BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

DICKERSON PETROLEUM, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 09-87
	)	PCB 10-05
ILLINOIS ENVIRONMENTAL	)	(UST Appeal)
PROTECTION AGENCY,	)	(Consolidated)
	)	
Respondent.	)	

NOTICE OF FILING

TO: Mr. John T. Therriault
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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board a **POST-HEARING BRIEF** directed to the Illinois Pollution Control Board, copies of which is herewith served upon you.

Respectfully submitted,

DICKERSON PETROLEUM, INC.,
Petitioner,

Dated: October 26, 2009

By: /s/Edward W. Dwyer
One of Its Attorneys

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POST-HEARING BRIEF

NOW COMES Petitioner, DICKERSON PETROLEUM, INC. ("Petitioner") by and through its attorneys, HODGE DWYER & DRIVER, and pursuant to the Hearing Report, dated September 16, 2009, submits its Post-Hearing Brief, and hereby states as follows:

I. INTRODUCTION

Petitioner was the owner of underground storage tanks ("USTs") formerly located at 823 Upper Cahokia Road, Cahokia, Illinois ("Site"), prior to their removal on May 14, 2008. Hearing Transcript, *Dickerson Petroleum, Inc. v. Illinois EPA*, PCB Nos. 09-87, 10-05 (consolidated) at 19 (Ill.Pol.Control.Bd. Sept. 25, 2009) (hereafter cited as "Tr."). On January 18, 2008, during a preliminary investigation of the Site, which included visual and olfactory observations and photoionization detector ("PID") measurements of a release, Petitioner's consultant, in accordance with applicable Illinois Pollution Control Board ("Board") and Office of the State Fire Marshal ("OSFM") requirements, notified the Illinois Emergency Management Agency ("IEMA") of a release from the USTs. Record at 1-2 ("hereafter cited as "R."). IEMA assigned the release Incident No.

20080084. *Id.* Petitioner received an Eligibility and Deductibility determination from OSFM on April 4, 2008. R. at 89-90.

Herlacher Angleton and Associates ("HAA"), the consultant retained by Petitioner to perform the preliminary investigation at the Site, submitted a 20-Day Certification, 45-Day Report ("Report"), and 45-Day Report Addendum ("Addendum") to the Illinois Environmental Protection Agency ("Illinois EPA") for the above-referenced leaking UST ("LUST") incident. Tr. at 18-20; R. at 3, 37, and 222. Based upon analytical results of the confirmation samples taken after removal of the USTs and contaminated soils during early action, the Addendum requested that the Illinois EPA issue Petitioner a No Further Remediation Letter. R. at 49-50. By letter dated March 9, 2009, the Illinois EPA determined that based on the Report, "the incident is not subject to 35 Ill. Adm. Code 734, 732, or 731." R. at 110-111; Exhibit A, Amended Petition for Review, *Dickerson Petroleum, Inc. v. Illinois EPA*, PCB No. 09-87 (Ill.Pol.Control.Bd. May 26, 2009) ("Amended Petition"). In addition, the Illinois EPA stated in regards to the Addendum, "[b]ased on the above findings regarding the April 25th 45-Day Report, the Illinois EPA finds that the September 5, 2008 45-Day Report Addendum falls outside the jurisdiction and scope of the Leaking Underground Storage Tank Program." *Id.*

On January 15, 2009, Petitioner submitted an application for payment from the UST Fund to the Illinois EPA for costs incurred during the early action period from January 18, 2008 to September 5, 2008. R. at 122. The application requested reimbursement of costs totaling $84,090.69. R. at 122, 125. By letter dated June 10, 2009, the Illinois EPA determined that "[b]ased on the information currently in the Illinois EPA's possession, this incident is not subject to Title XVI: Petroleum

Underground Storage Tanks of the Act and 35 Ill. Adm. Code 734, 732, or 731." R. at 112-114; Exhibit A, Petition for Review, *Dickerson Petroleum, Inc. v. Illinois EPA*, PCB No. 10-05 (Ill.Pol.Control.Bd. July 7, 2009). The Illinois EPA concluded, "[t]herefore, the Illinois EPA's [sic] has determined that this claim cannot be reviewed and a voucher cannot be prepared for submission to the Comptroller's Office for payment." *Id.*

The issues on appeal concern the Illinois EPA's erroneous determination that the above-referenced release is a Non-LUST incident that is not subject to the applicable Illinois statutes and regulations governing USTs. Both the March 9, 2009 and June 10, 2009 decision Letters (hereafter "Letter" or "Letters") from the Illinois EPA are deficient because each fails to provide the statutory or regulatory basis for the determination that the release was a Non-LUST incident. In addition, as discussed in more detail below, the Illinois EPA has stated that the release was excluded from LUST regulation because there were no laboratory analytical results of soil samples showing contamination exceedances above Tier I remediation objectives ("ROs") to confirm the release. The Illinois EPA's explanation for excluding the release from LUST regulation is erroneous as there are no statutory or regulatory requirements that mandate laboratory analysis of soil or groundwater samples to confirm a release from a regulated UST. The Petitioner confirmed the release in accordance with OSFM regulations, incorporated by reference in the Board's regulations at 35 Ill Admin. Code Part 734, and thus, the release discussed above is subject to LUST Program requirements.

II. BACKGROUND FACTS

As noted above, HAA was retained by the Petitioner to conduct a preliminary site investigation at the Site. Tr. at 20. On January 18, 2008, during the preliminary

investigation, Mr. Tom Herlacher of HAA used a hand auger to collect a soil sample from the backfill around the two 10,000 gallon USTs at the Site. R. at 14; Tr. at 20. The soil sample had a petroleum odor, and vapors from the sample triggered the PID alarm, which was set to trigger at 1,000 ppm, indicating soil contamination. R. at 14-15; Tr. at 25-27. Based on his visual and olfactory observations of the soil sample, as well as the PID measurement, Mr. Herlacher, at the request of the Petitioner, notified IEMA of a release at the Site. Tr. at 28.

In accordance with the Board's UST regulations, HAA submitted a 20-Day Certification and the Report to the Illinois EPA on January 25, 2008 and April 25, 2008, respectively. R. at 3, 222. The Report, which was accepted by the Illinois EPA, stated that the release at the Site appeared to be the result of spills and overfills and that the USTs at the Site were scheduled to be removed. R. at 11, 13-14. The Illinois EPA granted HAA's request to extend the early action period until June 15, 2008. R. at 226-228. HAA requested a second extension, which was also granted by the Illinois EPA, extending the early action period until September 13, 2008. R. at 231-233.

On May 14, 2008, two USTs were removed from the Site. R. at 44. Mr. Kent Gelarden, the OSFM storage tank safety specialist ("STSS"), was on site during the removal. R. at 44; Tr. at 105. During excavation activities, HAA used a PID to measure for the presence of volatile organic chemicals ("VOCs").[1] Tr. at 102. As contaminated soils were removed from the UST cavity, HAA used the PID to measure the contaminant levels in order to determine when applicable ROs were met. Tr. at 103, 108-109.

