BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

SWIF-T-FOOD MART, Petitioner,	)	
v.	)	PCB No. 03-185
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	(UST Appeal)

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

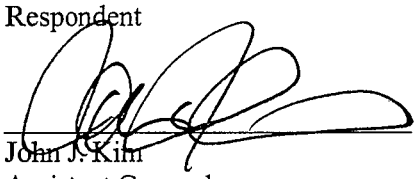
Stephen F. Hedinger
Hedinger Law Office
2601 South Fifth Street
Springfield, IL 62703

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a MOTION FOR LEAVE TO FILE INSTANTER and RESPONSE TO PETITIONER'S BRIEF, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: April 7, 2004

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

SWIF-T-FOOD MART, Petitioner,	)	
v.	)	PCB No. 03-185
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	(UST Appeal)

MOTION FOR LEAVE TO FILE INSTANTER THE RESPONSE TO PETITIONER'S BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, hereby requests that the Illinois Pollution Control Board ("Board") grant the Illinois EPA leave to file instanter the Response to Petitioner's Brief. In support of this motion, the Illinois EPA states as follows:

1. Pursuant to an order entered by the Hearing Officer on March 4, 2004, the Illinois EPA was to file its Response to the Petitioner's Brief on or before April 6, 2004. Unfortunately, the current workload of the undersigned attorney, including filing of a post-hearing brief with the Board in a different matter on April 5, 2004 (Saline County Landfill, Inc. v. Illinois EPA, PCB 04-117), has delayed the filing of the response.

2. The Illinois EPA does not believe the Petitioner will be unduly prejudiced by this one day delay in filing the response. A courtesy copy of this response will be telefaxed to opposing counsel to expedite his receipt of the response.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board grant the Illinois EPA leave to file instanter the Response to Petitioner's Brief.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

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Special Assistant Attorney General
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SWIF-T-FOOD MART, Petitioner,	)	
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RESPONSE TO PETITIONER'S BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to an order entered by the Hearing Officer dated March 4, 2004, hereby submits its Response to the Petitioner's Closing Brief ("Petitioner's brief") to the Illinois Pollution Control Board ("Board").

I. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. Therefore, Swif-T Food Mart ("Swif-T") must demonstrate to the Board that it has satisfied that burden. It cannot merely argue that the Illinois EPA's decision or decision-making process was flawed; rather, Swif-T must present evidence and arguments to demonstrates that, by virtue of the submittals to the Illinois EPA that led to the decision under appeal, it satisfied its requirements pursuant to the Illinois Environmental Protection Act ("Act") and underlying regulations. The failure by Swif-T to do so means the Board must find in favor of the Illinois EPA and affirm the decision under appeal.

II. STANDARD OF REVIEW

Section 57.8(i) of the Act (415 ILCS 5/57.8(i)) grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS

5/40). Section 40 of the Act, the general appeal section for permits, has been used by the legislature as the basis for this type of appeal to the Board. Thus, when reviewing an Illinois EPA final decision of ineligibility for reimbursement from the Underground Storage Tank Fund, the Board must decide whether or not the application submitted demonstrates compliance with the Act and Board regulations. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must look to the documents within the Administrative Record and exhibits presented at hearing, along with hearing testimony.[1] Based upon that information, evidence and testimony, as applied to the Act and the Board's regulations, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA's decision dated March 3, 2003.

III. STATEMENT OF FACTS

The relevant facts are fairly straightforward. On or about August 10, 1995, the Petitioner or one of its agents reported a suspected release from underground storage tanks at the Petitioner's facility at 1100 Belvidere Road in Waukegan, Illinois. The release was reported to the Illinois Emergency Management Agency ("IEMA"), who in turn assigned Incident Number 951716. Exs. 1, 2. In September 1995, the Petitioner submitted an application to the Office of the State Fire Marshal ("OSFM") seeking an eligibility and deductibility determination for three underground storage tanks that had releases out of a total of eight tanks at the site. The Petitioner stated in the application that only three tanks had experienced releases. Ex. 2, pp. 2, 4. On January 8, 1996, OSFM issued a decision finding that three tanks were eligible for reimbursement in response to the "referenced occurrence" (identified by incident number

[1] References to the Administrative Record will hereinafter be made as, "AR, p. ___." Also, references to the Respondent's exhibits admitted at the hearing will hereinafter be made as, "Ex. #, p. ___." References to the hearing transcript will hereinafter be made as, "TR, p. ___."

