

July 2, 2016

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	
KNAPP OIL COMPANY)	
)	DOCKET PCB 16-103
-vs-)	
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY)	

Hearing held, pursuant to notice, on Tuesday, June 28, 2016, at the hour of 10:00 a.m. at 1021 N. Grand Avenue East, Springfield, Illinois, before CAROL WEBB, duly appointed Hearing Officer.

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STATE OF ILLINOIS
Pollution Control Board

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1 APPEARANCES:

2

PATRICK SHAW
3 Attorney at Law

4

appearing on behalf of
Petitioner;

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MELANIE JARVIS
6 IEPA

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appearing on behalf of
Respondent.

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I N D E X

WITNESS	DIRECT	CROSS
JAMES ROBERT MALCOM III		
By Ms. Jarvis	8	
By Mr. Shaw		16

EXHIBITS

	IDENTIFIED	ADMITTED
Petitioner's Exhibit A	7	7
Agency Exhibit A	10	11
Agency Exhibit B	12	--

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PROCEEDINGS

HEARING OFFICER WEBB: Good morning.
My name is Carol Webb, and this is the hearing for
PCB 16-103, Knapp Oil Company versus IEPA. It is
June 28th, and we are beginning at 10 a.m.

For the record, although this
facility is located in Massac County, there was no
known public interest in this case so I granted the
parties' request to hold the hearing in Springfield.

There are no members of the public
present to comment, but written public comment may
be filed with the clerk by July 12th.

At issue in this case are Agency
modifications to Petitioner's Stage I site
investigation plan budget for a facility located at
1117 East Fifth Street in Metropolis.

The Pollution Control Board members
will make the final decision in this case. My
purpose is to conduct the hearing in a neutral and
orderly manner so that we have a clear record of the
proceedings.

The decision deadline is
September 8th although the petitioner has just
discussed with me that that may be waived for

1 another period of time.

2 This hearing was noticed pursuant to
3 the act in the Board's rules and will be conducted
4 pursuant to Sections 101.600 through 101.632 of the
5 Board's procedural rules.

6 At this time, I will ask the parties
7 to please make their appearances on the record.

8 MR. SHAW: Thank you, Your Honor.
9 Patrick Shaw for Petitioner, Knapp
10 Oil Company.

11 MS. JARVIS: Melanie Jarvis for
12 Illinois EPA.

13 HEARING OFFICER WEBB: Thank you.

14 Are there any preliminary matters to
15 discuss on the record? No? Okay.

16 Would the petitioner like to give an
17 opening statement?

18 MR. SHAW: Yes. I'll just make a
19 brief statement.

20 This is an appeal of a
21 rejection/modification portions of a budget
22 submitted for reimbursement purposes for the LUST
23 Fund. Today we will be presenting and requesting
24 that the Board take official notice of instructions

1 for the budget and billing forms that are on the
2 Illinois EPA's website and are dated April 2009 so
3 they were in existence at the time of the underlying
4 decision, and we will rest our case after that.

5 HEARING OFFICER WEBB: Ms. Jarvis?

6 MS. JARVIS: Yes. Good morning.

7 Basically for the Agency, the issues
8 in this case are twofold.

9 One is whether or not a camera is a
10 direct or indirect cost in a leaking underground
11 storage tank remediation.

12 The other three denial points, and
13 they aren't really denial points, they're
14 modification points, basically just asked at the
15 time that the billing is submitted that they submit
16 additional documentation to show that what they were
17 using was necessary and not excessive.

18 We're going to be presenting evidence
19 today regarding these two issues.

20 HEARING OFFICER WEBB: Okay.

21 Mr. Shaw, would you like to present
22 your case?

23 MR. SHAW: Yes.

24 I'd like to call as my first exhibit

1 Petitioner's Exhibit A. We would request the Board
2 take official notice of the document on the EPA's
3 website titled Instructions For the Budget and
4 Billing Forms.

5 Without repeating what I just said in
6 the opening remarks, we would like the Board to take
7 official notice of that.

8 MS. JARVIS: And we have no objection
9 to this exhibit.

10 HEARING OFFICER WEBB: Okay.

11 Petitioner's Exhibit A is admitted
12 into the record.

13 (Whereupon Petitioner's Exhibit A
14 was admitted into evidence at
15 this time.)

