

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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STATE OF ILLINOIS
Pollution Control Board

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

NOTICE

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

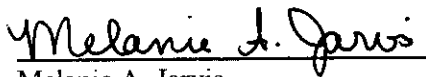
Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

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

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a MOTION FOR SUMMARY JUDGEMENT, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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217/782-9143 (TDD)
Dated: July 17, 2007

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

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

NOW COMES the Respondent, the Illinois Environmental Protection Agency (“Illinois EPA”), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, 101.508 and 101.516, hereby respectfully moves the Illinois Pollution Control Board (“Board”) to enter summary judgment in favor of the Illinois EPA and against the Petitioner, L. Keller Oil Properties/Farina (“Keller-Farina”), in that there exist herein no genuine issues of material fact, and that the Illinois EPA is entitled to judgment as a matter of law with respect to the following grounds. In support of said motion, the Illinois EPA states as follows:

I. STANDARD FOR ISSUANCE AND REVIEW

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 483, 693 N.E.2d 358, 370 (1998); McDonald’s Corporation v. Illinois Environmental Protection Agency, PCB 04-14 (January 22, 2004), p. 2.

Section 57.8(i) of the Illinois Environmental Protection Act (“Act”) (415 ILCS 5/57.8(i)) grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the

Act (415 ILCS 5/40). Section 40 of the Act, the general appeal section for permits, has been used by the legislature as the basis for this type of appeal to the Board. Thus, when reviewing an Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund, the Board must decide whether or not the application as submitted demonstrates compliance with the Act and Board regulations. Rantoul Township High School District No. 193 v. Illinois EPA, PCB 03-42 (April 17, 2003), p. 3.

In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must look to the documents within the Administrative Record ("Record" or "AR"). The Illinois EPA asserts that the Record and the arguments presented in this motion are sufficient for the Board to enter a dispositive order in favor of the Illinois EPA on all relevant issues. Accordingly, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA's decision.

II. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

III. ISSUES

The issues before the Board are framed by the Illinois EPA decision letter and are as follows:

- 1) Whether the Petitioner, by drilling soil borings during Stage 1 in excess of the soil borings required in 35 Ill. Adm. Code 734.315, exceeded the minimum requirements of the Act and regulations thereunder.
- 2) Whether the Petitioner's wells were constructed in a manner that allows for samples to

be taken at the desired interval pursuant to 35 Ill. Adm. Code 734.430.

As will be argued below, the facts in this case are undisputed and clearly demonstrate that the decisions were appropriate and should be affirmed.

IV. THE ILLINOIS EPA IS ENTITLED TO SUMMARY JUDGMENT BASED ON THE FACTS AND LAW

A. Relevant Facts

The facts in the Illinois EPA record supporting this motion are as follows:

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 which stored gasoline, diesel fuel and heating oil. (AR, p.7)
2. LUST Incident Numbers 20051539, 20060136, 20060153 and 20060346 were obtained by Keller Farina. The site has been assigned LPC #0514155011 – Fayette. (AR, p.7)
3. The 20-Day Certification for Incident Number 20060153 was submitted to Illinois EPA by the Petitioner on February 21, 2006. (AR p. 7)(Exhibit 1)
4. On December 5, 2005, the Illinois EPA approved an extension of the early action period through April 30, 2006. (AR, p. 7)(Exhibit 2)
5. The Petitioner submitted the 45-Day Report and Stage 1 Certification on December 20, 2005. (AR, p. 7) (Exhibit 3)
6. The Illinois EPA rejected the 45-Day Report on May 22, 2006. (AR, p. 7)(Exhibit 4)
7. Petitioner submitted a 45-Day Addendum Report to the Illinois EPA on July 6, 2006. (AR, p.7)(Exhibit 5)
8. The Illinois EPA approved the 45-Day Report on March 8, 2007. (Exhibit 6)
9. On August 7, 2006, Petitioner sent a Stage 1 Report/Stage 2 Site Investigation Plan and Budget

to the Illinois EPA. (AR, p. 1)

10. The Illinois EPA issued a decision letter on October 5, 2006 denying the Stage 1 Report/Stage 2 Site Investigation Plan and Budget. (AR, p.157)

11. On January 24, 2007, the Illinois EPA received a Stage II Site Investigation Plan and Budget, Additional Information and Reconsideration. (AR, p.167)

12. The Stage II Site Investigation Plan and Budget, Additional Information and Reconsideration was not a complete Stage II Site Investigation Plan and Budget, but merely responded to the denial points the Illinois EPA listed in its October 5, 2006 denial letter. (AR, p. 168)

13. On May 17, 2007, the Illinois EPA issued a decision letter rejecting the State 2 Plan and Budget, which is the subject of this appeal. (AR, p. 256)

B. Relevant Law

35 Ill. Adm. Code 734.210, Early Action, states as follows:

- a) Upon confirmation of a release of petroleum from an UST system in accordance with regulations promulgated by the OSFM, the owner or operator, or both, must perform the following initial response actions within 24 hours after the release:
 - 1) Report the release to IEMA (e.g., by telephone or electronic mail);
 - 2) Take immediate action to prevent any further release of the regulated substance to the environment; and
 - 3) Identify and mitigate fire, explosion and vapor hazards.
- b) Within 20 days after initial notification to IEMA of a release plus 14 days, the owner or operator must perform the following initial abatement measures:
 - 1) Remove as much of the petroleum from the UST system as is necessary to prevent further release into the environment;
 - 2) Visually inspect any aboveground releases or exposed below ground releases and prevent further migration of the released substance into surrounding soils and groundwater;

