BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE OF FILING

TO:

Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
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Springfield, Illinois 62794-9276

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
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PLEASE TAKE NOTICE that on January 29, 2008, filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of Petitioner's Motion for Leave to File Reply in Support of Motion for Reconsideration along with Petitioner's Reply in Support of its Motion for Reconsideration and Request for Oral Argument.

Dated: January 29, 2008

Respectfully submitted,

L. KELLER OIL PROPERTIES / FARINA

By: Carolyn S. Hesse
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, on oath state that I have served the attached Petitioner's Motion for Leave to File Reply in Support of Motion for Reconsideration along with Petitioner's Reply in Support of its Motion for Reconsideration and Request for Oral Argument by placing a copy in an envelope addressed to:

Melanie A. Jarvis
Assistant Counsel
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Carol Webb
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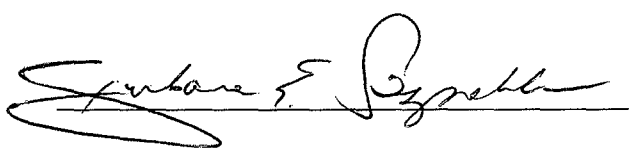
from One North Wacker Drive, Suite 4400, Chicago, Illinois, before the hour of 5:00 p.m., on this 29th Day of January, 2008.



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BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

PETITIONER'S MOTION FOR LEAVE TO FILE
REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

Pursuant to 35 Ill. Adm. Code 101.500(e), Petitioner, L. Keller Oil Properties/Farina ("Keller"), by its counsel Barnes & Thornburg LLP moves the Illinois Pollution Control Board (the "Board") for leave to file a Reply in Support of its Motion for Reconsideration. 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 on Keller's appeal.

3. On December 6, 2007, the Board issued an Opinion and Order of the Board (the "Decision") in this case. In the Decision, the Board partially affirmed and partially reversed determinations made by the Illinois Environmental Protection Agency (the "Agency") in its May 17, 2007 letter rejecting Keller's Site Investigation Plan and Budget for the underground storage tank site located at 1003 West Washington Avenue, Farina, Fayette County.

4. On January 11, 2008, Keller filed a Motion for Reconsideration of the Board's December 6, 2007 Order.

5. On January 17, 2008, the Agency filed a Response in Opposition to Keller's Motion for Reconsideration. In its Response, the Agency at page 3 argues that "The Petitioner has not detailed any newly discovered evidence." Then, the Agency completely ignores the new evidence. The Agency also argues that "Illinois EPA requires the wells to be constructed in a manner that complies with the Act and regulations" at page 5 of its Response, but fails to adequately respond to Keller's arguments that wells installed per Illinois EPA policy would violate regulations. Further, the Agency again claims that the Record does not support Keller's position, which Keller strongly disputes. Finally, the Agency opposes Keller's request for Oral Argument.

6. Keller seeks leave to reply to the Agency brief because, if Keller is not allowed to reply to the Agency's arguments, Keller will be materially prejudiced.

7. Accordingly, Keller seeks leave pursuant to 35 Ill. Adm. Code 101.500(e) to file Reply in Support of its Motion for Reconsideration, in order to address the above issues and to prevent material prejudice that will result from the Agency's submissions.

8. Attached to this Motion as Exhibit A is a proposed Reply in Support of the Motion for Reconsideration that Keller seeks to file.

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

Respectfully submitted,

L. Keller Oil Properties (Farina)

By: Carolyn S. Hesse
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	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 07-147
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

KELLER OIL PROPERTIES' REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION AND REQUEST FOR ORAL ARGUMENT

Now comes the Petitioner, L. Keller Oil Properties/Farina ("Keller" or "Keller/Farina"), by its counsel Barnes & Thornburg LLP and in support of its Motion for Reconsideration and Request for Oral Argument pursuant to 35 Ill. Admin. Code 101.500, 101.700, and 101.904 states as follows:

