ILLINOIS POLLUTION CONTROL BOARD
May 20, 2004

SWIF-T-FOOD MART,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 03-185
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

STEPHEN HEDINGER OF HEDINGER LAW OFFICES APPEARED ON BEHALF OF SWIF-T-FOOD MART, and

JOHN J. KIM APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

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

This case is before the Board on a July 7, 2003 petition for review of an Illinois Environmental Protection Agency (Agency) determination. At issue is the Agency's approval of reimbursement of requested costs of corrective action, with modifications, regarding Swif-T-Food Mart's (Swif-T) underground storage tank site located at 1100 Belvidere Road, Lake County. The parties went to hearing on February 11, 2004, and the case has been fully briefed.

For the reasons set forth below, the Board reverses the Agency's decision to deduct $13,808.86 in handling charges and to apply a second deductible.

PROCEDURAL BACKGROUND

On July 7, 2003, Swif-T filed a petition for review of a March 3, 2003 Agency determination. The Board accepted the case for hearing on July 10, 2003, and the Agency filed the administrative record on September 29, 2003. On February 11, 2004, a hearing was held before Board Hearing Officer Brad Halloran. Swif-T and the Agency appeared. Swif-T called two witnesses: Agency employees Eric Kuhlman and Niki Weller. Hearing Officer Halloran found no credibility issues with either of the witnesses. At the hearing, the parties jointly submitted 18 exhibits.

On March 19, 2004, Swif-T filed its closing brief. The Agency filed a motion for leave to file response brief *instanter* accompanied by its response brief on April 9, 2004. On April 22, 2004, Swif-T filed a motion for leave to file a reply *instanter* along with a reply.

PRELIMINARY MATTERS

Swif-T and the Agency each filed motions for leave to file *instanter*. No response to either motion was received. If a party files no response to a motion within 14 days the party will be deemed to have waived objection to the granting of the motion. *See* 35 Ill. Adm. Code 101.500(d). Accordingly, both motions for leave to file *instanter* are granted, and the Board accepts the Agency's response brief and Swif-T's reply brief.

FACTS

Swif-T owns and operates a service station facility located at 110 Belevidere Road, Waukegan, Lake County. During a boring test in August 1995, a release was discovered and the Illinois Emergency Management Agency (IEMA) was notified. Tr. at 39; Ex. 1. In September 1995, Swif-T submitted an application for an eligibility and deductible determination from the Leaking Underground Storage Tank (LUST) Fund to the Office of the State Fire Marshal (OSFM). Ex. 2. Swif-T stated in the application that three tanks had experienced releases. *Id*. On January 8, 1996, the OSFM issued a decision finding that three tanks were eligible for reimbursement in response to the referenced occurrence identified by incident number 951716 and imposed a $10,000 deductible.

In March 1996, Swif-T received a permit from the OSFM to remove the underground storage tanks at the site. Ex. 3. On March 28, 2003, eight tanks were removed. Ex. 4. On May 2, 1996, Swif-T reported a suspected release to IEMA reporting that eight tanks had experienced a release. Ex. 5; Tr. 39-41. A second incident number of 96-0723 was assigned by IEMA. *Id*. On February 19, 1999, Swif-T submitted another application for an eligibility and deductibility determination. Ex. 6. At that time, Swif-T stated that all eight tanks at the site had releases as reported on May 2, 1996. On November 18, 1999, the OSFM issued a decision for incident number 96-0723 determining that a $10,000 deductible applied for the eight tanks referenced in the application. AR at 71.

On June 21, 2000, the Agency received a request for reimbursement from Swif-T that listed both incident numbers on the front page, but incident number 96-0723 for each of the tanks at the site. Ex. 12. Prior to that request, Swif-T and the Agency had been involved in discussions concerning the deductible. In December 1999, Swif-T notified the Agency of the two incident numbers for the site, identifying the second number as a re-reporting of the 95-1716 incident number. Ex. 7. On January 5, 2000, Swif-T sent a letter that purported to confirm a telephone conversation during which Swif-T's consultant and the Agency agreed that the incident numbers would be combined. Ex. 8. On January 20, 2000, Agency employee Jay Gaydosh (the then project manager assigned to the site) sent a memorandum wherein the Agency agreed that the 1996 release was a re-reporting of the 1995 incident, and stating that all reporting requirements should be addressed through the 95-1716 incident number. Ex. 9.

