BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

L. KELLER OIL PROPERTIES/FARINA,	)	
	)	
Petitioner,	)	
v.	)	PCB No. 07-147
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

Carolyn S. Hesse
Barnes & Thornburg
1 North Wacker Drive
Suite 4400
Chicago, IL 60606

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board, via the Clerk's Office On-Line (COOL) System, a REPLY TO PETITIONER'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGEMENT, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

_____/s/_____

Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: August 6, 2007

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REPLY TO PETITIONER'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGEMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500(e), hereby respectfully responds to the Response in Opposition to Motion for Summary Judgment ("Petitioners' response") filed by the Petitioners. In reply to the Petitioners' response, the Illinois EPA states as follows:

I. INTRODUCTION

There is no genuine issue of material fact. All material facts can be found in the Administrative Record. While the parties may not agree as to what the facts in this matter represent, all of the facts are present and uncontroverted. The Board has all of the facts necessary to make a decision in this case. The Illinois EPA's denial letter frames the issues on appeal. Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). The Illinois EPA's decision was based upon the documents submitted to the Illinois EPA by the Petitioner. All of the documents supporting the Illinois EPA decision are included within the Administrative Record or have been attached to the Petitioner's Petition or the Illinois EPA's Motion for Summary Judgment. The Petitioner submitted the facts in this case to

the Illinois EPA. It was upon these facts that the Illinois EPA made its decision. No genuine issue of material fact exists.

The Petitioner claims that the issue is whether the "Petitioner performed work in accordance with generally accepted engineering practices or principles of professional geology." (Petitioner's Response, p.1). However, Petitioner fails to fully quote the statute. 35 Ill. Adm. Code 734.510 states that "the overall goal of the technical review for plans must be to determine if the plan is sufficient to satisfy the requirements of the Act and regulations and has been prepared in accordance with generally accepted engineering practices or principles of professional geology." As states above, the Illinois EPA's denial letter frames the issues on appeal. Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). The Illinois EPA May 17, 2007 decision letter does not state that the work performed by the Petitioner was not done in accordance with generally accepted engineering practices or principles of professional geology. (AR, p. 256). It is the Illinois EPA's position that the record clearly shows that the information submitted by the Petitioner did not comply with all of the requirements of Part 734, and in some cases exceeded the minimum requirements of the Act and regulations making the activities listed in the May 17, 2007 decision letter as not eligible for payment pursuant to 35 Ill. Adm. Code Section 734.630(o).

The Petitioner lists out disputed facts on page 6 of its response. However, these are not facts in dispute at all. The list is a list of the issues in the case which can be summarized into the two issues presented by the Illinois EPA in its Motion for Summary Judgment. The Illinois EPA will discuss each of these issues below. The "disputed facts", as set forth by the Petitioner, are even phrased as issues as they all begin with the word "Whether". The Petitioner tries to present several red herrings throughout its response in an attempt to divert the Board's attention away from the real issues at hand. One red herring is by listing facts of different appeals that have been taken at the site, but are not at issue here.

Another is by labeling the issues as "disputed facts". By labeling the issues in this case as "disputed facts" the Petitioner is attempting to convince the Board that it does not have all of the facts in the case to decide these very issues. However, all of the facts are present in the Administrative Record dealing with each of these issues. Any additional substantive information presented by the Petitioner at this time would not be relevant to the question of whether the Illinois EPA made the correct decision in its May 17, 2007 decision letter because the information was not presented to or reviewed by the Illinois EPA when making its decision. The Petitioner cannot at hearing present facts that were not presented to the Illinois EPA at the time of the decision to show that the decision was improper. The Illinois EPA decision was made based upon the facts in the Administrative Record. The Administrative Record is what is used to support the decision of the Illinois EPA.

Another red herring the Petitioner is attempting to present is by stating the qualifications of the Petitioner's consultant. The Illinois EPA is not disputing the qualifications of the consultant, and they are not in issue in this case. Even a qualified professional can err. By admitting an error, the Petitioner may not get reimbursed for some of the work performed, and this is all about the reimbursement. Pursuant to 35 Ill. Adm. Code 734.630(o) costs for activities which exceed the minimum requirements of the regulations are not eligible for reimbursement. Pursuant to 35 Ill. Adm. Code 734.630(p) improperly installed monitoring wells (pursuant to 734.430) are not eligible for reimbursement.

For the reasons that will be explained below, the Illinois EPA's decision comported with the law and facts as presented, and the Illinois Pollution Control Board ("Board") should affirm the Illinois EPA's decision.