- 3) Continue to monitor and mitigate any additional fire and safety hazards posed by vapors or free product that have migrated from the UST excavation zone and entered into subsurface structures (such as sewers or basements);
 - 4) Remedy hazards posed by contaminated soils that are excavated or exposed as a result of release confirmation, site investigation, abatement or corrective action activities. If these remedies include treatment or disposal of soils, the owner or operator must comply with 35 Ill. Adm. Code 722, 724, 725, and 807 through 815;
 - 5) Measure for the presence of a release where contamination is most likely to be present at the UST site, unless the presence and source of the release have been confirmed in accordance with regulations promulgated by the OSFM. In selecting sample types, sample locations, and measurement methods, the owner or operator must consider the nature of the stored substance, the type of backfill, depth to groundwater and other factors as appropriate for identifying the presence and source of the release; and
 - 6) Investigate to determine the possible presence of free product, and begin removal of free product as soon as practicable and in accordance with Section 734.215 of this Part.
- c) Within 20 days after initial notification to IEMA of a release plus 14 days, the owner or operator must submit a report to the Agency summarizing the initial abatement steps taken under subsection (b) of this Section and any resulting information or data.
 - d) Within 45 days after initial notification to IEMA of a release plus 14 days, the owner or operator must assemble information about the site and the nature of the release, including information gained while confirming the release or completing the initial abatement measures in subsections (a) and (b) of this Section. This information must include, but is not limited to, the following:
 - 1) Data on the nature and estimated quantity of release;
 - 2) Data from available sources or site investigations concerning the following factors: surrounding populations, water quality, use and approximate locations of wells potentially affected by the release, subsurface soil conditions, locations of subsurface sewers, climatological conditions and land use;
 - 3) Results of the site check required at subsection (b)(5) of this Section; and
 - 4) Results of the free product investigations required at subsection (b)(6) of this Section, to be used by owners or operators to determine whether free product must be recovered under Section 734.215 of this Part.

- e) Within 45 days after initial notification to IEMA of a release plus 14 days, the owner or operator must submit to the Agency the information collected in compliance with subsection (d) of this Section in a manner that demonstrates its applicability and technical adequacy.
- f) *Notwithstanding any other corrective action taken, an owner or operator may, at a minimum, and prior to submission of any plans to the Agency, remove the tank system, or abandon the underground storage tank in place, in accordance with the regulations promulgated by the Office of the State Fire Marshal (see 41 Ill. Adm. Code 160, 170, 180, 200). The owner may remove visibly contaminated fill material and any groundwater in the excavation which exhibits a sheen. For purposes of payment of early action costs, however, fill material shall not be removed in an amount in excess of 4 feet from the outside dimensions of the tank [415 ILCS 5/57.6(b)].* Early action may also include disposal in accordance with applicable regulations or ex-situ treatment of contaminated fill material removed from within 4 feet from the outside dimensions of the tank.
- g) For purposes of payment from the Fund, the activities set forth in subsection (f) of this Section must be performed within 45 days after initial notification to IEMA of a release plus 14 days, unless special circumstances, approved by the Agency in writing, warrant continuing such activities beyond 45 days plus 14 days. The owner or operator must notify the Agency in writing of such circumstances within 45 days after initial notification to IEMA of a release plus 14 days. Costs incurred beyond 45 days plus 14 days must be eligible if the Agency determines that they are consistent with early action.

BOARD NOTE: Owners or operators seeking payment from the Fund are to first notify IEMA of a suspected release and then confirm the release within 14 days to IEMA pursuant to regulations promulgated by the OSFM. See 41 Ill. Adm. Code 170.560 and 170.580. The Board is setting the beginning of the payment period at subsection (g) to correspond to the notification and confirmation to IEMA.

- h) The owner or operator must determine whether the areas or locations of soil contamination exposed as a result of early action excavation (e.g., excavation boundaries, piping runs) or surrounding USTs that remain in place meet the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants.
 - 1) At a minimum, for each UST that is removed, the owner or operator must collect and analyze soil samples as indicated in subsections (h)(1)(A). The Agency must allow an alternate location for, or excuse the collection of, one or more samples if sample collection in the following locations is made impracticable by site-specific circumstances.
 - A) One sample must be collected from each UST excavation wall. The samples must be collected from locations representative of soil that is the most contaminated as a result of the release. If an area of contamination cannot be

identified on a wall, the sample must be collected from the center of the wall length at a point located one-third of the distance from the excavation floor to the ground surface. For walls that exceed 20 feet in length, one sample must be collected for each 20 feet of wall length, or fraction thereof, and the samples must be evenly spaced along the length of the wall.

