ILLINOIS POLLUTION CONTROL BOARD
February 4, 2010

DICKERSON PETROLEUM, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 9-87
	)	PCB 10-5
ILLINOIS ENVIRONMENTAL	)	(UST Appeal)
PROTECTION AGENCY,	)	(Consolidated)
	)	
Respondent.	)	

EDWARD D. DWYER AND MONICA T. RIOS, HODGE DWYER & DRIVER, APPEARED ON BEHALF OF PETITIONER; and

JAMES G. RICHARDSON, ASSISTANT COUNSEL, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by A.S. Moore):

On May 26, 2009, Dickerson Petroleum, Inc. (Dickerson) timely filed an amended petition seeking the Board's review of a March 9, 2009 determination by the Illinois Environmental Protection Agency (Agency or IEPA or Illinois EPA). The Agency determined that an incident at the site of the Cahokia Quick Shop facility (Site) in Cahokia, St. Clair County, was not subject to Parts 731, 732, or 734 of the Board's underground storage tank (UST) regulations (35 Ill. Adm. Code 731, 732, 734). The Agency found that an Addendum to Dickerson's 45-Day Report fell outside the scope and jurisdiction of the UST program. The Board accepted this petition for hearing and docketed it as PCB 09-87.

On July 10, 2009, Dickerson timely filed a second petition seeking the Board's review of a June 10, 2009 determination by the Agency. After Dickerson sought payment from the UST Fund for costs associated with the same incident at the Site, the Agency determined that the incident was not subject to the UST provisions of the Environmental Protection Act (Act) or the Board's regulations. The Agency declined to review Dickerson's claim and to submit it for payment. The Board accepted this second petition for hearing and docketed it as PCB 10-5. On August 6, 2009, the Board granted Dickerson's motion to consolidate the two dockets and consolidated PCB 09-87 and PCB 10-5 for purposes of conducting the hearing but not necessarily for the Board's decisions.

For the reasons stated below, the Board today finds that the Agency's March 9, 2009, and June 10, 2009, denial letters fail to comply with the requirements of 35 Ill. Adm. Code 734.505(b). The Board remands these consolidated proceedings to the Agency and directs the Agency to cure the deficiencies in those letters and to re-issue determinations consistent with this order and with applicable statutory and regulatory requirements within 30 days of the date of this

order. Also for the reasons stated below, the Board declines to exercise its discretion to direct the Agency to reimburse Dickerson's attorney fees from the UST Fund.

This opinion first reviews the procedural history of this case before summarizing both of Dickerson's consolidated petitions for review. The opinion then summarizes the factual background, the issues raised in the consolidated appeals, and the post-hearing briefs filed by Dickerson and the Agency. This opinion then sets forth the relevant statutory and regulatory provisions and the burden of proof and standard of review applicable to this case. The Board then discusses and rules upon the issues before providing its conclusion and issuing its order.

PROCEDURAL HISTORY

PCB 09-87

On April 15, 2009, Dickerson filed a petition seeking the Board's review of Agency determinations regarding Dickerson's 45-Day Report and 45-Day Report Addendum regarding USTs once located at the Site. In an order dated May 7, 2009, the Board accepted Dickerson's petition as timely but directed Dickerson to file an amended petition addressing specified deficiencies within 30 days. On May 26, 2009, Dickerson timely filed an amended petition (Am. Pet.). In an order dated June 4, 2009, the Board accepted Dickerson's amended petition for hearing. On July 6, 2009, the Agency filed its administrative record (R. at 1-109).

On July 10, 2009, Dickerson filed a motion to consolidate this proceeding with PCB 10-5. In an order dated August 6, 2009, The Board granted the motion for purposes of conducting the hearing but not necessarily for decision.

PCB 10-5

On July 10, 2009, Dickerson filed a petition (Pet.) seeking the Board's review of an Agency determination regarding Dickerson's application for payment from the UST Fund. Also on July 10, 2009, Dickerson filed a motion to consolidate the proceeding with PCB 09-87. In an order dated July 23, 2009, the Board accepted Dickerson's petition in PCB 10-5 for hearing but reserved ruling on the motion to consolidate until expiration of the response period. On August 6, 2009, the Board granted the motion to consolidate for purposes of conducting the hearing but not necessarily for decision.

Post-Consolidation

As noted above, the Board on August 6, 2009, granted Dickerson's motion to consolidate PCB 09-87 and PCB 10-5. On August 18, 2009, the Agency filed a supplement to its administrative record (R. at 110-90). The hearing in these consolidated cases took place on September 16, 2009, in Springfield. The Board received the transcript of the hearing (Tr.) on September 25, 2009. Mr. Thomas L. Herlacher and Mr. James G. Foley, both of Herlacher Angleton Associates, testified on behalf of Dickerson, and Mr. Jay Gaydosh testified on behalf of the Agency.

During the hearing, the Agency filed an additional supplement to the administrative record (R. at 191-233). *See* Tr. at 6-7. Also during the hearing, the parties agreed to admission of six exhibits, and the hearing officer admitted the following exhibits into the record:

Resume of Mr. Thomas L. Herlacher, P.E., Principal Engineer, Herlacher Angleton Associates, LLC (Exh. 1);

35 Ill. Adm. Code 734.505 (Exh. 2);

35 Ill. Adm. Code 734.210 (Exh. 3);

41 Ill. Adm. Code 170.560 (Exh. 4);

41 Ill. Adm. Code 170.580 (Exh. 5); and

Resume of Mr. James G. Foley (Exh. 8). Tr. at 7, 9.

During the hearing, Dickerson moved to admit into the record a Log of Underground Storage Tank dated November 28, 2006, and regarding Facility Number 6-038369, the County Line Quick Stop in Cahokia, St. Clair County (Exh. 6). Tr. at 73. The hearing officer sustained the Agency's objection to admission on the basis of relevance. *Id*. at 73-74. Dickerson made an offer of proof to the Board regarding the relevance of that exhibit. *Id*. at 74-75.

Also during the hearing, Dickerson began direct examination of Mr. Herlacher on a Log of Underground Storage Tank Removal dated January 29, 2009, and regarding Facility Number 6-019239, the Red Bud Oil Company in Red Bud, Randolph County (Exh. 7). *Id*. at 75-76. The Agency objected to this examination on the basis of relevance, and the hearing officer sustained the objection. *Id*. at 76. Dickerson made an offer of proof to the Board regarding the relevance of this exhibit. *Id*. at 76-77.

On October 26, 2009, Dickerson filed its post-hearing brief (Brief). On November 23, 2009, the Agency filed its post-hearing brief (Resp.).

In an order dated December 2, 2009, the hearing officer granted the parties' request for additional briefing, making Dickerson's reply brief due on or before December 9, 2009, and the Agency's sur-reply due December 23, 2009.

On December 9, 2009, Dickerson filed a reply to the Agency's response to Dickerson's post-hearing brief (Reply). On December 23, 2009, the Agency filed its sur-reply to Dickerson's reply (Sur-Reply).

STATUTORY AND REGULATORY PROVISIONS

Section 57.2 of the Act provides in pertinent part that "'[c]orrective action' means activities associated with compliance with the provisions of Sections 57.6 [early action] and 57.7 [site investigation and corrective action] of this Title [XVI]." 415 ILCS 5/57.2 (2008).

Section 57.7(c)(4) of the Act, addressing the Agency's review and approval of plans or reports submitted under the UST Program, provides in pertinent part that,

> [f]or any plan or report received after June 24, 2002, any action by the Agency to disapprove or modify a plan submitted pursuant to this Title [XVI] shall be provided to the owner or operator in writing within 120 days of the receipt by the Agency . . . and shall be accompanied by:
>
> (A) an explanation of the Sections of the Act which may be violated if the plans were approved;
>
> (B) an explanation of the provisions of the regulations, promulgated under this Act, which may be violated if the plan were approved;
>
> (C) an explanation of the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and
>
> (D) a statement of specific reasons why the Act and the regulations might not be met if the plan were approved. 415 ILCS 5/57.7(c)(4)(A-D) (2008).

Section 734.505(b) of the Board's regulations, addressing the Agency's review of plans, budgets, or reports submitted with regard to releases from USTs reported on or after June 24, 2002, provides in pertinent part that

> [t]he Agency has the authority to approve, reject, or require modification of any plan, budget, or report it reviews. The Agency must notify the owner or operator in writing of its final action on any such plan, budget, or report, except in the case of 20 day, 45 day, or free product removal reports, in which case no notification is necessary. . . . 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. Adm. Code 734.505(b)(1-3).

SUMMARY OF PETITIONS FOR REVIEW

PCB 09-87

Dickerson states that it was the owner of USTs before their removal from the Site on May 14, 2008. Am. Pet. at 2 (¶2). Dickerson also states that, in the course of a preliminary investigation of the Site on January 18, 2008, and according to Office of the State Fire Marshal (OSFM) requirements, it notified the Illinois Emergency Management Agency (IEMA) of a release from the USTs. *Id*. (¶3). Dickerson states that IEMA "assigned the release Incident No. 20080084" and issued an Eligibility and Deductibility determination on April 4, 2008. *Id*.

Dickerson states that it submitted its report of this UST incident to the Agency on or about April 15, 2008. Am. Pet. at 2 (¶4). Dickerson further states that "[b]y letter dated May 15, 2008, the Agency approved the Report and a Stage I Site Investigation Plan." *Id*. Dickerson claims that its consultant requested and the Agency approved an extension of the early action period. *Id*. Dickerson states that, "[b]y letter dated June 13, 2008, the Agency approved the second extension of the early action period." *Id*. (¶5). Dickerson further states that it submitted an Addendum to its Report to the Agency on or about September 5, 2008. *Id*.

