

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE OF FILING

TO:	Melanie A. Jarvis	Carol Webb
	Assistant Counsel	Hearing Officer
	Division of Legal Counsel	Illinois Pollution Control Board
	Illinois Environmental Protection Agency	1021 North Grand Avenue East
	1021 North Grand Avenue East	P.O. Box 19274
	P.O. Box 19276	Springfield, Illinois 62794-9274
	Springfield, Illinois 62794-9276	

PLEASE TAKE NOTICE that on October 22, 2007, there was filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of Petitioner's Motion to File Post-Hearing Reply Brief and Reply in Support of Post-Hearing Brief.

Dated: October 22, 2007

Respectfully submitted,

L. KELLER OIL PROPERTIES / FARINA

By: Carolyn S. Hesse
One of Its Attorneys

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**MOTION OF PETITIONER L. KELLER OIL PROPERTIES/FARINA TO FILE
POST-HEARING REPLY BRIEF**

Pursuant to 35 Illinois Administrative Code 101.500(e), Petitioner, L. Keller Oil Properties/Farina (“Keller/Farina” or “Keller”) by its counsel Barnes & Thornburg LLP hereby moves the Illinois Pollution Control Board (“Board”) for leave to file a Reply in Support of its Post-Hearing Brief. In support of this motion, Keller states as follows:

1. On June 27, 2007, Keller filed a Petition for Review challenging the Agency’s May 17, 2007 letter that rejected a Site Investigation Plan and Budget for work by Keller related to UST leaks.

2. On August 22, 2007, the Board held a hearing in this appeal.

3. On September 18, 2007, Keller timely filed its post-hearing brief.

4. On October 9, 2007, the Illinois Environmental Protection Agency (the “Agency”) filed its Response to Keller’s Post-Hearing Brief. In its Response, the Agency raised a number of issues for the first time, including but not limited to the Agency’s improper application of a definition from the Part 732 Rules to the site owned by Keller, which is regulated under Part 734, not Part 732. The Agency also raised for the first time in its brief issues that the Agency did not raise in its denial letter, such as an allegation

that certain information is not included on certain forms. The Agency raises additional arguments in its brief that Keller had not raised in its post-hearing brief and that the Agency had not raised previously.

5. Accordingly, Petitioner, Keller/Farina seeks leave pursuant to 35 Ill. Admin. Code 101.500(e) to file a Reply in Support of its Post-Hearing Brief, in order to address the above narrow issues and to prevent the material prejudice that will result from the Agency's misleading submissions.

6. Attached to this Motion as Exhibit A is a proposed Reply in Support of the Post-Hearing Brief that Keller seeks to file.

WHEREFORE, Petitioner L. Keller Oil Properties/Farina respectfully requests the Board grant this Motion for Leave to file the attached Reply in Support of Post-Hearing Brief, and grant all other relief the Board deems fair and just.

Respectfully submitted,

L. Keller Oil Properties (Farina)

By: Jonathan P. Froemel
One of Its Attorneys

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EXHIBIT A

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

L. KELLER OIL PROPERTIES / FARINA)	
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**REPLY OF PETITIONER L. KELLER OIL PROPERTIES/FARINA
IN SUPPORT OF POST HEARING BRIEF**

Now comes the Petitioner, L. Keller Oil Properties/Farina (“Keller or “Keller/Farina”), by its counsel Barnes & Thornburg LLP and hereby submits its reply to the Illinois Environmental Protection Agency’s (“IEPA” or the “Agency”) Post Hearing Brief to the Illinois Pollution Control Board (“Board”).

INTRODUCTION

Keller has met its burden of proof that the Stage 1 site investigation and the proposed Stage 2 site investigation plan and budget comply with applicable regulations and that the Agency improperly rejected certain aspects of this work in a final decision letter dated May 17, 2007 (the “Letter”). In sharp contrast, the Agency failed to present any testimony or evidence at hearing and failed to cite to any portions of the Administrative Record in its Response to support its decisions contained in the Letter. For example, the Agency did not provide any witnesses to explain or other evidence to support its erroneous interpretation of what the term “desired ground water interval” means, or where monitoring wells should be screened.

Further, the Agency for the first time in its post-hearing brief erroneously attempted to apply a definition in the Part 732 regulations to this site. However, the site is instead subject to Part 734.

In addition, the Agency at hearing and in its brief raised new issues that were not included in the Letter that is the subject of this appeal, such as the hydraulic conductivity test that was performed at the Keller site. The Agency also ignores information in the record such as documentation that the monitoring wells and soil borings were drilled on the same day so that the data from the soil boring samples were not available to Keller when soil samples from drilling the monitoring wells had to be submitted for analysis. *See* 35 Ill. Admin. Code 734.315(a)(2)(C). Therefore, *as of the date* the soil samples were taken from the monitoring wells, no other soil sampling indicated the extent of soil contamination in the location of the monitoring well.

Keller contests IEPA's decisions on the following issues: installation of the monitoring wells, analysis of soil samples from monitoring wells MW1 through MW4, the drilling of soil borings SB4 and SB5 and the Agency's rejection of the proposed Stage 2 site investigation and budget. Contrary to the Agency's assertions, Keller's monitoring wells were installed in accordance with all applicable regulatory requirements, the soil boring samples were drilled in compliance with Part 734, soil samples that were collected while the monitoring wells were being installed were correctly submitted for analysis, and the proposed additional Stage 2 site investigation plan and budget comply with applicable regulations. In the very limited instances where Keller/Farina recognized that it made an error, Keller corrected the error, and those few issues are not part of this appeal to the Board. Even so, the Agency attempts in its brief to use those errors to argue that Keller is wrong on all the issues before the Board.

Keller met its burden of proof, the Agency presented no credible evidence to the contrary, and the Agency failed to support its Response with appropriate citations to the Record. Thus, the Board must find in favor of Keller and approve Keller's Stage 1 site investigation work and proposed Stage 2 site investigation plan and budget.

BURDEN OF PROOF AND STANDARD OF REVIEW

Keller/Farina agrees with IEPA that UST appeals before the Board are treated in the same manner as permit appeals. Keller/Farina also agrees that it has the initial and ultimate burden of proof for establishing that it should prevail on the issues raised in its Petition for Review. However, when a petitioner presents a *prima facie* case on an issue, the burden then shifts to IEPA to present some evidence to dispute the issue. *John Sexton Contractors Co. v. PCB*, 201 Ill. App. 3d 415, 425, 558 N.E.2d 1222, 1229 (1st Dist. 1990) ("Once Sexton had established a *prima facie* case that the [permit] conditions were unnecessary, it became incumbent upon the Agency to refute the *prima facie* case."); *Marathon Petroleum Co. v. IEPA*, PCB No. 88-179, p. 16 (July 27, 1989) (Petitioner prevailed on monitoring and reporting issue where it presented evidence to support issue, and IEPA "did not refute this *prima facie* case."); *IEPA v. Bliss*, PCB No. 83-17, pp. 6-7 (Aug. 2, 1984). Indeed, if a petitioner submits evidence and proves a *prima facie* case, and IEPA presents no evidence to dispute the issue, there is no issue of fact that petitioner is entitled to prevail on the undisputed issue. *Id.* Keller/Farina proved its case. IEPA presented no credible or other evidence to rebut Keller's case. Accordingly, Keller is entitled to an order in its favor on its Petition for Review.

STATEMENT OF FACTS

In its opening brief, Keller presented a detailed Statement of Facts, including background information about the site and numerous submissions to and from the Agency, (See pp. 2-7 of

Keller's Post Hearing Brief) That Statement of Facts will not be repeated in its entirety here.

Rather, Keller/Farina wishes to emphasize the following relevant facts:

1. Keller presented four qualified witnesses, while the Agency presented none.

At hearing Keller presented four witnesses, two of whom are professional engineers and two of whom are professional geologists. Each of them have had years of experience in investigating remediation sites. (T. 14, 87, 175; Ex. 3, 7, 10, 13)¹ Collectively, they have installed or supervised the installation of thousands of monitoring wells. (*Id.*) Keller's witnesses testified that the work that was done at the site complied with applicable Agency rules and generally accepted professional engineering practices and professional geologist procedures. (T. 58-59, 96-97, 150, 180-182) In sharp contrast, the Agency presented no witnesses or evidence at hearing to show that the work did not comply with applicable rules, or generally accepted engineering or geology practices (T. 185-186)

2. The Record shows the wells were screened at the appropriate interval.

The Administrative Record (the "Record") that was before the Agency shows that the wells were screened to intersect the desired groundwater interval. Moisture was first encountered at approximately 10 feet below ground surface ("bgs"), and between approximately 12 and 13½ feet below ground surface the lithology was wet sand. (T. 90; See bore hole logs for the monitoring wells at R. 90-94)

Specifically, the bore hole log for monitoring well 1 (MW1) is located at R. 90 and documents that the lithology was clayey silt between 2½ and about 12 feet bgs, where fine

¹ The designation "R." refers to the administrative record in this appeal. The designation "T." refers to the transcript of the Board hearing that took place in this appeal on August 22, 2007. The designation "Ex." Refers to exhibits at the August 22, 2007 hearing.

grained sand started, and at a depth of 10½ to 12 feet bgs it was moist and became wet, very fine sand at a depth of 12 to 13½ feet bgs.

