have the material shipped to Illinois;
- The Para. 20 allegation that AET created a manifest, even if true, does not bring AET within Illinois' jurisdiction by way of 415 ILCS 5/21(e), as such action is not proscribed by the Act and occurred entirely in Colorado, outside of Illinois jurisdiction.[6]

Consequently, and even if, *arguendo*, AET may be deemed to have admitted to the foregoing factual allegations by way of default through the Requests to Admit, the State's allegations on their face, even taken as true in favor of the State (even though disputed or unsupported facts are to be inferred against the MSJ movant), simply are insufficient to confer jurisdiction over AET upon the State or IPCB under 415 ILCS 5/21(e), and in fact clearly establish that it was EOR, not AET, that "arranged" the shipment into Illinois. *Complaint at paras. 19, 21.*

Aside from EOR's inquiry to AET regarding the material (para. 19), the State's complaint fails to allege even a minimum contact between AET and Illinois with regard to EOR's shipment, and thus the Complaint is jurisdictionally deficient, and there was never any Illinois jurisdiction over AET at the outset. *Ruhrgas, et al, Supra.; Estate of Johnson v. Condell Memorial Hospital, Supra; Santelli v. City of Chicago, Supra; Martin-Trigona v. Bloomington Federal Savings & Loan Assoc, Supra.*

The Complaint pleads AET out of this case at the outset.[7] As a consequence, the IPCB need

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[6] It should be noted that AET's official 10/7/07 Answer to the Complaint denied this allegation, although such allegation is not relevant to 415 ILCS 5/21(e) jurisdiction or liability. *10/7/07 AET Answer at p2.*

[7] As discussed in coming sections, Count 1 of the Complaint is further jurisdictionally deficient since it fails to allege or find that the material at issue was discarded and thus a "solid waste" when it arrived in Illinois as required for 415 ILCS 5/21(e) jurisdiction and liability, rather only reciting the statutory definition, then skipping straight to the allegation that the material was hazardous waste. *Complaint at paras. 8, 9 and 14*. Count 1 is thus again fatally jurisdictionally deficient, as 5/21(f) regulates hazardous wastes, not (e), and AET or EOR are not alleged to have transported a 415 ILCS 5/21(e) solid waste, but rather an 5/21(f) hazardous waste, contrary to the State's prayer for relief under 5/21(e). *Complaint at 6.*

proceed no further, but rather is obligated to dismiss AET from this matter entirely and with prejudice for the State's failure to establish jurisdiction it its Complaint, along with its costs and attorney's fees. Such dismissal is strongly supported by the subsequent failure of the State to establish jurisdiction by way of the RTAs, in part due to conflicting requests and "admissions" that cannot co-exist, and thus must be construed against the movant State. *Ruhrgas, Supra.; Estate of Johnson v. Condell Memorial Hospital, Supra; Santelli v. City of Chicago, Supra; Martin-Trigona v. Bloomington Federal Savings & Loan Assoc, Supra.*

B. COMPLAINT FAILS TO ALLEGE THAT EITHER AET OR TRANSPORTED AND DISCARDED A 415 ILCS 5/21(e) "WASTE" INTO ILLINOIS

With regard to the regulatory classification of the material itself, and further exacerbating the lack of subject matter jurisdiction over AET as pertinent to Counts 1 and 5 (and ultimately all 5 counts as to both Respondents), the Complaint skips over the solid waste determination step discussed in the Statutory Framework section above, and alleges the ultimate 415 ILCS 5/21(f) legal conclusion that "the acid is a 'hazardous waste' as defined by...415 ILCS 5/3.220." *Complaint at 3, para. 14.*

In support, the Complaint first cites to February 24, 2004, USEPA "samples" (e.g. sample results) that allegedly revealed that material tested at the Kincaid site in 2004, 2 years after it alleged shipment to Illinois, had a pH of less than 2 and a TCLP of over 5mg/L. *Complaint at 5, para 26.* AET objects that Illinois' reliance on the alleged EPA data is on its face hearsay, as Illinois ignores evidentiary foundation requirements for analytical data, such as sampling protocols, chain of custody, data quality assurance and control, data verification, etc., such as would be contained in an affidavit from the USEPA witness who should have testified to the alleged sample results. AET thus objects and moves that the "evidence" be excluded or simply ignored due to its unverified hearsay nature and the failure of the State to lay a proper foundation from same.[8]

[8]The fact that a material has hazardous characteristics does not automatically subject it to regulation as a waste, and in fact innumerable industrial chemicals/products, including those used at oil fields and in the wells, have such characteristics, such characteristics being in fact a primary reason for such use and thus providing value, as is the case with acid wash candidates for oil wells and enhanced oil

The Complaint then generically concludes that the "discharges of the acid" between 2002 to 2004 into EOR's wells, "constituted disposal of a hazardous waste", and consequently both AET and EOR transported a regulated "waste" for storage and disposal in violation of 415 ILCS 5/12(e). *Complaint at 5, para. 23 and at 6, para. 31.*

The complaint fails to allege that AET "discarded" the material in Illinois, alleging only that "EOR arranged" to have it shipped to Illinois. *Complaint at para 19.* Thus, the material was not rendered an Illinois "solid waste" by way of AET's actions in Colorado, and was not regulated by Illinois while AET was handling its disposition in Colorado, even if the material was a RCRA solid or hazardous waste in Colorado. 415 ILCS 5/21(e); *415 ILCS 5/3.470, 5/3.535 and 5.3220; 40 CFR 261.*

Consequently, since whatever AET did in Colorado with regard to the material prior to EOR shipping it to Illinois is irrelevant to the 40 CFR 261 determination required of IEPA for Illinois RCRA jurisdiction at the time and after the material entered Illinois, the Illinois complaint failed to properly plead 415 ILCS 5/21 subject jurisdiction over AET by way of asserting the material was a solid waste. Based on the face of the Complaint, AET must be dismissed entirely from this matter as a result of it not being alleged to have sent a solid waste, let alone any material, to Illinois. *415 ILCS 5/3.470, 5/3.535 and 5.3220; 40 CFR 261; Ruhrgas, et al, Supra.; Estate of Johnson v. Condell Memorial Hospital, Supra; Santelli v. City of Chicago, Supra; Martin-Trigona v. Bloomington Federal Savings & Loan Assoc, Supra.*

C. EVEN AS DEEMED ADMITTED, REQUESTS TO ADMIT FAIL TO ESTABLISH THAT AET DID ANYTHING TO EVEN ARGUABLY BE SUBJECT TO 415 ILCS 5/21(e)

The 3/24/08 Requests to Admit to AET relied on by the State's MSJ contain the same fatal jurisdictional pleading defect as the Complaint, failing to establish that AET did even one thing that might arguably subject it to 415 ILCS 5/21(e) jurisdiction, even given the "facts" deemed

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recovery. *e.g See Att. A hereto (IMES Listing of Pre-used "Acids" similar to material at issue, indicating value and market).*

admitted by way of the IPCB grant of the State's motion to deem facts admitted. The Requests contain the following operative assertions, which collectively establish only that someone other than AET was responsible for the material's shipment to Illinois:

120. EOR purchased the acid material from AET.
121. AET gave the acid material to EOR.
122. Luxury Wheels gave the acid material to EOR.
123. EOR purchased the acid material from Luxury Wheels.
124. On August 30, 2002, the load of twelve (12) totes of acid material was shipped from the AET warehouse in Denver, CO, to Kincaid P&P in Pawnee, IL.

125. AET paid to ship the acid material to Pawnee, IL.
126. EOR paid to ship the acid material to Pawnee, IL.
127. Luxury Wheels paid to ship the acid material to Pawnee, IL.