Dickerson claims that a March 9, 2009 letter from the Agency determined on the basis of the Report that "the incident is not subject to 35 Ill. Adm. Code 734, 732, or 731." Am. Pet. at 2 (¶6), citing *id*., Exh. A (Agency letter). The same letter found that the Addendum "falls outside the jurisdiction and scope" of the UST program. *Id*. at 2-3 (¶6).

Dickerson indicates that, although the Agency's letter did not include language regarding an owner or operator's appeal rights, "the Agency has orally acknowledged that the March 9, 2009 letter was a final decision." Am. Pet. at 4 (¶9). Dickerson's petition claims that the Act defines "corrective action" to include early action activities. *Id*. (¶10), citing 415 ILCS 5/57.2 (2008). Dickerson further claims that, under authorities including Part 734 of the Board's regulations, "[a]n owner or operator may seek reimbursement for corrective action costs, including costs incurred for early action activities," from the UST Fund. Am. Pet. at 4 (¶10), citing 35 Ill. Adm. Code 734. Dickerson states that it submitted documents required by these authorities. Am. Pet. at 4 (¶11). Dickerson asserts that the Agency's March 9, 2009, letter provided a final decision on its request and thus may be reviewed by the Board. *Id*., citing 415 ILCS 5/40 (2008).

Dickerson argues that "[t]he March 9, 2009 letter provides neither a statutory nor regulatory basis for its determination that the above-referenced release is a non-LUST incident." Am. Pet. at 3 (¶8); *see id*. at 4 (¶12). Dickerson claims that, in conversations with its consultant, the Agency indicated that it rejected the report and excluded the release from the UST program "because there was no *laboratory analysis* of soil samples *confirming* the release." Am. Pet. at 3 (¶8) (emphasis in original). Dickerson characterizes this explanation as "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." *Id*. Dickerson states that, because it "confirmed the release in accordance with the OSFM regulations, incorporated by reference in the Board's regulations at 35 Ill. Adm. Code 734, the release discussed above is subject to LUST program requirements." *Id*. Dickerson argues that the Agency's determination was "arbitrary, capricious, and without statutory or regulatory authority," and that Dickerson is entitled to review of the Agency's decision. Am Pet. at 4 (¶12), citing 415 ILCS 5/40 (2008).

Dickerson claims that the Agency's March 9, 2009 letter "does not comply with the requirements of Section 57.7(c)." Am. Pet. at 4 (¶13), citing 415 ILCS 5/57.7(c) (2008). Dickerson further claims that the Agency also failed to comply with the Section 734.505 of the Board's regulations. Am. Pet. at 4-5 (¶13), citing 35 Ill. Adm. Code 734.505(b)(1-3). Dickerson argues that this noncompliance entitles it "to seek review of the Agency's disapproval or rejection of the report." Am. Pet. at 5 (¶13), citing 415 ILCS 5/40 (2008). In addition, Dickerson argues that "[t]he Agency's decision also constitutes a refusal to reimburse corrective action costs, which is similarly subject to review. . . ." Am. Pet. at 5 (¶14), citing 415 ILCS 5/40, 57.8(i) (2008).

Dickerson's petition seeks the following relief: a Board finding that the Agency's March 9, 2009 decision was "arbitrary, capricious, and without statutory or regulatory authority;" an order reversing the Agency's decision and finding that the incident must be regulated under Part 734 of the Board's regulations; a finding that the 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;" an award of "reasonable attorney's fees and expenses occurred in bringing this action;" and "such further relief as the Board deems just and equitable." Am. Pet. at 5-6; *see also* Brief at 34, Reply at 9-10.

PCB 10-5

Dickerson states that it was the owner of USTs before their removal from the Site on May 14, 2008. Pet. at 1 (¶1). Dickerson also states that, in the course of a preliminary investigation of the Site on January 18, 2008, and according to OSFM requirements, it notified IEMA of a release from the USTs. *Id*. (¶2). Dickerson states that IEMA "assigned the release Incident No. 20080084" and provided an Eligibility and Deductibility determination on April 4, 2008. *Id*. at 1-2.

Dickerson states that, on February 15, 2009, it submitted to the Agency a request for payment from the UST Fund. Pet. at 2 (¶3). Dickerson further states that it requested reimbursement of $84,090.69 for costs incurred "during the early action period covering January 18, 2008 to September 5, 2008." *Id*. Dickerson indicates that, in a letter dated June 10, 2009, the Agency determined that "this incident is not subject to Title XVI: Petroleum Underground Storage Tanks of the Act and 35 Ill. Adm. Code 734, 732, or 731." *Id*. (¶4), citing *id*., Exh. A (Agency letter). Dickerson reports that the Agency thus determined "that this claim cannot be reviewed and a voucher cannot be prepared for submission to the Comptroller's Office for payment." Pet. at 4 (¶4), citing *id*., Exh. A.

Dickerson claims that the Act defines "corrective action" to include early action activities. Pet. at 2 (¶7), citing 415 ILCS 5/57.2 (2008). Dickerson continues that, under authorities including Part 734 of the Board's regulations, "[a]n owner or operator may seek reimbursement for corrective action costs, including costs incurred for early action activities," from the UST Fund. Pet. at 2-3 (¶7), citing 35 Ill. Adm. Code 734. Dickerson claims that it submitted documents required by these authorities. Pet. at 3 (¶8). Dickerson further claims that

the Agency's June 10, 2009, letter provided a final decision on its request and thus may be reviewed by the Board. Pet. at 3 (¶8), citing 415 ILC 5/40 (2008).

Dickerson argues that the Agency's letter "provides neither a statutory nor regulatory basis for its determination that the application for payment is not reviewable because the incident is not subject to regulation under the Act or UST regulations." Pet. at 4 (¶6); *see id*. at 3 (¶9). Dickerson further argues that this renders the determination arbitrary, capricious, and lacking authority, entitling Dickerson to review by the Board. Pet. at 3 (¶9), citing 415 ILCS 5/40 (2008); *see* Pet. at 3-4 (¶11). In addition, Dickerson argues that "[t]he Agency's decision constitutes a refusal to reimburse corrective action costs," which is subject to the Board's review. Pet. at 3 (¶10), citing 415 ILCS 5/40, 57.8(i) (2008).

Dickerson seeks the following relief: a Board finding that the Agency's June 10, 2009 decision was "arbitrary, capricious, and without statutory or regulatory authority;" an order reversing "the Agency's determination that the above-referenced incident is not subject to UST regulation;" a finding that the incident is eligible to gain access to the UST Fund "and that costs incurred during the early action period for this release are eligible for reimbursement . . .;" an award of "reasonable attorney's fees and expenses occurred in bringing this action;" and "such further relief as the Board deems just and equitable." Pet. at 4-5; *see* Brief at 34, Reply at 9-10.

FACTUAL RECORD

Dickerson owned two USTs before their removal from the Site, which had served as the location of a convenience store at 823 Upper Cahokia Road, Cahokia, St. Clair County. R. at 1, 91, Tr. at 18-19. Each of the two USTs stored 10,000 gallons of unleaded gasoline. R. at 5, 11, 22. Dickerson retained Herlacher Angleton Associates (HAA) to conduct a preliminary investigation of the Site, which Mr. Thomas L. Herlacher, P.E., performed on January 18, 2008. Tr. at 18-20; *see* Exh. 1 (Herlacher resume).

In the course of this investigation, Mr. Herlacher drilled a single hand-augered soil boring "into the backfill material between the two USTs to a depth of four feet." R. at 14, Tr. at 20-21. Mr. Herlacher observed that, beginning approximately two feet below the surface, the sample exhibited gray and green discoloration consistent with gasoline contamination. Tr. at 21-22, 26, 81; *see* R. at 14-15. Mr. Herlacher also observed that the soil sample had a petroleum odor. R. at 14-15, Tr. at 22, 26.

Mr. Herlacher placed a sample of sand from this boring into a bag in order to measure the concentration of volatile organic compounds, a number of which are present in gasoline, with a photoionization detector (PID). Tr. at 22-23. Mr. Foley testified that HAA's PIDs do not provide readings of or print out measurements or have data logging capabilities. Tr. at 96. Mr. Herlacher noted that vapors from the sample triggered the alarm on the PID, which he had set to trigger with a concentration of 1,000 parts per million (ppm), a level indicating soil contamination. R. at 14-15, Tr. at 25-27. Mr. Herlacher testified that, "any time PID readings for a gasoline-contaminated soil sample exceed a couple hundred parts per million, then a laboratory analysis of that sample would come back above the tier 1 cleanup objectives." Tr. at 89; *see* Tr. at 95. Mr. Herlacher reported that "[n]o samples from the preliminary boring were

retained for laboratory analysis." R. at 15. On the basis of visual and olfactory observations and the PID alarm, Mr. Herlacher concluded that the boring revealed a release of petroleum and contamination of the backfill. Tr. at 21-28, R. at 14-15.

On the basis of this conclusion, Mr. Herlacher notified Dickerson of his findings. Tr. at 28. On January 18, 2008, at Dickerson's direction, Mr. Herlacher notified IEMA of a release from the two USTs at the Site. R. at 1-2 (IEMA Hazmat report), Tr. at 28. IEMA assigned the reported release Incident Number H-2008-0084. R. at 1. In a letter to Dickerson dated January 23, 2008, the Agency acknowledged that it had received notification from IEMA of a release from a UST system at the Site with incident number 20080084. R. at 225, *see* R. at 93, *see also* Tr. at 29. The letter states that, "[a]s a result of this release, the owner or operator of the underground storage tank(s) is required to comply with the Leaking Underground Storage Tank (Leaking UST) Program requirements, including the submittal of applicable documentation on forms prescribed by and provided by the Illinois EPA." R. at 225.

By letter dated April 4, 2008, the OSFM acknowledged receiving from Dickerson a Reimbursement Eligibility and Deductible Application. R. at 89-90, 127-28, 181-82, 202-03. The OSFM determined that Dickerson was "eligible to seek payment of costs in excess of $10,000" with regard to incident number 08-0084 at the Site. *Id*. The Agency did not receive this determination until after it had issued its March 9, 2009 denial letter. *See* Tr. at 43-44.