The bore hole log for monitoring well 2 (MW2) is located at R. 91 and documents that the lithology was clayey silt from about 2½ to 11½ feet bgs that was moist at 9½ to 10 feet bgs and was wet, very fine sand at a depth of 12 to 13½ feet bgs.

The bore hole log for monitoring well 3 (MW3) is located at R. 92 and documents that the clayey silt was located between 2 and 12 feet bgs that became moist at 10½ feet bgs and changed to wet, very fine sand at 12 feet bgs; the wet sand continued to 13½ feet bgs.

The bore hole log for monitoring well 4 (MW4) is located at R. 93 and documents that the lithology was clayey silt between 3 and about 12 feet bgs, was moist clayey silt that started to include some sand at 10½ to 12 feet bgs, and was wet, very fine sand at 12 to 13½ feet bgs.

The bore hole log for monitoring well 5 (MW5) is located at R. 94 and documents that the lithology was clayey silt between 2½ and 12 feet bgs, was moist at 10½ to 12 feet bgs and became wet, very fine sand at 12 to 13½ feet bgs.

Thus, it is clear from the record that there is a saturated zone at a depth of 12 to 13½ feet bgs where the wet sand is located. (T. 30, 90; R. 90-94) Further, the moist layer that was encountered is likely the capillary fringe, which is an area above an aquifer that becomes moist due to capillary action of water rising into the soil layer. (See Ex. 4)

Keller presented testimony at hearing and presented the well completion reports in the Record documenting that the well screens intersected both the wet, sandy zone and the moist clayey silt zone above that. (T. 34, 48, 88-91, 123-124; R. 90-94, 102-106) Thus, because the wells were screened where the wet sand was located, they were screened in accordance with

IEPA regulations (T. 34) and samples from the desired groundwater interval could be and, in fact, were collected. (T. 34, 47-48, 94, 96-97)

In response to this evidence, the Agency presented no testimony, no citation to the Record, and no other evidence to explain why the Agency asserts that the wells were not screened at the correct intervals, or why the Agency claims that the wells should have been screened at the water levels in the wells, which is the static water level.

3. The Record shows that groundwater is not present in the lithology at the level of the water in the wells.

The static water levels in the monitoring wells 1 through 5 are at the relative elevation range of 96.91 to 98.00 feet, where the 100 foot level is the ground surface at monitoring well 1. (R. 102-106) By calculating the depth to groundwater in each well (subtract the elevation of the static water level from the elevation of the ground surface), the depth to the static water level in each well can be determined as follows: MW1 - static water level is 2.25 feet bgs (R. 102); MW2 - static water level is 3.42 feet bgs (R. 103); MW3 - static water level is 4.36 feet bgs (R. 104); MW4 - static water level is 4.15 feet bgs (R. 105); and MW5 - static water level is 2.7 feet bgs (R. 106).

When the depth to the static water level in each well is compared to information for the respective drilling bore hole logs, information in the Record documents that the clayey silt located at the same elevation as the static water level is not wet and is not even moist. Thus, there is no water in the lithology at the same level as the static water level.

4. The saturated sand seam is a confined aquifer.

Because moisture was first encountered at approximately 10 feet bgs, more than 5 feet below the static water levels (compare information at R. 90-94 with R. 102-106), the saturated sand seam meets the definition of "confined water." (See Ex. 4).

5. The soil samples from the monitoring wells were taken on the same date as the soil boring samples.

The chain of custody report in the Record documents that the Stage 1 soil samples from the monitoring wells were collected on the same day, July 12, 2006, that the other soil boring samples were collected. (R. 125-126) The samples were collected on the same day because the monitoring wells and soil borings were drilled on the same day. (T. 153, 155, 161; R. 125-126)

ARGUMENT

I. IEPA May Not Raise Issues Now That Were Not Raised in the Letter and Must Not Be Allowed to Use Rules That Do Not Apply.

Keller/Farina agrees with IEPA that the May 17, 2007 IEPA decision letter frames the issues on appeal. *Ayers v. IEPA*, PCB No. 03-214, p. 8 (Apr. 1, 2004). Indeed, principles of fundamental fairness dictate that IEPA cannot raise new issues before the Board that were not included in the denial letter:

Principles of fundamental fairness require that an applicant be given notice of the statutory and regulatory bases for denial of an application for reimbursement and that the Agency be bound on review by those cited bases for denial given in its denial statement. Fundamental fairness would be violated if the Agency were free to cite additional statutory and regulatory reasons for denial for the first time at the Board hearing.

Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142, p. 7 (Dec. 20, 1990).

Nevertheless, the Agency raises issues in its Response that were not raised in the Letter, including the hydraulic conductivity tests that were performed at the site, and the application of the definition of "tank field" in Part 732 to a site governed by Part 734. Based on the standard established in *Pulitzer*, the Agency cannot now raise such issues.

A. The Agency cannot use the definition of "tank field" under Section 732 to reject Keller's soil borings.

The Agency, for the first time in its brief, tries to apply the definition of the term “tank field” in Section 732.103 to the work performed by Keller pursuant to Part 734. While 732.103 does define the term “tank field” as “all underground storage tanks at a site that reside within a circle with a 100 foot radius,” there is no similar definition in Part 734. Further, the term “tank field” is not even used in Part 734. When IEPA proposed new regulations at Part 734 and amended Part 732, if IEPA had wanted to include a definition of “tank field” in the new Part 734 rules, it could easily have included it, but the Agency did not do so. Because the term “tank field” does not appear in the Part 734 rules, and this site is not subject to Part 732, IEPA should not be allowed to use the definition.

The relevant rules in Part 734 to which the Agency attempts to apply the definition of “tank field” are found at Section 734.315(a)(1). Part 734 instead uses the term “each independent UST² field” in the context of describing work to be done during Stage 1 site investigations. Section 734.315(a)(1)(A) requires that up to four borings be “drilled around each independent UST field where one or more UST excavation samples,” excluding backfill samples, exceed the most stringent TACO Tier 1 Remediation Objectives. Because “tank field” and “each independent UST field” are different terms, they should be given different meanings.

As the term “each independent UST field” is not defined in Part 734, the term should be given its plain, ordinary meaning. *Alhambra-Grantfork Tel. Co. v. Ill. Commerce Comm.*, 358 Ill. App. 3d 818, 822, 832 N.E.2d 869, 873 (5th Dist. 2005) (“The word ‘customer’ is not defined in the statute, and so we apply the rules of statutory construction and afford the statutory language its plain and ordinary meaning.”); *O’Loughlin v. Village of River Forest*, 338 Ill. App. 3d 189, 195, 788 N.E.2d 157, 162 (5th Dist. 2003) (“The Act does not define the term. As such,

² The term “underground storage tank” or “UST” includes one or a combination of tanks “including underground pipes connected thereto” 35 Ill. Admin. Code 734.115.

the rules of statutory construction require us to first look to the plain language of the statute and interpret the language according to its plain and ordinary meaning.”) The plain meaning of this term is that each separate tank basin that contains one or more USTs and associated piping is considered an independent UST field. Thus, the gasoline, heating oil, and diesel tank basins are independent of each other, and therefore constitute three independent UST fields.

Since there were three independent UST fields at this property (gasoline tanks, diesel tank and heating oil tank³) and excavation samples from two of them contained indicator contaminants at concentrations greater than TACO Tier 1 Remediation Objectives, pursuant to Section 734.315(a)(1)(A) an owner/operator could drill up to eight soil borings, four around the gasoline UST excavation and four around the diesel UST excavation. In addition, Section 734.314(a)(1)(B) requires that up to two borings be drilled around each UST piping run if at least one piping run sample exceeds the most stringent Tier 1 Remediation Objectives. Because releases were associated with both the diesel and gasoline piping runs (Ex. 11), Keller would be permitted pursuant to Section 734.315(a)(1)(B) to collect up to four soil borings during its Stage 1 investigation of piping run contamination. Thus, under Section 734.314 (a)(1)(A) and (B), Keller would be allowed to drill up to 12 soil borings during the Stage 1 site investigation.

In fact, Keller drilled a total of 8 soil borings, less than the maximum number permitted.⁴ In short, the Agency's last minute attempt to apply a definition in the Part 732 rules to a Part 734 site must be stricken for three reasons: (1) Part 732 rules and definitions do not apply here, (2) the use of the definition of “tank field” was not raised in the Letter as a basis for denying and

³ While there were releases from the heating oil tank, early action activities removed the contamination. (R. 8, Ex. 11) Hence, the heating oil tank did not require further investigation, and was not investigated as part of Stage 1.

⁴ Further, Keller is not contesting that SB6 was drilled in error, and the only soil borings at issue in this appeal are SB4 and SB5. The Agency has not disputed the appropriateness of SB1, SB2, SB3, SB7 or SB8.

rejecting Keller's work at the site, and (3) Keller collected fewer than the maximum number of samples allowed under Part 734.315(a)(1).

