ILLINOIS POLLUTION CONTROL BOARD
June 21, 2007

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

OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

In this October 17, 2005 underground storage tank (UST) appeal, Knapp Oil Company, Don's 66 (Knapp Oil) seeks review of a September 21, 2005 letter issued to Knapp Oil by the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2006); 35 Ill. Adm. Code 105.208(a). Knapp Oil's facility, Don's 66, is located in Olney, Richland County.

On September 21, 2005, the Agency rejected the high priority corrective action plan (HCAP) and associated budget for Knapp Oil's leaking underground petroleum storage tank facility located at 700 East Main Street, Olney, Richland County. Knapp Oil appeals on the grounds that: (1) the reasons stated by the Agency for rejection are contradictory to information previously provided, are internally inconsistent, and exceeded the Agency's authority; (2) the HCAP and budget submitted to the Agency are reasonable and consistent with the Environmental Protection Act (Act) (415 ILCS 5 (2006)) and applicable regulations; and (3) the Agency's rejection was arbitrary, capricious, and for the sole purpose of harassing Knapp Oil and its consultants.

Today's order addresses the parties' cross-motions for summary judgment. The primary issues presented in the parties' motions are whether Knapp Oil is eligible for reimbursement from the UST Fund for activities performed to remediate a release from a diesel tank located on its site, and whether additional sampling is necessary to further define the area of contamination.

For the reasons set forth below, the Board grants the Agency's motion for summary judgment and denies Knapp Oil's cross-motion.

PROCEDURAL BACKGROUND

On October 20, 2005, the Board accepted the petition for hearing and the Agency filed the administrative record (Rec.) on December 30, 2005. The Agency filed a motion for summary judgment (Ag. Mot.), for leave to supplement the record, and a supplemental administrative record (Supp. Rec.) on September 22, 2006.

Knapp Oil responded in opposition to the motion for summary judgment (Knapp Resp.), filed a motion for leave to supplement the record, and also submitted a supplemental record (Supp. Rec. 2) on December 7, 2006.

On December 12, 2006, Knapp Oil filed a cross-motion for summary judgment (Cr. Mot.). On December 21, 2006, the Agency responded in opposition to Knapp Oil's motion to supplement the record and asked that the supplemented documents be stricken. Also on December 21, 1006, the Agency moved for leave to reply to Knapp Oil's response in opposition of the Agency's motion for summary judgment, filed a reply (Ag. Reply), and responded to Knapp Oil's cross-motion for summary judgment (Ag. Resp.).

PRELIMINARY MATTERS

The Board grants the Agency's motion for leave to file a reply and considers the reply in the Board's analysis below.

The Agency's Motion to Supplement the Record

The Agency states that a review of the record and discussions with other Agency staff revealed that several documents were not included in the administrative record, but were relied upon by Agency staff in issuing the September 21, 2005 Knapp Oil decision. The Agency contends that supplementing the record will cause neither party hardship. Knapp Oil did not respond to the motion.

Failure to respond to a motion is deemed a waiver of any objection to the Board granting the motion. 35 Ill. Adm. Code 101.500(d). Pursuant to Section 105.212 of the Board's procedural rules and an affidavit supporting the Agency's motion, the supplemental documents are documents relied upon by the Agency in making its determination. 35 Ill. Adm. Code 105.212(b). Accordingly, the Board grants the Agency's motion and accepts the supplemental documents as part of the administrative record of review.

Knapp Oil's Motion to Supplement and the Agency's Motion to Strike

On December 7, 2006, Knapp Oil moved to supplement the record with several documents it claims the Agency relied upon in issuing the September 21, 2005 denial letter. Knapp Oil claims these documents fall 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." Mot. to Supp. at 3, citing 35 Ill. Adm. Code 105.212. Knapp Oil states they are documents that the Agency should have included in the administrative record when originally filed in 2005. *Id*. For these reasons, Knapp Oil asks the Board to grant its motion and allow Knapp Oil to supplement the administrative record with these documents.

In moving to strike the documents, the Agency states that Agency technical staff did not rely on any of the documents that Knapp Oil now seeks to submit. Mot. to Strike at 2 (referencing an affidavit of an Agency staff person stating the same). For example, the Agency states it does not have the OSFM application in its file, so it could not have relied upon that

document in issuing the September 21, 2005 letter. *Id*. For these reasons, the Agency asks the Board to deny Knapp Oil's motion to supplement the record, grant the Agency's motion to strike, and strike any mention of the documents from the pleadings in this proceeding. *Id*. at 3.