16 HEARING OFFICER WEBB: Do you have
17 anything else you would like to present, Mr. Shaw?

18 MR. SHAW: No, we don't. We rest our
19 case.

20 HEARING OFFICER WEBB: Okay.

21 Ms. Jarvis?

22 MS. JARVIS: And I'm going to call
23 James Malcolm.

24 Would the court reporter please swear

1 the witness.

2 HEARING OFFICER WEBB: Mr. Malcom, if
3 you'd please have a seat up here.

4 Would the court reporter please swear
5 in the witness?

6 (Whereupon the witness was sworn
7 by the reporter.)

8
9 JAMES ROBERT MALCOM III
10 called as a witness herein, on behalf of Petitioner,
11 having been first duly sworn on his oath, was
12 examined and testified as follows:

13
14 DIRECT EXAMINATION

15 BY MS. JARVIS:

16 Q. Can you please state your name?

17 A. It is James Robert Malcolm III.

18 Q. And where are you employed?

19 A. The LUST Section which is the Leaking
20 Underground Storage Tank Section at the Illinois
21 Environmental Protection Agency.

22 Q. And how long have you been employed?

23 A. For 17 years and 6 months.

24 Q. And have you always been in the

1 position in the Leaking Underground Storage Tank
2 Unit?

3 A. Correct, yes.

4 Q. And you are the project manager on
5 the Knapp Oil site?

6 A. Correct.

7 Q. Okay. I'm going to show you what is
8 page 56 of the record, and it is Attachment A.

9 Are you familiar with this document?

10 A. Yes, I am.

11 Q. And did you author the document?

12 A. Correct.

13 Q. Okay. Now, what is the first
14 modification that you made to the budget?

15 This is a modification for a budget,
16 correct?

17 A. Yes, that's correct.

18 Q. What was the first modification made?

19 A. It is saying that the cost associated
20 with a camera is considered an indirect cost and not
21 a reimbursable cost.

22 Q. And why did you make that
23 determination?

24 A. Based on the fact that the cost for a

1 camera was originally for the processing of film
2 which currently does exist but it's rarely used.

3 Q. And why is it rarely used?

4 A. It's due to pictures on cell phones
5 and digital cameras which is directly downloaded to
6 a personal computer.

7 Q. So there's no longer anything that
8 needs to be restocked like film?

9 A. Correct, yes.

10 MS. JARVIS: Okay. Then at this
11 point, I'm going to ask that Agency Exhibit 1 --

12 HEARING OFFICER WEBB: Can we use
13 letters since Patrick already started, or did you
14 already make --

15 MS. JARVIS: I had mine done first
16 before he came in.

17 HEARING OFFICER WEBB: It's not a big
18 deal. Don't worry about it. I didn't realize they
19 were already done.

20 MS. JARVIS: That's okay. I made it
21 an A, Agency Exhibit A.

22 I'd just like that exhibit as Black's
23 Law Dictionary, and it has the definitions of direct
24 and indirect cost so I'd like to enter that into the

1 record.

2 HEARING OFFICER WEBB: And I
3 understand there's no objection to the Black's Law
4 Dictionary entry being admitted into the record?

5 MR. SHAW: No. It's law. It's a
6 legal source.

7 HEARING OFFICER WEBB: Okay. The
8 Agency Exhibit A is admitted into the record.

9 (Whereupon Agency Exhibit A was
10 admitted into evidence at this
11 time.)

12 Q. BY MS. JARVIS: I now want to just
13 kind of show you the record at page 31.

14 A. Okay.

15 Q. And do you recognize that?

16 A. Absolutely.

17 Q. And is the camera listed?

18 A. It is for \$30 a day for a time of one
19 day.

20 Q. Okay. And then that's all on the
21 direct cost?

22 A. Correct.

23 Q. So now if I want you to go back to
24 the other record, not the exhibit, there you go,

1 now, you have three more modification points?