951716). The decision further stated that a deductible of $10,000.00 must be met before costs could be paid. The decision was a final decision that could be appealed to the Board. AR, pp. 74-76. No evidence has been presented that any such appeal was filed.

On May 2, 1996, the Petitioner reported another suspected release to IEMA, this time reporting that all eight tanks at the site had experienced a release. A new number, 960723, was assigned by IEMA. Ex. 5. Following that date, the Petitioner submitted another application for an eligibility and deductibility determination to OSFM, on or about February 19, 1999. Ex. 6. In that application, the Petitioner stated that of the eight tanks at the site, all eight had releases that were reported to IEMA on May 2, 1996. Ex. 6, p. 4. Also in the application, the Petitioner noted that another incident (number 951716) had been reported at the site. The application form states in part:

> 5. Occurrence for which you intend to seek reimbursement: Incident # 960723.
>
> Other incident numbers reported at the site: 951716. (A separate application must be filed for each occurrence. Please indicate if any of the additional incident numbers are erroneously reported incidents, or a second reporting of the same occurrence for which you intend to seek reimbursement.)

Ex. 6, p. 2. There is no statement or notation by the Petitioner on the form that indicates it believes the 960723 incident number is a re-reporting of the 951716 incident. Also, the OSFM form clearly states that the incident number being provided is done for a separate occurrence, unless otherwise disputed or addressed by the Petitioner (which was not done here).

Based on that 1999 eligibility and deductible application, OSFM issued a second final decision on November 18, 1999. AR, pp. 71-73. That final decision provides that eight tanks are now eligible for reimbursement. The final decision also states, "The Reimbursement Eligibility and Deductible Application received on November 4, 1999 for the above referenced

occurrence has been reviewed. * * * It has been determined that you are eligible to seek payment of costs in excess of $10,000.00. The costs must be in response to the occurrence referenced above and associated with the following tanks: [listing of the eight tanks]." AR, p. 71. The letter identifies incident number 960723 as being the occurrence in question. The final decision constituted an appealable decision issued by OSFM. AR, p. 72. The Petitioner provided no evidence that an appeal of that decision was ever filed.

Following receipt of those OSFM decisions, there was correspondence between the Petitioner and the Illinois EPA regarding whether or not the two incident numbers were re-reports of one incident, e.g., Exs. 7, 8 and 9.

On April 9, 2001, the Illinois EPA issued a final decision approving a budget that contained certain costs associated with physical soil classification and groundwater investigation. Ex. 10. As part of the final decision, an attachment was included that listed the line item approvals for different types of work. Among the different line items was "Handling Charges" in the amount of $211.08. Ex. 10, p. 3.

On or about June 21, 2001, the Illinois EPA received a request for reimbursement from the Petitioner for costs associated with the site classification work plan and budget. Ex. 12. The request identified both incident numbers on the first page of the request, though it later listed the 960723 incident number for each of the tanks at the site. Ex. 12, p. 2. On July 25, 2001, the Illinois EPA issued a final decision approving reimbursement for some of the costs sought for reimbursement. The final decision includes an assessment of a $10,000.00 deductible, and references incident number 960723. Ex. 14. Since the Petitioner has presented no evidence that the final decision was ever appealed, any arguments based on the content of the July 2001 final decision have been waived. Also, the Petitioner has not shown that the Illinois EPA has

approved any other reimbursement in association with incident number 960723. In other words, the July 25, 2001 final decision is the only decision that approves payment for costs associated with incident number 960723.

Later, on three different occasions and in three different final decisions, the Illinois EPA approved either the budget or amended budget for costs associated with the high priority corrective action plan ("HCAP"). On March 19, 2002, the Illinois EPA issued a final decision approving with modifications the proposed HCAP budget. AR, pp. 77-81. The final decision included an attachment that listed the approved amounts. No costs were approved for handling charges. AR, p. 79.

