BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING AND PROOF OF SERVICE

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

John Kim
Division of Legal Counsel
Illinois Environmental Protection Agency
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Springfield, IL 62794-9276

The undersigned certifies that an original and nine copies of Petitioner's Motion for Leave to File Reply Instanter, along with the original and nine copies of the proposed Petitioner's Reply Brief were served upon the Clerk of the Illinois Pollution Control Board via FedEx, and one copy was served upon the hearing officer and the above party of record in this case by enclosing same in envelopes with postage fully prepaid, and by depositing said envelopes in a FedEx dropbox or a U.S. Post Office Mail Box before 5:30 p.m. in Springfield, Illinois on the 21st day of April, 2004.

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

MOTION FOR LEAVE TO FILE REPLY INSTANTER

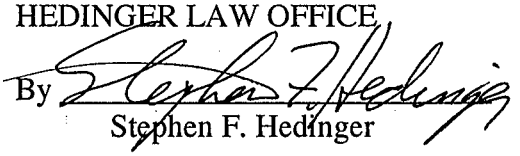
Petitioner, SWIF-T FOOD MART, through its undersigned attorney hereby requests leave to file instanter the attached proposed Petitioner's Reply Brief, in the event the Board allows Respondent to file its proposed Response to Petitioner's Brief. In support of this motion, Petitioner states as follows:

1. Respondent's response was to have been filed on or before April 6, 2004. Respondent did not file the brief that day, but instead on April 7, 2004 submitted a motion for leave to file instanter.
2. As of the date of this motion, no ruling has yet been issued with respect to Respondent's motion. Hence Petitioner at this time does not know whether any response exists requiring Petitioner's reply.
3. Those circumstances have likewise delayed Petitioner's drafting of the proposed and provisional reply, and of this motion.
4. Accordingly, Petitioner asks this Board's leave to file instanter the attached proposed reply, in the event this Board allows Respondent's motion to file its response brief instanter.

Respectfully submitted,

SWIF-T FOOD MART,
Petitioner,

By its attorney,
HEDINGER LAW OFFICE

By 
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PETITIONER'S REPLY BRIEF

Petitioner, SWIF-T FOOD MART, hereby submits its reply to the proposed Response to Petitioner's Brief (hereinafter "Response Brief"), submitted by Respondent ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (hereinafter "IEPA"). The Response Brief is currently pending a ruling on IEPA's "Motion for Leave to File Instanter the Response to Petitioner's Brief," and Petitioner asks that this Board consider this Reply Brief in the event leave is granted for filing the IEPA's response. (As of the submittal of this reply, no ruling has been made on IEPA's motion). For its reply, Petitioner states as follows:

A. Clarification of Issues Presented

IEPA's record in this case is more than a little bit confusing. Indeed, the actual record is only some 84 pages in length, but an additional 19 relevant documents were submitted as agreed exhibits at the start of the hearing, which nearly doubled the size of the record. Unfortunately, in its Response Brief the IEPA has attempted to capitalize on the confusion it has created in order to bolster the slim reeds supporting the final decision at issue. This reply, therefore, focuses upon setting the record straight against IEPA's mischaracterizations and misrepresentations.

To start, the IEPA attempts to support its decision by arguing in favor of the cutting of $8,275.18 from the Handling Charges category of Petitioner's reimbursement submittal. That deduction was made in the first numbered paragraph of the "Attachment A" of the IEPA's March 3, 2003 final decision letter which is at issue. (R.3; see generally R.1-R.3). The IEPA's response supports the "Handling Charges" decision by claiming that: "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. 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." (Response Brief, at 14-15 (citation to Record omitted)).

The IEPA truly is tilting at windmills, for Petitioner is not challenging in this appeal the $8,275.18 deduction! There is no reason for the IEPA to expend time and energy (its own and Petitioner's and this Board's) reviewing issues that have not been raised by Petitioner. If anything, the fact that IEPA can only support that portion of its decision reveals the paucity of justification for the decision that is being challenged.

