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
Assistant Clerk
Illinois Pollution Control Board
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(VIA ELECTRONIC MAIL)

Carol Webb, Esq.
Hearing Officer
Illinois Pollution Control Board
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Springfield, Illinois 62794-9274
(VIA U.S. MAIL)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board a **REPLY TO THE ILLINOIS EPA'S RESPONSE TO PETITIONER'S 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: December 9, 2009

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

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REPLY TO THE ILLINOIS EPA'S
RESPONSE TO PETITIONER'S POST-HEARING BRIEF

NOW COMES Petitioner, DICKERSON PETROLEUM, INC. ("Petitioner") by and through its attorneys, HODGE DWYER & DRIVER, and pursuant to the Hearing Officer Order, dated December 2, 2009, submits its Reply to the Illinois EPA's Response to Petitioner's Post-Hearing Brief ("Reply"), and hereby states as follows:

I. BACKGROUND

On October 26, 2009, Petitioner filed a Post-Hearing Brief ("Brief") describing in detail the reasons why the Illinois Environmental Protection Agency's ("Agency's") March 9, 2009 and June 10, 2009 final decision letters ("Letters") were erroneous, and further describing why the Agency's basis for the exclusion of the incident from leaking underground storage tank ("LUST") regulation—namely that the Petitioner did not confirm the release by providing laboratory analysis showing contamination above Tier I remediation objectives ("ROs")—was arbitrary, capricious, and without statutory or regulatory authority. On November 23, 2009, the Agency filed its Response to Petitioner's Post-Hearing Brief ("Response"). On December 2, 2009, the Hearing Officer

granted Petitioner's request to file a Reply to the Agency's Response and also provided for the Agency to file a Surreply.

In reviewing the Response, it is clear that the Agency has resolved to maintain its position that there are release confirmation requirements that do not exist in the Office of the State Fire Marshal ("OSFM") or Illinois Pollution Control Board ("Board") regulations. The Agency makes no meaningful effort to controvert the arguments advanced at hearing by the Petitioner and articulated in Petitioner's Brief. To the extent that the Agency advances any credible argument in its Response, it continues to be premised upon an unpromulgated rule that requires actions and information that has no regulatory basis.

II. THE AGENCY IS INCONSISTENT REGARDING THE LETTERS' LACK OF BASIS FOR EXCLUSION OF THE INCIDENT FROM THE LUST PROGRAM.

As described in Petitioner's Brief, the Agency failed to comply with 35 Ill. Admin. Code § 734.505(b)(1) – (3) when it issued the Letters, which lacked the required explanation for why the Petitioner's submittals were being rejected and why the site was being deemed a non-LUST incident. Brief at 7-9. In fact, Mr. Gaydosh, who testified on behalf of the Agency at hearing, could not provide any reason why the March 9, 2009 letter did not include an explanation for the rejection of the 45-Day Report or the determination that the site was deemed a non-LUST incident. Hearing Transcript, *Dickerson Petroleum, Inc. v Illinois EPA*, PCB Nos. 09-87, 10-05 (consolidated) at 142-143 (Ill.Pol.Control.Bd. Sept. 25, 2009) (hereafter cited as "Tr."); Brief at 8.

The Agency in its Response attempts to explain its failure to include the required information in the Letters by stating:

> If a factual situation or site is not covered within the parameters of a statutory scheme such as the Illinois EPA [LUST] Program, it is difficult to cite specific provisions from the statutory scheme since the matter in question is an anomaly.

Response at 5-6. The notion that it is difficult for the Agency to provide a basis for its decision is curious since the Agency's own Response states that "Illinois EPA Project Manager Jay Gaydosh was looking for evidence that the level of contamination at the site required corrective action to be performed." *Id.* at 5. The Response further references that the information Petitioner provided to the Agency "cannot provide specific levels of specific contaminants." *Id.* Not only do such statements demonstrate that the Agency could have provided an explanation for denial in its Letters since the Agency was clearly, by its own statements, looking for information showing specific levels of contamination, but such statements also appear to be tacit admissions that the Agency requires owners or operators to show that a certain threshold of contamination exists at the site in order to confirm a release—a requirement that has no statutory or regulatory basis. Thus, the Agency's inconsistent statements regarding the difficulty of citing to a specific provision because the site is an "anomaly" and its review for specific levels of contamination, demonstrates the Agency's inability to find a statutory or regulatory basis for its requirement that laboratory analysis showing contaminants above Tier I ROs is necessary to confirm a release, which is understandable since no such basis exists.

III. THE AGENCY FAILS TO PROVIDE ANY CITATION TO SUPPORT ITS POSITION THAT LABORATORY ANALYSIS SHOWING EXCEEDANCES OF TIER I ROs IS NECESSARY TO CONFIRM A RELEASE.