2 A. True.

3 Q. Are they modification points?

4 A. True. If justification and
5 coordinating documentation was provided, these could
6 be a reimbursable cost.

7 Q. So it's just asking for justification
8 when the bills are submitted?

9 A. True.

10 Q. But it didn't cut them from the
11 budget?

12 A. No.

13 Q. Now I want to show you Agency Exhibit

14 B.

15 Are you familiar with Agency Exhibit

16 B?

17 A. Correct, yes, I am.

18 Q. And what is it?

19 A. It's a rental page showing that this
20 item cost a certain amount a day three days a week
21 for a month.

22 Q. Okay. And are there other pages
23 attached to that?

24 A. There's similar.

1 Q. And they're all similar?

2 A. Correct.

3 Q. And how did these pages come to your
4 attention?

5 A. I had contacted an environmental firm
6 for documentation, and they e-mailed this which
7 justified their cost.

8 Q. And are those similar to what we
9 requested or the Agency requested justification for
10 in the Knapp Oil decision letter?

11 A. Correct.

12 Q. So simply by e-mailing these types of
13 documents, those costs could be justified?

14 A. Correct.

15 Q. And we didn't need the justification
16 until the billing package came in?

17 A. True.

18 I was going to actually cut cost in
19 this case so I had contacted the consultant whereas
20 in the current case it wasn't an actual cut. It was
21 a suggestion that when the actual cost came through
22 that I had documentation.

23 MS. JARVIS: Okay. And I would ask
24 that Agency Exhibit B be submitted for the Board's

1 consideration as to what type of documentation we're
2 looking for when we ask for justification in this
3 case, so I asked that it be admitted.

4 MR. SHAW: We object. The rules as I
5 believe are restated in the Board's decision
6 accepting this case for hearing indicate that the
7 issues are framed by the Agency's denial letter, and
8 the Agency's denial letter is supposed to meet the
9 requirements of the Illinois Environmental
10 Protection Act specifying the particular information
11 that would be required to satisfy the Agency.

12 What we have here is a fairly odd
13 proceeding by which the letter did not provide any
14 specificity or particularity about anything, and by
15 testimony, they're trying to explain and go around
16 the fact that they failed to meet the requirement of
17 the Illinois Environmental Protection Act that
18 requires specification of particular information
19 required, when it would be required, what form it
20 would be in.

21 This is happening at the responsive
22 stage of this hearing this information is being
23 provided, so yes, we would object.

24 HEARING OFFICER WEBB: Okay. I'm

1 looking at it. You know, there are certain
2 instances in which the Board has allowed exhibits
3 that are not part of the administrative record, but
4 I'm not sure that this meets that requirement.

5 MS. JARVIS: However, the Board has
6 also allowed testimony and evidence on other cases
7 and other situations that the Agency has in front of
8 it, and I think it was the Farina versus Illinois
9 EPA, and it was a CW3M case, and the hearing
10 officer, which was you, allowed in evidence of other
11 cases that were pending in front of the Agency.

12 All this document does is show that
13 in another pending case with very similar
14 circumstances, the people sent this type of
15 documentation in, and that was sufficient.

16 So it's just giving the Board an idea
17 of what the Agency would do if this type of
18 documentation were put in.

19 HEARING OFFICER WEBB: Well, I don't
20 remember when the Farina case was, if it was before
21 or after the Board clarified what I was allowed to
22 admit and not admit at hearing.

23 You know, maybe in the future if you
24 could bring these things to me in advance of hearing

1 I could research it, but I will take this as an
2 offer of proof but I just don't think that it meets
3 the qualification of what the Board has previously
4 allowed as non-record exhibits in these hearings.

5 MS. JARVIS: Okay. And that's fine,
6 and we can always argue that in the brief.

7 HEARING OFFICER WEBB: Yes.

8 MS. JARVIS: Okay. I have no further
9 questions.

10 MR. SHAW: I just have a few
11 questions, I promise.

12

13 CROSS-EXAMINATION

14 BY MR. SHAW:

15 Q. With respect to indirect costs, I
16 believe you indicated that the issue is that
17 processing film is rare?

18 A. True.

19 Q. And no longer needs to be stocked?

20 A. Correct.

21 Q. When did this occur?

22 A. I've been with the Agency for 17-1/2
23 years and have not seen an actual camera used since
24 probably 2001, and then it switched to digital

1 cameras, and then within the last five to eight
2 years, it's all done on a cell phone which I have
3 seen on numerous sites the consultant taking
4 pictures with a cell phone, and I'm sure it's sent
5 to a computer of some sort or saved on the actual
6 phone.

