

ORIGINAL

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

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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**


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

PLEASE TAKE NOTICE that on December 7, 2006, there was filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois, an original, executed copy of the **APPEARANCE, PETITIONER'S MOTION FOR LEAVE TO SUPPLEMENT ADMINISTRATIVE RECORD, PETITIONER'S SUPPLEMENT TO THE ADMINISTRATIVE RECORD, and PETITIONER'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**, copies of which are herewith served upon you.

Dated: December 7, 2006

Respectfully submitted,

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

By:   
One of Its Attorneys

Carolyn S. Hesse  
David T. Ballard  
**Barnes & Thornburg LLP**  
One North Wacker Drive  
Suite 4400  
Chicago, Illinois 60606  
(312) 357-1313

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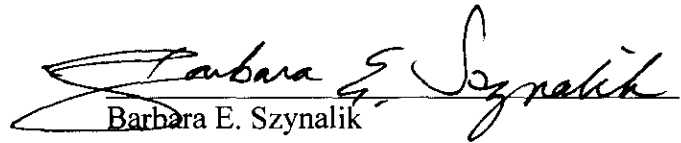
~~ORIGINAL~~  
**PROOF OF SERVICE**

STATE OF ILLINOIS  
Pollution Control Board

I, the undersigned, a non-attorney, certify, under penalties pursuant to 735 ILCS 5/1-109, that I caused the attached **NOTICE OF FILING** and **APPEARANCE, PETITIONER'S MOTION FOR LEAVE TO SUPPLEMENT ADMINISTRATIVE RECORD, PETITIONER'S SUPPLEMENT TO THE ADMINISTRATIVE RECORD, and PETITIONER'S RESPONSE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**, to be served via U.S. Mail, this 7th day of December, 2006, upon the following:

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

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

  
Barbara E. Szynalik

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**APPEARANCE**

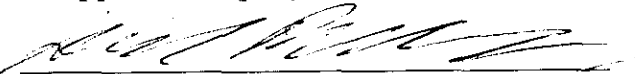
The undersigned hereby enters an **APPEARANCE** on behalf of the Petitioner, Knapp Oil Company, Don's 66, in this matter:

Petitioner: Knapp Oil Company, Don's 66

Attorneys: David T. Ballard  
Barnes & Thornburg LLP  
One North Wacker Drive  
Suite 4400  
Chicago, Illinois 60606  
Phone: (312) 357-1313

Respectfully submitted,

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

By:   
One of Its Attorneys

DATED: December 7, 2006

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**PETITIONER'S MOTION FOR LEAVE TO  
SUPPLEMENT ADMINISTRATIVE RECORD**

Petitioner, Knapp Oil Company ("Knapp"), by its counsel Barnes & Thornburg, LLP, and pursuant to 35 Ill. Adm. Code 101.508 and 105.212, moves the Board for leave to file a supplement to the Administrative Record filed previously. In support of its Motion, Knapp states as follows:

1. On October 17, 2005, Knapp filed a Petition for Review of Illinois Environmental Protection Agency ("IEPA") Decision based on IEPA's rejection of a High Priority Corrective Action Plan and Budget on September 21, 2005.
2. On December 29, 2005, the Illinois Environmental Protection Agency ("IEPA") mailed the filing of the Administrative Record in this case.
3. On September 21, 2006, IEPA filed a Motion for Summary Judgment, seeking that the Board affirm IEPA's decision. The Agency's Motion references and relies on documents that were not included in the Record that the Agency filed previously.
4. On September 22, 2006, IEPA filed a Motion for Leave to Supplement Administrative Record to include the documents that IEPA cited in its Motion for Summary

Judgment. Knapp did not object to IEPA's Motion for Leave to Supplement Administrative Record.

5. Through the course of reviewing IEPA's Motion for Summary Judgment and assessing its response to IEPA's Motion, Knapp discovered several documents that were submitted to IEPA by Knapp and correspondence from IEPA to Knapp that were not included in the Administrative Record that IEPA filed in 2005 or in the Supplemental Administrative Record IEPA filed more recently.