128. The acid material was not shipped with a Hazardous Waste Manifest.
129. The acid material was shipped with a Hazardous Material Bill of Lading.
130. The Hazardous Material Bill of Lading was dated "8/30/02."
131. The Hazardous Material Bill of Lading listed the Shipper as Luxury Wheels.
132. The Hazardous Material Bill of Lading listed the Consignee as Kincaid P&P.
133. The Hazardous Material Bill of Lading listed Kincaid P&P's address as "Route 104 (EAST OF PAWNEE)," Pawnee, IL 62558.
134. The Hazardous Material Bill of Lading listed the acid material as "CORROSIVE LIQUID ACID, INORGANIC, N.O.S. (PHOSPHORIC, NITRIC), 8, UN3264, PGII."

135. The Hazardous Material Bill of Lading is signed by Frank Gines.
136. The Hazardous Material Bill of Lading lists Frank Gines as the Agent for Luxury Wheels.
137. The Hazardous Material Bill of Lading listed the Carrier as SLT Express.

138. The acid material was a blue-green color when it arrived in Pawnee, IL.
139. AET never refunded any money paid by Luxury Wheels to AET for the disposal of the acid material after the acid material was sent to the Pawnee, IL location.

With regard to Request Nos. 120-124, and ignoring, for the moment, the obvious conflicts between them (e.g. 120 vs. 123, which have EOR somehow both purchasing the material first indirectly from AET, and then directly from Luxury Wheels, which conflicts in any event must either be construed against the State where possible, or are at least grounds to deny the MSJ), the sum total of the allegations make it clear, in addition to the Complaint, that AET was, one way or the other, NOT involved with the transfer from Colorado to Illinois after EOR inquired about and took control over the disposition of the materials.

To wit, Requests 120-123 establish that, regardless of the manner, the material was transferred to EOR while still in Colorado, prior to any shipment to Illinois. *Also See Paragraph 19 of Complaint*. Like Paragraph 21 of the Complaint, Request No. 124 fails to allege that AET "shipped" the material to Illinois, but rather also leaves the shipper unidentified, and thus there is no allegation or AET "admission" as to arranging the shipment to Illinois in either the Complaint or the RTAs.

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 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).

Finally, 415 ILCS 5/21(e) does not impose liability on an entity who pays for a shipment of someone else's "waste", only on the "transporter", thus the "fact" of who actually picked up the tab for alleged sole owner/shipper EOR is irrelevant to jurisdiction and liability under the Act for disposal of same in Illinois. *415 ILCS 5/21(e)*. As indicated above, AET liability is precluded since the Complaint and RTAs plead and establish that someone other than AET was the shipper/disposer. *Complaint at para. 19; Request Nos. 120-123*.

Consistent with the Complaint, the remaining Requests to Admit, 128-139, similarly fail to allege any further involvement of AET after EOR allegedly took control of the material in Colorado. In

fact, these Requests expressly allege and establish that AET was not involved with the material once EOR took over, prior to it leaving Colorado.

To wit, Request Nos. 130-136 establish that the actual "shipper" was in fact the generator, Luxury Wheels, with the receiver Kincaid as co-signee. *Request to Admit Nos. 131-136; 9/16/10 IPCB Order Deeming Facts Admitted.* The actual carrier was in fact deemed to be SLT Express, an thus there simply is no mention (or need to mention) AET, as all the available 415 ILCS 5/21(e) liability slots are already filled up as pleaded.

Quite simply, when the Complaint and afore-noted Requests to Admit are taken in toto, the State has essentially pleaded AET out of this matter, as there is no act alleged or admitted to by which AET could have become subject to, or violated, 415 ILCS 5/21(e). In fact, Luxury Wheels, EOR, SLT Express and Kincaid are alleged to be the responsible parties potentially subject to the Act, to the exclusion of AET, in fact and on the record before the IPCB.

Consequently, based on the pleadings alone, the State has failed to even plead or prove a basic prima facie jurisdictional claim under 415 ILCS 5/21(e) over AET, and AET must be dismissed entirely from this matter based on a lack of jurisdiction as pleaded, prior to addressing the merits of the MSJ. *Ruhrgas, Supra; People v. Wade, Supra; Karazanos v. Madison Two Assoc. Supra*.

The dismissal of AET, based upon review of the pleadings relied upon by the State, and prior to even considering the merits of the State's MSJ, is further supported by the State's EOR MSJ, and the IPCB Order granting same (which became law of the case when issued). *6/27/12 EOR MSJ; 9/16/12 IPCB Order; Norton v. City of Chicago, 293 Ill. App. 3d 620 (1997); Penn v. Gerig, 334 Ill. App. 3d 345 (2002)*(The law of the case doctrine requires that where an issue has been litigated and decided, a court's unreversed decision on that question of law or fact settles that question for all subsequent stages of the suit).

Given that the State asserted, and the IPCB found, that EOR, and not AET, was the transporter who violated 415 ILCS 5/21(e) under Count 1, these pleadings and order have mooted the AET

MSJ, independent of the failure of the pleadings to establish a prima facie jurisdictional case as to AET. *Id.*

D. EOR MSJ AND IPCB ORDER ALSO REQUIRE DISMISSAL OF AET SINCE EOR DETERMINED TO BE TRANSPORTER AS PLEADED IN COMPLAINT

Without digging into the underlying specifics (yet), the AET MSJ frames the issue before the IPCB as to Count I as follows:

> "The issue before the Board is whether AET violated Section 21 (e) of the Act, 415 I LCS 5/21 (e) (2004). More specifically, *whether AET transported any waste into the State of Illinois for disposal, treatment, storage or abandonment*, at a site or facility which does not meet the requirements of the Act and of regulations and standards thereunder." *AET MSJ at 4.* (Emphasis Added).

By comparison, and again with regard to Count I and EOR, the EOR MSJ's assertion of what the State seeks the IPCB to find is identical to that of the AET MSJ, other than the named entity:

> "The Board must decide whether EOR violated Section 21(e) of the Act, 415 ILCS 5/21 (e) (2004) . More specifically, the Board must determine if EOR transported waste into the State of Illinois for disposal, treatment, storage or abandonment, at a site or facility which does not meet the requirements of the Act and of regulations and standards thereunder." *EOR MSJ at 5.*

Nowhere in the Complaint, the RTAs or elsewhere on the record does the State assert that AET and EOR somehow both "co-transported" the material into Illinois. Thus keystone allegations of the two MSJ's are in conflict, in that there can only be one "transporter", especially where paragraph 19 of the Complaint alleges only EOR as the arranger. *Complaint at para. 19.*

Concomitantly, the conclusion of the EOR MSJ does not mention AET, but states that EOR, and no one else, was the "Transporter" which violated 415 ILCS 5/21(e):

> "The record clearly shows that it is more likely than not that EOR caused the hazardous waste acid, an industrial process waste, to be transported from Colorado to the Kincaid P&P Site.". *EOR MSJ at 57 (62/65 pdf)*.

A purview of the overlying EOR MSJ arguments reveals the EOR MSJ is bereft of any mention of AET somehow being a "co-transporter", but only speaks of EOR as being that singular regulated

party, with AET's involvement being attenuated to a bystander after AET filled out the Bill of Lading that accompanied AET's transfer of the material to EOR in Colorado:

> "Once AET made the decision to transfer the hazardous waste acid to EOR, EOR directed AET to ship the acid to the Kincaid P&P Site. On EOR's direction, AET employees created a bill of lading to accompany the acid. The Bill of Lading named Kincaid P&P as the consignee for the acid. However, the acid was shipped to the Kincaid P&P Site for use by EOR. Kincaid P&P did not arrange for the acid to be shipped to their site. In fact, they were only notified of the shipment of the acid after it was enroute from Colorado to Illinois. The acid was only stored at the Kincaid P&P Site because EOR employed Kincaid P&P employees, Wake and Geary, to manage the EOR Wells.
>
> Without that connection, the acid would have never been shipped to Illinois. Kincaid P&P is not in the oil production business and had no use for the acid material. EOR may not have physically driven the truck containing the acid material, but by directing AET to ship the hazardous waste acid to the Kincaid P&P Site, EOR effectively caused the waste acid to be transported to the State of Illinois. *If not for EOR's direction, the hazardous waste acid would not have been shipped from Colorado to Illinois.* Therefore, the Board should find that EOR transported the hazardous waste acid to Illinois.
> *EOR MSJ at 26-27 (31-32 pdf).*

The EOR MSJ argues only EOR is liable for violating 415 ILCS 5/21(e), as it was the party who, after acquiring the material from AET, decided to ship its material to Illinois. *Id.* This argument appears to preclude the State trying to make the same argument as to AET, especially after the IPCB granted the MSJ based in part thereon.

