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MAR 29 2004

CERTIFICATE OF SERVICE

STATE OF ILLINOIS
Pollution Control Board

I, the undersigned attorney at law, hereby certify that on March 26, 2004, I served true and correct copies of a JOINT STIPULATION and MOTION FOR SUMMARY JUDGMENT, by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Carol Sudman, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue, East
P.O. Box 19274
Springfield, IL 62794-9274

Dean E. Sweet, Assistant State's Attorney
Madison County Administration Building
157 North Main Street
Suite 402
Edwardsville, IL 62025-1964

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent


John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

MAR 29 2004

STATE OF ILLINOIS
Pollution Control Board

CASSENS AND SONS, INC.,)	
Petitioner,)	
v.)	PCB No. 01-102
ILLINOIS ENVIRONMENTAL)	(UST Fund Appeal)
PROTECTION AGENCY,)	
Respondent.)	

JOINT STIPULATION

NOW COME the Petitioner, Cassens and Sons, Inc. ("Cassens"), by its attorney, Dean Sweet, and the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and hereby submit to the Illinois Pollution Control Board ("Board") this Joint Stipulation. The parties hereby stipulate as follows:

1. That the Petitioner believes the affidavit of William St. Peters (Exhibit 1) contains information and testimony he would provide if he were called to testify in a hearing in this matter.
2. That the Illinois EPA believes some or all of the information and testimony in the affidavit may be irrelevant, erroneous, legally conclusory in nature, and otherwise objectionable.
3. That the Illinois EPA would accordingly contest or object to some or all of the information and testimony found in the affidavit if it were presented as testimony in a hearing in this matter.
4. That the Illinois EPA reserves the right to, and may, raise a relevancy or any other objection to the information and testimony within the affidavit in the context of the Petitioner's possible reliance on or reference to the affidavit in a motion for summary judgment or related pleading.

5. That the parties agree that the facts contained in the Illinois EPA's Request to Admit Facts (Exhibit 2) are true and accurate and may be relied upon by the parties and the Board in reaching a resolution in this matter.

Respectfully submitted,

CASSENS AND SONS, INC.,
Petitioner



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Voice: 618 692-6280
Facsimile: 618 296-7001
Dated: 1-16-07

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Special Assistant Attorney General
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217/782-5544
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Dated: 1/14/07

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

CASSENS AND SONS, INC.,)	
Petitioner.)	
)	PCB No. 01-102
vs.)	(UST Fund Appeal)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

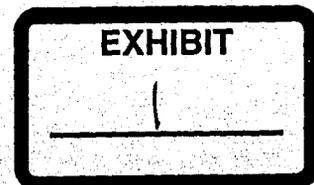
AFFIDAVIT OF WILLIAM ST. PETERS

I, William St. Peters, do hereby state and affirm as follows:

1. The Madison County Transit (MCT) Edwardsville Station is located directly across the street from the Madison County Government Center and Edwardsville City Hall. The \$5,000,000 project is one of 5 transit hubs serving the residents of Madison County, by providing transit linkages to the greater St. Louis region and its light rail system, MetroLink. The project was funded with a combination of Federal Transit Administration (FTA) funds via a Congressional earmark; Illinois Department of Transportation (IDOT) funds, and local transit funds.
2. In 1989 (prior to Safety Partners), four underground storage tanks (UST's) were removed from Cassens and Sons property located on the south side of Hillsboro Avenue in Edwardsville, Illinois. The UST's were removed under the supervision of the OSFM and the Edwardsville Fire Chief. Based on a declaration form from the OSFM representative present during the 1989 UST removals, the four UST's were all registered, removed, and non-leaking. No release was declared.

In 1996, Safety Partners began the Due Diligence Phase I and Phase II Environmental Assessments for the Madison County Transit property (formerly owned by Cassens and Sons) located on both sides of Hillsboro Avenue in Edwardsville, Illinois. During the Phase I, SPL found that underground storage tanks (UST's) were listed for the property on both sides of Hillsboro Avenue. Based on a no release reported for the four UST's on the south side of Hillsboro Avenue removed in 1989, Safety Partners performed no subsurface, investigative borings in the area.

In May 1999, during removal of existing asphalt surfacing material and lighting structures on the south side of Hillsboro Avenue, a hydraulic cylinder was discovered by the paving company in the same area as the four UST's removed in 1989 and a



former (i.e., prior to 1989) service station. Prior to sampling the soil, Safety Partners was contacted by Mr. Jerry Kane, Madison County Transit and informed of the problem. A soil sample was then collected and analyzed to determine if contamination levels were above IEPA remediation objectives.

During the removal of impacted soil and prior to soil sample results, Safety Partners discussed notifying IEPA with Mr. Kane. Our delay in reporting was based on several factors:

- a. The uncertainty of the level of contamination found to actually declare a release;
- b. The extent of the contamination in the soil;
- c. We felt that under the rules of the IEPA LUST, this cleanup may be considered within the purview of the IEPA Site Remediation Program (SRP), a non-funded cleanup program designed for soil and water contamination problems not associated with a Leaking Underground Storage Tank, to provide for the proper documentation that a release was completed in accordance with IEPA requirements; and
- d. The decision of the OSFM based on documentation provided by our firm during this incident, declaring that this was still an underground storage tank release.

We deferred notification of this release to the Illinois Emergency Management Agency (IEMA) until such information was available and that this was still considered by the OSFM a UST (LUST).