On June 12, 2002, the Illinois EPA issued another final decision modifying a HCAP budget for the Petitioner's site. AR, pp. 82-84. The final decision included an attached listing line item approved amounts. Again, no costs were approved for handling charges. AR, p. 84.

Finally, on August 7, 2002, the Illinois EPA issued another final decision further modifying the HCAP budget. Ex. 18. The attachment to the final decision does not include any costs approved for the handling charge line item. Ex. 18, p. 2. Each of the three final decisions approving or modifying the HCAP budget referenced both incident numbers (951716 and 960723). AR, pp. 77, 82; Ex. 18. The Petitioner has presented no evidence that any of the three final decisions approving or modifying the HCAP budget were appealed.

On or about November 7, 2002, the Petitioner submitted a reimbursement request to the Illinois EPA. AR, pp. 14-84. The request sought payments associated with the HCAP and budget. AR, p. 14. The Petitioner listed both incident numbers on the first page of the request, though it later referenced the 960723 incident number for each of the eight tanks. AR, pp. 14-

15. The Petitioner also stated that the costs in the request were incurred between December 1, 1995 to November 20, 2001. AR, p. 66.

On March 3, 2003, the Illinois EPA issued a final decision in response to the November 2002 reimbursement request. AR, pp. 1-3. That decision, and the deductions made therein, are the subject of this appeal. Included in the final decision is the assessment of the $10,000.00 deductible. The final decision references incident number 951716. AR, p. 1. Other than this final decision, the Petitioner has presented no evidence that any other payments for costs have been approved in reference to the 951716 incident number. Thus, the March 2003 final decision is the only one that has approved costs in conjunction with the 951716 incident number.

At the hearing in this case, the Illinois EPA staff responsible for making the deductions were called to testify. Eric Kuhlman, a project manager in the Illinois EPA's Leaking Underground Storage Tank ("LUST") Section, testified that he determined that two deductibles should apply for the site based on the fact that OSFM had issued two deductible decisions. TR, pp. 36-37.

Mr. Kuhlman also testified that his interpretation that two deductibles should apply was shared by his supervisor, Harry Chappel. TR, p. 64. He also stated that if he felt that his position, and that of his supervisor's, was correct, and there was a possibility that earlier decisions were incorrect, the proper thing to do would be to rectify any error and state the correct position. TR, p. 66.

As to his involvement in the issuance of approvals for budgets for the HCAP, Mr. Kuhlman answered the question of whether amounts in the line items of approved budgets should be considered as maximum amounts, minimum amounts, or guaranteed amounts in terms

of reimbursement. He testified that any approved proposed budget is the maximum amount an owner or operator of an underground storage tank could receive. TR, p. 79.

Niki Weller of the Illinois EPA also provided testimony. She explained the method by which she deducted certain markups included in the November 2002 reimbursement request. TR, pp. 121-125. She also testified that the Illinois EPA believes there is a prime contractor associated with corrective action that should receive a handling charge. TR, p. 125. Between subcontractors and the prime contractor, only the prime contractor should receive a handling charge. Id.

IV. THE ILLINOIS EPA PROPERLY ASSESSED A $10,000.00 DEDUCTIBLE

The Petitioner argues that the Illinois EPA's decision to apply the $10,000.00 deductible to the present reimbursement request was contrary to law and fact. Nothing could be further from the truth, since the Illinois EPA's decision is strongly supported both legally and factually.

A. The Illinois EPA did not reconsider or reverse any past decision

The Petitioner alleges that based upon a prior submittal, the Illinois EPA had previously rendered a final decision on the issue of how many deductibles should apply, the answer being that only one was appropriate. Petitioner's brief, p. 6. This is a false statement, and not surprisingly the referenced "prior submittal" is neither identified or explained.

