BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

PETITIONER'S CLOSING BRIEF

NOW COMES Petitioner, SWIF-T FOOD MART, through its undersigned attorney, and pursuant to Hearing Officer order, submits its closing brief in this Leaking Underground Storage Tank Fund (hereinafter "LUST Fund") appeal.

Introduction

This is a LUST Fund appeal, brought pursuant to Section 40(a)(1) of the Illinois Environmental Protection Act, 415 ILCS 5/40(a)(1), and Section 105 Subpart D of this Board's procedural regulations, 35 Ill. Adm. Code 105.400-105.412, as permitted by 415 ILCS 5/57.8(i). Petitioner is seeking this Board's review and reversal of the decision of the Respondent Illinois Environmental Protection Agency (hereinafter "IEPA"), dated March 3, 2003, which deducted $13,808.86 for field purchases and other costs by a subcontractor as unreasonable and as unapproved in the budget, and applying a second $10,000 deductible to the reimbursement request. Accordingly, Petitioner seeks a total of $23,808.86 in this proceeding. The IEPA's final decision letter, dated March 3, 2003, is attached as Exhibit A to the Petition for Review in this case, and is also included as the first three pages of the record (R.1 - R.3). [References to the record will be to R., followed by the page number set forth on the bottom of the record pages. Exhibits introduced at

hearing will be referred to as Ex., followed by the exhibit number. Citations to the transcript of the February 11, 2004 hearing will be to Tr., followed by the page number of the transcript.] Hearing was held on February 11, 2004, at which the IEPA submitted 19 exhibits with agreement of Petitioner, all of which are thereby included in the record in this case as though they were originally a part of the IEPA's record. In addition, two witnesses, Eric Kuhlman and Niki Weller, testified during the hearing. As set forth in the Hearing Officer's post-hearing order, no members of the public provided any comments following the hearing, nor have any submitted any post-hearing written comments.

Factual Background

Petitioner owns and operates a service station facility located at 1100 Belevidere Road, in Waukegan, Lake County, Illinois. (See Ex. 1) During a boring test in August of 1995, it was discovered that a release had occurred from underground storage tanks at the site, and consequently the Illinois Emergency Management Agency (IEMA) was notified and subsequently IEMA assigned incident number 95-1716. (Tr. 39; Ex. 1). Based upon the results of that boring, in December 1995 Petitioner submitted to the Office of the State Fire Marshal an application for an eligibility and deductible determination from the LUST Fund. (Ex. 2).

In March 1996 Petitioner sought and received from the Office of the State Fire Marshal a permit to remove the underground storage tanks at the site, and they were removed on March 28, 1996. (Ex. 3; Ex. 4; Tr. 39-41). A total of eight underground storage tanks were removed on that day, six gasoline, one diesel and one kerosene. (Ex. 4). In Petitioner's original eligibility and deductible application based upon the boring, the diesel underground storage tank and gasoline underground storage tanks number 1 and 2 were identified as having leaked (Ex. 2); the Office of the State Fire Marshal's UST removal log also stated that the kerosene underground storage tank

and most of the other gasoline underground storage tanks had leaked, as well. (Ex. 4). In May of 1996, Petitioner installed new underground storage tanks at the facility, and at that time reported again to IEMA and a second incident number (96-0723) was issued for the site; unleaded gasoline, diesel fuel and kerosene all were identified as materials involved. (Ex. 5; Tr. 39-41). Petitioner did not seek a second eligibility and deductible determination from the Office of the State Fire Marshal until February 25, 1999. (Ex. 6; Tr. 39-41). In December of 1999, Petitioner, through its consultant, notified the IEPA of the two incident numbers for the site, identifying the second incident number as "a re-reporting of the 95-1716 incident number." (Ex. 7). That correspondence was subject to a follow-up letter from the consultant, confirming a telephone conversation during which the consultant and IEPA agreed that the incident numbers would be combined. (Ex. 8). This correspondence was, in turn, confirmed by a memorandum from the IEPA (drafted by Jay Gaydosh, the project manager then assigned to Petitioner's site (Tr. 23 - Tr. 24)) dated January 20, 2000, in which the 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).

