ILLINOIS POLLUTION CONTROL BOARD
November 18, 2004

CASSENS AND SONS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 01-102
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

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

Both the petitioner, Cassens and Sons, Inc. (Cassens) and the respondent, the Illinois Environmental Protection Agency (Agency) have filed motions for summary judgment in this proceeding. In addition, the parties have stipulated to a set of facts. As discussed below, the Board finds that there is no genuine issue of material fact and that summary judgment in favor of the Agency is appropriate. The Board grants the Agency's motion for summary judgment and denies Cassens' motion, thereby affirming the Agency's November 29, 2000 denial letter.

PROCEDURAL BACKGROUND

On November 29, 2000, the Agency denied reimbursement for $61,843.36 in costs for corrective action sought by Cassens. On January 2, 2001, Cassens filed this appeal.

On March 29, 2004, the parties filed a joint stipulation of facts[1] in this proceeding consisting of the affidavit of William St. Peters and a request to admit facts. Also on March 29, 2004, the Agency filed a motion for summary judgment. Cassens filed a response to the Agency's motion and its own motion for summary judgment on June 15, 2004. Cassens filed an open waiver of the statutory decision deadline in this matter.

FACTS

The stipulation of facts provides that Cassens believes the affidavit of William St. Peters, a Senior Environmental Specialist for Cassens' environmental consultant Safety Partners (Peters), contains information and testimony he would provide if called to testify in this matter.

[1] The Board will cite the joint stipulation of facts as "Stip. at __."; the affidavit of William St. Peters will be cited as "Aff. at __."; the request to admit facts will be cited as "Req. at __."; the Agency's motion for summary judgment will be cited as "Ag. Mot. at __."; Cassens' motion for summary judgment will be cited as "Cass. Mot. at __"; Cassens' response to the Agency's motion will be cited as "Cass. Resp. at __."; and the Agency's reply will be cited as "Reply at __."

Stip. at 1. The Agency believes some or all of the information in the affidavit is irrelevant, legally conclusory and otherwise objectionable, and would object to some or all of the information were he called to testify at hearing. *Id*. The parties agree that the facts contained in the request to admit are true and accurate. Stip. at 2.

On May 27, 1999, Cassens notified the Illinois Emergency Management Agency (IEMA) of a suspected release from underground storage tanks (USTs) at the Cassens site (site) located at 126 Hillsboro Avenue in Edwardsville, Illinois. The incident was assigned Incident # 991273. Req. at 1; AR at 5, 39. On December 2, 1999, Cassens submitted an Eligibility and Deductibility Application (E/D application) to Office of the State Fire Marshal (OSFM) stating that there were six USTs at the site, and that all six USTs had a release. Req. at 1; AR at 4-7.

Peters attests that four USTs were removed in 1989, and that an OSFM inspector did not declare any release. Aff. at 1. Peters states that in 1996, a due diligence Phase I and Phase II environmental assessment was performed and that based on the no release reported in 1989, no subsurface or investigative borings were taken. *Id*. Peters states that in May 1999, during removal of existing asphalt surfacing material and lighting structures, a hydraulic cylinder was discovered in the same area as the four USTs that were removed in 1989. *Id*. Peters avers that a soil sample was collected and analyzed to determine if contamination existed at the site. Aff. at 2.

Peters states that during the removal of impacted soil and prior to the results being known, notification of the Agency was delayed after internal discussion. Aff. at 2. Peters attests that the delay in reporting was based on the uncertainty of the level of contamination; the extent of contamination; the belief that the cleanup may be considered within the purview of the site remediation program; and the decision of the OSFM, based on information provided during the incident, that this was still an underground storage tank release. *Id*. Peters also states that notification of the release to IEMA was deferred until such information was available and that this was still considered by the OSFM an UST. *Id*.

On May 27, 1999, Cassens notified the IEMA of a suspected release from USTs at the Cassens site (site) located at 126 Hillsboro Avenue in Edwardsville, Illinois. The incident was assigned Incident # 991273. Req. at 1; AR at 5, 39. On December 2, 1999, Cassens submitted an E/D application to OSFM stating that there were six USTs at the site, and that all six USTs had a release. Req. at 1; AR at 4-7.