The Agency's entire Response only includes a single citation to the relevant rule, 35 Ill. Admin. Code Part 734, and the Agency only specifically references Section 734.210(h), the requirements for early action *closure* sampling. Response at 5. Section 734.210(h)(1) and (2) specify the closure sampling locations for USTs that are removed or abandoned in place. 35 Ill. Admin. Code § 734.210(h)(1)-(2). Section 734.210 also provides the requirements for submitting a *closure* report if sampling results show that the appropriate ROs have been met. 35 Ill. Admin. Code § 734.210(h)(3). It is clear that the portion of the rule cited by the Agency, Section 734.210(h), deals with the requirements for meeting *closure* requirements, *not* with release confirmation.

It is noteworthy that the Agency chose only to cite to Section 734.210(h) in its Response. The Petitioner's Brief repeatedly states that the Agency has no support for its policy that laboratory analysis showing contaminant exceedances above Tier I ROs is needed to confirm a release. The Agency does not provide in its Response a single statutory or regulatory citation to controvert the Petitioner's statements. The Agency's glaring failure to provide any legal basis for its unpromulgated policy is evidence in itself of the lack of basis for deeming this incident a non-LUST incident for failing to confirm a release by submitting laboratory analysis showing exceedances above Tier I ROs.

IV. THE AGENCY DOES NOT DENY THE USE OF A TWO-STEP CONFIRMATION POLICY.

The Agency in its Response also fails to deny that it utilizes a two-step confirmation policy as testified to by Mr. Jay Gaydosh at hearing, and the Agency

provides no further explanation of Mr. Gaydosh's testimony on his use of the two-step policy. As described in Petitioner's Brief, Mr. Gaydosh, who has worked in the LUST Program for 16 years, testified that if the OSFM Storage Tank Safety Specialist ("STSS") determines that there is no release, "we normally look for laboratory analysis to confirm the presence of contaminants above tier I objectives." Tr. at 130; Brief at 13. In addition, as noted in Petitioner's Brief, Mr. Harry Chappel, a regional subunit manager for the LUST Program, stated to Mr. Herlacher that the Agency's policy requires laboratory analysis showing contamination above Tier I ROs to confirm a release. Brief at 13. Mr. Chappel also informed Mr. Herlacher that the requirement is not in Part 734. *Id.* The Agency failed to address in its Response the statements made by Mr. Gaydosh at hearing or Mr. Herlacher's testimony regarding his conversation with Mr. Chappel. Such testimony, which remains uncontroverted by the Agency, clearly demonstrates that the Agency utilizes a release confirmation policy that is not in Part 734.

V. THE AGENCY'S POLICY VIOLATES THE APA'S RULEMAKING REQUIREMENTS.

As noted above, the Agency's Response contains no explanation for its policy that laboratory analysis showing contamination above Tier I ROs is required in order to confirm a release. Mr. Gaydosh, at hearing, was unable to provide a citation to the regulations where such a requirement is articulated, and Mr. Chappel stated to Mr. Herlacher that the Agency's policy is not in Part 734. Brief at 13. The Agency's policy is not codified in either the Board or OSFM regulations; however, it was applied as a rule in violation of the Administrative Procedure Act's ("APA") rulemaking requirements.

Petitioner raised a related concern in its April 3, 2009 letter to Mr. Gaydosh, where Petitioner stated that if the Agency requires laboratory analysis to confirm a

release, "it needs to communicate that to the regulated community. Moreover, a rulemaking proceeding before the Board would be appropriate to amend Part 734 to expressly require laboratory analysis to confirm a LUST release." R. at 97-103. Petitioner's April 3, 2009 letter further requested a written response from the Agency regarding whether the LUST Program requires laboratory analysis to confirm a release, and it also stated that Petitioner was willing to consider an extension of the appeal deadline in order to further discuss its concerns with the Agency and determine whether an appeal was necessary. A written response to the April 3, 2009 letter, which was also sent to Mr. Hernando Albarracin, Manager of the LUST Section, and Mr. William Ingersoll, Deputy Chief Legal Counsel, was requested from the Agency. Though a written response was requested, no response, written or otherwise, was received. As a result, Petitioner was forced to incur significant costs to appeal the application of an unpromulgated rule and to determine the basis for the rejection of Petitioner's submittals.

VI. THE AGENCY MISCONSTRUES PETITIONER'S TESTIMONY REGARDING PID MEASUREMENTS.

In regards to photoionization detector ("PID") measurements, the Agency states that Mr. James Foley, who testified on behalf of the Petitioner at hearing, "acknowledged that PID readings were not acceptable to the department for reaching conclusions." Response at 5. The Agency has taken Mr. Foley's statements out of context and excluded important details from the portion of the testimony from which the Agency's characterization stems. At hearing, Mr. Foley stated in response to a question regarding why PID measurements were not in the 45-Day Report or Addendum:

> They're not required and they're not acceptable by the department for reaching any conclusions, at least for the purpose of closure. The—You know, I was mainly using it as a tool to determine where we were in terms

> of getting to the point of conditions that appeared to be, quote, unquote, clean.