By letter dated January 25, 2008, HAA on behalf of Dickerson submitted a 20-Day Certification regarding incident number H2008-0084 at the Site to the Agency. R. at 222-24, *see* Tr. at 30. The Agency received the 20-Day Certification Report on February 11, 2008. R. at 93.

By a letter dated January 28, 2008, HAA on behalf of Dickerson requested a 90-day extension of time to perform early action remediation at the Site under incident number 2008-0084. R. at 226; *see* R. at 93. Specifically, HAA requested "that the early action period for this site be extended for 90 days to allow us sufficient time to schedule and complete the reimbursable early action remediation activities" under 35 Ill. Adm. Code 734. R. at 226; *see* Tr. at 30.

By a letter dated February 19, 2008, the Agency acknowledged receiving the request for an extension of the period for early action. R. at 35-36, 227-28. The Agency stated that "[t]he initial 45-day period for which early action costs shall be considered reimbursable is extended to June 15, 2008." *Id*. at 35-36, 93, 227-28; *see* Tr. at 30.

On April 10, 2008, the OSFM issued Dickerson a permit for removal of two 10,000-gallon gasoline USTs at the Site under incident number 08-0084. R. at 188, 201; *see* Tr. at 87-88. On May 12, 2008, Mr. Foley was present at the Site with WSI, a mechanical contractor, to remove pavement and uncover USTs. Tr. at 97; *see* R. at 205 (photographs 3, 4). Mr. Foley testified that he observed soil staining and a petroleum odor indicating release of gasoline. Tr. at 98. On May 13, 2009, Mr. Foley was present at the Site to remove residual product and gasoline vapors from USTs. Tr. at 99; *see* R. at 206 (photograph 5). Mr. Foley testified that staining on tanks and in soil indicated a release, and he noted the presence of a petroleum odor. Tr. at 99-

100. Mr. Foley testified that he used a PID and that samples produced readings "from the low hundreds up to and above 1,000." Tr. at 100.

On May 14, 2008, two USTs were removed from the Site. R. at 44. Mr. Kent Gelarden, a storage tank safety specialist (STSS) with the OSFM, and Mr. James Foley of HAA were present at the Site during the removal. R. at 44, Tr. at 85, 105. Mr. Foley testified that a petroleum odor was present and that soil staining in the excavation indicated that a release had occurred. Tr. at 101-02; *see* R. at 208 (photograph 9). Mr. Foley also testified that, on the day of the removal, he obtained PID readings ranging "from background to in excess of 1,000." Tr. at 102. On May 15, 2008, Mr. Foley was present at the Site for the "excavation and hauling of contaminated backfill material." Tr. at 103. He testified that he used a PID that day and obtained readings "between 200 and 1,000." *Id*. at 103-04. He also testified that he observed "discoloration characteristic of petroleum contamination" and the presence of a petroleum odor. *Id*. at 105.

On behalf of the OSFM, Mr. Gelarden prepared a "Log of Underground Storage Tank" dated May 14, 2008, regarding removal of two USTs from the Site under incident number 08-0084. R. at 91, 189. He did not provide a copy of that log to Mr. Foley. Tr. at 107-08. Under "Contamination Information," Mr. Gelarden indicated that neither of the two USTs appeared to have leaked. *Id*. As to the contamination status of the two USTs, Mr. Gelarden indicated that neither had an apparent release. *Id*. Mr. Herlacher testified that he was not aware of and had not seen this document until he obtained it from the OSFM on March 13, 2009. Tr. at 47-48.

After removal of USTs at the Site, Mr. Foley oversaw the process of obtaining soil samples from the walls and the floor of the excavation area. R. at 51; *see* Tr. at 62-64, 108. Mr. Foley testified that he obtained "pretty low" PID readings from these samples, indicating that "we were getting to the point in the excavation where the more contaminated materials had been removed or getting down to the point where we're reaching clean conditions." Tr. at 109. Analysis of the samples for benzene, toluene, ethylbenzene, total xylenes, and MTBE showed some of these present in some of the samples at levels above their detection limits. Tr. at 64; *see* R. at 51. The analysis showed "no concentrations of indicator contaminants above the applicable TACO Tier 1 Residential Soil Cleanup Objectives. . . ." R. at 49, 51; *see* Tr. at 66. In the course of the removal, approximately more than 748 tons of contaminated materials were removed from the Site. R. at 47, 49.

By letter dated April 25, 2008, HAA submitted a 45-Day Report (Report) prepared by Mr. Foley regarding incident H2008-0084 to the Agency on behalf of Dickerson. R. at 5-36, 93, 109; *see* Tr. at 30. The Agency received the Report on April 28, 2008. R. at 3, 93. The Report stated that "[a] single hand-augured soil boring was installed into the backfill material between the two USTs to a depth of 4 feet. Evidence of a petroleum release was apparent through visual and olfactory observations, and PID readings. No samples from this boring were retained for laboratory analysis." R. at 14-15. Mr. Herlacher testified that "it had been my experience that there was no reason to have a laboratory analysis performed on a sample; that the PID measurement and the other observations were adequate to confirm the presence of a lot of petroleum." Tr. at 33. Mr. Foley testified that he does not typically and did not in this case

include PID measurements because "[t]hey're not required and they're not acceptable by the department for reaching any conclusions, at least for the purpose of closure." Tr. at 109-10.

The Report attributed the release from USTs at the Site to spills and overfills. R. at 11, 13-14. The Report indicated that the owner/operator of the USTs intended to remove them. R. at 14. The Report concluded that "[a] 45-Day Report Addendum will be submitted upon completion of all Early Action Activities. The 45-Day Addendum Report will include a summary of all Early Action activities including tables, OSFM Permits, manifests, additional potable well data, analytical results, and site maps." R. at 16.

By letter dated May 15, 2008, the Agency acknowledged receiving from Dickerson the 45-Day Report for a release at the Site under incident number 20080084. R. at 229. The Agency noted that the Report "included a Stage 1 Site Investigation Plan and Budget certification. . . ." *Id*. The Agency approved the plan and budget. *Id*. The Agency also stated that it would conduct a full review at a later date after submission of other plans or reports. R. at 94, 229.

By letter dated May 28, 2008, HAA on behalf of Dickerson requested a 90-day extension of the time to perform early action remediation at the Site under incident number 2008-0084. R. at 231, *see* R. at 93. Specifically, HAA requested "that the early action period for this site be extended for 90 days to allow us sufficient time to complete the reimbursable early action remediation activities" under 35 Ill. Adm. Code 734. R. at 231; *see* Tr. at 30.

By letter dated June 13, 2008, the Agency acknowledged receiving a request for an extension of the period for early action. R. at 68-69, 232-33. The Agency's response stated that "[t]he initial 45-day period for which early action costs shall be considered reimbursable is extended to September 13, 2008." R. at 232-33, *see* Tr. at 30. The Agency's response also noted that "this will be the last early action extension granted for this site." R. at 232-33.

On February 17, 2009, the Agency received from HAA a 45-Day Report Addendum (Addendum) prepared by Mr. Foley dated September 5, 2008, and regarding the incident at the Site. R. at 37, 93, 109; *see* Tr. at 30-31. The Addendum included twenty photographs. R. at 204-13. Mr. Foley testified that he does not typically and did not in this case include PID measurements because "[t]hey're not required and they're not acceptable by the department for reaching any conclusions, at least for the purpose of closure." Tr. at 109-10. The Addendum requested that the Agency issue a No Further Remediation (NFR) letter to Dickerson. R. at 49-50. HAA based this request upon analysis indicating that soil samples obtained at the Site did not exceed applicable Tiered Approach to Corrective Action Objective (TACO) Tier 1 residential remediation objectives for soil. R. at 49-51.

In his testimony, Mr. Gaydosh cited experience in implementing the UST regulations and meetings with persons including OSFM personnel for his understanding that a release from a UST can be confirmed in one of two ways. Tr. at 129-30. Mr. Gaydosh testified that "[i]f you're on site and an Office of the State Fire Marshal says, there's evidence here that I have observed that require you to call this in and report a release, that's a done deal, but if that is not present or if the fire marshal says there isn't a release, then we normally look for laboratory analysis to confirm the presence of contaminants above tier 1 objectives." Tr. at 130.

Mr. Gaydosh testified that, in his role as an environmental protection specialist with the Agency, he was assigned to review the files and reports submitted with regard to the Site. Tr. at 120-22. He stated that, in his review,

> [t]he 45-day report quickly caught my eye in that the only evidence that was submitted or proposed that showed that there was any kind of release was strictly visual, olfactory and PID readings, but there were no readings. It was just stated we used a PID. So my job then was to look through the rest of the report, look for tables, look for maps, look for certifications from laboratories, look for anything that would tell me that I'm dealing with a contaminations release. At that point in time, there wasn't any. Tr. at 123.

Mr. Gaydosh further testified that, when he reviewed the 45-Day Report, he did not have the OSFM's UST removal log and that he did not rely upon it in reaching the decision expressed in the March 9, 2009, denial letter. Tr. at 130. He also testified that, based on his review of the Report, "that was not sufficient evidence to document or demonstrate confirmation of a release." *Id*. at 129.

Mr. Gaydosh testified that, when he turned to the Addendum, he sought to "see if something had been left out or something had been discovered at a later date that would support the confirmation of a release." *Id*. at 124. He further testified that "there wasn't anything in there that ever said they had contamination above the requirements of the regulations that would indicate that a cleanup was required." *Id*. He testified that a meeting about this incident with his supervisor concluded "that without any kind of proof whatsoever that there was actual contamination above the cleanup objectives that we really didn't have anything here. There was no justification for a release, and that's when the March 9 letter was written and issued." *Id*.