After notification by OSFM that the site still qualified as a LUST incident since the vent/distribution lines were not removed in 1989 and after receiving soil results from the sample taken around the distribution lines, we then reported this release and made the attempt to recover the costs of this proper effort to remove this contamination and the potential for further impact to the environment under the LUST Act.

The main area of uncertainty was the eligibility for reimbursement under Title XVI LUST. This was based on the documentation that the UST's on this site had originally been declared, 10 years prior to this work, clean by an officer of the OSFM.

Our experience in a similar situation just a year or so prior to this incident found inconsistent information and policy. The main gasoline/product UST's were removed and the piping left onsite. The vent and distribution piping was discovered by our firm during the removal of a Heating Oil Tank some years after the main UST removals. This discovery and subsequent cleanup under LUST was disallowed by the IEPA. The resulting SRP cost our client considerable expense and time for issuance of No Further Action status.

However, the OSFM decision to Safety Partners that if any part of a UST system (piping, etc.) remains in the ground following the removal of the tanks, according to the State of Illinois Regulations, it is still considered to be an UST system. The

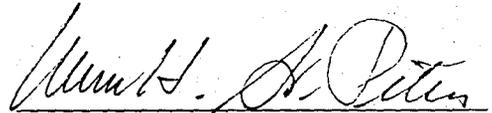
OSFM determined the eligibility after we corrected the registration information. This eligibility determination was confirmed by the OSFM on February 14, 2000 establishing \$10,000.00 deductibility.

Safety Partners did not anticipate the extent of soil contamination eventually found. While waiting for these issues to be addressed, contaminated soil was removed from the area of the hydraulic cylinder and vent and distribution lines remaining from the 1989 lines that appeared to be gasoline residue. Due to the need to expedite the paving, pending lab analysis of the soil sample, and the uncertainty of reimbursement, Safety Partners continued with the soil removal. During the project we experienced several days of rain and the accumulated rain water was removed (pumped) from the excavation.

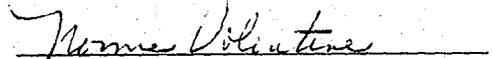
Safety Partners believes that Madison County Transit should be compensated for the full amount of Early Action work minus the \$10,000 deductible established by the OSFM.

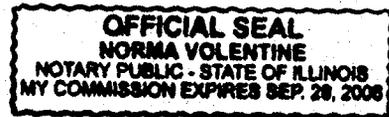
3. I further state that the information contained in this affidavit was made known to the Illinois Environmental Protection Agency during the Eligibility and Deductibility Application process as a result of written documents, telephone conversations, and meetings with the staff for the Agency. This information was provided to the Agency prior to its Reimbursement Decision dated November 29, 2000.

Further, the Affiant saith not.


AFFIANT

SUBSCRIBED and SWORN to before me on this 24th day of
December, 2003.


NOTARY PUBLIC



**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

CASSENS AND SONS, INC.,)	
Petitioner,)	
v.)	PCB No. 01-102
ILLINOIS ENVIRONMENTAL)	(UST Fund Appeal)
PROTECTION AGENCY,)	
Respondent.)	

REQUEST TO ADMIT FACTS

NOW COME the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.618, requests that the Petitioner, Cassens and Sons, Inc., stipulate to the following facts.

1. On May 27, 1999, Cassens (or an agent or representative of Cassens) notified the Illinois Emergency Management Agency ("IEMA") of a suspected release from underground storage tanks ("USTs") at the Cassens (a/k/a Madison County Transit) site ("site") located at 126 Hillsboro Avenue in Edwardsville, Illinois. The incident was assigned Incident # 991273. Administrative Record ("AR"), pp. 5, 39.

2. On December 2, 1999, Cassens (or an agent or representative of Cassens) submitted an Eligibility and Deductibility Application ("E/D application") to OSFM. The E/D application stated that there were six USTs at the site, and that all six USTs had a release. AR, pp. 4-7.

3. On February 16, 2000, OSFM issued a determination based on the E/D application that two tanks were eligible for reimbursement (Tanks 1 and 2, each a 1,500 gallon gasoline tank) and that two tanks were ineligible for reimbursement (Tanks 3 and 4, each a 1,500



gallon gasoline tank). Further, OSFM determined that Cassens was eligible to seek reimbursement of corrective action costs in excess of \$10,000. AR, pp. 10-12.

4. On May 22, 2000, Cassens sent a Billing Package to the Illinois EPA requesting reimbursement for costs associated with Early Action activities performed at the site. The request sought a total of \$91,384.99 in reimbursement for costs incurred between May 27, 1999, to July 6, 1999. AR, pp. 38-113.

5. Included in the Billing Package was a form entitled, "Owner/Operator and Professional Engineer Billing Certification Form for Leaking Underground Storage Tank Sites." The form provided in part, "I further certify that costs ineligible for payment from the [UST] Fund pursuant to 35 Illinois Administrative Code Section 732.606 are not included in this billing package. Such ineligible costs include but are not limited to: * * * Costs incurred prior to IEMA notification. * * *." AR, p. 43.

6. On May 17, 2000, Allen Cassens, President of Cassens, signed the form described in Stipulation #5 above. On May 22, 2000, Talbert Eisenberg, Professional Engineer, signed the form. AR, p. 43.