[1] VOCs include Benzene, Toluene, Ethylbenzene and Xylene ("BTEX"). The indicator contaminants for a petroleum release from a UST include BTEX. *See* 35 Ill. Admin. Code § 734.405(b).

Multiple PID measurements in the range of 100 to 1,000 ppm indicated that the soil was contaminated. Tr. at 100, 102-104, and 108-110. Eventually, over 748 tons of contaminated material was removed and transported to a landfill for disposal. R. at 49. After the contaminated soil was removed, HAA collected post-excavation confirmation samples which were submitted to an accredited laboratory for analysis in accordance with 35 Ill. Admin. Code § 734.210(h)(1). R. at 49.

Once UST removal activities were completed at the Site, HAA submitted the Addendum to the Illinois EPA on September 5, 2008. R. at 37. In the Addendum, HAA requested that the Site be classified as requiring no further remediation because the results from the laboratory analysis of confirmation soil samples indicated that there were no exceedances above the applicable Tiered Approach to Corrective Action Objectives ("TACO") Tier 1 residential ROs for soil. R. at 49-50. The laboratory analytical results were included in a table in the Addendum. R. at 51.

As stated above, on March 9, 2009, the Illinois EPA issued Petitioner a Letter stating that "[b]ased on the above findings regarding the April 25th 45-Day Report, the Illinois EPA finds that the September 5, 2008 45-Day Report Addendum falls outside the jurisdiction and scope of the . . . [LUST] Program." R. at 110-111. The Illinois EPA's Letter did not identify any specific statutory or regulatory section supporting this determination. After the receipt of the March 9, 2009 Letter, HAA personnel had several conversations with Illinois EPA personnel, who indicated that the Illinois EPA was excluding the release from LUST regulation because there was no laboratory analysis of soil samples confirming the release. Tr. at 51-52. Subsequently, on June 10, 2009, the

Illinois EPA issued a Letter, similar to the March 9, 2009 Letter, stating that the reimbursement application for the early action activities at the Site was rejected because the release was a Non-LUST incident. R. at 112-114.

Petitioner filed timely appeals of the March 9, 2009 and June 10, 2009 final decisions Letters with the Board. On August 6, 2009, the Board consolidated the appeals, and on September 16, 2009, the Board held a hearing in this matter. At hearing, Mr. Tom Herlacher and Mr. James Foley of HAA testified on behalf of the Petitioner. Mr. Jay Gaydosh, the project manager for the Site, testified on behalf of the Illinois EPA.

III. STANDARD OF REVIEW

The Illinois Environmental Protection Act ("Act"), 415 ILCS 5/1, *et seq.*, provides that an owner or operator may appeal an Illinois EPA disapproval or modification of a plan or report to the Board pursuant to Section 40 of the Act. 415 ILCS 5/57.7(c) and 57.8(i). "Under Section 40 of the Act, the Board's standard of review is whether the application as submitted to the Agency would not violate the Act and Board regulations. *Illinois Ayers Oil Company, v. Illinois EPA,* PCB No. 03-214 (Ill.Pol.Control.Bd. Apr. 1, 2004) ("*Ayers Oil*")(citing *Browning Ferris Industries of Illinois v. PCB,* 179 Ill. App. 3d 598, 534 N.E.2d 616 (2nd Dist. 1989)). The Illinois EPA's denial Letter "frames the issue on appeal." *Ayers Oil* (citing *Kathe's Auto Service Center v. Illinois EPA,* PCB No. 96-102 (Ill.Pol.Control.Bd. Aug. 1, 1996)). The "Board does not review the Agency's decision using a deferential manifest-weight of the evidence standard." *Id.*

IV. ILLINOIS EPA'S FINAL DECISION LETTERS FAIL TO COMPLY WITH ACT AND BOARD REQUIREMENTS

Section 734.505(b) provides, in part:

> If the Agency rejects a plan, budget, or report or requires modifications, the written notification must contain the following information, as applicable:
>
> 1) An explanation of the specific type of information, if any, that the Agency needs to complete its review;
>
> 2) An explanation of the Sections of the Act or regulations that may be violated if the plan, budget, or report is approved; and
>
> 3) A statement of specific reasons why the cited Sections of the Act or regulations may be violated if the plan, budget, or report is approved.

35 Ill. Admin. Code § 734.505(b)(1) – (3); *see also* Hearing Exhibit 2. The Illinois EPA failed to include the required explanations, as enumerated in Section 734.505(b)(1) – (3), in the March 9, 2009 and June 10, 2009 final decision Letters. The Letters merely stated that the incident was not subject to Title XVI of the Act or Parts 731, 732, or 734 of the Board's regulations. R. at 110-114. As discussed below, the absence of any citation to specific regulations and specific reasons for the denial is because there was and is no such basis for the denials. Rather, as admitted by Mr. Jay Gaydosh at hearing and his supervisor Mr. Harry Chappel during a telephone conference with Mr. Tom Herlacher after the March 9, 2009 Letter issued, the basis for the denials is an unpromulgated policy that laboratory analytical results showing the presence of indicator contaminants, i.e. BTEX at greater than Tier 1 ROs, is required to confirm a release from a UST. Further, and for the first time at hearing, Mr. Gaydosh identified an initial step involving whether

a release is indicated on the OSFM STSS UST Removal Log as having a role in confirming a release.

At hearing, Mr. Herlacher testified, on behalf of the Petitioner, that upon review of the March 9, 2009 Letter, he understood that the Illinois EPA was rejecting the Report, but he could not determine a specific reason why it was rejected. Tr. at 35. He further testified that there was no indication in the March 9, 2009 Letter of the specific type of information the Illinois EPA might need to complete its review and no explanation of the provisions of the Act or Board regulations that might be violated if the Report was approved. Tr. at 37-38. This testimony is uncontroverted and corroborated by Mr. Gaydosh at the hearing in this matter.

Indeed, Mr. Jay Gaydosh, who testified on behalf of the Illinois EPA, confirmed that the March 9, 2009 Letter did not contain references to Section 734.210[2] or Sections 170.560 and 170.580[3] of the OSFM's regulations. Tr. at 142-143. Further, he could not provide a particular reason why the March 9, 2009 decision Letter did not provide any explanation about why the Report was being rejected and why the Site was being deemed a Non-LUST incident. Tr. at 143.

It is clear from the testimony provided by the Illinois EPA's witness, as well as the Letters, that the Illinois EPA failed to comply with the requirements of Section 734.505(b) (1) – (3) when it issued the March 9, 2009 and June 10, 2009 Letters that deemed the release a Non-LUST incident without providing a detailed explanation for

[2] As discussed below, at hearing, Mr. Herlacher testified that Mr. Gaydosh informed him that compliance with Section 734.210(h)(2) was required. Tr. at 39-40.