The Agency's Technical Review of the Report and Addendum prepared by Mr. Gaydosh for incident number 20080084 states that "no samples were collected or submitted to a laboratory to be analyzed to confirm the presence or absence of contamination in excess of the appropriate indicator contaminant objectives." R. at 94. The review concludes that "[v]isual, olfactory, and PID screening fail to meet the standards required for establishing quantitative and qualitative verification of a contaminant release. Therefore, the initially submitted 45-Day Report is denied and will be issued a Non-LUST Letter." *Id*.; *see* Tr. at 124-25.

By letter dated March 9, 2009, the Agency responded to the Report dated April 25, 2008. R. at 110-11. The Agency's response stated that "[b]ased on the information currently in the Illinois EPA's possession, the 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." *Id*., *see* Tr. at 31. Mr. Gaydosh's testimony agreed that the "letter doesn't contain any reference to a failure to comply with [35 Ill. Adm. Code] 734.210" or refer to failure to comply with OSFM regulations. Tr. at 143. He also stated that there was not a particular reason that the letter provided no more explanation. *Id*.

The Agency's Technical Review of the Report and Addendum prepared by Mr. Gaydosh for incident number 20080084 also states that, "[w]ithout the presence of a verifiable release, the 45-Day Report Addendum/Corrective Action Completion Report falls outside the jurisdiction of the Leaking Underground Storage Tank Program." R. at 94. The review recommended issuing a statement indicating "the lack of jurisdiction to review the 45-Day Report Addendum." *Id*.

The Agency's March 9, 2009 letter also responded to the Addendum dated September 5, 2008, and filed by Dickerson. R. at 110-11. The Agency's response stated 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 Leaking Underground Storage Tank Program." R. at 110-11; *see* Tr. at 31.

Mr. Herlacher testified that, on March 10, 2009, he had a conversation about the March 9, 2009 letter with Mr. Gaydosh. Tr. at 38-39. He further testified that Mr. Gaydosh attributed the denial to a failure to confirm a release according to the requirements of 35 Ill. Adm. Code 734.210(h)(2) and to obtaining a sample from backfill rather than native soil. *Id*. at 39-40. He also testified that the Agency's March 9, 2009 denial letter did not refer to these issues. *Id*. at 40; *see* R. at 110-11.

Mr. Herlacher testified that he spoke with Mr. Gaydosh on March 12, 2009, and on March 13, 2009, when Mr. Gaydosh requested the OSFM's determination of eligibility and deductible and its tank removal log for the Site. Tr. at 42-43. Mr. Herlacher testified that he provided these documents to the Agency on March 13, 2009. *Id*. at 43; R. at 88-92.

Mr. Herlacher testified that he spoke on March 31, 2009, with Mr. Harry Chappel, Mr. Gaydosh's supervisor at the Agency. Tr. at 42, 49-50. He further testified that Mr. Chappel called to explain why the Agency rejected Dickerson's submissions "and why this procedure we used to confirm the presence of a release was, inadequate, in his viewpoint, at least. . . ." Tr. at 51. Mr. Herlacher further testified that Mr. Chappel attributed the denial to "agency policy that you had to have a laboratory analysis of the sample to -- that indicated that the contamination level in the sample was above tier 1 cleanup objectives." *Id*. Mr. Herlacher also testified that "I asked him several times, I said, where in Part 734 does it require that we have a laboratory analysis of a sample that exceeds tier 1 to confirm the presence of a release, and he told me every time that it's not in there." *Id*. at 51-52.

By letter dated January 15, 2009, Dickerson applied to the Agency for payment from the UST Fund to reimburse costs incurred at the Site during the early action period. R. at 122. Specifically, Dickerson requested reimbursement in the amount of $84,090.69 for costs incurred between January 18, 2008, and September 5, 2008. R. at 122, 125, 130.

By letter dated June 10, 2009, the Agency responded to the request for reimbursement of the amount of $84,090.69 for the period from January 18, 2008, to September 5, 2008. R. at 112-15. The Agency 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. Therefore, 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." R. at 112, *see* Tr. at 31.

PRELIMINARY MATTER REGARDING OFFERS OF PROOF

During the hearing, Dickerson sought to introduce Exhibit 6, an OSFM UST Removal Log for the County Line Quick Stop in Cahokia, St. Clair County, and Exhibit 7, an OSFM UST Removal Log for the Red Bud Oil Company in Red Bud, Randolph County. Tr. at 73, 75-76. Counsel for the Agency objected on the basis of relevance to both of the exhibits. *Id*. at 73, 76. After sustaining the objection, the hearing officer allowed Dickerson to make an offer of proof. *Id*. at 74, 76. Dickerson proceeded to make separate offers of proof regarding the relevance and admissibility of the two exhibits. Tr. at 74-75, 76-77.

The caselaw is clear that the Board's review is generally limited to the record before the Agency at the time of its determination. *See*, *e.g.*, Freedom Oil v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, and 04-2 (consol.), slip op. at 11 (Feb. 2, 2006); Kathe's Auto Service Center v. IEPA, PCB 95-43, slip op. at 8, 16 (May 18, 1995). The Board reviews the record before the Agency to determine whether Dickerson's submissions, as presented to the Agency, demonstrate compliance with the Act. *See* Illinois Ayers Oil Co v. IEPA, PCB 03-214, slip op. at 7, 15 (Apr. 1, 2004). The Agency's record does not include Exhibit 5 or 6, which pertain to sites at other UST facilities. Having reviewed the offers of proof, the Board cannot conclude that they challenge matters in the record relied upon by the Agency to determine that a release at the Site fell outside the scope of the UST program. *See* Freedom Oil v. IEPA, PCB 03-54, 03-5 6, 03-105, 03-179, and 04-2 (consol.), slip op. at 11 (Feb. 2, 2006) (citations omitted). Accordingly, the Board finds that Dickerson's offer of proof is insufficient to admit Exhibit 6 or Exhibit 7 into evidence and declines to overrule the hearing officer. Consequently, the Board will not address them below either in summarizing the parties' arguments or in its discussion and conclusion.

DICKERSON'S POST-HEARING BRIEF

Dickerson challenges the Agency's determinations on a number of bases and argues that the Board must reverse them. *See* Brief at 33. In the following subsections of the opinion, the Board summarizes the arguments made by Dickerson in its post-hearing brief.

Agency Decision Letters

Dickerson cites the Board's UST regulations to state that, in order for the Agency to reject or require modification of a plan, budget, or report, its notification must contain specified information. Brief at 7, citing 35 Ill. Adm. Code 734.505(b), Exh. 2. Dickerson further argues that the Agency's decision letters of March 9, 2009, and June 10, 2009, failed to include this information. Brief at 7; *see* R. at 110-11, 112-13. Dickerson claims that "[t]he 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." Brief at 7, citing R. at 110-14.

Dickerson argues that the Agency failed to cite any authority or specific reasons for its denials "because there was and is no such basis for the denials." Brief at 7. Dickerson cites Mr.

Gaydosh's testimony that the Agency's March 9, 2009 letter did not refer either to the Board's UST regulations or to OSFM regulations. *Id*., citing Tr. at 142-43; *see* 35 Ill. Adm. Code 734.210, 41 Ill. Adm. Code 170.560, 170.580. Dickerson argues that Mr. Gaydosh was unable to "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." Brief at 8, citing Tr. at 143.

Dickerson also argues that both Mr. Gaydosh and his supervisor, Mr. Harry Chappel, admitted after the issuance of the March 9, 2009 letter that "the basis for the denial is an unpromulgated policy that laboratory analytical results showing the presence of indicator contaminants, *i.e.*, BTEX [benzene, toluene, ethylbenzene, and xylene] at greater than Tier I ROs, is required to confirm a release from a UST." Brief at 7; *see infra* at 13-17 (Laboratory Analysis). Dickerson also claims that, "for the first time at hearing, Mr. Gaydosh identified an initial step involving whether a release is indicated on the OSFM STSS [storage tanks safety specialist] UST removal log as having role in confirming a release." Brief at 7-8.

Dickerson claims that both the denial letter and the testimony of Mr. Gaydosh show that the Agency failed to comply with the Board's UST regulations when it issued denials "that deemed the release a Non-LUST incident without providing a detailed explanation for such decisions." Brief at 8-9. Dickerson argues that, because the letters did not comply with those regulations, they are deficient. *Id*. at 9. Dickerson further argues that these deficient letters demonstrate that the Agency had no legitimate basis for its determination that the release was not a UST incident. *Id*. Dickerson concludes that the Board must accordingly "find that both final decision Letters are arbitrary, capricious, and without statutory or regulatory authority." *Id*.

Laboratory Analysis

Regulatory Requirements

Dickerson cites the Board UST regulations governing early action activities. Brief at 10, citing 35 Ill. Adm. Code 734.210. Dickerson argues that, under these regulations, it "timely submitted its Report and Addendum" to the Agency. Brief at 11, citing 35 Ill. Adm. Code 734.210(d), (e); *see* Exh. 3. Dickerson further argues that the Report and Addendum provide the information required by those regulations and that "the Letters issued by the Illinois EPA determining that the release was a Non-LUST incident, do not provide otherwise." Brief at 11, citing 35 Ill. Adm. Code 734.210(d)(e); *see* Exh. 3.

Dickerson cites a Note following Section 734.210(g) of the Board's UST regulations, which states that

> [o]wners or operators seeking payment from the [UST] 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. Brief at 11 (emphasis in original), citing 35 Ill. Adm. Code 734.210.

Dickerson stresses that this Note specifically refers to an OSFM regulation, which provides in pertinent part that

> [o]wners or operators of UST systems shall report to the 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 owner, 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). . . . Brief at 11-12 (emphasis in original), citing 41 Ill. Adm. Code 170.560; *see* Exh. 4.