Inasmuch as it apparently is not yet clear, Petitioner will once again express just what is at issue in this case: IEPA's second numbered paragraph of the March 3, 2003 letter deducted $13,808.86 because "[t]here cannot be a percentage markup and a handling charge both requested and there has not been any handling charges approved in a budget." This decision was wrong because (a) there is no authority for limiting the applicant to either "a percentage markup [or] a handling charge" and in any event these charges had already been approved (moreover, ironically the "handling charge" component had been denied in the same letter!), and (b) the amount had been approved in the budget. In addition, the March 3, 2003 decision imposed a second deductible for

the site, arbitrarily and contrary to a previous decision in which the IEPA had imposed only a single deductible and had expressly agreed with Petitioner in doing so.

The Response Brief mentions several decisions which were not appealed, including Office of State Fire Marshal (OSFM) deductible/eligibility decisions, and earlier IEPA decisions. (See, e.g., Response Brief, at 3: "No evidence has been presented that any such appeal [of OSFM decisions] was filed;" see also Response Brief, at 4: "The Petitioner provided no evidence that an appeal of that [IEPA original reimbursement decision, applying a single $10,000 deductible] was ever filed.").

Apparently IEPA regrets these earlier rulings, but the fact is that the sole issue in this case is whether the IEPA's March 3, 2003 decision was correct, and not any of those earlier decisions. Indeed, Petitioner obtained satisfactory relief with respect to the decisions cited by the IEPA, and so no reason would have existed to have appealed. The more pressing and clearly relevant question raised in this case is why the IEPA felt justified and empowered to change final decisions it had made. There is no such justification, nor any such power, and Petitioner is therefore entitled to the sum sought in this appeal.

B. The Second $10,000 Deductible Was Wrongly Applied

IEPA claims that no prior decision had been rendered concerning the applicability of a single $10,000 deductible.

The facts reveal otherwise. Petitioner submitted an application for reimbursement way back in May 2001. (Ex. 12). That application specifically stated that it was submitted with respect to both incident numbers 95-1716 and 96-0723. (Ex. 12, p. 1). Contemporaneously, the IEPA and Petitioner's consultant had exchanged communications with respect to the two incident numbers (Ex. 7; Ex. 8; Ex. 9), summarized by the memo of Jay Gaydosh (the project manager assigned to

Petitioner's site at the time), dated January 20, 2000, in which IEPA agreed that "the 1996 release was a rereporting of the 1995 Incident. Therefore, all reporting requirements should be addressed through the 95-1716 Incident number." (Ex. 9).

Petitioner's May 2001 reimbursement application sought a total of $11,971.08. The IEPA reached its final decision on that application on July 25, 2001. (Ex. 14). Consistent with its discussions with Petitioner, IEPA considered only one incident number to be relevant, applied a $10,000 deductible to "this claim," and approved payment of the remaining $1,971.08. Despite the fact that Petitioner's application had proceeded under both incident numbers (the very first page reveals that Petitioner considered the request to be with respect to: "IEMA Incident No.: 951716/960723") (Ex. 12), the IEPA did not apply any of the remaining $1,971.08 to the 95-1716 incident number.

IEPA suggests that Petitioner should have appealed the July 2001 decision—but why? That decision granted to Petitioner everything Petitioner has requested—Petitioner has never disputed, after all, that one $10,000 deductible must be applied. Rather than attempting to shift the blame to Petitioner, IEPA should have expended its energy explaining why in 2001 only one deductible was determined applicable as to an application that cited both incident numbers, and explaining what authority exists for it to have reconsidered that **final decision** and attempted to impose another $10,000 deductible in 2003.

But IEPA failed to provide any evidence to support the reconsideration. Indeed, the evidence of record clearly reveals that Eric Kuhlman, the project manager responsible for the reconsideration, disagreed with the earlier decisions made by Jay Gaydosh (a peer of Kuhlman's with substantially more experience) and by Eric Ports (supervisor to both Gaydosh and Kuhlman). Kuhlman, in fact, was the one who applied the single $10,000 deductible in 2001 upon the advise and direction, respectively, of Gaydosh and Ports; by 2003, though, Ports was no longer Kuhlman's

supervisor, so Kuhlman procured a new opinion from his new boss, Harry Chappel, even though Chappel had been in the LUST position even less time than Kuhlman. Chappel said apply a second deductible, and Kuhlman did.