[3] The Board requires confirmation of a release in accordance with Part 170 of OSFM's regulations. 35 Ill. Admin. Code §§ 734.115 and 734.210(g).

such decisions. Because the Illinois EPA did not comply with the Board's regulations, the Illinois EPA's Letters are deficient. The deficient Letters are evidence, as discussed in detail below, that the Illinois EPA did not have a legitimate reason on which to base its determination that the release was a Non-LUST incident. Accordingly, the Board must find that both final decision Letters are arbitrary, capricious, and without statutory or regulatory authority.

V. THE ACT AND REGULATIONS DO NOT REQUIRE LABORATORY ANALYSIS TO CONFIRM A RELEASE FROM A REGULATED UST.

The Illinois EPA determined that the release at the Site was a Non-LUST incident because the Petitioner did not (1) submit laboratory analysis showing (2) an exceedance of indicator contaminants above Tier I ROs.[4] R. at 94; Tr. at 51-52, 129-130. Curiously, Mr. Gaydosh could provide no explanation why this basis for denial was not in the Letters. The simple answer for the absence from the Letters is that there is no regulatory basis for this "requirement" for confirmation of a release. At hearing, Mr. Gaydosh was unable to provide a statutory or regulatory citation that requires that owners or operators of USTs submit laboratory analysis to confirm a release. In fact, he agreed that Sections 170.560 and 170.580 of OSFM's regulations do not require that soil or other media be sent for laboratory analysis to confirm a release. Tr. at 142. Similarly, he offered no statutory or regulatory authority mandating that a confirmed release exceed Tier I ROs. This becomes even clearer from the review of applicable regulations.

[4] At hearing, for the first time, Petitioner learned that there is another step to confirming a release involving the UST Removal Log completed the OSFM STSS. The Illinois EPA's two-step policy is discussed in detail in subsequent sections of this Brief.

Section 734.210 governs early action activities. 35 Ill. Admin. Code § 734.210. The Board regulations state in pertinent part in regards to early action activities and the confirmation of a release as follows:

a) Upon confirmation of a release of petroleum from an UST system in accordance with regulations promulgated by the OSFM, the owner or operator, or both, must perform the following initial response actions within 24 hours after the release:

1) Report the release to IEMA (e.g., by telephone or electronic mail);

* * *

d) Within 45 days after initial notification to IEMA of a release plus 14 days, the owner or operator must assemble information about the site and the nature of the release, including information gained while confirming the release or completing the initial abatement measures in subsections (a) and (b) of this Section. This information must include, but is not limited to, the following:

1) Data on the nature and estimated quantity of release;

2) Data from available sources or site investigations concerning the following factors: surrounding populations, water quality, use and approximate locations of wells potentially affected by the release, subsurface soil conditions, locations of subsurface sewers, climatological conditions and land use;

3) Results of the site check required at subsection (b)(5) of this Section; and

4) Results of the free product investigations required at subsection (b)(6) of this Section, to be used by owners or operators to determine whether free product must be recovered under Section 734.215 of this Part.

e) Within 45 days after initial notification to IEMA of a release plus 14 days, the owner or operator must submit to the Agency the

> information collected in compliance with subsection (d) of this Section in a manner that demonstrates its applicability and technical adequacy.
>
> * * *
>
> g) For purposes of payment from the Fund, the activities set forth in subsection (f) of this Section must be performed within 45 days after initial notification to IEMA of a release plus 14 days, unless special circumstances, approved by the Agency in writing, warrant continuing such activities beyond 45 days plus 14 days. The owner or operator must notify the Agency in writing of such circumstances within 45 days after initial notification to IEMA of a release plus 14 days. Costs incurred beyond 45 days plus 14 days must be eligible if the Agency determines that they are consistent with early action.
>
> BOARD NOTE: Owners or operators seeking payment from the Fund are to first notify IEMA of a suspected release and then confirm the release within 14 days to IEMA pursuant to regulations promulgated by the OSFM. See 41 Ill. Adm. Code 170.560 and 170.580. The Board is setting the beginning of the payment period at subsection (g) to correspond to the notification and confirmation to IEMA.

35 Ill. Admin. Code § 734.210(a), (d) –(e), (g). (Emphasis added.) Petitioner timely submitted its Report and Addendum to the Illinois EPA in accordance with the requirements of Section 734.210(d) and (e). R. at 4, 37. The Report and Addendum address the requirements of Section 734.210(d) and (e), and the Letters issued by the Illinois EPA determining that the release was a Non-LUST incident, do not provide otherwise.

As referenced in Section 734.210(g), Section 170.560 of OSFM's regulations states, in part:

> Owners or operators of UST systems shall report to Illinois Emergency Management Agency within 24 hours and follow the procedures in Section 170.580 for any of the following conditions:

> a) The discovery by owners, operators or others of released regulated substances at the UST site or in the surrounding area (such as the presence of free product or vapors in soils, basements, sewer or utility lines or nearby surface water);

41 Ill. Admin. Code § 170.560(a). (Emphasis added.) In addition, Section 170.580 provides requirements for release investigation reporting, site assessment, and initial response. 41 Ill. Admin. Code § 170.580; *see* Hearing Exhibit 5. The above-referenced regulations do not include any requirements that an owner or operator of a UST submit laboratory analyticals showing exceedance of indicator contaminants above Tier 1 ROs to confirm a release. Hearing Exhibits 3, 4, and 5.

A. Illinois EPA's Secret Two-Step Policy on Confirmation of a Release from a UST

Part 734 of the Board's regulations defines "confirmation of a release" and "confirmed release" as follows:

> "Confirmation of a release" means the confirmation of a release of petroleum in accordance with regulations promulgated by the Office of the State Fire Marshal at 41 Ill. Adm. Code 170.
>
> "Confirmed Release" means a release of petroleum that has been confirmed in accordance with regulations promulgated by the Office of the State Fire Marshal at 41 Ill. Adm. Code 170.

35 Ill. Admin. Code § 734.115. As referenced above, Section 734.210(g) requires owners or operators to confirm a release in accordance with Sections 170.560 and 170.580 of OSFM's regulations. Hearing Exhibits 3, 4 and 5. As set forth above, neither the Act nor Board or OSFM regulations require the owner or operator to submit laboratory analysis showing contaminant exceedances above Tier I ROs in order to confirm a release from a petroleum UST. *Id.*

At hearing, Mr. Herlacher testified that Mr. Gaydosh informed him, during a telephone conversation on March 10, 2009, that the Report was rejected because HAA did not "confirm the release in accordance with [A]gency regulations." Tr. at 39. Specifically, Mr. Gaydosh directed Mr. Herlacher to Section 734.210(h)(2), which requires confirmation sampling for USTs abandoned in place. Tr. at 39-40, 144. During his testimony, Mr. Gaydosh did not deny this statement. However, the USTs at the Site were removed, and thus, Section 734.210(h)(2) did not apply to the USTs at the Site. Mr. Herlacher discussed the inapplicability of 734.210(h)(2) further with Mr. Gaydosh but ultimately ended up speaking with Mr. Gaydosh's supervisor. Mr. Herlacher testified that he had a telephone conversation with Mr. Harry Chappel, a regional subunit manager in the LUST Program, after his discussions with Mr. Gaydosh. Tr. at 51. Mr. Chappel informed Mr. Herlacher that the Illinois EPA's "policy" requires laboratory analysis of a sample indicating contamination above Tier I cleanup objectives to confirm a release. Tr. at 51-52. Further, Mr. Herlacher testified that Mr. Chappel stated that such a requirement is not in Part 734. Tr. at 51. Mr. Gaydosh did not controvert any of this testimony and in fact acknowledged that this "requirement" for laboratory analysis to confirm a release from a UST was part of the Illinois EPA's two-step process for release confirmation. Tr. at 129-130.

