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STATE OF ILLINOIS
Pollution Control Board
157 North Main Street
Suite 402
Edwardsville, Illinois 62025



OFFICE OF THE STATE'S ATTORNEY
MADISON COUNTY, ILLINOIS

William A. Mudge
State's Attorney

Voice: 618 692-6280
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June 15, 2004

Illinois Pollution Control Board
Philip Novak, Chairman
State of Illinois Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601

SENT VIA FAX AND MAIL

RE; PCB No. 01-102

Response to Motion for Summary Judgment and Motion for Summary Judgment

Dear Chairman Novak and Members of the Board:

Enclosed you will find the Response to the Motion for Summary Judgment previously filed by the Illinois EPA and Petitioner's Motion for Summary Judgment. In addition, I am forwarding a letter to the Board from Illinois Senator William R. Haine.

Petitioner does not request oral argument in this matter.

Please note that a copy of these documents is being sent by facsimile and mail this date to Hearing Officer Carol Sudman and Assistant Counsel John Kim.

Thank you for your cooperation in this matter.

Sincerely,

Dean Sweet, Assistant State's Attorney

CC: Hearing Officer Carol Sudman
Assistant Counsel John Kim

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STATE OF ILLINOIS
Pollution Control Board

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

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

PETITIONER'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT

NOW COMES the Petitioner, Cassens and Sons, Inc., by and through Assistant State's Attorney Dean E. Sweet and hereby respectfully responds to the Illinois EPA Motion for Summary Judgment.

I. STANDARD FOR ISSUANCE AND REVIEW

Petitioner agrees with the Illinois EPA that there are no genuine issues as to any material facts.

II. BURDEN OF PROOF

Petitioner agrees with the Illinois EPA regarding the allocation of the burden of proof.

III. ISSUE

Petitioner agrees with the of the Illinois EPA that the issue is whether the deductions imposed in the Agency's final decision dated November 29, 2000 are correct when taking into account the underlying facts and law. Petitioner disagrees with the argument and conclusions contained in Motion of the Illinois EPA.

IV. THE MOTION OF ILLINOIS EPA FOR SUMMARY JUDGMENT SHOULD BE DENIED

Petitioner submits that the Illinois EPA is NOT entitled to Summary Judgment based upon the facts and law.

A. Relevant Facts

Petitioner does not disagree with the relevant facts as stated in the Motion for Summary Judgment. However, Petitioner notes for the Board's attention the Permit for Removal for Underground Storage Tanks for Petroleum and Hazardous Materials signed by Fire Inspector Candela regarding the removal date March 16, 1989 at AR, pp 8-9 which does not indicate that there has been a release of petroleum or other materials.

B. The \$54,811 in Costs Plus the Related Handling Charges Are Reimbursable

The "Pre IEMA" costs, as referred to in the Motion of the Illinois EPA, are in fact reimbursable. The sole issue of disagreement between the parties concerns these costs and the associated handling charges. It is Petitioner's position that Petitioner complied with Section 732.202 or in the alternative was justified in not providing notice as follows:

- (a) **PRIOR NOTIFICATION RECEIVED BY THE ILLINOIS EPA.**
There is no question that the Illinois EPA and the Petitioner had the same actual knowledge of the fact of underground storage tanks and possible petroleum and hazardous materials releases as of March 1989. Petitioner had in fact had applied for and received a permit for removal of storage tanks and the site had been inspected and approved by Fire Inspector Candela, now deceased, AR pp 8-9. The actions of Petitioner at that time and the report of Candela gave the Illinois EPA actual and substantive knowledge of the possibility of a release. Any cleanup efforts instituted by Petitioner on or after that date literally and substantively place Petitioner in compliance with the applicable law, rules and regulations, including 35 Ill. Adm. Code sections 732.202 and 732.606(n).

