

ILLINOIS POLLUTION CONTROL BOARD

August 9, 2007

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

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

Today the Board decides a motion for summary judgment filed by the respondent, the Illinois Environmental Protection Agency (Agency). The petitioner, Keller Oil Properties, Inc./Farina (Keller) seeks the Board’s review of a May 17, 2007 determination of the Agency denying Keller’s Stage 2 Site Investigation Plan & Budget. For the reasons described below, the Board denies the Agency’s motion and directs the hearing officer to proceed expeditiously to the hearing in this matter, which is scheduled to take place on Wednesday, August 22, 2007.

In this opinion and order, the Board first provides the procedural history of this proceeding before addressing two preliminary motions and the relevant regulatory authorities. The opinion then summarizes Keller’s amended petition for review, the Agency’s motion for summary judgment, and Keller’s response to that motion. After stating its standard of review, the Board discusses the motion before reaching its conclusion.

PROCEDURAL HISTORY

On June 27, 2007, Keller filed a petition (Pet.) asking the Board to review a May 17, 2007 determination of the Agency. In an order dated July 12, 2007, the Board accepted the petition for hearing. On July 6, 2007, the Agency filed the administrative record (R.).

On July 12, 2007, the Agency filed motion to strike portions of Keller’s petition for review (Mot. Strike). Keller did not file a response to this motion. On July 24, 2007, Keller filed a motion to file an amended petition (Mot. Amend), accompanied by an amended petition for review (Am. Pet.). The Agency did not file a response to Keller’s motion.

In an order dated July 18, 2007, the hearing officer scheduled a hearing in this matter to take place on August 22, 2007 in Springfield.

Also on July 18, 2007, the Agency filed a motion for summary judgment (Mot. SJ). On August 1, 2007, Keller filed its response in opposition to the motion for summary judgment

(Resp.). On August 6, 2007, the Agency filed a reply to petitioner's response in opposition to motion for summary judgment.

PRELIMINARY MOTIONS

Agency's Motion to Strike Portions of Petition

In its July 12, 2007 motion to strike portions of the petitioner's petition for review, the Agency specifically requested that the Board strike paragraph 18 of that petition. In its entirety, paragraph 18 states

IEPA ignored and/or chose not to consider information that was provided in the Stage 2 Site Investigation Plan and Budget that was submitted originally and in the Proposed Plan and Budget. Thus, the Letter rejecting the Proposed Plan and Budget was for the sole purpose of harassing Petitioner's consultant, CW³M, delaying corrective action at the Station and increasing Petitioner's administrative costs of preparing the plans and budgets an is an abuse of IEPA's discretion. Pet. at 5 (¶18).

The Agency argues that Keller's statements about the purpose and effect of the Agency's denial letter are "baseless." Mot. Strike at 1. The Agency states that "[t]o allow such an argument to stand as a basis for pleading requires the Board to presume facts not presented and will unfairly require the Illinois EPA to respond to such assertions absent facts presented to respond to." *Id.* at 1-2. Keller has not responded to the Agency's motion.

Keller's Motion to File Amended Petition

In its July 24, 2007 motion to file an amended petition, Keller addresses three separate issues. First, Keller seeks to provide two pages missing from its Exhibit 1 and the entire Exhibit 5, which "was inadvertently not included in some of the copies of the Petition that were filed." Mot. Amend at 1. Second, Keller seeks to make "minor corrections" in the wording of paragraphs five and eight. *Id.* at 2. Third, Keller to seeks to amend paragraph 18, the subject of the Agency's motion to strike, as follows:

IEPA ignored and/or chose not to consider information that was provided with the Stage 2 Site Investigation Plan and Budget. Further, the Agency is requesting that installation of monitoring wells be done in a matter that is in violation of 35 Ill. Admin. 734.315(a)(2)(E)(ii). *Id.* at 1-2.

The Agency has not responded to Keller's motion.

Board Analysis

Under Section 101.500(d) of the Board's procedural rules, "[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 grants Keller's motion to file an amended petition and accepts the amended petition. Having done so, the Board denies the Agency's motion to strike as moot.

