

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

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DEC 12 2006

STATE OF ILLINOIS  
Pollution Control Board

KNAPP OIL COMPANY,	)	
DON'S 66,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 06-52
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**NOTICE OF FILING**

<b>TO:</b>	Melanie A. Jarvis	Carol Webb
	Assistant Counsel	Hearing Officer
	Division of Legal Counsel	Illinois Pollution Control Board
	1021 North Grand Avenue East	1021 North Grand Avenue East
	P.O. Box 19276	P.O. Box 19274
	Springfield, IL 62794-9276	Springfield, IL 62794-9274

**PLEASE TAKE NOTICE** that on December 12, 2006 filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of Petitioner's Cross-Motion for Summary Judgment.

Dated: December 12, 2006

Respectfully submitted,

**Knapp Oil Company, Don's 66**

By: Carolyn S. Hesse  
One of Its Attorneys

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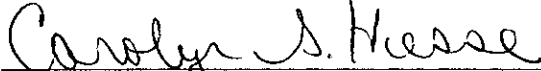
**CERTIFICATE OF SERVICE**

I, on oath state that I have served the attached Petitioner's Cross-Motion for Summary Judgment by placing a copy in an envelope addressed to:

Melanie A. Jarvis  
Assistant Counsel  
Division of Legal Counsel  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, IL 62794-9276

Carol Webb  
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Illinois Pollution Control Board  
1021 North Grand Avenue East  
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from One North Wacker Drive, Suite 4400, Chicago, Illinois, before the hour of 5:00 p.m., on this 12<sup>th</sup> Day of December, 2006.

  
\_\_\_\_\_  
Carolyn S. Hesse

**BEFORE THE POLLUTION CONTROL BOARD  
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**PETITIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Petitioner, Knapp Oil Company ("Knapp"), by its counsel Barnes & Thornburg, LLP, and pursuant to 35 Ill. Adm. Code 101.500, 101.508, and 101.516, moves for Summary Judgment in favor of Knapp and against the Illinois Environmental Protection Agency ("IEPA" or the "Agency") on Knapp's Petition for Review of IEPA's Decision. In support of its Motion, Knapp states as follows:

**INTRODUCTION**

The sole issue presented in this Motion for Summary Judgment is whether IEPA can determine whether a underground storage tank ("UST") is eligible for reimbursement. Contrary to IEPA's arguments, only the Office of the State Fire Marshall ("OSFM") can make such determinations. Once the OSFM determines that an UST is eligible for reimbursement, IEPA is bound by that determination. As the facts and law provide below, Knapp is entitled to summary judgment, in that IEPA improperly rejected Knapp's high priority corrective action plan and budget based on the false premise that IEPA can nullify OSFM's eligibility determinations.

## BACKGROUND FACTS

1. Knapp is the owner of underground storage tanks (“USTs”) at a former gasoline service station known as “Don’s 66,” located at 700 East Main Street, Olney, Richland County, Illinois (the “Station”). There are three USTs at the Station, two of which stored gasoline and one that stored diesel.<sup>1</sup>

2. On July 19, 1990, Knapp notified IEMA that it found gasoline in the monitoring well next to Knapp’s Super No Lead tank located at the Station. SAR 4.<sup>2</sup> Knapp originally believed that only one gasoline tank leaked.

3. Both gasoline tanks and the diesel tank were relined and upgraded on September 7, 1990. AR 13.

4. On June 28, 1995, Knapp submitted a Site Classification Work Plan and Budget to the IEPA. SAR 5. Because it believed at that time that only gasoline had been released from one tank, Knapp proposed testing only for benzene, toluene, ethylbenzene and xylene (BTEX), indicators of the presence of gasoline. SAR 12, 18.

5. On June 26, 1995, Knapp submitted an Underground Storage Tank Fund Eligibility and Deductibility Application to OSFM. SAR 66. This Application indicated that there were three USTs at the Station, but that only one of the USTs storing gasoline had a release. SAR 67.

6. On July 25, 1995, OSFM notified Knapp that the 6,000-gallon gasoline tank was eligible for the payment of costs from the Underground Storage Tank Fund. SAR 63. The

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<sup>1</sup> Hereinafter, the 1,000-gallon diesel fuel tank will be referenced as the “Diesel UST” or “Diesel Tank.”

