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STATE OF ILLINOIS  
Pollution Control Board

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

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

NOTICE

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

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO PETITIONER'S RESPONSE, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
Respondent

  
\_\_\_\_\_  
John J. Kim  
Assistant Counsel  
Special Assistant Attorney General  
Division of Legal Counsel  
1021 North Grand Avenue, East  
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Springfield, Illinois 62794-9276  
217/782-5544  
217/782-9143 (TDD)  
Dated: August 6, 2004



petroleum or other materials. Petitioner's Motion, p. 2; AR, pp. 8, 9.

However, the permit for removal was issued before the removal of the tanks was conducted, therefore it would be impossible for that document to make reference to any leak discovered at the time of removal. AR, p. 9. Looking to the document signed by the OSFM inspector, it indeed does not indicate any notation by the inspector that a release had occurred. That omission notwithstanding, there is no relevance attached to that fact since the issue here does not turn on whether the OSFM inspector properly detected a release at the time of the tanks' removal. Rather, the issue turns on whether certain activities conducted by the Petitioner pre-dated the date of notification to the Illinois Emergency Management Agency ("IEMA") of a possible release. The Petitioner acknowledges that the activities in question pre-dated the notification. Petitioner's Motion, p. 2. Thus, the costs associated with those activities are clearly ineligible for reimbursement.

Further, the Petitioner somehow claims that the actions of the Petitioner at the time of the removal of the tanks in question put the Illinois EPA on actual and substantive knowledge that there was a possibility of a release from those tanks. Petitioner's Motion, p. 2. That is a statement stretches the facts at best. The Illinois EPA did apparently receive a copy of the removal report signed by the OSFM inspector. To conclude, however, that receipt of such a document puts the Illinois EPA on notice that there was a possibility of a release is both irrelevant and inconsequential. There was no actual or substantive notice on the part of the Illinois EPA that a release had occurred as evidenced by a report of a release provided to IEMA. The Illinois EPA and IEMA are separate state agencies, and even if there was actual notice of a release (which in this case there was not) provided to the Illinois EPA, such actual notice would still not constitute notice to the proper state

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<sup>1</sup> References to the Administrative Record will henceforth be done as "AR, p. \_\_\_."

agency (IEMA) as clearly required by the Act.

The issue here does not turn on whether the Illinois EPA had reason to believe that the Petitioner's tanks, or any underground storage tanks in the State, carry with them a possibility of a release. The issue here is whether the steps taken by the Petitioner, and not assumptions it seeks to impute upon the Illinois EPA, were such that costs associated with the steps are not eligible for reimbursement. Whether or not the Illinois EPA had reason to think that the Petitioner's tanks may have experienced a release does not change the fact that the Petitioner conducted activities prior to notifying IEMA of a release and that the Petitioner now seeks to be reimbursed for ineligible costs associated with those activities.

For the Petitioner to state that the Illinois EPA had actual knowledge of a possibility of release from tanks, and that actual knowledge of a possibility is akin to the Petitioner satisfying necessary notification requirements clearly set forth in the Illinois Environmental Protection Act ("Act") and related Board regulations, is an incredulous stretch of the facts and law. The Petitioner's statement that it literally and substantively complied with applicable laws and regulations is patently false. Petitioner's Motion, p. 3. The costs under appeal were indisputably incurred before the date that the Petitioner notified IEMA of a release from the tanks. There is nothing in the facts that can cause that fact pattern to change or be rendered immaterial.

The Petitioner also states that it was the fault of the State, and not the Petitioner, that created the situation at hand. The Petitioner argues that the document signed by the OSFM inspector did not include any notation of a release, and therefore the document was erroneous. Petitioner's Motion, p. 3. Thus, the reasoning goes that this inaccurate information from the State was relied upon to the detriment of the Petitioner. Setting aside that the Petitioner has not attempted to make any credible

argument regarding detrimental reliance, the lack of such a notation in the OSFM document does not in any way alleviate the Petitioner from its responsibilities and obligations set forth in the Act and Board regulations. It is the Petitioner's obligation to make a timely notification to IEMA of a release, and it is the Petitioner's restriction that costs associated with activities conducted prior to such notification to IEMA are not eligible for reimbursement.

## **II. The Financial Impact Of This Situation Does Not Justify Reversal**

The Petitioner argues that the present situation regarding the tank site and the costs associated with the remediation are such that an inequity will be created if the Illinois EPA's final decision is not overturned. Petitioner's Motion, pp. 3-4. The Illinois EPA acknowledges that the final decision under appeal may create a hardship to the Madison County Transit Mass Transit District ("District"), and that is certainly regrettable. However, in order for there to be some redress to the District in this situation, there must be a corresponding legal authority allowing for a change in the final decision. The Petitioner has identified none, as none exists.

Indeed, if the Board were to go beyond their statutory authority and attempt to resolve this case on the basis of argued inequities, it would do more extensive damage to the application and utilization of the Leaking Underground Storage Tank Program as a whole, since it would result in a decision that is without basis in either fact or law. That the District has found itself in a difficult position not necessarily of its own doing may be true, but equally true is that the Illinois EPA's final decision comported with the relevant law and properly applied the undisputed facts.

### III. Conclusion

For the reasons stated herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's final decision under appeal.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



John J. Kim  
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Dated: August 6, 2004

This filing submitted on recycled paper.

## CERTIFICATE OF SERVICE


I, the undersigned attorney at law, hereby certify that on August 6, 2004, I served true and correct copies of a RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT AND REPLY TO PETITIONER'S RESPONSE, 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

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