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
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1021 North Grand Avenue East
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Springfield, Illinois 62794-9276

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
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PLEASE TAKE NOTICE that on August 1, 2007, filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of a Petitioner's Response in Opposition to Motion for Summary Judgment.

Dated: August 1, 2007

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 Response in Opposition to Motion for Summary Judgment by placing a copy in an envelope addressed to:

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Illinois Environmental Protection Agency
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from One North Wacker Drive, Suite 4400, Chicago, Illinois, before the hour of 5:00 p.m., on this 1st Day August, 2007.

Carolyn S. Hesse

Carolyn S. Hesse

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 RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Petitioner, L. Keller Oil Properties / Farina, by its counsel Barnes & Thornburg LLP, and pursuant to 35 Ill. Admin. Code 101.516, files its response in opposition to the Illinois Environmental Protection Agency's ("IEPA" or the "Agency") Motion for Summary Judgment. In support of this response, Keller Oil states as follows:

INTRODUCTION

Summary judgment is not appropriate in this appeal because there are genuine issues of material fact. The main issues raised on appeal and by IEPA in its motion revolve around the factual questions of whether certain monitoring wells were installed properly or soil boring samples were collected from appropriate areas. These issues relate to the central question of whether the work that Petitioner performed was in accordance with generally accepted engineering practices or principles of professional geology. The regulations do not contain detailed specifications for how wells are to be installed or borings located. Rather the rules allow for the use of field observations and professional judgment when this work is performed.

Accordingly, the answers to these questions are fact dependent, and are not questions of law, as the IEPA suggests. Therefore, IEPA's motion for summary judgment must be denied.

BACKGROUND FACTS NOT IN DISPUTE

In the statement of relevant facts in the Agency's Motion for Summary Judgment, the Agency provides an incomplete list of the multiple reports and letters that were exchanged between Petitioner's consultant and the Agency regarding this site. Petitioner does not dispute the fact that numerous reports were sent to the Agency and that there has been prior correspondence between the Agency and Petitioner's representatives. Of particular importance are the material facts that arise from the Agency's denial letter from which this appeal is taken. While still not complete, the following is a more thorough list of reports sent to the Agency and correspondence between Petitioner and the Agency.

1. Keller/Farina was the owner of tanks located at a gasoline service station located at 1003 West Washington Avenue, Farina, Fayette County, Illinois. The underground storage tanks at issue were located on the property; the tanks stored gasoline, diesel fuel and heating oil. (AR, p. 7)

2. LUST Incident Numbers 20051539 and 20060153 were obtained by Keller/Farina. AR 7. The site has been assigned LPC #0514155011 - Fayette. (AR, p. 7)

3. The consultant for Petitioner submitted to the Agency a request for a time extension for early action activities for Incident Number 20051539. (*Exhibit 1*)

4. The 20-Day Certification for Incident Number 20051539 was submitted to Illinois EPA by the Petitioner on November 28, 2005. (AR, p. 7) (*Exhibit 2*)

5. The 20-Day Certification for Incident Number 20060153 was submitted to Illinois EPA by the Petitioner on February 21, 2006. (AR, p. 7) (*Exhibit 3*)

6. On December 5, 2005, the Illinois EPA approved an extension of the early action period for Incident Number 20051539 through April 30, 2006. (AR, p. 7) *(Exhibit 4)*

7. The consultant for Petitioner submitted to the Agency a request for a time extension for early action activities for Incident Number 20060153, incorrectly dated as March 2, 2005. (*Exhibit 5*) The correct date is March 2, 2006.