Under Section 105.114(b) of the Board's procedural rules, "[w]hen the petitioner files an amended petition, the decision period recommences when the amended petition is filed in accordance with 35 Ill. Adm. Code 101.300(b)(4)." 35 Ill. Adm. Code 105.114(b). Section 101.300(b)(4) provides that, "[f]or purposes of Board decision deadlines, time does not begin until the date on which the initial filing is date-stamped by the Board." 35 Ill. Adm. Code 101.300(b)(4). The Board date-stamped Keller's amended petition on July 24, 2007. Consequently, the decision deadline is now November 21, 2007, the 120th day after July 24, 2007. *See* 415 ILCS 5/40(a)(2) (2006); 35 Ill. Adm. Code 105.114. The Board meeting immediately before the decision deadline is scheduled to take place on November 15, 2007.

REGULATORY BACKGROUND

Section 734.210 of the Board's UST regulations, addressing early action, provides

- a) Upon confirmation of a release of petroleum from a 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) through (E). 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 described 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 734.210.

Section 734.315 of the Board's UST regulations, addressing Stage 1 site investigations, provides

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 734.315.

Section 734.320 of the Board's UST regulations, addressing Stage 2 site investigations, provides

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 734.320.

Section 734.430(a) of the Board's UST regulations, addressing monitoring well construction and sampling, provides

- 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 Ill. Adm. Code 734.430.

Section 734.505 of the Board's UST regulations, regarding review of plans, budget, or report, provides

- 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 Ill. Adm. Code 734.505.

Section 734.510 of the Board's UST regulations, regarding standards for review of plans, budget, or reports, provides

- 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 734.510.

KELLER'S AMENDED PETITION FOR REVIEW

In its amended petition, Keller states that it was the owner of USTs for the storage of gasoline, diesel fuel, and heating oil at the site of a former gasoline service station at 1003 West Washington Avenue, Farina, Fayette County (Site). Am. Pet. at 1 (¶1). Keller further states that “LUST Incident Numbers 20051539, 20060136, 20060153, and 20060346 were obtained” and that LPC #0514155011 has been assigned to the Site. *Id.* (¶2).

Keller states that it sent a Stage 2 site investigation plan and budget to the Agency on August 7, 2006. Am. Pet. at 2 (¶3), citing Am. Pet., Exh. 1. Keller further states that, in a letter dated October 5, 2006, the Agency commented on the plan and budget and rejected them. Am. Pet. at 2 (¶4), citing Am. Pet., Exh. 2.

Keller claims it prepared a document entitled “Stage 2 Site Investigation Plan and Budget, Additional Information and Reconsideration” in order to respond to issues raised in the Agency’s October 5, 2006 letter. Am. Pet. at 2 (¶5). Keller further claims that the Agency received this document from Keller’s consultant on January 24, 2007. *Id.*, citing Am. Pet., Exh. 3. Keller maintains that, in a letter dated May 17, 2007, the Agency rejected the Stage 2 plan and budget. Am. Pet. at 2 (¶6), citing Am. Pet., Exh. 4. Keller states that the Agency’s May 17, 2007 letter “contains lengthy quotes of several regulations and states that the Stage 2 Plan was rejected for a number of reasons.” Am. Pet. at 2 (¶7), citing Am. Pet., Exh. 4. Keller further states that this May 17, 2007 letter forms the basis of its appeal. Am. Pet. at 2 (¶6).

Keller asserts that the Agency approved Keller’s Stage 1 site investigation plan and budget in letters dated April 7, 2006 and May 9, 2006. Am. Pet. at 2 (¶), Am. Pet., Exh. 5. Keller argues that comments in item 1 of the Agency’s May 17, 2007 letter refer to the Stage 1

investigation, do not relate to the proposed Stage 2 investigation, “and are irrelevant to approval of the Proposed [Stage 2] Plan and Budget.” Am. Pet. at 2 (¶8), *see* Am. Pet., Exh. 5 at 1.