II. SOIL BORINGS EXCEEDED THE MINIMUM REQUIREMENTS OF THE ACT AND CANNOT BE REIMBURSED.

During early action, owner/operators are required to sample the floor and walls of the excavation. They are also required to sample the piping run. 35 Ill. Adm. Code 734.210(h). Pursuant to

35 Ill. Adm. Code 734.315, the Stage 1 investigation must be designed to gather initial information regarding the extent of on-site soil and groundwater contamination that as a result of the release, exceeds the most stringent Tier 1 remediation objectives for applicable indicator contaminants. During the Stage 1 investigation, owner/operators are allowed up to four borings that be "drilled around each independent UST field where one or more UST excavation samples collected pursuant to 734.210(h), excluding backfill samples, exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants". 35 Ill. Adm. Code 734.315(a)(1)(A). "Up to two borings must be drilled around each UST piping run where one or more piping run samples collected pursuant to Section 734.210(h) exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants." 35 Ill. Adm. Code 734.315(a)(1)(B).

SB4 exceeded the minimum requirements of the Act and regulations because the wall of the excavation closest to SB4 was clean during Early Action. (AR, p.99) (See Exhibit 5 from Respondent's MSJ). Because the wall of the excavation was clean, SB4 did not need to be drilled under the regulations. In their response to the initial Illinois EPA denial letter, (AR, p.157) the Petitioner agreed that where SB4 was placed on the map they submitted to the Illinois EPA was in error. They stated that they had moved SB4 to the correct location, however, the new map showed SB4 in the same location as the prior map. (AR, p168, Maps AR, pp.28, 214).

SB5 and SB6 exceeded the minimum requirements of the Act and regulations because no contamination was found during Early Action in the excavation wall in that area. (See Exhibit 5 from Respondent's MSJ). In their response to the initial Illinois EPA denial letter, the Petitioner again agreed that the two borings were in the wrong place. (AR, p.170). These borings should have been drilled in the area of the piping run and not near the excavation. In regards to SB6, the Petitioner fully agreed that the boring exceeded the minimum requirements of the Act and regulations. (AR, p.170). In regards to

SB5, the Petitioner disagrees that the boring was inappropriate because the boring had a slight hit for Benzene. However, the Petitioner has not shown how this hit for Benzene was related to the diesel tank in question when the walls of the Early Action excavation were clean in the area of SB5 and the only contaminant of concern in the area was Naphthalene. (See Exhibit 5 from Respondent's MSJ, p.6). The Petitioner did make a claim that suggested their work during Early Action may not have been completed correctly. (AR, p.170). However, when submitting the 45-day report, the Petitioner's consultant did certify that the activities taken were done in accordance with the regulations. (See Exhibit 5 from Respondent's MSJ, Early Action Certification p.4 of 4).

In their Response, the Petitioner states that the exact location and depth of the borings were based on field observation and data samples collected from Early Action. (Response, p.11). 35 Ill. Adm. Code 734.315(a)(1) defines the requirements for gathering the initial information regarding the extent of on-site soil contamination that as a result of the release, exceeds the most stringent Tier 1 remediation objectives for applicable indicator contaminants. Section 734.315(a)(1) states the following regarding field observations issues: "The borings must be advanced through the entire vertical extent, based on field observations." The Petitioner also states SB5 and SB6 were advanced in the incorrect area in an attempt to define soil contamination from an incorrectly placed excavation sample. It is unclear what field observation and data from sampling was used, as borings were placed in areas previously defined by early actions samples.

The Petitioner did not submit to the Illinois EPA data regarding contamination located at 10 ft below the surface. (Response, p.12). According to the 45-day Report, groundwater infiltrated the bottom of the excavation so confirmation samples could not be collected in accordance with 35 Ill. Adm. Code 734.210(h). (See Exhibit 5 from Respondent's MSJ). These floor samples, in conjunction the tank excavation sidewall samples usually determine if the tanks have had a release at the bottom the

excavation. Contaminated soil in the groundwater unit is addressed as groundwater contamination. In this case, the excavation sidewalls did not show contamination in the diesel excavation and the piping runs samples did not demonstrate contamination migrating from the piping runs. This information, submitted by the Petitioner, is acceptable to determine the unsaturated soils have been adequately defined in that area without further sampling.