The Board denies Knapp Oil's motion to supplement and grants the Agency's motion to strike. The Board finds that the documents submitted by Knapp Oil are not correspondence, documents, or materials related to the application that is the subject of this appeal. Rather, the documents submitted relate to a prior corrective action plan (CAP) submitted to the Agency for approval. Accordingly, the Board denies Knapp Oil's motion for leave and strikes any reference to the documents submitted by Knapp Oil.

FACTS

On July 3, 1990, Mr. Bill Knapp notified the Illinois Emergency Services & Disaster Agency (now, the Illinois Emergency Management Agency (IEMA)) and the Agency of a leak of gasoline from a UST on his property at 700 E. Main Street, Olney, Richland County. Supp. Rec. at 2 and 4. The leak was assigned incident number 901831. Supp. Rec. 1 and 4. On July 19, 1990, Mr. Knapp notified the Agency of the leak by letter. Supp. Rec. at 4. The following three tanks are located on the Knapp Oil property: (1) a 6,000-gallon gasoline UST; (2) an 8,000-gallon gasoline UST; and (3) a 1,000-gallon diesel fuel UST. Supp. Rec. at 12.

On June 28, 1995, CW^{3}M Company, on behalf of Knapp Oil, submitted a Site Classification Work Plan and Budget to the Agency. Supp. Rec. at 5. The work plan and budget states that the diesel fuel tank did not leak and was not part of the site's incident number. *Id*. at 39. On July 28, 1995, the Office of the State Fire Marshal (OSFM) determined, in response to Knapp Oil's Application for Eligibility and Deductibility, that Knapp Oil was eligible to seek reimbursement, but only for the 6,000-gallon gasoline UST. *Id*. at 63.

CW^{3}M submitted a Site Classification Completion Report to the Agency on September 13, 2000. The completion report indicated that only gasoline had been released and there were no holes in the diesel tank. Supp. Rec. at 4, 78. Based on soil borings, migratory pathway determination, and groundwater analysis, the site classification report concluded that the site should be classified as "High Priority." *Id*. at 91. The Agency approved this report on January 3, 2001.

On July 27, 2001, CW^{3}M, on behalf of Knapp Oil, submitted a Site Assessment Report and CAP to the Agency that indicated that "all three tanks *may* have contributed to the release." Supp. Rec. at 155 (emphasis added). On November 16, 2001, the Agency rejected Knapp Oil's High Priority Site Investigation (Assessment) Report and CAP (HCAP) because the full extent of soil and groundwater contamination had not been adequately defined. *Id*. at 296-98. The Agency's rejection letter noted that the HCAP budget included costs for removal of tanks not associated with the incident number 901831 and stated:

> The corrective action plan indicates a diesel tank may have leaked. This should be verified prior to corrective action. If contamination from the diesel tank is

found to be present, the owner/operator must call in the tank and have an IEMA incident number assigned to the leak. Supp. Rec. at 299.

The Agency recommended additional soil borings with sampling and analysis or additional groundwater monitoring wells with sampling and analysis. *Id*. at 296-298.

On March 26, 2002, the OSFM issued a revised eligibility determination, finding that the diesel tank was eligible for reimbursement from the UST Fund. Rec. at 303. The OSFM's determination also noted that to be eligible to access the UST Fund, the owner or operator must first notify IEMA of a confirmed release. *Id.* at 303-04.

On October 4, 2004, CW^3M submitted another HCAP and budget to the Agency. This time the plan and budget included corrective action and costs associated with the diesel tank. Rec. at 1. On January 19, 2005, the Agency again rejected Knapp Oil's HCAP. *Id*. at 314. The Agency rejected the HCAP and budget because the incident number for the site governed a reported release of only gasoline. *Id*. at 316. Accordingly, the Agency found that Knapp Oil's proposed corrective action and associated budget costs to remediate diesel fuel contaminants exceeded the minimum requirements to comply with the Act and were not reimbursable pursuant to Section 732.606(o) of the Board's UST regulations (35 Ill. Adm. Code 732.606(o)). *Id*. at 316.