7 Q. Well, approximately when did this
8 occur?

9 MS. JARVIS: I'm going to object
10 because I don't think that the question is very
11 clear. When did what occur?

12 HEARING OFFICER WEBB: When did what
13 occur?

14 MR. SHAW: Basically he's saying that
15 this is something acceptable at one point in time
16 for a budget and now it's not.

17 Q. When did that occur approximately?

18 A. The actual cutting of the camera was
19 brought up in a LUST Section meeting in April of
20 2016.

21 Q. Are you aware of any plans to seek to
22 amend the Board regulations on the subject of
23 cameras?

24 A. You mean change them?

1 Q. Change the regulations, yes.

2 A. I'm not sure I understand what you're
3 saying.

4 Q. Are you aware of any proposed
5 regulations planned regarding the subject of
6 cameras?

7 A. No.

8 Q. With respect to the other
9 modification points, you indicated that in another
10 case, I take it recently, you contacted somebody for
11 documentation.

12 How did you contact them?

13 A. Via e-mail and just simply asked
14 instead of actually cutting all of these costs if
15 you could provide documentation and provide it
16 within a day.

17 Q. Did you contact the consultant in
18 this case in a similar fashion?

19 A. No, because it wasn't an actual cut.
20 It was a suggestion for when the actual costs were
21 submitted. I would have the documentation.

22 Q. With respect to Agency Exhibit 2
23 which I guess is going to be subject to continuing
24 dispute, is any of the equipment identified in that

1 exhibit the type of equipment that is at issue in
2 this case?

3 A. Let me look.

4 The survey equipment which is Item 3
5 is.

6 MR. SHAW: I don't have any further
7 questions.

8 HEARING OFFICER WEBB: Ms. Jarvis, do
9 you have anything further for this witness?

10 MS. JARVIS: No, I don't.

11 HEARING OFFICER WEBB: Okay. Thank
12 you.

13 (Witness excused.)

14 HEARING OFFICER WEBB: Do you have
15 anything further you'd like to present?

16 MS. JARVIS: Can I have just a couple
17 minute recess?

18 HEARING OFFICER WEBB: Yes.
19 We'll go off the record.

20 (Pause)

21 MS. JARVIS: We can go back on.
22 We have nothing further.

23 HEARING OFFICER WEBB: Okay. We're
24 back on the record, and, Ms. Jarvis, you're telling

1 me you have nothing further to present?

2 MS. JARVIS: Correct. We have
3 nothing further to present.

4 HEARING OFFICER WEBB: Okay. And I
5 have all the exhibits.

6 All right. The transcript is due by
7 July 6th and will be posted on the Board's website.

8 The public comment deadline is
9 July 12th. Any public comment must be filed in
10 accordance with Section 101.628 of the Board's
11 procedural rules.

12 The petitioner's brief is due to by
13 July 22nd and respondent's brief is due by
14 August 8th, and petitioner has agreed to file a
15 deadline waiver to allow time to file an MRI brief
16 which will be due by August 18th and the deadline
17 will be waived to October 6th.

18 Mr. Shaw, would you like to make any
19 closing argument?

20 MR. SHAW: I'll just save my closing
21 argument for the brief.

22 HEARING OFFICER WEBB: Ms. Jarvis?

23 MS. JARVIS: I will likewise save my
24 closing argument for the brief.

1 HEARING OFFICER WEBB: And nobody
2 here cares to make any public comment?

3 All right. At this time, I will
4 conclude the proceedings, and we stand adjourned.

5 Thank you everybody.

6 (Which were all of the
7 proceedings held at this time.)

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1 STATE OF ILLINOIS)
) SS.
2 COUNTY OF SANGAMON)

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CERTIFICATE

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I, Laurel A. Patkes, Certified Shorthand Reporter in and for said County and State, do hereby certify that I reported in shorthand the foregoing proceedings and that the foregoing is a true and correct transcript of my shorthand notes so taken as aforesaid.

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I further certify that I am in no way associated with or related to any of the parties or attorneys involved herein, nor am I financially interested in this action.