Keller argues that item 2 of the Agency’s May 17, 2007 letter refers to monitoring wells installed during the Stage 1 investigation according to Board regulations. Am. Pet. at 3 (¶9), citing 35 Ill. Adm. Code 734.315(a)(2)(B), (C). Keller claims that, while the Agency correctly cites subsection 734.315(a)(2)(C) as the source of requirements for installing monitoring wells when groundwater contamination is suspected, the Agency cites no regulatory authority for its comments on whether piping run samples are adequate substitutes for determining whether groundwater and soil are contaminated. Am. Pet. at 3 (¶9); *see* 35 Ill. Adm. Code 734.315(a)(2)(C). Keller argues that, “[s]ince piping runs are typically located two to three feet below grade, they are usually located well above the vadose zone and the groundwater table.” *Id.*, citing Am. Pet., Exh. 3 at 4.

Keller next argues that item 3 of the Agency’s May 17, 2007 letter, the Agency cites Section 734.430(a) as the regulatory source of requirements for the installation of monitoring wells. Am. Pet. at 3 (¶10); *see* 35 Ill. Adm. Code 734.430(a). Keller asserts that this regulation does not include “the requirements that the Agency provides as the basis for disapproving the Proposed Plan.” Am. Pet. at 3 (¶10). Keller also claims that “the Agency had already been provided with information explaining the location of the monitoring well screens.” *Id.*, citing Am. Pet., Exh. 3 at 6.

Keller next argues that, in item 4 of the Agency’s May 17, 2007 letter, “the Agency misinterprets the applicable regulations and the information Petitioner provided.” Am. Pet. at 4 (¶11).

Keller next argues that item 5 of the Agency’s May 17, 2007 letter cites a lack of required certifications as a basis for rejecting the proposed plan. Am. Pet. at 4 (¶12). Keller claims that these certifications “are contained in page 21 of the Proposed Plan and Budget.” *Id.*, citing *id.*, Exh. 3 at 21.

Keller states that the Agency’s May 17, 2007 letter rejected the plan’s associated budget “for a number of reasons.” Am. Pet. at 4 (¶13), citing Am. Pet., Exh. 4. Keller argues that the Agency’s rejection of the proposed budget is directly related to rejection of the proposed plan and states that it appeals both denials “as set forth in the May 17, 2007 letter.” Am. Pet. at 4 (¶14).

Keller argues that its proposed plan and budget contain detailed technical information providing “the same level of detail that the Agency has approved historically.” Am. Pet. at 4 (¶15). Keller further argues that the Agency “violated its statutory authority by re-reviewing information it had previously approved. *Id.* at 4-5 (¶16), citing Reichold Chem. v. PCB, 561 N.E.2d 1333, 1345 (3rd Dist. 1990). Keller asserts that the Agency’s May 17, 2007 letter “requires documentation that does not appear on any IEPA forms or in the applicable regulations. Am. Pet. at 5 (¶17). Keller maintains that the Agency “ignored and/or chose not to consider information that was provided with the Stage 2 Site Investigation Plan and Budget.” *Id.* (¶18). Keller also argues that the Agency requests installation of monitoring wells in a manner

that violates applicable regulatory requirements. *Id.*, citing 35 Ill. Adm. Code 734.315(a)(2)(E)(ii).

AGENCY’S MOTION FOR SUMMARY JUDGMENT

The Agency argues that, under the Board’s regulations, a Stage 2 site investigation must be designed to complete the identification of soil and groundwater contamination that results from a release at the site that exceeds Tier I remediation objectives for indicator contaminants. Mot. SJ at 19, citing 35 Ill. Adm. Code 734.320. The Agency further argues that a Stage 2 plan must include specific elements, including “[a]n executive summary of Stage 1 site investigation activities” and “[t]he results of Stage 1 site investigation.” Mot. SJ at 19, citing 35 Ill. Adm. Code 734.320(b). The Agency further argues that its technical review of plans, budget, and reports “must consist of a detailed review of the steps proposed or completed to accomplish the goals of the plans and to achieve compliance with the Act and regulations.” Mot. SJ at 20, citing 35 Ill. Adm. Code 734.510(a). The Agency claims that this review involves matters such as wells and boring, samples and their analysis, and the results of the analysis of those samples. *Id.*