On August 2, 2005, CW^3M submitted another Site Assessment Report and CAP to the Agency addressing concerns raised by the Agency in rejecting Knapp Oil's October 4, 2004 CAP. Rec. at 4. The report and CAP indicated that "all three tanks had contributed to the release." *Id.* at 13. CW^3M performed additional testing and sampling through Fall 2004. *Id*. at 36. The additional testing and sampling demonstrated that two benzo(a)pyrene plumes were attributable to the diesel tank. *Id*. at 37. CW^3M's August 2005 submittal included a budget requesting $309,657.43 for the proposed corrective action.

Again the Agency rejected Knapp Oil's CAP on September 21, 2005. The Agency again reasoned that the site classification completion report for the applicable incident number (901831) that it approved on January 3, 2001 indicated there was no release from the diesel tank. Therefore, any activity associated with remediating a release from the diesel tank exceeds the minimum requirements to comply with the Act.

APPLICABLE STATUTES AND BOARD REGULATIONS

Sec. 57.7(a)(1) of the Act provides:

(a) Site investigation.

(1) For any site investigation activities required by statute or rule, the owner or operator shall submit to the Agency for approval a site investigation plan designed to determine the nature, concentration, direction of movement, rate of movement, and extent of the contamination as well as the significant physical features of the site

and surrounding area that may affect contaminant transport and risk to human health and safety and the environment. 415 ILCS 5/57.7(a)(1) (2006).

Section 57.7(c)(4)(D) of the Act provides that for Agency review and approval of any corrective action taken at a site:

(D) For any plan or report received after the effective date of this amendatory Act of 1993, any action by the Agency to disapprove or modify a plan submitted pursuant to this Title shall be provided to the owner or operator in writing within 120 days of the receipt by the Agency or, in the case of a corrective action plan for which payment is not being sought, within 120 days of receipt of the corrective action completion report, and shall be accompanied by:

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

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

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

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

Any action by the Agency to disapprove or modify a plan or report or the rejection of any plan or report by operation of law shall be subject to appeal to the Board in accordance with the procedures of Section 40. If the owner or operator elects to incorporate modifications required by the Agency rather than appeal, an amended plan shall be submitted to the Agency within 35 days of receipt of the Agency's written notification. 415 ILCS 57.7(c)(4)(D) (2006).

Section 732.202 of the Board's UST regulations concerning early action states:

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, shall 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. 35 Ill. Adm. Code 732.202(a).

Sections 732.404(b) and (e) of the Board's regulations concerning high priority sites provide:

***

b) The owner or operator shall develop a corrective action plan based on site conditions and designed to achieve the following as applicable to the site:

1) For sites that have submitted a site classification report under Section 732.309, provide that:

A) After complete performance of the corrective action plan, applicable indicator contaminants identified in the groundwater investigation are not present in groundwater, as a result of the underground storage tank release, in concentrations exceeding the remediation objectives referenced in Section 732.408 of this Part at the property boundary line or 200 feet from the UST system, whichever is less;

B) After complete performance of the corrective action plan, Class III special resource groundwater quality standards for Class III special resource groundwater within 200 feet of the UST system are not exceeded as a result of the underground storage tank release for any indicator contaminant identified in the groundwater investigation;

C) After complete performance of the corrective action plan, remediation of contamination in natural or man-made exposure pathways as a result of the underground storage tank release has been conducted in accordance with 35 Ill. Adm. Code 742;

D) Threats to potable water supplies are remediated; and

E) Threats to bodies of surface water are remediated.

2) For sites that have submitted a site classification completion report under Section 732.312 of this Part, provide that, after complete performance of the corrective action plan, the concentrations of applicable indicator contaminants meet the remediation objectives developed under Section 732.408 for any applicable exposure route not excluded from consideration under Section 732.312.

***

e) 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.

1) In addition to the potable water supply wells identified pursuant to Section 732.307(f) of this Part, the owner or operator must extend the water supply well survey if soil or groundwater contamination exceeding the Tier 1 groundwater ingestion exposure route remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants extends beyond the site's property boundary, or, as part of a corrective action plan, the owner or operator proposes to leave in place soil or groundwater contamination exceeding the Tier 1 groundwater ingestion exposure route remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants and contamination exceeding such objectives is modeled to migrate beyond the site's property boundary. At a minimum, the extended water supply well survey must identify the following:

   A) All potable water supply wells located within 200 feet, and all community water supply wells located within 2,500 feet, of the current or modeled extent of soil or groundwater contamination exceeding the Tier 1 groundwater ingestion exposure route remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants; and

   B) All regulated recharge areas and wellhead protection areas in which the current or modeled extent of soil or groundwater contamination exceeding the Tier 1 groundwater ingestion exposure route remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants is located.