7. Included in the Billing Package was a Personnel Summary Sheet that listed work performed by Safety Partners, Ltd. ("Safety Partners"), a contractor. The work performed was described to have taken place from May 27, 1999, to July 6, 1999. AR, p. 47.

8. The Personnel Summary Sheet included costs and descriptions set forth in different line items, including the following:

- a. W. St. Peters, a Sr. Env. Spec., performing 44 hours of work at a rate of \$70.00/hour for a total charge of \$3,080.00. AR, p. 47.

- b. M. Trgovich, a Supervisor, performing 75 hours of work at a rate of \$50.00/hour for a total charge of \$3,750.00. AR, p. 47.
 - c. R. Manton, a Laborer, performing 47 hours of work at a rate of \$45.00/hour for a total charge of \$2,115.00. AR, p. 47.
 - d. G. Heafner, a Laborer, performing 8 hours of work at a rate of \$45.00/hour for a total charge of \$360.00. AR, p. 47.
9. Included in the Billing Package were copies of invoices from prime consultants and/or contractors and subcontractors. AR, pp. 50-110.
10. The copies were provided in support of the request for payment of reimbursement from the UST Fund. The costs described and referenced on the invoices were part of the request for payment of reimbursement from the UST Fund. AR, pp. 50-110.
11. Included in the Billing Package was a copy of an invoice from Safety Partners, dated March 14, 2000, and identified as Invoice #99185. AR, p. 58.
12. Included in Safety Partners Invoice #99185 were costs and descriptions set forth in different line items, including the following:
- a. A Senior Environmental Specialist performing 40 hours of Project Management at a rate of \$70.00/hour for a total charge of \$2,800.00. AR, p. 58.
 - b. A Project Supervisor performing 75 hours of work at a rate of \$50.00/hour for a total charge of \$3,750.00. AR, p. 58.
 - c. A Union Laborer performing 87 hours of work at a rate of \$45.00/hour for a total charge of \$3,915.00. AR, p. 58.
13. On August 24, 2000, the Illinois EPA sent a letter to Cassens regarding the site and the Billing Package. The letter stated that the application for payment was incomplete due to

a lack of supporting documentation. In Attachment A to the letter, the Illinois EPA asked in part for dates of service and duties for the dates for the Personnel Summary Sheet for Safety Partners. AR, pp. 26-28.

14. On September 21, 2000, Talbert Eisenberg of Safety Partners sent a letter to the Illinois EPA in response to the Illinois EPA's letter dated August 24, 2000. Mr. Eisenberg's letter included time sheets with dates, work descriptions, and hours in support of the previously submitted Personnel Summary Sheet. AR, pp. 29-31.

15. The Timesheet sent by Mr. Eisenberg of Safety Partners to Illinois EPA included descriptions of work performed by different employees, including the following:

- a. William St. Peters, a Sr. Env. Spec., performed 20.5 hours of work (project management) between May 18, 1999, and May 25, 1999. This work was a subset of the total of 44 hours of work performed by Mr. St. Peters as documented on the Timesheet. AR, p. 30.
- b. Michael Trgovich, a Supervisor, performed 39.5 hours of work (remove contaminated soil and demucked hole) between May 18, 1999, and May 25, 1999. This work was a subset of the total of 75 hours of work performed by Mr. Trgovich as documented on the Timesheet. AR, p. 30.
- c. Robert Manton, a Laborer, performed 21 hours of work (on site labor) between May 19, 1999, and May 25, 1999. This work was a subset of the total of 45 hours of work performed by Mr. Manton as documented on the Timesheet. AR, p. 31.
- d. Gene Heafner, a Laborer, performed 8 hours of work (on site labor) on May 21, 1999. AR, p. 30.

16. The work performed by Mr. St. Peters, as described in the Timesheet sent by Safety Partners to Illinois EPA (See paragraph 15.a. above), is the same as the work described in the Personnel Summary Sheet in the Billing Package (See paragraph 8.a. above) and Safety Partners Invoice #99185 (See paragraph 12.a. above). AR, pp. 30, 47, 58.

17. The work performed by Mr. Trgovich, as described in the Timesheet sent by Safety Partners to Illinois EPA (See paragraph 15.b. above), is the same as the work described in the Personnel Summary Sheet in the Billing Package (See paragraph 8.b. above) and Safety Partners Invoice #99185 (See paragraph 12.b. above). AR, pp. 30, 47, 58.

18. The work performed by Mr. Manton and Mr. Heafner, as described in the Timesheet sent by Safety Partners to Illinois EPA (See paragraphs 15.c. and 15.d. above, respectively), is the same as the work described in the Personnel Summary Sheet in the Billing Package (See paragraphs 8.c. and 8.d. above, respectively) and Safety Partners Invoice #99185 (See paragraph 12.c. above, collectively). AR, pp. 30, 47, 58.

19. The Billing Package included a Subcontractors form that totaled the billing charges for subcontractors retained by the Prime Consultants and/or Contractors. The Subcontractor form listed, among others, Riverbend Contractors as a subcontractor. The form identified Riverbend Contractors as having billed \$38,304.81 for excavation and hauling work. AR, p. 62.

20. In support of the claim for reimbursement of the charges from Riverbend Contractors, several invoices from Riverbend Contractors were included in the Billing Package. Included among those invoices are Riverbend Contractors Invoices #974332 and 974368. AR, pp. 64-68, 70-79.