1. EOR MSJ RELIANCE ON EOR RTAs FURTHER ESTABLISH THAT AET WAS NOT RESPONSIBLE FOR TRANSPORT UNDER 415 ILCS 5/21(e)

Like the AET MSJ, the EOR MSJ is based in large part upon the State's January 22, 2009 Requests to Admit issued to EOR. *See EOR MSJ at footnotes 1-56, and Exh A to EOR MSJ - 1/22/09 Requests to Admit to EOR*.[9] An inspection of the EOR RTAs reveals that AET cannot be the transporter/disposer, since the State asserts that EOR has admitted to this by way of being deemed to have admitted the RTAs, and to have shipped the material to Illinois. *EOR RTA No. 48*.

Additionally, the EOR RTAs allege that Arthur Clark was a "corporate officer in EOR" (RTA

[9]Respondent notes that the notice of service dated 1/23/09 on e-record does not contain a copy of the Requests, only the notice itself is present.

8), and thus any "decision" he made regarding the shipment in conjunction with Mr. Hamilton of EOR (See RTAs 66-67) must be presumed to have been made on behalf of EOR., not on AET, especially as there is and now can be no claim that the corporate veil of AET should be pierced or that the entities were "alter egos".

Finally, like the AET RTAs, the EOR RTAs in fact point the finger at Luxury Wheels as the actual shipper, not AET or even EOR. *EOR RTAs 49-53*. In any event, the EOR RTAs state that "E.O.R. paid Luxury Wheels for the acid material", and then that "E.O.R. paid to ship the material from Colorado to Illinois.*". EOR RTAs 60 and 64.* As discussed above, the AET RTAs also state that EOR was in control after EOR acquired the material, prior to shipment to Illinois. *AET RTAs 120-124*. Thus, the State cannot logically or legally assert that AET did those things or is somehow liable as if it were EOR.[10]

2. IPCB ORDER FINDS THAT UNDER STATE'S PLEADING ONLY EOR CAN BE LIABLE

The September 6, 2012, IPCB Order granting the State's EOR MSJ acknowledges that EOR was in control of the material at the time of shipment, stating that:

> "At some point during July and August of 2002, AET gave the material to EOR and on August 30, 2002, 12 totes of acid material shipped from the AET warehouse to Kincaid P&P in Pawnee, Sangamon County (Kincaid site)." *Order at 4.*

Notably, the IPCB does not state that AET was the shipper or transporter. *Id.* The Order also clearly finds that the State argued, exclusively, that EOR, not AET, caused the material be shipped for EOR's use after it acquired it from AET:

> "The People argue that once a decision was made by AET to transfer the waste to EOR, EOR directed

[10]While the EOR. RTAs, unlike the AET RTAs' fail to assert that the material was transferred from AET to EOR control prior to shipment, the State can not have it both ways (and did not plead in the alternative in any event), and are bound to the facts as pleaded in AET's RTA which clearly establish that AET had transferred control/ownership of the material to EOR prior to the shipment to Illinois. *See AET RTAs.*

> the waste be shipped to the Kincaid site. EOR Mot. at 26. The People acknowledge that the waste was shipped to the Kincaid site; however, the People assert that the shipment of the waste was "for use by EOR". *Id*. The People assert that the waste was stored at the Kincaid site because EOR employed the Kincaid employees to manage EOR wells. The People opine that were it not for the EOR wells being managed by Kincaid employees, the waste would not have been shipped to Illinois. EOR Mot. at 27. ...The People further argue that under EOR's direction, Mr. Wake and Mr. Geary disposed of the waste in EOR's wells. EOR Mot. at 27." *Order at p8.*

The IPCB then found that after acquisition from AET, EOR was the 415 ILCS 5/21(e) transporter/arranger, without further mention of AET:

> "Luxury Wheels, generator of the acid material, hired AET to dispose of the acid material and AET in fact attempted to dispose of the material. *See e.g.* EOR Mot. Exh. A at 2. At some point, after the attempts to dispose of the material proved unsuccessful, AET gave the material to EOR... *See* EOR Mot. Exh. A at 4. EOR directed Kincaid P&P employees to store and ultimately dispose of the acid material. *See* EOR Mot. Exh. A at 7; Exh. I at 11." *Order at p12.*

> "*These facts clearly establish that EOR arranged the shipment of the acid material, a material that is a waste, to the Kincaid site. Furthermore, the facts are uncontroverted that EOR directed Mr. Wake and Mr. Geary to dispose of the acid material in EOR's wells. Therefore, the Board finds that EOR transported waste into Illinois for storage and disposal at a site that does not meet the requirements of the Act or Board regulations in violation of Section 21(e) of the Act."* *Order at p12.* (Emphasis Added) .

As a consequence of the Board's finding, holding EOR liable as the shipper/arranger under Count 1, AET can not be, and need not be, held liable under 415 ILCS 5/21(e) for EOR's actions, as based upon the pleadings, and without having to address the merits of the AET MSJ, since the AET MSJ is mooted thereby. *Norton v. City of Chicago, 293 Ill. App. 3d 620 (1997); Penn v. Gerig, 334 Ill. App. 3d 345 (2002)*(The law of the case doctrine requires that where an issue has been litigated and decided, a court's unreversed decision on that question of law or fact settles that question for all subsequent stages of the suit). Notwithstanding, for the sake of argument, and addressing the merits of the AET MSJ for the record, it is clear that the merits of the AET MSJ cannot cure the prior pleading problems.

V. STATE'S AET MSJ FACTUALLY INSUFFICIENT TO ESTABLISH LIABILITY OF AET, EMBELLISHMENT OF FACTS CANNOT CURE JURISDICTIONAL FLAWS

A. MSJ REPEATEDLY EMBELLISHES ON CITED EVIDENCE

Addressing the merits of the State's motion, the MSJ's alleged facts relevant to AET and Count I are set forth at pp5-11, and rely almost entirely on the AET Requests to Admit. *AET MSJ at 5-11.* As discussed in detail below, the MSJ writer attempts to add facts and details to the MSJ narrative that are not contained in the evidence cited.. Nonetheless, the MSJ fails entirely to change the prior circumstance that it was EOR that is alleged and found to have been in control and the transporter, not AET. (The number following each sentence is the AET Request(s) to Admit cited in the footnotes to that sentence as evidence):

1. **"After the acid material was stabilized, Luxury Wheels hired AET to remove and dispose of the acid material involved in the July 15th Luxury Wheels incident.". {RTAs 20 and 21}.**

As background, the 'stabilization' referred to here relates to a July 15, 2002, incident where a solution contained in a Luxury Wheels storage tank began fuming and was quenched by addition of ice by the Grand Junction, Co., Fire Department. *See AET RTAs 18 and 19.* The MSJ here relies on RTA 20 and 21, which state that AET was "hired to remove" (RTA 20) and then "hired to dispose" (RTA 21) the material by Luxury Wheels.