6. According to the Board's procedural rules at 35 Ill. Adm. Code 105.212 the documents that Knapp is seeking to have included in the Record for this appeal must be included in the record. Section 105.212 states:

- a) The Agency must file its entire record of its decision with the Clerk in accordance with Section 105.116 of this Part.
- b) The record must include:
  - 1) Any permit application or other request that resulted in the Agency's final decision;
  - 2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application;
  - 3) The permit denial letter that conforms to the requirements of Section 39(a) of the Act or the issued permit or other Agency final decision;

\* \* \*

and

- 4) Any other information the Agency relied upon in making its final decision.
- 7. The documents that Knapp seeks to have included in the Record consist of:

A letter from Knapp's consultant dated February 14, 2002 responding to the Agency's comments regarding the Knapp site and forwarding an amended Budget (P 1-2);

The February 14, 2002 amended Budget for Knapp Oil (P 3-37);

A letter from IEPA dated May 15, 2002 to Knapp regarding the February 14, 2002 Budget (P 38-40);

A letter from Knapp's consultant dated October 4, 2004 forwarding a Site Assessment Report and Corrective Action Plan for Knapp Oil (P 41);

The Site Assessment Report and Corrective Action Plan for Knapp Oil dated October 2004 (P 42-347); and

The Application to the OSFM to amend the eligibility determination. (P 348-352)

A copy of the Petitioner's Supplement to the Administrative Record is filed concurrently with this Motion.

8. Because these documents are within the category of "correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application," or as relevant in this case, the CAP and Budget that are subject to this appeal, they are documents that the Agency should have included in the Administrative Record when it was originally filed in 2005.

9. The omission of the documents was not due to any bad faith of Knapp, but rather was only recently discovered to have been excluded from the original Administrative Record and the Supplemental Administrative Record.

10. No hardship to IEPA should occur due to the filing of the Supplemental Administrative Record attached to this Motion, as all of the documents, except perhaps the letter to the OSFM, were submitted to IEPA before this appeal was filed and are documents the IEPA already had in its possession. The inclusion of these documents should be allowed to complete the Administrative Record before the Board.

11. Failure to include the documents would prejudice Petitioner because those documents include information that the Agency had in its possession and should have reviewed

and considered when making its decisions that are the subject of this appeal. The Agency should not be allowed to pick and choose only the information that the Agency wants to consider when making a decision and the Agency should not be permitted to disregard relevant, more recent information that contradicts older information that the Agency cited as the basis of its decisions. In this case, IEPA argued that in 1990, Knapp reported that only a gasoline tank had a release, citing to documents IEPA included in the Supplemental Administrative Record; yet IEPA chose to ignore a report in its files dated October 2004 that states that, “contamination found during the site assessment indicates that all three tanks had contributed to the release.” P 49. IEPA also chose to ignore the fact that the October 2004 report contained data showing contamination with chemicals that indicate the presence of diesel fuel (P 59-61) and the OSFM determination that the diesel tank at issue here was eligible for reimbursement from the Underground Storage Tank Trust Fund. P 346-347. The samples that documented the release were collected in 2002 after the dates of the documents the Agency cited to support its arguments that the diesel tank did not have a release. P 59-61.

12. The documents that Knapp wishes to file to supplement the Record should have been included in the Administrative Record when it was originally filed in 2005. The Agency should be compelled to supplement the Record with all documents that were in its possession related to this site at the time of its decision on September 21, 2005 that led to this appeal.

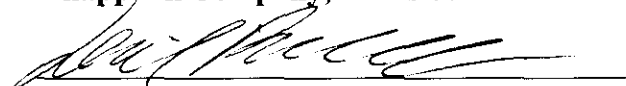
13. Knapp also respectfully requests that it be allowed to file a reduced number of copies of its proposed supplemental record with the Board and is concurrently filing a total of five copies with the Board.