Dickerson argues that this provision does "not include any requirements that an owner or operator of a UST submit laboratory analytical showing exceedance of indicator contaminants above Tier I ROs to confirm a release." Brief at 12, citing Exhs. 3, 4, 5.

Dickerson asserts that the Note also specifically refers to a second OSFM regulation, which "provides requirements for release investigation reporting, site assessment, and initial response." Brief at 12, citing 41 Ill. Adm. Code 170.580, Exh. 5. Dickerson argues that this provision too does "not include any requirements that an owner or operator of a UST submit laboratory analytical showing exceedance of indicator contaminants above Tier I ROs to confirm a release." Brief at 12, citing Exhs. 3, 4, 5.

Confirmation of a Release

Dickerson argues that the Board's UST regulation define both "confirmation of a release" and "confirmed release" in terms of compliance with OSFM regulations. Brief at 12, citing 35 Ill. Adm. Code 734.115; *see* 41 Ill. Adm. Code 170. Dickerson further argues that the Board's UST regulations require confirmation of a release according to 41 Ill. Adm. Code 170.560 and 170.580. Brief at 12, citing 35 Ill. Adm. Code 734.210(g); *see* Exhs. 3, 4, 5. Dickerson asserts that "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. Brief at 12, citing Exhs. 3, 4, 5.

Dickerson cites Mr. Herlacher's testimony "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.'" Brief at 13, citing Tr. at 39. Dickerson claims that Mr. Gaydosh in that conversation relied upon Section 734.210(h)(2), "which requires confirmation sampling for USTs abandoned in place." Brief at 13, citing Tr. at 39-40, 144; *see* 35 Ill. Adm. Code 734.210(h)(2). Dickerson emphasizes that it removed USTs from the Site, making this provision inapplicable there. Brief at 12.

Dickerson also cites Mr. Herlacher's testimony that he had a telephone conversation with Mr. Chappel after discussing the in applicability of Section 734.210(h)(2) with Mr. Gaydosh.

Brief at 13, citing Tr. at 51. Dickerson argues that "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." Brief at 13, citing Tr. at 51-52. Dickerson notes Mr. Herlacher's testimony that, despite nearly 20 years of experience as an Illinois environmental consultant, he had never before these two conversations been aware of a requirement to submit laboratory analysis. Brief at 14, citing Tr. at 40, 79. Dickerson stresses Mr. Heralcher's testimony that Mr. Chappel acknowledged that Part 734 does not include this requirement. Brief at 13, citing Tr. at 51; *see also* Brief at 14, citing Tr. at 51, 133, 151. Dickerson also stresses Mr. Gaydosh's testimony acknowledging "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." Brief at 13, citing Tr. at 129-30.

Dickerson argues that Mr. Herlacher's testimony shows that the Agency followed a policy when it issued denial letters rejecting the report and Addendum. Brief at 14. Dickerson further argues that the Agency "intentionally chose not to provide that 'policy' as the specific reasons for its rejection. . . ." *Id.* Dickerson professes to be disturbed by the Agency's "admission at hearing that his policy is not found in any of the relevant regulations for confirmation of a release from a UST." *Id.* In addition, Dickerson claims that Mr. Gaydosh's testimony reveals "a new step in the confirmation of a release involving review of and reliance on the OSFM's STSS UST Removal Log." *Id.*

Dickerson claims that Mr. Gaydosh's testified that the Agency may confirm a release from a UST in one of two ways. Brief at 14, citing Tr. at 129-30. Dickerson cites his testimony that a report from an on-site STSS can detect confirmation. Brief at 14, citing Tr. at 130. Dickerson also cites his testimony that, "if the STSS determines that there is no release, the Illinois EPA 'normally looks for laboratory analysis to confirm the presence of contaminants above the tier I objectives.'" Brief at 14-15, citing Tr. at 130. Dickerson argues that the Board's regulations define "confirmed release" and "confirmation of release" with reference to "Part 170 of OSFM's regulations, which make no reference to requiring laboratory analysis above Tier I ROs to confirm a release. . . ." Brief at 15, citing Tr. at 150, Exhs. 3, 4, 5. Dickerson claims that, in the absence of such statutory or regulatory authority requiring such analysis, "the Illinois EPA's 'policy' requiring such is *ultra vires*[1] the Act and Board regulations." Brief at 15.

Tier I Remediation Objectives

Dickerson argues that the Agency seeks to rely on demonstrated exceedances of Tier I ROs to confirm a release when the STSS has determined that a release has not occurred. Brief at 16, citing Tr. at 130. Dickerson further argues, however, that the "TACO ROs are used to determine when a contaminated site has been remediated to the proper closure level" and are not intended to confirm releases. Brief at 16, citing Tr. at 130.

Dickerson claims that the Board adopted TACO regulations "to establish procedures for developing ROs that achieve acceptable risk levels to provide adequate protection of human

[1] "*Ultra vires*" is defined as "[u]nauthorized" or "beyond the scope of power allowed or granted by a corporate charter or by law." BLACK'S LAW DICTIONARY 1525 (7th ed. 1999).

health from environmental conditions." Brief at 16, citing 35 Ill. Adm. Code 742.100. Dickerson argues that "[t]he 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." Brief at 16. Dickerson describes Tier I evaluation of a site as a comparison of contamination levels and 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." Brief at 16, citing 35 Ill. Adm. Code 742.110(b). Dickerson thus claims that "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." Brief at 16

Dickerson further argues that neither the Act nor the OSFM regulations refers to Tier I ROs in defining the term "release." Brief at 17, citing 415 ILCS 5/3.395 (definition of "release"); *see* 41 Ill. Adm. Code 170.400 (Definitions). Dickerson claims that, by effectively requiring a release to result in contamination exceeding Tier I RO levels, the Agency re-defines "release" in a manner inconsistent with statutory and regulatory language. *See* Brief at 17. Although Dickerson does not acknowledge this requirements as an validly-adopted or enforceable regulation, it argues that "there were laboratory analytical results submitted in Petitioner's Addendum showing that BTEX indicator contaminant were present in soils at the Site." *Id*., citing R. at 51 (Tank Closure Soil Sample Data dated May 14, 2008). Dickerson states that "HAA remediated the Site to a level at which contaminants satisfied the TACO Tier I RO requirements and requested a no further action determination." Brief at 17. Dickerson claims that the record before the time of the Agency's determination "clearly shows that there was contamination at the Site." *Id*. Dickerson argues that, "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." *Id*.

Reliance on OSFM Determinations

Dickerson asserts that Mr. Kent Gelarden, an OSFM STSS, was present at the Site to observe removal of USTs. Brief at 20. Dickerson also asserts that Mr. James Foley of HAA was also present at the Site during the tank removal and "observed Mr. Gelarden walk out onto the USTs in order to check the tanks for explosive vapors." *Id*., citing Tr. at 105-06. Dickerson notes Mr. Foley's testimony that Mr. Gelarden did so while standing "[a]lmost right on top of" contamination. Brief at 20, citing Tr. at 107. Dickerson claims that Mr. Gelarden completed a UST Removal Log (Log) indicating "no release" as the "contamination status" of the Site, although he "did not take a soil sample to confirm or disprove that a release had occurred." Brief at 20, citing R. at 91-92.

Dickerson notes Mr. Gaydosh's testimony that "he did not rely on the Log in issuing the March 9, 2009 final decision. Brief at 20, citing Tr. at 130. Dickerson also notes his statement that "if the Log contradicted his findings that he would reverse his decision." Brief at 20, citing Tr. at 140-41. Dickerson further notes Mr. Gaydosh's statements "that the first method used to confirm a release is for the STSS to determine that a release occurred" and that "[i]t 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.'" Brief at 20, citing Tr. at 130-31, 137-38. Dickerson argues,

however, that "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." Brief at 20, citing Tr. at 142.

Dickerson casts doubt on the determination of the OSFM STSS. First, Dickerson claims that Mr. Gelarden determined that no release had occurred despite evidence of a release at the Site. Brief at 24. Dickerson also cites Mr. Herlacher's testimony "that the STSS is primarily on site for safety reasons and not to determine whether there was a release at the site. *Id*., citing Tr. at 45. Dickerson notes Mr. Foley's testimony that Mr. Gelarden "tested the USTs for explosivity" but "did not take any samples or use any measurement device to determine whether there had been a release at the Site." Brief at 26, citing Tr. at 105-07.

Dickerson thus characterizes reliance on the STSS to determine whether a release has occurred as both "misplaced and not authorized by statute or regulation." Brief at 24, 26. To the extent that the Agency relies on such a determination by the STSS as part of a two-step confirmation process, Dickerson argues that such reliance lacks foundation in both law and reliability. *Id*. at 24-25, citing Tr. at 40, 79, 91, 102, 107. Specifically, Dickerson argues that the Agency presented no testimony on the training and duties of an STSS and did not present Mr. Gelarden in support of his own determination. Brief at 25. Dickerson claims the record in this case shows no basis to rely upon the UST Removal Log. *Id*. at 26; *see* R. at 91.

Agency Support for Its Determinations

Dickerson argues that the Agency provided no support for its determination that the incident at the Site falls outside the UST program. Brief at 18. Dickerson claims that both Mr. Herlacher and Mr. Foley offered undisputed testimony, based on visual and olfactory observations and PID measurements, that a release of petroleum had occurred at the Site. *Id*., citing Tr. at 28, 98-100, 103. Dickerson further claims that these two witnesses "testified that there were no other likely sources of the VOCs near or at the Site except the UST systems." Brief at 18, citing Tr. at 66, 94.

Dickerson compares the testimony of Mr. Gaydosh, arguing that he could not state precisely what Board regulations require in order to confirm a release. Brief at 19-20, citing Tr. at 139-40. Dickerson argues that Mr. Gaydosh has acknowledged that OSFM regulations do not require the confirmation of laboratory analysis. Brief at 19, citing Tr. at 142. Dickerson claims that Mr. Gaydosh testified only that confirmation requires a "measurement of something." Brief at 19, citing Tr. at 141.