- B) Two samples must be collected from the excavation floor below each UST with a volume of 1,000 gallons or more. One sample must be collected from the excavation floor below each UST with a volume of less than 1,000 gallons. The samples must be collected from locations representative of soil that is the most contaminated as a result of the release. If areas of contamination cannot be identified, the samples must be collected from below each end of the UST if its volume is 1,000 gallons or more, and from below the center of the UST if its volume is less than 1,000 gallons.
 - C) One sample must be collected from the floor of each 20 feet of UST piping run excavation, or fraction thereof. The samples must be collected from a location representative of soil that is the most contaminated as a result of the release. If an area of contamination cannot be identified within a length of piping run excavation being sampled, the sample must be collected from the center of the length being sampled. For UST piping abandoned in place, the samples must be collected in accordance with subsection (h)(2)(B) of this Section.
 - D) If backfill is returned to the excavation, one representative sample of the backfill must be collected for each 100 cubic yards of backfill returned to the excavation.
 - E) The samples must be analyzed for the applicable indicator contaminants. In the case of a used oil UST, the sample that appears to be the most contaminated as a result of a release from the used oil UST must be analyzed in accordance with Section 734.405(g) of this Part to determine the indicator contaminants for used oil. The remaining samples collected pursuant to subsections (h)(1)(A) and (B) of this Section must then be analyzed for the applicable used oil indicator contaminants.
- 2) At a minimum, for each UST that remains in place, the owner or operator must collect and analyze soil samples as follows. The Agency must allow an alternate location for, or excuse the drilling of, one or more borings if drilling in the following locations is made impracticable by site-specific circumstances.
- A) One boring must be drilled at the center point along each side of each UST, or along each side of each cluster of multiple USTs, remaining in place. If a side exceeds 20 feet in length, one boring must be drilled for each 20 feet of

side length, or fraction thereof, and the borings must be evenly spaced along the side. The borings must be drilled in the native soil surrounding the UST(s) and as close practicable to, but not more than five feet from, the backfill material surrounding the UST(s). Each boring must be drilled to a depth of 30 feet below grade, or until groundwater or bedrock is encountered, whichever is less. Borings may be drilled below the groundwater table if site specific conditions warrant, but no more than 30 feet below grade.

- B) Two borings, one on each side of the piping, must be drilled for every 20 feet of UST piping, or fraction thereof, that remains in place. The borings must be drilled as close practicable to, but not more than five feet from, the locations of suspected piping releases. If no release is suspected within a length of UST piping being sampled, the borings must be drilled in the center of the length being sampled. Each boring must be drilled to a depth of 15 feet below grade, or until groundwater or bedrock is encountered, whichever is less. Borings may be drilled below the groundwater table if site specific conditions warrant, but no more than 15 feet below grade. For UST piping that is removed, samples must be collected from the floor of the piping run in accordance with subsection (h)(1)(C) of this Section.
 - C) If auger refusal occurs during the drilling of a boring required under subsection (h)(2)(A) or (B) of this Section, the boring must be drilled in an alternate location that will allow the boring to be drilled to the required depth. The alternate location must not be more than five feet from the boring's original location. If auger refusal occurs during drilling of the boring in the alternate location, drilling of the boring must cease and the soil samples collected from the location in which the boring was drilled to the greatest depth must be analyzed for the applicable indicator contaminants.
 - D) One soil sample must be collected from each five-foot interval of each boring required under subsections (h)(2)(A) through (C) of this Section. Each sample must be collected from the location within the five-foot interval that is the most contaminated as a result of the release. If an area of contamination cannot be identified within a five-foot interval, the sample must be collected from the center of the five-foot interval, provided, however, that soil samples must not be collected from soil below the groundwater table. All samples must be analyzed for the applicable indicator contaminants.
- 3) If the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants have been met, and if none of the criteria set forth in subsections (h)(4)(A) through (C) of this Section are met, within 30 days after the completion of early action activities the owner or operator must submit a report demonstrating compliance with those remediation objectives. The report must include, but not be limited to, the following:

- A) A characterization of the site that demonstrates compliance with the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants;
 - B) Supporting documentation, including, but not limited to, the following:
 - i) A site map meeting the requirements of Section 734.440 of this Part that shows the locations of all samples collected pursuant to this subsection (h);
 - ii) Analytical results, chain of custody forms, and laboratory certifications for all samples collected pursuant to this subsection (h); and
 - iii) A table comparing the analytical results of all samples collected pursuant to this subsection (h) to the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants; and C) A site map containing only the information required under Section 734.440 of this Part.
- 4) If the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants have not been met, or if one or more of the following criteria are met, the owner or operator must continue in accordance with Subpart C of this Part:
- A) There is evidence that groundwater wells have been impacted by the release above the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants (e.g., as found during release confirmation or previous corrective action measures);
 - B) Free product that may impact groundwater is found to need recovery in compliance with Section 734.215 of this Part; or
 - C) There is evidence that contaminated soils may be or may have been in contact with groundwater, unless:
 - i) The owner or operator pumps the excavation or tank cavity dry, properly disposes of all contaminated water, and demonstrates to the Agency that no recharge is evident during the 24 hours following pumping; and
 - ii) The Agency determines that further groundwater investigation is not necessary.

35 Ill. Adm. Code 734.315, Stage 1 Site Investigation, states as follows:

The Stage 1 site investigation must be designed to gather initial information regarding the extent of on-site soil and groundwater contamination that, as a result of the release, exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants.