Petitioner, Keller Oil Properties/Farina ("Keller"), filed its motion for the Board to reconsider its decision in the above-captioned matter with respect to the construction and screening of monitoring wells and with respect to the Board's denial of Keller's attorneys' fees. Simply put, the sole issue with respect to the construction of the monitoring wells, which includes where the well is screened, is whether the phrase "desired interval" in subsection 734.430(a)(1) means that a monitoring well should be screened where groundwater is found in the ground, which is Keller's position, or at the level to which groundwater will rise in a well after the well is constructed, which is the Agency's position. Evidence in the Record that was before the Illinois Environmental Protection Agency ("IEPA" or the "Agency") when the Agency made its decision, testimony that was presented at the Board hearing in this matter from two professional geologists and two professional engineers, citations to respected technical

reference documents regarding geological terms and principles, newly discovered evidence, and common sense all support Keller's position. The Agency has presented no credible or even incredible evidence to support its position. The Agency's argument that the Record does not contain information to support Keller's position merely demonstrates the Agency's lack of knowledge of the technical field the Agency is required to review.

Keller's motion to reconsider is based on the following:

The Board's Decision that the Monitoring Wells Were Not Screened at the Desired Interval Was Based on Misrepresentations by the Agency.

The Board's Decision regarding where monitoring wells should be screened was based on misrepresentations made by the Agency. Section 101.904(b)(2) allows the Board to "relieve a party from a final order entered in a contested proceeding," on the basis of misrepresentation by the adverse party. Keller does not know whether the Agency intentionally or unintentionally misrepresented to the Board that the Record at R. 13 documents that the silty clay layer is a water bearing unit. As discussed by Keller at pages 17-18 and 46-48 of its brief accompanying its Motion to Reconsider ("Initial Brief"), R. 13 actually shows that the silty clay layer is **not** a water bearing unit. If the Board had reviewed page R. 13 of the Record and other information in the Record and understood that information, absent the Agency's misrepresentations, the Board would have seen that the silty clay layer is not the water bearing unit. Rather, the wet sand layer below that, at a depth of 12 to 13.5 feet below ground surface ("bgs"), is the unit that produced water (i.e. the sand is wet because water is in the pore spaces of the sand, which means that the sand is saturated). This is the information that Keller has consistently provided to the Agency. The wet sand layer is the desired interval for locating the monitoring well screens in order to obtain a representative groundwater sample because that is where the groundwater is located. Keller's Initial Brief at pages 4-20, 34-35, 38-39, and 41-48 supports its position that the silty

clay layer is not the water bearing unit, and that the wet sand layer is the water producing unit and, thus, the desired interval.

The Agency has presented no testimony concerning the contents of R. 13 to support its position. Further, the Agency's briefs do not cite to any recognized scientific reference documents for support. Instead, the Agency briefs rely on the Agency's erroneous arguments and misinterpretations of what page R. 13 actually shows.

Further, the Agency misrepresented to the Board that Keller did not explain that the groundwater located at 10 to 13½ bgs was under hydrostatic pressure that pushed the groundwater up the monitoring well to the static groundwater elevation that was observed days later during Keller's next trip to the site after the wells were installed. This information is located at R. 173 and was explained in detail at hearing and in Keller's Initial Brief at pages 43-46.

In short, the Agency's arguments that information in the Record do not support Keller's position misrepresents the facts in the Record.

Newly Discovered Evidence Confirms Keller's Position that the Water Bearing Unit is the Wet Sand Layer and that the Dry Silty Clay Layer above the Wet Sand is not a Water Bearing Unit.

The Agency's Response to Keller's Motion to Reconsider fails to address Keller's new evidence. Instead the Agency argues at pages 4 and 5 of its Brief that the Record that was before the Agency when it made its decision does not contain this new information. The Agency even tries to brush off this evidence as "irrelevant." Agency Brief at page 5. The Agency ignores the fact that the new well was screened entirely in the silty clay layer that the Agency said and the Board agreed was the water bearing unit. The new well was not screened to intersect the wet sand layer that Keller repeatedly told the Agency in the Record and told the Board at hearing and in post hearing briefs was the desired interval to obtain a representative groundwater sample.

The new well was constructed, including screened, consistent with Agency policy, which was adopted by the Board, and the well did not produce water. Keller told the Agency in the Record at R. 173 that a well constructed as the Agency required would not produce water. Of course the Agency is going to oppose the Board's consideration of this new evidence because the evidence unequivocally demonstrates that the Agency is wrong and confirms Keller's position taken in the Record.