- (b) **JUSTIFIABLE RELIANCE.** It is clear from the affidavit of William St. Peters that the Petitioner relied upon the information contained in the Permit for Removal of underground storage tanks and for petroleum and hazardous materials received by the Agency on or about March 27, 1989 AR, p. 8-9. (Affidavit of William St. Peters attached to joint stipulation.) Clearly the information contained in the report of Fire Inspector Candela of 1989 was incorrect, there had been a release. Petitioner began the project in good faith and in reliance upon the information which it had obtained after due diligence on its part. When the test reports were returned, indicating that the information from the State was inaccurate, additional notification was provided to the Agency with this new information. In this case, Petitioner was not relying on the information, advice or expertise of a third party, but rather upon information supplied by an official source of the State of Illinois, the Office of the State Fire Marshal.
- (c) **CASSENS and Sons, Inc.** was in fact the owner of the property at the time of question. However, the real party of interest will be the Madison County Mass Transit District, the present owner, which funded and over saw this project through a grant from Federal Governmental sources and local match funds. The Transit Hub and parking lot which was built at this location serves the residents of Madison County, including indigent, aged and disabled adults, with over 2 million riders county wide annually. The purpose of the project was to provide better service to those in need. The project was primarily funded from Federal Governmental sources and was originally budgeted based upon the information the information available, which included the incorrect information from 1989. The denial of this request will cause the

District to bear the additional costs of the cleanup with no additional Federal reimbursement.

- (d) The General Assembly has stated that it is the public policy of the State of Illinois for the State Government to encourage and assist local governments to adopt and implement environmental protection programs consistent with the Act, and in appropriate cases to afford financial assistance in preventing environmental damage. Paraphrase 415 ILCS 5/2(iv). Clearly, the Illinois EPA had actual notice, and the same notice as the Petitioner, of a problem at this site from 1989. In addition, the Petitioner was justified in relying on the documentation which it had received from the State of Illinois indicating that no release had occurred at the site. To penalize the Petitioner for failure to give additional notice and to rely on the actions and deeds of the Office of the State Fire Marshal is contrary to the public purpose of the Act, is contrary to the facts of this case, and is contrary to the law of the State of Illinois.

V. WAIVER OF CLAIM

The Petitioner hereby waives its appeal and any claim for additional reimbursement of the \$3512.40 related to the Compaction and Backfill Density Testing costs.

VI. CONCLUSION

Conclusion, for the reason stated herein Petitioner respectfully requests that the Board deny the Motion for Summary Judgment of the EPA, grant the appeal of Petitioner, and award the amount of \$54,811.51 plus applicable reimbursable handling charges related to such eligible costs.

RESPECTFULLY SUBMITTED,

BY:



Dean E. Sweet
Assistant State's Attorney
157 North Main Street
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618-296-5353
618-296-7001 FAX

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STATE OF ILLINOIS
Pollution Control Board

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

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

PETITIONER'S MOTION FOR SUMMARY JUDGMENT

NOW COMES the Petitioner, Cassens and Sons, Inc., by and through Assistant State's Attorney Dean E. Sweet and hereby respectfully moves the Illinois Pollution Control Board to enter summary judgment in favor of the Petitioner and against to the Illinois EPA. The Illinois EPA has previously filed a Motion for Summary Judgment. For consistency and to assist the Board, to the extent that the parties agree, the same facts and format are followed in this Motion. In support of this Motion the Petitioner states as follows:

I. STANDARD FOR ISSUANCE AND REVIEW

Petitioner agrees with the Illinois EPA that there are no genuine issues as to any material facts.

II. BURDEN OF PROOF

Petitioner agrees with the Illinois EPA regarding the allocation of the burden of proof.

III. ISSUE

Petitioner agrees with the of the Illinois EPA that the issue is whether the deductions imposed in the Agency's final decision dated November 29, 2000 are correct when taking into account the underlying facts and law. Petitioner disagrees with the argument and conclusions contained in Motion of the Illinois EPA.

IV. THE PETITIONER IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

Petitioner submits that it entitled to Summary Judgment based upon the following undisputed facts and law.

A. Relevant Facts

Petitioner does not disagree with the relevant facts as stated in the Motion for Summary Judgment previously filed by the Illinois EPA. However, Petitioner notes for the Board's attention the Permit for Removal for Underground Storage Tanks for Petroleum and Hazardous Materials signed by Fire Inspector Candela regarding the removal date March 16, 1989 at AR, pp 8-9 which does not indicate that there has been a release of petroleum or other materials.