Mr. Herlacher is a licensed professional engineer, who is licensed in Illinois, Arkansas, Kentucky, Missouri, Iowa, Oklahoma, and Wisconsin, and has worked on numerous LUST sites as an environmental consultant in Illinois, Missouri, Indiana, and Wisconsin. Tr. at 15-17; Hearing Exhibit 1. Mr. Herlacher has extensive experience with the Illinois LUST Program and has successfully closed LUST sites in accordance

with the Act and Board regulations. In his almost 20 years of experience as an environmental consultant in Illinois, Mr. Herlacher had never been informed that, in order to confirm a release from a UST, laboratory analyticals showing exceedances of Tier I objectives was "required." Tr. at 40, 79. It was not until Mr. Herlacher's conversations with Mr. Gaydosh and Mr. Chappel that he first learned of the Illinois EPA's "policy" requiring laboratory analysis to confirm a release from a UST. Tr. at 40, 79. As discussed above, neither Mr. Gaydosh nor Mr. Chappel could identify a section of the Act or Part 734 that requires laboratory analysis to confirm a release. Tr. at 51, 133, and 151. Mr. Herlacher's testimony regarding his conversations with Mr. Gaydosh and Mr. Chappel remains uncontroverted.

It is clear from Mr. Herlacher's testimony that the Illinois EPA had a basis or "policy" upon which it relied in issuing the Letters rejecting the Petitioner's Report and Addendum. Equally clear is that it intentionally chose not to provide that "policy" as the specific reasons for its rejection of Petitioner's Report and Addendum in the denial Letters. More disturbing is its admission at hearing that this policy is not found in any of the relevant regulations for confirmation of a release from a UST. Indeed, at hearing, Mr. Gaydosh identified a new step in the confirmation of a release involving review of and reliance on the OSFM's STSS UST Removal Log.

At hearing, Mr. Gaydosh explained the Illinois EPA's unpublished and unpromulgated "policy" on confirming a release. He testified that a release can be confirmed in two ways. Tr. at 129-130. Either the OSFM STSS on site reports a release, or if the STSS determines that there is no release, the Illinois EPA "normally looks for

laboratory analysis to confirm the presence of contaminants above tier 1 objectives." Tr. at 130. Mr. Gaydosh agreed that in order to confirm a release, an owner or operator has to comply with OSFM regulations (Tr. at 131), and admitted that Section 170.560 (Hearing Exhibit 4) does not state that laboratory analysis is required to confirm a suspected release. Tr. at 133. Thus, the Illinois EPA's secret two-step confirmation "policy" that Mr. Chappel spoke of with Mr. Herlacher and Mr. Gaydosh testified to is in direct contradiction of the regulatory requirements for confirmation of a release, which mandate confirmation in accordance with OSFM's Part 170 regulations. Moreover, as noted later, the OSFM STSS determination is neither supported by any regulation nor reliable as a release confirmation method.

As noted above, Mr. Gaydosh testified that if the STSS determines that there is no release, the Illinois EPA normally looks for laboratory analysis above Tier I ROs. Tr. at 130. However, Board regulations define "confirmed release" and "confirmation of release" in terms of confirmation in accordance with Part 170 of OSFM's regulations, which make no reference to requiring laboratory analysis above Tier I ROs to confirm a release, as the Illinois EPA claims is required. Tr. at 150-151; Hearing Exhibits 3 and 4. Thus, as there are no statutory or regulatory requirements mandating laboratory analysis showing indicator contaminants above Tier 1 ROs, the Illinois EPA's "policy" requiring such is contrary to and indeed *ultra vires* the Act and Board regulations. *Id.* Accordingly, the Illinois EPA's decision to deem the release in this matter a Non-LUST incident because Petitioner did not provide laboratory analysis above Tier I ROs to confirm the release is arbitrary, capricious, not supported by and arguably beyond the Illinois EPA's authority set forth in the Act and Board regulations.

B. Tier I ROs Are Not Intended to Be Used to Confirm a Release

Mr. Gaydosh testified that the Illinois EPA's policy requires laboratory analysis showing exceedances of Tier I ROs to confirm a release in cases where the STSS has determined that there is no release at a site. Tr. at 130. The Illinois EPA, however, as discussed above, cites no statutory or regulatory basis for such a policy. In any event, Tier I ROs are not intended to be used to confirm a release; rather, TACO ROs are used to determine when a contaminated site has been remediated to the proper closure level. The TACO regulations at 35 Ill. Admin. Code Part 742, were adopted to establish procedures for developing ROs that achieve acceptable risk levels to provide adequate protection of human health from environmental conditions. 35 Ill. Admin. Code § 742.100. The LUST Program requires owners or operators to develop ROs in accordance with Part 742 in order to determine the contaminant levels that must be reached in order to properly close a site. In a Tier I evaluation of a site, the owner or operator compares the level of contamination at the site to the Tier I ROs in Part 742 in order to determine whether the site levels are below the ROs or whether corrective action is needed to achieve the Tier I ROs. 35 Ill. Admin. Code § 742.110(b). The Tier I ROs do not establish levels of contamination that are required to be present in order to confirm a release at a site. Tier I ROs are the levels of contaminant concentrations that must be met in order to close a site. Thus, the Illinois EPA's policy requiring analytical results showing exceedances of Tier I ROs is not only unfounded, but it also applies the Tier I ROs to a situation for which they were never intended to be used.

Also, the Act and OSFM regulations make no mention of Tier I ROs in their definitions of release. The Act broadly defines release as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment . . ." 415 ILCS 5/3.395. However, the Illinois EPA's unpromulgated two-step confirmation "policy" effectively redefines "release" in terms of whether the release contaminated the site above Tier I RO levels. "Release" is clearly not defined as any "spilling, leaking . . . or disposing into the environment above Tier I ROs." If a release was required to be above Tier I ROs, the General Assembly would have provided so in its definition. Also, as discussed above, "confirmation of release" is defined as confirmation in accordance with Part 170 of OSFM's regulations. Again, the definition does not include a requirement or qualification that a release be measured in terms of the TACO Tier I closure levels.