The Board should allow and should consider this new evidence because it goes to the heart of the issue in this appeal. Keller and the Agency disagree on where the desired interval for sampling groundwater is located. Keller told the Agency in the Record where the desired interval of groundwater is located (the borehole logs at R. 90-94 show the location of the wet sand layer). Keller told the Agency in the Record that the monitoring wells were screened to intersect the desired interval and several feet above that interval. (The well construction reports at R. 102-106 show that the wet sand layer and several feet above the wet sand layer were screened in the monitoring wells.) Thus, if contaminants were floating on the groundwater, the screened interval would have captured them as well. Keller also told the Agency in the Record that if a well were installed in accordance with the Agency's position that the well would be dry. (R. 173). At hearing before the Board, Keller presented four witnesses who explained that the wells were screened properly. They also explained that if a well were constructed as the Agency required, it would not produce water. The Agency presented no evidence to rebut any of Keller's evidence. In spite of the overwhelming evidence in Keller's favor, the Board decided this issue in favor of the Agency and instructed Keller to submit a revised work plan to the Agency consistent with the Agency's position on how monitoring wells should be constructed.

The Agency states in its Response brief on pages 4-5: "further, the Illinois EPA does not direct the installation of wells as Petitioner states. Instead, the Illinois EPA requires the wells be constructed in a manner that complies with the Act and regulations." First of all, throughout the Record, and in its argument before the Board, the IEPA specifically told Keller where and at what depth the wells needed to be located. R. 157-161, 258-260. This has the same effect as the Agency directing the installation of wells, regardless of what verb the Agency uses. Further, as discussed in Keller's Initial Brief, the Agency's position would require Keller to construct monitoring wells in a manner that would violate numerous regulatory requirements as well as professional engineering practices and professional geologist principles, and as the new evidence confirms, would not produce groundwater. As a result, to supplement the Stage 1 Site Investigation so that the Stage 2 Site Investigation Work Plan could be prepared as ordered by the Board, Keller prepared to install and did install and screen one monitoring well in accordance with the terms of the Board's decision.[1] More wells were not installed and screened in that manner because when Keller installed the first well to a depth of 10 feet bgs, Keller observed that a water producing layer was not encountered and Keller did not want to waste money installing more groundwater monitoring wells that would not produce groundwater. As shown in Appendix A to Keller's Initial Brief, the well that was installed in accordance with the Board's decision did not produce water. At the same time, a monitoring well located a few feet away that was installed previously and screened at the depth that Keller maintains is the desired interval, was full of water. Thus, this new evidence is directly relevant, and directly in support of Keller's position, on the issue of the location of the desired interval where monitoring wells should be screened.

[1] Because the installation of monitoring wells was part of the Stage 1 investigation, Agency pre-approval of the work plan to install the wells is not required under Part 734.

This new information was not available at the time of the Board hearing or when the documents that make up the Record was reviewed by the Agency because Keller's consultants know what the regulations require and how to install and screen monitoring wells in accordance with generally accepted professional engineering practices and principles of professional geology. Keller would not waste time or money installing wells that do not comply with the Board's regulations. Further, the Agency's position on screening monitoring wells at the depth where water is observed in the well is not a position that Keller could have anticipated. As a Keller witness testified at hearing, the same Agency project manager has approved in the past monitoring wells that were screened exactly as Keller screened the wells here. T. 98-100.

The Board's procedural rules at Section 101.904 allow the Board to consider newly discovered evidence and to correct errors in Board orders. Specifically, Section 101.904 states that "the Board may relieve a party from a final order entered in a contested proceeding, for the following: 1) Newly discovered evidence that existed at the time of hearing and that by due diligence could not have been timely discovered; . . ." 35 Ill. Adm. Code 101.904; *see also People v. Community Landfill Co, Inc.*, PCB No. 03-191, 2006 Ill. Env. LEXIS 323, *2-3 (June 1, 2006) (emphasis added) (A party can file a motion to reconsider "to bring to the [Board's] attention **newly discovered evidence which was not available at the time of the hearing**, changes in the law or errors in the [Board's] previous application of existing law.").