This is a blatant reconsideration, driven by the project manager's dissatisfaction with the first instructions he was given. Had the IEPA attempted to impose two deductibles in 2001, when it was presented with an application that on its face proceeded under both incident numbers, then Petitioner could have appealed at that time, and failing such an appeal, Petitioner would now be bound by the results (IEPA acknowledges this in its Response Brief). IEPA did not do that—instead, it rendered a final decision that applied only a single deductible. Just as Petitioner would be bound by an adverse decision, so is IEPA actually bound by the decision actually made. Mr. Kuhlman simply lacks authority to reconsider and change his mind depending on who his current boss is.

The IEPA also argues that the "two deductible" conclusion was a foregone conclusion from the date of the OSFM's deductible and eligibility decisions. "The [IEPA] has no choice but to follow the decisions issued by OSFM, since those determinations are delegated solely to OSFM." (Response Brief, at 10). The "decision" by which Petitioner is purportedly bound, according to the IEPA, is form instructions included on the application for an eligibility/deductible decision in 1999, paragraph 5 of which requests identification of the "[o]ccurrence for which you intend to seek reimbursement" and of any other "incident numbers reported at the site," following which this admonition is made: "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, pg. 2).

The IEPA's protestations prove too much. First, of course, there is the matter of IEPA's own July 2001 final decision rejecting the concept of two deductibles and applying only one. Even

if that decision was wrong because OSFM had already decided the issue (as IEPA now claims), it is too late for IEPA now to change its mind, just as IEPA says (repeatedly) that it is too late for Petitioner to complain about final decisions.

Second, the instructions of the application for eligibility/deductible determination do not constitute a final decision. If it does, then IEPA must acknowledge that its July 2001 final decision is based on the May 2001 application Petitioner submitted. And in that case, again, IEPA has attempted to reconsider a final decision, which it is not permitted to do.

Third, contrary to IEPA's claim, the actual final OSFM decision in this matter supports Petitioner's position. Neither OSFM final decision says anything about two deductibles applying to the site; both, in fact, say "you are eligible to seek payment of costs in excess of $10,000. The costs must be in response to the occurrence referenced above and associated with the [identified] tanks." (See Ex. 12, which includes copies of both OSFM decisions). The decisions also identify other tanks at the site and note that "[y]our application indicates that there has not been a release from these tanks under this incident number. You may be eligible to seek payment of corrective action costs associated with these tanks if it is determined that there has been a release from one or more of these tanks. Once it is determined that there has been a release from one or more of these tanks you may submit a separate application for an eligibility determination to seek corrective action costs associated with this/these tanks" (emphasis added).

The OSFM expressly distinguishes between its eligibility and deductible decisions; these are separate issues, with separate standards for decision. The final decisions in this case clearly reveal a single deductible, with new eligibility decisions forthcoming based upon subsequent occurrences. This is consistent with the Environmental Protection Act, and is consistent with the IEPA's original decisions in this case.

Fourth, and finally, the IEPA's claim in the Response Brief to be bound by the OSFM decision is contrary to its own testimony in this very case. Ex. 8, drafted by Doug Oakley (manager of the LUST reimbursement sector), states that decisions concerning the number of deductibles to apply is made by the LUST technical unit. (See Tr. 25). Kuhlman explained that to do so, technical staff is called upon to review OSFM reports to interpret "as whether it's an original release or a re-reporting." (Tr. 25 – Tr. 26). In fact, the technical unit is specifically trained to make such decisions. (Tr. 26). Kuhlman acknowledged that the "training" consisted of job experience (Tr. 26 – Tr. 27), and he admitted that Eric Ports and Jay Gaydosh both had been with the technical unit substantially longer than he, and correspondingly had more experience and were thus better trained than he. (Tr. 27). In any event, the facts introduced in this case reveal that the deductible issue is decided by the IEPA's LUST technical unit, not by the OSFM. The IEPA's claim that Petitioner was bound by OSFM decisions which were not final, either as to IEPA or Petitioner, is no more than a "smoke screen" attempt to shift focus away from the final decision reached on the issue by Ports, Gaydosh and Kuhlman in 2001.