8. On March 10, 2006, the Illinois EPA approved an extension of the early action period for Incident Number 20060153 through July 9, 2006. (AR, p. 7) (*Exhibit 6*)

9. The Petitioner submitted the 45-Day Report and Stage 1 Certification for Incident Number 20051539 on December 20, 2005. (AR, p. 7) (*Exhibit* 7)

10. On January 19, 2006, the Agency sent a letter acknowledging receipt of the 45-Day Report dated December 20, 2005 for Incident Number 20051539. (*Exhibit 8*)

11. The Petitioner submitted the 45-Day Report and Stage 1 Certification for Incident Number 20060153 on March 23, 2006. (*Exhibit 9*)

12. On April 7, 2006, the Agency sent Petitioner a letter acknowledging receipt of the 45-Day Report which included a Stage 1 Site Investigation Plan and Budget certification for Incident Number 20060153, that was dated March 23, 2006. That letter also, based on the attached certification, approved the Stage 1 Site Investigation Plan and Budget. (*Exhibit 10*)

13. Petitioner submitted a 45-Day Addendum Report for Incident Number 20051539 to the Illinois EPA on April 24, 2006. (AR, p. 7) (*Exhibit 11*)

14. On May 9, 2006, the Agency sent Petitioner a letter acknowledging receipt of the 45-Day Report which included a Stage 1 Site Investigation Plan and Budget certification for Incident Number 20051539, that was dated April 24, 2006. That letter also approved the Stage 1 Site Investigation Plan and Budget, pursuant to the attached certification. (*Exhibit 12*)

15. The Illinois EPA, on May 22, 2006, sent Petitioner two letters (for Incidents Numbers 20051539 and 20060153, respectively) which stated that "this incident is not subject to Title XVI of the Act or 35 Ill. Admin. Code 731." (*Exhibit 13* and *14*).

16. On June 23, 2006, Petitioner appealed the May 22, 2006 letters in PCB 06-189 and 190.

17. On September 5, 2006, the Agency sent Petitioner two letters, one for each Incident Number, regarding this site which state as follows:

> Please disregard the previous Illinois EPA letter dated May 22, 2006 that indicated this incident is not subject to Title XVI of the Act or 35 Ill. Adm. Code 731. After further review it has been determined this Incident is subject to the Act and the regulations adopted thereunder.
>
> Therefore, you should proceed with the site investigation requirements of the rules.

(*Exhibit 15* and *16*). These Letters were sent because the Agency determined that the project manager's prior decisions were in error.

18. Petitioner submitted a 45-Day Addendum Report for Incident Number 20060153 to the Illinois EPA on July 6, 2006. (AR, p. 7) (*Exhibit 17*)

19. The Illinois EPA approved the Amended 45-Day Report dated December 15, 2006 for both Incident Numbers on March 8, 2007. (*Exhibit 18*)

20. On August 7, 2006, Petitioner sent a Stage 1 Report / Stage 2 Site Investigation Plan and Budget to the Illinois EPA for both incidents. (AR, p. 1)

21. On October 5, 2006, the Illinois EPA issued two decision letters after reviewing the 45-Day Report which included the Stage 1 Report / Stage 2 Site Investigation Plan and Budget. (AR, p. 157-166) (*Exhibit 19* and *20*) One letter disapproved the 45-Day Report because soil disposal manifests were not included and approved the Stage 1 Site Investigation Plan and Budget. (*Exhibit 19*). The other letter disapproved the Stage 2 Site Investigation Plan dated August 7, 2006 and raised issues related to the Stage 1 Site Investigation. (*Exhibit 20*)

22. On December 15, 2006 Petitioner forwarded a 45-Day Report Addendum that contained the copies of the manifests that were inadvertently omitted from the previously submitted report. (*Exhibit 21*)

23. On January 24, 2007, the Illinois EPA received a Stage II Site Investigation Plan and Budget, Additional Information and Reconsideration that was dated January 22, 2007. (AR, p. 167-245)

24. The Stage 2 Site Investigation Plan and Budget, Additional Information and Reconsideration dated January 22, 2007 provided additional information in response to the issues raised by the Agency in its October 5, 2006 letters and supplemented the information in the Stage 1 Report / Stage 2 Plan and Budget with additional data because petitioner acknowledged an error in the prior report and corrected that error. (AR, p. 168-169)

25. On March 8, 2007, the Agency sent a letter approving the Amended 45-Day Report dated December 15, 2006. (*Exhibit 22*).