- a) The Stage 1 site investigation must consist of the following:
 - 1) Soil investigation.
 - A) Up to four borings must be drilled around each independent UST field where one or more UST excavation samples collected pursuant to 734.210(h), excluding backfill samples, exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. One additional boring must be drilled as close as practicable to each UST field if a groundwater investigation is not required under subsection (a)(2) of this Section. The borings must be advanced through the entire vertical extent of contamination, based upon field observations and field screening for organic vapors, provided that borings must be drilled below the groundwater table only if site-specific conditions warrant.
 - B) Up to two borings must be drilled around each UST piping run where one or more piping run samples collected pursuant to Section 734.210(h) exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. One additional boring must be drilled as close as practicable to each UST piping run if a groundwater investigation is not required under subsection (a)(2) of this Section. The borings must be advanced through the entire vertical extent of contamination, based upon field observations and field screening for organic vapors, provided that borings must be drilled below the groundwater table only if site-specific conditions warrant.
 - C) One soil sample must be collected from each five-foot interval of each boring drilled pursuant to subsections (a)(1)(A) and (B) of this Section. Each sample must be collected from the location within the five-foot interval that is the most contaminated as a result of the release. If an area of contamination cannot be identified within a five-foot interval, the sample must be collected from the center of the five-foot interval. All samples must be analyzed for the applicable indicator contaminants.
 - 2) Groundwater investigation.
 - A) A groundwater investigation is required under the following circumstances:

- i) There is evidence that groundwater wells have been impacted by the release above the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants;
 - ii) Free product that may impact groundwater is found to need recovery in compliance with Section 734.215 of this Part;
or
 - iii) There is evidence that contaminated soils may be or may have been in contact with groundwater, except that, if the owner or operator pumps the excavation or tank cavity dry, properly disposes of all contaminated water, and demonstrates to the Agency that no recharge is evident during the 24 hours following pumping, the owner or operator does not have to complete a groundwater investigation, unless the Agency's review reveals that further groundwater investigation is necessary.
- B) If a groundwater investigation is required, the owner or operator must install five groundwater monitoring wells. One monitoring well must be installed in the location where groundwater contamination is most likely to be present. The four remaining wells must be installed at the property boundary line or 200 feet from the UST system, whichever is less, in opposite directions from each other. The wells must be installed in locations where they are most likely to detect groundwater contamination resulting from the release and provide information regarding the groundwater gradient and direction of flow.
- C) One soil sample must be collected from each five-foot interval of each monitoring well installation boring drilled pursuant to subsection (a)(2)(B) of this Section. Each sample must be collected from the location within the five-foot interval that is the most contaminated as a result of the release. If an area of contamination cannot be identified within a five-foot interval, the sample must be collected from the center of the five-foot interval. All soil samples exhibiting signs of contamination must be analyzed for the applicable indicator contaminants. For borings that do not exhibit any signs of soil contamination, samples from the following intervals must be analyzed for the applicable indicator contaminants, provided that the samples must not be analyzed if other soil sampling conducted to date indicates that soil contamination does not extend to the location of the monitoring well installation boring:
- i) The five-foot intervals intersecting the elevations of soil samples collected pursuant to Section 734.210(h), excluding backfill samples,

that exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants.

- ii) The five-foot interval immediately above each five-foot interval identified in subsection (a)(2)(C)(i) of this Section;
and
 - iii) The five-foot interval immediately below each five-foot interval identified in subsection (a)(2)(C)(i) of this Section.
- D) Following the installation of the groundwater monitoring wells, groundwater samples must be collected from each well and analyzed for the applicable indicator contaminants.
- E) As a part of the groundwater investigation an in-situ hydraulic conductivity test must be performed in the first fully saturated layer below the water table. If multiple water bearing units are encountered, an in-situ hydraulic conductivity test must be performed on each such unit.
- i) Wells used for hydraulic conductivity testing must be constructed in a manner that ensures the most accurate results.
 - ii) The screen must be contained within the saturated zone.
 - 3) An initial water supply well survey in accordance with Section 734.445(a) of this Part.
- b) The Stage 1 site investigation plan must consist of a certification signed by the owner or operator, and by a Licensed Professional Engineer or Licensed Professional Geologist, that the Stage 1 site investigation will be conducted in accordance with this Section.
- c) If none of the samples collected as part of the Stage 1 site investigation exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants, the owner or operator must cease site investigation and proceed with the submission of a site investigation completion report in accordance with Section 734.330 of this Part. If one or more of the samples collected as part of the Stage 1 site investigation exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants, within 30 days after completing the Stage 1 site investigation the owner or operator must submit to the Agency for review a Stage 2 site investigation plan in accordance with Section 734.320 of this Part.

35 Ill. Adm. Code 734.320, Stage 2 Site Investigation, states as follows:

The Stage 2 site investigation must be designed to complete the identification of the extent of soil and groundwater contamination at the site that, as a result of the release, exceeds the most stringent Tier 1

remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. The investigation of any off-site contamination must be conducted as part of the Stage 3 site investigation.

- a) The Stage 2 site investigation must consist of the following:
 - 1) The additional drilling of soil borings and collection of soil samples necessary to identify the extent of soil contamination at the site that exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. Soil samples must be collected in appropriate locations and at appropriate depths, based upon the results of the soil sampling and other investigation activities conducted to date, provided, however, that soil samples must not be collected below the groundwater table. All samples must be analyzed for the applicable indicator contaminants; and
 - 2) The additional installation of groundwater monitoring wells and collection of groundwater samples necessary to identify the extent of groundwater contamination at the site that exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. If soil samples are collected from a monitoring well boring, the samples must be collected in appropriate locations and at appropriate depths, based upon the results of the soil sampling and other investigation activities conducted to date, provided, however, that soil samples must not be collected below the groundwater table. All samples must be analyzed for the applicable indicator contaminants.
- b) The Stage 2 site investigation plan must include, but not be limited to, the following:
 - 1) An executive summary of Stage 1 site investigation activities and actions proposed in the Stage 2 site investigation plan to complete the identification of the extent of soil and groundwater contamination at the site that exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants;
 - 2) A characterization of the site and surrounding area, including, but not limited to, the following:
 - A) The current and projected post-remediation uses of the site and surrounding properties; and
 - B) The physical setting of the site and surrounding area including, but not limited to, features relevant to environmental, geographic, geologic, hydrologic, hydrogeologic, and topographic conditions;
 - 3) The results of the Stage 1 site investigation, including but not limited to the following:

- A) One or more site maps meeting the requirements of Section 734.440 that show the locations of all borings and groundwater monitoring wells completed to date, and the groundwater flow direction;
 - B) One or more site maps meeting the requirements of Section 734.440 that show the locations of all samples collected to date and analyzed for the applicable indicator contaminants;
 - C) One or more site maps meeting the requirements of Section 734.440 that show the extent of soil and groundwater contamination at the site that exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants;
 - D) One or more cross-sections of the site that show the geology of the site and the horizontal and vertical extent of soil and groundwater contamination at the site that exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants;
 - E) Analytical results, chain of custody forms, and laboratory certifications for all samples analyzed for the applicable indicator contaminants as part of the Stage 1 site investigation;
 - F) One or more tables comparing the analytical results of the samples collected to date to the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants;
 - G) Water supply well survey documentation required pursuant to Section 734.445(d) of this Part for water supply well survey activities conducted as part of the Stage 1 site investigation; and
 - H) For soil borings and groundwater monitoring wells installed as part of the Stage 1 site investigation, soil boring logs and monitoring well construction diagrams meeting the requirements of Sections 734.425 and 734.430 of this Part; and
- 4) A Stage 2 sampling plan that includes, but is not limited to, the following:
- A) A narrative justifying the activities proposed as part of the Stage 2 site investigation;
 - B) A map depicting the location of additional soil borings and groundwater monitoring wells proposed to complete the identification of the extent of soil and groundwater contamination at the site that exceeds the most stringent

Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants; and

- C) The depth and construction details of the proposed soil borings and groundwater monitoring wells.

- c) If the owner or operator proposes no site investigation activities in the Stage 2 site investigation plan and none of the applicable indicator contaminants that exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 as a result of the release extend beyond the site's property boundaries, upon submission of the Stage 2 site investigation plan the owner or operator must cease site investigation and proceed with the submission of a site investigation completion report in accordance with Section 734.330 of this Part. If the owner or operator proposes no site investigation activities in the Stage 2 site investigation plan and applicable indicator contaminants that exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 as a result of the release extend beyond the site's property boundaries, within 30 days after the submission of the Stage 2 site investigation plan the owner or operator must submit to the Agency for review a Stage 3 site investigation plan in accordance with Section 734.325 of this Part.

- d) If the results of a Stage 2 site investigation indicate that none of the applicable indicator contaminants that exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 as a result of the release extend beyond the site's property boundaries, upon completion of the Stage 2 site investigation the owner or operator must cease site investigation and proceed with the submission of a site investigation completion report in accordance with Section 734.330 of this Part. If the results of the Stage 2 site investigation indicate that applicable indicator contaminants that exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 as a result of the release extend beyond the site's property boundaries, within 30 days after the completion of the Stage 2 site investigation the owner or operator must submit to the Agency for review a Stage 3 site investigation plan in accordance with Section 734.325 of this Part.

35 Ill. Adm. Code 734.430 Monitoring Well Construction and Sampling, states as follows:

- a) At a minimum, all monitoring well construction must satisfy the following requirements:
 - 1) Wells must be constructed in a manner that will enable the collection of representative groundwater samples;
 - 2) Wells must be cased in a manner that maintains the integrity of the borehole. Casing material must be inert so as not to affect the water sample. Casing requiring solvent-cement type couplings must not be used;
 - 3) Wells must be screened to allow sampling only at the desired interval. Annular space between the borehole wall and well screen section must be packed with clean, well-

rounded and uniform material sized to avoid clogging by the material in the zone being monitored. The slot size of the screen must be designed to minimize clogging. Screens must be fabricated from material that is inert with respect to the constituents of the groundwater to be sampled;

- 4) Annular space above the well screen section must be sealed with a relatively impermeable, expandable material such as cement/bentonite grout that does not react with or in any way affect the sample, in order to prevent contamination of groundwater samples and groundwater and avoid interconnections. The seal must extend to the highest known seasonal groundwater level;
 - 5) The annular space must be backfilled with expanding cement grout from an elevation below the frost line and mounded above the surface and sloped away from the casing so as to divert surface water away;
 - 6) Wells must be covered with vented caps and equipped with devices to protect against tampering and damage. Locations of wells must be clearly marked and protected against damage from vehicular traffic or other activities associated with expected site use; and
 - 7) Wells must be developed to allow free entry of groundwater, minimize turbidity of the sample, and minimize clogging.
- b) Monitoring well construction diagrams must be completed for each monitoring well. The well construction diagrams must be submitted in the corresponding site investigation plan, site investigation completion report, or corrective action completion report on forms prescribed and provided by the Agency and, if specified by the Agency in writing, in an electronic format.
- c) Static groundwater elevations in each well must be determined and recorded following well construction and prior to each sample collection to determine the gradient of the groundwater table, and must be reported in the corresponding site investigation plan, site investigation completion report or corrective action completion report.