On July 25, 2001, the Agency issued a final determination that applied a single $10,000 deductible and reimbursed Swif-T $1,971.08 - the total amount sought less the $10,000 deductible. Ex. 14. The final decision references only incident number 96-0723. *Id*.

On March 19, 2002, the Agency issued a final decision approving with modifications the proposed high priority corrective action plan (HCAP) budget. AR at 77-81. On May 21, 2002, Swif-T's consultant submitted correspondence to justify costs denied in the approved budget. Ex. 17. On June 12, 2002, the Agency issued a final decision modifying a HCAP budget for the site. AR at 82-84. On August 7, 2002, the Agency issued a third final decision further modifying the HCAP budget. Ex. 18. Each of the three final decisions on the HCAP budget references both incident numbers. AR at 77-81; AR at 82-84; Ex. 18.

On November 7, 2003, Swif-T submitted a reimbursement application to the Agency. AR at 14. The application seeks a total of $203,644.16 in payments associated with the HCAP budget. *Id*. Swif-T lists both incident numbers on the first and second pages of the application, but uses incident number 96-0723 thereafter. AR 14-22. On March 3, 2003, the Agency issued the final decision at issue in this case. AR at 1-3. The March 3, 2003 decision assesses a $10,000 deductible for incident number 95-1716, and denies $8,275.18 for costs exceeding the approved budget amounts and $13,808.86 as being unreasonable as submitted. *Id*.

Specifically, the Agency's denial letter states in pertinent part:

> Deductions for costs which are unreasonable as submitted. (Section 57.7(c)(4)(C) of the Act and 35 Ill. Adm. Code 732.606(hh))
>
> A deduction for costs associated with High Priority site activities. The billings submitted exceed the approved budget amounts. The Illinois EPA is unable to approve billings that exceed the approved budget amounts. (Section 57.8(a)(1) of the Act and 35 Ill. Adm. Code 732.601(f))
>
> A deduction is being made from the Field Purchases and Other Costs in the amount of $13,808.86. The costs are from Peter J. Hartmann Company invoices for the percentage markup and a handling charge both requested; there has not been any handling charges approved in a budget. AR at 3.

STATUTORY AND LEGAL BACKGROUND

In 1993, the General Assembly repealed Section 22.18b of the Environmental Protection Act (Act) and enacted a new Title XVI regarding Underground Storage Tank Fund (UST) reimbursement applications and determinations. 415 ILCS 5/57 (2002). The new law provided that releases reported to the State on or after the effective date of the amendments, September 13, 1993, would proceed under the new Title XVI. 415 ILCS 5/57.13(a) (2002).

The Board's authority to review an Agency budget determination in UST reimbursement claims arises from Section 57.7(c)(4)(D) and 57.8(i) of the Act. 415 ILCS 5/57.7(c)(4)(D), 57.8(i) (2002). Section 57.7(c)(4)(D) grants owners and operators the right to appeal an Agency determination on a proposed plan to the Board in accordance with the procedures of Section 40 of the Act. 415 ILCS 5/40 (2002). Section 57.8(i) of the Act grants the right to petition the Board to review the Agency denial or partial payment of a UST fund reimbursement request in the manner provided in Section 40 of the Act.

When seeking reimbursement from the UST Fund at a high priority site, the owner or operator must supply the Agency with "an accounting of all costs associated with the implementation and completion of the corrective action plan." 415 ILCS 5/57.7(c)(1)(B). The owner or operator must prove that the costs associated with the budget are reasonable, will be incurred in performing corrective action, and will be used to satisfy only the minimum requirements of the Act. 415 ILCS 57.7(c)(4)(C).

Section 57.9(b) in Title XVI sets forth the statutory provisions governing deductible determinations and provides, in part, as follows:

> B. An owner or operator may access the Underground Storage Tank Fund for costs associated with an Agency approved plan and the Agency shall approve the payment of costs associated with corrective action after the application of a $10,000 deductible, except in the following situations:
>
> * * *
>
> 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. 415 ILCS 5/57.9(b) (2002).

A number of definitions are instructive in this case.

> "Site" means any single location, place, tract of land or parcel of property including continguous property not separated by a public right of way.
>
> * * *
>
> "Occurrence" means an accident, including continuous or repeated exposure to conditions, that results in a sudden or nonsudden release from an underground storage tank. 415 ILCS 5/57.2 (2002).