Tr. at 110. (Emphasis added.) Mr. Foley was explaining that PID measurements are not acceptable for purposes of *closure.* In terms of closure, he only used the PID measurements to aid in determining when the level of contaminants in the excavated area was close to "clean." In order to close the site, Petitioner took closure samples in accordance with Section 734.210(h), and submitted the results to the Agency as shown in the Table 1 of the Addendum. R. at 51. Mr. Foley also testified that he was unaware of any requirement that PID measurements be included in reports submitted to the Agency. Tr. at 110.

VII. THE AGENCY'S CONCERN REGARDING PRE-PLANNED UST REMOVALS IS UNWARRANTED.

The Agency posits a scenario where if the Board reverses the Agency's decision, owners or operators of USTs at sites with "pre-planned tank pulls" with "questionable levels of contamination" will be able to access the UST Fund by submitting "inadequate information." Response at 6-7. The Agency's concern is unwarranted and unjustified. First, all UST removals are planned since a permit is required from OSFM prior to removal so, in fact, pre-planned UST removals are required by OSFM and Board regulations. 415 ILCS 5/57.6(b); 41 Ill. Admin. Code § 170.541. In addition, the concern with "inadequate levels" of contamination has no basis in law, since as discussed above and in detail in Petitioner's Brief, there is no specific "level" of contamination required to be present at sites in order to confirm a release. Visual, olfactory, and PID measurements are sufficient to provide evidence of a release in accordance with Board and OSFM regulations. 35 Ill. Admin. Code § 734.210(g) (stating that owners or

operators are to confirm a release in accordance with OSFM regulations); 41 Ill. Admin. Code §§ 170.560, 170.580; *see also* Brief at 17 (noting that the definition of "release" does not include a requirement that it be above Tier 1 ROs). In this case, Petitioner, at minimum, provided the necessary information to confirm a release in accordance with OSFM and Board regulations, and accordingly, the incident should be subject to the LUST Program regulations, and Petitioner should be allowed to access the UST Fund for reimbursement of early action costs in accordance with applicable regulations. Brief at 26-29.

VIII. CONCLUSION

For the reasons discussed above and articulated in Petitioner's Brief, the Agency's decisions to reject Petitioner's submittals and deem the release a non-LUST incident were arbitrary, capricious, and without statutory or regulatory authority. The Agency's arbitrary decisions forced the Petitioner to unreasonably incur significant costs to appeal the erroneous application of an unpromulgated rule. Petitioner requests the Board bear in mind that Petitioner sought to avoid an appeal of the Agency's decisions. R. at 97-103. Petitioner's April 3, 2009 letter to the Agency sought clarification of the Agency's basis for the determination that the release was a non-LUST incident and requested a written response from the Agency, or in the alternative, an extension of the appeal deadline in order to further discuss the issues raised in the letter. *Id.* However, the Agency provided no response to the letter, effectively denying Petitioner's request for an extension of the appeal deadline and forcing Petitioner to incur substantial costs to appeal the Agency's arbitrary determinations. The Board should not condone the Agency's abuse of its authority and its unauthorized rulemaking.

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 Agency's March 9, 2009 and June 10, 2009 final decision Letters are arbitrary, capricious, and without statutory or regulatory authority;

b. Reverse the Agency's determination that the above-referenced incident is a non-LUST incident and find that the Petitioner's 45-Day Report and Addendum satisfied the requirements for release confirmation as set forth in 35 Ill. Admin. Code Part 734;

c. Find that release confirmation in compliance with Part 734 requires neither a determination by the OSFM STSS nor laboratory analysis showing contaminant exceedances above Tier I ROs;

d. 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;

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

f. Award Petitioner reasonable attorney's fees and expenses incurred in bringing this action pursuant to the APA and Section 57.8(l) of the Illinois Environmental Protection Act; and

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

Respectfully submitted,

DICKERSON PETROLEUM, INC.,
Petitioner,

Dated: December 9, 2009

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

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CAHO:001/Fil/Consolidated/Reply Brief

CERTIFICATE OF SERVICE

I, Edward W. Dwyer, the undersigned, hereby certify that I have served the attached REPLY TO THE ILLINOIS EPA'S RESPONSE TO PETITIONER'S POST-HEARING BRIEF upon:

John T. Therriault
Assistant Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, Illinois 60601

via electronic mail on December 9, 2009; and upon:

James G. Richardson
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by depositing said documents in the United States Mail, postage prepaid, in Springfield, Illinois on December 9, 2009.

/s/Edward W. Dwyer
Edward W. Dwyer

CAHO:001/Fil/NOF & COS – Reply Brief