The IEPA has also attempted to explain its interpretation of the deductible provisions of the Environmental Protection Act, but its attempt turns the statute into hash. According to IEPA, although Section 57.8(a)(4) (415 ILCS 5/57.8(a)(4)) unequivocally provides that "[o]nly one deductible shall apply per underground storage tank site," what it really means is that only one deductible shall apply per occurrence. The IEPA reaches this conclusion by reference to the last paragraph of Section 57.9(b), which provides 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." The IEPA says that if Section 57.8(a)(4) is interpreted according to its clear terms, it would "render[] 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." (Response Brief, at 12).

One would assume that if the General Assembly intended to be interpreted as suggested by IEPA, it would have said so, and certainly would not have been so unambiguous with what it did say. Section 57.8(a)(4), contrary to IEPA's fanciful interpretation, provides that once OSFM has made a deductible determination, that deductible is to be subtracted from any payment invoice, and the deductible amount is to be subtracted only once "per underground storage tank site." It does not say, or mean, that the deductible applies per site per occurrence; it simply says per site.

As for the Section 57.9(b) language quoted above, it is a perfect compliment to the Section 57.8(a)(4) scheme, without re-writing the statute as proposed by the IEPA. Pursuant to Section 57.9(b), the "per site" limitation of Section 57.8(a)(4) is modified to allow for a new deductible if a new occurrence occurs at a site one year after response action has been completed as to the original occurrence. Hence, if an underground storage tank site experienced an occurrence in 1995 for which a $10,000 deductible applies, and response action as to that occurrence is completed in 1997, only one deductible would apply. If there was another occurrence at the same site in 1996, still only the original deductible would apply as provided by Section 57.8(a)(4); however, if the occurrence did not happen until 1999, then a new deductible would apply pursuant to Section 57.9(b).

Not only does Petitioner's interpretation make sense of the entire statute, and give effect to the clear words used by the legislature, but it also comports with reality. Kuhlman admitted, during the hearing, 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. Remediation will not be completed for either incident number until remediation is completed for

both incident numbers. (Tr. 41 – Tr. 42). Moreover, the decision as to which incident number to use is made purely upon the whim of the LUST managers—and the reimbursement manager may choose a different number than the technical staff manager, as happened here! It is therefore completely arbitrary for the IEPA to decide in some cases to apply one deductible while in others to apply two, when in either event the remediation will be the same anyway. Clearly the General Assembly understood the arbitrariness and absurdity of a scheme where the IEPA, on a whim, can double the deductible amount even though remediation is unaffected. Hence it created a scheme to limit the deductible per site, but still to allow for a new deductible if in fact incidents were discreet and apportionable (i.e., if the first occurrence is remediated at least a year before the second occurrence). Hence, here only one deductible should have been subtracted from Petitioner's reimbursement.

C. The $13,808.86 Was Wrongly Deducted

Petitioner's November 7, 2002 reimbursement application sought, among other things, $229,800.00 under the category of "Field Purchases and Other Costs." (Ex. 11). That amount had previously been accepted by Kuhlman as part of the approved budget, and the information submitted specifically explained the basis for all costs requested for approval, including mark-ups of subcontractors. Both the budget approval request and the submittal correspondence specifically informed Kuhlman of these mark-ups.