B. The Agency's arguments about the monitoring wells are internally inconsistent and inaccurate.

Throughout its brief, the Agency continuously and erroneously argues that the desired ground water interval for sampling is the water level in the well, which is the same as the static water level. The Agency claims on page 29 of its brief, without citing to specific sections of the Record to support its unfounded claim, that "All documentation submitted by the Petitioner regarding groundwater, indicates that the groundwater producing layer is the silty clay layer depicted in the Administrative Record" As Keller has pointed out at hearing and in its brief, that is not what the Record demonstrates. The Record clearly demonstrates, and Ms. Rowe and Mr. St. John testified, that the moist layer begins at a depth of about 10 feet bgs and becomes saturated at 12 to 13½ feet bgs. (T. 81, 97; R. 90-94) There is nothing in the Record that indicates that groundwater exists in the lithology above the 9½ foot level. In fact, Keller presented testimony that very little, if any, water would flow into the well above the saturated zone, where the clayey silt is located. (T. 81)

On page 21 of the Agency's brief, the Agency correctly states "the Geologist (sic) must determine in the field the specific ground water bearing unit which would most likely be impacted by the release, hence the requirement for representative ground water sample." Keller did exactly that. Contrary to the Agency's arguments about where groundwater is located, the desired ground water interval for sampling at this site is the wet sand seam (T. 97), which is located at 12 to 13½ feet bgs. (R. 90-94) In addition, the moist foot and one half above that may have produced some water as well. (T.97) This wet sand seam is the water bearing unit of interest because it is the one located closest to the surface and the one most likely to become

contaminated by releases from USTs. (R. 90-94) The wet sand seam and moist zone above it were screened so they could be sampled. (T. 81, 88-91, 121; R. 102-106) The Agency never presented any evidence that the desired groundwater interval is located anywhere else.

Although the Agency produced no witnesses to explain what the Agency believes regarding the location of the water producing zone in the lithology, it appears from the arguments in its brief and the Agency's statement in the Letter (the wells must be screened at the level of the water in the well) (R. 258), that the Agency believes that at a confined aquifer site, which is what exists here (T. 29-30), water can enter through a well screen located at the same elevation as the static water level in the well. The Agency ignores the fact that the Record shows that the clayey silt is not wet or even moist at the same elevation as the static water level, which is the level of the water in the wells. (R. 90-94, 102-106) As shown above, the static water level is between 2.25 and 4.36 feet bgs and at least 5 feet above the saturated zone. The bore hole logs do not indicate wet or even moist conditions at that level. (*Id.*) The Agency has provided no evidence to show that water is present in the lithology at the level to which water rose in the wells. If water is not in the lithology at that level, it cannot enter the well at that level through the well screen.

As discussed in more detail in Keller's opening brief, the static water level is the level to which ground water will rise in a well. (*See* Ex. 4). Confined groundwater is under pressure and hydrostatic pressure on the water will cause the static water level to rise above where the water enters the well. (T. 29-30, Ex. 4) The static water level is used to determine the hydraulic gradient and which way the ground water will flow (T. 95), but the static water level for a confined aquifer, such as the one at this site, is no more representative of the location of the desired groundwater interval in the lithology for sampling purposes, than is groundwater that is

pumped from the well, contained in a sample jar, and placed on a table. In both cases the position of the water is different than where it was originally located in the lithology.

In its Response (pp. 18, 23), the Agency twists Ms. Rowe's testimony and argues that the wells were not screened as she intended because they were submerged because the top of the well screen was below the static water level. Yet the fact that the well screens were submerged is of no import and the Agency has presented no evidence to the contrary, nor cited any relevant regulations.⁵

In summary, screening the wells at the level of the water in the wells will not result in water entering the well at that level because water is not present at that level in the lithology. The Agency's arguments that the monitoring wells should have been screened at the level of the water in the wells are erroneous and are contrary to generally accepted professional engineering practices and principles of professional geology.⁶

II. Work at the Site Met Generally Accepted Engineering Practices and Principles of Professional Geology.

The Agency's brief is internally inconsistent in that, on page 7, the brief states:

The IEPA 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, page 256).

Yet on page 8, the brief says:

During Section 734.510 (a) review, the IEPA determined that the Stage 1 Site investigation was not conducted in accordance with the approved plan and Stage 1 monitoring wells were not installed in the manner consistent with the regulations and generally accepted engineering practices. (AR page 256)

⁵ The Agency also states without any support that "contaminants associated with petroleum releases are lighter than groundwater." (Response p. 15) This statement ignores that testimony of Mr. St. John that petroleum contaminants are soluble in water and will move through an aquifer with water. (T. 54-57)

⁶ Contrary to the Agency's position, the regulations do not prohibit submerging the well screens. (Response, 33). Further, Ms. Rowe and Mr. St. John testified that the well screens were properly placed. (T47-48, 94, 96-97)

Not only are these two quotes inconsistent, but as discussed above and as the Agency acknowledges in its brief, the Agency's Letter frames the issues on appeal. If during the Section 734.510(a) review, the Agency thought the work was not done in a manner consistent with generally accepted engineering practices, why was this issue not raised in the Letter? The bottom line is that Keller performed the contested work at the site in compliance with applicable rules, including in accordance with generally accepted engineering practices and professional geology principles. (T. 58-59, 96-97, 150, 180-182) The Agency presented no evidence at hearing or in its Response to the contrary.

III. The Agency Attempts to Cloud the Issues by Raising Points That Were Not in the Agency's Final Decision Letter and are Not on Appeal.

A. The hydraulic conductivity tests were not raised as an issue in the Letter and do not indicate depth to groundwater.

The Agency accuses Keller of "cherry picking". (Response, p. 28) However, the Agency is confusing "cherry picking" with Keller's desire to stick to the relevant issues, namely the issues listed in the Letter, that are the subject of this appeal, and the relevant portions of the Record. Contrary to the Agency's assertions, Petitioner's expert witness, Ron St. John, did review the relevant documents, which included all documents in the Record. (T. 97) His testimony about this site is based on the Record; throughout his testimony he used information from and referenced the bore hole logs and well construction reports found at R. 90-94 and 102-104. Prior to the hearing, however, he had not examined in detail the records related to the hydraulic conductivity test because the Letter did not raise any issues related to this test. Accordingly, the Agency accepted the hydraulic conductivity test and, thus, it is not one of the issues on appeal to the Board.

Nevertheless, the Agency now attempts to discredit Mr. St. John's testimony because he did not examine in detail, prior to hearing, information about a test that is irrelevant to this

[This filing submitted on recycled paper as defined in 35 Ill. Adm. Code 101.202]

Appeal. Even so, in response to the Agency's cross examination, Mr. St. John explained that the water that flowed into the well came from the sandy saturated zone at 12 to 13½ feet bgs. (T. 58) Even though the well screen extended into the dry, less permeable clayey silt above that zone, water was not located at that elevation to enter the well. (R. 90-94, 102-104)

The record shows that hydraulic conductivity calculations are based on the total well depth, screen length and radius, initial water depth and the water depth change over time. (R. 13) Here, the 10 foot well screens spanned not only the moist and wet zones which extended from about 10 to 13½ bgs, they also extended into the dry layer above that. Thus, the hydraulic conductivity test results were in a sense a mixture of the various layers of sand and clayey silt that were screened. (T. 79-80) Rather than discredit Mr. St. John, the Agency's cross examination of him supports Keller's position.⁷

B. Groundwater depth after drilling is the same as the static water level if equilibrium with atmospheric pressure has been reached.

The Agency also grasps at straws by trying to make an issue out of Keller/Farina's failure to include on the bore hole logs the groundwater depth after drilling. (Response, p. 18) This was not one of the bases for rejection that the Agency listed in the Letter and the Agency should not be allowed to raise this issue now.

Further, asking for the groundwater depth after drilling demonstrates the Agency's lack of experience and understanding of hydrogeology. The question about the depth of water after drilling a well, especially in a confined aquifer is not relevant. "Generally, static groundwater

⁷ The Agency also attempts to discredit Mr. St. John's testimony because he never visited the Keller site. Yet, Carol Hawbaker, the Agency's project manager for this site also never visited it before drafting the Letter. The Agency also takes out of context a portion of a court opinion in another case in an attempt to discredit Mr. St. John because he was not found to be an expert in wastewater treatment. (Response, pp. 27-28) However, that court did find him to be an expert in hydrogeology and Keller presented him as an expert in hydrogeology. *LeClercq v. The Lockformer Co.*, No. 00 C 7164, 2005 WL 1162979 at *3 (N.D. Ill. April 28, 2005) ("The Court concludes that St. John is qualified to provide expert testimony on hydrogeologic issues relating to the sewer line contamination theory.") Keller did not present him as an expert in wastewater treatment.

elevations do not stabilize on the date of well installation and well development procedures interfere with determination of static elevation.” (T. 32-33; R. 11) In a confined aquifer, such as the one at the Keller site, after a well is installed and developed, water will continue to slowly rise in the well until eventually the static water level is reached. Typically, well development involves causing water levels to fluctuate by surging and removing water from the well to remove fine grained material that gets smeared down to the level of the saturated zone. (T. 35, 92) In other words, in a confined aquifer and depending on site-specific lithology and soil permeability, there will likely be differences in the water level in the well immediately after the well is drilled and developed, one hour later, two hours later, and five hours later as the water continues to rise until the hydrostatic pressure on the water equilibrates with atmospheric pressure, in other words, when the static water level is reached. There is nothing in the Record and the Agency presents no evidence to support why a separate entry for depth to groundwater after drilling is significant or why that value differs from the static water level after equilibrium is reached. Further, the Agency did not raise this issue in the Letter and should be precluded from raising it now.