Dickerson argues that that Mr. Gaydosh's testimony admits that he does not know why the Agency's denial letters did not satisfy regulatory requirements and why the letters did not explain the Agency's determinations that the incident at the Site falls outside the UST program. Brief at 18, citing Tr. at 142-43. Dickerson further argues that Mr. Gaydosh could not attribute the determinations in these denial letters to the absence of laboratory analysis confirming a release because the Act and the UST regulations do not require this analysis. Brief at 18. Dickerson claims that Mr. Gaydosh could identify no authority providing "that the determination of whether a release from a 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." *Id*. at 19. Dickerson also claims that "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." *Id*. at 18-19, citing Tr. at 143-44.

Dickerson argues that the Agency failed to indicate what is necessary to confirm a release from a UST and has also failed to provide the required explanations of its determination in denial letters. Brief at 20. Based on the Agency's testimony on its policy on confirming releases, Dickerson claims that the Agency is following a procedure that is not present in the Board's or the OSFM's regulations. *Id*.

Evidence of Release at Dickerson Site

Dickerson argues that it confirmed a release at the Site according to OSFM regulations requiring "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.).'" Brief at 27 (emphasis in original), citing 41 Ill. Adm. Code 170.560(a). Dickerson states that, in the course of his preliminary investigation, Mr. Herlacher "collected a soil sample from the Site that had a petroleum odor and triggered the PID alarm" set to trigger that alarm at concentration equal to or greater than 1,000 ppm. Brief at 27, citing Tr. at 18-20, 24-27. Dickerson further states that both its Report and Addendum reported that "[e]vidence of a petroleum release was apparent through visual and olfactory observation, and photoionization detector (PID) readings." Brief at 27 n.5, citing Tr. at 14-15, 47-48. Dickerson notes Mr. Foley's testimony that those documents did not cite the PID measurements "because there is no requirement to include PID measurements in submittal to the Illinois EPA." Brief at 27 n.5, citing Tr. at 110. Dickerson claims that Mr. Herlacher relied on his professional experience to detect a release of petroleum, report it to IEMA according to OSFM regulations, and document his activities in the Report submitted to IEPA. Brief at 27, citing Tr. at 113-15.

Dickerson also relies on the testimony of Mr. Foley, stating that he "was at the Site during the UST removals and observed evidence of a petroleum release." Brief at 28, citing Tr. at 98-103. Dickerson claims that, as the project manager at the Site, Mr. Foley took photographs that "clearly show petroleum stained soil." Brief at 28, citing Tr. at 98-102.[2] Dickerson cites Mr. Foley's testimony about photographs P4, P5, and P9, arguing that those three photographs show stains on, beneath, and in the vicinity of the two tanks indicating a release into the soil. Brief at 28, citing R. at 205, 206, 209, Tr. at 98-99, 101-02. Dickerson states that its Addendum submitted to the Agency included these photographs. Brief at 27, citing R. at 204-13.

[2] Dickerson states that "[t]he 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 . . . are located on pages 204-213 of the Record." Brief at 27 n.6.

Dickerson also cites Mr. Foley's testimony that he detected an odor of petroleum during excavation activities at the Site and his view that the odor indicated a release there. Brief at 29, citing Tr. at 98-100, 102, 105. Dickerson also argues that Mr. Foley's excavation activities included the use of "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." Brief at 29, citing Tr. at 100, 102-04, 108-10. Dickerson claims that the PID measured concentrations "from the 100s ppm to greater than 1,000 ppm, which as Mr. Foley testified, can be relied upon as an indication of contamination." Brief at 29, citing Tr. at 95-96, 100, 102-04, 108-10. Dickerson argues that Mr. Foley collected confirmation samples after the excavation was complete and included sampling results in the Addendum. Brief at 29. Dickerson further argues that these samples "showed that any remaining contamination at the Site was below the applicable Tier 1 ROs" and supported the request "that the Site be deemed as requiring no further action." Brief at 29, citing R. at 49-51. Dickerson concludes by arguing that "[t]here is clear and measures evidence of a release at the Site, that it was confirmed according to OSFM regulations, and that "the Board must deem the release a LUST incident subject to the state LUST Program requirements." Brief at 29.

APA Requirements

Dickerson argues that Mr. Gaydosh's testimony reveals a "two-step" Agency procedure to confirm a release at a UST site. Brief at 29, citing Tr. at 130. Dickerson claims that, in the first step, "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." Brief at 29. Dickerson further claims that, as a second step, if the OSFM STSS determines that no release occurred, then "the owner or operator submits laboratory analysis showing exceedances above Tier I ROs to confirm the release." Brief at 29-30, citing Tr. at 130. Dickerson cites Mr. Gaydosh's testimony to characterize such a procedure as "a decision left to 'IEPA management.'" Brief at 30, citing Tr. at 138.

Dickerson argues that the Illinois Administrative Procedure Act (APA) (5 ILCS 100/1-1 *et seq*. (2008)) defines a "rule" 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. . . ." Brief at 30, citing 5 ILCS 100/1-70 (2008). Dickerson further argues that "[a]ll rules of agencies shall be adopted in accordance with" Article 5 of the APA. Brief at 30, citing 5 ILCS 100/5-5 (2008). Dickerson also cites the APA as providing 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. . . ." Brief at 30, citing 5 ILCS 100/1-70 (2008).

Dickerson claims that, with regard to its Site, the Agency "is applying its two-step confirmation 'policy' to the release at Petitioner's Site as if it required by statute or regulation." Brief at 30-31. Dickerson argues that the Agency lacks any authority to do so. *See* Brief at 30. Dickerson assets that the Agency did not propose such a policy as part of a rulemaking proposal and did not provide any opportunity for public comment on its possible impact. *Id*. at 31.

Dickerson claims that application of this two-step procedure constitutes a violation of the APA. *Id*., citing Illinois Ayers Oil Co. v. IEPA, PCB 03214, slip op. at 9-11, 15-16 (Apr. 1, 2004).

Dickerson argues that the Agency testified that, without an STSS determination that a release occurred, "its two-step policy to confirm a release requires laboratory analysis showing contamination above Tier I ROs. . . ." Brief at 31. Dickerson claims that this 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." *Id*. at 31-32. Dickerson further claims that Mr. Gaydosh's testimony shows that the policy applies to all UST incidents, although the policy has not been made known to the public. *Id*. at 30, 32. Dickerson argues that the Agency's "policy is a rule by definition and should have been properly promulgated pursuant to the APA." *Id*. at 32.

Dickerson argues that the Agency's explanation for determining that the release at the Site was not a UST 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 a Non-LUST incident." Brief at 32. Dickerson argues that, if the Agency relies on a two-step policy of confirming releases after its final decision on March 9, 2009, then it admits that it applied as a rule a policy 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." *Id*. Dickerson notes that, although the Agency recently had opportunities to propose amendments to the UST regulations, it did not propose adoption of a two-step confirmation policy. *Id*., citing Proposed Amendments to Regulation of Leaking Underground Storage Tanks (35 Ill. Adm. Code 732, 734), R04-22(A), 04-23(A) (consol.) (Feb. 16, 2005); 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 (Nov. 15, 2007). Dickerson concludes that the Agency "is improperly imposing on the Petitioner an Illinois EPA policy as a rule in violation of the APA." Brief at 33.

AGENCY'S RESPONSE

Introduction

The Agency states that "the Administrative Record filed in this case contains information and documents that were not before the Illinois EPA prior to its March 9, 2009 decision." Resp. at 3. The Agency indicates that it included these materials in the record only to "acknowledge[] the contacts between the Illinois EPA and Dickerson after March 9, 2009." *Id*. The Agency states that it "in no way waives its position and the long standing principle that only information before the Illinois EPA prior to its final determination can be considered by the Board in its review." *Id*., citing Kathe's Auto Service, Inc. v. IEPA, PCB 95-43 (May 18, 1995).

In the subsections below, the Board summarizes the arguments made by the Agency in its response brief.

Basis of Agency's Determination

The Agency claims that, after excluding information that was not before it at the time of its decision, "it is difficult to imagine that the Illinois EPA could have reached any other decision concerning this site." Resp. at 3. The Agency argues that Dickerson's "45-Day Report based evidence of a petroleum release on visual observations, olfactory observations, and PID measurements, without identifying specific readings, originating from one hand-augured soil boring." *Id*. The Agency further argues that Dickerson's 45-Day Addendum contained only analytical results showing no concentrations exceeding Tier 1 Residential Soil Cleanup Objectives. *Id*. The Agency also claims that Dickerson provided no "specific PID readings obtained during excavation activities or analytical results of the contaminated backfill." *Id*. at 3-4. The Agency asserts that "[t]he evidence Dickerson submitted to the Illinois EPA prior to March 9, 2009 was inadequate for a determination that contamination above the regulatory requirements requiring corrective action had been present at the Dickerson site." *Id*. at 4.

The Agency claims that its determination is consistent with other evidence in the record. The Agency first cites the UST Removal Log prepared by Mr. Gelarden. *See* R. at 91-92. That log reflects that neither of the two tanks at the Site appeared to have leaked. R. at 91. That log also reflects "No Apparent Release" under 'Contamination Status." *Id*. Second, the Agency claims that there was no evidence, such as the failure of a tank tightness test, that the tanks had leaked. Resp. at 4. The Agency argues that "[f]rom testimony, basically all that is known about the tanks before January 18, 2008 was that the tanks were empty and ownership of the site itself had changed but Dickerson was still responsible for the tanks." *Id*. at 4-5, citing Tr. at 20, 80. Third, the Agency cites testimony "that the tanks were intact and not leaking when they were pulled on May 14, 2008." Resp. at 5, citing Tr. at 113.

