

ILLINOIS POLLUTION CONTROL BOARD
October 18, 2007

JOE'S MIDTOWN AUTO REPAIR,)
)
 Petitioner,)
)
 v.) PCB 07-143
) (UST Appeal)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by G.T. Girard):

On September 20, 2007, the Board accepted a petition for review from Joe's Midtown Auto Repair (petitioner) concerning a decision by the Illinois Environmental Protection Agency (IEPA) to apply a second deductible to the reimbursement request of petitioner. The site is a leaking underground petroleum storage tank facility located at One South Main Street, Princeton, Bureau County. On September 17, 2007, the IEPA filed a motion to dismiss the petition for review (Mot.). On September 25, 2007, petitioner filed a response (Resp.). As discussed below, the Board denies the motion to dismiss and directs the parties to proceed with this case. The Board will summarize the arguments of the parties, and then clarify the Board's reasoning.

ARGUMENTS

The IEPA states that petitioner notified the Illinois Emergency Management Agency (IEMA) of a release for a 100-gallon heating oil tank and a 500-gallon waste oil tank on May 27, 1997. Mot. at 1. IEMA assigned incident number 970927 to this release. On August 1, 1998, another release was reported by petitioner to IEMA for a 6000-gallon gasoline tank. *Id.* IEMA assigned incident number 982038 to this release. *Id.* On August 5, 2002, the Office of the State Fire Marshal (OSFM) issued two reimbursement and deductibility determinations for petitioner's site. *Id.*

IEPA states that OSFM determined that for incident number 970927, a deductible of \$10,000 applied and for incident number 982038, a deductible of \$10,000 applied. Mot. at 2. IEPA argues that any challenge to the deductible amount must have been filed by petitioner within 35 days of the date of the OSFM decision. Mot. at 2, citing Maple Quick Mart and Ranjit Singh v. IEPA, PCB 07-21 (Nov. 6, 2006). IEPA asserts that the deductible amount determined by OSFM was merely applied by the IEPA in making the reimbursement decision. Mot. at 2. IEPA argues there is no relief the Board can grant petitioner and the Board should dismiss the petition. Mot. at 2-3.

In response, petitioner maintains that procedurally a motion to dismiss is not appropriate for the grounds raised by the IEPA. Resp. at 2. Petitioner points out that the Board's procedural

rules enumerate situations in which a petition may be dismissed and none of the specific situations apply here. Resp. at 2, citing 35 Ill. Adm. Code 105.108. Petitioner concedes that Section 105.108(e) provides that dismissal may be appropriate if other grounds exist that “bar petitioner from proceeding” with the petition. *Id.* However, petitioner argues that the other grounds must be like in nature and involve a defect to the petition. Resp. at 3. Petitioner asserts that because the motion to dismiss is supported by portions of the IEPA record that has not yet been filed, such an evidentiary motion is not proper grounds for dismissal. *Id.*

Petitioner further argues that even if the motion is procedurally proper, the Board should deny the motion. Resp. at 3. Petitioner maintains that petitioner is appealing the IEPA’s determination of the amount to be reimbursed and the IEPA wrongfully applied a second deductible. *Id.* Petitioner asserts that properly applying the deductible is the responsibility of the IEPA not OSFM. *Id.*

Petitioner notes that the IEPA did not specifically address the issue of two deductibles but did file documents indicating that two deductibles were applied to the same site. Resp. at 3. Petitioner argues that the Board has previously interpreted the Environmental Protection Act (415 ILCS 5/1 *et. seq.* (2006)) as assessing deductibles per site not per incident. *Id.*, citing Swif-T-Food Mart v. IEPA, PCB 03-185 (May 20, 2004). Petitioner argues that in Swif-T-Food Mart the Board rejected the same arguments made by IEPA in the motion to dismiss. *Id.* Petitioner argues that the motion to dismiss is directly contrary to Swif-T-Food Mart and should be denied. *Id.*

DISCUSSION

The Board’s standard for deciding motions to dismiss has been well-established in case law. *See, e.g.,* People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001); Shelton v. Crown, PCB 96-53 (May 2, 1996); Krautsak v. Patel, PCB 95-143 (June 15, 1995); Miehle v. Chicago Bridge and Iron Co., PCB 93-150 (Nov. 4, 1993). The Board takes all well-pleaded allegations as true in determining a motion to dismiss. Import Sales Inc. v. Continental Bearings Corp., 217 Ill. App. 3d 893, 577 N.E.2d 1205 (1st Dist. 1991); *see also* Stein Steel, PCB 02-1; Shelton, PCB 96-53; Krautsack, PCB 95-143; Miehle, PCB 93-150. In addition, dismissal of a complaint is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief. *See* Stein Steel, PCB 02-1; Shelton, PCB 96-53; Krautsack, PCB 95-143; Miehle, PCB 93-150.

In addition, the Board’s procedural rules set forth four specific grounds for dismissing a petition and one general. 35 Ill. Adm. Code 105.108. The petition may be dismissed if it fails to contain information required by the Board’s rules or the petitioner fails to comply with a Board or hearing officer order. 35 Ill. Adm. Code 105.105(a) and (c). The petition may also be dismissed if the petition is untimely or petitioner does not have standing. 35 Ill. Adm. Code 105.105(b) and (d). Finally, a petition may be dismissed for if other grounds exist which bar the petitioner from proceeding. 35 Ill. Adm. Code 105.105(c).

The IEPA seeks dismissal of the petition on the grounds that the Board cannot provide the relief sought by petitioner. The Board has reviewed the arguments and disagrees with the

IEPA's arguments. The Board finds that there are facts and legal arguments that could entitle petitioner to the relief sought. Further, based on prior Board precedent, the Board may be able to grant the relief sought. Specifically, the petitioner has raised the similarities between the facts of this case, as now before the Board, and Swif-T-Food Mart. Therefore, the Board denies the motion to dismiss and directs the parties to proceed with the case.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 18, 2007, by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board