Unfortunately for the State, even if this arrangement between AET and Luxury in fact occurred, the State's allegations in the Complaint and assertions in the EOR MSJ, that EOR took control of the material prior to AET's being able to dispose of it, and that EOR had it transported to Illinois, removes AET from any possible 415 ILCS 5/21 liability.[11]

[11]The remainder of this portion of the AET MSJ goes to great detail on AET's alleged but admittedly futile attempts to "dispose" of the material as a "waste" prior to giving or selling it to EOR, apparently in an attempt to foment facts sufficient to meet the first 415 ILCS 5/21(e) liability prong, requiring that a material be a "waste" by way of being "discarded", before it is regulated thereunder. *40 CFR 261.2.* However, the State's focus on the materials classification while in Colorado is misplaced, as the material must be determined to meet the definition of solid waste and be regulated under 415 ILCS

2. **"While the acid material was under the control of AET, Arthur Clark ("Clark"), an AET employee and a principal in EOR Energy, LLC, ("EOR") asked if EOR could have the acid material.". {RTA 117}**.

Contrary to the detail contained in the MSJ allegation, RTA 117 states, in full, only: "While the acid material was under the control of AET, EOR Energy, LLC, inquired about the acid material". The cited RTA 117 does not mention "Arthur Clark", nor state that EOR "asked" to have the materials, and thus the MSJ's assertion is unfounded as stated. Furthermore, the State's embellishment does nothing to change the alleged fact that AET transferred the material to EOR prior to it being shipped to Illinois.

3. **"At the time, Clark was working for both companies and EOR's office was located in the same building as AET. ". {RTAs 5, 6, 118, 119}**.

Even if true, this statement, by itself or in context, does nothing to support or prove that AET transported anything into Illinois or otherwise violated 415 ILCS 5/21(e), and there is no piercing the corporate veil claim in this matter.

4. **"EOR wanted to apply the acid material to oil and other wells ("EOR Wells") it owned which are located in Central Illinois. After the inquiry, AET gave the acid material to EOR. ". {RTA 121}**.

Again, contrary to the State's MSJ assertion, RTA 121 does not mention what EOR's intent was or "EOR Wells", but states only that "AET gave the material to EOR".[12] *RTA 121.* As noted previously, this latter fact results in AET being argued out of the case, since it is now EOR, not AET, who the State asserts owned and controlled the material immediately prior to it being shipped to Illinois. As such, under the facts pleaded and alleged by the State, AET cannot be, and never was,

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5/21(e) as a "solid waste" in Illinois, first, and only then can it be regulated as "hazardous waste" thereafter under 415 ILCS 5/21(f). *415 ILCS 5/21.*

[12]The State also ignores RTAs 122 and 123, which assert that Luxury Wheels, not AET, either gave or sold the material to EOR, further attenuating any AET connection to, or responsibility for, the shipment and alleged violations of 415 ILCS 5/21..

subject to 415 ILCS 5/21(e) jurisdiction.

5. **"On August 30, 2002, AET arranged to have the load of twelve (12) totes of acid material shipped from the AET warehouse in Denver, Colorado, to Kincaid P&P in Pawnee, IL ("Kincaid P&P Site"). ". {RTAs 124 and 137}.**

As previously noted, and again contrary to the MSJ's assertion, RTA 124 conspicuously omits mention of who "shipped" the material from Colorado to Illinois, and RTA 137 has no relation to the "arranger" assertion, stating only that "SLT Express" was listed in the Bill of Lading as the "Carrier". The cited RTAs simply do not support the assertion that AET did any arranging, a failure consistent with the Complaint's (and the EOR MSJ's) allegation that it was EOR that in fact was the (sole) responsible entity under Count I. *Complaint at para 19; 9/16/12 IPCB Order.*

6. **"The EOR Wells are located near the Kincaid P&P Site. EOR paid two Kincaid P&P employees, Rick Wake ("Wake") and Charles Geary ("Geary") to maintain the EOR Wells. AET billed Luxury Wheels for its services to arrange shipment of the acid material to Pawnee, IL.". {RTA 127}**.

RTA 127 states only that "Luxury Wheels paid to ship the acid material to Pawnee, IL.". No mention is made of "AET", "EOR Wells", "Kincaid", "employees", or that AET "billed Luxury...for its services to arrange shipment". *MSJ at 10*. The State's embellishment is, to say the least, extreme.

7. **"Unlike the prior attempts to ship the acid material to ATC and Safety Kleen, AET did not ship the acid material with an accompanying Hazardous Waste Manifest. ". {RTA 128}.**

RTA 128 only states that the "acid material was not shipped with a Hazardous Waste Manifest", and, as the other cited RTAs, makes no mention of AET, or any other entity, as the shipper.

8. **"Instead, AET prepared a Hazardous Material Bill of Lading ("Kincaid Hazardous Material Bill of Lading") .". {RTA 129}**.

RTA 129, like RTA 128, makes no mention of AET or any other entity, or of any "preparation", but only states that "The acid material was shipped with a Hazardous Material Bill of Lading.".

Next, an inspection of the "Kincaid" Bill of Lading (*See Attachments to AET MSJ, at Exhibit 1, at 54/197 pdf*), reveals that AET is not listed or mentioned in the document at all, and there is no party listed as the "preparer" of same (In fact, it appears to the untrained eye that the document likely had more than one "preparer", and in any event it contains two different signatures).

Again, the MSJ attempts to infer evidence where there is none, and there is no evidence that AET prepared the Bill, but in fact to the contrary (e.g. it appears that AET did not prepare the document). As such, the unestablished assertion must be construed against the movant, and for purposes of the AET MSJ it must be assumed AET did not prepare the Bill of Lading or shipping order. *Complaint at para. 20.* Once that assumption is made, there is absolutely zero evidence cited for a connection between AET and the material, after EOR inquired and then obtained same from AET.

Also, any inference that the material was a hazardous waste upon arrival in Illinois due to the presence of the Bill of Lading/shipping order, or that Luxury Wheels erred by not using a waste manifest, must be rejected, as it always has been Respondents' position that the material was being shipped by Luxury to Kincaid as a recycled product and was used by EOR at legally permitted oilfields in place of a commercial product, and was thus exempt from RCRA (even though it was "hazardous"), and was not a "waste" or "solid waste" since it was used rather than discarded, thus the use of the appropriate Bill of Lading for hazardous materials (rather a manifest for hazardous waste- see discussion below)..

Finally, absent this last attempted connecting thread (that AET "arranged" by the mere alleged act of filling out the Bill/shipping order, AET's last connection to this matter was when EOR took over control of the material prior to it being transported to Illinois by SLT Express or whatever carrier was used. Thus, there simply was no act alleged or proven that ever subjected to AET to Illinois jurisdiction, and EOR's involvement cuts off AET's liability, if any.

9. "The Kincaid Hazardous Material Bill of Lading is attached to and incorporated by reference into this motion as Exhibit I ("Exhibit I" or "Kincaid Hazardous Material Bill of Lading"). The Kincaid Hazardous Material Bill of Lading was dated '8/30/02' {RTA 130; MSJ Exh. 1 at p54}.

In a rare instance, the MSJ's assertion in fact corresponds to RTA 130, which states that the "Bill of Lading was dated "8/30/02". However, an inspection of the document reveals that the "8/30/02" date appears next to the signature of the carrier SLT Express, and was clearly not made by Mr. Gines, shipper Luxury Wheels' agent. Thus, it is not clear at all that the document was prepared on that date, if that was meant to be the inference. *MSJ at Attachments, Exh I, at 54/197 pdf.*

10. "AET listed Luxury Wheels as the Shipper, SLT Express as the Carrier, and Kincaid P&P as the Consignee.". {RTAs 131, 132, and 137; MSJ Exhibit I at 54 pdf}.

First, RTAs 131, 132, and 137 do not contain any mention of AET, rather they simply state whose names appear on the Bill of Lading. he as noted above, AET was not shown, on the record, to have had anything to do with the Bill of Lading, and for purposes of the motion must be assumed to have not "listed" anyone on the Bill of Lading. The MSJ assertion is again baseless and must be rejected as to AET.