In the case at bar, reconsideration of the Board's order is appropriate, among other reasons, because Keller has now discovered new evidence that supports Keller's position that the desired interval for screening a monitoring well is where groundwater is found in the ground when a well is drilled. If a well is not screened at that interval it will not produce water. This evidence was discovered while Keller was attempting to comply with Agency policy and the

Board's opinion and order. Because this evidence is newly discovered pursuant to the Board's final order, and because the evidence establishes that Keller's position was correct, the Board should reconsider.

Interpretation of the Desired Interval For Screening a Monitoring Well Extends Well Beyond the Keller Site and Would Apply to All Monitoring Wells Installed in the State; Thus, How Monitoring Wells are Constructed and Where They are Screened is a Mixed Question of Fact and Law and Must be Consistent With Geological Principles.

The Agency states in its brief "further, the Petitioner misses the point that what was at issue is the placement of the screen at the desired interval and not how the well was drilled." Agency Brief at p. 4. Petitioner does not miss the point. That is the point. Keller has presented significant, un-rebutted evidence that Keller's wells screens were placed properly. Monitoring wells screens must be located where groundwater is located in the ground, so water can enter the well, if they are going to produce groundwater; this is the desired interval.

Setting aside for the moment the particular facts in the Record at Keller's site at Farina, the question before the Board as a matter of law to be applied to all monitoring wells[2] is whether monitoring wells should be screened where groundwater is observed in the ground or where groundwater is observed in the monitoring wells themselves after the water levels in the wells have stabilized. At some locations the level of the groundwater in a well is the same as the surface of the groundwater table. In scientific terms, the reason is that the hydrostatic pressure on the groundwater is equal to atmospheric pressure so that the pressure on the groundwater is not so great that groundwater is pushed up the well. Such groundwater is referred to as "unconfined."[3]

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[2] The regulations do not contain different standards for determining the location of the "desired interval" depending on site lithology.

[3] The Glossary of Hydrology explains an unconfined aquifer in the definition of "water table" which is "the upper surface of the saturated zone. The surface in an unconfined aquifer or confining bed at which the pore-water

It is undisputed from the facts in the Record that at the Keller site the interval of wet sand is not located at the same depth below ground surface where water was observed in the wells. R. 102-106. In fact, those levels are located several feet apart. Keller has explained numerous times to the Agency and then explained at the Board hearing the science behind this phenomenon. This phenomenon is not unique to the Keller site. Pressure on the water located in the wet sand layer pushed the water up the monitoring well. R. 173. Groundwater is not actually located in the ground at the level to which the water rose in the well. (The well completion reports at R. 102-106 can be used to compare elevations of the surface of the moist layer with the elevation where the water rose in the wells. See Keller's Initial Brief at pp. 7-9.) The level of water in wells is referred to as the static water level, the static groundwater elevation and the isostatic water level. These terms mean the same thing. When the static water level is higher than the level where groundwater is in the ground and enters the well, the groundwater is referred to as "confined" or "artesian water."[4]

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pressure is atmospheric. Its position can be identified by measuring the water level in a shallow well extending a few feet into the saturated zone."

[4] The Glossary of Hydrology, Ex. 4, contains the following definitions:

Aquifer: A formation, group of formations, or part of a formation that contains sufficient saturated permeable material to yield significant quantities of water to wells and springs.

Confined aquifer: An aquifer that is bounded above and below by confining beds; an aquifer containing confined ground water.

Confined groundwater: Groundwater under pressure significantly greater than that of the atmosphere. Its upper surface is the bottom of a confining bed.

Confining bed: A body of distinctly less permeable material that is stratigraphically adjacent to one or more aquifers. In nature, its hydraulic conductivity may range from nearly zero to any value that is distinctly less than that of the aquifer.

Hydrostatic pressure: The pressure exerted at the base of a column of water.

Saturated: Said of the condition in which the interstices of a material are filled with a liquid, usually water. It applies whether the liquid is under greater than or less than atmospheric pressure, so long as all connected interstices are full.

Saturated zone: A subsurface zone in which all the interstices are filled with water under pressure greater than that of the atmosphere. Although the zone may contain gas-filled interstices or interstices filled with fluids other

As noted from the definition of artesian water, the groundwater may be under enough pressure to rise above the surface of the ground. It would be impossible to screen a well at the level of the water in the well if that level were above the ground surface. The Agency has presented no explanation to the contrary. Thus, it would be impossible as a matter of law and fact to apply the Agency's interpretation of "desired interval" universally and the Board should reconsider its erroneous application of existing law.