2) The Agency may require additional investigation of potable water supply wells, regulated recharge areas, or wellhead protection areas if site-specific circumstances warrant. Such circumstances must include, but is not limited to, the existence of one or more parcels of property within 200 feet of the current or modeled extent of soil or groundwater contamination exceeding the Tier 1 groundwater ingestion exposure route remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants where potable water is likely to be used, but that is not served by a public water supply or a well identified pursuant to Section 732.307(f)(1) of this Part or subsection (e)(1) of this Section. The

additional investigation may include, but is not limited to, physical well surveys (e.g., interviewing property owners, investigating individual properties for wellheads, distributing door hangers or other material that requests information about the existence of potable wells on the property, etc.). 35 Ill. Adm. Code 732.404(b), (e).

Sections 732.405(b) and (c) of the Board's regulations regarding plan submittal and review provides:

b) 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 is not 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. Formulation of budget plans should be consistent with the eligible and ineligible costs listed at Sections 732.605 and 732.606 of this Part and the maximum payment amounts set forth in Subpart H of this Part. As part of the budget plan the Agency may require a comparison between the costs of the proposed method of remediation and other methods of remediation.

c) The Agency shall have the authority to review and approve, reject or require modification of any plan or budget plan submitted pursuant to this Section in accordance with the procedures contained in Subpart E of this Part. 35 Ill. Adm. Code 732.405(b) and (c).

Sections 732.606(o) and (n) of the Board's regulations lists the following as ineligible corrective action costs:

n) Costs of corrective action incurred before providing notification of the release of petroleum to IEMA in accordance with Section 732.202 of this Part;

o) Costs for corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act. 35 Ill. Adm. Code 732.606(o) and (n).

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." Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998), 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).

BURDEN OF PROOF

Pursuant to Sections 57.7(c) and 57.8(i) of the Act (415 ILCS 5/57.7(c) and 57.8(i) (2006)), an applicant may appeal an Agency determination to "disapprove or modify a plan or report" to the Board under the provisions of Section 40 of the Act (415 ILCS 5/40 (2006)). The standard of review under Section 40 of the Act (415 ILCS 5/40 (2006)) is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. Ted Harrison Oil Co. v. EPA, PCB 99-127, slip op. at 5 (July 24, 2003), citing Browing Ferris Ind. of Illinois v. PCB, 534 N.E.2d 616 (2nd Dist. 1989). The Board will not consider new information that was not before the Agency prior to its final determination regarding the issues on appeal. Kathe's Auto Service Center v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). The Agency's denial letter frames the issues on appeal. Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990).

AGENCY'S MOTION FOR SUMMARY JUDGMENT

In its motion for summary judgment, the Agency states the Board must first decide whether Knapp Oil's activities at the site related to the diesel tank exceed the minimum requirements of the Act. Mot. at 2. According to the Agency, this determination affects whether Knapp Oil is eligible for reimbursement from the UST Fund for activities performed prior to the reporting of a release. *Id.* Second, states the Agency, the Board must determine whether additional samples are needed to accurately define the area of contamination. *Id.* at 2-3.

Eligibility of Diesel Tank

The Agency asserts that any activities associated with the release from the diesel tank exceed the minimum requirements of the Act because Knapp Oil did not report any release from the diesel tank to IEMA. Mot. at 9. Because the site is certified as a High Priority Site, states the Agency, the CAP for the site must meet the requirements of Section 732.404. *Id.*; 35 Ill. Adm. Code 732.404. The purpose of the corrective action plan is to remediate or eliminate each of the criteria set forth in 35 Ill. Adm. Code 732.404(b) that caused the site to be classified as High Priority. 35 Ill. Adm. Code 404(b). Incident number 901831 was assigned based on the reported release of gasoline found in an observation well located in the gasoline tank basin. *Id.*, citing Supp. Rec. at 2, 4, 65. The Agency states that Knapp Oil specifically stated that the diesel tank did not have a release. Mot. at 9. Further, Knapp oil sampled and analyzed only indicator constituents for gasoline.