The assertion, made without qualification and assumed to be a statement of fact, is however relevant to AET's lack of liability, as the State thus admits that, on the record, AET was not the shipper or carrier, and that other entities took over the fate of the material once it was transferred to EOR by AET in Colorado. Consequently AET is alleged, and the State has asserted in the MSJ (once the baseless assertions are deleted), that AET does not fall within the ambit of 415 ILCS 5/21(e).

11. "AET listed the acid material as "CORROSIVE LIQUID ACID, INORGANIC, N.O.S. (PHOSPHORIC, NITRIC), 8, UN3264, PGIII . ". {RTA 134; MSJ Exh I}.

RTA 134 does not mention AET at all, and as just discussed it is not clear who in fact filled in the above-cited phrase or other entries on the Bill of Lading. As prior, the MSJ assertion of AET

involvement is incorrect. Further, the cited phrase indicates the material was not a waste, and by including the phrase, the shipper and others adequately disclosed the nature of the material being transported such that a first responder would be able to ascertain same from the bill, just as if the load were accompanied by a waste manifest instead.

12. "The Kincaid Hazardous Material Bill of Lading was signed by AET employee Frank Gines. ". {RTA 135 and 136; MSJ Exh. I}.

While RTA 135 states that Mr. Gines signed the Bill of Lading, it does not state the Gines was an employee of AET, and, contrary to the assertion, RTA 136 reiterates that the Bill itself lists Mr. Gines acting as an agent of Luxury Wheels at that time. Again, the attempted assertion of connection between AET and the shipment is not supported by the State's citations.

13. "After sending the acid material to the Kincaid P&P site, AET never refunded any money paid by Luxury Wheels to AET for the disposal of the acid material.". {RTA 139}.

Again, the State embellishes RTA 139, adding the phrase "After sending the acid material to the Kincaid P&P site," to RTA 139 which states only:

> "139. AET never refunded any money paid by Luxury Wheels to AET for the disposal of the acid material after the acid material was sent to the Pawnee, IL location."

Also, the intended inference is unclear, especially where it was never definitively established by the State that Luxury paid anyone to "dispose" of the material, nor, assuming money exchanged hands, how much was allegedly paid, when, by and to whom, by what means, etc. Further, the lack of a "refund" would not be inconsistent with Respondents' position that the material was not a waste being disposed of, but rather a usable material with industrial value, thus Luxury would not have had to pay anyone to "dispose" of it as one normally does to have garbage removed, and there would be nothing for anyone to refund to Luxury.

Consequently, any attempted reverse inference that, since AET alleges that it did not dispose of the material and that in any event it was not a waste, AET should have proven it refunded the disposal fee to Luxury if it in fact was not disposed of as alleged by AET, must be rejected as lacking foundation and assuming facts that are not in evidence.

* * *

The MSJ's repeated embellishment of the "facts", when compounded with the prior misstatements, is confounding, let alone plain wrong according to the very evidence cited. In absence of any facts in support of Count I against AET, the State attempts to make its case by way of embellishment in the narrative in its Motion. Unfortunately for Illinois, statements made in a motion are not evidence, and it was the State's burden to elicit evidence to support its conclusions. *Brazinski v. Transport Service Co., 159 Ill. App. 3d 1061 (1987); Merrifield v. Illinois State Police Merit Board, 294 Ill. App. 3d 520 (1997)(*When a brief or motion improperly includes argument, conclusions, or inappropriate record citations, the court may, in its discretion, strike or disregard those portions).

Furthermore, simply repeating the conclusory allegations does not make them magically come true, especially where the evidence that was adduced clearly points away from, and not at, AET. The State's pleading and evidence dilemma as to AET became incurable due to the State's MSJ against EOR, and the IPCB Order granting it as those documents also clearly exculpate AET by alleging and finding, as law of the case, that it was EOR, not AET, that owned and was responsible for shipping the material from Colorado to Illinois.

B. STATE MOTIONS FAIL TO DEMONSTRATE MATERIAL AT ISSUE WAS DISCARDED AS A SOLID WASTE UNDER RCRA OR 415 ILCS 5/21

1. AET MSJ ALLEGES THAT ILLEGAL DISPOSAL INTO EOR SDWA REGULATED WELLS RETROACTIVELY RENDERED MATERIAL SOLID WASTE AND HAZARDOUS, BUT IEPA DOES NOT HAVE JURISDICTION TO MAKE SDWA ILLEGAL DISPOSAL FINDING

Instead of amending the Complaint, the State attempts to cure the pleading defects of the complaint as to AET in the AET MSJ, addressing the regulatory classification issue in its discussion of the first required prong for 415 ILCS 5/12 jurisdiction, that the material be a "waste". *AET MSJ at 22-25 (25-28 pdf).* The State's discussion is broken into three parts: 1) the material was discarded; 2) the material resulted from an industrial process; 3) the waste was a hazardous waste.

a. State Argument That Material Was Discarded Because AET Gave It to EOR For Free Incorrect and Unpersuasive

Illinois' AET MSJ claims:

> "There is no question that Luxury Wheels discarded the material. They were unable to safely store the material, had no use for it and hired AET to dispose of it at a properly permitted hazardous waste disposal' site. This is exactly what AET attempted to do. It was only after rejections by ATC and Safety Kleen, that AET decided to ship the acid material to the Kincaid P&P Site to be injected into wells owned by EOR. luxury Wheels paid AET to dispose of the material and expected AET to dispose of it. *Instead, AET gave the material to EOR, free of charge.* After the material was sent to the Kincaid P&P Pawnee site, AET never refunded any money to Luxury Wheels. *If the material had any value, Luxury Wheels would not have paid AET to take it away and AET would not have given it away to EOR for nothing in return. The acid material was discarded by Luxury Wheels and given away for free by AET.* For all of these reasons, the acid material should be considered a discarded liquid." *AET MSJ at 22-23.* (Emphasis Added).

First, the State asserts that AET gave the material to EOR, and thus it had no value and must have been discarded by AET. *Id.* However, the issue of what value it had to Luxury or AET is not germane, as it is EOR that the State asserts had final possession and say over the material immediately prior to its shipment to Illinois by way of it being "given" EOR.[13] *Id; Complaint at*

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[13]As noted before, the AET MSJ is, at best, conflicted as to AET's role in the material being shipped, attempting to claim that AET "gave the material to EOR", but at the same time asserting that despite AET having divested control of same, AET, not EOR, "decided to ship the material to Illinois". *AET MSJ at 22-23.* The AET MSJ also asserts that: "On August 30, 2002, AET arranged to have the load of twelve (12) totes of acid material shipped from the AET warehouse in Denver, Colorado, to Kincaid P&P in Pawnee, IL ("Kincaid P&P Site,,). [57]" *AET MSJ at 10 (13/37 pdf).*

As discussed previously, upon comparison the State's MSJ against EOR directly contradicts the AET MSJ assertions, and instead there the State clearly alleges EOR was the "decider", with AET being, at best, an agent, for EOR: "Under EOR's direction, AET arranged to have the twelve totes of acid material shipped from the AET Facility to the Kincaid P&P Site.46 *EOR MSJ at 13, (18/65 pdf).".*

However, despite Illinois' attempts at inferring dual responsibility now, instead of in the Complaint, the IPCB expressly found that it was EOR that "decided" and arranged, consistent with paragraph 19 of the Complaint: "These facts clearly establish that EOR arranged the shipment of the acid material, a material that is a waste, to the Kincaid site...EOR transported waste into Illinois for storage and disposal.". *9/6/12 IPCB Order at 12.* Consequently, Luxury's and AET's intent and handling of the material prior to AET giving it to EOR are irrelevant to whether it had value to EOR (which it did as an acid wash for EOR wells) and whether EOR "discarded" it when EOR shipped it to EOR's Illinois oilfields and allegedly disposed of it in its legally permitted, RCRA-exempt, SDWA Class II injection wells and related non-RCRA IDNR-regulated oil and gas wells.

para. 19. Given the States' assertion that EOR was the decider, Luxury's and AET's actions in Colorado prior to what EOR did with the material are obviously irrelevant as to what EOR's intent was, or if the material was "waste"when it was shipped to Illinois, and thus the State proved nothing with regard to AET's liability.