21. Riverbend Contractors Invoice #974332 sought payment for work performed on April 30, 1999, May 12, 1999, May 17, 1999, May 17, 1999, and May 18, 1999. The total amount due for this work was \$1,712.95. AR, pp. 78-79.

22. Riverbend Contractors Invoice #974368 sought payment for work performed on May 19, 1999, May 20, 1999, May 21, 1999, May 24, 1999, and May 25, 1999. The total amount due for this work was \$17,905.04. AR, pp. 74-77.

23. The Subcontractor form in the Billing Package also included a line item for ESI, or Ecological Systems, Inc. The form identified ESI as having billed \$4,455.12 for waste water disposal work. AR, p. 62.

24. In support of the claim for reimbursement of the charges from ESI, several invoices from ESI were included in the Billing Package. Those invoices are ESI Invoices #99-433, 20646 and 20647. AR, pp. 81-83.

25. ESI Invoice #99-433 sought payment for work performed on May 20, 1999, the "Ship Date." The total amount due for this work was \$702.62. AR, p. 82.

26. ESI Invoice #20646 sought payment for work performed on May 25, 1999, the "Received" date. The total amount due for this work was \$1,662.50. AR, p. 83.

27. ESI Invoice #20647 sought payment for work performed on May 24, 1999, the "Received" date. The total amount due for this work was \$2,090.00. AR, p. 81.

28. The Subcontractor form in the Billing Package also included two line items for Bluff City Minerals. The form identified Bluff City Minerals as having billed \$1,454.93 for 2" rock backfill, and \$304.81 for aglime backfill. AR, p. 62.

29. In support of the claim for reimbursement of the charges from Bluff City Minerals, several invoices from Bluff City Minerals were included in the Billing Package.

Included among those invoices are Bluff City Minerals Invoices #13104 and 13105. AR, pp. 92-94.

30. Bluff City Minerals Invoice #13104 sought payment for product with a ticket date of May 24, 1999. The total amount due for this product was \$112.35. AR, p. 92.

31. Bluff City Minerals Invoice #13105 sought payment for product with ticket dates all of May 25, 1999. The total amount due for this product was \$1,501.87. AR, p. 93.

32. The Subcontractor form in the Billing Package also included a line item for Waste Management. The form identified Waste Management as having billed \$24,279.18 for soil disposal work. AR, p. 62.

33. In support of the claim for reimbursement of the charges from Waste Management, an invoice from Waste Management was included in the Billing Package. The invoice is Waste Management Invoice #2450-0000049. AR, pp. 97-105.

34. Waste Management Invoice #2450-0000049 sought payment for soil disposal on May 18, 1999, May 19, 1999, May 20, 1999, May 21, 1999, May 24, 1999, and May 25, 1999. The total amount due for this soil disposal was \$24,279.18. AR, p. 105.

35. The Subcontractor form in the Billing Package also included a line item for Teklab. The form identified Teklab as having billed \$130.00 for landfill analysis work. AR, p. 62.

36. In support of the claim for reimbursement of the charges from Teklab, an invoice from Teklab was included in the Billing Package. The invoice is Teklab Invoice #37609. AR, p. 108.

37. Teklab Invoice #37609 sought payment for soil testing on May 4, 1999. The total amount due for this soil testing was \$130.00. AR, p. 108.

38. The Billing Package included an Equipment form that totaled the billing charges for equipment used by the Contractor, Safety Partners. The Equipment form included a line item for a Compactor at a total cost of \$1,290.40. AR, p. 48.

39. In support of the claim for reimbursement of equipment charges, an invoice from Safety Partners is included in the Billing Package. The invoice is Safety Partners Invoice #99185. AR, p. 58.

40. Safety Partners Invoice #99185 includes a line item for Equipment Rental of a Compactor for a total amount of \$1,290.40. AR, p. 58.

41. Included with the September 21, 2000 letter sent by Mr. Eisenberg of Safety Partners to the Illinois EPA was a copy of an invoice from Equipment Company at Mitchell. Mr. Eisenberg's letter stated that the invoice was a receipt for the use of the compactor. The invoice is Equipment Company at Mitchell Invoice #20834 and sought payment in the amount of \$1,290.40. AR, pp. 29, 32.

42. The Compactor line item found on the Equipment form in the Billing Package (See paragraph 38 above) references the same compactor listed in Safety Partners Invoice #99185 (See paragraph 40 above) and the item that is the subject of Equipment Company at Mitchell Invoice #20834 (See paragraph 41 above). AR, pp. 32, 48, 58.

43. The compactor was used for the compaction and/or density testing of backfill material at the site.

44. The Subcontractor form in the Billing Package also included a line item for SCI Engineering. The form identified SCI Engineering as having billed \$2,222.00 for compaction testing work. AR, p. 62.

45. In support of the claim for reimbursement of the charges from SCI Engineering, invoices from SCI Engineering were included in the Billing Package. Those invoices are SCI Invoices #3243 and 3319. AR, pp. 88-89.

46. SCI Engineering Invoice #3243 sought payment for field office and laboratory services for density testing. The total amount due for this work was \$1,243.40. AR, p. 88.

47. SCI Engineering Invoice #3319 sought payment for field office and laboratory services for density testing. The total amount due for this work was \$978.60. AR, p. 89.

48. The field office and laboratory services for density testing work supplied by SCI Engineering was for compaction and/or density testing of backfill at the site.