The Agency states that “[t]he staged site investigation process is designed to provide a systemic approach to define the full extent of soil and groundwater [contamination] resulting from the release of the underground storage tank system.” Mot. SJ at 20. The Agency argues that, because the stages build on one another, Stage 2 must include information from Stage 1 “in order to develop a plan for additional activities” *Id.* at 20-21. The Agency states that Keller’s Stage 2 plans include its Stage 1 monitoring well construction diagrams. *Id.* The Agency argues, however, that those diagrams “indicate the wells were not screened properly to allow for sampling at the desired interval.” *Id.*, citing R at 89. Accordingly, the Agency claims that that data obtained from Keller’s improperly-screened wells do not provide a basis for a Stage 2 plan to determine the full extent of groundwater contamination. *Id.*

The Agency states that Section 734.315(b) of the Board’s UST regulations provides 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 that provision. Mot. SJ at 21, citing 35 Ill. Adm. Code 734.315(b). The Agency claims that this certification was included with Keller’s 45-Day Report form and not as a separate document. Mot. SJ at 21, citing Mot. SJ, Exh. 5. The Agency claims that the 45-Day Report often receives only a cursory review and that the certification is the only information provided at Stage 1 that the Agency reviews and approves before Stage 1 activities occur. Mot. SJ at 21. The Agency thus argues that approving the 45-Day Report that includes the Stage 1 certification is not approval of the Stage 1 activities and does not preclude further review of those activities. *Id.* The Agency further argues that the language of the certification provides that the owner or operator of the UST “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.” Mot. SJ at 21; *see* 35 Ill. Adm. Code 734.315.

The Agency argues that Keller’s activities at Stage 1 failed to comply with the minimum standards of the Board’s regulations. Mot. SJ at 22; citing 35 Ill. Adm. Code 734.315. The

Agency further argues that, even if a Stage 1 certification constituted an approved plan, that plan required compliance with the provisions of Section 734.315. Mot. SJ at 22; *see* 35 Ill. Adm. Code 734.315. The Agency claims that, even if the Board accepts Keller’s argument regarding certification, “activities not conducted in accordance with the applicable regulation, Section 734.315, cannot be approved by the Illinois EPA.” Mot. SJ at 22, citing 35 Ill. Adm. Code 734.315; *see* 35 Ill. Adm. Code 734.510(a).

Soil Borings

The Agency states that the Board’s regulations require an owner or operator “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.” Mot. SJ at 23, citing 35 Ill. Adm. Code 734.210(h). The Agency further states that samples, including piping run samples, can be the basis for determining whether soil meets those objectives and for obtaining a No Further Remediation letter. Mot. SJ at 23.

The Agency argues that the Board’s regulations “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.” Mot. SJ at 23, citing 35 Ill. Adm. Code 734.210(h). The Agency further argues that, although additional borings may have a technical basis, they exceed the minimum requirements of the Act and regulations for the purpose of reimbursement from the Fund. Mot. SJ at 23, citing 35 Ill. Adm. Code 734.630(o). The Agency maintains that it rejected Keller’s plan because monitoring wells did not satisfy regulatory requirements and not “based on the additional proposed borings which exceeded minimum requirements.” Mot. SJ at 23, citing 35 Ill. Adm. Code 734.430. The Agency states that it notified Keller that additional soil investigation would not be eligible for reimbursement. Mot. SJ at 24, citing 35 Ill. Adm. Code 734.505(b).

The Agency argues that “[t]he requirements of Stage 1 are very specific and are prescribed by Section 734.315.” Mot. SJ at 23, citing 35 Ill. Adm. Code 734.315. The Agency further argues that this regulation allows little, if any, deviation from its terms and that Keller exceeded the regulation by performing additional activities. Mot. SJ at 23. The Agency claims that the Board faces not a factual question but a legal question: whether Keller, “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.” Mot. SJ at 22-23, citing 35 Ill. Adm. Code 734.315.

Monitoring Wells

The Agency states that, because contaminants associated with petroleum are lighter than groundwater, those contaminants float atop it. Mot. SJ at 24. The Agency argues that this is why the Board’s regulations require monitoring wells to be screened at an interval allowing sampling “where the screen intersects the groundwater in the well.” *Id.*, citing 35 Ill. Adm. Code 734.430(a). The Agency further argues that, “[w]hen the well screen is submerged in the well,

the groundwater being sampled is below where most petroleum contaminants are likely to be observed.” Mot. SJ at 24.