<sup>2</sup> “SAR \_\_” means IEPA’s Supplemental Administrative Record, “AR \_\_” means the original Administrative Record, and “P \_\_” means the Supplemental Administrative Record submitted by Knapp that is at issue in Knapp’s Motion for Leave to Supplement Administrative Record.

July 25, 1995 OSFM eligibility determination referred to tank number 3, the Diesel Tank, and the other gasoline tank, tank number 1, and stated as follows:

Your application indicates that there has not been a release from these tanks. **You may be eligible to seek payment of corrective action costs associated with these tanks if it is determined that there has been release from one or more of these tanks.** Once it is determined that there has been release from one or more of these tanks, you may submit a separate application for an eligibility determination to seek corrective action costs associated with this/these tanks.

SAR 65 (emphasis added).

7. On July 27, 2001, Knapp submitted a Site Assessment Report and Corrective Action Plan (the "2001 CAP"). SAR 148-294. In the 2001 CAP, Knapp stated that it discovered that there may have been a release from the Diesel Tank as well as the other gasoline tank. This report states:

While prior reporting indicated that tank numbers 1 and 3 did not contribute to the release, contamination found during the site assessment beneath the pump island and at the east property line indicates that all three tanks may have contributed to the release.

SAR 155.

8. By letter dated November 16, 2001, the Agency rejected the 2001 CAP and required Knapp to perform additional investigation (AR 11, SAR 296-305), including the investigation of whether the Diesel Tank leaked. SAR 299.

9. On February 14, 2002, CW<sup>3</sup>M on behalf of Knapp responded to various issues IEPA raised on November 16, 2001, and submitted a revised CAP and budget to get paid for costs already incurred to investigate BTEX.<sup>3</sup> P 1-37. The February 14, 2002 submission also explained that it was only during the subsequent site assessment that Knapp discovered that the

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<sup>3</sup> Knapp still has not been reimbursed for these costs.

Diesel Tank and the other gasoline tank may have contributed to contamination at the Station. P 1-37.

10. On March 7, 2002, Knapp submitted an Amended Eligibility and Deductibility application which corrected the “date” registered for all three tanks at the property and listed in paragraph 8 that there have been releases from all three tanks on the property. P 348. This was done in accordance with the instructions from the OSFM to submit an “application for an eligibility determination to seek corrective action costs associated with this/these tanks” if it was determined that there were releases from them. SAR 65.

11. On March 26, 2002, OSFM issued an eligibility and deductibility determination that the Diesel Tank, as well as both of the gasoline tanks at the Station, were eligible for reimbursement from the UST Fund. AR 303-304. The releases from the gasoline and diesel tanks likely occurred around the same time because all three tanks were upgraded and relined at the same time. OSFM stated that its determination was “the final decision as it relates to your eligibility and deductibility.” AR 304. A copy of the OSFM determination was included in Appendix G of the Site Assessment Report and Corrective Action Plan dated August 2005.<sup>4</sup> AR 304-305. The OSFM determination was also included in documents submitted to IEPA earlier.

12. The budget for the site investigation work was rejected by the Agency on May 15, 2002. P 38-40.

13. Another Site Assessment Report and Corrective Action Plan to address both gasoline and diesel contamination was submitted on behalf of Knapp to IEPA on October 4, 2004. (the “2004 CAP”). P 41-347. The 2004 CAP included data from samples collected on

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<sup>4</sup> Note that the Agency’s denial of the August 2005 Corrective Action Plan and its associated Budget are the subject of this Appeal.

February 20, 2002 and August 27, 2002 that were analyzed for polynuclear aromatic hydrocarbons (PAH) which are diesel fuel indicators, and polynuclear aromatic hydrocarbons were found. P 57, 59-61. These actions are consistent with IEPA's instructions in November of 2001 to investigate the Diesel Tank further. SAR 299.

14. On January 19, 2005, IEPA rejected the 2004 CAP because it included the removal of the Diesel Tank and remediation of the diesel contamination (AR 316) and requested an affidavit from Knapp identifying specific off-site property that required access and for which access had been denied. AR 317. IEPA also requested that Knapp perform additional off site investigation. AR 26-27.