WHEREFORE, Knapp Oil Company requests that the Board grant this Motion, grant Knapp leave to file a supplement to Administrative Record, and grant all relief it deems fair and just.

Respectfully submitted,

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

By:

  
One of Its Attorneys

Carolyn S. Hesse  
David T. Ballard  
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**PETITIONER'S RESPONSE IN OPPOSITION TO  
MOTION FOR SUMMARY JUDGMENT**

Petitioner, Knapp Oil Company ("Knapp"), by its counsel Barnes & Thornburg, LLP, and pursuant to 35 Ill. Adm. Code 101.516, files its Response in Opposition to the Illinois Environmental Protection Agency's ("IEPA" or the "Agency") Motion for Summary Judgment. In support of its Response, Knapp states as follows:

**INTRODUCTION**

Summary judgment is not appropriate on either of the bases raised in IEPA's Motion. First, the Agency's motion for summary judgment should be denied as to the issue of whether a diesel underground storage tank ("UST") at the property at issue is eligible for reimbursement under a high priority corrective action plan and budget submitted by Knapp. As the record shows, the Office of the State Fire Marshall ("OSFM") determined that the diesel UST is eligible for reimbursement. IEPA argues that it determined the diesel UST is not eligible for reimbursement because Knapp did not report a release from the diesel UST to the Illinois Emergency Management Agency ("IEMA"). This argument is wrong, as OSFM has exclusive

jurisdiction under the Environmental Protection Act (“Act”) at Section 57.9(c) to make eligibility determinations for USTs.

In addition, IEPA seeks summary judgment on the issue that an additional investigation should be conducted on the properties west of the contaminated property. A material issue of fact, however, exists as to whether such an investigation is necessary, as required under 35 Ill. Adm. Code 732.404(e). Because an issue of fact exists, summary judgment should be denied.

### **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. That Plan and Budget stated that the “following tanks are located on the Station’s property: one (1) 6,000-gallon gasoline UST, one (1) 8,000-gallon gasoline UST, and one (1) 1,000-gallon diesel fuel UST.” SAR 12. The Plan and Budget also reported that on July

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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.

3, 1990, “gasoline was found in a monitoring well next to one of the gasoline UST’s . . .” SAR 12. Because it believed at that time that only gasoline had been released, 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 July 25, 1995 OSFM eligibility determination referred to tank number 3, the Diesel Tank 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.

7. On September 13, 2000, Knapp submitted a Site Classification Completion Report. SAR 71-147. At that time, Knapp still believed that only one of the gasoline tanks leaked. SAR 78. Hence, samples were analyzed only for BTEX, that indicated the presence of gasoline. SAR 126, 128-130.

8. 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 there may have been a release in the Diesel 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.

9. 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.

10. 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 Diesel Tank may have contributed to contamination at the Station. P 1-37.

11. On March 7, 2002, Knapp submitted an Amended Eligibility and Deductibility application which changed 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." SAR 65.

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

12. 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 Underground Storage Tank 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.

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

14. Another Site Assessment Report and Corrective Action Plan to address both gasoline and diesel contamination were submitted on behalf of Knapp to IEPA on October 4, 2004. (the “2004 CAP”). P 41-347. In the 2004 CAP, the release status of the Diesel Tank was listed as “unknown” and the report stated, while prior reporting indicated that tank numbers 1 and 3 did not contribute to the release, a review of the history of the site, interviews with the tank owner and operator, and contamination found during the site assessment indicated that all three tanks had contributed to the release. P 49. The 2004 CAP included data from samples collected on February 20, 2002 and August 27, 2002 that were analyzed for polynuclear aromatic hydrocarbons (PAH) which are diesel fuel indicators, and polynuclear aromatic hydrocarbons

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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.

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.

15. On January 19, 2005, IEPA rejected the 2004 CAP because it included 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 request access from the Elliot Avenue Highway Authority to investigate the right-of-way area on the west side of the street. *Id.* If this was not possible, IEPA stated that "additional delineation beyond the Bank of Olney property will be required for verification that soil or groundwater contamination does not extend downgradient beyond the Bank of Olney property." *Id.* At that time, the Bank had not granted access to collect samples on its property. AR 26-27.