35 III. Adm. Code 734.505 Review of Plans, Budgets, or Reports, states as follows:

- a) The Agency may review any or all technical or financial information, or both, relied upon by the owner or operator or the Licensed Professional Engineer or Licensed Professional Geologist in developing any plan, budget, or report selected for review. The Agency may also review any other plans, budgets, or reports submitted in conjunction with the site.
- b) The Agency has the authority to approve, reject, or require modification of any plan, budget, or report it reviews. The Agency must notify the owner or operator in writing of its final action on any such plan, budget, or report, except in the case of 20 day, 45 day, or free

product removal reports, in which case no notification is necessary. Except as provided in subsections (c) and (d) of this Section, if the Agency fails to notify the owner or operator of its final action on a plan, budget, or report within 120 days after the receipt of a plan, budget, or report, the owner or operator may deem the plan, budget, or report rejected by operation of law. If the Agency rejects a plan, budget, or report or requires modifications, the written notification must contain the following information, as applicable:

- 1) An explanation of the specific type of information, if any, that the Agency needs to complete its review;
 - 2) An explanation of the Sections of the Act or regulations that may be violated if the plan, budget, or report is approved; and
 - 3) A statement of specific reasons why the cited Sections of the Act or regulations may be violated if the plan, budget, or report is approved.
- c) For corrective action plans submitted by owners or operators not seeking payment from the Fund, the Agency may delay final action on such plans until 120 days after it receives the corrective action completion report required pursuant to Section 734.345 of this Part.
- d) An owner or operator may waive the right to a final decision within 120 days after the submittal of a complete plan, budget, or report by submitting written notice to the Agency prior to the applicable deadline. Any waiver must be for a minimum of 60 days.
- e) The Agency must mail notices of final action on plans, budgets, or reports by registered or certified mail, post marked with a date stamp and with return receipt requested. Final action must be deemed to have taken place on the post marked date that such notice is mailed.
- f) Any action by the Agency to reject or require modifications, or rejection by failure to act, of a plan, budget, or report must be subject to appeal to the Board within 35 days after the Agency's final action in the manner provided for the review of permit decisions in Section 40 of the Act.
- g) In accordance with Section 734.450 of this Part, upon the approval of any budget by the Agency, the Agency must include as part of the final notice to the owner or operator a notice of insufficient funds if the Fund does not contain sufficient funds to provide payment of the total costs approved in the budget.

35 III. Adm. Code 734.510 Standards for Review of Plans, Budgets, or Reports, states as follows:

- a) A technical review must consist of a detailed review of the steps proposed or completed to accomplish the goals of the plan and to achieve compliance with the Act and regulations. **Items to be reviewed, if applicable, must include, but not be limited to, number and placement of wells and borings, number and types of samples and analysis, results of sample**

analysis, and protocols to be followed in making determinations. The overall goal of the technical review for plans must be to determine if the plan is sufficient to satisfy the requirements of the Act and regulations and has been prepared in accordance with generally accepted engineering practices or principles of professional geology. 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.

- b) A financial review must consist of a detailed review of the costs associated with each element necessary to accomplish the goals of the plan as required pursuant to the Act and regulations. Items to be reviewed must include, but are not limited to, costs associated with any materials, activities, or services that are included in the budget. The overall goal of the financial review must be to assure that costs associated with materials, activities, and services must be reasonable, must be consistent with the associated technical plan, must be incurred in the performance of corrective action activities, must not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations, and must not exceed the maximum payment amounts set forth in Subpart H of this Part.

35 Ill. Adm. Code 734.630, Ineligible Corrective Action Costs, states as follows:

Costs ineligible for payment from the Fund include but are not limited to:

* * * * *

- o) Costs for corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act;

* * * * *

C. No Genuine Issues Of Material Fact Exist

The question in this case is not one of fact, but rather of law. On August 7, 2006, the Petitioner filed its Stage 1 Report/Stage 2 Site Investigation Plan and Budget. The Illinois EPA issued a decision letter on October 5, 2006 rejecting this submittal. The Illinois EPA's denial letter frames the issues on appeal. Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). In the October 5, 2006 decision letter, the Illinois EPA cited to the requirements of the Act and regulations that the

Petitioner did not comply with. The Illinois EPA did not raise any questions in this letter as the Petitioner alleges in Paragraph 5 of its Petition. The Petitioner filed a response to the October 5, 2006 letter on January 24, 2007 attempting to justify the work performed at the site that the Illinois EPA found exceeded the minimum requirements of the Act and regulations. On May 17, 2007, the Illinois EPA issued a decision letter regarding the January 24, 2007 submittal and that letter is the subject of this appeal.

Pursuant to 35 Ill. Adm. Code 734.320, a Stage 2 site investigation must be designed to complete the identification of the extent of soil and groundwater of the site that, as a result of the release, exceeds the most stringent Tier 1 remediation objective of 35 IAC 742 for the applicable indicator contaminants. Additionally, pursuant to 35 Ill. Adm. Code 734.320(b), the Stage 2 plan must consist of the following:

- 1) An executive summary of Stage 1 site investigation activities and actions proposed in the Stage 2 site investigation plan to complete the identification of the extent of soil and groundwater contamination at the exceeds the most stringent Tier 1 remediation objectives of 35 IAC 742.
- 2) A characterization of the site and surrounding area,
- 3) The results of Stage 1 site investigation,
- 4) A stage 2 sampling plan that includes, but is not limited, the following:
 - A) A narrative justifying the activities proposed as part of the Stage 2 investigation,
 - B) A map depicting the location of additional soil borings and groundwater monitoring wells proposed to complete the identification the extent of soil and groundwater contamination at the site that exceeds the most stringent Tier 1 remediation objectives of 35 IAC 742 for the applicable indicator objectives.

- C) The depth and construction details of the proposed soil borings and groundwater monitoring wells.

