

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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DEC 28 2009

STATE OF ILLINOIS  
Pollution Control Board

DICKERSON PETROLEUM, INC., )  
Petitioner, )  
 )  
v. )  
 )  
ILLINOIS ENVIRONMENTAL PROTECTION )  
AGENCY, )  
Respondent. )  
 )  
 )

PCB 09-87  
PCB 10-05  
(UST Appeal)  
(Consolidated)

NOTICE

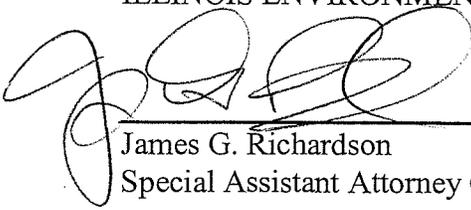
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Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
P.O. Box 19274  
Springfield, Illinois 62794-9274

PLEASE TAKE NOTICE that I have today caused to be filed a SUR-REPLY TO PETITIONER'S REPLY BRIEF with the Illinois Pollution Control Board, copies of which are served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

  
James G. Richardson  
Special Assistant Attorney General

Dated: December 23, 2009  
P.O. Box 19276  
Springfield, Illinois 62794-9276  
217/782-5544

THIS FILING SUBMITTED ON RECYCLED PAPER

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**SUR-REPLY TO PETITIONER'S REPLY BRIEF**

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, James G. Richardson, Assistant Counsel and Special Assistant Attorney General, and hereby submits to the Illinois Pollution Control Board ("Board") its Sur-Reply to Petitioner's Reply Brief.

**I. ARGUMENT**

Rather than being a traditional reply to an opponent's brief, Dickerson's Reply is really a declaration of victory and a vehicle to commence arguments seeking the award of attorney's fees in this case. Dickerson comments "The Petitioner's Brief repeatedly states that the Agency has no support for its policy," the "Agency makes no meaningful effort to controvert the arguments" Dickerson has advanced, and "any credible argument" in the Illinois EPA's Response is still premised on the unpromulgated secret two-step confirmation policy ("Two-Step.") Reply at 2,4. Once one gets beyond the bravado, it is clear that the Reply does not advance Dickerson's efforts to meet its burden of proof in these cases.

Dickerson writes that "Visual, olfactory, and PID measurements are sufficient to provide

evidence of a release in accordance with Board and OSFM regulations” and states that it provided the necessary information in this case. Reply at 7-8. But as to PID measurements prior to the March 9, 2009 determination, the Illinois EPA was informed only of the taking of readings and not the specific readings obtained. In the world according to Dickerson, are specific PID readings not even necessary for entry into the Illinois EPA Leaking Underground Storage Tank Program, a program that is focused on corrective action, meeting cleanup objectives, and reimbursing only the costs necessary to achieve these objectives? Objective and scientific data, namely analytical results of soil samples from the excavation walls and floor, are needed for closure. Is it not reasonable and beneficial for the Illinois EPA to have comparable objective and scientific data concerning initial conditions at a site, or should the Illinois EPA be “left in the dark” as the Dickerson scheme would have it? No comfort from this latter prospect is found in Dickerson’s brief response to the Illinois EPA’s concern that pre-planned tank pulls or other sites with questionable levels of contamination could enter the Illinois EPA Leaking Underground Storage Tank Program and access the UST Fund. Reply at 7, Response at 6-7.

Dickerson has thrown everything but the kitchen sink into its efforts to be reimbursed for this tank pull. It has alleged a Two-Step to which the Illinois EPA has responded. Response at 5-6. Dickerson seizes upon the fact that there has been no formal denial of the Two-Step. Reply at 4-5. But Dickerson has not proven the existence of the Two Step, and it would be illogical and superfluous for the Illinois EPA to deny something that does not exist. Dickerson’s onslaught continues in the Reply. Although not referenced during the hearing or in the parties initial briefs, Dickerson at the 11<sup>th</sup> hour references an April 3, 2009 letter written by its counsel to the Illinois

EPA. Reply at 5-6. Further, in the Reply's Conclusion, Dickerson writes as follows:

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. Reply at 8.

Dickerson's conduct here is objectionable. First, there was no evidence presented concerning its litigation costs, so Dickerson is arguing facts that are not in evidence. Second, these costs and actions concerning the April 3, 2009 letter are irrelevant and beyond the information available to the Illinois EPA when the March 9, 2009 determination was made. Response at 2-4. The Illinois EPA asks that the Board not consider these matters in deciding this case. The one point clearly demonstrated in these appeals is Dickerson's intent to be reimbursed for its tank pull, even at the cost of trampling over the rules of evidence and practice and regardless of its impact to the Illinois EPA Leaking Underground Storage Tank Program.

## II. CONCLUSION

For all of the reasons and arguments presented herein and in the Response to Petitioner's Post-Hearing Brief, it is the position of the Illinois EPA that Dickerson has failed to meet its burden of proof in these cases. The Illinois EPA respectfully requests that the Board affirm its March 9, 2009 and June 10, 2009 decisions.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY



James G. Richardson  
Special Assistant Attorney General

Dated: December 23, 2009

**CERTIFICATE OF SERVICE**

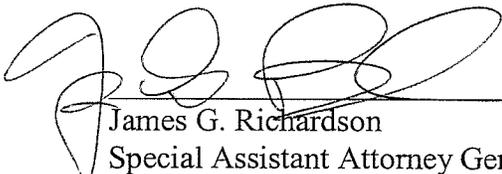
I, the undersigned attorney at law, hereby certify that on December 23, 2009 I served true and correct copies of a SUR-REPLY TO PETITIONER'S REPLY BRIEF upon the persons and by the methods as follows:

*[Facsimile and 1<sup>st</sup> Class U.S. Mail]*  
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