On February 16, 2000, OSFM issued a determination based on the E/D application that tanks 1 and 2 were eligible for reimbursement and that tanks 3 and 4 were ineligible for reimbursement. Req. at 2-3. The OSFM determined that Cassens was eligible to seek reimbursement of corrective action costs in excess of $10,000. Req. at 3.; AR at 10-12. On May 22, 2000, Cassens sent a Billing Package to the (Agency) 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. Req. at 2; AR at 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” that provided

in part, that ineligible costs include costs incurred prior to IEMA notification. Req. at 2; AR at 43. Allen Cassens, President of Cassens, and Talbert Eisenberg, Professional Engineer, signed the form. Req. at 2; AR at 43.

A number of invoices were included in the Billing Package. A Safety Partners Invoice, dated March 14, 2000, and identified as Invoice #99185 was included. (Req. at 3; AR at 58). On August 24, 2000, the Agency sent a letter to Cassens stating that the application for payment was incomplete due to a lack of supporting documentation. The Agency asked in part for dates of service and duties for the dates for the Personnel Summary Sheet for Safety Partners. Req. at 3; AR at 26-28. On September 21, 2000, Talbert Eisenberg of Safety Partners sent a letter to the Agency in response that included time sheets with dates, work descriptions, and hours in support of the previously submitted Personnel Summary Sheet. Req. at 4; AR at 29-31.

The Timesheet sent by Mr. Eisenberg of Safety Partners to the Agency included descriptions of work performed by different employees, including 20.5 hours of work by William St. Peters, a Senior Environmental Specialist, between May 18, 1999, and May 25, 1999; 39.5 hours of work by Michael Trgovich, a Supervisor, between May 18, 1999 and May 25, 1999; 21 hours of work by Robert Manton, a Laborer, between May 19, 1999 and May 25, 1999; 8 hours of work by Gene Heafner, a Laborer, on May 21, 1999. Req. at 4-5; AR at 30. The work performed by the Safety Partners employees, as described in the Timesheet sent by Safety Partners to the Agency, is the same as the work described in Safety Partners Invoice #99185. Req. at 5; AR at 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. Req. at 5; AR at 62. Riverbend Contractors Invoices #974332 and 974368 were included in the Billing Package. Req. at 5; AR at 64-68, 70-79.

Riverbend Contractors Invoice #974332 sought $1,712.95 for work performed on April 30, 1999, May 12, 1999, May 17, 1999, May 17, 1999, and May 18, 1999. Req. at 6; AR at 78-79.

Riverbend Contractors Invoice #974368 sought $17,905.04 for work performed on May 19, 1999, May 20, 1999, May 21, 1999, May 24, 1999, and May 25, 1999. Req. at 6; AR at 74-77.

The Subcontractor form in the Billing Package also included a line item for ESI, or Ecological Systems, Inc. that identified ESI as having billed $4,455.12 for waste-water disposal work. Req. at 6; AR at 62. ESI Invoice #99-433 sought $702.62 for work performed on May 20, 1999, the “Ship Date.” Req. at 6; AR at 82. ESI Invoice #20646 sought $1,662.50 for work performed on May 25, 1999, the “Received” date. Req. at 6; AR at 83. ESI Invoice #20647 sought $2,090 for work performed on May 24, 1999, the “Received” date. Req. at 6; AR at 81.

The Subcontractor form in the Billing Package also identified Bluff City Minerals as having billed $1,454.93 for 2" rock backfill, and $304.81 for aglime backfill. Req. at 7; AR at 62. Bluff City Minerals Invoice #13104 sought payment of $112.35 for product with a ticket date of May 24, 1999. Req. at 7; AR at 92. Bluff City Minerals Invoice #13105 sought payment of $1,501.87 for product with ticket dates all of May 25, 1999. Req. at 7; AR at 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. Req. at 7. Waste Management Invoice #2450-0000049 sought $24,279.18 for soil disposal on May 18, 1999, May 19, 1999, May 20, 1999, May 21, 1999, May 24, 1999, and May 25, 1999. Req. at 7; AR at 105.

The Subcontractor form in the Billing Package also included a line item for Teklab. The form identified Teklab as having billed $130 for landfill analysis work. Req. at 7; AR at 62. Teklab Invoice #37609 sought $130 for soil testing on May 4, 1999. Req. at 7; AR at 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. Req. at 8; AR at 48. Safety Partners Invoice #99185 85 includes a line item for Equipment Rental of a Compactor for a total amount of $1,290.40. Req. at 8; AR at 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. Req. at 8; AR at 29, 32. The Compactor line item found on the Equipment form in the Billing Package references the same compactor listed in Safety Partners Invoice #99185 and the item that is the subject of Equipment Company at Mitchell Invoice #20834. Req. at 8; AR at 32, 48, 58. The compactor was used for the compaction and/or density testing of backfill material at the site. Req. at 8.