The Agency claims that, when reviewing submissions made by Dickerson before March 9, 2009, Mr. Gaydosh sought "evidence that the level of contamination at the site required corrective action to be performed." Resp. at 5. The Agency argues that it should not be surprising that discussions following the March 9, 2009, decision letter refer to laboratory analysis: "a laboratory analysis of a soil sample is a simple, economical, and scientifically acceptable form of such evidence." *Id*. The Agency notes Dickerson's argument that this would misuse Tier I ROs but argues that the Board's regulation addressing early action refer to meeting those objectives. *Id*., citing 35 Ill. Adm. Code 734.210(h). The Agency thus claims that its position "was neither illogical nor inappropriate." Resp. at 5.

The Agency also disputes Dickerson's claim that there existed "clear and measured evidence of a release at this site." Resp. at 5, citing Brief at 29, 33. The Agency claims that visual and olfactory observations, photographs, and PID readings "cannot provide specific levels of specific contaminants." Resp. at 5. The Agency also notes Mr. Herlacher's testimony that a PID readings "could not identify specific contaminants or their levels." *Id*. The Agency also cites Mr. Foley's acknowledgement that "PID readings were not acceptable to the department for reaching conclusions." *Id*., citing Tr. at 82-83, 110. The Agency argues that "there remains no clear and measured evidence of a release at this site." Resp. at 5.

Agency's Decision Letter

The Agency asserts that its March 9, 2009 "decision letter stated that the incident was not subject to 35 Ill. Adm. Code 734, 732, or 731." Resp. at 5. The Agency argues that, "[i]f a factual situation is not covered within the parameters of a statutory scheme such as the Illinois EPA Leaking Underground Storage Tank Program, it is difficult to cite specific provisions from that statutory scheme since the matter in question is an anomaly." *Id*. at 5-6.

The Agency addresses Dickerson's claim that it follows an "unpromulgated secret two-step confirmation policy" in addressing releases from USTs. The Agency argues that Dickerson provided no evidence of other cases in which it applied such a policy. Resp. at 6. The Agency also cites Mr. Herlacher's testimony that he had never before encountered such a policy in 20 years of experience. *Id.* The Agency also notes Dickerson's assumption that other UST owners, operators, and consultants are similarly unaware of such a policy. *Id*., citing Brief at 30-32. The Agency argues that assumptions and allegations provide no convincing evidence that the Agency relies on a secret procedure or an unpromulgated rule. Resp. at 6. Dickerson argues that, if the Board reverses its decision, then "parties with pre-planned tank pulls or other types of sites with questionable levels of contamination could submit inadequate information to the Illinois EPA as Dickerson did and gain entry into the Illinois EPA Leaking Underground Storage Tank Program and access the UST Fund." Resp. at 6-7.

DICKERSON'S REPLY

Dickerson argues that its post-hearing brief explained in detail why the Agency's denial letters were "erroneous." Reply at 1. Dickerson further argues that it also explained why the Agency "was arbitrary, capricious, and without statutory or regulatory authority" by apparently basing its determination on a failure to "confirm the release by providing laboratory analysis showing contamination above Tier I remediation objectives." *Id*. at 1, 8. Dickerson notes that the hearing officer granted its request for leave to file a reply. *Id*. at 1-2. The Board below summarizes the arguments made by Dickerson in its Reply, which renews a request for relief including an award of "reasonable attorney's fees and expenses. . . ." *Id*. at 9; *see* Brief at 34.

Agency's Decision Letter

Dickerson restates its argument that the Agency "failed to comply" with regulatory requirements in issuing its denial letters because the letters did not explain why the Agency rejected Dickerson's submissions and why it deemed the Site a non-UST incident. Reply at 2, citing 35 Ill. Adm. Code 734.505(b). Dickerson claims that Mr. Gaydosh's testimony provided no reason why the Agency's March 9, 2009, letter rejected Dickerson's 45-Day Report or the determination that the Site was not a UST incident. Reply at 2, citing Tr. at 142-43, Brief at 8.

Dickerson notes the Agency's defense of its denial letter: "[i]f a factual situation or site is not covered within the parameters of a statutory scheme such as the Illinois EPA Leaking Underground Storage Tank Program, it is difficult to cite specific provisions from that statutory scheme since the matter in question is an anomaly." Reply at 3, citing Resp. at 5-6. Dickerson expresses curiosity with this explanation. Reply at 3. Dickerson argues that Mr. Gaydosh sought evidence that the Site required corrective action. Dickerson also notes the Agency's response that Dickerson had not submitted "specific levels of specific contaminants." Reply at 3, citing

Resp. at 5. Dickerson suggests that, if the Agency believed it lacked this information, then "the Agency could have provided an explanation for denial in its Letters. . . ." Reply at 3. However, Dickerson argues that that explanation is "tacit admission 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. . . ." *Id.*

Dickerson suggests that that Agency's response reflects confusion. On one hand, Dickerson notes the Agency's argument that it is difficult to cite specific statutory authorities for a determination regarding a site that is anomalous. *See* Reply at 3, Resp. at 5-6. On the other hand, Dickerson claims that the Agency apparently based its determination on failure to submit specific information that is not required by statute or regulation. *See* Reply at 3.

Laboratory Analysis

Dickerson notes that its brief repeatedly states "that the Agency has no support for its policy that laboratory analysis showing contaminant exceedances above Tier 1 ROs is needed to confirm a release." Reply at 4. Dickerson argues that the Agency has not cited a statute or regulation persuasively disputing that statement. *Id.* Dickerson suggest that this absence of a citation indicates that the Agency lacked a basis for its determinations. *Id.*

Dickerson claims that the Agency's response regarding this issue refers specifically only to 35 Ill. Adm. Code 734.210(h), which does not address the confirmation of a release. Reply at 4, citing Resp. at 5. Dickerson argues that subsections (h)(1) and (h)(2) "specify the closure sampling locations for USTs that are removed or abandoned in place." Reply at 4, citing 35 Ill. Adm. Code 734.210(h)(1), (2). Dickerson further argues that "Section 734.210 also provides the requirements for submitting a *closure* report if sampling result show that the appropriate ROs have been met." Reply at 4 (emphasis in original), citing 35 Ill. Adm. Code 734.210.

Agency Confirmation of Release

Dickerson argues that the Agency has failed to deny that it employs unpromulgated two-step procedure in confirming releases from USTs. Reply at 4. Dickerson cites Mr. Gaydosh's testimony that, if an STSS determines that no release occurred, "we normally look for laboratory analysis to confirm the presence of contaminants above tier 1 objectives." *Id.* at 5, citing Tr. at 130, Brief at 13. Dickerson also cites a statement by Mr. Chappel "that the Agency's policy requires laboratory analysis showing contamination above Tier 1 ROs to confirm a release." Reply at 5, citing Brief at 13. Dickerson argues that Mr. Chappel has stated that this policy is not contained in the requirements of Part 734. Reply at 5.

APA Requirements

Dickerson restates its position that the Agency relies upon and has not supported an unpromulgated two-step procedure in confirming releases from USTs. Reply at 5. Dickerson claims that the Agency applies this procedure in violation of APA requirements. *Id.* Dickerson states that it raised this issue in an April 3, 2009, letter to the Agency. *Id.* at 5-6, 9; citing R. at 97-103.

PID Measurements

Dickerson cites Mr. Foley's response to a question asking why the 45-Day Report or Addendum did not include PID measurements: "[t]hey're not required and they're not acceptable for reaching any conclusions, *at least for 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." Reply at 6-7 (emphasis in original), citing Tr. at 110. Dickerson argues that Mr. Foley sought only to explain "that PID measurements are not acceptable for purposes of *closure*." Reply at 7 (emphasis in original). Dickerson suggest that he used PID measurements in preparing for closure only to determine "when the level of contaminants in the excavated area was close to 'clean.'" Reply at 7. Dickerson claims that, to close its Site, it took closure samples as required by the Board's UST regulations and submitted results to the Agency. Reply at 7, citing R. at 51. Dickerson argues that the Agency statement that Mr. Foley "acknowledged that PID readings were not acceptable to the department for reaching conclusions" takes Mr. Foley's statements out of context and excludes important details. . . ." Reply at 6

Agency Argument Regarding Sufficient Information

Dickerson notes the argument that, if the Board reverses the Agency, "owners or operators of USTs at sites with 'pre-planned tank pulls' with 'questionable levels of contamination' will be able to access the SUT Fund by submitting 'inadequate information.'" Reply at 7. Dickerson discounts the Agency's professed concern. First, Dickerson argues that all UST removals are planned because they require an OSFM permit before the time of removal. Reply at 7. Dickerson further argues that "pre-planned UST removals are required by OSFM and Board regulations." *Id*., citing 415 ILCS 5/57.6(b) (2008), 41 Ill. Adm. Code 170.541. Second, Dickerson dismisses the Agency's concern with "inadequate levels" of contamination. Dickerson claims that the concern lacks a basis in law, as "there is no specific 'level' of contamination required to be present at sites in order to confirm a release." Reply at 7.

Dickerson argues that "[v]isual, olfactory, and PID measurements are sufficient to provide evidence of a release in accordance with Board and OSFM regulation." Reply at 7, citing 35 Ill. Adm. Code 734.210(g), 41 Ill. Adm. Code 170.560, 170.580. Dickerson claims that it provided the Agency information sufficient under Board and OSFM regulations to confirm a release and that it is subject to the UST program. Reply at 8. Dickerson also argues that it "should be allowed to access the UST Fund for reimbursement of early action costs in accordance with applicable regulations." *Id*., citing Brief at 26-29.