Here, there have been only two approvals of payment for costs associated with either incident number 951716 or 960723. The first was issued on July 25, 2001, for incident number 960723, and a $10,000.00 deductible was assessed. Ex. 14. No appeal was taken from that decision. Also, that decision did not include any statement regarding the Illinois EPA's position as to whether a separate deductible should apply for incident number 951716, since that issue was not raised. There was simply no reason for any gratuitous statement of that kind to be

included in the final decision. And, regardless of whether one or both incident numbers should have been associated with that final decision, the fact is that the Petitioner did not appeal the decision. Therefore, any complaints or arguments associated with that decision have long since been waived.

The second approval for costs is the decision now under review. That decision clearly identifies incident number 951716 as the occurrence in question, and the $10,000.00 deductible associated with that occurrence was properly applied. But no final decision issued by the Illinois EPA has been revisited or reconsidered in any way, since no previous decision approving reimbursement of costs for incident number 951716 has ever been issued other than the decision under review. There is simply no past decision that could have been reconsidered. The only possible fact that the Petitioner can claim was contradicted were pieces of correspondence between the Petitioner and the Illinois EPA. However, any representations made by the Illinois EPA in any such correspondence has not been shown to have played any part in any past final decision. At best, the Petitioner might be able to argue that the Illinois EPA has changed its interpretation of the question of whether one or two deductibles apply—but the Petitioner cannot argue that the Illinois EPA has reconsidered a final decision. Unless and until multiple final decisions have been reached on the same issue, the Illinois EPA cannot be said to have contradicted itself.

Even assuming *arguendo* that the Illinois EPA did change its interpretation of this situation, the Board has recognized that the Illinois EPA's prior actions, if in error, are properly remedied by correcting the error, not perpetuating it. State Bank of Whittington v. Illinois EPA, PCB 92-152 (June 3, 1993); Chemrex, Inc. v. Illinois EPA, PCB 92-123 (February 4, 1993). Again, the Illinois EPA has not taken any past action other than to make certain statements in

correspondence.[2] But even if that were to be taken as a memorialization of some kind, the proper course of action would be to correct the wrong interpretation and proceed with the right decision. The Illinois EPA believes that it is unnecessary to go to those lengths to justify its final decision, but if taken to that extreme the Board has recognized that the final decision here, and the reasoning thereto, is the correct means of resolution.

B. The OSFM decisions required that the Illinois EPA apply two deductibles

Mr. Kuhlman testified that his decision to apply a deductible in this final decision was based on the fact that OSFM had issued two separate decisions, imposing two separate deductibles. TR, pp. 36-37. The Board has noted that the Illinois EPA must act in accord with the division of responsibilities established in the Act's regulatory scheme. Since neither the Illinois EPA does not have the authority to review decisions made by OSFM, the Illinois EPA is bound to accept OSFM's decisions. Kean Oil Co. v. Illinois EPA, PCB 92-60 (September 5, 1996), p. 6.

Here, it is clear from OSFM's eligibility and deductible application forms and final decisions that the Petitioner sought, and received, two different deductible determinations for two different occurrences. There is no question that in response to the September 1995 application, the Petitioner received a decision that incident number 951716 related to an occurrence that was subject to a $10,000.00 deductible. Similarly, the application form the Petitioner filed with OSFM in February 1999 clearly asked whether any other incident number reported at the site was for a re-reporting of the same occurrence. Ex. 6, p. 2. The Petitioner did not indicate that incident number 951716 referenced a different occurrence than that referenced by incident number 960723.

[2] Correctly, the Petitioner has not made any unfounded arguments that any past statements in correspondence act to estop the Illinois EPA from the action taken in the March 2003 final decision.

Accordingly, the final (unappealed) decision issued by OSFM in November 1999 clearly stated that the occurrence for incident number 960723 was the subject of the final decision. AR, p. 71. Since the Petitioner did not appeal either of the OSFM final decisions, there is no conclusion that can be reached other than the Petitioner agreed with OSFM that a $10,000.00 deductible applied to two separate occurrences, one referenced by incident number 951716 and the other by incident number 960723. The Illinois EPA has no choice but to follow the decisions issued by OSFM, since those determinations are delegated solely to OSFM.[3]

Based on the information provided by the Petitioner to OSFM, and the OSFM decisions, there is no doubt that there were two occurrences at the site. The Petitioner argues that nothing generated by OSFM or found in the administrative record supports a finding that two occurrences were involved. Petitioner's brief, p. 8. That statement totally ignores the information that the Petitioner itself provided, the decisions (and wording therein) issued by OSFM, and the failure by the Petitioner to appeal the OSFM decisions. In fact and law, there were two occurrences at the site, and the Petitioner cannot dispute that finding.