The soil samples that the Petitioner took in MW1 through MW5 exceed the minimum requirements of the Act and regulations. Section 734.315(a)(2)(C) states that soil samples must be examined from the Monitoring wells "provided that the samples must not be analyzed if other soil sampling conducted to date indicates that soil contamination does not extend to the location of the monitoring well installation boring." In the case at hand, the Petitioner chose to sample soils from the monitoring well borings in contradiction of the requirements of Section 734.315(a)(2)(C). (AR, p. 28, 90-101). Soil samples are not required from the monitoring well borings because sampling conducted to date indicated soil contamination did not extend to that area. The soil samples taken from the soil borings defined the area of contamination. Therefore the BTEX/MTBE soil analysis completed from the drilling of MW1 and MW5, and the PNA soil analysis completed from the drilling of MW1, MW2, MW4 and MW5 exceeded the minimum requirements of the Act and regulations.

The Petitioner also proposes additional soil borings. (AR, p. 29). The proposed soil boring south of the pump island is not needed because the wall of the Early Action excavation was clean, as was MW1. (See Exhibit 5 from Respondent's MSJ). The soil borings east of the tank field but west of MW2 exceed the minimum requirements of the Act and regulations because MW2 exceeds the clean up objectives. It has, therefore, already been determined that the contamination is beyond the point of the proposed borings. These proposed borings are not reimbursable under the Act and regulations. (AR, p.29). The Petitioner also proposes two additional borings in the area of SB5 because SB5 had that

slight hit for Benzene discussed above. However, as discussed previously, the Petitioner has not shown how this hit for Benzene was related to the diesel tank in question when the walls of the excavation were clean in the area of SB5 and the only contaminant of concern in the area was Naphthalene. (See Exhibit 5 from Respondent's MSJ, p.6).

In regards to the additional soil borings, the Petitioner argues in their response to the original decision letter that the piping samples are not deep enough to sample the entire vadose zone. (AR, p. 171). However, if these samples, required by 734. 210(h)(1)(C), are clean, as in this case, no further sampling is required and a No Further Remediation letter can be obtained without further sampling. Further, if the walls of the excavation are clean towards the piping run, as is the case here, then the depth of the piping run samples is sufficient for the purpose at hand, which is checking to see if the piping run leaked.

In summary, the soil borings discussed above are clearly shown by the Administrative Record to exceed the minimum requirements of the Act and regulations. All relevant facts are contained within the Administrative Record. No genuine issue of material fact exists.

III. MONITORING WELLS NOT SCREENED AT THE PROPER INTERVAL

35 Ill. Adm. Code 734.430(a)(3) requires that "wells must be screened to allow sampling only at the desired interval." The Administrative Record clearly shows that the wells at issue in this case were not screened at the desired interval. For wells MW1 through MW5, the Administrative Record indicates that the groundwater depth while drilling was between 10 and 11 feet. (AR, pp. 90-94). The Petitioner did not indicate on any of these "Drilling Borehole Logs" the depth of the groundwater after drilling as required by Section 734.425(c)(6). (AR, pp90-94). The wells were drilled and completed on July 12, 2006. (AR, pp. 90-94).

For MW1, the record indicates that the depth to water was 97.75 feet static. (AR, p.102). The top of the screen for MW1 is 95.50 feet. The total screen interval is 10 feet. (AR, p.102). This indicates that the screen is submerged 2.25 feet below the surface. Section 734.430 clearly states that the wells are to be constructed in a manner that will enable the collection of representative groundwater samples. Further, wells must be screened to allow sampling only at the desired interval. The contaminants of concern in gasoline and diesel fuel float on the top of water. If the screen is submerged 2.25 feet below the surface, the well is not constructed in a manner that will enable the collection of representative groundwater samples. Nor is it screened to allow sampling only at the desired interval.

The same can be said about MW2 through MW5. The record indicates that the depth to water for MW2 is 96.91 feet static. (AR, p. 103). The top of the screen is at 95.83 feet. (AR, p. 103). The top of the screen is 1.08 feet below the surface. The well closest to the surface is MW3. The record shows that MW3 has a depth to water of 97.11 feet static. (AR, p. 104). The top of the screen is 96.97 feet. (AR, p. 104). Therefore the top of the screen at MW3 is .14 feet below the surface. The record indicates that the depth to water for MW4 is 97.30 feet static. (AR, p. 105). The top of the screen is at 96.95 feet. (AR, p. 105). Therefore the top of the screen is .35 feet below the surface. For MW5, the record indicates that the depth to water is 98.00 feet static. (AR, p. 106). The top of the screen is at 96.20 feet. (AR, p. 106). Therefore the top of the screen is submerged 1.80 feet below the surface. These monitoring wells are not constructed in a manner that will enable the collection of representative groundwater samples. None of these wells, MW2 through MW5 are constructed to allow sampling only at the desired interval.

