ILLINOIS POLLUTION CONTROL BOARD
March 20, 2008

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| L. KELLER OIL PROPERTIES, INC./FARINA, | ) | |
| Petitioner, | ) | |
| v. | ) | PCB 07-147 (UST Appeal) |
| ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, | ) | |
| Respondent. | ) | |

ORDER OF THE BOARD (by A.S. Moore):

On June 27, 2007, L. Keller Oil Properties, Inc./Farina (Keller) filed a petition seeking the Board's review of a May 17, 2007 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2006); 35 Ill. Adm. Code 105.404. The Agency rejected Keller's Stage II Site Investigation Plan and Budget regarding an underground storage tank (UST) site at 1003 West Washington Avenue, Farina, Fayette County (Site).

In an order dated December 6, 2007, the Board partially affirmed and partially reversed the Agency's determinations in rejecting Keller's proposed plan and budget. In resolving one of the contested issues, the Board affirmed the Agency by finding that the record supported the Agency's determination that Keller did not construct monitoring wells in a manner that allows for sampling at only the desired interval. Accordingly, the Board directed Keller to submit to the Agency an amended Stage II Site Investigation plan and budget consistent with the terms of its opinion and order.

On January 11, 2008, Keller filed a motion to reconsider and request for oral argument (Mot.), accompanied by a brief in support of its motion (Brief). On January 18, 2008, the Agency filed its response to petitioner's motion for reconsideration and request for oral argument (Resp.). On January 29, 2008, Keller filed a motion for leave to file a reply (Mot. Leave) in support of its motion for reconsideration, accompanied by its reply (Reply).

For the reasons stated below, the Board denies Keller's motion for reconsideration and affirms its December 6, 2007 opinion and order in its entirety. In addition, the Board denies Keller's request for oral argument.

## PRELIMINARY MATTER

In its motion for leave to file a reply in support of its motion for reconsideration, Keller argues that, if it is not granted leave to reply to claims and arguments made in the Agency's response to the motion, it will suffer material prejudice. Mot. Leave at 2. The Board's

procedural rules provide that, "[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board . . . in its disposition of the motion." 35 Ill. Adm. Code 101.500(d). The Board has received no response to Keller's motion for leave to file a reply. The Board grant's Keller's motion for leave, accepts the reply filed with its motion, and below summarizes the arguments made in the reply.

## KELLER'S MOTION TO RECONSIDER

Keller's motion seeks the Board's reconsideration of the portion of its December 6, 2007 opinion and order affirming the Agency's determination that monitoring wells at the Site were not constructed in a manner that allows for sampling at only the desired interval and that Keller therefore did not comply with Stage 1 groundwater monitoring requirements. Mot. Leave at 2; *see* Brief at 2. As the basis for its motion, Keller cites "newly discovered evidence, errors in the Board's previous application of existing law, and facts in the Record that the Board appears to have overlooked." *Id*. Keller also seeks reconsideration of the Board's denial of attorney fees and requests oral argument before the Board. *Id*. at 3

In support of its argument that the Board should reconsider its decision that the monitoring wells at the Site were not constructed in a manner that allows for sampling at only the desired interval, Keller lodges seven distinct arguments. First, Keller claims that the Board applied the term "desired interval" in a manner inconsistent with the rules of regulatory interpretation and with the Board's regulations when read as a whole. Brief at 25-33. Second, Keller argues that the Board's application of the term "desired interval" is not consistent with 35 Ill. Adm. Code 734.430(a) or with the evidence in the record. *Id*. at 34-36. Third, Keller argues that the record does not support the conclusion that screening monitoring wells at the static groundwater level is reasonable for detecting the presence of petroleum indicator contaminants because those contaminants are lighter than groundwater. *Id*. at 36-40. Fourth, Keller argues that the Board's opinion and order is not consistent with accepted principles of professional geology and therefore is not consistent with 35 Ill. Adm. Code 734.510(a). *Id*. at 40-42. Fifth, Keller claims that the record demonstrates that groundwater at the Site exists under confined conditions. *Id*. at 43-46. Sixth, Keller claims that the Board erroneously accepted the Agency's conclusion that results of hydraulic conductivity testing are consistent with the silty clay unit at the Site being a groundwater-producing layer. *Id*. at 46-48. Finally, Keller disputes the Agency' and Board's conclusion that, even after setting the well screen above the static water level, the well screen interval would have provided adequate collection of groundwater samples. *Id*. at 48-51. In support of this argument, Keller refers to installation of a new monitoring well on December 6, 2007. *Id*. at 49-50; *see* Brief at Appendix A (showing December 11, 2007 drilling date)

In addition, Keller argues that the Board should reconsider its rejection of Keller's request for attorney fees and costs. Brief at 51. Keller further argues that it should be permitted to file a brief addressing the fees and costs related to issues on which it has prevailed before the Board and which it may be entitled to recover. *Id*. at 52.

## AGENCY'S RESPONSE

The Agency argues that Keller has failed to establish any criterion that might justify reconsideration of the Board's December 6, 2007 opinion and order. Resp. at 2. First, the Agency claims that Keller has not presented newly-discovered facts or evidence and "is merely attempting to re-argue issues that were already raised and briefed" before the Board issued its opinion and order. *Id*. The Agency argues that, although Keller attempts to introduce as new evidence the drilling of a new well, reference to the new drilling should be struck because the drilling was not before the Agency when it made its determination and is not relevant. *Id*. at 4.