Second, the State's "value"argument is illogical, as in most cases someone will not volunteer to remove an item from another's possession for free unless the item has value to the remover, such as when a dealer agrees to remove your junk car for no charge in return for the title, or scavengers take "garbage" for their own use or reuse. Obviously, a previously "discarded" item can quickly become "undiscarded" (such as when a pop can is retrieved from the garbage by a can collector for return of the deposit or sale as scrap). Value, or lack thereof, alone is not determinative, especially where one person's junk is another's gold.

Consequently, the State's inference that the material at issue should be considered as "discarded" based on Luxury's or AET's prior actions, or that it became discarded merely upon being given to EOR or even shipped to Illinois (regardless of who the shipper was or whether the material resulted from an industrial process), is not tenable and must be rejected as illogical.

Based on the requirement that the material be "discarded" prior to being a solid waste, it is EOR's handling of the material that would determine whether it was ultimately regulated, and such Illinois regulation could not begin until after EOR got it to Illinois (not at the time of shipping from Colorado).

Concomitantly, AET can not be liable for "discarding" of the material into Illinois, as it was EOR that shipped it and decided what to do with it after it got to Illinois, and AET's actions in Colorado did not and could not render it a "solid waste" in Illinois. *Complaint at para. 19; 9/16/12 IPCB Order; 415 ILCS 5/21(e).*

b. State Argument That Material Resulted From Industrial Process Not Determinative

The State next argues that the material was "discarded" because it resulted from an industrial process and was classified as "spent etchant" in various waste profiles that were never used (as AET obviously did not achieve a disposition for same prior to EOR taking it and shipping it to Illinois). *(AET MSJ at 7-10 and at AET MSJ Attachments, Exhs. D-H).* However, such fact of prior use, alone, or in combination with the used material exhibiting hazardous characteristics, does not automatically subject the material to Illinois' or RCRA jurisdiction, as there are exceptions that exclude such materials from regulation where they are being used or reused as a substitute for a commercially available product, as is the Respondents' longstanding claim here . *See 40 CFR 261(e)(1)(ii) and 35 IAC 721.102(e)(1)(B).*

As noted above, it is the State's burden to determine that the material is not only discarded by the Respondent, but that it is not subject to one of several exemptions to regulation. *40 CFR § 261.2(a)(1) and (f)*. If an exemption applies, there is no need to go on to determine if the material was a hazardous waste as it simply is not regulated. *Id.*

However, like the Complaint, the AET MSJ conveniently fails to discuss any potential exemptions, overlooking that part of the process to proclaim: "Because the acid material was a *discarded liquid* material resulting from *industrial activities,* it was a "waste" as defined under Section 3.535 of the Act, 415 ILCS 5/3.535 (2004)". *AET MSJ at 23 (26/37 pdf).* After skipping the exemption analysis, the AET MSJ concludes that "Since the waste acid at issue in this matter exhibited the characteristics of *corrosivity* and *toxicity,* the wastes [sic] acid was a characteristic hazardous waste.". *Id. at 25 (28/37 pdf).*

c. AET MSJ Again Erroneously Alleges That AET Transported Waste For Use By EOR

The MSJ next asserts that "By shipping the waste acid from its warehouse in Denver, Colorado, to Kincaid P&P in Pawnee, Illinois under a hazardous materials bill of lading instead of a hazardous waste manifest, AET caused the waste acid to be transported to the State of Illinois.". *AET MSJ at 26 (29/37 pdf)*.

However, even if the State had not pleaded that EOR was the sole transporter *(Complaint para. 19*), and IPCB not agreed on 9/6/12 that EOR was the transporter, transport by AET would not be enough to prove jurisdiction, since 415 ILCS 5/21(e) does not prohibit transport of all wastes into Illinois, but only those wastes that are stored, treated, disposed of or abandoned at an unpermitted facility.[14] *415 ILCS 5/21(e).*

Ignoring the Complaints' allegation that EOR was the transporter for its own purposes (*Complaint para. 19*), ignoring the allegations that EOR stored and otherwise directed disposition of the material after it acquired it from AET in Colorado (*Complaint paras. 22-25*), and ignoring the IPCB finding the EOR was responsible for transporting, the State MSJ argues that AET transported the material from Colorado to Illinois for storage and disposal by EOR at a third party site (Kincaid) into EOR's wells, thus "satisfying" the last prong of jurisdiction over AET under 415 ILCS 5/21(e):

> "It is clear that AET transported hazardous waste acid, an industrial process waste, into the State of Illinois for storage and disposal at the Kincaid P&P Site and surrounding wells, sites which do not meet the requirements of the Act and of regulations and standards thereunder and therefore violated Section 21(e) of the Act, 4151LCS 5/21 (e) (2004). *AET MSJ at 26 (29/37)."*

Assuming for the sake of argument that AET, and not EOR, was the transporter and decision-maker, the State still must allege and prove the material at issue was actually illegally stored and illegally disposed of, at AET's direction, in order for the State to have jurisdiction over AET under 415 ILCS 5/21(e) for illegal "waste" transport and disposal. *415 ILCS 5/21(e).*

[14]As noted above, the IPCB Order found EOR, and not AET liable for the shipment: "These facts clearly establish that EOR arranged the shipment of the acid material, a material that is a waste, to the Kincaid site. Furthermore, the facts are uncontroverted that EOR directed Mr. Wake and Mr. Geary to dispose of the acid material in EOR's wells. Therefore, the Board finds that EOR transported waste into Illinois for storage and disposal at a site that does not meet the requirements of the Act or Board regulations in violation of Section 21(e) of the Act." *9/6/12 IPCB Order at 12.*

d. MSJ Fails to Establish That State Determined Whether *40 CFR 261(e)(1)(ii) and 35 IAC 721.102(e)(1)(B)* Exempted Material as Commercial Substitute; Johnson Affidavit Insufficient

It is at this point the State's case again fails as to AET, since as previously noted, the State previously failed to plead and find that the material at issue was not subject to an exemption that would render any injection into EOR's wells "use" rather than "disposal", despite it otherwise being regulated as a "solid waste" under RCRA or 415 ILCS 5/21(e).

Not only does an exemption exist that the State failed to exclude, the IEPA here does not even have the jurisdiction to allege that the use or injection of the material in EOR's UIC SDWA-permitted wells was "disposal" in the first place, as all regulatory matters associated with those wells are entrusted to the IDNR, including alleging and determining whether any injections were legal or illegal *See EOR Motion to Reconsider; 35 IAC 704.202; 42 USC 300h, 225 ILCS 725, 62 IAC 240.*

Furthermore, the record clearly shows that the State's "determination" that the material was a RCRA regulated waste was in fact made by their sole witness, Chris Johnson, a Regional Manager and field inspector for the IEPA, whose determination, and thus the IEPA's determination in this case, ultimately turns on his assumption that EOR's placement of the material in its wells was illegal land disposal barred by 415 ILCS 5/21(e), despite the wells being regulated by IDNR, not IEPA.

As such, the State's sole witness in support of the MSJ is in fact not qualified or authorized to pass on activities involving IDNR-permitted wells such as EOR's, and his hearsay testimony regarding the alleged illegal disposal into EOR's wells must also be stricken and ignored due to lack of qualification, and authority, of the IEPA inspector over IDNR regulated wells. *35 IAC 704.202.*

Further, testimony from Mr. Johnson indicates the State's reliance on the alleged illegal disposal of the material by EOR into its wells, for the findings that the material was a waste illegally disposed of in violation of 415 ILCS 5/21(e):

> "As previously described, 8 of the twelve totes with the waste acid have been discharged down into oil formations. While EOR Energy, AET Environmental and Mr. David O'Neill of USA CoalGas, have all

said the waste acid was reused constituting a substitute of a product, the information points to the act of land disposal.