Eric Kuhlman, the IEPA project manager currently assigned to Petitioner's facility, testified that before he was assigned to the file back in approximately 2000, Jay Gaydosh was the site's project manager, and thus was qualified to determine whether one or two incidents should be established for the facility. (Tr. 23 - Tr. 24). Gaydosh, in fact, had been a project manager in the LUST unit for a substantially longer amount of time than Mr. Kuhlman. (Tr. 27). Shortly after the facility was assigned to Mr. Kuhlman, Mr. Kuhlman had occasion to determine for himself whether one or more incident numbers should be applied to the facility, and based upon discussions with his supervisor, Eric Ports, Kuhlman determined that a single deductible applied to the facility. (Tr. 20 - Tr. 23). Like Mr. Gaydosh, Mr. Ports had been in the LUST unit a substantially longer amount of time than had Mr. Kuhlman. (Tr. 27). Petitioner had submitted a reimbursement application dated

May 8, 2001 (received by the IEPA on June 20, 2001), which identified the IEMA incident numbers in question as both 95-1716 and 96-0723. (Ex. 12). In response to this request, by letter dated July 25, 2001, the IEPA applied a single $10,000 deductible, and reimbursed the Petitioner $1,971.08, which was the total amount requested by the Petitioner (minus the single $10,000 deductible); this correspondence, for some reason, identified only 96-0723 as the incident number. (Ex. 14). (This was the only reimbursement made with respect to Petitioner's site prior to the instant claim. (Tr. 46)).

The reimbursement application at issue in this case was dated November 7, 2002, and was received by the IEPA on November 18, 2002, and sought a total of $203,644.16. (R.14). At the time of its submittal, the LUST unit input clerk inquired of the unit manager, Doug Oakley, as to which of the two incident numbers the facility should be reviewed under, and inexplicably on this occasion Mr. Oakley chose the 1995 incident number (R.13; Tr. 96 - Tr. 97; Tr. 108 - Tr. 112). The LUST application was given to Niki Weller for review, and one issue she flagged was whether one or two deductibles should be applied to the site, in light of the two incident numbers listed (Tr. 94) (although the IEPA's files included all previous discussions and decisions concerning the deductible, Ms. Weller did not avail herself of those materials in conducting her review (Tr. 95 - Tr. 96; Tr. 114), and in fact she did not even know of the prior deductible discussions or decision until the very day of the hearing! (Tr. 114 - Tr. 115)). Ms. Weller took the issue directly to the LUST technical unit manager, Harry Chappel (Tr. 95 - Tr. 96); even though Mr. Chappel had been in the LUST technical unit even less time than Mr. Kuhlman (only about a year and a half), and accordingly significantly less time than either Mr. Ports or Mr. Gaydosh, Mr. Chappel decided to reverse the prior decisions and instructed Mr. Kuhlman to apply two deductibles to the site (Tr. 64; Tr. 94 - Tr. 95). Accordingly, when the IEPA rendered its final decision on March 3, 2003, the

facility was considered under the 95-1716 incident number, and the IEPA deducted a $10,000 deductible from the claim. (R.1 - R.3).