The Subcontractor form in the Billing Package also included a line item for SCI Engineering billing $2,222 for compaction testing work. Req. at 8; AR at 62. SCI Invoices #3243 and 3319 were included in the Billing Package. Req. at 9; AR at 88-89. SCI Engineering Invoice #3243 sought $1,243.40 for field office and laboratory services for density testing. Req. at 9; AR at 88. SCI Engineering Invoice #3319 sought $978.60 for field office and laboratory services for density testing. Req. at 9; AR at 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. Req. at 9. 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. Req. at 9; AR at 62.

On November 29, 2000, the Agency denied reimbursement of $61,843.36 for costs of remediation at the site. AR at 13-15. Attachment A to the Agency's denial letter provided:

1. $54,811.51, deduction for costs for corrective action or indemnification that were incurred prior to the owner or operator providing notification of the release to the Illinois Emergency Management Agency (IEMA, formerly IESDA) (35 IAC Section 732.606(n) and Section 57.8(k) of the Act).

* * *

2. $3,512.40, deduction for costs associated with the compaction and density testing of backfill material (35 IAC Section 732.606(w)).

* * *

3. $3,519.45, adjustment in the handling charges due to the deduction(s) of ineligible costs (Section 57.8(f) of the Act and 35 IAC Section 732.607). Handling on ineligible subcontractors costs. AR at 15.

STATUTORY AND LEGAL BACKGROUND

Because this matter is before the Board on motions for summary judgment, the following section will set forth the standard of review for the consideration of a motion for summary judgment. The section will then include a discussion of the relevant law and standard of review to be applied in reviewing an appeal of an underground storage tank reimbursement.

Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is 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). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Both Cassens and the Agency have asked that the Board grant summary judgment in their favor. Upon reviewing the pleadings and the record in this matter, the Board agrees that there are no issues of material fact and that it may grant summary judgment as a matter of law. In determining whether to grant a motion for summary judgment, the Board must look to the burden of proof in an underground storage tank appeal and the arguments presented by the parties.

Underground Storage Tank Fund

In 1993, the General Assembly repealed Section 22.18b of the Environmental Protection Act (Act) and enacted a new Title XVI regarding UST Fund reimbursement applications and determinations. 415 ILCS 5/57 (2002). The new law provided that releases reported to the State on or after the effective date of the amendments, September 13, 1993, would proceed under the

new Title XVI. 415 ILCS 5/57.13(a) (2002). Owners or operators who reported releases prior to the effective date could choose to proceed under the new Title XVI by submitting a written statement of election to the Agency. 415 ILCS 5/57.13(b) (2002). Without a written statement of election, Section 22.18b would apply. Ted Harrison Oil Company v. IEPA, PCB 99-127 (July 24, 2003).

The parties agree that the release in this case was reported after the adoption of Title XVI. Req. at 1. Therefore, Title XVI governs these proceedings. An applicant may appeal an Agency decision denying reimbursement to the Board under the provisions of Section 40 of the Act (415 ILCS 5/40 (2002)). Under Section 40 of the Act (415 ILCS 5/40 (2002)), the Board's standard of review is whether the application as submitted to the Agency would not violate the Act and Board regulations. Browning Ferris Industries of Illinois v. IPCB, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2nd Dist. 1989). Therefore the Board must decide whether or not the application as submitted to the Agency, demonstrates compliance with the Act and Board regulations. Kathe's Auto Service Center v. IEPA, PCB 96-102 (Aug. 1, 1996). Further, the Agency's denial letter frames the issue on appeal. *Id*. Finally, the burden of proof is on the owner or operator, who must provide an accounting of all costs. Platolene 500, Inc. v. IEPA, PCB 92-9 (May 7, 1992).

Applicable Statutes and Regulations

Section 57.8(k) of the Act provides:

> (k) The Agency shall not pay costs of corrective action or indemnification incurred before providing notification of the release of petroleum in accordance with the provisions of this Title. 415 ILCS 5/57.8(k) (2002).