Further, the purpose for determining the level to which water rises in monitoring wells is to determine the potentiometric surface, which in turn is used to determine which direction groundwater flows at a site. "Potentiometric surface is defined as ... an **imaginary** surface representing the total head of groundwater and defined by the level to which water will rise in a tightly cased well." (Ex. 4, p. 156) (emphasis added) The Agency's position results in a requirement that wells must be screened at an imaginary level. This approach cannot be applied as matter of law to all possible sets of facts.

In addition, as Keller explained at hearing and in the Initial Brief at pages 3-4 and 6-13, when installing a monitoring well and setting the well screen, one can determine, as Keller did, where groundwater is located in the ground and set well screens to intercept the groundwater and extend above the groundwater; and this is what Keller did. However, as Keller explained in the

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than water, it is still considered saturated. This zone is separated from the unsaturated zone (above) by the water table.

The McGraw-Hill Dictionary of Scientific and Technical terms, 5th Ed. 1994 ("McGraw-Hill Dictionary") defines the terms as follows:

Confined Aquifer - *See* artesian aquifer

Artesian Aquifer - An aquifer that is bounded above and below by impermeable beds and that contains artesian water. Also known as confined aquifer.

Artesian Water - Groundwater that is under sufficient pressure to rise above the level at which it encounters a well, but does not necessarily rise to or above the surface of the ground.

Artesian Well - A well in which the water rises above the top of the water-bearing bed.

Hydrostatic Pressure - The pressure at a point in a fluid at rest due to the weight of the fluid above it.

Initial Brief at p. 12, the static water level cannot be determined reliably when a well is drilled and is determined days later after the water level in the well has stabilized. Thus, unless one become a time traveler, it is impossible at some sites to screen a well at the level where water is later observed in the well. In short, the Board erroneously held that the term "desired interval" means the static water level in the well. Because this is a mixed question of fact and law, the Board may reconsider its decision. *People v. Community Landfill.* **Dave please check cite for accuracy.**

The Agency's Position That Monitoring Wells Should be Screened at the Level Where Water is Observed in the Well Would Result in Some Monitoring Wells Violating Numerous Board Regulations.

The Agency's statement that it requires wells to be constructed in a manner that complies with the Act and regulations (Agency Brief at page 5) is contrary to what the Agency is actually doing here. Keller has provided testimony and legal arguments in its Initial Brief that, if wells were installed at Keller's Site in accordance with the Agency's position, numerous Board regulations at Section 734.430 would be violated. In addition, the Agency's position, which the Board adopted, is internally inconsistent with the language of applicable rules. See Initial Brief at pages 24-33. The Agency's argument is merely a smoke screen to hide the Agency's lack of understanding of generally accepted professional engineering practices and principles of professional geologists, which is the standard of review that the Agency is required to apply to technical reviews in the underground storage tank program. 35 Ill. Admin. Code 734.510(a).

Keller has presented a prima facie case and the Agency has presented no rebuttal evidence. In such circumstances, a petitioner is entitled to a favorable order from the Board. *See 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, where a petitioner, such as Keller, submits evidence and proves a *prima facie* case, and IEPA presents no evidence to dispute the issue (as happened at the hearing of this case), there is no issue of fact, and petitioner is entitled to prevail on the undisputed issue. *Id.* Keller proved its case. IEPA presented no credible or other **evidence** to rebut Keller's case, only unsupported arguments. The Board should reconsider its final order.

The Board failed to apply existing case law in its review of the Record and in reaching its decision. The evidence in the record, which Keller has cited to exhaustively, documents that the wells at the Keller site were screened in accordance with the regulations and with generally accepted professional engineering practices and principles of professional geologists. There is no evidence in the record to support the Agency's decision. Under either a clearly erroneous[5] or manifest weight of the evidence[6] standard (depending on whether the Board views the issue as a mixed issue of fact and law, or a purely factual issue), Keller should prevail because the Agency did not present a shred of evidence, only unsupported arguments that were insufficient to create any issue of fact to rebut Keller's *prima facie* evidence. The Board should reconsider its final order.