Further, pursuant to 35 Ill. Adm. Code 734.510(a), a technical review must consist of a detailed review of the steps proposed or completed to accomplish the goals of the plan and to achieve compliance with the Act and regulations. Under this regulation, items to be reviewed, if applicable, must include, but are not limited to, number and placement of wells and borings, numbers and types of samples and analysis, results of sample analysis, and protocols to be followed in making determinations. The overall goal of the technical review for plans is to determine if the plan is sufficient to satisfy the requirements of the Act and regulations and has been prepared in accordance with generally accepted engineering practices. The overall goal of the technical review for reports is 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 Act and regulations have been satisfied.

The Illinois EPA conducted a review in accordance with the procedures set forth in 734.510(a), to determine if the activities certified in the Stage 1 plan and budget certification had been conducted in accordance with the regulations and generally accepted engineering practices. Information regarding the Stage 1 activities was presented in the Stage 2 Plans in accordance with 35 Ill. Adm. Code 734.320. (AR, pp. 1-13) During its Section 734.510(a) review, the Illinois EPA determined that the Stage 1 site investigation was not conducted in accordance with the approved plan and the Stage 1 monitoring wells were not installed in a manner consistent with generally accepted engineering practices. (AR, p. 256)

The staged site investigation process is designed to provide a systemic approach to define the full extent of soil and groundwater resulting from the release of the underground storage tank system. Each

stage builds upon the prior stages. Therefore, Stage 2 and Stage 3 must include the information collected from the prior stage or stages in order to develop a plan for additional activities and locations based on the information gathered from the previous activities. The Stage 1 monitoring well construction diagrams provided in the Stage 2 plans indicate the wells were not screened properly to allow for sampling at the desired interval. (AR, p. 89) Due to this fact, a Stage 2 plan for determining the full extent of groundwater contamination resulting from the release can not be formulated based on the data provided from these improperly screened wells.

Additionally, 35 Ill. Adm. Code 734.315(b) requires that a Stage 1 Site Investigation Plan must consist of a certification by a Licensed Professional Engineer or a Licensed Professional Geologist that Stage 1 will be conducted in accordance with this section. This certification (what the Petitioner refers to as a Stage 1 Site Investigation Plan and Budget) was included as Section G of the 45-day Report Form. (Exhibit 5) This certification is actually a part of the 45-Day Report and not a separate document. This Certification is the only Stage 1 information “reviewed” and “approved” by the Illinois EPA prior to the Stage 1 activities taking place. The 45-Day Report, itself, often only gets a cursory review. By approving the 45-Day Report that includes the Stage 1 certification, the Illinois EPA is not approving the Stage 1 activities at the site foreclosing further review of said activities. In fact, the certification makes it clear that the Petitioner must submit a summary of such activities with the Stage 2 Site Investigation Plan and Budget for review by the Illinois EPA to make sure that the provisions of Section 734.315 were followed as the owner or operator certified. The Certification states,

“UST owner or Operator and Licensed Professional Engineer or Licensed Professional Geologist Certification of Stage 1 Site Investigation Plan and Budget (applies to Part 734 sites continuing beyond early action): Pursuant to 35 Ill. Adm. Code Part 734.315(b), I

certify that the Stage 1 site investigation will be conducted in accordance with 35 Ill. Adm. Code 734.315 and that costs of the Stage 1 site investigation will not exceed the amounts set forth in 35 Ill. Adm. Code 734 Subpart H, Appendix, D and Appendix E. This certification is intended to meet the requirements for a plan and budget for Stage 1 Site Investigation required to be submitted pursuant to 35 Ill. Adm. Code 734.310.

A summary of the actual costs for conducting the Stage 1 site investigation will be submitted concurrently with the results of the Stage 1 site investigation and the Stage 2 site investigation plan and budget.”

This certification, which the petitioner signed, states that the Petitioner will conduct Stage 1 activities in accordance with 35 Ill. Adm. Code 734.315. However, the Petitioner failed to do so. Activities performed at the site and submitted as part of the Stage 1 Executive Summary in the Stage 2 proposed plan, showed that activities for Stage 1 were not conducted in accordance with the minimum requirements to comply with Section 734.315. Even if the Petitioner is correct, and the Stage 1 certification, which was signed by the Petitioner, were an approved plan, the approved plan states that the Petitioner was to comply with the provisions of Section 734. 315. They did not do so. Therefore, even when accepting the Petitioner’s argument as correct, the Petitioner violated Section 734. 510(a), in that they did not conduct activities in accordance with an approved plan. Pursuant to 35 Ill. Adm. Code 734.510(a), activities not conducted in accordance with the applicable regulations, Section 734.315, cannot be approved by the Illinois EPA.

Issue 1: The Borings

The question in this case is not one of fact, but rather of law. Specifically, the question is whether the Petitioner, by drilling soil borings during Stage 1 in excess of the soil borings required in 35 Ill. Adm.

Code 734.315, exceeded the minimum requirements of the Act and regulations thereunder. The requirements of Stage 1 are very specific and are prescribed by Section 734.315. The regulation allows little, if any, deviation from its prescribed activities. The Petitioner exceeded this regulation by performing activities in addition to those allowed in the regulation.