C. The Illinois EPA's application of a deductible is consistent with the Act and regulations

The Petitioner claims that the imposition of a deductible here was based on a clear misunderstanding of statutory requirements. Petitioner's brief, p. 8. Just the opposite is true, as the Illinois EPA's interpretation of the Act and underlying regulations is well-founded, while the position taken by the Petitioner is misleading at best.

[3] The Illinois EPA properly applied incident number 951716 to the present final decision. The reimbursement request submitted by the Petitioner was somewhat confusing in that at times both incident numbers were listed, and at other times only one incident number was listed. AR, pp. 14-15. However, from a practical standpoint, since the Petitioner did not provide any apportionment of costs between one incident number to the other, the Illinois EPA had to apply the 951716 number based on the dates the costs were incurred. The Petitioner certified that the costs in the reimbursement request were incurred from December 1, 1995 to November 20, 2001. The date that the second incident was reported to IEMA was in May 1996; therefore, at least some if not all of the costs in the reimbursement request must have been attributed to incident number 951716. It was reasonable and appropriate to apply the 951716 incident number to the review of the reimbursement request.

The Petitioner claims that only one deductible shall apply per underground storage tank site. Id. In support of that allegation, the Petitioner cites to Section 57.8(a)(4) of the Act (415 ILCS 5/57.8(a)(4)). However, a careful reading of that section indicates a different conclusion. Section 57.8 provides in pertinent part:

> Section 57.8. * * * If an owner or operator is eligible to access the Underground Storage Tank Fund pursuant to an Office of State Fire Marshal eligibility/deductible final determination letter issued in accordance with Section 57.9, the owner or operator may submit a complete application for final or partial payment to the Agency for activities taken in response to a confirmed release. * * *
>
> (a) * * * The owner or operator may submit an application for payment for activities performed at a site after completion of the requirements of Sections 57.6 and 57.7, or after completion of any other required activities at the underground storage tank site. * * *
>
> (4) Any deductible, as determined pursuant to the Office of the State Fire Marshal's eligibility and deductibility final determination in accordance with Section 57.9, shall be subtracted from any payment invoice paid to an eligible owner or operator. Only one deductible shall apply per underground storage tank site.

This language shows that, read as a whole, two points are made. First, the context of the language in the beginning of Section 57.8 of the Act makes reference to a single OSFM eligibility/deductible final decision, not multiple decisions for the same site as was the case here. Also, there are repeated references to Section 57.9 of the Act (415 ILCS 5/57.9).

Section 57.9(b)(3) of the Act (415 ILCS 5/57.9(b)(3)) provides in part that, "A deductible shall apply annually for each site at which costs were incurred under a claim submitted pursuant to this Title, except that if corrective action in response to an occurrence takes place over a period of more than one year, in subsequent years, no deductible shall apply for costs incurred in response to such occurrence."

If the Board were to accept the Petitioner's argument that only one deductible can ever be applied to an underground storage tank site, regardless of how many occurrences have taken place, then there would be no need for any of the language cited above. There would simply be one deductible period. Also, Section 57.9(b) makes repeated references to tying a deductible to an occurrence, just as done in the OSFM final decisions. That is the correct interpretation, that a separate deductible is applied to each separate occurrence. If that is the case, then the language in Section 57.9(b) makes sense.

Also, in Section 732.603(b) of the Board's regulations (35 Ill. Adm. Code 732.603(b)), the rules regarding deductibles are set forth. Included is Section 732.603(b)(2), which states that only one deductible shall apply per occurrence. Again, if the Petitioner's argument is followed, then the Board's regulation has no meaning.