IV. Soil Borings SB4 and SB5 Complied With Part 734.

In its opening brief, Keller provided detailed arguments and cites to the Record and applicable regulations that the soil borings that the Agency objected to, SB4 and SB5, were drilled in compliance with applicable regulations. Keller will not repeat those detailed arguments here. As discussed above, rather than point to evidence in the Record or present witnesses at hearing to explain its position, the Agency in its brief argues for the first time that the definition for “tank field” in Part 732 applies to a Part 734 site. The Agency did not raise this

issue in the Letter and should not be allowed to apply inapplicable rules or be allowed to raise issues that were not contained in the Letter or in the Record.

Further, on page 22 of the Agency's brief, the Agency argues that:

Since only one tank basin excavation sample exceeded the most stringent remediation objectives, soil sample E1, only one soil boring (SB3) is needed per the minimum requirements of Section 734.315(a)(1)(A). Any other soil borings such as SB4 exceeds the minimum requirements of the Act and its regulations.

Section 734.315(a)(1)(A) does not say that only one additional soil boring should be drilled if there is only one contaminated excavation sample. Rather, that section of the regulations clearly states that "up to four borings must be drilled around each independent UST field where one or more . . . excavation samples . . . exceeds the most stringent Tier 1 Remediation Objectives of [TACO]." Keller/Farina correctly drilled two borings in directions away from the contaminated excavation sample to define the extent of contamination. (T. 134; Ex. 11) SB4 was located to the north of the contaminated sample and SB3 was located to the east of the contaminated sample. (T. 134; Ex. 11) No other data was available when those samples were collected as they were drilled on the same day. (R. 125-126) The Agency provides no evidence to support its position.

Collecting samples from soil borings around contaminated tank fields is important to determine the extent of contamination. As explained to the Agency previously (R. 9), Keller/Farina was not able to collect floor samples from the bottom of the tank excavations because groundwater infiltrated into the bottom of the excavation. Section 734.210(h)(1) provides: "The Agency must allow an alternate location for, or excuse the collection of, one or more samples if sample collection in the following location is made impracticable by site-specific circumstances."

The listed locations include the excavation floor. *See* 35 Ill. Admin. Code 734.210(h)(1)(B). Thus, SB4 and SB5 did not exceed minimum requirements as the Agency argues. The lack of samples collected from the bottom of the excavation cannot be used to demonstrate that there were no leaks from the diesel tanks nor can the lack of samples be used to determine that unsaturated soil had been adequately defined in that area. Additional samples were needed near the excavations to document whether a release occurred or not. In other words, SB5 which is located near the diesel tank excavation is needed because there was a release associated with the diesel UST piping (T. 134; Ex. 11) and samples could not be collected from the bottom of the diesel tank excavation to show that it was clean. (T. 176; R. 9) Likewise, SB4 was needed because no other data was available to document whether contamination migrated north from the sidewall sample E1 in the gasoline tank excavation. Accordingly, borings SB4 and SB5 were correctly drilled and samples from them analyzed for contamination.

V. Analysis of Soil Samples From Monitoring Wells MW1-MW4 Complied With Part 734.

The Agency continues to argue that soil samples collected when the monitoring wells were installed did not need to be analyzed. (Response, p. 23). Yet the Agency fails to point to anything in the Record to support the Agency position that there was data available on the date the samples were collected to document that contamination did not extend to the locations of the monitoring wells. As discussed above, it is clear from the chain of custody forms in the Record that the monitoring wells and soil borings were drilled on the same day. (R. 125-126) Thus, Keller did not have available the results of the soil boring analyses before it was necessary to submit the soil samples from the monitoring wells to the lab for analysis. (T. 136-142) In order to be certain that a sample is contaminated or not, one must submit the sample to a laboratory for analysis. Indeed, numerous regulations, including the TACO regulations at Part 742 require

laboratory analysis of samples. Further, Keller is not aware of any rules that allow an owner/operator to certify that his or her site is clean based solely on visual or olfactory observations and the Agency has cited no such provisions. Thus, soil samples from the monitoring wells were properly submitted for analysis because there were no sample data available on the date the samples were collected that indicated that soil contamination did not extend to the location where the monitoring wells were installed. Keller/Farina met the requirements of 734.315(a)(2)(C).⁸

VI. The Proposed Stage 2 Site Investigation Plan Should Be Approved.

On page 10 of its Response, the Agency states that:

Illinois EPA did not reject the plan based on the additional proposed borings which exceed the minimum requirements. The plan was denied because the monitoring wells did not satisfy the requirements of 35 Ill. Admin. Code 734.430.

As demonstrated elsewhere in this and Keller's opening brief, the monitoring wells do comply with Section 734.430. Thus, the proposed Stage 2 plan must be approved.

A. The proposed soil borings to delineate contamination from piping runs did not exceed the minimum requirements of Part 734.

Mr. Wienhoff explained at hearing (T. 142-145, Ex. 12) that a release from a piping run could sink into the ground and then spread and that would not be detected with an adjacent piping run sample that is only 2 to 3 feet bgs. Instead, it is necessary to install a soil boring in the area where the deeper contamination plume might be located in order to determine if it is present or not. This is one of the purposes for conducting additional investigations during Stage 1 and Stage 2.

⁸ The Agency asserts without citation to the Transcript that Mr. Wienhoff "admitted" that the soil sampling from the monitoring wells violated the regulations. (Response, p. 13) To the contrary, Mr. Wienhoff testified that the soil sampling complied with the regulations. (T. 136-142)

The Agency's arguments related to this point are in error as the Agency asserts that clean piping run samples can be used to obtain an NFR Letter. The Agency conveniently ignores the fact that the rule at Section 734.210(h)(3) that allows such use of piping run samples to obtain a no further remediation letter only applies when all of the Early Action samples meet the most stringent TACO tier I cleanup objectives. In contrast, if any of the Early Action samples exceed the most stringent TACO Tier 1 remediation objectives, Section 734.210(h)(4) requires that the owner or operator must continue in accordance with Subpart C. Among other requirements, pursuant to Section 315, a Stage 1 site investigation must be performed and additional samples must be collected. The Agency also ignores the plain language of Section 734.315(a)(1)(B) which requires that soil borings be drilled through the entire vertical extent of contamination, based on field observations, if a sample from the piping excavation is contaminated. This rule does not say that additional samples do not need to be collected any deeper than the depth of the excavation to remove the piping, which is generally 2 to 3 feet bgs. (R. 171)

In its brief, the Agency also takes issue with testimony about diving plumes and states there was no evidence that a diving plume is located on this site. (Response, p. 29) The Agency is correct that there is no such evidence. However, the Agency's logic fails because the purpose of the site investigation is to find out if such a plume exists. Without performing a subsurface investigation it is impossible to determine whether contamination from a tank or piping run release sank into the ground and then spread out into a plume. (T. 143-145; Ex. 12) The purpose of the testimony about diving plumes was to explain that contamination tends to migrate downward as it also moves laterally with groundwater.

Because contamination from piping runs was found during Early Action, pursuant to Section 734.315(a)(1)(B) soil borings must be drilled; shallow piping run samples cannot be used

to determine if contamination exists throughout the entire vadose zone. Without installing soil borings at greater depths than piping run samples, a site owner/operator will have no way of knowing whether a diving plume exists or not. The only way to know if one exists is to conduct the Stage 1 and Stage 2 investigations and to sample in areas where a diving plume would most likely be located.

B. Proposed soil samples between the gasoline pump island and MW2 do not exceed the minimum requirements of Part 734.

On page 25 of its brief, the Agency takes issue with the proposed soil samples to be located between the pump island and MW2. As Keller/Farina argued before, it appears to Keller/Farina's consultant that the contamination at monitoring well 2 might meet Tier 2 Remediation Objectives after additional data is collected and the appropriate calculations are made to determine Tier 2 Remediation Objectives. (T. 147-150) Accordingly, the purpose of collecting samples between the pump island and monitoring well 2 is to begin to delineate the area that will likely exceed Tier 2 Remediation Objectives because those are the remediation objectives that are generally needed to meet the minimum requirements of the Act. (*Id.*) Such samples can either be collected as part of the Stage 2 Site Investigation when the consultant will be at the site to collect the Stage 2 samples, or the consultant can make a separate trip to the site at some point in the future when the Agency asks the consultant to perform further delineation of the contamination in order to reduce the size of the area that must be remediated. Since in all likelihood the samples will need to be collected at some point in the future, it makes more sense and it is more cost effective to collect the samples as part of the Stage 2 Site Investigation. (*Id.*) Accordingly, the proposed samples should be approved.

