

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

DICKERSON PETROLEUM, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB No. 09-87
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF FILING

TO: Mr. John T. Therriault
Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
(VIA ELECTRONIC MAIL)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board an **AMENDED PETITION FOR REVIEW**, directed to the Illinois Pollution Control Board, a copy of which is herewith served upon you.

Respectfully submitted,

DICKERSON PETROLEUM, INC.,
Petitioner,

Dated: May 26, 2009

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

Edward W. Dwyer
Monica T. Rios
HODGE DWYER & DRIVER
3150 Roland Avenue
Post Office Box 5776
Springfield, Illinois 62705-5776
(217) 523-4900

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Petitioner,)	
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v.)	PCB No. 09-87
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ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
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Respondent.)	

AMENDED PETITION FOR REVIEW

NOW COMES Petitioner, DICKERSON PETROLEUM, INC. (“Petitioner”), by and through its attorneys, HODGE DWYER & DRIVER, and pursuant to Sections 40, 57.7(c), and 57.8(i) of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/40, 57.7(c), 57.8(i) and 35 Ill. Admin. Code Part 105, hereby requests review of the decision by the Respondent, Illinois Environmental Protection Agency (“Agency”), regarding Petitioner’s 45-Day Report (“Report”) and 45-Day Report Addendum (“Addendum”). In support of this Amended Petition for Review (“Petition”), Petitioner states as follows:

1. On April 15, 2009, Petitioner timely filed a Petition for Review of the Agency’s March 9, 2009 determination with the Illinois Pollution Control Board (“Board”). On May 7, 2009, the Board issued an order stating that Petitioner has until June 8, 2009 to amend its filing to include the “date of service of the Agency’s final decision and a statement specifying the grounds of appeal.” Board Order, *Dickerson Petroleum, Inc. v. IEPA*, PCB No. 09-87 (Ill.Pol.Control.Bd. May 7, 2009). Pursuant to the Board’s order, this Petition is filed to address the alleged deficiencies.

2. 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.

3. On January 18, 2008, during a preliminary investigation of the Site, Petitioner, in accordance with applicable Board and Office of the State Fire Marshal (“OSFM”) requirements, notified the Illinois Emergency Management Agency (“IEMA”) of a release from the USTs. IEMA assigned the release Incident No. 20080084. Petitioner received an Eligibility and Deductibility determination from OSFM on April 4, 2008.

4. On or about April 15, 2008, Petitioner submitted its Report to the Agency for the above-referenced leaking UST (“LUST”) incident. By letter dated May 15, 2008, the Agency approved the Report and a Stage 1 Site Investigation Plan. In May of 2008, Petitioner’s consultant submitted a request for extension of the early action deadline. By letter dated February 19, 2008, the Agency approved the extension of the early action period.

5. By letter dated June 13, 2008, the Agency approved the second extension of the early action period. On or about September 5, 2008, after the removal of the USTs from the Site, Petitioner submitted its Addendum to the Report to the Agency.

6. By letter dated March 9, 2009, the Agency determined that based on the Report, “the incident is not subject to 35 Ill. Adm. Code 734, 732, or 731.” *See* Letter from Illinois EPA to Dickerson Petroleum, Inc. (Mar. 9, 2009), attached hereto as Exhibit A. In addition, the Agency stated in regards to the Addendum, “[b]ased on the above

findings regarding the April 25th 45-Day Report,¹ 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.*

7. The date of service on the Petitioner of the Agency’s March 9, 2009 final decision was March 11, 2009. The Petition for Review was filed within 35 days after the date of service of the Agency’s final decision in accordance with Board’s rules governing service and LUST appeals. 35 Ill. Admin. Code §§ 101.300(c), 105.404.

8. The March 9, 2009 letter provides neither a statutory nor regulatory basis for its determination that the above-referenced release is a non-LUST incident. Further, after the receipt of the March 9, 2009 letter, Petitioner’s consultant had several conversations with Agency representatives, who indicated that the Agency was rejecting the Report, *i.e.*, excluding the release from LUST regulation because there was no laboratory analysis of soil samples confirming the release. The Agency’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 at a site. Accordingly, because Petitioner confirmed the release in accordance with the OSFM regulations, incorporated by reference in the Board’s regulations at 35 Ill Admin. Code Part 734, the release discussed above is subject to LUST Program requirements.

9. The Agency’s March 9, 2009 letter did not include language explaining the owner/operator’s appeal rights as typically seen in the Agency’s final decisions in LUST matters. Although the Petitioner’s appeal rights were not delineated in the

¹ The March 9, 2009 letter from the Agency inaccurately identifies the Report as being dated April 25, 2008. The correct date of the Report is April 15, 2008.

March 9, 2009 letter, the Agency has orally acknowledged that the March 9, 2009 letter was a final decision.

10. Early action activities are considered corrective action as defined by the Act in Section 57.2. 415 ILCS 5/57.2. An owner or operator of UST may seek reimbursement for corrective action costs, including costs incurred for early action activities, from the LUST Fund pursuant to the Act and Board regulations. 415 ILCS 5/57.8; 35 Ill. Admin. Code Part 734. Subpart B of Part 734, as well as other sections of Part 734, provide the requirements for seeking reimbursement from the LUST Fund for early action activities. 35 Ill. Admin. Code Part 734.

11. Petitioner submitted the documents required by the applicable statute and regulations to the Agency. The Agency's March 9, 2009 final decision determined that the release reported "is not subject to 35 Ill. Adm. Code 734, 732 or 731." *See* Exhibit A. The March 9, 2009 letter was a final decision and may be reviewed by the Board pursuant to Section 40 of the Act. 415 ILCS 5/40.

