

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

KNAPP OIL COMPANY,)	
Petitioner,)	
v.)	PCB 2016-103
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

PETITIONER'S POST-HEARING BRIEF

NOW COMES Petitioner, KNAPP OIL COMPANY, by its undersigned counsel, for its post-hearing brief, states as follows:

STATEMENT OF FACTS

Knapp Oil Company operates a convenience store in Metropolis, Illinois. (R.8 -R.10) A gasoline release from underground storage tanks was reported in 1999, and assigned incident numbers 991949 and 992410, the latter of which was a re-reporting of the former. (R.9 - R.10) In 2014, a release from two gasoline underground storage tanks was reported, and assigned incident number 20141214. (R.8) These tanks were removed as part of early action. (R.8) Because a no-further remediation letter had not been issued with respect to the previous incidents, the Illinois EPA directed Knapp to address all three incidents at the same time "as both plumes are intermingled." (R.9)

On February 25, 2016, in response to the Illinois EPA's directions, Knapp's consultants submitted a Stage One Site Investigation Plan and Budget. (R.10) The plan proposed conducting a soil and groundwater investigation to define the extent of any contamination over

remediation objectives as a result of the 2014 incident. (R.11) The budget for this work was \$34,581.30. (R.22) Of this amount, \$1,970.50 are for consultant's materials cost. (R.31 & R.32)

On March 8, 2016, the plan was approved and the proposed budget was modified. (R.52)

The modifications were listed as follows:

The cost associated with the camera will not be reimbursable as this is an indirect costs billed as a direct cost.

The rate proposed for the bailer will need supporting documentation as the proposed rate of \$25/bailer is deemed excessive at this time.

Justification is being requested in regards to the cost associated with the survey equipment. What type of survey equipment is being used?

A breakdown of items associated with a sampling kit will need to be submitted to determine if this exceeds the minimum requirements to meet Title XVI.

(R.53)

Petitioner timely filed an appeal of this final decision on April 14, 2016. (Pet for Rev.)

LEGAL ARGUMENT

The subject of this appeal is a budget, and given that a number of the modifications to the budget are based upon lack of documentation, it is important to emphasize that this is a budget. The purpose of the budget is to give “an estimate of all costs associated with the development, implementation, and completion of the site investigation plan.” (35 Ill. Adm. Code § 734.310(b) (emphasis added)) Costs must be set forth in a manner consistent with how such costs are addressed in the Board's regulations (id.), using budget forms prescribed and provided by the

Agency. (35 Ill. Adm. Code § 734.135(a))

There are three categories of issues that arise from reviewing a plan and budget:

In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine, by a procedure promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title.

(415 ILCS 5/57.7(c)(3))

In summary, the Illinois Environmental Protection Agency (herein “the Agency) pursuant to Board procedures must determine that the costs are (i) reasonable, (ii) for corrective action, and (iii) are for activities that do not exceed any legal requirements. Unlike the similar permitting process, Board regulations do not provide for a completeness review or similar two-step process in the LUST Program.

If the budget is to be denied or modified, the Act requires the Agency to specify with particularity the decision:

[A]ny action by the Agency to disapprove or modify a plan submitted pursuant to this Title . . . shall be accompanied by:

(A) an explanation of the Sections of this Act which may be violated if the plans were approved;

(B) an explanation of the provisions of the regulations, promulgated under this Act, which may be violated if the plan were approved;

(C) an explanation of the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and

(D) a statement of specific reasons why the Act and the regulations might not be met if the plan were approved.

(415 ILCS 5/57.7(c)(4))

These detailed statements frame the issues to be decided by the Board and the Agency is precluded from raising any issue not contained therein. Environmental Protection Agency v. Pollution Control Bd., 86 Ill. 2d 390, 405 (1981). “[T]he burden of proof is on the petitioner to prove that the Agency's denial reason was insufficient to warrant affirmation.” Rosman v. IEPA, PCB No. 91-80 (Dec. 19, 1991). The question before the Board is “whether the application, as submitted to the Agency, would not violate the Act and Board regulations.” Metropolitan Pier and Exposition Authority v. IEPA, PCB 10-73, at p. 51 (July 7, 2011).