49. The Subcontractor form in the Billing Package includes a table of Eligible Handling Charges as a Percentage of Cost based upon the Subcontract or Field Purchase Cost. AR, p. 62.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Special Assistant Attorney General
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217/782-5544
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Dated: November 18, 2003

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

MAR 29 2004

STATE OF ILLINOIS
Pollution Control Board

CASSENS AND SONS, INC.,)	
Petitioner,)	
v.)	PCB No. 01-102
ILLINOIS ENVIRONMENTAL)	(UST Fund Appeal)
PROTECTION AGENCY,)	
Respondent.)	

MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, 101.508 and 101.516, hereby respectfully moves the Illinois Pollution Control Board ("Board") to enter summary judgment in favor of the Illinois EPA and against the Petitioner, Cassens and Sons, Inc. ("Cassens"), in that there exist herein no genuine issues of material fact, and that the Illinois EPA is entitled to judgment as a matter of law with respect to the following grounds. In support of said motion, the Illinois EPA states as follows:

I. STANDARD FOR ISSUANCE AND REVIEW

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 483, 693 N.E.2d 358, 370 (1998); McDonald's Corporation v. Illinois Environmental Protection Agency, PCB 04-14 (January 22, 2004), p. 2.

Section 57.8(i) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/57.8(i)) grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/40). Section 40 of the Act, the general appeal section for permits,

has been used by the legislature as the basis for this type of appeal to the Board. Thus, when reviewing an Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund, the Board must decide whether or not the application as submitted demonstrates compliance with the Act and Board regulations. Rantoul Township High School District District No. 193 v. Illinois EPA, PCB 03-42 (April 17, 2003), p. 3.

In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must look to the documents within the Administrative Record ("Record" or "AR") and the facts contained within the Joint Stipulation ("stipulation"). The Illinois EPA asserts that the stipulation and the arguments presented in this motion are sufficient for the Board to enter a dispositive order in favor of the Illinois EPA on all relevant issues. Accordingly, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA's decision.

II. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

III. ISSUE

The issue before the Board is whether the deductions imposed in the Illinois EPA's final decision dated November 29, 2000 (AR, pp. 13-15), are correct when taking into account the underlying facts and law. As will be argued below, the facts in this case are undisputed and clearly demonstrate that the deductions were appropriate and should not be approved for payment.

IV. THE ILLINOIS EPA IS ENTITLED TO SUMMARY JUDGMENT BASED ON THE FACTS AND LAW

A. Relevant Facts

In paragraph 5 of the stipulation, the parties agree that the facts contained within the Illinois EPA's request to admit are true and accurate and may be relied upon by the parties and the Board in reaching a resolution in this matter.¹ Those facts are as follows.

On May 27, 1999, Cassens (or an agent or representative of Cassens) notified the Illinois Emergency Management Agency ("IEMA") of a suspected release from underground storage tanks ("USTs") at the Cassens (a/k/a Madison County Transit) site ("site") located at 126 Hillsboro Avenue in Edwardsville, Illinois. The incident was assigned Incident # 991273. AR, pp. 5, 39.

On December 2, 1999, Cassens (or an agent or representative of Cassens) submitted an Eligibility and Deductibility Application ("E/D application") to OSFM. The E/D application stated that there were six USTs at the site, and that all six USTs had a release. AR, pp. 4-7.

On February 16, 2000, OSFM issued a determination based on the E/D application that two tanks were eligible for reimbursement (Tanks 1 and 2, each a 1,500 gallon gasoline tank) and that two tanks were ineligible for reimbursement (Tanks 3 and 4, each a 1,500 gallon gasoline tank). Further, OSFM determined that Cassens was eligible to seek reimbursement of corrective action costs in excess of \$10,000. AR, pp. 10-12.

¹ The stipulation also includes an affidavit of William St. Peters, which contains information and testimony that the Petitioner believes would be provided if Mr. St. Peters were called to testify in a hearing in this matter. The Illinois EPA has expressly reserved the right to contest or object to the information and testimony found in the affidavit. Specifically, any statements made by Mr. St. Peters that are not found in the Record should not be considered by the Board, since they were prepared after the final decision issued in this matter. It is well-established that information prepared following the issuance of a final decision that was not before the Illinois EPA at the time of its decision should not be considered by the Board. Typically, information or evidence that was not before the Illinois EPA at the time of its decision is not admitted at hearing or considered by the Board. Community Landfill Company and City of Morris v. Illinois EPA, PCB 01-170, p. 4 (December 6, 2001).

On May 22, 2000, Cassens sent a Billing Package to the Illinois EPA requesting reimbursement for costs associated with Early Action activities performed at the site. The request sought a total of \$91,384.99 in reimbursement for costs incurred between May 27, 1999, to July 6, 1999. AR, pp. 38-113.

Included in the Billing Package was a form entitled, "Owner/Operator and Professional Engineer Billing Certification Form for Leaking Underground Storage Tank Sites." The form provided in part, "I further certify that costs ineligible for payment from the [UST] Fund pursuant to 35 Illinois Administrative Code Section 732.606 are not included in this billing package. Such ineligible costs include but are not limited to: * * * Costs incurred prior to IEMA notification. * * *." AR, p. 43.