SWIF-T ARGUMENTS

Deductible

Swif-T asserts that the Agency's decision to apply a second $10,000 deductible was contrary to the law and facts of this case. Pet. Br. at 6. Swif-T argues that the Agency had previously rendered a final decision on the issue of how many deductibles to apply and had detemined that only a single deductible was appropriate. *Id*. Swif-T argues that the Agency's subsequent decision was a reconsideration of a final decision and that the Board has previously denied relief to a permit applicant who sought approval of a request intended to eliminate an imposed permit condition on the grounds that the proper means of obtaining relief from challenged conditions was to have brought an appeal. Pet. Br. at 6-7.

Swif-T contends that had the Agency, in its initial determination, decided to apply the $10,000 deductible for each incident, Swif-T's relief would have been to appeal that decision and that if Swif-T would have been bound by such a decision, the Agency should be bound by the

decision it did make – especially in light of the fact that no new or different information concerning the deductibles was ever presented. Pet. Br. at 7-8.

Swif-T argues that the Act is clear that only one deductible shall apply per underground storage tank site. Pet. Br. at 8 citing 415 ILCS 5/57.8(a)(4) (2002). Swif-T asserts that no question exists that only a single site is at issue here and the Agency's decision to apply two deductibles is perplexing. Pet. Br. at 8. Swif-T asserts that nothing generated by the OSFM or otherwise included in the record suggest that more than one occurrence is an issue here. *Id*. In addition, Swif-T contends, even the Agency witness Mr. Kuhlman admitted that contamination from each of the eight tanks in question is so intermingled as to make it impossible to conduct any separate remediation or to ultimately issue separate no further remediation letters. Pet. Br. at 8, citing Tr. 41-42.

Swif-T contends the Agency's original decision on this point, made by the Agency managers and reviewers with the most experience, was correct. Pet. Br. at 9. Swif-T asserts that in December 1999, it notified the Agency of the two incident numbers for the site, identifying the second incident number as a re-reporting of the first incident number. Pet. Br. at 3, citing Ex. 7. Swif-T asserts that the Agency agreed that the incident numbers would be combined, and that a January 20, 2000 memorandum drafted by Jay Gaydosh (the project manager then assigned to the site) confirmed that the 1996 release was a rereporting of the 1995 incident and all reporting requirements should be addressed through the 95-1716 incident number. Pet. Br. at 3, citing Ex. 8 and Ex. 9.

Swif-T contends that Kuhlman (the project manager currently assigned to the site and responsible, in part, for the March 3, 2003 final decision) testified that before he was assigned to the site, Gaydosh was qualified to determine whether one or two deductibles should apply as the then project manager. Pet. Br. at 3. Swif-T asserts that when the facility was initially assigned to Kuhlman, he contacted his supervisor Eric Ports and determined that a single deductible applied to the facility. *Id*. Swif-T asserts that it was only in November 2002, when the reimbursement application dated November 7, 2002 was received by the Agency, that LUST technical unit manager Harry Chappel decided to reverse the prior decisions and instructed Kuhlman to apply two deductibles to the site. Pet. Br. at 4, citing Tr. 64, 94-95. Swif-T notes that Kuhlman has substantially less time of service with the Agency than does Gaydosh or Ports, and that Chappel had been in the unit for only one-and-a-half years at the time he made that decision – even less time than Kuhlman. Pet. Br. at 3-4.

Handling Charges

Swif-T claims that the handling charges in question were approved in the budget, specifically that Mr. Kuhlman had the handling charges before him, and approved the budget as presented. Pet. Br. at 9. Swif-T claims that the costs in question were actually incurred, were corrective action costs as defined by the Act, and were even approved by Mr. Kuhlman prior to the request for reimbursement. Pet. Br. at 9-10. Swif-T asserts that any objection that the Agency had to where the handling charges were listed on the budget form should have been made by Mr. Kuhlman and that he was satisfied. Pet. Br. at 10.

Swif-T contends that the Agency's actions in striking the handling charges were arbitrary and capricious and constitutes an attempt to reconsider Mr. Kuhlman's previous decision. Pet. Br. at 10. Swif-T contends that the March 3, 2003 final decision that frames the issues for appeal says nothing about the handling charges being denied because they were set forth in the allegedly wrong line item category. *Id*.