Under 35 Ill. Adm. Code 734.210(h), the owner/operator is required to collect excavation samples and piping run samples during underground storage tank removal to determine if the soil contamination exposed as a result of early action excavation meets the most stringent Tier 1 remediation objectives pursuant to 35 Ill. Adm. Code Part 742. Under 35 Ill. Adm. Code 734.210(h)(3), if the samples (including piping run samples) meet the most stringent Tier 1 remediation objectives pursuant to 35 Ill. Adm. Code Part 742, the owner/operator may submit a report demonstrating compliance with those remediation objectives. If the Illinois EPA determines those remediation objective have been met, the Illinois EPA will issue a No Further Remediation letter to the owner/operator. This provides regulatory authority for the Illinois EPA to accept piping run samples as acceptable samples to determine if soil surrounding the underground storage tank system meets remediation objectives.

Additionally, the regulations at 35 Ill. Adm. Code 734.315(a)(1)(B), allow for up to two borings to be drilled around each piping run where one or more piping run samples exceed the most stringent Tier 1 remediation objectives under 35 Ill. Adm. Code Part 742. Although it may be technically acceptable to further investigate piping runs, for purposes of reimbursement from the fund, those activities exceed the minimum requirements of the Act and regulations pursuant to 35 Ill. Adm. Code 734.630(o). It should be noted that the Illinois EPA did not reject the plan based on the additional proposed borings which exceeded minimum requirements. The plan was denied because the monitoring wells did not satisfy the requirements of 35 Ill. Adm. Code 734.430. Under 35 Ill. Adm. Code 734.505(a), the Illinois EPA conducted the review

based on all technical and financial information relied upon by the owner/operator and the Licensed Professional Engineer or Licensed Professional Geologist in developing any plan, budget or report. The Illinois EPA, pursuant to Section 734.505(b), notified the owner/operator that the additional soil investigation exceeded the minimum requirements and was therefore not eligible for reimbursement.

Issue 2: The Wells

The question in this case is not one of fact, but rather of law. The question is whether the Petitioner's wells were constructed in a manner that allows for samples to be taken at the desired interval pursuant to 35 Ill. Adm. Code 734.430.

Pursuant to 35 Ill. Adm. Code 734.430(a), monitoring well installation requirements, the well must be screened at an interval to allow sampling only at the desired interval. In the instance of gasoline indicator contaminants, specifically benzene, the well must be screened at the interval where the screen intersects the groundwater in the well. This is because the contaminants associated with petroleum releases are lighter than the groundwater. Due to this fact, the contaminants "float" on top of the groundwater, as evidenced in the sheen on water produced when petroleum products and water co-mingle. This top layer in the wells is the intended target for groundwater sampling. When the well screen is submerged in the well, the groundwater being sampled is below where most petroleum contaminants are likely to be observed. Ten-foot well screens are installed to allow for groundwater hydrostatic pressure and seasonal fluctuations. The wells in question were installed on July 12, 2006. Normally, this means that the screen was inserted and the well was sealed with bentonite to prevent surface water infiltration. Once the well is installed, the consultant usually waits for a few days for the well to stabilize to a natural groundwater flow state after boring into the soil and setting the well, which can disrupt the groundwater in that location. Next, the consultant returns to the well after it is stabilized to record groundwater elevation readings and collect samples. In this case, this

was conducted on 07/14/06. The monitoring well construction diagrams state the groundwater elevation after stabilization, i.e., 2 days after the well was installed, show the well screens to be submerged. (AR, p. 89)

The Illinois EPA disagrees with the assertion that the wells would be dry if they had been installed as the Illinois EPA commented. According to the monitoring well construction diagrams provided by the Petitioner in the Stage 2 Site Investigation plan dated August 7, 2006, the groundwater could have dropped significantly without causing a dry well. (AR, p. 89)

Additional Argument:

Under 35 Ill. Adm. Code 734.135(c), all plans, reports and budget must be signed by the owner/operator and list the owner/operator's full name, address and telephone number. The Stage 2 site investigation plan dated January 22, 2007 did not contain the owner/operator signature on the required forms. (AR, p. 167)

Additionally, 35 Ill. Adm. Code 734.135(d) requires that all plans, budgets, and reports with the exception of the Corrective action Completion Report contain a certification from a Licensed Professional Engineer or Licensed Professional Geologist. The plan dated January 22, 2007 did not contain this certification. (AR, p. 167)

In regards to the rejection of the budget, a proposed budget may not be approved unless the corresponding plan is approved. The corresponding plan has not been approved. Further, the Stage 1 Investigation did not meet the requirements of the regulations in regard to the screening of the monitoring wells. Activities for Stage 2 may not proceed until all the requirements of Stage 1 have been satisfied. Activities which exceed the minimum requirements of the Act and regulations were conducted and all associated costs associated with activities conducted that exceed the minimum requirements to comply with

the Act and regulations are ineligible for payment from the fund.

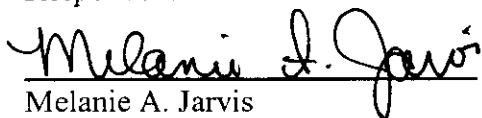
V. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's decision to reject the Stage 2 Site Investigation Plan and Budget in the May 17, 2007 final decision for the above reasons.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

A handwritten signature in cursive script that reads "Melanie A. Jarvis". The signature is written in black ink and is positioned above a horizontal line.

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Dated: July 17, 2007

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

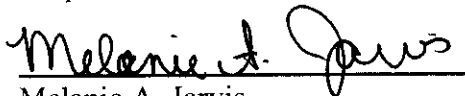
I, the undersigned attorney at law, hereby certify that on July 17, 2007 I served true and correct copies of a MOTION FOR SUMMARY JUDGEMENT by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. Mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

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