VII. The Proposed Budget Must Be Approved.

Because the Agency's denial of the proposed budget is based on the Agency's erroneous denial of the proposed Stage 2 site investigation, the Board should approve the proposed budget.

VIII. Mr. St. John's Testimony Should Not Be Stricken.

The Agency appears to be confused by Mr. St. John's testimony. The purpose of his testimony was to explain generally accepted principles of hydrogeology that are relevant to the Keller/Farina site. The reason for this is simple. The Agency does not understand basic hydrogeology. In order to make correct decisions about how monitoring wells are constructed, the Agency should understand these principles. There is no information in the record as to whether anyone from the Agency that reviewed the documents sent in by Keller/Farina understood any of these principles. In fact, the Agency's Response refers to the bore hole logs (Response p. 26) that clearly say "moist" around the 10 foot bgs level (R. 90-94) and argues that the water in the wells came from the silty clay layer above the "moist" level." (Response, p. 29) There is no information in the record and no testimony was presented at hearing regarding the qualifications of the Agency's project manager for this site. In fact, had the Agency presented the project manager as a witness, Keller's attorney would have questioned her about her qualifications. Further, the Agency presented no witnesses or other evidence to contradict Mr. St. John's testimony, the hearing officer admitted his testimony, and Mr. St. John is a qualified expert in hydrogeology with years of experience who has installed thousands of monitoring wells. (Ex. 3, T. 11-14) His testimony should not be stricken.

CONCLUSION

Keller met its burden of proof that the work performed at the site that is the subject of this appeal complied with applicable laws and regulations. The Agency presented no credible evidence to the contrary. Accordingly, the Board must find in favor of Keller/Farina and against the Agency and award Keller its attorney's fees and costs.

Respectfully submitted,

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Further, the Agency for the first time in its post-hearing brief erroneously attempted to apply a definition in the Part 732 regulations to this site. However, the site is instead subject to Part 734.

In addition, the Agency at hearing and in its brief raised new issues that were not included in the Letter that is the subject of this appeal, such as the hydraulic conductivity test that was performed at the Keller site. The Agency also ignores information in the record such as documentation that the monitoring wells and soil borings were drilled on the same day so that the data from the soil boring samples were not available to Keller when soil samples from drilling the monitoring wells had to be submitted for analysis. *See* 35 Ill. Admin. Code 734.315(a)(2)(C). Therefore, *as of the date* the soil samples were taken from the monitoring wells, no other soil sampling indicated the extent of soil contamination in the location of the monitoring well.

Keller contests IEPA's decisions on the following issues: installation of the monitoring wells, analysis of soil samples from monitoring wells MW1 through MW4, the drilling of soil borings SB4 and SB5 and the Agency's rejection of the proposed Stage 2 site investigation and budget. Contrary to the Agency's assertions, Keller's monitoring wells were installed in accordance with all applicable regulatory requirements, the soil boring samples were drilled in compliance with Part 734, soil samples that were collected while the monitoring wells were being installed were correctly submitted for analysis, and the proposed additional Stage 2 site investigation plan and budget comply with applicable regulations. In the very limited instances where Keller/Farina recognized that it made an error, Keller corrected the error, and those few issues are not part of this appeal to the Board. Even so, the Agency attempts in its brief to use those errors to argue that Keller is wrong on all the issues before the Board.

Keller met its burden of proof, the Agency presented no credible evidence to the contrary, and the Agency failed to support its Response with appropriate citations to the Record. Thus, the Board must find in favor of Keller and approve Keller's Stage 1 site investigation work and proposed Stage 2 site investigation plan and budget.

BURDEN OF PROOF AND STANDARD OF REVIEW

Keller/Farina agrees with IEPA that UST appeals before the Board are treated in the same manner as permit appeals. Keller/Farina also agrees that it has the initial and ultimate burden of proof for establishing that it should prevail on the issues raised in its Petition for Review. However, when a petitioner presents a *prima facie* case on an issue, the burden then shifts to IEPA to present some evidence to dispute the issue. *John Sexton Contractors Co. v. PCB*, 201 Ill. App. 3d 415, 425, 558 N.E.2d 1222, 1229 (1st Dist. 1990) ("Once Sexton had established a *prima facie* case that the [permit] conditions were unnecessary, it became incumbent upon the Agency to refute the *prima facie* case."); *Marathon Petroleum Co. v. IEPA*, PCB No. 88-179, p. 16 (July 27, 1989) (Petitioner prevailed on monitoring and reporting issue where it presented evidence to support issue, and IEPA "did not refute this *prima facie* case."); *IEPA v. Bliss*, PCB No. 83-17, pp. 6-7 (Aug. 2, 1984). Indeed, if a petitioner submits evidence and proves a *prima facie* case, and IEPA presents no evidence to dispute the issue, there is no issue of fact that petitioner is entitled to prevail on the undisputed issue. *Id.* Keller/Farina proved its case. IEPA presented no credible or other evidence to rebut Keller's case. Accordingly, Keller is entitled to an order in its favor on its Petition for Review.

STATEMENT OF FACTS

In its opening brief, Keller presented a detailed Statement of Facts, including background information about the site and numerous submissions to and from the Agency, (See pp. 2-7 of

Keller's Post Hearing Brief) That Statement of Facts will not be repeated in its entirety here.

Rather, Keller/Farina wishes to emphasize the following relevant facts:

1. Keller presented four qualified witnesses, while the Agency presented none.

At hearing Keller presented four witnesses, two of whom are professional engineers and two of whom are professional geologists. Each of them have had years of experience in investigating remediation sites. (T. 14, 87, 175; Ex. 3, 7, 10, 13)¹ Collectively, they have installed or supervised the installation of thousands of monitoring wells. (*Id.*) Keller's witnesses testified that the work that was done at the site complied with applicable Agency rules and generally accepted professional engineering practices and professional geologist procedures. (T. 58-59, 96-97, 150, 180-182) In sharp contrast, the Agency presented no witnesses or evidence at hearing to show that the work did not comply with applicable rules, or generally accepted engineering or geology practices (T. 185-186)

2. The Record shows the wells were screened at the appropriate interval.

The Administrative Record (the "Record") that was before the Agency shows that the wells were screened to intersect the desired groundwater interval. Moisture was first encountered at approximately 10 feet below ground surface ("bgs"), and between approximately 12 and 13½ feet below ground surface the lithology was wet sand. (T. 90; See bore hole logs for the monitoring wells at R. 90-94)

Specifically, the bore hole log for monitoring well 1 (MW1) is located at R. 90 and documents that the lithology was clayey silt between 2½ and about 12 feet bgs, where fine

¹ The designation "R." refers to the administrative record in this appeal. The designation "T." refers to the transcript of the Board hearing that took place in this appeal on August 22, 2007. The designation "Ex." Refers to exhibits at the August 22, 2007 hearing.

grained sand started, and at a depth of 10½ to 12 feet bgs it was moist and became wet, very fine sand at a depth of 12 to 13½ feet bgs.

The bore hole log for monitoring well 2 (MW2) is located at R. 91 and documents that the lithology was clayey silt from about 2½ to 11½ feet bgs that was moist at 9½ to 10 feet bgs and was wet, very fine sand at a depth of 12 to 13½ feet bgs.

The bore hole log for monitoring well 3 (MW3) is located at R. 92 and documents that the clayey silt was located between 2 and 12 feet bgs that became moist at 10½ feet bgs and changed to wet, very fine sand at 12 feet bgs; the wet sand continued to 13½ feet bgs.

The bore hole log for monitoring well 4 (MW4) is located at R. 93 and documents that the lithology was clayey silt between 3 and about 12 feet bgs, was moist clayey silt that started to include some sand at 10½ to 12 feet bgs, and was wet, very fine sand at 12 to 13½ feet bgs.

The bore hole log for monitoring well 5 (MW5) is located at R. 94 and documents that the lithology was clayey silt between 2½ and 12 feet bgs, was moist at 10½ to 12 feet bgs and became wet, very fine sand at 12 to 13½ feet bgs.

Thus, it is clear from the record that there is a saturated zone at a depth of 12 to 13½ feet bgs where the wet sand is located. (T. 30, 90; R. 90-94) Further, the moist layer that was encountered is likely the capillary fringe, which is an area above an aquifer that becomes moist due to capillary action of water rising into the soil layer. (See Ex. 4)

Keller presented testimony at hearing and presented the well completion reports in the Record documenting that the well screens intersected both the wet, sandy zone and the moist clayey silt zone above that. (T. 34, 48, 88-91, 123-124; R. 90-94, 102-106) Thus, because the wells were screened where the wet sand was located, they were screened in accordance with

IEPA regulations (T. 34) and samples from the desired groundwater interval could be and, in fact, were collected. (T. 34, 47-48, 94, 96-97)

In response to this evidence, the Agency presented no testimony, no citation to the Record, and no other evidence to explain why the Agency asserts that the wells were not screened at the correct intervals, or why the Agency claims that the wells should have been screened at the water levels in the wells, which is the static water level.