While in no way acknowledging that the Illinois EPA's "policy" has the force of a rule, there were laboratory analytical results submitted in the Petitioner's Addendum showing that BTEX indicator contaminants were present in soils at the Site. R. at 51. HAA remediated the Site to a level at which contaminants satisfied the TACO Tier I RO requirements and requested a no further action determination. The table in the Addendum (R. at 51.), which was before the Illinois EPA when it issued its Letters, clearly shows that there was contamination at the Site, and thus, even if the Illinois EPA's policy requiring laboratory analytical results in cases where the STSS determined no release was valid, there was evidence of BTEX at the Site, which indicates a release from a UST did occur.

C. Illinois EPA Failed to Provide Any Support For Its Decision that the Release at the Site Is a Non-LUST Incident

The Illinois EPA did not provide any support for its decision that the release at the Site is a Non-LUST incident. In fact, as discussed above and further below, there was evidence of a release at the Site, and Mr. Herlacher's and Mr. Foley's testimony regarding their visual and olfactory observations, as well as the PID measurements from the Site, remain uncontested. Both Mr. Herlacher and Mr. Foley clearly stated that based on their experience and observations of the Site, there was a release of a petroleum substance. Tr. at 28, 98-100, and 103. Mr. Herlacher and Mr. Foley testified that there were no other likely sources of the VOCs near or at the Site except the UST systems. Tr. at 66, 94. The Illinois EPA did not provide any documentary support or testimonial evidence to contradict the Report, Addendum, or Mssrs. Herlacher's or Foley's testimony on this issue.

In regards to the final decision Letters, Mr. Gaydosh, on behalf of the Illinois EPA, admitted that he did not know why the Letters did not comply with the regulatory requirements and did not know why the Letters did not include any explanation for the determination that the release was a Non-LUST incident. Tr. at 142-143. He failed to provide any explanation or justification for why the Letters do not inform Petitioner that the reason for the Non-LUST incident determination was due to Petitioner's failure to submit laboratory analysis showing exceedances above Tier I ROs. It would have been difficult for Mr. Gaydosh to include the basis for the Non-LUST incident decision in the Letters since the Illinois EPA's basis—that there was no laboratory analysis confirming the release—is not required by the Act or LUST regulations. Further, Mr. Gaydosh does

not deny that the explanation for the Non-LUST incident determination was only offered to the Petitioner's consultants after the issuance of the deficient March 9, 2009 Letter. Tr. at 143-144.

Although Mr. Gaydosh is a project manager with the LUST Program and it is his responsibility to review submittals from UST owners or operators, he is not a professional engineer, and even though Mr. Gaydosh may be familiar with LUST Program requirements and the Illinois EPA's unpromulgated two-step confirmation "policy," he was not able to provide a regulatory basis for the Illinois EPA's "policy" or provide an answer as to what is required to confirm a release. When repeatedly questioned on the issue, Mr. Gaydosh could not identify any statutory provision or regulatory section of Part 734 that provides that the determination of whether a release from an UST occurred is based on the STSS finding that there was a release or the submission of analytical results showing an exceedance of Tier I ROs in cases where the STSS determines that there was no release.

During his testimony, all that Mr. Gaydosh could articulate was that a "measurement of something is required" to confirm a release (Tr. at 141), but when pressed, Mr. Gaydosh agreed that Sections 170.560 and 170.580 of OSFM regulations do not state that laboratory analysis is needed to confirm a release. Tr. at 142. Mr. Gaydosh was repeatedly asked but was unable to provide an answer as to what precisely is needed under the Board regulations to confirm a release. At this time during the hearing, his counsel objected that the question had been asked and answered. Tr. at 140. However, the Hearing Officer, in response to the objection by the Illinois EPA counsel, noted that though the question had been asked multiple times, Mr. Gaydosh had not answered. Tr.

at 139-140. Mr. Gaydosh, on behalf of the Illinois EPA, never provided a definitive answer as to what is needed under the regulations to confirm a release. The Illinois EPA's testimony on its two-step confirmation policy in conjunction with its failure to provide an answer on what is necessary to confirm a release, as well as the failure to provide an explanation in the final Letters, is evidence that the Illinois EPA has created a two-step policy that is not present in the Board's regulations and is not required to confirm a release in accordance with OSFM's Part 170 regulations.

D. Reliance on OSFM STSS UST Release Determinations

On May 14, 2008, Mr. Kent Gelarden, an OSFM STSS, was on Site in order to observe the removal of the USTs. Mr. James Foley, the HAA project manager for the Site, was also at the Site during the UST removal and observed Mr. Gelarden walk out onto the USTs in order to check the tanks for explosive vapors. Tr. at 105-106. Mr. Foley testified that while Mr. Gelarden was testing the USTs for explosive vapors that Mr. Gelarden was standing "[a]lmost right on top of" the contamination. Tr. at 107. In addition, Mr. Foley testified that Mr. Gelarden did not take a soil sample and did not provide a copy of the UST Removal Log ("Log") to HAA during his visit to the Site. Tr. at 107-108. Although Mr. Gelarden was standing nearly on top of the contamination at the Site and did not take a soil sample to confirm or disprove that a release had occurred, the Log he completed indicated "no release" as the "contamination status" of the Site. R. at 91-92.

Mr. Gaydosh, on behalf of the Illinois EPA, stated that he did not rely on the Log in issuing the March 9, 2009 final decision. Tr. at 130. However, he did state that if the Log contradicted his findings that he would reverse his decision. Tr. at 140-141.

Further, Mr. Gaydosh stated several times during his testimony that the first method used to confirm a release is for the STSS to determine that a release occurred. Tr. at 130-131, 137-138. It is only if the STSS determines that there is no release that laboratory analysis is needed to confirm a release per Illinois EPA's "policy." Tr. at 137-138. However, as detailed above, Mr. Gaydosh agreed that neither the Act nor Board regulations discuss the role of the STSS in release confirmation nor do they require laboratory analysis to confirm a release. Tr. at 142.

1. Hearing Exhibits 6 and 7

Since Mr. Gaydosh testified that the Illinois EPA "policy" relies on the STSS UST Removal Log to determine whether a release has occurred and thus, whether laboratory analysis is required to confirm the release (in the absence of a UST Removal Log indicating that a release occurred), Petitioner sought to introduce certain evidence bearing on the reliability of the UST Removal Log as a release confirmation methodology. Counsel for the Illinois EPA objected and the Hearing Officer sustained the objection but allowed Petitioner to make an offer of proof. Tr. at 74-77. Petitioner made an offer of proof on the relevance and admissibility of tendered Hearing Exhibits 6 and 7.

The offer of proof provided at hearing for Hearing Exhibits 6 and 7 is sufficient. The purpose of an offer of proof is to disclose the nature of the offered evidence to the trial judge and opposing counsel, and to give the reviewing court information to determine whether exclusion of the evidence was erroneous or harmful. *In re Romanowski*, 329 Ill. App. 3d 769, 773, 771 N.E.2d 966, 970, 265 Ill. Dec. 7 (1st Dist. 2002). An offer of proof must explain "what the offered evidence is or what the expected

testimony will be, by whom it will be presented and its purpose." *Id.* at 773; *see also Lagestee v. Days Inn Management Co.*, 303 Ill. App. 3d 935, 709 N.E.2d 270, 237 Ill. Dec. 284 (1st Dist. 1999) (the purpose of the offered testimony was obvious from plaintiffs' counsel's statement, so the plaintiffs made a sufficient offer of proof).