B. The \$54,811 in Costs, Plus the Related Handling Charges Are Reimbursable

The "Pre IEMA" costs, as referred to in the Motion of the Illinois EPA, are in fact reimbursable. The sole issue of disagreement between the parties concerns these costs and the associated handling charges. It is Petitioner's position that Petitioner complied with Section 732.202 or in the alternative was justified in not providing notice as follows:

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There is no question that the Illinois EPA and the Petitioner had the same actual knowledge of the fact of underground storage tanks and possible petroleum and hazardous materials releases as of March 1989. Petitioner had in fact had applied for and received a permit for removal of storage tanks and the site had been inspected and approved by Fire Inspector Candela, now deceased, AR pp 8-9. The actions of Petitioner at that time and the report of Candela gave the Illinois EPA actual and substantive knowledge of the possibility of a release. Any cleanup efforts instituted by

Petitioner on or after that date literally and substantively place Petitioner in compliance with the applicable law, rules and regulations, including 35 Ill. Adm. Code sections 732.202 and 732.606(n).

- (b) **JUSTIFIABLE RELIANCE.** It is clear from the affidavit of William St. Peters that the Petitioner relied upon the information contained in the Permit for Removal of underground storage tanks and for petroleum and hazardous materials received by the Agency on or about March 27, 1989 AR, p. 8-9. (Affidavit of William St. Peters attached to joint stipulation.) Clearly the information contained in the report of Fire Inspector Candela of 1989 was incorrect, there had been a release. Petitioner began the project in good faith and in reliance upon the information which it had obtained after due diligence on its part. When the test reports were returned, indicating that the information from the State was inaccurate, additional notification was provided to the Agency with this new information. In this case, Petitioner was not relying on the information, advice or expertise of a third party, but rather upon information supplied by an official source of the State of Illinois, the Office of the State Fire Marshal.
- (c) **CASSENS and Sons, Inc.** was in fact the owner of the property at the time of question. However, the real party of interest will be the Madison County Mass Transit District, the present owner, which funded and over saw this project through a grant from Federal Governmental sources and local match funds. The Transit Hub and parking lot which was built at this location serves the residents of Madison County, including indigent, aged and disabled adults, with over 2 million riders county wide annually. The purpose of the project was to provide better service to those in

need. The project was primarily funded from Federal Governmental sources and was originally budgeted based upon the information the information available, which included the incorrect information from 1989. The denial of this request will cause the District to bear the additional costs of the cleanup with no additional Federal reimbursement.

- (d) The General Assembly has stated that it is the public policy of the State of Illinois for the State Government to encourage and assist local governments to adopt and implement environmental protection programs consistent with the Act, and in appropriate cases to afford financial assistance in preventing environmental damage. Paraphrase 415 ILCS 5/2(iv). Clearly, the Illinois EPA had actual notice, and the same notice as the Petitioner, of a problem at this site from 1989. In addition, the Petitioner was justified in relying on the documentation which it had received from the State of Illinois indicating that no release had occurred at the site. To penalize the Petitioner for failure to give additional notice and to rely on the actions and deeds of the Office of the State Fire Marshal is contrary to the public purpose of the Act, is contrary to the facts of this case, and is contrary to the law of the State of Illinois.

V. WAIVER OF CLAIM

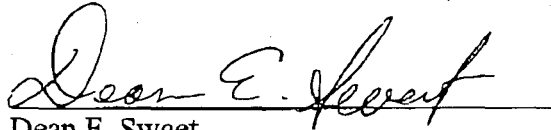
The Petitioner hereby waives its appeal and any claim for additional reimbursement of the \$3512.40 related to the Compaction and Backfill Density Testing costs.

VI. CONCLUSION

Conclusion, for the reason stated herein Petitioner respectfully requests that the Board grant this Motion for Summary Judgment, grant the appeal of Petitioner, and award the amount of \$54,811.51 plus applicable reimbursable handling charges related to such eligible costs.

RESPECTFULLY SUBMITTED,

BY:



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