12. The March 9, 2009 determination does not provide a factual, statutory, or regulatory basis and further fails to provide an explanation or justification for concluding that the release "is not subject to 35 Ill. Adm. Code 734, 732 or 731." *See* Exhibit A. This renders the Agency's final decision arbitrary, capricious, and without statutory or regulatory authority. Petitioner is entitled under the Act to review of the Agency's final decision and reversal of such decision. 415 ILCS 5/40.

13. The Agency's March 9, 2009 decision is a disapproval or rejection of a report, but does not comply with the requirements of Section 57.7(c), including but not limited to the requirements of Section 57.7(c)(4)(A) – (D). 415 ILCS 5/57.7. Further,

the Agency's final disapproval or rejection of the report failed to comply with the Board's requirements at Section 734.505(b)(1)-(3). 35 Ill. Admin. Code § 734.505(b)(1)-(3). Petitioner is entitled to seek review of the Agency's disapproval or rejection of the report. *Id.*; 415 ILCS 5/40.

14. The Agency's decision also constitutes a refusal to reimburse corrective action costs, which is similarly subject to review pursuant to Section 57.8(i) of the Act. 415 ILCS 5/57.8(i); 415 ILCS 5/40.

15. Petitioner's counsel has reviewed similar Petitions for Review of final LUST decisions filed with the Board and believes that the above satisfies the Board's Section 105.408 requirements. If the Amended Petition is deemed insufficient, Petitioner respectfully requests that the Board provide specific guidance as to any deficiencies.

16. Petitioner is entitled to seek review of the Agency's March 9, 2009 final determination that the above-referenced incident is not subject to the State's LUST regulations. The Agency's determination regarding this incident is arbitrary, capricious, and without statutory or regulatory authority.

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 final decision is 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 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 LUST Fund and that costs incurred during the early action period for this release are eligible for reimbursement from the LUST Fund in accordance with applicable regulations;

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

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

Respectfully submitted,

DICKERSON PETROLEUM, INC.,
Petitioner,

Dated: May 26, 2009

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

Edward W. Dwyer
Monica T. Rios
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3150 Roland Avenue
Post Office Box 5776
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CAHO:001/Fil/Amended Petition for Review



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 - (217) 782-2829
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601 - (312) 814-6026

DOUGLAS P. SCOTT, DIRECTOR

217/782-6762

CERTIFIED MAIL

MAR 09 2009

7008 1830 0004 1767 7056

Dickerson Petroleum, Inc.
Attn: Thomas H. Wuller, VP
920 North Illinois Street
Belleville, Illinois 62220

Re: LPC #1630205077 - St. Clair County
Cahokia/Dickerson Petroleum, Inc. (aka: Cahokia Quick Shop)
823 Upper Cahokia Road
Leaking UST Incident No. 20080084
Leaking UST Technical File

Dear Mr. Wuller:

The Illinois Environmental Protection Agency (Illinois EPA) has reviewed the 45-Day Report (report) submitted for the above-referenced incident. This report dated April 25, 2008, was received by the Illinois EPA on April 28, 2008. Citations in this letter are from the Environmental Protection Act (Act) and 35 Illinois Administrative Code (35 Ill. Adm. Code).

Based on the information currently in the Illinois EPA's possession, this incident is not subject to 35 Ill. Adm. Code 734, 732 or 731. Therefore, the Illinois EPA Leaking Underground Storage Tank Program has no reporting requirements regarding this incident.

Based 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.

This letter, however, does not address whether any remaining contamination at this site is being managed to protect human health or the environment. Any remaining contamination not the subject of this letter may be subject to other provisions of the Act.

If you wish to address any remaining contamination, or portion thereof, at the site and want Illinois EPA concurrence that any cleanup measures taken are protective of human health, you may wish to consider participation in the Illinois EPA's Site Remediation Program. The Site Remediation Program has been developed to provide Illinois EPA guidance, assistance and

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determinations of successful completion for the voluntary conduct of remediation actions. The objectives of the program are as follows:

1. To provide Illinois EPA experience and assistance towards a timely, effective, and resource efficient cleanup of soil and/or groundwater contamination; and
2. To provide proper conclusion of participation in the program resulting in the issuance of either a No Further Remediation letter or a Release of Responsibility letter by the Illinois EPA.

Under the Site Remediation Program the Illinois EPA is authorized, and may agree, to provide review and evaluation services for actions at sites where hazardous substances, pesticides or petroleum may be present for which the owner or operator requested such services in writing. Any other person similarly may request review and evaluation services for actions at the site so long as that other person has provided the Illinois EPA with the written permission of the owner or operator to conduct those actions. Participants in the Program are required to reimburse the Illinois EPA for such services.

If you have any questions or require further assistance, please contact Jay F. Gaydosh at 217-785-0231.

Sincerely,



Harry A. Chappel, P.E.
Unit Manager
Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

HAC:JFG\20080084 Not Subject to LUST Letter

cc: Heriacher Angleton Associates, Inc.
BOL File

CERTIFICATE OF SERVICE

I, Edward W. Dwyer, the undersigned, hereby certify that I have served the attached AMENDED PETITION FOR REVIEW 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 May 26, 2009; and upon:

Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Post Office Box 19276
Springfield, Illinois 62794-9276

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

/s/Edward W. Dwyer
Edward W. Dwyer

CAHO:001/Fil/NOF & COS -- Amended Petition for Review