The Illinois EPA interprets the Act and the Board's regulations to mean that one deductible shall apply to one separate occurrence. Multiple occurrences result in multiple deductibles, as is undoubtedly the position of OSFM given the language in their final decisions. The Petitioner has misconstrued some of the language in Section 57.8(a)(4) of the Act, and reading it in a vacuum renders other provisions of the Act and Board regulations meaningless. Rather, the language relied on by the Petitioner should be interpreted to mean that multiple deductibles without any finding or consideration of multiple occurrences should not be allowed for, and only one deductible should apply per site if there is only one occurrence.

Further, the Board's regulations provide the answer in the proper interpretation of the language in question found in Section 57.8(a)(4). Section 732.603(b) of the Board's regulations contains other deductible rules, such as if multiple incident numbers are issued for a single site in the same calendar year, then only one deductible shall apply for those incidents, even if the

incidents relate to more than one occurrence.[4] Also, the rule is stated that if more than one deductible determination is made, the higher deductible shall apply. Thus, if OSFM for some reason issues multiple deductibles for the same occurrence, only the higher deductible shall apply. This is consistent with the language in Section 57.8(a)(4) of the Act that only one deductible shall apply per site; notably, Section 57.8(a)(4) is not couched in terms of an occurrence as is done in Section 57.9 of the Act and in Section 732.603 of the Board's regulations. Thus, applying the language in Section 57.8(a)(4) to an argument involving deductibles and occurrences is misplaced.

V. THE ILLINOIS EPA PROPERLY DENIED HANDLING CHARGES

The Illinois EPA's decision to deduct handling charges from the reimbursement request was proper for several reasons. As stated in the final decision, the request for handling charges exceeded the approved budgeted amount, and further it would be inappropriate to allow both percentage markups and a handling charge. AR, p. 3.

A. The handling charges were not approved in a budget

The Petitioner argues that the handling charges in question, which in reality were markups passed on from a subcontractor to the primary contractor, were nonetheless included in the approved budget. Petitioner's brief, p. 9. This argument is based on the fact that the costs that were deducted from the reimbursement request were included in costs that were approved as "Field Purchases" in a June 12, 2002 final decision. AR, pp. 82, 84.

In the reimbursement request that led to final decision under appeal, the Petitioner noted that $229,800.00 had been approved as "Field Purchases and Other Costs." AR, p. 16. Also, the

[4] This language is not applicable to the present situation since the multiple incident numbers and occurrences were not in the same calendar year. However, the language provides an exception to the general rule that multiple occurrences result in multiple deductibles (i.e., unless the occurrences are in the same calendar year), thus recognizing the general rule itself.

Petitioner apparently sought an amendment to the amount of handling charges that had been approved to date, as evidenced by the notation of "Amendment Requested." Id. That notation is important for several reasons. First, it evidences the Petitioner's acknowledgment that an amendment in the amount of handling charges approved as of the date of submission of the reimbursement request was needed; this was especially true since no costs had ever been approved for handling charges. Also, it demonstrates that, just as was done when the Petitioner sought costs associated with site classification, there was a separate and distinct line item for handling charges on the Illinois EPA's forms that directly corresponded to the amount of costs for handling charges that could be approved.

Section 732.405(b) of the Board's regulations (35 Ill. Adm. Code 732.405(b)) clearly states that any owner or operator of an underground storage tank that intends to seek reimbursement shall submit a budget that will include, inter alia, a line item estimate of all costs associated with relevant activities. Section 732.405(b) also provides that budgets shall be submitted on forms prescribed and provided by the Illinois EPA.

As seen by the first page of the "Budget and Billing Form for Leaking Underground Storage Tank Sites," the budget and billing form is intended to be used for submission of both a budget and a request for reimbursement, depending on which items are checked by the owner/operator. AR, p. 14. This is done so that approvals for budget line items will directly correspond to requests made for reimbursement. The different line items for a budget or reimbursement request are listed, and the items listed in the "Amount approved in the Budget" section directly correspond to the items listed in the "Amount requested for Reimbursement" section. AR, p. 16. It is clear on the face of the reimbursement request that of the $8,275.18

sought in handling charges reimbursement, none had been approved to date though an amendment was requested. Id.