The Agency states that Keller installed the wells in question on July 12, 2006. Mot. SJ at 24. The Agency argues that, after installing a well, a consultant waits “for a few days” to return to the well to record groundwater elevation readings and take samples. *Id.* The Agency states that, because boring and setting a well can disrupt the flow of groundwater, waiting allows groundwater flow to stabilize. *Id.* The Agency argues that Keller’s consultant returned to the Site in only two days on July 14, 2006. *Id.* at 24-25. The Agency claims that, at the end of that two-day period, the well screens were submerged. *Id.* at 25, citing R. at 89. The Agency disputes that Keller’s well would have been dry if installed as the Agency had commented: “[a]ccording 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.” Mot. SJ at 25, citing R. at 89.

The Agency again claims that the Board faces not a factual question but a legal question: whether Keller’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.” Mot. SJ at 24, citing 35 Ill. Adm. Code 734.430.

Additional Arguments

The Agency states that “all plans, reports and budget must be signed by the owner/operator and list the owner/operator’s full name, address and telephone number.” MSJ at 25, citing 35 Ill. Adm. Code 734.135(c). The Agency claims that Keller’s Stage 2 site investigation plan did not include the required signature. MSJ at 25, citing R. at 167.

The Agency further states that plans, budgets, and reports, with the exception of the Corrective Action Completion Report, must “contain a certification from a Licensed Professional Engineer or Licensed Professional Geologist.” MSJ at 25, citing 35 Ill. Adm. Code 734.135(d). The Agency claims that Keller’s plan did not include the required certification. MSJ at 25, citing R. at 167.

KELLER’S RESPONSE

Keller states that, because the Site involves two separate incident numbers and regulatory deadlines, it filed separate 20-Day Reports, 45-Day Reports, and Addenda to the 45-Day Reports with the Agency. Resp. at 10. Keller further states that the 45-Report Addenda include “[d]ata from the excavation samples that were collected when the tanks were pulled.” *Id.*, citing Exhs. 11, 17. Keller also states that the addenda included “certifications for performing a Stage 1 Site Investigation. *Id.*, citing Exh. 11 at 17. Keller claims that “[t]he 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.” *Id.*, citing Exhs. 12, 19.

Keller states that, with regard to subsequent investigations, it had submitted a single set of reports covering both incident numbers. Resp. at 10. Keller further states that “[d]ata from

the Stage 1 Investigation are included in the Stage 2 Site Investigation Plan and Budget which covers both incidents.” *Id.* Keller asserts that its Stage 2 Site Investigation Plan and Budget, Additional Information and Reconsideration includes data from two additional borings and other information responding to issues raised by the Agency. *Id.* at 10-11.

Soil Borings

Keller argues that Section 734.315 of the Board’s regulations addresses Stage 1 Site Investigations. Resp. at 11, citing 35 Ill. Adm. Code 734.315. Keller argues that these regulations “do not specify the exact location of each boring; instead the rules provide that field observations should be used when advancing borings.” Resp. at 11, citing 35 Ill. Adm. Code 734.315(a)(1)(A). Keller states that it relied upon field observations and data from samples collected during early action in order to determine exact boring locations and their depths. Resp. at 11, citing Exh. 26 (affidavit of Jeffrey R. Wienhoff). Accordingly, Keller claims that it performed these borings in a manner consistent with Board regulations. Resp. at 11. Keller further claims that “the Agency’s brief references no facts to support the Agency’s claim that the Site 1 Site Investigations was not in compliance with applicable rules.” *Id.* Keller thus argues that there exists with regard to these borings a genuine issue of material fact making summary judgment inappropriate. *Id.* at 11-12.