26. On May 17, 2007, the Illinois EPA issued the decision letter rejecting the Stage 2 Plan and Budget, which is the subject of this appeal. (AR, p. 256-263) (*Exhibit 23*)

DISPUTED FACTS THAT CREATE A GENUINE ISSUE

The Agency's denial letter from which this appeal is taken frames the issues in dispute. Illinois Pollution Control Board Order dated July 12, 2007, citing 35 Ill. Admin. Code 105.412. The following is a list of the issues that create material facts that are in dispute, and that were raised in the letter from which this appeal is taken:

1. Whether SB-4 was advanced in accordance with the regulations and whether SB-4 was placed in an area defined by other samples.

2. Whether SB-5 was advanced in accordance with the regulations and whether the benzene contamination noted in SB-5 is an anomaly.

3. Whether the benzene contamination emanating from the excavated UST system had been adequately defined before SB-5, which found benzene contamination, was advanced. A question of fact exists as to IEPA's allegation that SB-5 was not placed in an appropriate area because benzene was detected in samples from that boring, but was not detected in the excavation samples from that area.

4. Whether soil samples selected from monitoring wells MW-1, MW-2, MW-4, and MW-5 exceed the minimum requirements to comply with the applicable regulations.

5. Whether soil samples collected to a depth of two to three feet along piping runs are acceptable for determining the contamination extent at an entire site or whether such piping run samples are appropriate for determining only whether there were leaks from the piping.

6. Whether monitoring wells and their well screens were installed in a manner that is in compliance with applicable regulations.

7. Whether the locations of two proposed monitoring wells and one proposed soil boring to the east of the gasoline pump are in accordance with generally accepted engineering practices or principles of professional geology and applicable regulations.

8. Whether the proposed monitoring well located south of the gasoline pump islands is necessary, whether soil contamination has been defined in that area, or whether the piping run samples are capable of determining in accordance with generally accepted engineering practices or principles of professional geology whether groundwater may be contaminated in that area or whether soil contamination has been defined in accordance with generally accepted engineering practices or principles of professional geology.

9. Whether the proposed additional soil borings west of the diesel tank excavation are in accordance with generally accepted engineering practices or principles of professional geology.

10. Whether Early Action sampling activities were conducted in accordance with applicable regulations, or just the missed benzene contamination.

11. Whether the Stage 2 Groundwater Sampling Proposal can be evaluated by the Agency.

12. Whether the monitoring wells installed for Stage 1 were installed in accordance with generally accepted engineering practices or principles of professional geology.

13. Whether costs for certain soil boring installation and laboratory analysis exceeded the minimum requirements necessary to comply with the Act.

14. Whether the costs associated with the installation and sampling of monitoring wells are eligible for payment from the Fund.

15. Whether costs for preparing and reviewing certain budgets are eligible for payment from the Fund.

16. Whether the Agency properly rejected the proposed Stage 2 Plan and Budget.

17. Whether the actions taken by Petitioner at the service station were in compliance with applicable regulations, including whether the actions met generally accepted engineering practices or principles of professional geology.

In short, there are numerous material factual issues in dispute in this matter and summary judgment is therefore not appropriate. Petitioner plans to present testimony at hearing to support Petitioner's position and to cross examine the project manager with regard to these disputed facts.

ARGUMENT

I. Standard for summary judgment.

Petitioner agrees that summary judgment is appropriate when the pleadings, depositions, and affidavits disclose that there is no genuine issue as to a material fact. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). However the pleading, depositions and affidavits must be viewed strictly against the movant and in favor of the non-movant. *Id.* "Because summary judgment is a drastic means of disposing of litigation, a court must exercise extraordinary diligence in reviewing the record so as not to preempt a party's right to fully present the factual basis for its claim." *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 205-206, 837 N.E.2d 99, 106 (Ill. 2005). In addition,

summary judgment should only be granted "when the right of the moving party is clear and free from doubt." *Id.* "In ruling upon a motion for summary judgment, a court has a duty to construe the evidence strictly against the movant and liberally in favor of the nonmovant." *Chatham Foot Specialists, P.C. v. Health Care Serv. Corp.*, 216 Ill. 2d 366, 376, 837 N.E.2d 48, 55 (Ill. 2005). Under these standards, summary judgment is not appropriate in IEPA's favor.[1]

II. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT IN THIS CASE.

