

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

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

STATE OF ILLINOIS
Pollution Control Board

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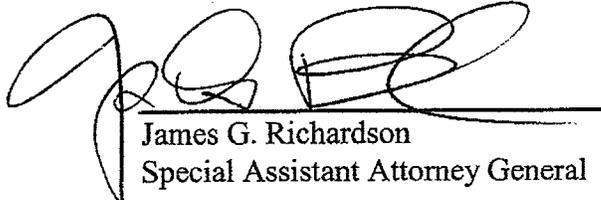
John Therriault
Acting Clerk
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

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 PETITIONER'S POST-HEARING BRIEF with the Illinois Pollution Control Board, copies of which are served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY


James G. Richardson
Special Assistant Attorney General

Dated: November 23, 2009
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 PETITIONER’S POST-HEARING BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency (“Illinois EPA”), by one of its attorneys, James G. Richardson, Assistant Counsel and Special Assistant Attorney General, and hereby submits to the Illinois Pollution Control Board (“Board”) its Response to Petitioner’s Post-Hearing Brief.

I. STANDARD OF REVIEW

Section 57.8(i) of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/57.8(i), grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act, 415 ILCS 5/40. Section 40 is the general appeal section for permits and has been used by the legislature as the basis for this type of appeal to the Board. Therefore when reviewing an Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund (“UST Fund”), the Board must decide whether or not the application, as submitted to the Illinois EPA, demonstrates compliance with the Act and Board regulations. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

Pursuant to 35 Ill. Adm. Code 105.112(a), the Petitioner, Dickerson Petroleum, Inc.

(“Dickerson”), has the burden of proof in this case. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003). New information that was not before the Illinois EPA prior to its final determination regarding the issues on appeal will not be considered by the Board. Kathe’s Auto Service, Inc. v. Illinois EPA, PCB 95-43 (May 18, 1995). Thus Dickerson must demonstrate to the Board with appropriate information that it has satisfied its burden before the Board can enter an order reversing or modifying the Illinois EPA’s decision under review.

II. RELEVANT FACTS

The Illinois EPA received a 20-Day Certification Report concerning this site on February 11, 2008. Administrative Record (“AR”) pp. 93, 222. The 45-Day Report was received on April 28, 2008. AR p.3. Concerning a January 18, 2008 preliminary site investigation, it presented the information as follows:

A single hand-augered 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 photoionization detector (PID) readings. No samples from this boring were retained for laboratory analysis. AR pp. 13-15.

No specific PID readings were presented. The report concluded saying that a 45-Day Report Addendum would be submitted upon completion of all Early Action activities and would include, among other things, analytical results. AR p.16.

The 45-Day Report Addendum was received by the Illinois EPA on February 17, 2009. AR p.37. It stated that the two USTs were removed on May 14, 2008 and that 748 tons of contaminated backfill were excavated and disposed at the Milam Landfill. AR pp.48-49. The report provided

neither specific PID readings taken during excavation activities nor analytical results for the contaminated backfill that was removed. Analytical results of soil samples taken from the walls and floor of the excavation area did not exceed the applicable TACO Tier 1 Residential Soil Cleanup Objectives. AR pp.49-50. Based upon these results, the report concluded with a request that the site be classified as requiring no further remediation.

On March 9, 2009, the Illinois EPA issued its decision letter stating that this incident was not subject to 35 Ill. Adm. Code 734, 732 or 731. AR pp.110-111.

III. ARGUMENT

It must first be noted 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. Inclusion of these materials in the Administrative Record simply acknowledges the contacts between the Illinois EPA and Dickerson after March 9, 2009. But by doing this, the Illinois EPA 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. Kathe's Auto Service, Inc. v. Illinois EPA, PCB 95-43 (May 18, 1995).

And when only the appropriate matters are considered, it is difficult to imagine that the Illinois EPA could have reached any other decision concerning this site. The 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-augered soil boring. The only analytical results contained in the 45-Day Report Addendum were for soil samples from the floor and walls of the excavation area that indicated there were no concentrations above the applicable TACO Tier 1 Residential Soil Cleanup Objectives. No specific PID readings obtained

during excavation activities or analytical results of the contaminated backfill were provided. The 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.

The Illinois EPA's decision is consistent with other evidence presented to the Board in this case. First, there is the UST Removal Log for the May 14, 2008 tank pull prepared by Office of the State Fire Marshal Storage Tank Safety Specialist ("STSS") Kent Gelarden. AR pp.91-92. For both tanks, Gelarden placed "No" on the form in response to "Appears to have leaked" and "NR" for no apparent release in response to "Contamination status." Dickerson attempted to attack Gelarden's competence with Hearing Exhibits 6 and 7, but the Hearing Officer correctly sustained the Illinois EPA's objection to their relevance. Transcript ("TR") pp.72-77. The Illinois EPA asks that the Board not consider these exhibits due to their lack of relevance. But if the Board does accept them, they should be given little weight. Hearing Exhibit 6 was a log prepared by Gelarden all the way back in 2006 while Hearing Exhibit 7 was not even prepared by Gelarden. There is also no context or perspective for consideration of these exhibits as Dickerson provided no information as to the universe of logs that exist, such as the number of logs prepared by Gelarden every year. In its brief, Dickerson wonders why the Illinois EPA did not call Gelarden to testify concerning his May 14, 2008 findings. Petitioner's Post-Hearing Brief ("BR") pp.25-26. But what impediment prevented Dickerson from calling Gelarden to directly challenge his May 14, 2008 findings?