16. 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. Knapp provided information showing that additional investigation activities were not necessary to determine the full extent of the soil or groundwater contamination. AR 2. As to the requested affidavit, Knapp stated that it would be included in the Corrective Action Completion Report ("CACR"), as was required by the applicable regulations. AR 1-2. Knapp also stated that "If the Bank changes its mind and permits access prior to the preparation of the CACR, the owner/operator reserves the right to investigate and if contamination is found, remediate the contamination." AR 2. Knapp also stated that because of the urban setting and numerous utilities, an investigation of the right-of-way was not practical. *Id.* Moreover, Knapp stated that:

The properties west of the Bank of Olney property do not appear to be downgradient, as the groundwater flow direction appears to be

[This filing submitted on recycled paper as defined in 35 Ill. Adm. Code 101.202]

north-northwest. Modeling was also performed which indicates that the contamination would not reach the Bank of Olney property, let alone across and beyond it. Investigation well beyond the modeled distances would exceed the minimum requirements of the Act.

*Id.*

17. The 2005 CAP and Budget included costs related to removing the Diesel Tank in addition to the 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 was eligible for reimbursement and the 2005 CAP and Budget included a copy of the OSFM letter stating that the Diesel Tank is 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.

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.

18. The 2005 CAP and Budget 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)flouranthene and benzo(k)flouranthene (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).

19. 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. This letter ignored the information provided in 2004 and 2005.

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.**

35 Ill. Adm. Code 101.516(b) 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.

“Because summary judgment is a drastic means of disposing of litigation, a court must exercise extraordinary diligence in reviewing the record so as not to preempt a party’s right to fully present the factual basis for its claim.” *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 205-206, 837 N.E.2d 99, 106 (Ill. 2005). Moreover, “[a]t the summary judgment stage, plaintiffs are not required to prove their cases.” *Id.* In addition, summary judgment should only be granted “when the right of the moving party is clear and free from doubt.” *Id.* “In ruling upon a motion for summary judgment, a court has a duty to construe the evidence strictly against the movant and liberally in favor of the nonmovant.” *Chatham Foot Specialists, P.C. v. Health Care Serv. Corp.*, 216 Ill. 2d 366, 376, 837 N.E.2d 48, 55 (Ill. 2005). Under these standards, summary judgment is not appropriate in IEPA’s favor.

### II. **Knapp satisfied the requirements for approval of a High Priority Corrective Action Plan and Budget including for the Diesel Tank.**

IEPA argues that because Knapp did not report a release of the Diesel Tank to IEMA, Knapp failed to establish that it was entitled to approval of the 2005 CAP and Budget. IEPA is incorrect. As a review of the record shows, Knapp satisfied the requirements for approval of the

2005 CAP and Budget, such that summary judgment is appropriate in Knapp's favor.<sup>5</sup> IEPA's Motion should be denied.

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 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). IEPA argues that Knapp failed to meet the above elements because Knapp did not report a release from the Diesel Tank to IEMA. This argument is wrong, as Knapp provided the information required under section 732.405(b). Section 732.405(b) does not state that Knapp needs to file a separate report of a release from 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, an incident at the site was reported in 1990 and an incident number was obtained from IEMA. After learning that the Diesel Tank was also involved in the previously reported release, Knapp submitted an amended application to the OSFM. 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

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<sup>5</sup> Knapp agrees with IEPA's statement that the question of whether the reimbursements of the Diesel Tank costs are appropriate "is not one of fact, but rather of law." IEPA's Motion, p. 9. However, Knapp, and not IEPA, is entitled to summary judgment, as there is no issue of material fact that Knapp has satisfied the requirements for reimbursements of the 2005 CAP and Budget. Accordingly, Knapp will be filing its own Motion for Summary Judgment on this issue within the next several days.

\$10,000. AR 303-304. Accordingly, Knapp satisfied the requirements for approval of the high priority corrective action plan and budget.