Swif-T argues that the policy that only a subcontractor, not sub-subcontractors, is entitled to a percentage markup for handling has been rejected by the Board. Pet. Br. at 10, citing Whittington v. IEPA, PCB 92-152 (June 3, 1993). Swif-T argues that a full review is allowed only where the amounts sought exceed the budget plan, where the Agency has reason to suspect fraud, or the request is for unapproved early action costs. Pet. Br. at 11-12. Swif-T contends that none of these situations exist here, but the Agency conducted a full review nonetheless, that Ms. Weller's review should have been much more perfunctory than it was, and that the reasonableness and other evaluations were to have been made by Mr. Kuhlman when he conducted his review of the proposed budget. Pet. Br. at 12.

Swif-T argues that Ms. Weller took it upon herself to conduct the additional review prohibited by Section 57.8(a)(1) of the Act and the Board's regulations when she questioned Mr. Kuhlman's approval of the budgeted handling charges. Pet. Br. at 12.

AGENCY'S ARGUMENTS

The Agency asserts that Swif-T cannot merely argue that the Agency's decision was flawed, but must present evidence and arguments to demonstrate that by virtue of the submittals to the Agency, Swif-T satisfied its requirements pursuant to the Act and underlying regulations. Ag. Br. at 1. The Board, the Agency notes, must decide whether or not the application as submitted demonstrates compliance with the Act and Board regulations. Ag. Br. at 2.

Deductible

The Agency asserts that it did not reconsider or reverse any past decisions regarding how many deductibles should apply, and that there have been only two approvals of payment for costs associated with either incident number 95-1716 or 96-0723. Ag. Br. at 7. The first payment, contends the Agency, was issued on July 25, 2001 for incident number 96-0723 and a $10,000 deductible was assessed. *Id*. The Agency notes that no appeal from that decision was made. *Id*.

The second approval for costs is the matter at hand, asserts the Agency, and that decision clearly identifies incident number 95-1716 as the occurrence in question. Ag. Br. at 8. The Agency states that no final decision issued by it has been revisited or reconsidered in any way, since no previous decision approving reimbursement of costs for incident number 95-1716 has ever been issued prior to the one under review. *Id*. The Agency acknowledges that Swif-T may claim that pieces of correspondence between the Agency and Swif-T are contradicting, but that any representations made by the Agency in any such correspondence have not been shown to play any part in any past final decision. *Id*. The Agency argues that until multiple final decisions have been reached on the same issue, it cannot be said to have contradicted itself. *Id*.

Even if the Agency did change its interpretation, asserts the Agency, the Board has recognized that prior Agency actions, if in error, are properly remedied by correcting the error not perpetuating it. Ag. Br. at 8, citing State Bank of Whittington v. IEPA, PCB 92-152 (June 3, 1993). Accordingly, argues the Agency, if it the correspondence in question 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. Ag. Br. at 9.

The Agency asserts that its employee, Mr. Kuhlman, testified that his decision to apply a deductible in this final decision was based on the fact that the OSFM has issued two separate decisions, imposing two separate deductibles. Ag. Br. at 9, citing Tr. at 36-37. The Agency argues that since it does not have the authority to review decisions made by the OSFM, it is bound to accept the OSFM's decision in this regard. Ag. Br. at 9. The Agency contends it is clear from the OSFM's eligibility and deductible application forms and final decisions, that Swif-T sought and received two different deductible determinations for two different occurrences. *Id*.

The Agency asserts that since Swif-T did not appeal either of the OSFM final decisions, there is no conclusion that can be reached other than Swif-T agreed with the OSFM that a $10,000 deductible should be applied to two separate occurrences – one referenced by incident number 95-1716 and the other by incident number 96-0723. Ag. Br. at 10. The Agency had no choice, it asserts, but to follow the decision issued by the OSFM since those determinations are delegated solely to the OSFM. *Id*. The Agency contends that in fact and law there were two occurrences at the site and that Swif-T cannot dispute that finding. *Id*.

The Agency contends its application of a deductible is consistent with the Act and regulations. Ag. Br. at 10. The Agency argues that if the Board were to accept Swif-T's position that only one deductible can ever be applied to a UST site, regardless of how many occurrences have taken place, much of the language in Sections 57.8 and 57.9 of the Act would be unnecessary. Ag. Br. at 11-12. The correct interpretation, asserts the Agency, is that a separate deductible is applied to each separate occurrence. Ag. Br. at 12. This interpretation, concludes the Agency, allows the language of Section 57.9 of the Act to make sense. *Id*.