AET Environmental, with the help of EOR Energy, LLC, made a determination that the waste acid was not a waste, but a substitute for a product in accordance with 721.102(e)(1)(B) of 35 Ill. Adm. Code (40 CFR 261.2(e)(1)(ii). This provision indicates a material is not a solid waste when recycled by being used or reused as effective substitutes for commercial products. However, in 72l.102(e)(2)(A) of 35 Ill. Adm. Code (40 CFR 261.2(e)(2)) it states that materials are still solid wastes even if the recycling includes use, reuse, or return to the original process (described in subsections (e)(I)(I)(A) through (e)(l)(C) of Section 721.102) when the material is used in manner constituting disposal or used to produce products that are applied to the land.

AET Environmental and EOR Energy made the determination that the waste acid could be considered a substitute for a product in the above-mentioned regulation when used to acidize oil wells. **This determination was considered invalid because the waste was used in a manner constituting disposal and/or used to produce a product that was applied to the land**..." *AET MSJ Attachments, Exh. J at 81/197 pdf (11/17/04 Johnson Inspection Report, Kincaid P&P - LPC #02181 45007 at 5).* (Emphasis Added).

Johnson testified in conclusion:

"Based on my November 17, 2004 investigation the acid was deemed a hazardous waste and should have" been managed in compliance with the Illinois Environmental Protection Act and the regulations of 35 Illinois Administrative Code." *AET MSJ Att J at 68/197 - Johnson Site 1 Narrative*..."My investigation concurred with the CDPHE and the USEPA, that the acid was a hazardous waste and should have been managed in compliance with the Illinois Environmental Protection Act and the regulations of 35 Illinois Administrative Code. *AET MSJ Att. J at 72/197 -Site 2 Narrative*"[15]

Thus, in order to prove jurisdiction over the material as a solid waste (even where it exhibited hazardous characteristics and resulted from an industrial process), the State should have pleaded and shown EOR used the material, in Illinois, in a way other than reuse or as substitute, e.g. that EOR illegally disposed of it as a waste, rather than used it as EOR would use a commercial oil well acid

[15]Mr. Johnson testified that Colorado's regulatory authorities viewed the issue as follows (and in fact he may have adopted the position as his own):

"EOR Energy had apparently been involved in arranging the shipment and claimed that acid was to be used as a substitute for a commercial chemical product under the Code of Federal Regulations Section 261.2(e))(1)(ii), and therefore, would not be a solid waste. Since a material covered by this section is not a solid waste, it also cannot be a **hazardous** waste. CDPHE disagreed with EOR Energy's interpretation of the regulation and indicated in the Advisory Letter that the reuse exclusion did not apply if the material was recycled in a manner that constitutes disposal (i.e. the material is placed in or on the land). **In this case, the waste acid was reportedly injected into the ground to acidize oil wells."** *EOR MSJ at Exhibit I, Att. A at 77/197 (Johnson Narrative to Nov. 2004 RCRA Inspection)*(Emphasis Added).

wash product.[16] *40 CFR 261(e)(1)(ii); 35 IAC 721.102(e)(1)(B); 415 ILCS 5/3.535.*

Unfortunately for the State, the IEPA, and Mr. Johnson, simply did have the regulatory authority to determine what was legal or illegal about EOR's alleged disposal into the UIC SDWA-regulated and permitted EOR wells. *35 IAC 704.202.* Rather, IDNR should have made this finding and issued NOV's for the UIC permit violations.[17] *62 ILCS 240.150.* The fact that Mr. Johnson made his inspection and findings 2 years after the alleged transport does not help the State's cause either.

As such, the State failed to properly determine if EOR's alleged use was reuse or disposal and whether the use was exempted, and, having no jurisdiction over the wells in any event, consequently failed to show that the material was "discarded", thus the material was not regulated under 415 ILCS 5/21(e), and the entire Complaint must be dismissed for lack of subject matter jurisdiction. *415 ILCS 5/21(e); Ruhrgas; People v Wade; 35 IAC 704.202.*

VI. CONCLUSION

As demonstrated above, the State has failed to create a record that establishes any 415 ILCS 5/21(e) jurisdiction over AET, and even if there were jurisdiction, the record fails to prove AET violated 415 ILCS 5/21(e), and in fact establishes that AET did and could not.

As shown above and patently evident upon inspection, the Complaint on its face fails to allege any acts by AET bringing AET within Illinois jurisdiction under 415 ILCS 5/21(e), and in fact alleges that EOR was sole entity responsible for transfer to Illinois.

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[16]This is especially applicable here, where the acid solutions used in the industry to etch aluminum wheels already exhibit most of the hazardous characteristics for which it was listed on the cited profiles, prior to any initial use, and where the use and subsequent inevitable dilution (from rinsing) render the solution too weak for further reuse for aluminum etching, but not too weak or inappropriate for other industrial, non-disposal, uses. *See Att. A hereto - IMES Listing of Industrial Acids.*

[17] While no IDNR inspector was at the 11/04 inspection, Duane Pulliam of IDNR's UIC Division was present during the 4/19/05 inspection, yet there is no record of any IDNR action thereafter (e.g NOV's). *AET MSJ - Attachments at p61/197 (Johnson Aff. at 5-6, para. 22).*

Even if deemed admitted, the State's Requests to Admit fail to establish that AET did anything violate of 415 ILCS 5/21(e) in regard to Count I or Count V.

Further, the State's MSJ as to AET is legally and factually insufficient, relying on unfounded assertions not supported and contradicted by the record itself, and attempting to extend 415 ILCS 5/21(e) beyond its intended regulated parties.

The IPCB has precluded AET's liability by finding that it was EOR that violated 415 ILCS 5/21(e), after it acquired the material from AET, thus it is a legal impossibility for AET to be liable, the State's cause of action having been extinguished by the IPCB finding against EOR under the Law of the Case Doctrine.

It is clear that the material was not shipped as a waste, but rather as a reusable material intended for oil and gas use, regardless of any prior AET actions as to same. RCRA excludes these wastes from regulation, including under 415 ILCS 5/21(e), and thus even if AET was regulated under 415 ILCS 5/21, the material at issue was not.

The record, including Mr. Johnson's testimony, reflects that the Respondents' position has always been that, regardless of the prior classifications of the material, its prior use, or hazardous nature thereof, the material was exempt from regulation after it reached Illinois because it was not "disposed" of by EOR, but was used as a commercial substitute under 721.102(e)(1)(B) of 35 Ill. Adm. Code (40 CFR 261.2(e)(1)(ii).

If in fact IEPA believed such use was not appropriate for SDWA Class II injection well or 225 ILCS 725 regulated production well, IEPA should have referred it to IDNR, who in turn is obligated to issue an NOV to EOR for either a permit violation or illegal injection without a permit, prior to a claim of illegal injection being brought by the AG.

The fact that the chief of the INDR's UIC division, Duane Pulliam, was present during the 2005 inspection and thereafter IDNR took no action indicates that IDNR did not consider the injections

or use to be violative of the SDWA permits for those wells.

The fact Mr. Pulliam faxed Mr. Johnson and the IEPA copies of the SDWA UIC permits for these wells on April 5, 2005, proves beyond a doubt IEPA and the AG were expressly informed and aware that the EOR wells were not only not regulated by themselves, but that the wells were not an "unpermitted facility" under 415 ILCS 5/21(e) and 35 IAC 704.202, thus precluding the bringing of Count 5 and precluding an IEPA finding that the material was "discarded", thus precluding this Complaint entirely. *See AET MSJ Exhibit J at 187-191 pdf.*. Thus, there was no "illegal disposal" and the material was not "discarded" as required for 415 ILCS 5/21(e) jurisdiction.