Section 732.202 of the Board's regulations provides, in part:

> **Section 732.202 Early Action**
>
> a) Upon confirmation of a release of petroleum from an UST system in accordance with regulations promulgated by the OSFM, the owner or operator, or both, shall perform the following initial response actions within 24 hours after the release:
>
> 1) Report the release to IEMA (e.g., by telephone or electronic mail);
>
> * * *
>
> BOARD NOTE: Owners or operators seeking reimbursement are to first notify IEMA of a suspected release and then confirm the release within seven days to IEMA pursuant to regulations promulgated by the OSFM. See 41 Ill. Adm. Code 170.560, 170.580, 170.600. The Board is setting the beginning of the reimbursement period at subsection (g) to correspond to the notification and confirmation to IEMA. 35 Ill. Adm. Code 732.202.

Section 732.606 of the Board's regulations provides, in part:

> **Section 732.606 Ineligible Costs**
>
> * * *
>
> Costs ineligible for payment from the Fund include but are not limited to:
>
> n) Costs of corrective action or indemnification incurred before providing notification of the release of petroleum to IEMA in accordance with Section 732.202 of this Part; * * * 35 Ill. Adm. Code 732.606.

MOTIONS FOR SUMMARY JUDGMENT

The following section will summarize the motions for summary judgment and the responses to each motion respectively.

Agency Motion for Summary Judgment

The Agency argues that there are no genuine issues of material fact and that it is entitled to summary judgment. Ag. Mot. at 1. The Agency asserts that the stipulation and arguments in the motion are sufficient for the Board to enter a dispositive order. Ag. Mot. at 2. The Agency breaks the deductions into three categories: (1) costs incurred prior to notification; (2) costs for compaction and density testing; and (3) costs for handling charges. Ag. Mot. at 11-13.

Costs Incurred Prior to Notification

The Agency argues that Section 57.8(k) of the Act provides that the Agency shall not pay costs of corrective action incurred before providing notification of the release of petroleum in accordance with Title XVI. Ag. Mot. at 11. Further, contends the Agency, the Board's regulations provide that costs ineligible for reimbursement include costs of corrective action or indemnification incurred before providing notification of the release to IEMA. *Id.*

The Agency argues that Cassens admits the costs in item#1 of Attachment A of the Agency's final decision were incurred prior to date it notified IEMA of the release from the USTs in question. Ag. Mot. at 11-12. The Agency asserts that no facts were presented to justify violation of Section 57.8(k) of the Act and 35 Ill. Adm. Code 732.606(n). Ag. Mot. at 12.

Compaction and Backfill Costs

The Agency asserts that the second group of non-reimbursed costs relate to compaction and density testing of backfill – costs not eligible for reimbursement under the Board's regulations. Ag. Mot. at 12. These costs are found in item #2 of Attachment A of the Agency's final decision. The Agency asserts that Cassens has admitted that these costs were incurred as a part of compaction and density testing of backfill, and that since no dispute exists that the costs relate to work within the scope of 35 Ill. Adm. Code 732.606(w), the Agency decision should be upheld. Ag. Mot. at 13.

Handling Charges

The Agency asserts that the third group of deducted costs is an adjustment of $3,519.45 in handling charges stemming from the deduction of the other ineligible costs. Ag. Mot. at 13. The Agency asserts that Cassens used the sliding scale in Section 57.8(f) of the Act and 35 Ill. Adm. Code 732.607 to calculate the $5,510.04 in handling charges it seeks to have reimbursed. *Id*. The Agency notes that the total amount of subcontractor charges in the reimbursement application is $72,200.85. The Agency deducts the costs it deems ineligible ($19,617.99 for Riverbend Contractors, $4,455.12 for Ecological Systems, $1,614.22 for Bluff City Minerals, $24,279.18 for Waste Management, $130 for Teklab, and $2,2222 for SCI Engineering) and finds the revised total of $19,882.34 should be used as the baseline for any handling charge calculations made under the Act and regulations. *Id*. Using $19,882.34, the Agency calculates that $1,990.59 is the allowable handling charge, and deducts the difference ($3,519.45) in its final decision. *Id*.

Cassens' Motion for Summary Judgment and Response to Agency Motion

Cassens' motion for summary judgment and response to the Agency's motion for summary judgment are substantively identical. The Board will summarize the arguments contained therein together. Cassens agrees that no genuine issues of material facts exist in this matter. Cass. Resp. at 1; Cass. Mot. at 1.