The Agency interprets the Act and Board regulations at 35 Ill. Adm. Code 732.603(b) to mean that one deductible shall apply to one separate occurrence, and that multiple occurrence result in multiple deductibles as is undoubtedly the position of the OSFM given the language in their final decisions. Ag. Br. at 12.

Handling Charges

The Agency asserts that in the request that led to the final decision under appeal, Swif-T noted that $229,800 had been approved as 'Field Purchases and Other Costs' and sought an amendment to the amount of handling charges that had been approved to date as evidenced by the notation of amendment requested. Ag. Br. at 13-14. The Agency contends the notation is important because it evidences Swif-T's acknowledgment that an amendment in the amount of handling charges approved as of the date of submission was needed especially since no costs had ever been approved for handling. Ag. Br. at 14. The notation also demonstrates, argues the

Agency, the separate and distinct line item for handling charges on the Agency's forms that directly corresponded to the amount of costs for handling charges that could be approved. *Id*.

The Agency asserts that 35 Ill. Adm. Code 732.405(b) clearly states that any owner or operator of an UST 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, and that all budgets shall be submitted on forms prescribed and provided by the Agency. Ag. Br. at 14. The Agency argues that Swif-T was required to have approved budget line items for any costs sought for reimbursement, and did not. Ag. Br. at 15. The Agency contends that 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 handling charges was appropriate. *Id*.

The Agency asserts that Swif-T's contention that the costs were included in the field purchases section and therefore should be approved is flawed in that a simple reading of the costs clearly show that the markups (though improper for reimbursement) amounted to a handling charge at best. Ag. Br. at 15. The Agency notes that amounts approved in a budget represent the maximum amount that may be approved for reimbursement, and 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. Ag. Br. at 15-16.

The Agency asserts that the amount sought for handling charges in this instance clearly exceeded the $0.00 approved for handling charges in prior budget approvals, so a full review was warranted. Ag. Br. at 16. A full review, contends the Agency, can include review of the invoices and receipts that support the claim. *Id*. The Agency argues that Ms. Weller did not reconsider in any way Mr. Kuhlman's budget approvals, but that his budget approvals were what triggered her full review of the documents presented for reimbursement because he did not approve any costs for handling charges, yet that was what was sought by Swif-T in the reimbursement request. *Id*.

The Agency asserts that the Board has recently set forth the general rule that only the primary contractor may assess a handling charge. Ag. Br. at 17, citing Ted Harrison Oil Co. v. IEPA, PCB 99-127 (July 24, 2003).

SWIF-T REPLY

Swif-T asserts that the Agency has attempted to capitalize on the confusion it has created in order to bolster the slim reeds supporting the final decision at issue. Reply at 1. The Agency is truly tilting at windmills, Swif-T contends, when it addresses the $8,275.18 deduction in its response because Swif-T is not challenging that deduction, but is challenging the second numbered paragraph in the March 3, 2003 decision that deducted $13,808.86. Reply at 2. Swif-T asserts that the decision in that paragraph was wrong because there is no authority for limiting the applicant to either a percentage markup or a handling charge and the amount in question had been approved in the budget. *Id.*

Swif-T argues that the Agency's imposition of a second deductible was arbitrary and contrary to a previous decision in which the Agency had imposed only a single deductible. Reply at 3. Swif-T asserts that the sole issue in this case is whether the March 3, 2003 decision was correct, not any earlier decisions raised by the Agency. *Id*.

Deductible

Swif-T asserts that it submitted an application for reimbursement in May 2001, that specifically stated it was submitted with respect to both incident numbers 95-1716 and 96-0723. Reply at 3. Swif-T contends that at that time, the Agency and Swif-T exchanged communications summarized by the memorandum of Jay Gaydosh dated January 20, 2000 in which the Agency agreed that the 1996 release was a re-reporting of the 1995 incident and that all reporting requirements should be addressed through the 95-1716 incident number. Reply at 3-4.