Keller also argues that that parties disagree about the use of samples collected along piping runs. *See* Resp. at 12; 35 Ill. Adm. Code 734. Keller states that “[t]he Agency has contended that piping run samples may be used to characterize an entire area of a site.” *Id.* Keller claims that groundwater at the Site is situated “approximately eight to ten feet below grade and could cause contamination to migrate away from the tank locations.” *Id.* Keller argues that samples collected along piping runs are typically collected two to three feet below grade and “cannot characterize whether there may be contamination at the depth of the tank bottom.” *Id.* Keller further argues that “it is contrary to generally accepted professional engineering practices and principles of professional geology to use samples collected from two feet below ground surface to determine whether there is contamination located several feet deeper.” *Id.*, citing Exh. 26. Keller characterizes this disagreement as a factual dispute that should be addressed at hearing. Resp. at 12.

Monitoring Wells

Keller claims that the Agency has argued that “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.” Resp. at 12-13. Keller further claims that the Agency “believes that borings to install monitoring wells must end at the point where groundwater is encountered.” *Id.* at 13, citing R. at 149. Noting that “the screens must be contained *within* the saturated zone,” Keller argues that the Agency’s positions are contrary to generally accepted engineering practices or principles of professional geology and to the Board’s regulations. Resp. at 13 (emphasis in original), citing 35 Ill. Adm. Code 734.315(a)(2)(E)(ii). Keller further argues that a screen extending above the water table would not be within the saturated zones and unlikely to produce water. Resp. at 13.

Keller claims that the Agency appears to believe “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.” Resp. at 13, citing Mot. SJ at 24-25. Keller argues that, unless a site is heavily contaminated with several feet of free product atop the groundwater, “it is not practical or even possible to screen a well over such a narrow interval.” Resp. at 13. Characterizing the Agency’s apparent view as defying logic, Keller claims that this case requires a hearing in order to address and resolve factual disputes over generally accepted engineering practices or principles of professional geology. Resp. at 13. Keller further claims that the sampling it has performed and plans to perform satisfy these practices and principles. *Id.* at 15; *see* 35 Ill. Adm. Code 734.510. Keller argues that other disputed issues of material fact require a hearing to demonstrate “whether the monitoring wells that were installed during the Stage 1 Investigation met applicable requirements.” *See id.* at 13-15. Keller emphasizes that these issues “are not questions of law that can be determined through a motion for summary judgment.” *Id.* at 16.

Additional Arguments

Keller notes that Agency’s argument that Keller has not provided required signatures or certifications with the January 22, 2007 submissions. Resp. at 16. Keller claims in response that “signature pages and certifications were provided in the Stage II Site Investigation Plan and Budget that was submitted in August 7, 2006 and in the Stage II Site Investigation Plan and Budget Additional Information submitted on January 22, 2007.” *Id.*, citing R. at 21, 39, 182.

AGENCY’S REPLY

On August 6, 2007, the Agency filed a reply to petitioner’s response in opposition to motion for summary judgment. Section 101.500(e) of the Board’s procedural rules provides that “[t]he moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice.” 35 Ill. Adm. Code 101.500(e). The Agency has not requested and the Board has not granted leave to file a reply in this proceeding. Accordingly, the Board declines to accept the Agency’s reply.

STANDARD OF REVIEW FOR MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is 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). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” *Id.* Summary judgment “is a drastic means of disposing of litigation,” and therefore it should be granted only when the movant's right to relief “is clear and free from doubt.” *Id.*, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must “present a factual basis which would arguably entitle [it] to judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

BOARD DISCUSSION

In determining whether to grant this motion for summary judgment, the Board must consider the pleadings strictly against the Agency. *See Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d at 370, citing 735 ILCS 5/2-1005(c) (1996))

The parties have strenuously disputed a number of issues: whether Keller performed soil borings in a manner consistent with the Board's regulations, the use of samples collected along piping runs, the construction of monitoring wells, and the submission of required signatures and certifications. Although the disputes listed in the preceding sentence are not intended to be exhaustive, they nonetheless indicate that significant factual issues remain unresolved with regard to Keller's Stage 2 site investigation plan and budget.

Accordingly, the Board cannot conclude that there is no genuine issue of material fact and cannot conclude that the Agency is entitled to judgment as a matter of law. Accordingly, the Agency's motion for summary judgment is denied.

CONCLUSION

The Board denies the Agency's motion for summary judgment and directs the hearing officer to proceed to the hearing in this matter, which is scheduled to take place on Wednesday, August 22, 2007.

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 August 9, 2007, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board