On May 17, 2000, Allen Cassens, President of Cassens, signed the form described in Stipulation #5 above. On May 22, 2000, Talbert Eisenberg, Professional Engineer, signed the form. AR, p. 43. Included in the Billing Package was a Personnel Summary Sheet that listed work performed by Safety Partners, Ltd. ("Safety Partners"), a contractor. The work performed was described to have taken place from May 27, 1999, to July 6, 1999. AR, p. 47.

The Personnel Summary Sheet included costs and descriptions set forth in different line items, including the following:

- a. W. St. Peters, a Sr. Env. Spec., performing 44 hours of work at a rate of \$70.00/hour for a total charge of \$3,080.00. AR, p. 47.
- b. M. Trgovich, a Supervisor, performing 75 hours of work at a rate of \$50.00/hour for a total charge of \$3,750.00. AR, p. 47.

- c. R. Manton, a Laborer, performing 47 hours of work at a rate of \$45.00/hour for a total charge of \$2,115.00. AR, p. 47.
- d. G. Heafner, a Laborer, performing 8 hours of work at a rate of \$45.00/hour for a total charge of \$360.00. AR, p. 47.

Included in the Billing Package were copies of invoices from prime consultants and/or contractors and subcontractors. AR, pp. 50-110. The copies were provided in support of the request for payment of reimbursement from the UST Fund. The costs described and referenced on the invoices were part of the request for payment of reimbursement from the UST Fund. AR, pp. 50-110.

Included in the Billing Package was a copy of an invoice from Safety Partners, dated March 14, 2000, and identified as Invoice #99185. AR, p. 58. Included in Safety Partners Invoice #99185 were costs and descriptions set forth in different line items, including the following:

- a. A Senior Environmental Specialist performing 40 hours of Project Management at a rate of \$70.00/hour for a total charge of \$2,800.00. AR, p. 58.
- b. A Project Supervisor performing 75 hours of work at a rate of \$50.00/hour for a total charge of \$3,750.00. AR, p. 58.
- c. A Union Laborer performing 87 hours of work at a rate of \$45.00/hour for a total charge of \$3,915.00. AR, p. 58.

On August 24, 2000, the Illinois EPA sent a letter to Cassens regarding the site and the Billing Package. The letter stated that the application for payment was incomplete due to a lack of supporting documentation. In Attachment A to the letter, the Illinois EPA asked in part for dates of service and duties for the dates for the Personnel Summary Sheet for Safety Partners. AR, pp. 26-28.

On September 21, 2000, Talbert Eisenberg of Safety Partners sent a letter to the Illinois EPA in response to the Illinois EPA's letter dated August 24, 2000. Mr. Eisenberg's letter included time sheets with dates, work descriptions, and hours in support of the previously submitted Personnel Summary Sheet. AR, pp. 29-31.

The Timesheet sent by Mr. Eisenberg of Safety Partners to Illinois EPA included descriptions of work performed by different employees, including the following:

- a. William St. Peters, a Sr. Env. Spec., performed 20.5 hours of work (project management) between May 18, 1999, and May 25, 1999. This work was a subset of the total of 44 hours of work performed by Mr. St. Peters as documented on the Timesheet. AR, p. 30.
- b. Michael Trgovich, a Supervisor, performed 39.5 hours of work (remove contaminated soil and demucked hole) between May 18, 1999, and May 25, 1999. This work was a subset of the total of 75 hours of work performed by Mr. Trgovich as documented on the Timesheet. AR, p. 30.
- c. Robert Manton, a Laborer, performed 21 hours of work (on site labor) between May 19, 1999, and May 25, 1999. This work was a subset of the total of 45 hours of work performed by Mr. Manton as documented on the Timesheet. AR, p. 31.
- d. Gene Heafner, a Laborer, performed 8 hours of work (on site labor) on May 21, 1999. AR, p. 30.

The work performed by Mr. St. Peters, as described in the Timesheet sent by Safety Partners to Illinois EPA (See paragraph 15.a. above), is the same as the work described in the Personnel

Summary Sheet in the Billing Package (See paragraph 8.a. above) and Safety Partners Invoice #99185 (See paragraph 12.a. above). AR, pp. 30, 47, 58.

The work performed by Mr. Trgovich, as described in the Timesheet sent by Safety Partners to Illinois EPA (See paragraph 15.b. above), is the same as the work described in the Personnel Summary Sheet in the Billing Package (See paragraph 8.b. above) and Safety Partners Invoice #99185 (See paragraph 12.b. above). AR, pp. 30, 47, 58.

The work performed by Mr. Manton and Mr. Heafner, as described in the Timesheet sent by Safety Partners to Illinois EPA (See paragraphs 15.c. and 15.d. above, respectively), is the same as the work described in the Personnel Summary Sheet in the Billing Package (See paragraphs 8.c. and 8.d. above, respectively) and Safety Partners Invoice #99185 (See paragraph 12.c. above, collectively). AR, pp. 30, 47, 58.

The Billing Package included a Subcontractors form that totaled the billing charges for subcontractors retained by the Prime Consultants and/or Contractors. The Subcontractor form listed, among others, Riverbend Contractors as a subcontractor. The form identified Riverbend Contractors as having billed \$38,304.81 for excavation and hauling work. AR, p. 62.