The Agency notes that Knapp Oil submitted an eligibility determination from OSFM listing the diesel tank as an eligible tank. Mot. at 10. The OSFM determination states that the eligible tanks would only be able to access the UST Fund if a confirmed release was reported to IEMA for the tanks in question. *Id*. Knapp Oil, however, never notified IEMA of the diesel fuel release as required by 35 Ill. Adm. Code 732.202. The eligibility determination alone, states the Agency, does not replace the requirement to notify IEMA, and is not enough to obtain reimbursement from the UST Fund for remediation of a release. *Id*.

Additional Sampling

The Agency also states there is no genuine issue of material fact that Knapp Oil must perform further investigation to define the full extent of the soil and groundwater contamination pursuant to Section 732.404(e). Mot. at 10; 35 Ill. Adm. Code 732.404(e). The Agency states it asked Knapp Oil to investigate the extent of the release and to request access from the highway authority. If access was not possible, the Agency stated Knapp must verify that soil or groundwater contamination does not extend down-gradient beyond the Bank of Olney property. *Id*. at 11; *see* Rec. at 317. In the Agency's January 19, 2005 denial of Knapp Oil's HCAP, the Agency requested an affidavit for off-site access refusal from the Bank of Olney and full delineation of the soil and groundwater contamination from Knapp Oil. Mot. at 11; Rec. at 317.

The Agency claims that Knapp Oil responded on August 2, 2005, that the Agency's requests were untimely and impractical. Mot. at 11. To date, asserts the Agency, Knapp Oil has not ascertained the width of the groundwater plume and is, therefore, out of compliance with Section 732.404(e). *Id*., citing 35 Ill. Adm. Code 732.404(e). For these reasons, the Agency states it is entitled to judgment as a matter of law on all grounds of the complaint.

Knapp Oil's Response

Knapp Oil contends that both of the Agency's arguments in favor of summary judgment must fail. Knapp Oil asserts that it has satisfied all of the requirements for approval of the 2005 HCAP and budget and that summary judgment is appropriate in its favor.

Eligibility of Diesel Tank

Again, Knapp Oil maintains that the applicable Board regulations do not require notification to IEMA of a release from the diesel tank as a prerequisite for approving Knapp Oil's HCAP and budget. Knapp Resp. at 9-10. Knapp Oil states that the Agency is attempting to claim it can make eligibility determinations but has no authority to do so. *Id*. at 11. Knapp Oil states that with the OSFM's eligibility determination regarding the diesel tank, it has satisfied all the elements of Section 732.405 and is entitled to approval of the 2005 HCAP and budget. *Id*. at 12.

Knapp Oil argues it is entitled to approval of the 2005 CAP and budget as those two submittals relate to the release of diesel fuel. Knapp Oil contends that it fully informed the Agency that there had been a release from the diesel tank in the July 2001 HCAP. Knapp Resp.

at 12, citing Supp. Rec. at 150, 155. Knapp Oil further points to data demonstrating the presence of diesel fuel included in the 2005 CAP and budget and the OSFM eligibility determination that identified the diesel tank as an eligible tank. *Id*. at 23-25, 303-04.

Finally, Knapp Oil argues that the Agency's reliance on Section 732.606(o) is improper because Knapp Oil is not seeking reimbursement for costs, but rather seeking approval of a plan to remove the three eligible USTs. Knapp Resp. at 13. Knapp Oil contends that OSFM can confirm the release once the tanks are pulled and IEMA will be notified again.

Additional Sampling

Knapp Oil next contends that a genuine issue of material fact exists as to whether an additional investigation was necessary under Section 732.404(e). Knapp Resp. at 14. According to Knapp Oil, it has presented information showing that further investigation to determine the extent of soil and groundwater contamination is unnecessary. *Id*. Illustrating this point, Knapp Oil states it presented modeling in the 2005 HCAP and budget that the groundwater does not flow toward the Bank of Olney property. *Id*. at 14-15. Therefore, argues Knapp Oil, the contamination would not flow beyond Knapp's property line. Knapp Oil argues that the conflicting information raises a genuine issue of material fact as to whether additional sampling is necessary. *Id*. at 15. For these reasons, argues Knapp Oil, summary judgment in favor of the Agency should be denied.

