

ILLINOIS POLLUTION CONTROL BOARD  
August 19, 2004

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

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

This case is before the Board on a June 7, 2004 motion for authorization of payment of attorney fees as costs of corrective action filed by Swif-T-Food Mart (Swif-T). On May 20, 2004, the Board issued an order that reversed the Illinois Environmental Protection Agency's (Agency) denial of \$13,808.86 in reimbursement costs and the application of a \$10,000 deductible, thereby awarding Swif-T an additional \$23,808.86 in reimbursement. The order concerned the Agency's approval of reimbursement of requested costs of corrective action, with modifications, regarding Swif-T's underground storage tank site located at 1100 Belvidere Road, Lake County.

For the reasons set forth below, the Board grants Swif-T's request and awards legal fees consistent with Section 57.8(1) of the Environmental Protection Act (Act). 415 ILCS 5/57.8(1) (2002).

**STATUTORY BACKGROUND**

Title XVI of the Act sets forth the provisions for the administration and oversight of the Leaking Underground Storage Tank Program (LUST), which includes the underground storage tank fund (UST Fund). 415 ILCS 5/57 (2002). Title XVI also establishes requirements for eligible owners to seek reimbursement from the UST Fund. 415 ILCS 5/57 (2002). If an owner or operator plans to seek reimbursement, the owner or operator must comply with the provisions of Title XVI. 415 ILCS 5/57.5(a) (2002). Section 57.7 sets forth requirements for remediation of a site where a leaking underground storage tank is removed, including the submission of a corrective action plan. 415 ILCS 5/57.7 (2002).

Section 57.8 of the Act sets forth when an owner or operator may seek reimbursement "after completion of the requirements of Sections 57.6 and 57.7, or after completion of any other required activities at the UST site." 415 ILCS 57.8 (2002). Section 57.8 of the Act also includes the timeframes for Agency determinations and the right to appeal a decision to the Board. 415 ILCS 57.8(a)(1) (2002). Section 57.8 of the Act addresses indemnification and what steps an

owner or operator may take if the UST Fund lacks sufficient funds to reimburse for the activities. 415 ILCS 57.8(a)(5) (2002).

Section 57.8(1) of the Act provides:

Corrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under this Title unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees. 415 ILCS 5/57.8(1) (2002).

### **MOTION**

Swif-T argues that under Section 57.8(1) of the Act (415 ILCS 5/57.8(1) (2002)), legal defense costs are reimbursable from the UST Fund if the owner or operator prevails before the Board. Mot. at 1. Swift-T asserts that the \$23,808.86 awarded by the Board constituted the full amount that was sought in the reimbursement appeal, and that it has fully and completely prevailed in its action before the Board seeking payment under Title XVI of the Act. *Id.*

Swif-T contends that the motion is being made within 35 days following the Board order granting the relief herein. Mot. at 1-2. Swif-T requests the Board authorize the payment from the leaking underground storage fund the amount of \$11,291.37 in attorney fees and costs to Swif-T pursuant to Section 57.8(1) of the Act. Mot. at 2. Swif-T attached the affidavit of attorney Stephen F. Hedinger (Hedinger) documenting under oath the \$11,291.37 of attorney fees and costs being sought in this matter.

To date, the Agency has not filed a response to the motion.

### **DISCUSSION**

The Board recently addressed the issue of whether or not a prevailing petitioner should be awarded legal costs under Section 57.8 of the Act. *See Illinois Ayers Oil Company v. IEPA*, PCB 03-214 (Aug. 5, 2004). As discussed in *Illinois Ayers*, the first question the Board must address is whether or not the proceeding falls within the parameters of the statutory provision. The Board must then determine whether or not to exercise our discretion to award the costs. *Id.*

Section 57.8 (1) is part of Title XVI, which is known as the Leaking Underground Storage Tank Program. The purpose of Title XVI includes administering and overseeing the UST Fund, as well as establishing requirements for eligible owners to seek reimbursement from the UST Fund. 415 ILCS 5/57 (2002). Section 57.8 (1) of the Act (415 ILCS 5/57.8 (1)) clearly states that the Board “may authorize payment of legal fees” if the owner or operator prevails before the Board in seeking payment under Title XVI.

In this instance, it is undisputed that Swif-T prevailed in its action seeking payment under Title XVI. Accordingly, the Board finds that this proceeding falls within the parameters of Section 57.8(1) of the Act (415 ILCS 5/57.8(1) (2002)), and that the plain language of that section

allows for the awarding of legal fees. The Board must now determine whether or not it should, within its discretion, award the fees requested by Swif-T.

In Illinois Ayers, the Board stated that under a fee-shifting statute, the amount of fees to be awarded lies within the “broad discretionary powers” of the Board. Globalcom, Inc. v. Illinois Commerce Commission, 347 Ill. App. 3d 592; 806 N.E.2d 1194, 1214 (1st Dist. 2004). This includes a determination of reasonableness of the requested fees. United States Fidelity and Guaranty Company v. Old Orchard Plaza Limited Partnership, 333 Ill. App. 3d 727, 740; 776 N.E.2d 812, 824 (1st Dist. 2002); In re Pine Top Insurance Company, 292 Ill. App. 3d 596; 686 N.E.2d 657 (1997).

The motion filed by Swif-T includes an affidavit and an exhibit to the affidavit specifying the legal services provided. The Agency did not offer any argument as to why the Board should not decide to award legal fees, nor did the Agency rebut the reasonableness of the fees. The Board finds the legal fees sought in the motion and supported by the affidavit and exhibit reasonable.

Based on the facts of this case the Board finds that legal fees should be awarded and that the costs are reasonable.

### **CONCLUSION**

The Board finds that the reimbursement of legal fees is warranted based on the facts of this case. Therefore, Swif-T’s motion is granted and the Board directs that \$11,291.37 in legal fees be reimbursed. The Board will set forth the order modified by the instant award of legal fees below.

### **ORDER**

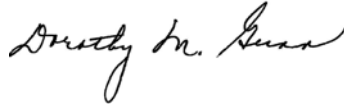
1. The Board reverses the Agency’s March 3, 2003 determination to deny reimbursement to Swif-T Food Mart and directs the Agency to provide reimbursement for:
  - A. \$10,000 imposed as a deductible.
  - B. \$13,808.86 requested under Field Operations and Other Costs.
2. The Board directs the Agency to provide reimbursement to Swif-T Food Mart for legal fees in the amount of \$11,291.37.

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 5/31(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 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 19, 2004, by a vote of 4-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board