The Petitioner responded to the Illinois EPA's first denial letter, (AR, p.157), by stating that the wells were set at the groundwater table encountered at drilling. (AR, p. 173). The Petitioner went on to state that "due to the hydro-static pressure of hydraulic head of the formation, the isostatic water levels

rose in the monitoring wells." (AR, p. 173). The Petitioner goes on to argue that the groundwater is still entering the monitoring wells in the screen and that to have the wells set at shallower depths would have resulted in no production. (AR, p. 173). The Illinois EPA disagrees with that assertion. The total well screen interval is 10 feet. The wells could be raised the amount of distance so that the top of the screen is above the surface and still have adequate screen interval below the surface to collect the necessary samples of the contaminants. Further, having the top of the screens above the surface would comply with the regulations that require that the wells are constructed to allow it to be screened to allow sampling only at the desired interval. As constructed, the desired interval in these wells is .14 feet to 2.25 feet above the current placement of the top of the screen. The Petitioner admitted that "due to the hydro-static pressure of hydraulic head of the formation, the isostatic water levels rose in the monitoring wells." (AR, p. 173). Basically, by not allowing the water in the well to recharge after drilling and by placing the screens in the wells to the depth of groundwater during drilling, instead of placing the screens in the wells to the depth of groundwater after drilling, the wells were not screened in a manner to satisfy the requirements of Section 734.430. The Petitioner did not provide the groundwater depth after drilling as required under Section 734.725(c)(6) on the soil boring log, so it is unclear if this depth was noted during the investigation.

The Petitioner states the requirement of Section 734.430 to construct a well to allow for sampling only at the desired interval violates Section 734.315(a)(2)(E)(ii), which requires the screen to be submerged for hydraulic conductivity analysis. This is another red herring to distract the Board from the real issue. The Illinois EPA did not deny the hydraulic conductivity analysis from the well with the submerged screen. As stated above, the issues are defined by the Illinois EPA decision letter.

The Illinois EPA would also like to point out that the Illinois EPA's reviewer notes may give insight into the decision of the Illinois EPA, however, the reviewer notes are not the decision of the

Illinois EPA. The decision of the project manager is reviewed by their supervisor and not all of the comments in the reviewer notes make the Illinois EPA decision letter. This is another red herring presented by the Petitioner in its petition. (Petitioner's Response, p.13)

In summary, the wells discussed above are clearly shown by the Administrative Record to be constructed in violation of the Act and regulations in that they do not allow the wells to be sampled at the desired interval. All relevant facts are contained within the Administrative Record. No genuine issue of material fact exists.

IV. THE REQUIRED CERTIFICATION

The Act and regulations require that all plans be certified by a Professional Engineer or Geologist and signed by the Owner/Operator. Two certifications are necessary: one for the Site Investigation Plan and one for the budget. The original report contained both certification required by the Act and regulations. (AR, pp. 19-21 and 39). The second report, the one under appeal, contained only the budget certification. (AR, p.21). The record clearly shows that the required certification was not submitted to the Illinois EPA.

V. AFFIDAVITS ATTACHED TO RESPONSE

The information contained in the affidavits of Jeffrey R. Wienhoff and Carol L. Rowe (Petitioner's Response, Exhibits 26 and 27, respectively), present information either contained within the Administrative Record or not submitted to the Illinois EPA. As the consultants for the Petitioner, Mr. Wienhoff and Ms. Rowe are responsible for presenting all relevant information to the Illinois EPA to make its decision. The information contained in their affidavits that is within the Administrative Record was reviewed by the Illinois EPA during its decision making process and is present in that Record for the Board's consideration. The information presented for the first time in their affidavits was

not information under review by the Illinois EPA during its decision making process and should be disregarded.

VI. CONCLUSION

For the reasons stated herein, as well as those previously made by the Illinois EPA, the Illinois EPA respectfully requests that the Board affirm its final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

_____/s/_____

Melanie A. Jarvis
Assistant Counsel
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)
Dated: August 6, 2007

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on August 6, 2007 I served true and correct copies of a REPLY TO PETITIONER'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGEMENT by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. Mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named person:

Carolyn S. Hesse
Barnes & Thornburg
1 North Wacker Drive
Suite 4400
Chicago, IL 60606

and an electronic copy of the same foregoing instrument on the same date via electronic filing via the Clerk's Office On-Line (COOL) System, upon the following named persons:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
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1021 North Grand Avenue East
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_____/s/_____

Melanie A. Jarvis
Assistant Counsel
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217/782-5544
217/782-9143 (TDD)