Hearing Exhibit 6 consists of a UST Removal Log for the County Line Quick Shop ("County Line Site") at 2913 Camp Jackson Road, Cahokia, Illinois and a Site Assessment Report submitted by HAA for the County Line Site as required by a condition of the OSFM permit for the removal of piping from the site. Petitioner's counsel stated that Hearing Exhibit 6 was relevant because the UST Removal Log for the County Line Site was prepared by the same OSFM STSS that prepared the Log for the Site involved in this matter. Tr. at 74. Like the Petitioner's Site, the UST Removal Log for the County Line Site indicated that no release occurred. However, the Site Assessment Report submitted to the OSFM for the County Line Site included a table that showed that there indeed was contamination at the site despite the fact that the UST Removal Log indicated no apparent release. Tr. at 74. In addition, Petitioner's counsel informed the hearing officer that, if Mr. Herlacher were allowed to testify regarding Hearing Exhibit 6, he would state that during the work at the County Line Site, he spoke with Mr. Gelarden regarding whether to call in a release showing him contaminated soil that had been measured with a PID exhibiting high ppm readings, and Mr. Gelarden stated that he had already prepared the UST Removal Log and would not change it despite seeing a sample demonstrating that there had been a release. Tr. at 74-75.

Hearing Exhibit 6 should be admitted as relevant for the above-stated reasons and because of the Illinois EPA's testimony on the two methods to confirm a release. Both

methods in its two-step "policy" appear to hinge on whether the OSFM STSS determines whether there was a release and indicated so on the UST Removal Log. In fact, Mr. Gaydosh stated at hearing that should the STSS indicate a release occurred, the inquiry into whether laboratory analysis is needed ends. Tr. at 137-138. Thus, the Illinois EPA does rely on OSFM's UST Removal Logs, and Hearing Exhibit 6 demonstrates that UST Removal Logs indicating no release can be incorrect, as is the case in this matter. Most importantly, reliance upon UST Removal Logs prepared by STSS Gelarden, is suspect at best.

At hearing, the Illinois EPA also objected to Petitioner's Hearing Exhibit 7, which consists of an OSFM UST Removal Log for the Red Bud Oil Company site ("Red Bud Site") located at 503 North Main, Red Bud, Illinois and the Illinois EPA LUST Incident Tracking database information pages for the Red Bud Site. The Hearing Officer sustained the objection and allowed Petitioner's counsel to make an offer of proof. Tr. at 76. Petitioner's counsel argued that Hearing Exhibit 7 was probative and relevant "with respect to whether or not the [F]ire [M]arshal's log can be relied upon to conclusively determine whether or not there's been a release at the site." Tr. at 77. Petitioner's counsel explained that the UST Removal Log for the Red Bud Site indicates no release; however, the Illinois EPA database information shows that early action has been performed at the Red Bud Site, a site investigation plan has been submitted and approved, and reimbursement for corrective action costs has been issued to the owner, despite the fact that the STSS UST Removal Log states that there was no apparent release. Tr. at 77.

Like Hearing Exhibit 6, Hearing Exhibit 7 is relevant because it demonstrates that the Illinois EPA has approved corrective action-related plans and reimbursement for

corrective action costs at a site where the OSFM STSS determined no release occurred. Since Mr. Gaydosh's testimony on the two methods to confirm a release is evidence that the Illinois EPA does rely on the OSFM STSS determination, Hearing Exhibits 6 and 7 are relevant and should be admitted because they show that OSFM has been incorrect in its release determinations.

2. Use of the STSS UST Removal Log

The reliability of the STSS determination is questionable at best given the examples provided in Hearing Exhibits 6 and 7, as well as the fact that there was evidence of a release at the Site, and Mr. Gelarden still determined that no release occurred. As discussed above, Hearing Exhibits 6 and 7 clearly show that the STSS has been wrong in determining whether there was a release at a site. In both examples, the STSS declared that there was no release, but sampling results showed in the case of Exhibit 6 that there was a release, and in the case of Hearing Exhibit 7, there is ongoing remediation at the site and the owner or operator has been reimbursed from the UST Fund. Further, Mr. Herlacher testified that the STSS is primarily on site for safety reasons and not to determine whether there was a release at the site. Tr. at 45. (We note that this makes sense given the title "Storage Tank Safety Specialist.") Thus, reliance on a STSS determination of whether a release occurred is misplaced and not authorized or required by statute or regulation. From the testimony provided at hearing, it is clear that the STSS determination is the basis of the Illinois EPA's two-step confirmation policy, and not only is such a basis not founded in law, but it is also fundamentally unreliable, as evidenced by the wrong determinations made by the STSS in this matter, as well as at the sites in Hearing Exhibits 6 and 7.

Equally disturbing is Mr. Herlacher's uncontroverted testimony that, until his discussion with Mssrs. Gaydosh and Chappel, he was unaware of the Illinois EPA's two-step policy of relying upon the STSS decision and requiring submission of analytical results for determining whether a release from a UST occurred. Tr. at 40, 79. As demonstrated in detail above, there is no support at all in either OFSM or Board regulations for the Illinois EPA's upromulgated two-step "policy" of confirming a release with the use of the STSS report and/or laboratory analysis showing exceedances above Tier I ROs. In this case, in particular, it is unreasonable to rely on the STSS decision because it appears that Mr. Gelarden could not credibly determine whether a release occurred, and even when provided evidence of a release, he was apparently unwilling to revise and file an accurate UST Removal Log at one site. Mr. Foley testified that Mr. Gelarden was almost on top of the soil contamination at the Site. Tr. at 107. Mr. Foley also testified that petroleum odor was present at the Site on May 14, 2009, which was the same day that the STSS was at the Site. Tr. at 102. Despite indications of a release at the Site, Mr. Gelarden reported that there was no apparent release. R. at 91.

Although the Illinois EPA stated that its two-step confirmation policy involves the STSS release determination, the Illinois EPA did not present any witnesses from OSFM to testify regarding STSS duties and the process used in determining whether a release occurred. There was no testimony on how an STSS is trained and whether an STSS has the knowledge and skills or any equipment to accurately determine whether a release occurred. In particular, the Illinois EPA did not present Mr. Gelarden, the STSS in this case, to substantiate the validity of his determination and explain why despite evidence of a release at the Site, he still reported that there was no apparent release. Accordingly,

reliance in any way on the STSS UST Removal Log in this case, or in any matter, as a basis for confirming a release is unreliable and should not be deemed reasonable since there has been no testimony presented by the Illinois EPA on the qualifications of an STSS to make a release determination, and, as discussed in more detail below, there has been no rulemaking process adopting such a policy.