A. Background

The facility that is the subject of this appeal is a service station owned by L. Keller Oil Properties that is located in Farina, Illinois. (AR, p. 8) On November 15, 2005, the three gasoline tanks at this service station were investigated to determine if they might be leaking and it was determined that they were leaking. Accordingly, an incident was reported to the Illinois Emergency Management Agency ("IEMA") and Incident Number 20051539 was assigned on November 15, 2005. (AR, p. 7) When the tanks were pulled on February 7, 2006, at the direction of the fire marshal, a second incident was called in to IEMA and Incident Number 20060136 was assigned. (*Exhibit 24*). Subsequently this second incident number was consolidated into the first incident number. *Id.* The gasoline tanks and the excavation pit from their removal are located north and slightly to the west of the building. (AR, p. 28)

The diesel tank which was located to the west of the building and a heating oil tank located south of the building were then investigated on February 10, 2006, for releases and as a result, Incident Number 20060513 was obtained. (AR, p. 7) When these tanks were pulled on

[1] In addition, the Agency's arguments concerning burden of proof are not appropriate in a motion for summary judgment, but instead only relates to Petitioner's burden at hearing. Such arguments should be ignored by the Board in deciding whether summary judgment should be granted.

March 22, 2006, a second incident was called in to IEMA at the direction of the fire marshal. (*Exhibit 25*) Incident number 20060346 was assigned to both tanks and has subsequently been consolidated with Incident Number 20060513. *Id.* Even though the heating oil tank had leaked, all the contamination surrounding the heating soil tank was removed during early action. Samples from the excavation that remained after Early Action Activities confirmed that the contamination had been removed. Thus, the heating oil tank area did not need further investigation. The heating oil tank is not one of the subjects of this appeal.

Because two separate incidents had been reported for this facility and because of the regulatory deadlines that require timely filing of these reports, separate 20-Day Reports, 45-Day Reports, and Addenda to the 45-Day Reports were sent to the Agency. Data from the excavation samples that were collected when the tanks were pulled are found in the 45-Day Report Addenda. (*Exhibit 11*, and *Exhibit 17*). There was one set of these reports for each incident. The 45-Day Report Addenda also contained certifications for performing a Stage 1 Site Investigation. (*Exhibit 11, p. 17*) The Agency approved Petitioner's requests to perform a Stage 1 Site Investigation, based on the certifications, and the Stage 1 Site Investigation work was performed. (*Exhibits 12* and *19*)

For purposes of the subsequent investigations of the excavated areas, one set of reports has been submitted that includes both incident numbers. Data from the Stage 1 Investigation are included in the Stage II Site Investigation Plan and Budget which covers both incidents. Data from two addition borings, SB 7 and 8, are included in the Stage II Site Investigation Plan and Budget, Additional Information and Reconsideration which also includes information in response to issues raised by the Agency regarding the Stage 1 Investigation and the Stage II

Investigation Plan and Budget. A separate Stage 1 Site Investigation report is not required by 35 Ill. Admin. Code 734. Rather, the results of all stages of site investigation will be compiled in a Site Investigation Completion Report after completion of the Stage 2 Investigation, and if necessary, a Stage 3 Investigation of offsite contamination.

Petitioner is appealing the Agency's decision letter dated May 17, 2007. The issues raised in that letter are not issues that can be resolved by a motion for summary judgment because there are genuine factual disputes. The issues relate to decisions that were based on the field observations and the appropriate standard of Agency review includes whether the locations of certain soil borings and installation of monitoring wells were "in accordance with generally accepted engineering practices or principles of professional geology." 35 Ill. Admin. Code 734.510. This is the standard of review that the Agency is required to use when reviewing such reports. Petitioner maintains that the work performed at the site met that standard.