Swif-T disputes the Agency's assertion that Swif-T should have appealed the July 2001 decision applying a $10,000 deductible to the claim and approving payment of the remaining $1,971.08. Reply at 4. Swif-T asserts that the decision granted everything it requested and that Swif-T never disputed that one $10,000 deductible must be applied. *Id*. Swif-T points out that Mr. Kuhlman was the one who applied the single $10,000 deductible in 2001 upon the advice and direction of Mr. Gaydosh and Mr. Ports, but that in 2003 Kuhlman procured a new opinion from his new supervisor was Mr. Chappel who said to apply a second deductible. Reply at 4-5.

Swif-T contends that this is a blatant reconsideration driven by Kuhlman's dissatisfaction with the first instructions he was given and had the Agency attempted to impose two deductibles in 2001 when it was presented with an application that on its face proceeded under both incident numbers, it could have appealed at that time. Reply at 5.

Swif-T argues that the actual final OSFM decisions in this matter support its position in that neither OSFM decision says anything about two deductibles applying to the site, and that both decisions actually say you are eligible to seek payment of costs in excess of $10,000 and the costs must be in response to the occurrence referenced above and associated with the tanks. Reply at 6, citing Ex. 12. Swif-T argues that the OSFM expressly distinguishes between its eligibility and deductible decisions, and that the final decisions in this case clearly reveal that a single deductible, with new eligibility decisions forthcoming based upon subsequent occurrences. Reply at 6.

Swif-T asserts that the facts introduced in this case reveal that the Agency's LUST technical unit, not the OSFM, decides the deductible issue, and that the Agency's claim that it was bound by the OSFM decisions is no more than a smoke screen attempt to shift focus. Reply at 7.

Section 57.8(a)(4) of the Act, contends Swif-T, does not say, or mean, that the deductible applies per site per occurrence, but simply says per site. Reply at 8. Swif-T argues that Mr. Kuhlman admitted that the contamination from the two purported occurrences has commingled and that it would be virtually impossible to separate the two occurrences for remediation

purposes, and that remeditation will not be completed for either incident number until remediation is completed for both. Reply at 8-9. Swif-T asserts that the general assembly has created a scheme to limit the deductible per site, but to still allow for a new deductible if incidents were discreet and apportionable – i.e., if the first occurrence is remediated at least a year before the second occurrence – and that here only one deductible should apply. Reply at 9.

Handling Charges

Swif-T asserts that the $229,800 under the category of field purchases and other costs had been previously accepted by Mr.Kuhlman as part of the approved budget and that the information submitted specifically explained the basis for all the costs including the mark-ups of subcontractors. Reply at 9. Swif-T asserts that Mr. Kuhlman did not reject the budget amounts as excessive or unreasonable, or as being in the wrong line-item category. *Id*. Thus, Swif-T argues, there was no reason for it to expect any response from the reimbursement unit other than approval of a payment since the payment request was exactly the same amount as the approved budget in exactly the same categories. Reply at 10. Swif-T reiterates that the decision of Ms. Weller was a blatant reconsideration of the final, appealable decision made by Mr. Kuhlman, and that she had no basis or authority for doing so. *Id*.

Swif-T contends that the only defense mounted by the Agency is to cast doubt on Mr. Kuhlman's final approval by claiming it was only for the maximum amount recoverable and could, therefore, be lowered by Ms. Weller. Reply at 10. The maximum figure of $229,800 expressly included and approved the $13,808.86 subsequently cut by Ms. Weller, Swif-T maintains. Reply at 11. In addition, Swif-T contends, the Agency's argument that a full review was permitted because the $13,808.86 should have been in the handling charges category and $0 was approved for handling charges, is pure sophistry. *Id*. Swif-T argues that no evidence supports the Agency's contention that the $13,808.86 was in the wrong category. *Id*.

Swif-T concludes that the Harrison case is not on point, but that Whittington is and provides that the "Board concludes it is inconsistent for the Agency, as a matter of policy, to allow a 15% handling charge on the basis that this fairly reflects overhead costs in the market place, and then turn around and deny the 15% handling charge to some persons simply because they are not the prime contractor." Reply at 12, citing Whittington, PCB 92-152 (June 3, 1993).

BURDEN OF PROOF

Section 105.112(a) provides the burden of proof is on the petitioner. 35 Ill. Adm. Code 105.112(a). The burden is on the petitioner for reimbursement to demonstrate that the costs incurred are related to corrective action, properly accounted for, and reasonable. Beverly Malkey, as Executor of the Estate of Roger Malkey d/b/a Malkey's Mufflers v. IEPA, PCB 02-104, slip op. at 9 (Apr. 17, 2003). When requesting reimbursement from the fund, the owner or operator must provide an accounting of all costs associated with the implementation and completion of the corrective action plan. *Id*. 415 ILCS 5/57.7(b)(3).