Finally, the Illinois EPA policy is contradictory in terms of its requirement for laboratory analysis and its reliance on the STSS to determine a release. The STSS is on site primarily for safety reasons. Tr. at 45. As Mr. Foley testified, Mr. Gelarden tested the USTs for explosivity and was on site during the UST removal. Tr. at 105-107. He did not take any samples or use any measurement device to determine whether there had been a release at the Site. In fact, he reported no apparent release, although there were visual and olfactory indications of a release at the Site. The Illinois EPA, however, relies on the STSS determination of a release, even though the STSS does not provide any data or measurement to substantiate the claim that a release occurred. This is in direct contradiction to the second method of the Illinois EPA's confirmation policy requiring laboratory analysis to confirm that a release occurred. The Illinois EPA requires no "measurement" of a release from the STSS, but requires owners and operators to submit laboratory analysis to confirm a release. Such a position is suspect at best, especially considering that Hearing Exhibits 6 and 7, as well as the STSS decision in this case, clearly demonstrate that the STSS determination is unreliable.

VI. EVIDENCE OF A RELEASE AT THE SITE

There is no statutory or regulatory provision requiring that owners or operators of USTs submit analytical results showing contaminant exceedances above Tier I ROs in

order to confirm a release. In this case, Petitioner confirmed the release in accordance with OSFM regulations that require notification to IEMA of a suspected release when there is "discovery by owners, operators or others of released regulated substances at a UST site or in the surrounding area (such as the presence of free product, vapors in soils, basements, sewer or utility lines or nearby surface water)." 41 Ill. Admin. Code § 170.560(a). (Emphasis added.) During the preliminary investigation, Mr. Herlacher collected a soil sample from the Site that had a petroleum odor and triggered the PID alarm, which was set to trigger at measurement levels of 1,000 ppm or greater.[5] Tr. at 18-20, 24-27. Thus, based on Mr. Herlacher's experience as an environmental consultant and the presence of vapors in the soil indicating a release of petroleum substances, Mr. Herlacher, in accordance with OSFM regulations, notified IEMA of a release. Mr. Herlacher documented his activities in the Report submitted to the Illinois EPA. R. at 13-15.

HAA, on behalf of the Petitioner, also submitted the Addendum to the Illinois EPA documenting the UST removal activities. R. at 37. The Addendum includes photographs depicting petroleum stained soil near and around the USTs. R. at 205 – 213. Mr. Foley, during his testimony at hearing, specifically discussed the soil staining in photographs P4, P5, and P9.[6] Tr. at 97-102. Mr. Foley, as noted above, is an employee

[5] The Report and Addendum both state that "[e]vidence of a petroleum release was apparent through visual and olfactory observations, and photoionization detector (PID) readings." R. at 14-15, 47-48. However, as Mr. Foley testified, the PID measurements were not included in the Report or Addendum because there is no requirement to include PID measurements in submittals to the Illinois EPA. Tr. at 110.

[6] The Illinois EPA failed to include color photographs in the Record it filed with the Board. At hearing, Petitioner provided color copies of the photographs in the Addendum to the hearing officer for the Board and to the Illinois EPA. The colored photographs, along with several other documents, were accepted as a supplement to the Record and were numbered pages 191 – 233. The colored photographs are located on pages 204 – 213 of the Record.

of HAA and has worked in the environmental consulting business for nearly 20 years. Tr. at 91-92; *see* Hearing Exhibit 8. During his career, he has worked on between fifty and one hundred LUST sites. Tr. at 92-93. Mr. Foley was at the Site during the UST removals and observed evidence of a petroleum release. Tr. at 98-103. As part of his duties as the project manager of the Site, Mr. Foley took photographs of the excavation activities at the Site. The photographs, as Mr. Foley testified, clearly show petroleum stained soil. Tr. at 98-102. For example, in photograph P4 (R. at 205), Mr. Foley stated that there is "staining on the surface of the tank and in the backfill material immediately adjacent to the tank near . . . about a third of the way down the tank near where the laborer is standing." Tr. at 98. In addition, in regards to photograph P5 (R. at 206), Mr. Foley stated that "you can see staining on both tanks in the vicinity of the manway. There's a manway about a third to halfway down the tank where there's staining on both – emanating from the manway going down both sides of the tank into the backfill." Tr. at 99. Mr. Foley also discussed photograph P9 (R. at 208), which shows the sand beneath where the USTs were located. Tr. at 101. Mr. Foley testified that in the center of photograph P9, "you can see dark staining" that "extends from the . . . right center of the photo toward the center of the photo and also from the upper left center of the photo downward toward the center of the photo." Tr. at 101. Mr. Foley during his testimony on each of the above-referenced photographs, stated that the soil staining indicated that there had been a release into the soil. Tr. at 98-99, 102. In order for the Board to have access to a complete record, Petitioner provided color photographs to the Board for its review, and as the Board will see during its review of the color photographs, the photographs clearly show evidence of a release at the Site.

In addition to the photographs showing petroleum stained soil near and around the USTs, Mr. Foley also testified that he smelled a petroleum odor at the Site during excavation activities. Tr. at 98-100, 102, and 105. Based on his experience, the presence of a petroleum odor indicated that there had been a release of petroleum substances at the Site. *Id.* Further, during the excavation activities, Mr. Foley routinely used a PID meter to measure the vapor content of the soil and determine the point at which excavation of the contaminated soil was nearly complete. Tr. at 100, 102-104, and 108-110. The PID measurements ranged from the 100s ppm to greater than 1,000 ppm, which as Mr. Foley testified, can be relied upon as an indication of contamination. Tr. at 95-96, 100, 102-104, and 108-110. After the excavation was complete, Mr. Foley collected confirmation samples, which as provided in the Addendum, showed that any remaining contamination at the Site was below the applicable Tier I ROs. R. at 49-51. Accordingly, Petitioner requested that the Site be deemed as requiring no further action. R. at 50.

There is clear and measured evidence of a release at the Site, and the release was confirmed in accordance with OSFM regulations. The Illinois EPA's claim that laboratory analysis is needed to confirm a release is unsubstantiated and has no basis in the Act or Board regulations. Accordingly, the Board must deem the release a LUST incident subject to the state LUST Program requirements.

VII. ILLINOIS EPA'S POLICY IS A VIOLATION OF THE APA

Mr. Gaydosh testified that there is a two-step procedure for confirming a release at a Site. Tr. at 130. Either the OSFM STSS determines that there is a release and reports as such on the UST Removal Log, ending the inquiry into whether a release occurred; or the OSFM STSS determines that there was no apparent release at the site,

and the owner or operator submits laboratory analysis showing exceedances above Tier I ROs to confirm the release. Tr. at 130. Mr. Gaydosh further testified that the two-step confirmation policy is a decision left to "IEPA management." Tr. at 138.

