

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE

John Therriault
Acting Clerk
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

Edward W. Dwyer
Hodge Dwyer & Driver
P.O. Box 5776
Springfield, Illinois 62705-5776

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

PLEASE TAKE NOTICE that I have today caused to be filed a RESPONSE TO MOTION FOR RECONSIDERATION OF THE ILLINOIS POLLUTION CONTROL BOARD'S FEBRUARY 4, 2010 ORDER with the Illinois Pollution Control Board, copies of which are served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

/s/ James G. Richardson
James G. Richardson
Special Assistant Attorney General

Dated: March 25, 2010
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544

THIS FILING SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**RESPONSE TO MOTION FOR RECONSIDERATION OF THE ILLINOIS
POLLUTION CONTROL BOARD'S FEBRUARY 4, 2010 ORDER**

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, James G. Richardson, Assistant Counsel and Special Assistant Attorney General, and pursuant to 35 Ill. Adm. Code 101.520 submits to the Illinois Pollution Control Board ("Board") its Response to Motion for Reconsideration of the Illinois Pollution Control Board's February 4, 2010 Order. The Illinois EPA requests that this Motion for Reconsideration of the Illinois Pollution Control Board's February 4, 2010 Order ("Motion") be denied.

I. FACTS

The Board issued an Opinion and Order in this case on February 4, 2010. The Board found that the Illinois EPA's denial letters of March 9, 2009 and June 10, 2009 did not satisfy the requirements of 35 Ill. Adm. Code 734.505(b), but noted that "the record appears to indicate that the Agency believed it had some basis for its determinations." Dickerson Petroleum, Inc. v. IEPA, PCB 9-87 & 10-5 (Consolidated), slip op. at 28 (February 4, 2010). The Board remanded the matter to the Illinois EPA "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.” Id. at 28-29. The Board declined to exercise its discretion and order reimbursement of Dickerson’s attorney fees as it could not conclude that Dickerson had prevailed within the meaning of Section 57.8(1) of the Illinois Environmental Protection Act (“Act”) based on its finding and remand.

On March 5, 2010, the Illinois EPA issued a No Further Remediation (“NFR”) letter to Dickerson for its site. Motion, Exhibit A. On March 4, 2010, the Illinois EPA issued a determination letter to Dickerson concerning its February 15, 2009 application for payment of \$84,090.69 in costs for this site. Motion, Exhibit B. As the site had a \$10,000.00 deductible, \$62,780.63 of costs were authorized for payment while payment of \$11,310.06 in costs was denied. Almost all of the denied costs exceeded either the maximum payment amounts allowed by the LUST regulations or the minimum requirements necessary to comply with the Act.

II. ARGUMENT

Dickerson claims that Exhibits A and B “demonstrate that the Illinois EPA did not have a basis for initially deeming the incident a non-LUST incident.” Motion at 3. But this conclusion is contrary to the Board’s observation that “the record appears to indicate that the Agency believed it had some basis for its determinations.” Dickerson, p. 28. And anyway, during litigation parties routinely re-examine their litigation strategies as the case evolves, especially when the decision-maker in the case makes findings and issues orders. There are a multitude of reasons for changes in strategy, such as particular evidence not having a predicted impact or the re-allocation of litigation resources. This claim by Dickerson is baseless speculation.

As the basis for its Motion, Dickerson argues that “the Board erred in the application of existing law by concluding that that (sic) Petitioner is not a prevailing party.” Motion at 3. In

support of its argument, it references three Board cases where attorney fees were awarded, namely Illinois Ayers Oil Company v. IEPA, PCB No. 03-214 (August 5, 2004), Swif-T-Food Mart v. IEPA, PCB 03-185 (August 19, 2004), and Ted Harrison Oil Company v. IEPA, PCB 99-127 (October 16, 2003). But first, is Dickerson so presumptuous to think that the Board was not cognizant of its own legal precedents when it declined to order the reimbursement of attorney fees in the instant case?

Second, Dickerson's reliance on these cases is flawed. In each one, the Board had already reversed a determination of the Illinois EPA before turning to the issue of whether attorney fees should be awarded. The Board has yet to reverse a determination of the Illinois EPA in the instant case. Here, the Board found that the Illinois EPA's determination letters of March 9, 2009 and June 10, 2009 did not satisfy the requirements of 35 Ill. Adm. Code 734.505(b) and remanded the matter to the Illinois EPA to re-issue new letters. Exhibits A and B represent Illinois EPA's compliance with this order. These letters provide Dickerson with the primary relief it sought in this case, a NFR Letter for its site and the approval of payment of eligible costs. If the Illinois EPA had issued letters with any other content, further arguments by the parties and/or action by the Board would have been necessary. But for all intents and purposes, this case should now be over without the need for the Board to enter a ruling affirming or reversing an Illinois EPA determination or to consider whether attorney fees should be awarded.

Third, Dickerson fails to address the historical context of statutes that allow for the award of attorney fees. As noted in Illinois Ayers, Section 57.8(l) of the Act is a "fee-shifting" statute. Such statutes must be strictly construed since they are in derogation of common law. Miller v. Pollution Control Board, 267 Ill. App. 3d 160, 171; 642 N.E.2d 475, 485 (4th Dist. 1994); Globalcom, Inc. v. Illinois Commerce Commission, 347 Ill. App. 3d 592, 618; 806 N.E.2d 1194, 1214 (1st Dist. 2004)

The Board has noted that it must strictly construe fee-shifting statutes, and that it has broad discretionary powers concerning the amount of fees to be awarded. Webb & Sons, Inc. v. IEPA, PCB No. 07-24 (May 3, 2007), slip op. at p. 4, Swif-T-Food Mart, p. 3. Rather than focusing on these concepts, Dickerson references Illinois Ayers, which the Illinois EPA has already distinguished, and reverts to its arguments from previous pleadings concerning alleged Administrative Procedure Act violations and its significant costs in litigating this matter that are neither germane nor relevant to the issue presently before the Board. Certainly Dickerson does not have an automatic right to its attorney fees here. The Board has absolute authority to award attorney fees and has stated its decision in this case. It could be argued that it is inherently impossible to challenge such a decision. But even if it can be challenged, Dickerson's Motion falls far short of justifying a change of the Board's February 4, 2010 order.

III. CONCLUSION

For all of the foregoing reasons and arguments presented herein, the Illinois EPA respectfully requests that Dickerson's Motion be denied.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

/s/ James G. Richardson

James G. Richardson
Special Assistant Attorney General

Dated: March 25, 2010

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on March 25, 2010 I served true and correct copies of a RESPONSE TO MOTION FOR RECONSIDERATION OF THE ILLINOIS POLLUTION CONTROL BOARD'S FEBRUARY 4, 2010 ORDER upon the persons and by the methods as follows:

[Electronic Filing]

John Therriault
Acting Clerk
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100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

[1st Class U.S. Mail]

Edward W. Dwyer
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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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