3. The Record shows that groundwater is not present in the lithology at the level of the water in the wells.

The static water levels in the monitoring wells 1 through 5 are at the relative elevation range of 96.91 to 98.00 feet, where the 100 foot level is the ground surface at monitoring well 1. (R. 102-106) By calculating the depth to groundwater in each well (subtract the elevation of the static water level from the elevation of the ground surface), the depth to the static water level in each well can be determined as follows: MW1 - static water level is 2.25 feet bgs (R. 102); MW2 - static water level is 3.42 feet bgs (R. 103); MW3 - static water level is 4.36 feet bgs (R. 104); MW4 - static water level is 4.15 feet bgs (R. 105); and MW5 - static water level is 2.7 feet bgs (R. 106).

When the depth to the static water level in each well is compared to information for the respective drilling bore hole logs, information in the Record documents that the clayey silt located at the same elevation as the static water level is not wet and is not even moist. Thus, there is no water in the lithology at the same level as the static water level.

4. The saturated sand seam is a confined aquifer.

Because moisture was first encountered at approximately 10 feet bgs, more than 5 feet below the static water levels (compare information at R. 90-94 with R. 102-106), the saturated sand seam meets the definition of "confined water." (See Ex. 4).

5. The soil samples from the monitoring wells were taken on the same date as the soil boring samples.

The chain of custody report in the Record documents that the Stage 1 soil samples from the monitoring wells were collected on the same day, July 12, 2006, that the other soil boring samples were collected. (R. 125-126) The samples were collected on the same day because the monitoring wells and soil borings were drilled on the same day. (T. 153, 155, 161; R. 125-126)

ARGUMENT

I. IEPA May Not Raise Issues Now That Were Not Raised in the Letter and Must Not Be Allowed to Use Rules That Do Not Apply.

Keller/Farina agrees with IEPA that the May 17, 2007 IEPA decision letter frames the issues on appeal. *Ayers v. IEPA*, PCB No. 03-214, p. 8 (Apr. 1, 2004). Indeed, principles of fundamental fairness dictate that IEPA cannot raise new issues before the Board that were not included in the denial letter:

Principles of fundamental fairness require that an applicant be given notice of the statutory and regulatory bases for denial of an application for reimbursement and that the Agency be bound on review by those cited bases for denial given in its denial statement. Fundamental fairness would be violated if the Agency were free to cite additional statutory and regulatory reasons for denial for the first time at the Board hearing.

Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142, p. 7 (Dec. 20, 1990).

Nevertheless, the Agency raises issues in its Response that were not raised in the Letter, including the hydraulic conductivity tests that were performed at the site, and the application of the definition of "tank field" in Part 732 to a site governed by Part 734. Based on the standard established in *Pulitzer*, the Agency cannot now raise such issues.

A. The Agency cannot use the definition of "tank field" under Section 732 to reject Keller's soil borings.

The Agency, for the first time in its brief, tries to apply the definition of the term “tank field” in Section 732.103 to the work performed by Keller pursuant to Part 734. While 732.103 does define the term “tank field” as “all underground storage tanks at a site that reside within a circle with a 100 foot radius,” there is no similar definition in Part 734. Further, the term “tank field” is not even used in Part 734. When IEPA proposed new regulations at Part 734 and amended Part 732, if IEPA had wanted to include a definition of “tank field” in the new Part 734 rules, it could easily have included it, but the Agency did not do so. Because the term “tank field” does not appear in the Part 734 rules, and this site is not subject to Part 732, IEPA should not be allowed to use the definition.

The relevant rules in Part 734 to which the Agency attempts to apply the definition of “tank field” are found at Section 734.315(a)(1). Part 734 instead uses the term “each independent UST² field” in the context of describing work to be done during Stage 1 site investigations. Section 734.315(a)(1)(A) requires that up to four borings be “drilled around each independent UST field where one or more UST excavation samples,” excluding backfill samples, exceed the most stringent TACO Tier 1 Remediation Objectives. Because “tank field” and “each independent UST field” are different terms, they should be given different meanings.

As the term “each independent UST field” is not defined in Part 734, the term should be given its plain, ordinary meaning. *Alhambra-Grantfork Tel. Co. v. Ill. Commerce Comm.*, 358 Ill. App. 3d 818, 822, 832 N.E.2d 869, 873 (5th Dist. 2005) (“The word ‘customer’ is not defined in the statute, and so we apply the rules of statutory construction and afford the statutory language its plain and ordinary meaning.”); *O’Loughlin v. Village of River Forest*, 338 Ill. App. 3d 189, 195, 788 N.E.2d 157, 162 (5th Dist. 2003) (“The Act does not define the term. As such,

² The term “underground storage tank” or “UST” includes one or a combination of tanks “including underground pipes connected thereto” 35 Ill. Admin. Code 734.115.

the rules of statutory construction require us to first look to the plain language of the statute and interpret the language according to its plain and ordinary meaning.”) The plain meaning of this term is that each separate tank basin that contains one or more USTs and associated piping is considered an independent UST field. Thus, the gasoline, heating oil, and diesel tank basins are independent of each other, and therefore constitute three independent UST fields.

Since there were three independent UST fields at this property (gasoline tanks, diesel tank and heating oil tank³) and excavation samples from two of them contained indicator contaminants at concentrations greater than TACO Tier 1 Remediation Objectives, pursuant to Section 734.315(a)(1)(A) an owner/operator could drill up to eight soil borings, four around the gasoline UST excavation and four around the diesel UST excavation. In addition, Section 734.314(a)(1)(B) requires that up to two borings be drilled around each UST piping run if at least one piping run sample exceeds the most stringent Tier 1 Remediation Objectives. Because releases were associated with both the diesel and gasoline piping runs (Ex. 11), Keller would be permitted pursuant to Section 734.315(a)(1)(B) to collect up to four soil borings during its Stage 1 investigation of piping run contamination. Thus, under Section 734.314 (a)(1)(A) and (B), Keller would be allowed to drill up to 12 soil borings during the Stage 1 site investigation.

In fact, Keller drilled a total of 8 soil borings, less than the maximum number permitted.⁴ In short, the Agency's last minute attempt to apply a definition in the Part 732 rules to a Part 734 site must be stricken for three reasons: (1) Part 732 rules and definitions do not apply here, (2) the use of the definition of “tank field” was not raised in the Letter as a basis for denying and

³ While there were releases from the heating oil tank, early action activities removed the contamination. (R. 8, Ex. 11) Hence, the heating oil tank did not require further investigation, and was not investigated as part of Stage 1.

⁴ Further, Keller is not contesting that SB6 was drilled in error, and the only soil borings at issue in this appeal are SB4 and SB5. The Agency has not disputed the appropriateness of SB1, SB2, SB3, SB7 or SB8.

rejecting Keller's work at the site, and (3) Keller collected fewer than the maximum number of samples allowed under Part 734.315(a)(1).

B. The Agency's arguments about the monitoring wells are internally inconsistent and inaccurate.

Throughout its brief, the Agency continuously and erroneously argues that the desired ground water interval for sampling is the water level in the well, which is the same as the static water level. The Agency claims on page 29 of its brief, without citing to specific sections of the Record to support its unfounded claim, that "All documentation submitted by the Petitioner regarding groundwater, indicates that the groundwater producing layer is the silty clay layer depicted in the Administrative Record" As Keller has pointed out at hearing and in its brief, that is not what the Record demonstrates. The Record clearly demonstrates, and Ms. Rowe and Mr. St. John testified, that the moist layer begins at a depth of about 10 feet bgs and becomes saturated at 12 to 13½ feet bgs. (T. 81, 97; R. 90-94) There is nothing in the Record that indicates that groundwater exists in the lithology above the 9½ foot level. In fact, Keller presented testimony that very little, if any, water would flow into the well above the saturated zone, where the clayey silt is located. (T. 81)

On page 21 of the Agency's brief, the Agency correctly states "the Geologist (sic) must determine in the field the specific ground water bearing unit which would most likely be impacted by the release, hence the requirement for representative ground water sample." Keller did exactly that. Contrary to the Agency's arguments about where groundwater is located, the desired ground water interval for sampling at this site is the wet sand seam (T. 97), which is located at 12 to 13½ feet bgs. (R. 90-94) In addition, the moist foot and one half above that may have produced some water as well. (T.97) This wet sand seam is the water bearing unit of interest because it is the one located closest to the surface and the one most likely to become

contaminated by releases from USTs. (R. 90-94) The wet sand seam and moist zone above it were screened so they could be sampled. (T. 81, 88-91, 121; R. 102-106) The Agency never presented any evidence that the desired groundwater interval is located anywhere else.

Although the Agency produced no witnesses to explain what the Agency believes regarding the location of the water producing zone in the lithology, it appears from the arguments in its brief and the Agency's statement in the Letter (the wells must be screened at the level of the water in the well) (R. 258), that the Agency believes that at a confined aquifer site, which is what exists here (T. 29-30), water can enter through a well screen located at the same elevation as the static water level in the well. The Agency ignores the fact that the Record shows that the clayey silt is not wet or even moist at the same elevation as the static water level, which is the level of the water in the wells. (R. 90-94, 102-106) As shown above, the static water level is between 2.25 and 4.36 feet bgs and at least 5 feet above the saturated zone. The bore hole logs do not indicate wet or even moist conditions at that level. (*Id.*) The Agency has provided no evidence to show that water is present in the lithology at the level to which water rose in the wells. If water is not in the lithology at that level, it cannot enter the well at that level through the well screen.