Kuhlman did not reject the budget amounts as excessive or unreasonable, and he did not reject them as being included in the wrong line-item category; particularly, he did not send the budget request back to Petitioner with instructions to separate out the various mark-ups and put those in the "Handling Charges" line item. Had he done any of these things, Petitioner could have appealed (Kuhlman's budget decision is a final, appealable decision), or Petitioner could have re-

submitted to satisfy procedural objections such as using the wrong line item. Again, had Kuhlman done any of these things and Petitioner not appealed, Petitioner would now be stuck with the result. Kuhlman approved, though, and so there was nothing for Petitioner to appeal. Nor was there any reason for Petitioner to expect any response from the reimbursement unit other than approval of payment, since the payment request was exactly the same amount as the approved budget, in exactly the same categories.

The reimbursement reviewer, Weller, was not satisfied with Petitioner's submittal as approved by Kuhlman. IEPA, in its Response Brief, asserts that Weller denied the $13,808.86 because she thought it should properly have been included in the "Handling Charges" category rather than "Field Purchases and Other Costs," and she didn't think subcontractors should be entitled to any markups. She therefore reversed Kuhlman's approval and denied reimbursement for the approved budget amounts.

Petitioner's opening brief explained that Weller's decision was a blatant reconsideration of the final, appealable decision made by Kuhlman, and that Weller has no basis or authority for doing so, nor for arbitrarily deciding that contractors cannot be reimbursed for mark-ups charged by subcontractors. The only defense mounted in IEPA's Response Brief is to cast doubt on Kuhlman's final approval by claiming that it was only for the maximum amount recoverable, and therefore could be lowered by Weller. This assertion defies fact and logic. Kuhlman was presented with exactly the same information Weller was given—IEPA even admits that the same form was used! ("...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." Response Brief, at 14). So when Kuhlman approved that "maximum" budget amount, he expressly considered that Petitioner's "Field Purchases and Other Costs" all qualified

and added together to reach that maximum figure of $229,800.00 That "maximum" therefore expressly included and approved the $13,808.86 that was subsequently cut by Weller. It is no more than sophistry (plausible but faulty or misleading argumentation) for IEPA to argue that since Kuhlman's figure was a "maximum" Weller was free to reconsider his approval, and to deny the $13,808.86 that Kuhlman had already ruled to be reimbursable.

Similarly, IEPA's argument that a "full review," such as that engaged in by Weller, was permitted because the $13,808.86 should have been in "Handling Charges," and $0 was approved for "Handling Charges," and therefore the $13,808.86 exceeded the approved budget—is pure sophistry. The point is that Kuhlman approved that amount as part of "Field Purchases and Other Costs," and the reimbursement request for that line item was exactly the same as the budget amount approved for that line item. No statutory basis existed for Weller to give a "full review" to this reimbursement package, and her actions amount to no more than an attempted reconsideration of Kuhlman's final and appealable decision.

It bears noting that much of IEPA's argument is unsupported by any evidence. In particular, no evidence supports IEPA's contention that the $13,808.86 was in the wrong category. It is certainly not a given that these charges can only be considered "Handling Charges"—clearly Kuhlman didn't think so. Equally plausible is an interpretation that "Field Purchases and Other Costs" includes all expenses incurred by a contractor, including necessary payments to subcontractors for materials (including mark-ups) incurred in performing their actions.

Finally, IEPA contends that "[i]t 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" (Response Brief, at 17), but IEPA does not explain why, nor does it even cite any authority that supports this bald assertion. IEPA did cite Ted Harrison Oil Co. v. Illinois EPA, PCB 99-127 (July 24, 2003), but as this Board

is aware, that case determined that the handling charges were imposed by the contractor, and so no need arose to determine whether a subcontractor's handling charges could be reimbursed. Directly on point, though, is the Board's language in State Bank of Whittington v. Illinois EPA, PCB 92-152, 1993 Ill. ENV LEXIS 490, at *23 (June 3, 1993): "The Board concludes that 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." The same is true here (doubly so, in fact, since Weller's denial first rejected any handling charges for the contractor, and then rejected handling charges (mark-ups) of the sub-contractor. See R.3).

D. Conclusion

Petitioner accordingly requests that the Board reverse the decisions of IEPA imposing a second $10,000 deductible and deducting $13,808.86 from the reimbursement. Both decisions were wrong, as a matter of law and fact.

Respectfully submitted,

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Petitioner,

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