The Agency's Reply

The Agency asserts that upon reporting the release that gave rise to Knapp Oil's incident number, and for eleven subsequent years, Knapp Oil did not report any release from the diesel tank on it site. Reply at 5. Further, states the Agency, the Agency told Knapp Oil that if there were a release from the diesel tank, to report the release to IEMA, but that Knapp Oil did not. *Id*.

The Agency states it did not ignore the information Knapp Oil provided regarding the diesel tank. Reply at 6. Rather, the Agency noted that the because no release of diesel fuel had been reported to IEMA under incident number 901831, the remediation of diesel constituents exceeded the minimum requirements to comply with Title XVI of the Act. *Id*. The Agency asserts that the diesel tank removal, as Knapp Oil provides in the HCAP, is not reimbursable because the incident identifies only a gasoline release. *Id*.

Further, the Agency disagrees that there is a genuine issue of material fact. Reply at 7. The Agency states that pursuant to Section 732.404(e), the extent of the soil and groundwater contamination must be determined before developing a CAP. 35 Ill. Adm. Code 732.404(e). Here, argues the Agency, Knapp Oil has not complied with the regulations.

Without citing to the record, the Agency contends that Knapp Oil has submitted information showing that the greatest concentrations of contaminants are found east of Elliot Avenue and that soil and groundwater migration trends from the release are north to northwest. Reply at 7. The Agency states that Knapp Oil has not submitted modeling in support of its argument. Further, the Agency states that modeling to determine the extent of contamination is

not even acceptable in areas where there is no ordinance prohibiting groundwater use. *Id*. In these areas, states the Agency, soil and groundwater plumes must be analytically verified. *Id*. The Agency concludes that failure to fully delineate the contamination plume is a valid reason for denying Knapp Oil's HCAP and summary judgment should be granted in its favor on this issue. *Id*. at 8.

KNAPP OIL'S CROSS-MOTION FOR SUMMARY JUDGMENT

The Agency Lacks Authority to Determine Tank Eligibility

In its cross-motion for summary judgment, the sole issue Knapp Oil presents is whether the Agency can determine if a UST is eligible for reimbursement. Cr. Mot. at 1. Knapp Oil contends that only the OSFM can make such determinations. *Id*. Knapp Oil contends it has satisfied all of the statutory and regulatory requirements for approval of the 2005 HCAP and budget and is entitled to reimbursement from the UST Fund for work performed related to the diesel tank.

Knapp Oil claims that neither Section 732.404 nor 732.405(b) requires notification of a release of the diesel tank to IEMA. Section 732.405(b) requires only that a copy of the OSFM eligibility and deductibility determination must be included. Knapp Oil contends that only Section 732.202(a)(1) requires a report of a release to IEMA and that Section 732.202 is irrelevant to the Agency's approval of Knapp Oil's CAP and budget. Cr. Mot. at 9.

Knapp Oil asserts that the Agency has no authority to make eligibility determinations, but rather it is the OSFM's responsibility to make them pursuant to Section 57.9(c) of the Act. Cr. Mot. at 8, citing 415 ILCS 5/57.9(c) (2006). Knapp Oil concludes that because there is no question of material fact on this issue, Knapp Oil concludes that it has satisfied the regulatory requirements and the Board should grant summary judgment as a matter of law in its favor. Cr. Mot. at 10.

The Agency's Response

In response, the Agency states that the HCAP and budget denial was not an attempt by the Agency to determine tank eligibility. The Agency notes it cannot approve an HCAP that includes remediation of a release never reported to IEMA.

BOARD ANALYSIS

The Agency's denial letter frames the issues on appeal. The Agency's denial letter rejects Knapp Oil's HCAP because the plan fails to meet the requirements of Section 732.404(a) and (b). Supp. Rec. at 325. Section 732.404(a) requires an owner or operator of a site to develop a CAP and perform corrective action in accordance with Section 732.404. 35 Ill. Adm. Code 732.404(a). Section 732.404(b) lists certain criteria that a CAP must remediate or eliminate. Supp. Rec. at 325; 35 Ill. Adm. Code 732.404(b).