Second, the Agency argues that there is "no justification" for granting Keller's motion to reconsider on the basis that the Board misapplied the law. Resp. at 2. Although noting Keller's seven arguments on this point, the Agency claims that the Board faced these arguments in Keller's pleadings and at hearing and addressed them in its opinion and order. *Id*. at 3. Third, the Agency argues that Keller's motion "is not premised on any changes in the applicable law since the date of the Board's decision." *Id*. at 2. Finally, the Agency argues that oral argument is not appropriate to address a claim that there is newly-discovered evidence and where Keller has had a full hearing of its issues and arguments before the Board. *Id*. at 4-5.

## KELLER'S REPLY

Keller states in its Reply that it bases its motion to reconsider on four chief arguments. First, Keller argues that the Agency misrepresented to the Board that the silty clay layer at the Site is a water-bearing unit and that Keller failed to explain that groundwater at the Site was under hydrostatic pressure. Reply at 2. Second, Keller argues that the Board should consider the new monitoring well drilled in December 2007, which it claims to have installed and screened according to the terms of the Board's opinion and order. *Id*. at 3-5; *see* Brief at Appendix A. Keller further argues that the Board should consider this new monitoring well as newly-discovered evidence. Reply at 6-7. Third, Keller claims that, if the "desired interval" is to be interpreted as that static water level in the monitoring well, "it would be impossible as a matter of law and fact to apply the Agency's interpretation of 'desired interval' universally . . . ." *Id*. at 9. Fourth, Keller argues that installation of monitoring wells at the Site according to the Agency's position would result in violation of Board regulations. *Id*. at 10, citing 35 Ill. Adm. Code 734.430.

In addition, Keller renews its request for reconsideration with regard to attorney fees and also renews its request for oral argument before the Board. Reply at 13.

## BOARD DISCUSSION AND CONCLUSION

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." Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); *see also* 35 Ill. Adm. Code 101.902.

In its motion, Keller emphasizes data submitted as Appendix A, a "Report on Construction of MW-2A," which is dated January 10, 2008, and which refers to borehole drilling begun and completed on December 11, 2007. *See* Mot. at 5, Mot. at Appendix A; *see also* Reply at 3-7. As the Board indicated in accepting Keller's petition for review in this case, "[h]earings will be based exclusively on the record before the Agency at the time the Agency issued its determination." Keller Oil Properties, Inc./Farina v. IEPA, PCB 07-147, slip op. at 1 (July 12, 2007), citing 35 Ill. Adm. Code 105.412. In its opinion and order dated December 6, 2007, the Board addressed its standard of review by stating that it "will not consider new information that was not before the Agency prior to its final determination regarding the issues on appeal." Keller, PCB 07-147, slip op at 40, citing Kathe's Auto Service Center v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995).

In considering Keller's motion for reconsideration, the Board need not determine whether the material submitted by Keller as Appendix A to its motion for reconsideration constitutes newly-discovered evidence. If it is new, it could not have been before the Agency at the time of its final determination and lies beyond the Board's review on appeal. If it does not constitute new evidence, it cannot serve as the basis for reconsideration of the Board's December 6, 2007 opinion and order.

In this regard, the Board notes that its December 6, 2007 opinion and order directed Keller to submit an amended Stage 2 Site Investigation plan to the Agency. The Board declines to review the material submitted by Keller as Appendix A to its motion for reconsideration, which appears to be information that the Agency would first consider as an element of an amended plan. *See* 415 ILCS 5/57.7(a) (2006).

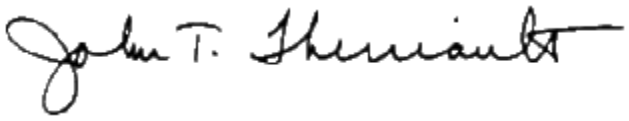
In addressing the issue of monitoring wells in its December 6, 2007, opinion, the Board indicated that "the Agency's review is generally limited to the information submitted by the petitioner" and that "the Board's review of the Agency's determination is also limited to the information in the Agency's administrative record." Keller, PCB 07-147, slip op at 41. After the opinion noted that Keller's response to the Agency's October 5, 2006 determination had not addressed the Agency's concerns regarding well screen placement, the Board concluded that "the plan submitted to [the] Agency by the petitioner's consultant did not include sufficient information for the Agency to determine that Keller constructed the monitoring wells in accordance with the requirements of Section 734.430(a)." *Id*. at 42.

While it has reviewed the parties' arguments on the motion for reconsideration, the Board is not persuaded that the conclusion above regarding the plan submitted to the Agency by Keller constitutes an erroneous application of the existing law or that it overlooked facts in the record. As stated above, the Board need not determine whether the material submitted by Keller as Appendix A to its motion for reconsideration constitutes newly-discovered evidence. Furthermore, Keller has not based its motion for reconsideration on a change in the law. *See* Mot. at 2, 6.

For the reasons stated above, the Board denies Keller's motion for reconsideration and affirms its December 6, 2007 opinion and order in its entirety. In addition, the Board denies Keller's request for oral argument.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 20, 2008, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board