Even had IDNR been concerned about an illegal injection or use, such claim should have been brought under the SDWA and 62 IAC 240, not RCRA and 35 IAC 700. Notwithstanding that Count 5 would have been brought under the SDWA, the RCRA IEPA Counts (1-4) then could have justifiably relied on the IDNR SDWA illegal injection claim to assert that the unpermitted injection, once established by IDNR, rendered the material non-exempt "solid waste" by being "discarded".

The State's failure to properly refer the illegal injection claim to IDNR and issue NOVs, and related failure to assure that the material was not exempt from RCRA regulation (e.g. failure to determine the material was or was not a solid waste), means that the State has failed to establish 415 ILCS 5/21(e) jurisdiction over AET (or EOR for that matter, as their was no illegal disposal or discarding, thus rendering the material unregulated), or any of the violations claimed in the Complaint, and thus this matter must be dismissed in its entirety for lack of jurisdiction over any of the Counts.

Dismissal of the entire Complaint is supported since the first four counts all rely on a finding of liability against EOR under Count 5 for illegal RCRA disposal into EOR's Illinois wells, given that 415 ILCS 5/21(e) jurisdiction and liability requires not only transport into Illinois, but also that the material or waste be *illegally* stored and disposed of in Illinois (e.g. at an unpermitted facility). *415 ILCS 5/21(e); Complaint at paras. 7 and 21*. (Emphasis Added).

Conversely, if there was no illegal disposal in Illinois of whatever was transported (regardless of whether it was a product, waste, or hazardous waste) there is no RCRA or 415 ILCS 5/21(e) jurisdiction over the material and thus no jurisdiction over either Respondent under Counts 1 - 5 (as can be inferred from EOR's October 18, 2012, Motion to Reconsider, which arguments are incorporated herein by reference).

Quite simply, if Count 5 fails, the entire Complaint fails as to both Respondents. *See EOR October 18, 2012, Motion to Reconsider*. Unfortunately for the IEPA and the State, the IDNR had and has jurisdiction over the Count 5 Class II underground injection and related oil and gas production wells and activities related thereto, including determining whether illegal disposal has occurred therein, under the Safe Drinking Water Act, 42 USC 300h, and the Illinois Oil and Gas Act, 225 ILCS 725.

IDNR did not take any such action or issue the required NOVs regarding any of the wells, both of which injection wells were properly permitted: E.O.R.'s Rink #1 was issued SDWA permit number 201004 (API 1202101869) in 1993, and Galloway #1 permit number 202036 (API 1216723505) was issued in 1999. *62 IAC 240.150.*

Regardless, since these wells and EOR's actions related thereto are specifically exempted from RCRA and IEPA purview by Illinois law , *inter alia* and specifically 35 IAC 704.202, IEPA does not and never had jurisdiction to determine and pursue the Count 5 SDWA violations, the AG had no standing to bring the Count 5 SDWA claims, and the IPCB had and has no jurisdiction to hear Count 5's SDWA claims. *35 IAC 704.202; 42 USC 300h, 225 ILCS 725, 62 IAC 240.*

As a result, Counts 1 - 4 also fail as they require illegal disposal for jurisdiction, and their illegal transport/storage claims, and the Complaint and matter must be dismissed with prejudice.

WHEREFORE, AET MOVES that this matter must be dismissed in its entirety, or at the least that AET be dismissed from this matter, with prejudice, costs and attorneys fees.

Respectfully submitted,

s/: *Felipe Gomez, Esq.*

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ATTACHMENT A

IMES LISTING

Each listing assumes shipping by truck is available

Available Material Listings

Acids

Acetic Acid **IM:A01/9229**
99.5% acetic acid, APHA color 20-30, three-tank truck loads per month, minimum one tank load, sample, lab analysis and MSDS on request.
Confidential Listing

Acetic Acid **IM:A01/9230**
85-92% acetic acid, water, acrylic acid solution, three tank truck loads now, bulk, 15,000 gallons per month, minimum one tank truck load, sample, lab analysis and MSDS on request.
Confidential Listing

Acetic Acid Solution **IM:A01/0265**
Obsolete material, approximately six years old, 60-70% glacial acetic acid, 30-40% water, 2,500 gallons available one time only, sample and MSDS on request.
Confidential Listing

Acid Mix **IM:A01/8110**
50% nitric acid, 25% sulfuric acid, 25% H_2O, one pound per gallon ammonium bifluoride, from aluminum parts cleaning, <2 pH, 2,000 gallons per week, drums, sample and MSDS on request.
Nashville, AR

Citric Acid **IM:A01/0284**
40.67% citric acid, water, no flashpoint, stable, 1,485 gallons in 275 gallon totes, 1,450 pounds dry USP technical grade, available one time only, sample and MSDS on request.
Confidential Listing

Electro Polish Solution **IM:A01/0168**
Obsolete, electropolishing solution, used very little prior to discontinued process, phosphoric acid with sulfuric acid trace amounts of iron, 715 gallons available one time only, sample and MSDS on request.
South Beloit, IL

Electrolyte Solution **IM:A01/2366**
13% H_2SO_4 aluminum anodizing electrolyte solution, clear, colorless liquid, contains 1% $AlSO_4$ and small quantities of leached metals, 330 gallons now available, 1000 gallons per week, lab analysis, sample and MSDS available on request.
Marinette, WI

Ferrous Chloride Solution **IM:A01/8340**
Ferrous chloride solution from pickling of steel, 3-5% HCl, 10-15% Fe in H_2O, Mn, Cr, Cu, Zn, and Ni, <1 pH, 10,000 gallons now, 12,000 gallons per week, sample on request.
Crawfordsville, IN

Ferrous Chloride Solution **IM:A01/8230**
Ferrous chloride solution from steel pickling, 20-25% $FeCl_2$, 11-12% Fe, 2-3% HCl, in H_2O, 25,000 gallons, bulk, no amount restrictions, lab analysis on request.
Hennepin, IL

Ferrous Sulfate **IM:A01/9033**
Ferrous sulfate, heptahydrate, from pickle process for cold drawn steel wire, 19% iron, 33% sulfate, 46% water, 50,000 pounds per week, sample and lab analysis on request.
Wheeling, IL

Fluoboric Acid **IM:A01/0337**
Obsolete material, 15 gallons fluoboric acid 48%, high purity material in original unopened container, available one time only, MSDS on request.
Lexington, KY

Flux **IM:A01/2361**
Hi-grade VOC free flux, product # 1075-EX-30, purchased 6/15/01, non-flammable liquid, available one time only one fifty-five gallon drum, MSDS on request.
Auburn, IL

Hydrochloric Acid **IM:A01/8342**
Hydrochloric acid solution, 1% HCl in H_2O, Mn, Cr, Ni and Zn, pH 1-2, bulk, 10,000 gallons now, 25,000 gallons per week, sample and lab analysis on request.
Crawfordsville, IN

Hydrochloric Acid **IM:A01/8287**
Obsolete, technical grade, hydrochloric acid, approximately 30% HCl, unopened, 30 kg container available one time only, MSDS on request.
Confidential Listing

Mach 73 **IM:A01/8217**
Obsolete material, Mach 73 m, glycolic acid 50% clear amber liquid, mild odor, pH of 10% solution, fourteen gallons available one time only, MSDS on request
Eau Claire, WI

Mixed Acid **IM:A01/2425**
Sulfuric acid mixed, 30-42% H_2SO_4, 3-8% NO_3, 49-50% H_2O, 1.25-1.65 specific gravity, 3,000 gallons every two weeks, sample, lab analysis and MSDS on request.
Carthage, MO

***Muriatic Acid** **IM:A01/7107**
Obsolete material, muriatic acid with slight iron contamination, 4,000 pounds available one only, no amount restrictions, MSDS available.
Hartford, IL

(Continued on page 14)

* Indicates New Listing This Issue