Because Knapp Oil's HCAP does not remediate any criteria set forth in Section 732.404(b), states the Agency, the activities associated with the delineation and remediation of diesel fuel indicator contaminants exceed the minimum requirements to comply with the Act. The Agency denial further stated that Knapp Oil was "presently in violation of 35 [Ill. Adm. Code] 732.202" for not notifying IEMA of the release from the diesel tank.[1] As a second reason for rejection, the Agency states that "[a]dditional activities to define the full extent of soil and groundwater contamination are required pursuant to 35 [Ill. Adm. Code] Section 732.404(e)."[2]

Regarding the budget, the Agency rejected the costs for the analysis of laboratory samples of diesel constituents as ineligible for payment from the UST Fund pursuant to Section 732.606(r). 35 Ill. Adm. Code 732.606(r). The Agency also rejected the costs for remediating the diesel contamination as "in excess of those necessary to meet the minimum requirements of Title XVI of the Act," pursuant to Section 732.606(o). 35 Ill. Adm. Code 732.606(o).

As Knapp Oil states, the Agency's rejections of both the HCAP and budget depend on the eligibility of Knapp Oil's diesel tank for reimbursement from the UST Fund. The Board, therefore, discusses this issue first.

Board's Discussion of Eligibility of Diesel Tank

Neither party disputes the fact that Knapp Oil did not report any release from the diesel tank to IEMA. The question remains, therefore, whether notifying IEMA is a prerequisite to Knapp Oil's reimbursement from the UST Fund for activities associated with remediating the diesel fuel contamination.

The Agency states that Knapp Oil never notified IEMA of a release from the diesel tank, as required under Section 732.202. Further, because the site is certified as a High Priority Site, states the Agency, the corrective action plan for the site must meet the requirements of Section 732.404. Knapp Oil states it satisfied the elements under Section 732.405 by obtaining and submitting an eligibility determination for the diesel tank. In addition, Knapp Oil states it does not need to comply with Section 732.202, and neither Section 732.404 nor 732.405 require Knapp Oil to notify IEMA of a release from the diesel tank. Knapp Oil argues that by requiring notification to IEMA, the Agency is imposing an additional requirement that is not supported by the regulatory language.

The Board finds that the Agency properly rejected Knapp Oil's August 2, 2005 plan and budget pursuant to Section 732.404 because both exceed the minimum requirements of the Act. The Section 732.404(b) criteria, set forth in the site classification completion report approved by the Agency on January 3, 2001, do not include diesel indicator contaminants. Corrective action to remediate diesel indicator contaminants in the HCAP, therefore, are not consistent with the requirements of Section 732.404.

---

[1] This page of the Agency's denial letter is missing from the administrative record, but can be found as the fourth page of Attachment C to Knapp Oil's petition for review.

[2] *Id.*

Regarding IEMA notification, Section 57.5(c) states that an owner or operator of a UST must determine whether a release has occurred in accordance with both the OSFM and Board regulations. 415 ILCS 5/57.5(c) (2006). OSFM regulations require that when a release is suspected, even before the release is confirmed, UST owners or operators must report to IEMA within 24 hours. 41 Ill. Adm. Code 170.560 (requiring owners or operators, after reporting a release, to follow the procedures in 41 Ill. Adm. Code 170.580). The Act provides that once a release is confirmed, owners and operators of USTs must comply with all applicable statutory and regulatory reporting and response requirements. 415 ILCS 5/57.6(a) (2006). Upon confirmation of a release, the OSFM regulations require the owner or operator to report the release to IEMA within 24 hours. 41 Ill. Adm. Code 170.580.

UST owners and operators cannot simply pick and choose to comply with some, but not all of the Board's regulations. Rather, owners and operators must, in response to all confirmed releases, comply with *all* statutory and regulatory reporting and response requirements. 415 ILCS 5/57.6 (emphasis added). Therefore, Knapp Oil's argument that the Agency was attempting to impose additional regulatory requirements fails.

Knapp Oil is subject to Section 732.202, which, upon confirmation of a release, also requires notification to IEMA within 24 hours. 35 Ill. Adm. Code 732.202(a). The Agency specifically informed Knapp Oil as early as November 16, 2001, that if contamination from the diesel tank was found, Knapp Oil must report the tank and have an IEMA incident number assigned to the leak. *See* Supp. Rec. at 299. Further, the Board has held that the Act and Board regulations make it clear that notifying IEMA of a petroleum release is a prerequisite to being eligible for reimbursement. Cassens and Sons, Inc. v. IEPA, PCB 01-102, slip op. at 9 (Nov. 18, 2004).