ARGUMENT

1. CAMERA COST

The first item at issue is one of the consultant’s materials costs:

Materials, Equipment, or Field Purchase	Time or Amount Used	Rate (\$)	Unit	Total Cost
Remediation Category	Description/Justification			
...				
Digital Camera	1.00	30.00	Day	\$30.00
Stage 1 - Field	Document Stage 1 Site Investigation field activities			

(R.31)

The Illinois EPA letter states that “[t]he cost associated with the camera will not be reimbursable as this is an indirect costs billed as a direct cost.” (R.53) That is, there is no allegation that documenting stage 1 site investigation field activities is not corrective action, nor

is there an allegation that the costs are unreasonable. The denial reason is based upon the claim that the costs are ineligible indirect costs. The Board regulations state in relevant part:

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

- t) Interest or finance costs charged as direct costs;**
- u) Insurance costs charged as direct costs;**
- v) Indirect corrective action costs for personnel, materials, service, or equipment charged as direct costs;**

(35 Ill. Adm. Code § 734.630(t), (u) & (v))

There is no definition of “direct costs” or “indirect costs” in the Board’s regulations, and at least as applied to anything other than interest, finance or insurance costs, the restriction is ambiguous. See Outboard Marine Corp. v. Liberty Mut. Ins. Co., 154 Ill.2d 90, 108-109 (1992) (ambiguities in insurance policies strictly construed in favor of coverage).

The purpose of the Underground Storage Tank Fund is to pay “any costs associated with physical soil classification, groundwater investigation, site classification and corrective action.” (415 ILCS 5/57(4) (emphasis added)) When courts have looked at similar language in environmental statutes, “any costs” has been understood to “include both direct costs and a proportionate share of indirect costs attributable to each site.” U.S. v. R.W. Meyer, 889 F.2d 1497, 1504 (5th Cir. 1989) (CERCLA)¹. Since the costs of photography at a particular site are direct costs under this interpretation, US v. Hardage, 750 F. Supp. 1460, 1499 (W.D. Okla. 1990), the distinctions between direct costs and attributable indirect costs are not relevant. If,

¹ Similarly, in the Site Remediation Program, ““Indirect costs’ means those costs incurred by the Agency that cannot be attributed directly to a specific site . . .” (35 Ill. Adm. Code § 740.120) Logically then “direct costs” under those regulations are those costs that can possibly be attributed to a specific site.

however, “direct costs” are defined stringently to preclude costs attributable to cleanup at a particular site, the purpose of the Act is not being met, however categorized.

Professional consulting services are reimbursed in the LUST Program on a “time and materials” basis. (35 Ill. Adm. Code § 734.845) For those items not expended during the work, “a reasonable rate may be charged for the usage of such materials, supplies, equipment, or tools.” (35 Ill. Adm. Code § 734.630(h)) The Agency’s Instructional document admitted into evidence at hearing recognizes that cameras are such reimbursable materials:

Include on the form the costs associated with materials provided by the professional consulting service (that is, the primary consulting firm) including but not limited to lodging and per diems, mileage (or vehicle), private utility locator, permit fees, well survey fees, NFR Letter recording fees, manifests, copies, and other equipment and supplies (such as PID, FID, explosimeter, DO/ORPH/pH meters, hand augers, cameras/photo development, gloves, plastic bags, decon kit [for consultant’s nondisposable field equipment] equipment to survey wells, peristaltic pump, purge pump, rope, bailers, measure wheel, transducer, data logger, water level indicator/interface probe, plastic tubing, metal detector, and barricades).

(Petitioner’s Ex. A, at p. 15 (emphasis added) (brackets in original))

If “cameras/photo development” was considered an indirect cost (*i.e.*, general overhead), it would not be specifically listed in the instructions as a cost to be included on the consultant’s materials form. These instructions are required to be used on the forms promulgated by the Illinois EPA. (Petitioner’s Ex. A, at p. 1)

In summary, the consultant budgeted for the use of a camera, at an amount that is not claimed to be unreasonable, and for purpose of documenting field activities that is not claimed to be beyond the needs for the work. Testimony was offered at the hearing in which the witness never mentioned the words “direct” or “indirect,” but offered an alternative theory to denying

reimbursement that is legally irrelevant because it was not raised in the denial letter. The only question presented is whether camera costs are indirect costs, and the Agency’s instructions indicate that they are not.

2. BAILER

The next consultant’s material cost objected to in the budget is the bailer:

Materials, Equipment, or Field Purchase	Time or Amount Used	Rate (\$)	Unit	Total Cost
Remediation Category	Description/Justification			
...				
Bailers	9.00	25.00	Each	\$225.00
Stage 1 - Field	Well reconditioning, well development and groundwater sample collection			

(R.31)

The denial letter states that the above rate is “deemed excessive at this time” and will need supporting documentation. The specific supporting documentation is not identified, which is in violation of the Act. (415 ILCS 5/57.7(c)(4)(C)) Furthermore, “excessive” is not a limitation under the Act. The Act requires that costs “will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title.” (415 ILCS 5/57.7(c)(3) (emphasis added)) That is to say, this restriction addresses whether the activities are necessary for to comply with environmental law. One of the most frequent areas where this issue arose in the early stages of the LUST program was concrete

replacement, which was usually deemed to be a cost of restoration or improvement of the subject property, and not necessary for remediation. E.g., *Graham v. IEPA*, PCB 95-89 (Aug. 24, 1995) (restoring service station to previous use is beyond the requirements of corrective action). The usage of concrete or asphalt as an engineered barrier has changed the outcome, but it is one of the clearest and at one time most litigated issues about activities that exceeded the environmental requirements of the law.