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[5] An agency decision involving a mixed question of fact and law is reviewed under a clearly erroneous standard, which is "between a manifest weight of the evidence standard and a *de novo* standard . . ." *Belvidere v. Illinois State Labor Relations Bd.*, 181 Ill. 2d 191, 204, 692 N.E.2d 295, 302 (1998). Mixed questions of law and fact include circumstances "that require an examination of the legal effect of a given set of facts . . ." *Salt Creek Rural Park District v. Dept. of Revenue*, 334 Ill. App. 3d 67, 70, 777 N.E.2d 515, 518 (1st Dist. 2002).

[6] Section 41(b) of the Environmental Protection Act, which applies the manifest weight of the evidence standard to judicial review of Board decisions, contemplates that "Any final order of the Board . . . shall be based solely on the **evidence** in the record . . . ." 415 ILCS 5/41(b) (emphasis added). As stated above, the Agency did not submit any evidence to the Board to contest Keller's undisputed evidence.

In the end, Keller's motion satisfies two of three possible bases for granting a motion to reconsider - Keller has provided the Board with new evidence that shows that Keller's Petition should be granted and has set forth reasons why the Board erred in its application of existing law. 35 Ill. Adm. Code 101.902 ("In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error."); *People v. Community Landfill Co.*, PCB 97-193 (July 26, 2001) (In granting in part and denying in part the respondent's motion to reconsider, the Board stated that "the Board will consider errors in its application of the law."); *IEPA v. Gates*, AC No. 06-50 (Dec. 21, 2006) (In granting motion to reconsider, the Board stated that a "motion to reconsider may be brought 'to bring to the [Board's] attention newly-discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law.'").

The Agency has only cited two cases that are facially distinguishable and do not support the denial of Keller's Motion. For example, in *Citizens against Regional Landfill v. County Board of Whiteside County*, PCB 92-156 (March 11, 1993), the petitioner requested that the Board reconsider entering sanctions against its counsel. *Id.* at 1. The Board initially found that, unlike Keller in the instant case, "Petitioner has not presented any new evidence or changes in the law." *Id.* at 2. Moreover, the Board stated that it viewed the petitioner's conduct "as an attempt by [petitioner's counsel] to circumvent the hearing officer's ruling and deceive the Board," - an issue wholly unlike the issues involved in the case at bar. *Id.* In contrast, here Keller attempted to comply with the Board's ruling.

The case of *Korogluyan v. Chicago Title and Trust Co.*, 213 Ill. App. 3d 622, 572 N.E.2d 1154 (1st Dist. 1991) is similarly distinguishable. In the *Korogluyan* case, the Court examined

the entirely unrelated issue of whether there was an issue of fact in order to deny summary judgment related to "an action to confirm a sale of property held as security for a loan in default." *Id.* at 624, 572 N.E.2d at 1157. Because Keller has demonstrated two bases for reconsideration, and the Agency has not provided any case law showing otherwise, the Board should reconsider its final order and rule in Keller's favor.

SUMMARY

Regarding the issue of the new evidence that is being brought to the Board's attention, Keller agrees that the information with respect to the most recently constructed well was not before the Agency when the Agency made its decision. However, it is clear from the Record that Keller advised the Agency before the Agency made its final decision from which this appeal is taken, that if a well were constructed in accordance with the Agency's position, the well would be dry. The new evidence was obtained because the Agency and the Board failed to believe Keller and Keller's professional geologists and professional engineers. Keller's attempt to comply with the Board's decision demonstrates that the Agency is wrong in this matter and the Board's decision must be reconsidered and changed because the Board's decision was in error.

In addition, as discussed in Keller's initial brief, the Board should reconsider its position on attorney's fees and allow Keller to recover fees for those issued where Keller prevailed.

Keller respectfully renews its request for oral argument before the entire Board to allow Keller to explain the legal and factual issues, including the newly discovered evidence, and to answer questions from the Board. In addition, to the extent that there is a deadline by which the Board must decide this motion to reconsider, Keller waives that deadline to allow the Board time to fully consider all the issues in this matter and to satisfy itself that the Record supports Keller's position.

Respectfully submitted,

L. Keller Oil Properties (Farina)

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