Cassens argues that the pre-notification costs and the related handling charges are reimbursable. Cass. Resp. at 2; Cass. Mot. at 2. Cassens waives its appeal and claim for additional reimbursement for the $3,512.40 in costs related to the compaction and backfill density testing. Cass. Resp. at 4; Cass. Mot. at 4.

Cassens asserts that the Agency had the same actual knowledge of the fact of the USTs and the possible petroleum and hazardous materials releases in March 1989. Cass. Resp. at 2; Cass. Mot. at 2. Cassens contends that it had applied for and received a permit for removal of storage tanks and the site had been inspected and approved by Fire Inspector Candela. *Id*, citing AR at 8-9. Cassens argues that its actions at that time and the report of Candela gave the Agency actual and substantive knowledge of the possibility of a release, and that any cleanup efforts after that date place Cassens in compliance with the applicable law. Cass. Resp. at 2; Cass. Mot. at 2.

Cassens argues that it relied on the information contained in the permit for removal of USTs received by the Agency on March 27, 1989. Cass. Resp. at 3; Cass. Mot. at 3. Cassens asserts the information contained in the report was incorrect, and that it began the project in good faith in reliance on the information therein. *Id*. Cassens contends that when it learned the information was inaccurate, additional notification was provided to the Agency. *Id*. Cassens notes that it was not relying on the information of a third-party, but by information supplied by an official source of the State of Illinois – the Office of the State Fire Marshal. *Id*.

Cassens stresses that although it was the owner of the property at the time in question, the real party of interest will be the Madison County Mass Transit District – the present owner – that funded and managed a project through a grant from the Federal government to build a transit hub

and parking lot at the site. Cass. Resp. at 3; Cass. Mot. at 3. Cassens states that the hub serves the citizens of Madison County, including indigent, aged and disabled adults with over two million riders county wide annually. *Id.*

Cassens asserts that the General Assembly has stated it is the public policy of the State of Illinos for state government to encourage and assist local governments to adopt and implement environmental protection programs consistent with the Act and to, in appropriate cases, afford financial assistance in preventing environmental damage. Cass. Resp. at 4; Cass. Mot. at 4. Cassens asserts that penalizing it for failing to give additional notice and for relying on the actions and deeds of the OSFM is contrary to the public purpose of the Act and to the law of the State of Illinois. *Id.*

Agency's Response to Cassens' Motion for Summary Judgment and Reply to Cassens' Response

The Agency argues that Cassens misstates facts and makes erroneous conclusions in its motion and response. Reply at 1. The Agency notes that the permit for removal referenced by Cassens was actually issued before the removal of the tanks was conducted, thereby making it impossible for that document to make reference to any leak discovered at the time of removal. Reply at 2. The Agency acknowledges that the document signed by the OSFM inspector does not indicate a release had occurred, but attaches no relevance to the fact since the issue turns not on whether the OSFM inspector detected a release, but whether certain activities conducted by Cassens predate IEMA notification. *Id.*

The Agency refutes that Cassens' actions at removal put it on actual notice of a possibility of a release from the tank. Reply at 2. The Agency admits it received a copy of the OSFM removal report, but contends that the receipt was irrelevant and inconsequential. *Id.* The Agency argues that there was no actual or substantive notice that a release occurred as evidenced by a report of a release to IEMA. *Id.* The Agency notes that it and IEMA are two separate state agencies and that even if actual notice of the release were given to the Agency (which the Agency contends did not happen), it would still not constitute proper notice to IEMA as required by the Act. Reply at 2-3.

The Agency asserts that the financial impact of the situation does not justify reversal of the Agency's final decision. Reply at 4. The Agency argues that there is no legal authority allowing for a change of its final decision, and that Cassens has not identified any. *Id.* The Agency argues that if the Board were to go beyond its statutory authority to resolve this case on the basis of the argued inequities, it would damage the utilization of the UST program as a whole since the decision would be without basis in fact or law. *Id.*

DISCUSSION

Having determined that summary judgment is appropriate, the Board will examine which party's motion should be granted. Essentially, the Board must decide only one issue in order to rule on the cross-motions for summary judgment - whether the costs of corrective action incurred prior to Cassens' notification of IEMA are reimbursable. The decision on handling charges

stems directly from whether or not the pre-notification denials are upheld, and Cassens has waived any claim to the denial of costs for compaction and backfill testing. The Board will elaborate on each of these issues below.