Moreover, 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 also 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 Underground Storage Tank Fund was made final by OSFM’s decision, and that determination cannot be second-guessed or challenged by IEPA, as it is attempting to do in its Motion.

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, 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 include 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's failure to approve the 2005 CAP and Budget for all three tanks is wrong.

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. Further, Knapp explained when he 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. In addition, 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. Moreover, the OSFM was informed and issued an eligibility determination that included the Diesel Tank. AR 303-304. Again, Knapp is entitled to approval of the 2005 CAP and Budget.

In its denial letter and its Memorandum in Support of its Motion for Summary Judgment, the Agency ignored the data and information contained in the 2005 CAP and Budget that the Agency received in 2001 and 2005 and chose to use information submitted in 1990 and 2000, before the samples that contained diesel were collected and the additional information was

provided to Knapp's consultant, CW<sup>3</sup>M. The Agency used the 2000 information to conclude that a diesel release did not occur. The Agency then cited 35 Ill. Adm. Code 732.606(o) to deny the 2005 CAP and Budget. This subsection provides as follows:

Section 732.606 Ineligible Costs. Costs ineligible for payment from the Fund include but are not limited to:

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

It appears that IEPA is confusing the statutory authority of the OSFM to determine tank eligibility with the regulatory provisions that apply to whether a specific cost is eligible for reimbursement.<sup>6</sup> However, the language in the Act at section 57.9(c) is clear. Determinations of whether a tank is eligible for reimbursement from the Fund are made by the OSFM, not the IEPA. 415 ILCS 5/57.9(c); *see also, People v. Whitney*, 188 Ill. 2d 91, 97, 720 N.E.2d 225, 228 (Ill. 1999) ("The language of a statute is the best means of determining legislative intent. The statutory language should be given its plain and ordinary meaning. Where statutory language is clear and not ambiguous, its plain meaning will be given effect.") (citations omitted).

Section 732.606 is not relevant here because Knapp Oil is not seeking reimbursement of costs. Rather, it is seeking to get a plan and budget approved to remove the three USTs that the OSFM has determined are eligible to access the fund. When the tanks are pulled, the OSFM will be able to further confirm the releases and as typically occurs, IEMA will be notified again. However, before that can happen, the 2005 CAP and Budget to allow the tanks to be removed

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<sup>6</sup> It should be noted that the Agency's brief in support of its motion for summary judgment raises for the first time that subsection 732.606(n) also applies to make costs related to the diesel tank ineligible for reimbursement. However, the Agency did not include Subsection 732.606(n) in its denial letter and, accordingly, waived that issue. *Pulitzer Community Newspapers, Inc. v. Illinois EPA*, PCB No. 90-142, 1990 Ill. ENV LEXIS 1040, \*14-15 (Dec. 20, 1990) (Board did not consider IEPA's reliance on additional reasons for denying petitioner's permit raised for the first time before the Board, stating "[f]undamental fairness would be violated if the Agency were free to cite additional statutory and regulatory reasons for denial for the first time at the Board hearing.")

must be approved by IEPA and Knapp Oil has met its burden for getting the 2005 CAP and Budget approved. Accordingly, IEPA's motion for summary judgment should be denied.

**III. An issue of material fact exists with regard to Knapp's compliance with 35 Ill. Adm. Code 732.404(e).**

IEPA argues that summary judgment is appropriate on the issue of whether an additional investigation should be conducted to verify that soil or groundwater contamination does not extend past the Bank of Olney property pursuant to 35 Ill. Adm. Code 732.404(e). IEPA, however, is wrong, in that there is a genuine issue of material fact as to whether an additional investigation was necessary under section 732.404(e).