In support of the claim for reimbursement of the charges from Riverbend Contractors, several invoices from Riverbend Contractors were included in the Billing Package. Included among those invoices are Riverbend Contractors Invoices #974332 and 974368. AR, pp. 64-68, 70-79. Riverbend Contractors Invoice #974332 sought payment for work performed on April 30, 1999, May 12, 1999, May 17, 1999, May 17, 1999, and May 18, 1999. The total amount due for this work was \$1,712.95. AR, pp. 78-79. Riverbend Contractors Invoice #974368 sought payment for work

performed on May 19, 1999, May 20, 1999, May 21, 1999, May 24, 1999, and May 25, 1999. The total amount due for this work was \$17,905.04. AR, pp. 74-77.

The Subcontractor form in the Billing Package also included a line item for ESI, or Ecological Systems, Inc. The form identified ESI as having billed \$4,455.12 for waste water disposal work. AR, p. 62. In support of the claim for reimbursement of the charges from ESI, several invoices from ESI were included in the Billing Package. Those invoices are ESI Invoices #99-433, 20646 and 20647. AR, pp. 81-83.

ESI Invoice #99-433 sought payment for work performed on May 20, 1999, the "Ship Date." The total amount due for this work was \$702.62. AR, p. 82. ESI Invoice #20646 sought payment for work performed on May 25, 1999, the "Received" date. The total amount due for this work was \$1,662.50. AR, p. 83. ESI Invoice #20647 sought payment for work performed on May 24, 1999, the "Received" date. The total amount due for this work was \$2,090.00. AR, p. 81.

The Subcontractor form in the Billing Package also included two line items for Bluff City Minerals. The form identified Bluff City Minerals as having billed \$1,454.93 for 2" rock backfill, and \$304.81 for aglime backfill. AR, p. 62. In support of the claim for reimbursement of the charges from Bluff City Minerals, several invoices from Bluff City Minerals were included in the Billing Package. Included among those invoices are Bluff City Minerals Invoices #13104 and 13105. AR, pp. 92-94.

Bluff City Minerals Invoice #13104 sought payment for product with a ticket date of May 24, 1999. The total amount due for this product was \$112.35. AR, p. 92. Bluff City Minerals Invoice #13105 sought payment for product with ticket dates all of May 25, 1999. The total amount due for this product was \$1,501.87. AR, p. 93.

The Subcontractor form in the Billing Package also included a line item for Waste Management. The form identified Waste Management as having billed \$24,279.18 for soil disposal work. AR, p. 62. In support of the claim for reimbursement of the charges from Waste Management, an invoice from Waste Management was included in the Billing Package. The invoice is Waste Management Invoice #2450-0000049. AR, pp. 97-105.

Waste Management Invoice #2450-0000049 sought payment for soil disposal on May 18, 1999, May 19, 1999, May 20, 1999, May 21, 1999, May 24, 1999, and May 25, 1999. The total amount due for this soil disposal was \$24,279.18. AR, p. 105. The Subcontractor form in the Billing Package also included a line item for Teklab. The form identified Teklab as having billed \$130.00 for landfill analysis work. AR, p. 62.

In support of the claim for reimbursement of the charges from Teklab, an invoice from Teklab was included in the Billing Package. The invoice is Teklab Invoice #37609. AR, p. 108. Teklab Invoice #37609 sought payment for soil testing on May 4, 1999. The total amount due for this soil testing was \$130.00. AR, p. 108.

The Billing Package included an Equipment form that totaled the billing charges for equipment used by the Contractor, Safety Partners. The Equipment form included a line item for a Compactor at a total cost of \$1,290.40. AR, p. 48.

In support of the claim for reimbursement of equipment charges, an invoice from Safety Partners is included in the Billing Package. The invoice is Safety Partners Invoice #99185. AR, p. 58. Safety Partners Invoice #99185 includes a line item for Equipment Rental of a Compactor for a total amount of \$1,290.40. AR, p. 58.

Included with the September 21, 2000 letter sent by Mr. Eisenberg of Safety Partners to the Illinois EPA was a copy of an invoice from Equipment Company at Mitchell. Mr. Eisenberg's letter stated that the invoice was a receipt for the use of the compactor. The invoice is Equipment Company at Mitchell Invoice #20834 and sought payment in the amount of \$1,290.40. AR, pp. 29, 32.

The Compactor line item found on the Equipment form in the Billing Package (See paragraph 38 above) references the same compactor listed in Safety Partners Invoice #99185 (See paragraph 40 above) and the item that is the subject of Equipment Company at Mitchell Invoice #20834 (See paragraph 41 above). AR, pp. 32, 48, 58. The compactor was used for the compaction and/or density testing of backfill material at the site. The Subcontractor form in the Billing Package also included a line item for SCI Engineering. The form identified SCI Engineering as having billed \$2,222.00 for compaction testing work. AR, p. 62.

In support of the claim for reimbursement of the charges from SCI Engineering, invoices from SCI Engineering were included in the Billing Package. Those invoices are SCI Invoices #3243 and 3319. AR, pp. 88-89. SCI Engineering Invoice #3243 sought payment for field office and laboratory services for density testing. The total amount due for this work was \$1,243.40. AR, p. 88. SCI Engineering Invoice #3319 sought payment for field office and laboratory services for density testing. The total amount due for this work was \$978.60. AR, p. 89.

The field office and laboratory services for density testing work supplied by SCI Engineering was for compaction and/or density testing of backfill at the site. The Subcontractor form in the Billing Package includes a table of Eligible Handling Charges as a Percentage of Cost based upon the Subcontract or Field Purchase Cost. AR, p. 62.