It is well-settled that the denial letter frames the issues on appeal. Centralia v. IEPA, PCB 89-170 at 6 (May 10, 1990). As discussed above, the burden of proof is on the petitioner to prove that the Agency's denial letter was insufficient to warrant affirmation. If the Agency's denial letter does not make the petitioner aware of the statutory and regulatory bases for denial, the proceeding may be fundamentally unfair. Rosman, PCB 91-80, slip op. at 11 (Dec. 19, 1991); citing Pulitzer, PCB 90-142 at 7 (Oct. 20, 1990). Here, the Agency's denial letter specifically stated that the $54,811.51 in costs was denied because they were incurred prior to the owner or operator providing notification of the release to IEMA. Further, the denial letter included a reference to the Act and Board regulations addressing that requirement. *Id*.

Cassens does not dispute that the costs were incurred prior to the notification of IEMA, but argues the Agency had actual knowledge regarding the USTs and the possible petroleum and hazardous materials releases as early as March 1989, because of the permit for removal of storage tanks and the inspection by OSFM inspector Candela. The Board is not persuaded by this argument. The governing statute and Board regulations make it clear that costs of corrective action or indemnification that are incurred before providing notification of the release of petroleum to IEMA are not eligible for reimbursement. Further, both Board and Illinois Appellate Court precedent establish that such pre-IEMA notification costs are not reimbursable. *See* ZMC, Inc. v. IEPA, PCB 93-100 (Aug. 26, 1993); Kronon Motor Sales v. PCB, 241 Ill. App. 3d 766, 609 N.E.2d 678 (1st Dist. 1992). A review of the record shows that the costs denied by the Agency all were incurred prior to May 27, 1999 – the date that Cassens notified IEMA of a suspected release.

Even if Cassens had, as it argues, notified the Agency of the release, the notification requirement would still not be met. Both the statute and the Board regulations require notification not of the Agency, but of IEMA. *See* 415 ILCS 5/57(k) (2002); 35 Ill. Adm. Code 732.606(n). Further, IEMA and the Agency are two separate and distinct State agencies. Notification of one State agency does not result in notification of all others. To so hold would result in an untenable situation and completely ignore the plain language of the statute and regulation specifically requiring that IEMA be notified before costs are reimbursable from the fund.

Similarly, the Board is not convinced by Cassens' claim of justifiable reliance. Once again, the fact that the OSFM inspector did not report a release when the tanks were removed in 1989, does not obviate the need for compliance with the Act and Board regulations before reimbursement from the UST fund. The Board agrees with the Agency that a potential hardship to the Madison County Mass Transit District, unfortunate thought it may be, does not provide the Board with discretion to ignore the clear language of the Act and Board regulations. Accordingly, the Board finds that no genuine issue of material fact exists that the Agency's letter appropriately denies reimbursement on the basis that the costs were incurred prior to notification.

As previously stated, the decision on handling charges is based solely on the denial of the pre-notification costs. Cassens has not challenged the denial of the handling charges on any other grounds. As the Board has found the Agency properly denied reimbursement of the pre-notification costs, it also finds that the denial of reimbursement for the handling charges was also appropriate.

CONCLUSION

Based on the record before it, the Board finds that there is no genuine issue as to any material fact and that the Agency is entitled to judgment as a matter of law. Accordingly, the Board affirms the Agency's November 29, 2000 decision denying reimbursement for $54,811.51 for costs incurred prior to notification of the release to IEMA, $3,512.40 for costs associated with the compaction and density testing of backfill material, and $3,519.45 for handling charges.

This opinion constitutes the Board's findings of fact and conclusions of law.

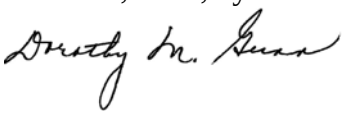
ORDER

The Board denies Cassens' motion for summary judgment and grants the Agency's motion in this matter. The Board affirms the Agency's November 29, 2000 decision denying reimbursement for $54,811.51 for costs incurred prior to notification of the release to IEMA, $3,512.40 for costs associated with the compaction and density testing of backfill material, and $3,519.45 for handling charges. There are no remaining issues in this proceeding and the docket is closed.

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 5/41(a) (2000); *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 opinion and order on November 18, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board