Prior to having made the November 2002 LUST reimbursement submittal, Petitioner had sought the budget approval for those exact same amounts as part of the technical review process. Petitioner had submitted, and Mr. Kuhlman reviewed, an initial budget request seeking, among other things, $229,800.00 under the category of "Field Purchases and Other Costs." (See Ex. 11). The IEPA had requested additional information to support that figure, and in response Petitioner, through its consultant, submitted a two page letter, along with a significant number of attachments, to justify the requested budget amounts. (Ex. 17). That correspondence explained that some of the corrective action had been conducted for the dual purposes of site upgrade and corrective action work, including concrete removal and replacement necessary both as a site upgrade activity and as a part of the corrective action. The consultant noted that the work in question had been conducted by a subcontractor, Peter J. Hartmann Company, which in turn had engaged a sub-subcontractor, Lindahl Bros. Inc., to perform certain work; the correspondence specifically noted and discussed that Peter J. Hartmann had marked up the Lindahl Bros. invoice by 15%. (Ex. 17, p. 2). Moreover, the final page of that submittal specifically included, as one of Peter J. Hartmann's invoices to the consultant, a number of payments made to sub-subcontractors, each of which was also given a 15% markup by Hartmann, and the letter sought budget approval that included these items. (Ex. 17, final page). In response to this submittal, Mr. Kuhlman, on behalf of the IEPA, specifically approved the budget as submitted by Petitioner, and for purposes of this appeal, specifically approved the category "Field Purchases and Other Costs" in the amount of $229,800.00 based upon Petitioner's supporting justification and documentation. (Ex. 18). Notably, that Kuhlman letter correctly stated that the budget approval was a final and appealable decision. (See Ex. 18, at page 2).

Notwithstanding Mr. Kuhlman's approval, when the reimbursement request seeking that exact amount (i.e., $229,800.00) arrived at Ms. Weller's desk, she denied a total of $13,808.86 on the basis that "[t]here cannot be a percentage markup and a handling charge both requested and there has not been any handling charges approved in the budget." (R.3). Ms. Weller acknowledged that she had never reviewed the technical files to actually determine what the budget request had been, nor even what the budget had approved, but instead looked only at the "bottom line," and from that apparently assumed that the budget had not included the subcontractor's handling charges incurred in dealing with sub-subcontractor invoices. (Tr. 117-119). In regards to the reasonableness, Ms. Weller explained that her unit had determined that only a prime contract is entitled to handling charges: "We consider there is a prime contractor, he should get the handling charge. And it should take care of nobody--I mean, we feel that there is only one prime contractor. The rest are subcontractors. And only one, the prime contractor, should get the handling charge." (Tr. 125). Accordingly, when she rendered the final decision on behalf of the IEPA, she deducted the $13,808.86, in addition to the $10,000 second deductible.

Argument

Deductible

The IEPA's decision to apply a second $10,000 deductible was clearly contrary to law and fact.

First, based upon a prior submittal, the IEPA had previously rendered a final decision on the issue of how many deductibles to apply, and had determined that only a single deductible was appropriate. Mr. Kuhlman's subsequent decision was therefore nothing less than a reconsideration of an IEPA final decision. This Board has, on many occasions, held that final decisions are binding between the parties, and moreover, the IEPA has no authority to reconsider final decisions. Hence,

this Board has denied relief to a permit applicant who sought approval of a request intended to eliminate a previously-imposed permit condition, on the grounds that the proper means of obtaining relief from challenged conditions was to have brought an appeal. See Bradd v. Illinois EPA, 1991 Ill. ENV LEXIS 367, PCB 90-173 (May 9, 1991). Further, this case is the mirror image of this Board's ruling in Panhandle Eastern Pipe Line Co. v. Illinois EPA, 1999 Ill. ENV LEXIS 52, at *32, PCB 98-102 (Jan. 21, 1999), where a permit application sought reconsideration of a previously issued permit condition; this Board rejected the attempt, noting that the permit request "not only seeks to revise its permit, but asks the [IEPA] to ignore the [IEPA's] 1988 permit determination. The [IEPA] may not do so." See also Panhandle Eastern Pipe Line Co. v. Illinois Pollution Control Board, 314 Ill. App. 3d 296, 734 N.E.2d 18 (4th Dist. 2000), in which the Court affirmed this Board and expressly agreed with its reasoning. Reichhold Chemicals, Inc. v. Pollution Control Board, 204 Ill. App. 3d 674, 561 N.E.2d 1343 (3d Dist. 1990), which was relied upon both in this Board's and the appellate court's Panhandle Eastern rulings, is also directly on point. There the IEPA purported to deny Reichhold Chemical's permit application while extending an offer to reconsider if the applicant submitted more information; Reichhold Chemicals did not submit any new information, but instead first asked the IEPA to reconsider based upon information already provided, and then filed a timely appeal to this Board. The appellate court held that since no new information had been provided by the applicant, there was no new permit application submitted, and the IEPA lacked any authority to reconsider final decisions, and accordingly jurisdiction had transferred to the Board with Reichhold Chemicals' timely appeal.