This interpretation is the same as in the Instructions for the Budget and Billing Forms. This form requires the rate at which an item is charged to be listed, but does not require justification for the rate. (Petitioner's Ex. A, at p. 15) Instead, it requires justification for the equipment's use:

g. Description/Justification – Enter a description of the materials, equipment, or field purchase and/or justification for its use.

(Petitioner's Ex. A, at p. 15 (emphasis added))

For those items specifically listed in the instructions as common consultant's materials, such justification is implicitly known by its description, but here the purpose for the bailers was adequately described as for purposes of well reconditioning, well development and groundwater sample collection. (R.31) There is no suggestion that the project manager believed that bailers were not useful for site investigation activities. The objection made is to the rate, and the standard for the rate is whether it is a reasonable estimate, not whether it exceeds some hypothetical cost point that the Illinois EPA imagines.

This form was prepared with the assistance of the professional consultant, who has personal knowledge of the rates the company charges for bailers, or since this is a budget, is

likely to be charged. No maximum rates have been set for bailers, and the purpose and direction of the Agency objections in this and other pending appeals appears to be to set rates on a case-by-case basis, that is all of the cost-and-expense of ratemaking without any of the benefits of economy since such determinations only apply once. The Agency has over a decade of data on what consultants charge for bailers, including data as to what Petitioner's consultants have charged for bailers.

The removal of bailers from the budget was not justified by any legal provision or reason, and Petitioner respectfully requests that the budget for the bailers be approved at the requested rate.

3. SURVEY EQUIPMENT

Similar to bailers, survey equipment was also rejected as lacking justification:

Materials, Equipment, or Field Purchase	Time or Amount Used	Rate (\$)	Unit	Total Cost
Remediation Category	Description/Justification			
	...			
Survey Equipment	1.00	150.00	Day	\$150.00
Stage 1 - Field	Survey well risers			

(R.31)

Justification is demanded “in regards to the cost associated with the survey equipment.”

(R.56) The only justification required by the regulations and the form is what use the equipment will be employed, and the application adequately explains that it will be used to survey well

risers. (R.31)

Without repeating all of the same points made with regard to the bailers, all of which are equally applicable to survey equipment, it is important to stress that the costs for the consultant to prepare budgets is a reimbursable expense under the regulations. These costs are projected on the basis of the time required to complete the forms based upon past experience. If consultants are now to be required to spend hours to justify cost estimates of materials based upon an unarticulated standard not found in the Board's procedures, nor applied consistently between project managers, those costs must also be projected and budgeted for reimbursement as well. Are such costs reasonable in the context of \$25 or \$150 items? No, they are not, unless the Agency is affirmed in its paper chase.

4. SAMPLING KIT

Unlike the previous items, the description of the sampling kit is the Agency's description from its own form. Furthermore, the sampling kit has a maximum payment rate set in Subpart H. All that the form required for an estimate of the sampling kit was the number of samples, cost (\$) per analysis, and the product thereof. (R.25)

The Agency's analytical costs form lists the sampling kit as "EnCore® Sampler, purge-and-trap sampler, or equivalent sampling device." (Petitioner's Ex. B, at p. 2 (attached hereto))² Neither the form, nor the instructions (Petitioner's Ex. A, at p. 8), require any more detail, and

² Petitioner asks the Board to take official notice of the Analytical Costs Form from the Agency's website, a copy of which is attached hereto as Petitioner's Exhibit B: <http://epa.illinois.gov/topics/cleanup-programs/lust/budget-and-billing-forms/index> (last visited July 22, 2016). See 35 Ill. Adm. Code 101.630; People v. Young, 355 Ill. App. 3d 317, 321 (2nd Dist. 2005) ("we may take judicial notice of information that the Department of Corrections has provided on its website.")

the information certainly cannot be legally inadequate since the Agency mandated it.

The Agency form corresponds with a specific item for which a maximum payment amount has been set by the Board regulations. (35 Ill. Adm. Code Part 734, App. D) No claim is made, nor could be made, that the estimated rate exceeds that standard, adjusted for inflation.

In summary, the information given in the budget is necessarily adequate because the Agency form actually supplied it. The rate charged is reasonable as it does not exceed Supart H rates set for the sampling kit. There is no legal justification for requiring breakdowns of the sampling kit, given that the form and rates are established on a unit basis.