15. On August 2, 2005, Knapp submitted a High Priority Corrective Act Plan and associated budget (the "2005 CAP and Budget") to IEPA and responded to IEPA's requests for information in the Agency's January 19, 2005 letter. AR 1-304.

16. The 2005 CAP and Budget included costs related to removing the Diesel Tank in addition to both gasoline tanks and to remediate the release from all the tanks. AR 1-304. The letter regarding the 2005 CAP and Budget stated that the OSFM made a determination that the Diesel Tank and both gasoline tanks were eligible for reimbursement and the 2005 CAP and Budget included a copy of the OSFM letter stating that all three tanks are eligible. AR 1, 303-304. The 2005 CAP and Budget also explained why the Diesel Tank was not initially included in the September 13, 2000 Site Classification Completion Report:

The information that the Diesel Tank had to be upgraded when the gasoline tanks were upgraded, and the product noted in the observation well had been assumed to be gasoline, but may have been diesel was not known by CW<sup>3</sup>M until after the Site Classification Completion Report was submitted. The presence of diesel does not change the High Priority designation, merely refines the release from them.

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The information that resulted in the Diesel Tank being added appeared in the CAP submitted in February of 2002, and was based on interviews and a review of the OSFM records for the site.

AR 1.

17. The 2005 CAP also contains data from numerous samples collected on August 27, 2002 in which indicator parameters for diesel exceeded their respective remedial objectives (“ROs”). For example, groundwater samples from MW-D exceeded ROs for benzo(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene and benzo(k)fluoranthene (AR 23); benzo-(a)pyrene exceeded ROs in soil samples collected from SB5a-3, SB1a-5, SB11-3 (AR 24) and from SB4a-3 (AR 25).

18. On September 21, 2005, IEPA issued a letter to Knapp rejecting the entire 2005 CAP and Budget. AR 323-330. IEPA rejected the 2005 CAP and Budget as related to the Diesel Tank based on the following statement:

Incident no. 901831 was reported as a result of free product observed in an observation well located in the gasoline tank basin. The substance reported released was gasoline only. The release was classified as High Priority based on the elevated concentration of gasoline indicator contaminants (BTEX). Site Classification was approved by the Agency on January 3, 2001, based on information supplied in the Site Classification Completion report received by the Agency on September 14, 2000. This report states that there was no release from the Diesel Tank, and diesel indicator contaminants were not analyzed for during site classification. Therefore, any activity associated with the delineation and remediation of diesel fuel indicator contaminants exceed the minimum requirements to comply with Title XVI of the Act. In addition, these costs are not reimbursable pursuant to 35 IAC Section 732.606(o).

AR 325. When drafting his letter, the Agency ignored the information provided by Knapp in 2004 and 2005.



19. The Agency did not raise issues in its September 21, 2005 letter related to whether one or both gasoline tanks leaked.

20. On October 17, 2005, Knapp filed a Petition for Review of Illinois Environmental Protection Agency Decision based on IEPA's rejection of the 2005 CAP and Budget on September 21, 2005.

## ARGUMENT

### **I. Standard for Summary Judgment.**

Section 101.516(b) of the Board's General Rules provides:

If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment.

35 Ill. Adm. Code 101.516(b). A review of the record shows that summary judgment is appropriate on Knapp's Petition for Review in favor of Knapp.

### **II. Knapp is entitled to approval of the 2005 CAP and Budget.**

In its Motion for Summary Judgment, IEPA correctly stated that "The question in this case is not one of fact, but rather of law." IEPA's Motion for Summary Judgment, p. 9. The question of law for Knapp's Motion for Summary Judgment is whether Knapp satisfied all of the statutory and regulatory requirements for approval of the 2005 CAP and Budget, such that it is entitled to reimbursement from the UST Fund for work performed on the Diesel Tank.

35 Ill. Adm. Code 732.405(b) provides the requirements for IEPA's approval of a high priority corrective plan and budget:

In addition to the plans required in subsections (a), (e), and (f) of this Section and prior to conducting any groundwater monitoring or corrective action activities, any owner or operator intending to

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seek payment from the Fund shall submit to the Agency a groundwater monitoring or corrective action budget plan with the corresponding groundwater monitoring or corrective action plan. **Such budget plans shall include, but not be limited to, a copy of the eligibility and deductibility determination of the OSFM** and an estimate of all costs associated with the development, implementation and completion of the applicable activities, excluding handling charges.