In this case, had the IEPA decided, in the initial determination, to apply the $10,000 deductible for each incident, then Petitioner's relief would have been to appeal that decision; the caselaw makes clear that the decision would have been final, as to Petitioner, for all subsequent reimbursement requests, particularly since no new information relating to the deductible was ever

submitted. If Petitioner would have been bound by such a decision, the IEPA clearly should be bound by the decision it did make; again this is especially so in light of the fact that no new or different information concerning the deductibles was ever presented. The IEPA's actions in this case constitute a blatant reconsideration of a final decision, which has been repeatedly prohibited by both this Board and the courts.

Moreover, the deductible decision was made based upon a clear misunderstanding of statutory requirements. Pursuant to Section 57.8(a)(4) of the Illinois Environmental Protection Act, 415 ILCS 5/57.8(a)(4), in administering the LUST Fund, the IEPA is to subtract the appropriate deductible "from any payment invoice paid to an eligible owner or operator. Only one deductible shall apply per underground storage tank site." Here there is no question that only a single site is at issue, and accordingly the IEPA's decision to apply two deductibles is perplexing. Further, pursuant to Section 57.9(d), 415 ILCS 5/57.9(d), among other things "[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 one year, in subsequent years no deductible shall apply for costs incurred in response to such occurrence." An "occurrence" is defined as "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. Here, clearly only one "occurrence" is an issue, and nothing generated by the Office of the State Fire Marshal or otherwise included in this Record suggests otherwise. The underground storage tank release was first noted following a boring test, and was confirmed upon removal of all of the underground storage tanks at the site barely half a year later. Even Mr. Kuhlman admitted that the contamination from each of the eight tanks in question is so intermingled to make it impossible to conduct any separate remediation, or to ultimately issue separate no further remediation letters, with respect to any alleged or hypothesized individual "occurrences". (Tr. 41 - Tr. 42; Tr. 69 - Tr. 70).

Simply put, there is virtually nothing in the record to suggest any separate "occurrences," but instead the record reveals the existence of a single occurrence, and that single occurrence took place at a single site; accordingly, pursuant to the Environmental Protection Act itself, only one deductible should be applied to this remediation. The IEPA's original (and final) decision on this point, made by the IEPA managers and reviewers with the most experience, was clearly correct, and in any event is not subject to reconsideration at the whim of a technical reviewer or his new supervisor.

Handling Charges

Ms. Weller expressed two separate reasons why she thought the $13,808.86 in handling charges should be denied. First, she claimed that the handling charges were never approved in the budget. This is an obvious mistake, revealed by simple review of the record (notably, Ms. Weller admitted that she had never even looked at the budget materials in making her budget decision) (Tr. 114 - Tr. 116; see also Tr. 118 - Tr. 119). Mr. Kuhlman specifically had before him the handling charges in question, and he approved the budget as presented. (See Ex. 17; Ex. 18; Tr. 55 - Tr. 56). There is no ambiguity, nor any question that the amounts sought for budget approval by Petitioner included the handling charges of the subcontractor. Hence, Ms. Weller was simply wrong in asserting that they had not been approved in the budget.

The IEPA apparently contends that the fact that these budget amounts were included in the line item "Field Purchases and Other Costs," rather than in a line item identified as "Handling Charges," somehow precluded their approval by Ms. Weller, notwithstanding that they were approved by Mr. Kuhlman. Nothing in the Environmental Protection Act would support such an interpretation, though. The costs requested 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. That is what the Act requires (it is all that the Act requires), and so reimbursement should be allowed. As between Mr. Kuhlman, who approved the budget, and Ms. Weller, whose job was to approve the payments, clearly any objection to where the handling charges were listed on the budget form should have been made by Mr. Kuhlman, yet he was satisfied. Had he objected, Petitioner could have resubmitted, but no objection was made. Under the circumstances Ms. Weller's actions, among other things, clearly were arbitrary and capricious, and constitute an attempt to reconsider Mr. Kuhlman's previous decision (again, though, the IEPA possesses no power to make any such reconsideration). In addition, the March 3, 2003 final decision letter says nothing about the item being denied because it was set forth in the allegedly wrong line item category, and that letter frames the issues in this LUST Fund appeal. The IEPA cannot make up new grounds for its decision after the fact.