35 Ill. Adm. Code 732.404(e) provides:

Except where provided otherwise pursuant to Section 732.312 of this Part, in developing the corrective action plan, additional investigation activities beyond those required for the site evaluation and classification **may be necessary** to determine the full extent of soil or groundwater contamination and of threats to human health or the environment. Such activities may include, but are not limited to, additional soil borings with sampling and analysis or additional groundwater monitoring wells with sampling and analysis. Such activities as are **technically necessary** and consistent with generally accepted engineering practices may be performed without submitting a work plan or receiving prior approval from the Agency, and associated costs may be included in a High Priority corrective action budget plan. A description of these activities and the results shall be included as a part of the corrective action plan.

(Emphasis added.)

An issue of fact exists as to whether the requested investigation by IEPA was necessary under 35 Ill. Adm. Code 732.404(e). According to IEPA, an investigation is necessary to determine whether there is additional soil and groundwater contamination west of the Bank of Olney. Knapp, however, has presented information showing that such an investigation is unnecessary. Specifically, in the 2005 CAP and Budget, Knapp provided information that the

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groundwater does not flow towards the Bank of Olney property, and would not extend beyond Knapp's property line in the direction of the Bank. AR 2. Instead, the groundwater flow from the site is to the north and northwest, and not to the west toward the Bank. Moreover, requiring an investigation of groundwater at the Bank and the property to the west of the Bank is not a generally accepted engineering practice under section 732.404(e), as modeling provided to IEPA shows that contamination will not reach the Bank property, let alone the property to the west of the Bank. AR 2. Accordingly, an issue of fact exists as to whether additional sampling is necessary, as IEPA and Knapp have presented contradictory evidence as to whether contamination would flow westward toward the Bank of Olney.

Lastly, despite IEPA's assertions, Knapp properly provided that it would submit an affidavit for off-site access refusal with its CACR. 35 Ill. Adm. Code 732.411(c) provides:

An owner or operator, in demonstrating that the requirements of this Section have been met, must provide to the Agency, as part of the corrective action completion report, the following documentation:

- 1) A sworn affidavit, signed by the owner or operator, identifying the specific off-site property involved by address, the measures proposed in the corrective action plan that require off-site access, and the efforts taken to obtain access, and stating that the owner or operator has been unable to obtain access despite the use of best efforts; and
- 2) A copy of the certified letter sent to the owner of the off-site property pursuant to subsection (b) of this Section.

(emphasis added). Under this regulation, Knapp was entitled to submit the affidavit requested by IEPA with the CACR, and was not required to submit the affidavit with the 2005 CAP and Budget, prior to the submission of the CACR, as requested by IEPA. AR 1-2. Accordingly, IEPA's insistence that the affidavit be submitted prior to Knapp's submission of the CACR was not supported by law.

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Knapp is entitled to present evidence at hearing as to whether an additional investigation is needed under section 732.404(e). Because an issue of fact exists as to whether a further investigation is needed under section 732.404(e), summary judgment should be denied.


**CONCLUSION**

For the forgoing reasons, the Board should deny IEPA's Motion for Summary Judgment and grant all relief it deems fair and just.

Respectfully submitted,

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

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ORIGINAL

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

KNAPP OIL COMPANY, )  
DON'S 66, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

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STATE OF ILLINOIS  
Pollution Control Board

PCB 06-52  
(UST Appeal)

**PETITIONER'S SUPPLEMENT TO THE ADMINISTRATIVE RECORD**

Petitioner, Knapp Oil Company ("Knapp"), by its counsel Barnes & Thornburg, LLP,  
files the following Supplement to the Administrative Record:

1. A letter from Knapp's consultant dated February 14, 2002 responding to the Agency's comments regarding the Knapp site and forwarding an amended Budget (P 1-2)
2. The February 14, 2002 amended Budget for Knapp Oil (P 3-37)
3. A letter from IEPA dated May 15, 2002 to Knapp regarding the February 14, 2002 Budget (P 38-40)
4. A letter from Knapp's consultant dated October 4, 2004 forwarding a Site Assessment Report and Corrective Action Plan for Knapp Oil (P 41)
5. The Site Assessment Report and Corrective Action Plan for Knapp Oil dated October 2004 (P 42-347)
6. The Application to the OSFM to amend the eligibility determination. (P 348-352)

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