B. A genuine issue of material fact exists as to Petitioner's soil borings.

Petitioner's Stage 1 Site Investigation was performed in compliance with applicable regulations and the Agency's brief references no facts to support the Agency's claim that the Stage 1 Site Investigation was not in compliance with applicable rules. The regulations at 35 Ill. Admin. Code 734.315 apply to Stage 1 Site Investigations. These rules contain some specific requirements, but do not specify the exact location of each boring; instead, the rules provide that field observations should be used when advancing borings. 35 Ill. Admin. Code 734.315(a)(1)(A). In compliance with the regulations, the exact boring locations and depth of the borings were based on field observations and data from samples collected during Early Action. (*See* Affidavit of J. Weinhoff, attached as *Exhibit 26.*) Therefore, a genuine issue of

material fact exists that can only be resolved at a hearing in which Petitioner has the opportunity to present testimony and question the project manager.

Further, there is a factual dispute as to whether the regulations at 35 Ill. Admin. Code 734 allow samples collected from along piping runs to adequately characterize releases from underground storage tanks that may be located at a depth of 10 feet or more below the locations of the piping run. The Agency has contended that piping run samples may be used to characterize an entire area of the site. However, it is contrary to generally accepted professional engineering practices and principles of professional geology to use samples collected from 2 feet below ground surface to determine whether there is contamination located several feet deeper. (*See* Affidavit of J. Weinhoff) Keller Oil believes that such piping run samples are properly used to characterize whether there was a release from the piping run. *Id.* Hence, their location and the depth of the borings are dependent on the depth of the piping. If the piping is at a shallower depth than the tanks, piping run samples would not detect contamination that exists at or below the bottoms of the tanks. *Id.* At this site, groundwater was approximately 8 to 10 feet below grade and could cause contamination to migrate away from the tank locations. Thus, samples along piping runs, which are typically collected between 2 to 3 feet below grade cannot characterize whether there may be contamination at the depth of the tank bottom. *Id.* This is a factual issue that should be the subject of testimony and cross examination at hearing.

C. A genuine issue of material fact exists as to Petitioner's installation of monitoring wells.

The Agency's denial letter claims that the monitoring well screens in the monitoring wells should have been positioned so that a portion of the screen would extend above the water table to intersect what the Agency appears to be referring to as a groundwater interval where

gasoline, which tends to float on water, may be located. It also appears from the Agency's review notes that the IEPA project manager believes that borings to install monitoring wells must end at the point where groundwater is encountered. (AR, p. 149) These Agency positions are contrary to generally accepted engineering practices or principles of professional geology and are contrary to the requirements in the Board's regulations. (*See* Affidavit of C. Rowe, attached as *Exhibit 27*.) Specifically, 35 Ill. Admin. Code 734.315(a)(2)(E)(ii) states that "the screens must be contained within the saturated zone." [emphasis added] If the screen extends above the water table in order to intercept the layer that the Agency is discussing, the screen would not be contained within the saturated zone and the well would likely not produce water.

It further appears, based on IEPA's brief on pages 24 and 25, that the Agency believes that the well screen should be positioned so that only a free product layer that may be floating on groundwater should be intercepted by the well screen. This argument defies logic. Unless a site is extremely contaminated and several feet of free product are floating on the groundwater, it is not practical or even possible to screen a well over such a narrow interval. A hearing is required so that the factual dispute concerning generally accepted engineering practices or principles of professional geology can be resolved.

Petitioner also plans to present testimony that the depth of groundwater is determined during drilling of the well and related field activities and is based on professional experience. (*See* Affidavit of C. Rowe.) How high groundwater will rise in a well depends on numerous factors such as whether the groundwater being sampled is in a confined layer, the type of soil and if it is consolidated, recent rain events, whether the location of the well is under concrete or grass and whether the well is located at the bottom of a hill, in a drainage swale or at another low area.

Id. Petitioner also plans to present testimony that, if a well is bailed properly prior to sampling, that water will be drawn into the well from the top of the water table, even if the static conditions in the well are such that the water level in the well is above the well screen. *Id.* How far the water raises up the riser pipe is irrelevant. In addition, a hearing would allow testimony by Petitioner's witnesses, who have installed hundreds of monitoring wells.

Further, while the regulations at 35 Ill. Admin. Code 734.430(a)(3) state that "Wells must be screened to allow sampling only at the desired interval" and the Agency's denial letter refers to a "groundwater interval," the term "groundwater interval" in not defined in any in the applicable regulations. The term "groundwater" is defined in the Illinois Environmental Protection Act and in the applicable regulations as:

> "Groundwater" means underground water which occurs within the saturated zone and geologic materials where the fluid pressure in the pore space is equal to or greater than atmospheric pressure [415 ILCS 5/3.210].
>
> This definition is repeated in the applicable regulations at 35 Ill. Admin. Code 734.115.