Ms. Weller's second basis for denying reimbursement is the assertion that the amount requested was not reasonable, because only a subcontractor is entitled to a percentage markup for handling, not sub-subcontractors. Ms. Weller cited her unit's policy as support for this proposition. (Tr. 125 - Tr. 126).

The unit policy has been expressly rejected by this Board already. See State Bank of Whittington v. Illinois EPA, 1993 Ill. ENV LEXIS 490, at *22-23, PCB 92-152 (June 3, 1993): "The issue here is whether the [IEPA], solely as a matter of policy and intent, can deny access to the 15% handling charge to persons other than the prime contractor." The Board held that the IEPA could not do so.

Moreover, Ms. Weller's entire review overlooks the IEPA's duties, limitations and obligations under the Environmental Protection Act. The IEPA concedes that Petitioner's reimbursement application is subject to the provisions of Title XVI of the Environmental Protection

Act, and Part 732 of this Board's regulation. (Tr. 80). Section 57.8, 415 ILCS 5/57.8, spells out the duties, rights and obligations with respect to reimbursement applications for such facilities:

> 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 [IEPA] for activities taken in response to a confirmed release.

That is what occurred here, and the provisions of Section 57.8(a)(1), 415 ILCS 5/57.8(a)(1), apply to the IEPA's review (emphasis added):

> In the case of any approved plan and budget for which payment is being sought, the [IEPA] shall make a payment determination within 120 days of receipt of the application. Such determination shall be considered a final decision. The [IEPA's] review shall be limited to generally accepted auditing and accounting practices. In no case shall the [IEPA] conduct additional review of any plan which was completed within the budget, beyond auditing for adherence to the corrective action measures in the proposal.

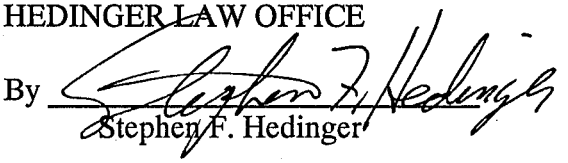
This Board's regulations further define the scope of Ms. Weller's task. The requirements for submittal of reimbursement applications are set forth in 35 Ill. Adm. Code 732.601; no question has been raised herein concerning the sufficiency of Petitioner's submittal, including both a certification that the amounts approved for payment correspond to the amounts approved in the budget, both of which were in conformance with approved remediation (732.601(b)(2)), and proof that the amount requested did not exceed the amount budgeted (732.601(b)(4)), as well as all other documentary requirements. Upon receipt of a complete reimbursement application, it was Ms. Weller's job to comply with the requirements of 35 Ill. Adm. Code 732.602(a); she was accordingly to have reviewed the application to assure it contained the material required by 35 Ill. Adm. Code 732.601(b) (see discussion immediately above), and having determined (as she did) that the information was included, she was to have approved the application for payment. Review of reasonableness is only permitted for applications subject to "full review" (see 35 Ill. Adm. Code

from the reimbursement by the IEPA on the grounds of not being approved in the budget and being unreasonable in amount.

Respectfully submitted,

SWIF-T FOOD MART,
Petitioner,

By its attorney,
HEDINGER LAW OFFICE

By 
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The undersigned certifies that an original and nine copies of Petitioner's Closing Brief were served upon the Clerk of the Illinois Pollution Control Board, 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 U.S. Post Office Mail Box before 5:30 p.m. in Springfield, Illinois on the 16th day of March, 2004.

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THIS FILING IS SUBMITTED ON RECYCLED PAPER