B. No Genuine Issues Of Material Fact Exist

As evidenced by the submission of the stipulation, the parties are in agreement with all relevant facts needed for the Board to consider while determining whether summary judgment is appropriate. The question in this case is not one of fact, but rather of law. Specifically, the question is whether the facts warrant the deduction of costs based on the dates that the costs were incurred and the nature of the costs.

C. The "Pre-IEMA" Costs Are Not Reimbursable

The Petitioner sought a total of \$91,384.99 in reimbursement. Following the application of a \$10,000.00 deduction, there remained a total of \$81,384.99 in reimbursable costs. Of that amount, the Illinois EPA deducted \$61,843.36 in costs as being ineligible for reimbursement. There are three groups of costs that make up that deduction. The first group involves costs that were incurred prior to the notification provided to IEMA by Cassen. These "pre-IEMA" costs, which total \$54,811.51, are detailed in Attachment A of the Illinois EPA's final decision under appeal. AR, p. 15.

Section 57.8(k) of the Act provides that the Illinois EPA shall not pay costs of corrective action or indemnification incurred before providing notification of the release of petroleum in accordance with the provisions of Title XVI of the Act. Similarly, Section 732.606(n) of the Board's regulations (35 Ill. Adm. Code 732.606(n)) provides that costs ineligible for reimbursement include costs of corrective action or indemnification incurred before providing notification of the release of petroleum to IEMA in accordance with Section 732.202 (35 Ill. Adm. Code 732.202).

As noted in the statement of facts above, the Petitioner acknowledges and admits that the costs noted in Item #1 of Attachment A of the final decision (AR, p. 15) were all incurred prior to the

date that the Petitioner informed IEMA of the release from the USTs in question. Those costs are:

Safety Partners Invoice #99185	\$4,715.00
Riverbend Contractors Invoices #974332, 974368	\$19,617.99
Ecological Systems Invoices #20647, 99-433, 206-46	\$4,455.12
Bluff City Minerals Invoices #13104, 13105	\$1,614.22
Waste Management Invoice #2450-0000049	\$24,279.18
Teklab Invoice #37609	<u>\$130.00</u>
Total	\$54,811.51

The Petitioner has admitted that all of those costs were incurred prior to IEMA notification. There are no facts that are relevant and were presented to the Illinois EPA at the time of their decision that would otherwise justify violation of Section 57.8(k) of the Act and Section 732.606(n) of the Board's regulations. Thus, the Board should find that the Illinois EPA properly denied the costs.

D. The Compaction And Backfill Density Testing Costs Are Not Reimbursable

The second group of costs deducted by the Illinois EPA relate to \$3,512.40 in costs for the compaction and density testing of backfill material. Pursuant to Section 732.606(w) of the Board's regulations, such costs are not eligible for reimbursement. The Illinois EPA also concluded that the costs were not related to corrective action. AR, p. 15. Those costs are listed in Item #2 of Attachment A of the final decision, and are comprised of the following costs:

Equipment Company at Mitchell Invoice #20834	\$1,290.40
SCI Engineering Invoices #3243, 3319	<u>\$2,222.00</u>
Total	\$3,512.40

The Petitioner has admitted and acknowledged in the facts above that those costs were indeed incurred as part of compaction and density testing of backfill. Since there is no dispute that the costs relate to work within the scope of Section 732.606(w) of the Board's regulations, the Illinois EPA's deduction of those costs on that basis was appropriate and should be upheld by the Board.

E. The Handling Charges Related To Ineligible Costs Are Not Reimbursable

The third group of costs deducted from the reimbursement request is \$3,519.45 in handling charges, an adjustment stemming from the deduction of the other ineligible costs noted above. As set forth in the reimbursement application submitted by Cassens, a total of \$5,510.04 in handling charges was sought for reimbursement. AR, p. 62. That figure was calculated based upon the total of the subcontractor charges and an application of the "sliding scale" found in Section 57.8(f) of the Act (415 ILCS 5/57.8(f)) and Section 732.607 of the Board's regulations (35 Ill. Adm. Code 732.607).

The total amount of the subcontractor charges set forth in the reimbursement application is \$72,200.85. After deducting the ineligible costs for subcontractors noted in the first two groups of deductions (i.e., all of the listed costs except for the Safety Partners costs (the prime consultant, for whom handling charges are not available) and the Equipment Company costs (for rental of compactor equipment, again not subject to a handling charge)), a revised total of \$19,882.34 should be used as the baseline for applying the sliding scale.² That figure yields an allowable handling charge of \$1,990.59. Subtracting that amount from the requested handling charge results in a difference of \$3,519.45, the amount deducted in the final decision. AR, p. 15.

As demonstrated above, the ineligible costs for subcontractors should not be approved for

² The original subcontractor total of \$72,200.85 minus the ineligible costs for Riverbend Contractors (\$19,617.99), Ecological Systems (\$4,455.12), Bluff City Minerals (\$1,614.22), Waste Management (\$24,279.18), Teklab (\$130.00),

reimbursement. That being the case, the handling charge amount must also be modified, and thus the Illinois EPA's adjustment in the handling charge amount was proper.

V. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's decision to deny approval of reimbursement of the costs identified in Attachment A of the final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

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and SCI Engineering (\$2,222.00), equals \$19,882.34.