As noted above, Mr. Herlacher first learned of the Illinois EPA's two-step confirmation policy only after the March 9, 2009 decision Letter was issued. Since Mr. Herlacher has worked in the environmental consulting business for nearly 20 years and did not know of the Illinois EPA's policy, it is reasonable to assume that other consultants, as well as owners and operators of USTs, are also not aware of the Illinois EPA's two-step confirmation policy. The Illinois EPA's reliance on a policy or procedure that has not been made known to the public or adopted through the rulemaking process is a violation of the Administrative Procedure Act's ("APA") rulemaking requirements. 5 ILCS 100/5-5 *et seq.*

The APA provides that "[a]ll rules of agencies shall be adopted in accordance with" Article 5 of the APA. 5 ILCS 100/5-5. It further states that "[n]o agency rule is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection and filed with the Secretary of State as required by this Act." 5 ILCS 100/5-10(c). A "rule" is defined as:

> each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency . . .,

5 ILCS 100/1-70.

In this case, the Illinois EPA, in the absence of any authority to do so, is applying its two-step confirmation "policy" to the release at Petitioner's Site as if it is required by

statute or regulation. The Illinois EPA's policy has not been proposed to the public as part of a rulemaking proposal, and consequently, the public has not had an opportunity to provide comment on a policy that impacts whether sites are subject to the LUST Program. Applying the two-step confirmation policy without having formally adopted the policy as a rule in accordance with APA rulemaking requirements is a violation of the APA and denies owners and operators of their right to provide comments on proposed regulatory requirements.

In *Ayers Oil,* the Board considered whether the Illinois EPA's use of a rate sheet to establish reasonable costs was a violation of the APA. *Ayers Oil* at *20-21. In that case, the Petitioner argued that the Illinois EPA's use of a rate sheet was a violation of APA rulemaking requirements because it was an "improperly promulgated rule." *Id.* at *24. According to the Petitioner, the Illinois EPA reviewers were required to use the rate sheets to determine whether corrective action costs were reasonable. The Illinois EPA, however, argued that the rate sheets were internal guidance documents and "a means of implementing a requirement in the Board's regulations." *Id.* at *26. The Board determined that the rate sheet was "a statement of Agency policy," and that "although the rate sheet is kept 'secret' from the public, the rate sheet is a statement of general applicability." *Id.* Thus, the Board concluded that the rate sheet was a rule that should have been promulgated pursuant to the APA.

In this case, the Illinois EPA testified that its two-step policy to confirm a release requires laboratory analysis showing contamination above Tier I ROs absent an STSS determination that there has been a release. This two-step confirmation policy effectively precludes certain incidents from the LUST Program because of the lack of a release

determination by the STSS or lack of laboratory analysis—neither of which are required by law. Although the Illinois EPA has not made its policy known to the general public, it presumably applies the policy to all incidents, as indicated by Mr. Gaydosh's testimony. Further, the policy impacts persons outside of the Illinois EPA, such as the Petitioner and other owners and operators of USTs. Thus, the Illinois EPA's policy is a rule by definition and should have been properly promulgated pursuant to the APA.

The de facto explanation provided by the Illinois EPA for the determination that the release was a Non-LUST incident was not based on any regulation, and such explanation was not provided in the final decision Letters because no basis exists for concluding that the release was Non-LUST incident. To the extent that the Illinois EPA has offered the two-step policy as an explanation after the issuance of the March 9, 2009 final decision Letter, such explanation is an admission that the Illinois EPA is applying the policy as a rule that has not been made widely known to the regulated community and not been through the public notice and comment period in accordance with the APA's rulemaking procedures. The Illinois EPA recently had the opportunity in a rulemaking to amend Part 734 to notify the regulated community of its two-step confirmation policy by proposing revisions to codify the reliance on the STSS UST Removal Log and/or laboratory analysis showing contamination above Tier I ROs to confirm a release or to amend the definitions of "release," "release confirmation," and "confirmed release" at Section 734.115; however, the Illinois EPA did not propose such revisions, and thus, did not provide the public notice of its two-step confirmation policy. *In the Matter of: Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732) and (35 Ill. Adm. Code 734)*, R4-22(A), R4-23(A) (Consolidated)

(Ill.Pol.Control.Bd. Feb. 16, 2005); *see also In the Matter of: Proposed Amendments to the Board's Procedural Rules and Underground Storage Tank Regulations to Reflect P.A. 94-0274, P.A. 94-0276, P.A. 94-0824, P.A. 95-0131, P.A. 95-0177, and P.A. 95-0408 (35 ILL. ADM. CODE 101.202, 732.103, 732.702, 734.115, 734.710)*, R07-17 (Ill.Pol.Control.Bd. Nov. 15, 2007). Accordingly, the Illinois EPA is improperly imposing on the Petitioner an Illinois EPA policy as a rule in violation of the APA.

VIII. CONCLUSION

The Petitioner confirmed the release in accordance with OSFM's Part 170 regulations, and timely submitted a Report and Addendum to the Illinois EPA that satisfied Section 734.210(d) and (e) requirements. However, the Illinois EPA deemed the release a Non-LUST incident. The Illinois EPA's final decision Letters were deficient and in violation of the Board's requirements. Further, the Illinois EPA testified that the release was a Non-LUST incident because Petitioner failed to provide laboratory analysis showing an exceedance of Tier I ROs to confirm the release. The Illinois EPA also admitted at hearing that such requirement is not found in applicable regulations. The Illinois EPA has arbitrarily and capriciously deemed this release a Non-LUST incident and such decision is in no way supported by the Act or Board regulations. Furthermore, the Illinois EPA has applied its unpromulgated secret two-step confirmation policy as a rule of general applicability in violation of the APA's rulemaking requirements. Accordingly, the Board must reverse the Illinois EPA's decision and conclude that laboratory analysis showing contamination exceedances above Tier I ROs is not required to confirm a release.

WHEREFORE, for the above and foregoing reasons, Petitioner, DICKERSON PETROLEUM, INC., respectfully requests that the Illinois Pollution Control Board grant the following relief:

a. Find that the Illinois EPA's March 9, 2009 and June 10, 2009 final decision Letters are arbitrary, capricious, and without statutory or regulatory authority;

b. Reverse the Illinois EPA's determination that the above-referenced incident is a non-LUST incident and find that the incident must be regulated in accordance with 35 Ill. Admin. Code Part 734;

c. Find that the above-referenced incident is eligible to access the UST Fund and that costs incurred during the early action period for this release are eligible for reimbursement from the UST Fund in accordance with applicable regulations;

d. Find that the Illinois EPA's unpromulgated two-step release confirmation policy is application of a rule in violation of the APA's rulemaking requirements;

e. Award Petitioner reasonable attorney's fees and expenses incurred in bringing this action; and

f. Award such further relief as the Board deems just and equitable.

Respectfully submitted,

DICKERSON PETROLEUM, INC.,
Petitioner,

Dated: October 26, 2009

By: /s/Edward W. Dwyer
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Edward W. Dwyer, the undersigned, hereby certify that I have served the attached POST-HEARING BRIEF upon:

John T. Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
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via electronic mail on October 26, 2009; and upon:

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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on October 26, 2009.

/s/Edward W. Dwyer
Edward W. Dwyer

CAHO-001\Filings\NOF & COS – Post-Hearing Brief.