CONCLUSION

WHEREFORE, Petitioner, KNAPP OIL COMPANY, prays that: (a) the Board find the Agency erred in its decision, (b) the Board direct the Agency to approve the budget as submitted, (c) the Board award payment of attorney's fees; and (d) the Board grant Petitioner such other and further relief as it deems meet and just.

KNAPP OIL COMPANY,
Petitioner

By its attorneys,
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Laboratory Analysis	Number of Samples		Cost (\$) per Analysis		Total per Parameter
Chemical Analysis					
BETX Soil with MTBE EPA 8260		X		=	
BETX Water with MTBE EPA 8260		X		=	
COD (Chemical Oxygen Demand)		X		=	
Corrosivity		X		=	
Flash Point or Ignitability Analysis EPA 1010		X		=	
Fraction Organic Carbon Content (f _{OC}) ASTM-D 2974-00		X		=	
Fat, Oil, & Grease (FOG)		X		=	
LUST Pollutants Soil - analysis must include volatile, base/neutral, polynuclear aromatics and metals list in Section 732. Appendix B and 734. Appendix B		X		=	
Dissolved Oxygen (DO)		X		=	
Paint Filter (Free Liquids)		X		=	
PCB / Pesticides (combination)		X		=	
PCBs		X		=	
Pesticides		X		=	
pH		X		=	
Phenol		X		=	
Polynuclear Aromatics PNA, or PAH SOIL EPA 8270		X		=	
Polynuclear Aromatics PNA, or PAH WATER EPA 8270		X		=	
Reactivity		X		=	
SVOC - Soil (Semi-Volatile Organic Compounds)		X		=	
SVOC - Water (Semi-Volatile Organic Compounds)		X		=	
TKN (Total Kjeldahl) "nitrogen"		X		=	
TPH (Total Petroleum Hydrocarbons)		X		=	
VOC (Volatile Organic Compounds) - Soil (Non-Aqueous)		X		=	
VOC (Volatile Organic Compounds) - Water		X		=	
		X		=	
		X		=	
		X		=	
		X		=	
		X		=	
Geo-Technical Analysis					
Soil Bulk Density (p _b) ASTM D2937-94		X		=	
Ex-situ Hydraulic Conductivity / Permeability		X		=	
Moisture Content (w) ASTM D2216-92 / D4643-93		X		=	
Porosity		X		=	
Rock Hydraulic Conductivity Ex-situ		X		=	
Sieve / Particle Size Analysis ASTM D422-63 / D1140-54		X		=	
Soil Classification ASTM D2488-90 / D2487-90		X		=	
Soil Particle Density (p _s) ASTM D854-92		X		=	
		X		=	
		X		=	
		X		=	

PENGAD 800-631-6989

PETITIONER'S
EXHIBIT

B

Analytical Costs Form

Metals Analysis				
Soil preparation fee for Metals TCLP Soil (one fee per soil sample)		X		=
Soil preparation fee for Metals Total Soil (one fee per soil sample)		X		=
Water preparation fee for Metals Water (one fee per water sample)		X		=
Arsenic TCLP Soil		X		=
Arsenic Total Soil		X		=
Arsenic Water		X		=
Barium TCLP Soil		X		=
Barium Total Soil		X		=
Barium Water		X		=
Cadmium TCLP Soil		X		=
Cadmium Total Soil		X		=
Cadmium Water		X		=
Chromium TCLP Soil		X		=
Chromium Total Soil		X		=
Chromium Water		X		=
Cyanide TCLP Soil		X		=
Cyanide Total Soil		X		=
Cyanide Water		X		=
Iron TCLP Soil		X		=
Iron Total Soil		X		=
Iron Water		X		=
Lead TCLP Soil		X		=
Lead Total Soil		X		=
Lead Water		X		=
Mercury TCLP Soil		X		=
Mercury Total Soil		X		=
Mercury Water		X		=
Selenium TCLP Soil		X		=
Selenium Total Soil		X		=
Selenium Water		X		=
Silver TCLP Soil		X		=
Silver Total Soil		X		=
Silver Water		X		=
Metals TCLP Soil (a combination of all metals) RCRA		X		=
Metals Total Soil (a combination of all metals) RCRA		X		=
Metals Water (a combination of all metals) RCRA		X		=
		X		=
		X		=
		X		=
		X		=
Other				
EnCore® Sampler, purge-and-trap sampler, or equivalent sampling device		X		=
Sample Shipping per sampling event ¹		X		=

¹A sampling event, at a minimum, is all samples (soil and groundwater) collected in a calendar day.

Total Analytical Costs: \$ _____