Second, there was no specific evidence that the tanks at the site had leaked, such as failure of a tank tightness test, prior to January 18, 2008. From 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. TR pp.20, 80. Third, testimony indicated that the tanks were intact and not leaking when they were pulled on May 14, 2008. TR p.113.

In reviewing the pre-March 9, 2009 submittals for this site, Illinois EPA Project Manager Jay Gaydosh was looking for evidence that the level of contamination at the site required corrective action to be performed. TR pp.122-124. As a laboratory analysis of a soil sample is a simple, economical and scientifically acceptable form of such evidence, it is not surprising that laboratory analysis would be referenced by the Illinois EPA in the discussions that occurred after the issuance of the March 9, 2009 decision letter. Dickerson portrays this activity as a misuse of the TACO Tier 1 cleanup objectives. Br. p.16. But 35 Ill. Adm. Code 734.210(h) concerning Early Action references the *meeting* of these objectives. Therefore the Illinois EPA's approach here was neither illogical nor inappropriate. Dickerson also seizes on this as evidence of what it characterizes as an "unpromulgated secret two-step confirmation policy" while simultaneously attempting to assure that there was "clear and measured evidence of a release at the Site." Br.pp.29, 33. But on this topic, Dickerson is apparently referencing visual observations, olfactory observations, photographs, and PID readings. Certainly the first three items cannot provide specific levels of specific contaminants. As for the PID, Thomas Herlacher testified that it could not identify specific contaminants or their levels, and James Foley acknowledged that PID readings were not acceptable to the department for reaching conclusions. Tr.pp.82-83,110. In reality, there remains no clear and measured evidence of a release at this site.

Now to the Illinois EPA's March 9, 2009 decision letter and the purported "unpromulgated secret two-step confirmation policy."("Two-Step"). The decision letter stated that the incident was not subject to 35 Ill. Adm. Code 734, 732 or 731. If 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. Dickerson's argument that the Illinois EPA's decision was driven by a secret and unpromulgated rule or policy is simply not supported by the evidence. Dickerson references the Administrative Procedure Act's definition of rule and suggests that the Two-Step "impacts persons outside of the Illinois EPA, such as the Petitioner and other owners and operators of USTs." Br.pp.30-32. Dickerson also notes that Herlacher had not heard of the Two-Step until after the issuance of the March 9, 2009 decision letter and states that "it is reasonable to *assume* that other consultants, as well as owners and operators of USTs, are also not aware of the Illinois EPA's two-step confirmation policy." (Emphasis added). Br.p.30. But Dickerson's Herlacher has nearly 20 years of experience and had never heard of the Two-Step before the instant case? Although Dickerson found information from two other UST sites for its attempt to challenge STSS Gelarden's Removal Log, Dickerson provided no evidence of other situations where the Two-Step has been applied. If the Two-Step is as pervasive and pernicious as Dickerson suggests, why has it not been discovered or challenged before the instant case? Assumptions and Dickerson's allegations in this one case are certainly not convincing evidence of a secret and unpromulgated rule or policy.

To sum up, the Illinois EPA deemed the instant site a Non-LUST incident based upon the information submitted to it prior to March 9, 2009. Even if the information presented at the hearing could be considered, it is inadequate to justify changing the original decision. If the Illinois EPA's March 9, 2009 decision is reversed, 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

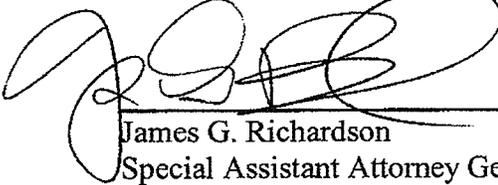
access the UST Fund. And certainly the existence of an alleged “unpromulgated secret two-step confirmation policy” has not been proven. Dickerson has failed to meet its burden of proof in this matter.

IV. CONCLUSION

For all of the reasons and arguments presented herein, the Illinois EPA respectfully requests that the Board affirm its March 9, 2009 and June 10, 2009 decisions.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY



James G. Richardson
Special Assistant Attorney General

Dated: November 23, 2009
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544

CERTIFICATE OF SERVICE

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

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

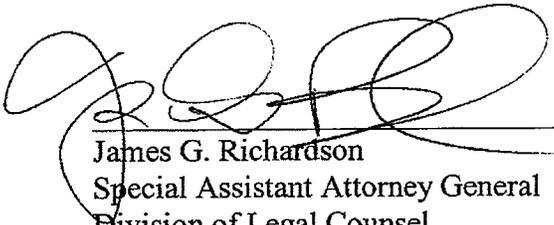
[1st Class U.S. Mail]

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

[1st Class U.S. Mail]

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

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY



James G. Richardson
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
DIVISION OF LEGAL COUNSEL
1021 NORTH GRAND AVENUE EAST, POST OFFICE BOX 19276
SPRINGFIELD, ILLINOIS 62794-9276
TELEPHONE (217) 782-5544 FACSIMILE (217) 782-9807

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