The term "interval" is not cited in the regulations, thus, one must refer to generally accepted usage of that term. *People v. Qualls*, 365 Ill. App. 3d 1015, 1019, 851 N.E.2d 767, 770 (Ill. App. Ct. 2006); *Ahmad v. Board of Educ.*, 365 Ill. App. 3d 155, 165, 847 N.E.2d 810, 819 (Ill. App. Ct. 2006). Webster's Third New International Dictionary, 1993 defines "interval" in part as:

> 2.a. A space between things, empty space between objects; 3. something that breaks or interrupts a uniform series or surface: an intervening part.

Hence, the term "groundwater interval" could refer to the groundwater producing layer between two confining layers of soil or between the water table and the uppermost aquitard. Further, there is a valid basis for not wanting a well screen to intersect more than one groundwater aquifer or interval. If a well is screened through a contaminated aquifer and a clean aquifer below that, the well could serve as a conduit for contamination to migrate through the aquitard to the lower, clean aquifer. (*See* Affidavit of J. Weinhoff.) In short, whether the monitoring wells that were installed during the Stage 1 Investigation met applicable requirements will require testimony at hearing, and constitutes a disputed question of material fact. Hence, the Agency's Motion for Summary Judgment should be denied.

D. Whether the work that was performed met generally accepted engineering practices or principles of professional geology is not a question of law.

The standards for review of plans, budgets or reports found at 35 Ill. Admin. Code 734.510 require that technical reviews not only consist of a review of the steps proposed and completed but that: "The overall goal of the technical review for reports must be to determine if the plan has been fully implemented in accordance with **generally accepted engineering practices or principles of professional geology**, if the conclusions are consistent with the information obtained while implementing the plan, and if the requirements of the Act and regulations have been satisfied." Petitioner contends that the sampling it has performed and plans to perform are in accordance with generally accepted engineering practices or principles of professional geology.

The Agency claims on page 23 of its motion that the Stage II Site Investigation Plan was not rejected based on additional proposed borings, but because the Agency believes, mistakenly, that *the monitoring wells* were not installed properly. In order for the Board to determine that

the wells were installed properly and in accordance with generally accepted engineering practices or principles of professional geology, Petitioner plans to present testimony at hearing consistent with the affidavits it has submitted with this response, and to either cross examine the project manager or to call her as a hostile witness. The issues related to the proper installation of the monitoring wells involve facts that are in dispute and are not questions of law that can be determined through a motion for summary judgment.

E. The Required Certification was submitted to the Agency.

The Agency's denial letter claims and the Agency's Motion for Summary Judgment argues that not all of the owner/operator signature pages and the Licensed Professional Engineer or Licensed Professional Geologist certifications were included in the January 22, 2007 submission. The Agency's letter did not specify what signature pages and certifications were missing. However, signature pages and certifications were provided in the Stage II Site Investigation Plan and Budget that was submitted on August 7, 2006 and in the Stage II Site Investigation Plan and Budget Additional Information submitted on January 22, 2007. AR 21, 39, and 182. Accordingly, the required certifications were sent to the Agency and were in the Agency's possession. If the Agency believed that any additional certification was required, the Agency could have simply telephoned Petitioner and asked for the additional certification, but the Agency did not do so.

F. Whether the Agency's denial of the budget was proper is a question of fact.

Because the Agency wrongfully rejected Petitioner's Stage 1 Site Investigation, the Agency also wrongfully rejected Petitioner's proposed State 2 Site Investigation Plan and Budget. A hearing must be held to allow testimony about the facts that are in dispute over the Agency's rejection of the Phase 2 Plan and Budget.

WHEREFORE, L. Keller Oil Properties (Farina) respectfully requests that the Board deny IEPA's motion for summary judgment.

Respectfully submitted,

L. Keller Oil Properties (Farina)

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One of Its Attorneys

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