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Certified Shorthand Reporter

<p>A a.m 1:11 4:5 Absolutely 11:16 acceptable 17:15 accepting 14:6 act 5:3 14:10,17 action 22:14 actual 13:20,21 16:23 17:5,18 18:19,20 additional 6:16 adjourned 21:4 administrative 15:3 admit 15:22,22 admitted 3:13 7:11,14 11:4,8 11:10 14:3 advance 15:24 aforsaid 22:10 Agency 1:7 3:15 3:15 4:13 6:7 8:21 10:11,21 11:8,9 12:13 12:15 13:9,24 14:11 15:7,11 15:17 16:22 18:22 Agency's 14:7,8 agreed 20:14 allow 20:15 allowed 15:2,6 15:10,21 16:4 amend 17:22 amount 12:20 appeal 5:20 appearances 2:1 5:7 appearing 2:4,7 appointed 1:13 approximately 17:7,17 April 6:2 17:19</p>	<p>argue 16:6 argument 20:19 20:21,24 asked 6:14 14:3 18:13 asking 12:7 associated 9:19 22:12 attached 12:23 Attachment 9:8 attention 13:4 Attorney 2:3 attorneys 22:13 August 20:14,16 author 9:11 Avenue 1:12 aware 17:21 18:4</p> <p style="text-align: center;">B</p> <p>B 3:15 12:14,16 13:24 back 11:23 19:21,24 Based 9:24 basically 6:7,14 17:14 beginning 4:5 behalf 2:4,7 8:10 believe 14:5 16:16 big 10:17 billing 6:1,15 7:4 13:16 bills 12:8 Black's 10:22 11:3 Board 1:2 4:17 5:24 7:1,6 15:2 15:5,16,21 16:3 17:22 Board's 5:3,5 13:24 14:5 20:7,10</p>	<p>brief 5:19 16:6 20:12,13,15,21 20:24 bring 15:24 brought 17:19 budget 4:15 5:21 6:1 7:3 9:14,15 12:11 17:16</p> <p style="text-align: center;">C</p> <p>call 6:24 7:22 called 8:10 camera 6:9 9:20 10:1 11:17 16:23 17:18 cameras 10:5 17:1,23 18:6 cares 21:2 Carol 1:13 4:3 case 4:8,13,18 6:4,8,22 7:19 13:19,20 14:3 14:6 15:9,13 15:20 18:10,18 19:2 cases 15:6,11 cell 10:4 17:2,4 certain 12:20 15:1 CERTIFICA... 22:4 Certified 22:5 22:17 certify 22:7,11 change 17:24 18:1 circumstances 15:14 clarified 15:21 clear 4:20 17:11 clerk 4:12 closing 20:19,20 20:24 come 13:3</p>	<p>comment 4:11 4:11 20:8,9 21:2 Company 1:4 4:4 5:10 computer 10:6 17:5 conclude 21:4 conduct 4:19 conducted 5:3 consideration 14:1 considered 9:20 consultant 13:19 17:3 18:17 contact 18:12,17 contacted 13:5 13:19 18:10 continuing 18:23 Control 1:2 4:17 coordinating 12:5 correct 9:3,6,12 9:16,17 10:9 11:22 12:17 13:2,11,14 16:20 20:2 22:9 cost 6:10 9:19,20 9:21,24 10:24 11:21 12:6,20 13:7,18,21 costs 13:13 16:15 18:14,20 County 4:7 22:2 22:6 couple 19:16 court 7:24 8:4 CROSS 3:2 CROSS-EXA... 16:13 CSR 1:24 current 13:20 currently 10:2</p>	<p>cut 12:10 13:18 13:20 18:19 cutting 17:18 18:14 CW3M 15:9</p> <p style="text-align: center;">D</p> <p>D 3:1 dated 6:2 22:15 day 11:18,19 12:20 18:16 days 12:20 deadline 4:22 20:8,15,16 deal 10:18 decision 4:18,22 6:4 13:10 14:5 definitions 10:23 denial 6:12,13 14:7,8 determination 9:23 Dictionary 10:23 11:4 digital 10:5 16:24 direct 3:2 6:10 8:14 10:23 11:21 directly 10:5 discuss 5:15 discussed 4:24 dispute 18:24 DOCKET 1:5 document 7:2 9:9,11 15:12 documentation 6:16 12:5 13:6 13:22 14:1 15:15,18 18:11 18:15,21 documents 13:13 downloaded</p>
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