STANDARD OF REVIEW

The standard of review under Section 40 of the Act is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at 5 (July 24, 2003); citing Browning Ferris Industries of Illinois v. PCB, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2nd Dist. 1989). The Board will not consider new information 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. IEPA, PCB 90-142 (Dec. 20, 1990).

DISCUSSION

Two separate issues are involved in this appeal – the imposition of a $10,000 deductible and the decision to deduct $13,808.86 from the reimbursement. The Board will address each issue in turn.

Deductible

The Board finds that only one $10,000 deductible applies for both incident numbers. Section 57.9(b) of the Act sets forth the statutory provisions governing deductible determinations. 415 ILCS 5/57.9(b) (2002). The Board has previously held that under the Act, deductibles are generally assessed per site, not per occurrence. *See* Mac Investments d/b/a Olympic Oldsmobile v. OSFM, PCB 01-29 (Dec. 19, 2002). The Agency's arguments in this case have not persuaded the Board to alter this decision.

Moreover, after a review of the record the Board is convinced that the 1996 release was a re-reporting of the 1995 incident, as initially decided by the Agency in 2001. While it is true the Board has held that the Agency is not prohibited from correcting an error, the facts in this particular case do not reveal any error in need of correction. Rather, the Board finds that Swif-T has met its burden in proving that the Agency erred when it imposed a second $10,000 deductible for this site in the final decision of March 3, 2003.

Handling Charges

The $13,808.86 in charges was deducted from the category of Field Purchases and Other Costs. In its final decision, the Agency states that there cannot be a percentage markup and a handling charge both requested and there have not been any handling charges approved in the budget.

The record is clear that no handling charges were included as a separate line item in the approved budget as of the date of the final decision. However, in this instance the costs were included under the field purchases line item of the approved budget. Moreover, the Agency was specifically notified that the costs in question were included under that line item in correspondence that led to the ultimate approval of the budget. *See* Exs. 17 and 18.

Accordingly, the Board finds the Agency's stated denial point that no handling charges were approved in the budget in error.

The Agency also denied the charges because there cannot be a percentage markup and a handling charge both requested. Reimbursement of handling charges is provided for in the Act and Board regulations. See 415 ILCS 57.8(f) (2002)) and 35 Ill. Adm. Code 732.607. Neither section contains the limitation used by the Agency to deny reimbursement in this case. At hearing, Ms. Weller (the Agency employee who made the decision to deny reimbursement) testified that the Agency's position that both the prime contractor and subcontractor cannot receive handling charges is not a rule, but an Agency policy. Tr. at 122-23.

The Board addressed this issue in Whittington, finding it inconsistent for the Agency as a matter of policy to allow a handling charge that fairly reflects overhead costs in the marketplace to the primary contractor and not to the others simply because they are not the prime contractor. Whittington, PCB 92-152, slip op. at 23 (June 3, 1993). As the Agency argues, the Board has stated that as a general rule only the primary contractor may assess a handling charge. *See* Ted Harrison Oil, PCB 99-127, slip op. at 24 (July 24, 2003). However, the facts in this case are more analogous to those in Whittington.

The Board finds that Swif-T has met its burden to demonstrate that the costs incurred are related to corrective action, properly accounted for, and reasonable. Accordingly, the Agency's decision to deny reimbursement for those costs is reversed.

CONCLUSION

The Board finds that the record supports the petitioner's request for reimbursement of $10,000 for the imposition of a second deductible and for $13,808.86 of costs denied by the Agency. Thus, the Board reverses the Agency's determination denying reimbursement for $10,000 and for $13,808.86.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board reverses the Agency's March 3, 2003 determination to deny reimbursement to Swif-T Food Mart and directs the Agency to provide reimbursement for:

   A. $10,000 imposed as a deductible.

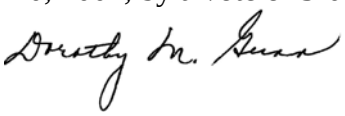
   B. $13,808.86 requested under Field Operations and Other Costs.

2. The Board remands to the Agency.

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) (2002); 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

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 20, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board