As discussed in more detail in Keller's opening brief, the static water level is the level to which ground water will rise in a well. (*See Ex. 4*). Confined groundwater is under pressure and hydrostatic pressure on the water will cause the static water level to rise above where the water enters the well. (T. 29-30, Ex. 4) The static water level is used to determine the hydraulic gradient and which way the ground water will flow (T. 95), but the static water level for a confined aquifer, such as the one at this site, is no more representative of the location of the desired groundwater interval in the lithology for sampling purposes, than is groundwater that is

pumped from the well, contained in a sample jar, and placed on a table. In both cases the position of the water is different than where it was originally located in the lithology.

In its Response (pp. 18, 23), the Agency twists Ms. Rowe's testimony and argues that the wells were not screened as she intended because they were submerged because the top of the well screen was below the static water level. Yet the fact that the well screens were submerged is of no import and the Agency has presented no evidence to the contrary, nor cited any relevant regulations.⁵

In summary, screening the wells at the level of the water in the wells will not result in water entering the well at that level because water is not present at that level in the lithology. The Agency's arguments that the monitoring wells should have been screened at the level of the water in the wells are erroneous and are contrary to generally accepted professional engineering practices and principles of professional geology.⁶

II. Work at the Site Met Generally Accepted Engineering Practices and Principles of Professional Geology.

The Agency's brief is internally inconsistent in that, on page 7, the brief states:

The IEPA 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, page 256).

Yet on page 8, the brief says:

During Section 734.510 (a) review, the IEPA determined that the Stage 1 Site investigation was not conducted in accordance with the approved plan and Stage 1 monitoring wells were not installed in the manner consistent with the regulations and generally accepted engineering practices. (AR page 256)

⁵ The Agency also states without any support that "contaminants associated with petroleum releases are lighter than groundwater." (Response p. 15) This statement ignores that testimony of Mr. St. John that petroleum contaminants are soluble in water and will move through an aquifer with water. (T. 54-57)

⁶ Contrary to the Agency's position, the regulations do not prohibit submerging the well screens. (Response, 33). Further, Ms. Rowe and Mr. St. John testified that the well screens were properly placed. (T47-48, 94, 96-97)

Not only are these two quotes inconsistent, but as discussed above and as the Agency acknowledges in its brief, the Agency's Letter frames the issues on appeal. If during the Section 734.510(a) review, the Agency thought the work was not done in a manner consistent with generally accepted engineering practices, why was this issue not raised in the Letter? The bottom line is that Keller performed the contested work at the site in compliance with applicable rules, including in accordance with generally accepted engineering practices and professional geology principles. (T. 58-59, 96-97, 150, 180-182) The Agency presented no evidence at hearing or in its Response to the contrary.

III. The Agency Attempts to Cloud the Issues by Raising Points That Were Not in the Agency's Final Decision Letter and are Not on Appeal.

A. The hydraulic conductivity tests were not raised as an issue in the Letter and do not indicate depth to groundwater.

The Agency accuses Keller of "cherry picking". (Response, p. 28) However, the Agency is confusing "cherry picking" with Keller's desire to stick to the relevant issues, namely the issues listed in the Letter, that are the subject of this appeal, and the relevant portions of the Record. Contrary to the Agency's assertions, Petitioner's expert witness, Ron St. John, did review the relevant documents, which included all documents in the Record. (T. 97) His testimony about this site is based on the Record; throughout his testimony he used information from and referenced the bore hole logs and well construction reports found at R. 90-94 and 102-104. Prior to the hearing, however, he had not examined in detail the records related to the hydraulic conductivity test because the Letter did not raise any issues related to this test. Accordingly, the Agency accepted the hydraulic conductivity test and, thus, it is not one of the issues on appeal to the Board.

Nevertheless, the Agency now attempts to discredit Mr. St. John's testimony because he did not examine in detail, prior to hearing, information about a test that is irrelevant to this

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Appeal. Even so, in response to the Agency's cross examination, Mr. St. John explained that the water that flowed into the well came from the sandy saturated zone at 12 to 13½ feet bgs. (T. 58) Even though the well screen extended into the dry, less permeable clayey silt above that zone, water was not located at that elevation to enter the well. (R. 90-94, 102-104)

The record shows that hydraulic conductivity calculations are based on the total well depth, screen length and radius, initial water depth and the water depth change over time. (R. 13) Here, the 10 foot well screens spanned not only the moist and wet zones which extended from about 10 to 13½ bgs, they also extended into the dry layer above that. Thus, the hydraulic conductivity test results were in a sense a mixture of the various layers of sand and clayey silt that were screened. (T. 79-80) Rather than discredit Mr. St. John, the Agency's cross examination of him supports Keller's position.⁷

B. Groundwater depth after drilling is the same as the static water level if equilibrium with atmospheric pressure has been reached.

The Agency also grasps at straws by trying to make an issue out of Keller/Farina's failure to include on the bore hole logs the groundwater depth after drilling. (Response, p. 18) This was not one of the bases for rejection that the Agency listed in the Letter and the Agency should not be allowed to raise this issue now.

Further, asking for the groundwater depth after drilling demonstrates the Agency's lack of experience and understanding of hydrogeology. The question about the depth of water after drilling a well, especially in a confined aquifer is not relevant. "Generally, static groundwater

⁷ The Agency also attempts to discredit Mr. St. John's testimony because he never visited the Keller site. Yet, Carol Hawbaker, the Agency's project manager for this site also never visited it before drafting the Letter. The Agency also takes out of context a portion of a court opinion in another case in an attempt to discredit Mr. St. John because he was not found to be an expert in wastewater treatment. (Response, pp. 27-28) However, that court did find him to be an expert in hydrogeology and Keller presented him as an expert in hydrogeology. *LeClercq v. The Lockformer Co.*, No. 00 C 7164, 2005 WL 1162979 at *3 (N.D. Ill. April 28, 2005) ("The Court concludes that St. John is qualified to provide expert testimony on hydrogeologic issues relating to the sewer line contamination theory.") Keller did not present him as an expert in wastewater treatment.

elevations do not stabilize on the date of well installation and well development procedures interfere with determination of static elevation.” (T. 32-33; R. 11) In a confined aquifer, such as the one at the Keller site, after a well is installed and developed, water will continue to slowly rise in the well until eventually the static water level is reached. Typically, well development involves causing water levels to fluctuate by surging and removing water from the well to remove fine grained material that gets smeared down to the level of the saturated zone. (T. 35, 92) In other words, in a confined aquifer and depending on site-specific lithology and soil permeability, there will likely be differences in the water level in the well immediately after the well is drilled and developed, one hour later, two hours later, and five hours later as the water continues to rise until the hydrostatic pressure on the water equilibrates with atmospheric pressure, in other words, when the static water level is reached. There is nothing in the Record and the Agency presents no evidence to support why a separate entry for depth to groundwater after drilling is significant or why that value differs from the static water level after equilibrium is reached. Further, the Agency did not raise this issue in the Letter and should be precluded from raising it now.

IV. Soil Borings SB4 and SB5 Complied With Part 734.

In its opening brief, Keller provided detailed arguments and cites to the Record and applicable regulations that the soil borings that the Agency objected to, SB4 and SB5, were drilled in compliance with applicable regulations. Keller will not repeat those detailed arguments here. As discussed above, rather than point to evidence in the Record or present witnesses at hearing to explain its position, the Agency in its brief argues for the first time that the definition for “tank field” in Part 732 applies to a Part 734 site. The Agency did not raise this

issue in the Letter and should not be allowed to apply inapplicable rules or be allowed to raise issues that were not contained in the Letter or in the Record.

Further, on page 22 of the Agency's brief, the Agency argues that:

Since only one tank basin excavation sample exceeded the most stringent remediation objectives, soil sample E1, only one soil boring (SB3) is needed per the minimum requirements of Section 734.315(a)(1)(A). Any other soil borings such as SB4 exceeds the minimum requirements of the Act and its regulations.

Section 734.315(a)(1)(A) does not say that only one additional soil boring should be drilled if there is only one contaminated excavation sample. Rather, that section of the regulations clearly states that "up to four borings must be drilled around each independent UST field where one or more . . . excavation samples . . . exceeds the most stringent Tier 1 Remediation Objectives of [TACO]." Keller/Farina correctly drilled two borings in directions away from the contaminated excavation sample to define the extent of contamination. (T. 134; Ex. 11) SB4 was located to the north of the contaminated sample and SB3 was located to the east of the contaminated sample. (T. 134; Ex. 11) No other data was available when those samples were collected as they were drilled on the same day. (R. 125-126) The Agency provides no evidence to support its position.