The Board and OSFM regulations clearly state that owners or operators seeking payment from the UST Fund are to first notify IEMA of a suspected release and then confirm the release within 14 days to IEMA. Knapp Oil concedes that it has done neither. As a result, the incident number assigned to Knapp Oil's site, and for which it submits the August 2, 2005 CAP and budget, does not cover any confirmed release from the diesel tank.

As noted above, the Agency cannot approve an HCAP that provides for corrective action regarding releases not associated with the incident number at issue. The Board's regulations require the UST owner or operator to base any corrective action plan on site conditions. 35 Ill. Adm. Code 732.404(b). The Board, therefore, agrees with the Agency that any activities in Knapp Oil's HCAP associated with determining the extent of contamination from the diesel tank, or remediating the diesel contamination, exceed the minimum requirements to comply with the Act.

Regarding the issue presented in Knapp Oil's cross-motion for summary judgment, the Board finds that the Agency is not claiming it has the authority to make eligibility determinations. Rather, the Agency is exercising its authority to approve or deny an HCAP and budget. For all of the above reasons, the Board finds that the Agency was correct in rejecting

Knapp Oil's HCAP and budget because both submittals exceeded the minimum requirements of the Act.

Board's Discussion of Additional Sampling

Next, the Board discusses the Agency's second ground for rejecting Knapp Oil's HCAP: whether Knapp Oil must perform further investigation to define the full extent of the soil and groundwater contamination. The Agency asserts that Knapp Oil has not adequately determined the boundaries of the groundwater plume and is, therefore, out of compliance with Section 732.404(e).

Knapp Oil does not dispute the fact that it has not determined the actual extent of contamination. Instead, Knapp Oil asserts that, contrary to the Agency's contentions, it has presented adequate information, in the form of modeling, showing that further investigation to determine the extent of soil and groundwater contamination is unnecessary.

Knapp Oil states "[m]odeling was performed which indicates that the contamination would not reach the Bank of Olney property, let alone across and beyond it." Rec. at 2. Knapp Oil relies on modeling to delineate the west side of the plume shown in Drawings 0007, 0008A, and 0008B. However, other than a brief note stating that the groundwater contamination plume on the west side would extend less than 7 feet beyond each well, no modeling calculations appear in the record. Rec. at 38. Further, the west side of the plume delineated in the 2005 HCAP is not analytically verified. The Board cannot find where in the 2005 HCAP Knapp Oil supports the modeling conclusion with sampling results. Further, the issue is not whether or not the contamination will reach the Bank of Olney property, but whether Knapp Oil has determined the exact boundaries of the contamination plume. Knapp Oil concedes that it has not provided this information in the HCAP.

Knapp Oil also contends that it would submit an affidavit for off-site access refusal with its corrective action completion report (CACR), but that an affidavit is not required before the CACR. Knapp Resp. at 15, citing 35 Ill. Adm. Code 732.411(c). Accordingly, states Knapp Oil, the Agency's denial based on a lack of an affidavit prior to Knapp's submission of the CACR was not supported by law.

Though previous Agency denials of Knapp Oil's HCAP had done so, the Agency's September 21, 2005 denial letter did not request an affidavit, or otherwise state that the lack of an affidavit from the Bank of Olney was any grounds for denial. The letter states only that Knapp Oil's plan fails to meet Section 732.404(e) because the full extent of soil and groundwater contamination has not been defined. The Agency's denial letter frames the issues on appeal. Accordingly, the Board finds there is no genuine issue of material fact regarding whether the Agency properly required additional sampling. The Board further finds the Agency properly denied Knapp Oil's HCAP for lack of additional sampling because the plan failed to delineate the extent of the contamination plume.

CONCLUSION

The Board finds there are no issues of material fact and grants the Agency summary judgment as a matter of law. The Board denies Knapp Oil's cross-motion for summary judgment and finds the Agency properly rejected Knapp Oil's August 2, 2005 high priority corrective action plan and budget.

ORDER

The Board grants the Agency's motion for summary judgment and denies Knapp Oil's cross-motion for summary judgment.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 21, 2007, by a vote of 4-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board