(emphasis added). Knapp provided the information required under section 732.405(b). Specifically, section 732.405(b) does not state that Knapp needs to report a release of the Diesel Tank to IEMA for IEPA to approve a high priority corrective action plan and budget. It only states that a copy of the OSFM eligibility and deductibility determination must be included. In this case, on March 26, 2002, OSFM made a final decision that the three tanks at the Station, including the Diesel Tank, were eligible for the payment of costs in excess of \$10,000. AR-303-304. Accordingly, Knapp satisfied the requirements for approval of a high priority corrective action plan and budget for the 2005 CAP and Budget.

In support of its rejection of the 2005 CAP and Budget, IEPA is attempting to claim that it can make eligibility determinations. To the contrary, as provided in Section 57.9(c) of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/57.9(c), "Eligibility and deductibility determinations shall be made by the Office of the State Fire Marshal." In accordance with its jurisdiction, OSFM made the determination that the Diesel Tank was an eligible tank. AR-303-304. IEPA is not entitled to second guess OSFM's eligibility decision, as OSFM issues its eligibility determination by issuing "one letter enunciating the final eligibility and deductibility determination, and such determination or failure to act within the time prescribed shall be a final decision appealable to the Illinois Pollution Control Board." 415 ILCS 5/57.9(c)(2). Accordingly, OSFM's decision that Knapp was eligible to access the UST Fund

was made final by OSFM's decision, and that determination cannot be second-guessed or challenged by IEPA.

IEPA attempts to explain that although "the Petitioner did have the Office of State Fire Marshal issue a new eligibility determination listing the Diesel Tank as an eligible tank, however, that does not replace the need for IEMA to be notified." IEPA's Motion for Summary Judgment, p. 10. This argument is misleading. Neither section 732.404 nor 732.405 requires that Knapp notify IEMA of a release from the Diesel Tank. Instead, only section 732.202 requires a report of a release to IEMA. 35 Ill. Adm. Code 732.202(a)(1). Sections 732.404 and 732.405, however, do not predicate approval of a CAP and budget upon compliance with 732.202, nor do they require Knapp to contact IEMA for any reason. IEPA is attempting to impose an additional requirement in 732.404 and 732.405 that is not supported in the regulatory language. As a result, whether Knapp notified IEMA of a release from the Diesel Tank is irrelevant for determining whether a CAP and budget that includes the Diesel Tank should be approved. Knapp satisfied the elements under 732.405 by obtaining an eligibility determination for the Diesel Tank, and is thus entitled to approval of the 2005 CAP and Budget.

IEPA also argues that Knapp is not entitled to approval of the 2005 CAP and Budget because Incident Number 908131, dated July 2, 1990, was reported as a release from a gasoline tank only. Knapp, however, fully informed IEPA that there had been a release from the Diesel Tank as soon as it became aware of the release in its Site Assessment Report and Corrective Action Plan, dated July 27, 2001. SAR-150. That Report and Plan stated that "While prior reporting indicted that tank numbers 1 and 3 did not contribute to the release, contamination found during the site assessment beneath the pump island and at the East property line indicates that all three tanks may have contributed to the release." SAR-155. Moreover, Knapp explained

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when it submitted the 2005 CAP and Budget why the release of the Diesel Tank was not discovered and disclosed in the September 13, 2000 Site Classification Completion Report. AR-1. Further, data indicating the presence of diesel is contained in the 2005 CAP and Budget on pages 13, 14, and 15 of that report. AR 23-25. Again, because there is no question of material fact that Knapp has satisfied its regulatory requirements, Knapp is entitled to approval of the 2005 CAP and Budget for future reimbursement, and summary judgment should be granted in its favor.


**CONCLUSION**

Knapp Oil Company requests that the Board grant this Motion, enter summary judgment in favor of Knapp and against IEPA, and grant all relief it deems fair and just.

Respectfully submitted,

**Knapp Oil Company, Don's 66**

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