So based on nothing more than the content of the reimbursement application and the fact that no handling charges had been approved in any budget as of the date of the final decision, the deduction of the handling charges was appropriate. The Petitioner was required to provide information in a breakdown required and defined by the Illinois EPA's forms, and it did not do so. The Petitioner was required to have approved budget line items for any costs sought for reimbursement, and it did not do so. Simply put, the Petitioner's own acknowledgments justify the deductions.

As for the contention that the costs were included in the Field Purchases section and therefore should be approved, a simple reading of the costs clearly shows that the markups (though improper for reimbursement) amounted to a handling charge at best. In fact, in the section of the reimbursement application where a breakdown of handling charges is to be made, legitimate field purchases are to be included. AR, pp. 62-63. The actual costs for field purchases or subcontractors activities are to be listed then totaled, and the statutory handling charge sliding scale (found in Section 57.8(f) of the Act (415 ILCS 5/57.8(f)) and Section 732.607 of the Board's regulations (35 Ill. Adm. Code 732.607)) is then applied. The inclusion of markups from a subcontractor to a prime contractor should not be included in the amounts that are subjected to the sliding scale.

Furthermore, as Mr. Kuhlman testified, amounts approved in a budget represent the maximum amount that may be approved for reimbursement. TR, p. 79. To instead interpret an approval of a budget line item to mean that such approval also constitutes an unconditional approval of a reimbursement request for that amount defeats the purpose of conducting reviews

for reimbursement. Section 732.602(b) of the Board's regulations (35 Ill. Adm. Code 732.602(b)) provides that a full review of any application for reimbursement may be conducted if the amounts sought for payment exceed the amounts approved in the corresponding budget plan.

Here, the amount sought for handling charges clearly exceeded the $0.00 approved for handling charges in prior budget approvals, so a full review was warranted. A full review can include review of the invoices and receipts that support the claim. 35 Ill. Adm. Code 732.602(d). Ms. Weller's review of the invoices in question, identified in her testimony (TR, pp. 121-125), was justified and allowed for under the Board's regulations. Ms. Weller did not reconsider in any way Mr. Kuhlman's budget approvals; rather, his budget approvals were what triggered her full review of the documents presented for reimbursement. He did not approve any costs for handling charges, yet that was what was sought by the Petitioner in the reimbursement request. Ms. Weller's actions were consistent with his decision and the Illinois EPA's obligations pursuant to the Act and regulations.

B. Handling charges can only be allowed for the prime contractor

The Petitioner argues that the Illinois EPA is wrong in taking the position that only a prime contractor can receive handling charges. Rather, the Petitioner contends that parties other than the prime contractor can charge for handling charges and have those charges considered eligible for payment. Petitioner's brief, p. 10. In support of this contention, the Petitioner cites to the case of State Bank of Whittington. However, as the Board recognized in State Bank, that decision was issued without taking into account the statutory sliding scale for handling charges. State Bank, fn. 8. A more recent on persuasive position from the Board was articulated in Ted

Harrison Oil Co. v. Illinois EPA, PCB 99-127 (July 24, 2003), in which the Board set forth the general rule that only the primary contractor may assess a handling charge.

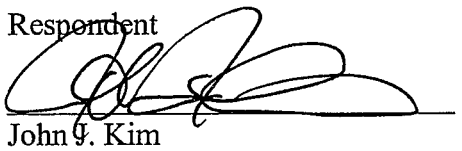
The Illinois EPA's policy and position on this issue is consistent and supported by the Board's past findings. It would be improper to allow for the recovery of handling charges assessed by any party other than the primary contractor, and then only when calculated through an application of the statutory and regulatory sliding scale.

VI. CONCLUSION

For all the reasons and arguments included herein, the Illinois EPA respectfully requests that the Board affirm its decision as to the issues raised by the Petitioner.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544, 217/782-9143 (TDD)
Dated: April 7, 2004

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on April 7, 2004, I served true and correct copies of a MOTION FOR LEAVE TO FILE INSTANTER and RESPONSE TO PETITIONER'S BRIEF, by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Stephen F. Hedinger
Hedinger Law Office
2601 South Fifth Street
Springfield, IL 62703

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)