AGENCY'S SUR-REPLY

The Agency disputes Dickerson's claim that "[v]isual, olfactory, and PID measurements are sufficient to provide evidence of a release in accordance with Board and OSFM regulations." Sur-Reply at 1-2, citing Reply at 7-8. The Agency also disputes Dickerson's claim that "it provided the necessary information in this case." Sur-Reply at 1-2, citing Reply at 7-8. The Agency argues that, before issuing its March 9, 2009 determination, it knew only that PID

readings had been taken and had not obtained specific PID readings from Dickerson. Sur-Reply at 2. The Agency claims that Dickerson would not require these readings for entry into the UST Program, which "is focused on corrective action, meeting cleanup objectives, and reimbursing only the costs necessary to achieve these objectives." *Id*. Arguing that "[o]bjective and scientific data, namely analytical results of soil samples from excavation walls and floors, are needed for closure," the Agency claims that it is reasonable and beneficial for the Agency "to have comparable objective and scientific data concerning initial conditions at the site. . . . " *Id*. The Agency asserts that Dickerson's position on this question would leave the Agency "in the dark." *Id*.

The Agency continues by suggesting that Dickerson has not persuasively addressed the Agency's "concern that pre-planned tank pulls or other sites with questionable levels of contamination could enter" the UST Program and gain access to the UST Fund. Sur-Reply at 2, citing Reply at 7, Resp. at 6-7.

The Agency notes that Dickerson's reply refers to an April 3, 2009 letter its counsel wrote to the Agency. Sur-Reply at 2-3, citing Reply at 5-6. The Agency also notes Dickerson's reference to "significant" litigation costs. Sur-Reply at 3, citing reply at 8. The Agency requests that the Board decline to consider these matters, as the letter was not available to it when it reached its March 9, 2009 determination and because the claim about costs argues facts that are not in the record. Sur-Reply at 3.

Finally, the Agency characterizes Dickerson's reply not as a traditional response to an opponent's arguments but as a "declaration of victory" and a vehicle for seeking an award of attorney's fees . *Id*. at 1. The Agency concludes by arguing that "the Reply does not advance Dickerson's efforts to meet its burden of proof in these cases." *Id*. The Agency "respectfully request that the Board affirm its March 9, 2009 and June 10, 2009 decisions." *Id*. at 3.

STANDARD OF REVIEW AND BURDEN OF PROOF

The standard of review under Section 40 of the Act (415 ILCS 5/40 (2006)) is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at 5 (July 24, 2003); citing Browning Ferris Industries of Illinois v. PCB, 534 N.E.2d 616 (2nd Dist. 1989). The Board will not consider new information that was not before the Agency prior to its final determination regarding the issues on appeal. Kathe's Auto Service Center v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). The Agency's denial letter frames the issues on appeal. Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

Finally, the Board's procedural rules provide that, in appeals of final Agency determinations, "[t]he burden of proof shall be on the petitioner. . . ." 35 Ill. Adm. Code 105.112(a), citing 415 ILCS 5/40(a)(1), 40(b), 40(e)(3), 40.2(a).

DISCUSSION AND CONCLUSION

Section 734.505(b) of the Board's UST regulations provides, in pertinent part that,

> [i]f the Agency rejects a plan, budget, or report or requires modification, 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 Section 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 Section of the Act or regulations may be violated if the plan, budget, or report is approved. 35 Ill. Adm. Code 734.505(b).

Even a cursory review of the Agency's denial letters dated March 9, 2009, and June 10, 2009, shows that the letters fall short of these requirements. *See* R. at 110-11, 112-13.

The Agency's March 9, 2009, letter first addresses Dickerson's 45-Day Report by stating in pertinent part that, "[b]ased 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." R. at 110. The same letter continues by addressing Dickerson's Addendum and 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 Leaking Underground Storage Tank Program." *Id*.

Regarding both reports, the March 9, 2009, letter fails to cite any "Sections of the Act or regulations that may be violated if the plan, budget, or report is approved." 35 Ill. Adm. Code 734.505(b)(2); *see* 415 ILCS 5/57.7(c)(4)(A), (B) (2008). In the absence of such a citation, the letter also fails to provide "[a] statement of *specific* reasons" why such a provision may be violated. 35 Ill. Adm. Code 734.505(b)(3) (emphasis added); *see* 415 ILCS 5/57.7(c)(4)(D) (2008). By referring to "the information currently in the Illinois EPA's possession," the Agency suggests that it may have lacked information necessary for completing its review. In any event, the Agency identifies no specific type of information that was not already in its possession and that was necessary for a complete review. *See* 415 ILCS 5/57.5(c)(4)(C) (2008); 35 Ill. Adm. Code 734.505(b)(1). Mr. Gaydosh's testimony confirms that the letter did not refer to any failure to comply with UST or OSFM regulations. Tr. at 142-43. He also testified that the letter used standard language and that there was not any particular reason why the letter provided no further information about the denial. Id. at 143. In light of these shortcomings, the Board can only conclude that the Agency's March 9, 2009, denial letter offers only a conclusory statement that the incident is not subject to the UST program. Accordingly, the Board finds that the Agency has failed to satisfy the requirements of 35 Ill. Adm. 734.505(b).

The Agency's June 10, 2009 letter addresses Dickerson's request for reimbursement from the UST Fund by stating in pertinent part 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. Therefore, 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. R. at 112.

As the Board noted with regard to the Agency's March 9, 2009, letter, this subsequent letter also fails to cite any "Section of the Act or regulations that may be violated if the plan, budget, or report is approved." 35 Ill. Adm. Code 734.505(b)(2); *see* 415 ILCS 5/57.7(c)(4)(A), (B) (2008). In the absence of such a citation, the June 10, 2009, letter also fails to provide "[a] statement of specific reasons" why such a provision may be violated. 35 Ill. Adm. Code 734.505(b)(3); *see* 415 ILCS 5/57.7(c)(4)(D) (2008). By referring to "the information currently in the Illinois EPA's possession," the Agency again suggests that it may have lacked information necessary for completing its review of Dickerson's request for reimbursement. In any event, the Agency identifies no specific type of information that was not already in its possession. *See* 35 Ill. Adm. Code 734.505(b)(1); *see* 415 ILCS 5/57.7(c)(4)(C) (2008). In light of these shortcomings, the Board can only conclude that the Agency's June 10, 2009, denial letter also offers only a conclusory statement that the incident is not subject to the UST program. Again, the Board finds that the Agency failed to satisfy the requirements of 35 Ill. Adm. 734.505(b).

Although the March 9, 2009 and June 10, 2009, letters failed to account for the Agency's denials, the record appears to indicate that the Agency believed it had some basis for its determinations. In technical review notes dated March 4, 2009, the Agency record reveals the following conclusion:

> [r]eview of the file finds that Incident No. 2008-0084 reported on June 18, 2008 [sic] provided insufficient information to warrant notification of a release. Visual, olfactory and PID screening fail to meet the standards required for establishing quantitative and qualitative verification of a contaminant release. Therefore, the initially submitted 45-Day Report is denied and will be issued a Non-LUST Letter. Without the presence of a verifiable release, the 45-Report [sic] Addendum/Corrective Action Completion Report falls outside the jurisdiction of the Leaking Underground Storage Tank Program. R. at 94.

Mr. Gaydosh's testimony about his review also shows that he considered the evidence in Dickerson's submissions to be insufficient to confirm that a release had occurred at the Site. Tr. at 128-29. As noted above, the Agency's denial letters do not reveal that the Agency weighed considerations of this nature or that it based its conclusions upon them. Having determined that the letters do not satisfy the requirements of 35 Ill. Adm. Code 734.505(b), the Board need not consider whether this omission is inadvertent or results from any other cause. The Agency's denial letters do not cite to the administrative record or to any statutory or regulatory authority to support the conclusion that the incident is not subject to the UST program.

In the absence of denial letters complying with the requirements of 35 Ill. Adm. Code 734.505(b), the Board remands these consolidated proceedings to the Agency. The Board directs the Agency to cure the deficiencies in its determinations and to re-issue them within 30 days of

the date of this order in a manner consistent with this order and with applicable statutory and regulatory requirements.

REQUEST FOR ATTORNEY FEES AND COSTS

Section 57.8(l) of the Act provides that corrective action excludes "legal defense costs," which include "legal costs for seeking payment . . . unless the owner operator prevails before the Board in which case the Board may authorize payment of legal fees." 415 ILCS 5/57.8(l) (2008). The Board has required the reimbursement of legal fees from the UST Fund where the petitioner has prevailed in appealing the Agency's rejection of a plan and budget. *See, e.g.*, Illinois Ayers Oil Co. v. IEPA, PCB 03-214 (Aug. 5, 2004). Dickerson has throughout these consolidated proceedings requested attorney fees incurred in this action. Am. Pet. at 6, Pet. at 4, Brief at 34, Reply at 9. However, the record does not indicate the amount of legal fees incurred by Dickerson.

Based on its conclusion above and its direction to the Agency to re-issue its determinations in a manner consistent with this order and with applicable statutory and regulatory requirements, the Board cannot conclude that Dickerson has "prevailed" within the meaning of Section 57.8(l) and thus declines to exercise its discretion to direct the Agency to reimburse Dickerson's attorney fees from the UST Fund.

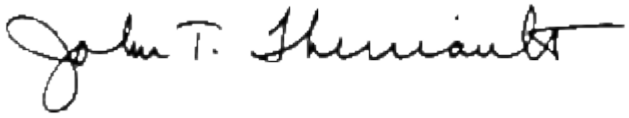
ORDER

For the reasons stated above, the Board finds that the Agency's March 9, 2009, and June 10, 2009, denial letters fail to comply with the requirements of 35 Ill. Adm. Code 734.505(b). The Board remands these consolidated proceedings to the Agency and directs the Agency to cure the deficiencies in those letters and to re-issue determinations consistent with this order and with applicable statutory and regulatory requirements within 30 days of the date of this order. For the reasons stated above, the Board declines to exercise its discretion to direct the Agency to reimburse Dickerson's attorney fees from the UST Fund.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on February 4, 2010 by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board