Collecting samples from soil borings around contaminated tank fields is important to determine the extent of contamination. As explained to the Agency previously (R. 9), Keller/Farina was not able to collect floor samples from the bottom of the tank excavations because groundwater infiltrated into the bottom of the excavation. Section 734.210(h)(1) provides: "The Agency must allow an alternate location for, or excuse the collection of, one or more samples if sample collection in the following location is made impracticable by site-specific circumstances."

The listed locations include the excavation floor. *See* 35 Ill. Admin. Code 734.210(h)(1)(B). Thus, SB4 and SB5 did not exceed minimum requirements as the Agency argues. The lack of samples collected from the bottom of the excavation cannot be used to demonstrate that there were no leaks from the diesel tanks nor can the lack of samples be used to determine that unsaturated soil had been adequately defined in that area. Additional samples were needed near the excavations to document whether a release occurred or not. In other words, SB5 which is located near the diesel tank excavation is needed because there was a release associated with the diesel UST piping (T. 134; Ex. 11) and samples could not be collected from the bottom of the diesel tank excavation to show that it was clean. (T. 176; R. 9) Likewise, SB4 was needed because no other data was available to document whether contamination migrated north from the sidewall sample E1 in the gasoline tank excavation. Accordingly, borings SB4 and SB5 were correctly drilled and samples from them analyzed for contamination.

V. **Analysis of Soil Samples From Monitoring Wells MW1-MW4 Complied With Part 734.**

The Agency continues to argue that soil samples collected when the monitoring wells were installed did not need to be analyzed. (Response, p. 23). Yet the Agency fails to point to anything in the Record to support the Agency position that there was data available on the date the samples were collected to document that contamination did not extend to the locations of the monitoring wells. As discussed above, it is clear from the chain of custody forms in the Record that the monitoring wells and soil borings were drilled on the same day. (R. 125-126) Thus, Keller did not have available the results of the soil boring analyses before it was necessary to submit the soil samples from the monitoring wells to the lab for analysis. (T. 136-142) In order to be certain that a sample is contaminated or not, one must submit the sample to a laboratory for analysis. Indeed, numerous regulations, including the TACO regulations at Part 742 require

laboratory analysis of samples. Further, Keller is not aware of any rules that allow an owner/operator to certify that his or her site is clean based solely on visual or olfactory observations and the Agency has cited no such provisions. Thus, soil samples from the monitoring wells were properly submitted for analysis because there were no sample data available on the date the samples were collected that indicated that soil contamination did not extend to the location where the monitoring wells were installed. Keller/Farina met the requirements of 734.315(a)(2)(C).⁸

VI. The Proposed Stage 2 Site Investigation Plan Should Be Approved.

On page 10 of its Response, the Agency states that:

Illinois EPA did not reject the plan based on the additional proposed borings which exceed the minimum requirements. The plan was denied because the monitoring wells did not satisfy the requirements of 35 Ill. Admin. Code 734.430.

As demonstrated elsewhere in this and Keller's opening brief, the monitoring wells do comply with Section 734.430. Thus, the proposed Stage 2 plan must be approved.

A. The proposed soil borings to delineate contamination from piping runs did not exceed the minimum requirements of Part 734.

Mr. Wienhoff explained at hearing (T. 142-145, Ex. 12) that a release from a piping run could sink into the ground and then spread and that would not be detected with an adjacent piping run sample that is only 2 to 3 feet bgs. Instead, it is necessary to install a soil boring in the area where the deeper contamination plume might be located in order to determine if it is present or not. This is one of the purposes for conducting additional investigations during Stage 1 and Stage 2.

⁸ The Agency asserts without citation to the Transcript that Mr. Wienhoff "admitted" that the soil sampling from the monitoring wells violated the regulations. (Response, p. 13) To the contrary, Mr. Wienhoff testified that the soil sampling complied with the regulations. (T. 136-142)

The Agency's arguments related to this point are in error as the Agency asserts that clean piping run samples can be used to obtain an NFR Letter. The Agency conveniently ignores the fact that the rule at Section 734.210(h)(3) that allows such use of piping run samples to obtain a no further remediation letter only applies when all of the Early Action samples meet the most stringent TACO tier I cleanup objectives. In contrast, if any of the Early Action samples exceed the most stringent TACO Tier 1 remediation objectives, Section 734.210(h)(4) requires that the owner or operator must continue in accordance with Subpart C. Among other requirements, pursuant to Section 315, a Stage 1 site investigation must be performed and additional samples must be collected. The Agency also ignores the plain language of Section 734.315(a)(1)(B) which requires that soil borings be drilled through the entire vertical extent of contamination, based on field observations, if a sample from the piping excavation is contaminated. This rule does not say that additional samples do not need to be collected any deeper than the depth of the excavation to remove the piping, which is generally 2 to 3 feet bgs. (R. 171)

In its brief, the Agency also takes issue with testimony about diving plumes and states there was no evidence that a diving plume is located on this site. (Response, p. 29) The Agency is correct that there is no such evidence. However, the Agency's logic fails because the purpose of the site investigation is to find out if such a plume exists. Without performing a subsurface investigation it is impossible to determine whether contamination from a tank or piping run release sank into the ground and then spread out into a plume. (T. 143-145; Ex. 12) The purpose of the testimony about diving plumes was to explain that contamination tends to migrate downward as it also moves laterally with groundwater.

Because contamination from piping runs was found during Early Action, pursuant to Section 734.315(a)(1)(B) soil borings must be drilled; shallow piping run samples cannot be used

to determine if contamination exists throughout the entire vadose zone. Without installing soil borings at greater depths than piping run samples, a site owner/operator will have no way of knowing whether a diving plume exists or not. The only way to know if one exists is to conduct the Stage 1 and Stage 2 investigations and to sample in areas where a diving plume would most likely be located.

B. Proposed soil samples between the gasoline pump island and MW2 do not exceed the minimum requirements of Part 734.

On page 25 of its brief, the Agency takes issue with the proposed soil samples to be located between the pump island and MW2. As Keller/Farina argued before, it appears to Keller/Farina's consultant that the contamination at monitoring well 2 might meet Tier 2 Remediation Objectives after additional data is collected and the appropriate calculations are made to determine Tier 2 Remediation Objectives. (T. 147-150) Accordingly, the purpose of collecting samples between the pump island and monitoring well 2 is to begin to delineate the area that will likely exceed Tier 2 Remediation Objectives because those are the remediation objectives that are generally needed to meet the minimum requirements of the Act. (*Id.*) Such samples can either be collected as part of the Stage 2 Site Investigation when the consultant will be at the site to collect the Stage 2 samples, or the consultant can make a separate trip to the site at some point in the future when the Agency asks the consultant to perform further delineation of the contamination in order to reduce the size of the area that must be remediated. Since in all likelihood the samples will need to be collected at some point in the future, it makes more sense and it is more cost effective to collect the samples as part of the Stage 2 Site Investigation. (*Id.*) Accordingly, the proposed samples should be approved.

VII. The Proposed Budget Must Be Approved.

Because the Agency's denial of the proposed budget is based on the Agency's erroneous denial of the proposed Stage 2 site investigation, the Board should approve the proposed budget.

VIII. Mr. St. John's Testimony Should Not Be Stricken.

The Agency appears to be confused by Mr. St. John's testimony. The purpose of his testimony was to explain generally accepted principles of hydrogeology that are relevant to the Keller/Farina site. The reason for this is simple. The Agency does not understand basic hydrogeology. In order to make correct decisions about how monitoring wells are constructed, the Agency should understand these principles. There is no information in the record as to whether anyone from the Agency that reviewed the documents sent in by Keller/Farina understood any of these principles. In fact, the Agency's Response refers to the bore hole logs (Response p. 26) that clearly say "moist" around the 10 foot bgs level (R. 90-94) and argues that the water in the wells came from the silty clay layer above the "moist" level." (Response, p. 29) There is no information in the record and no testimony was presented at hearing regarding the qualifications of the Agency's project manager for this site. In fact, had the Agency presented the project manager as a witness, Keller's attorney would have questioned her about her qualifications. Further, the Agency presented no witnesses or other evidence to contradict Mr. St. John's testimony, the hearing officer admitted his testimony, and Mr. St. John is a qualified expert in hydrogeology with years of experience who has installed thousands of monitoring wells. (Ex. 3, T. 11-14) His testimony should not be stricken.

CONCLUSION

Keller met its burden of proof that the work performed at the site that is the subject of this appeal complied with applicable laws and regulations. The Agency presented no credible evidence to the contrary. Accordingly, the Board must find in favor of Keller/Farina and against the Agency and award Keller its attorney's fees and costs.

Respectfully submitted,

L. Keller Oil Properties (Farina)

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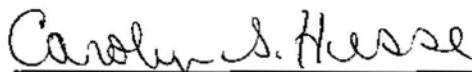
CERTIFICATE OF SERVICE

I, on oath state that I have served the attached Petitioner's Motion to File Post-Hearing Reply Brief and Reply in Support of Post-Hearing Brief by e-mail and placing a copy in an envelope addressed to:

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from One North Wacker Drive, Suite 4400, Chicago, Illinois, before the hour of 5:00 p.m., on this 22nd day of October, 2007.



Carolyn S. Hesse