BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ESTATE OF GERALD D. SLIGHTOM, Petitioner,	)	
v.	)	PCB 11-25
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 N. Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

Melanie Jarvis
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), Petitioner's Reply in Support of Motion to Compel Deposition, a copy of which is herewith served upon the hearing officer and upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon the hearing officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said hearing officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office mailbox in Springfield, Illinois on the 29th day of July, 2011.

Respectfully submitted,
ESTATE OF GERALD D. SLIGHTOM, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323
Telephone: 217/528-2517
Facsimile: 217/528-2553

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ESTATE OF GERALD D. SLIGHTOM, Petitioner,	)	
v.	)	PCB 11-25
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITIONER'S REPLY IN SUPPORT OF MOTION TO COMPEL DEPOSITION

NOW COMES Petitioner, Estate of Gerald D. Slightom (hereinafter "the Estate"), pursuant to the Order of the Hearing Officer dated July 19, 2011, by it's undersigned attorneys, moves to compel the deposition of Catherine S. Elston, stating as follows:

I. THE ESTATE IS NOT THE DECEDENT.

The Agency erroneously argues that the Estate is one and the same as the decedent, Gerald Slightom, so as to falsely claim that the Petitioner applied for two deductibility determinations. (Obj. Pet's Mot. Compel, at p. 9) This is incorrect as a matter of fact, of probate law and of environmental law.

Gerald Dean Slightom died September 5, 2007, and on September 20, 2007, Richard D. Slightom was appointed the executor of the Estate. (Ex. A)[1] The Estate did not exist in 1991, and could not have performed any function prior to September of 2007.

An "estate" is simply the sum of the property interests, real or personal, that the law recognizes as being subject to descent and distribution. In re Estate of Barnes, 133 Ill. App. 3d

[1] Exhibit A was not selected by the Agency to be in the administrative record, though it was filed with the Office of the State Fire Marshall as part of requesting access to the LUST Fund, and other application materials were selected. (Rec. 31-34)

361, 365 (1st Dist. 1985). The estate is a collection of non-sentient things placed under the control of the Circuit Courts of Illinois, which ultimately appoint an executor as "an officer of the court" to administer the estate under the Probate Act. In re Estate of Spaits, 117 Ill. App. 3d 142, 149 (5th Dist. 1983). The purposes of administering the estate are to marshal the assets of the estate, pay its debts, and distribute the residue to the heirs. Id.

An estate is not deemed to possess the knowledge of the decedent, but must be specifically informed of any obligations through timely presentment of claims to the court or executor. 755 ILCS 5/18-1. For example, an estate does not know about any lawsuits pending against the decedent at the time of death unless formally notified of them. In re Estate of Worrell, 92 Ill. 2d 412, 418 (1982). This is true even though the lawsuit was filed in the same court in which the estate was probated. Id.

Similarly, the Illinois Environmental Protection Act treats an estate as a separate legal entity. See 415 ILCS 5/3.315 (definition of "person"), as does the Office of the State Fire Marshall (hereinafter "OSFM") regulations. 41 Ill. Adm. Code 174.100 (definition of "person") For purposes of the LUST program, there is a very practical reason for treating the estate as a separate entity: the federal tax code requires an estate to be treated as a separate person, which must obtain it's own taxpayer identification number. (26 CFR 301.7701-6(a)) To receive reimbursement from the LUST Fund, a federal taxpayer identification number, (35 Ill. Admin. Code § 734.605(b)(5)), as was provided here. (Rec. 61)

The Agency's actions in this case are consistent with treating the estate as a separate legal entity. On February 22, 2008, the Estate filed it's election to proceed as "owner" of the

unfinished cleanup after having "acquired an ownership interest in the . . . site." (Exhibit B)[2] On March 3, 2008, the Agency accepted the election, stating in particular:

> **As the new owner, you may be eligible to access the Underground Storage Tank Fund for payment of costs related to remediation of the releases. For information regarding eligibility and the deductible amount to be paid, please contact the Office of the State Fire Marshal at 217/785-5878.** (Exhibit C)[3]

In other words, the Agency believes a "new owner" must obtain their own eligibility and deductibility determination. In order to get such a determination, the Estate had to prove to OSFM that the prior owner was dead, and an executor had been appointed to take possession of the property on which their had been a release. (Ex. A)

The claim that the Estate was involved in or knew of events prior to September of 2007, which is being made to argue against discovery, is without basis. The Estate is a "new owner," separate and distinct from prior owners, and it certainly did not, and could not have applied for anything twenty years ago.

II. THE PURPOSE OF A SUMMARY JUDGMENT PROCEEDING IS TO DETERMINE WHETHER THE AFFIDAVITS AND DEPOSITIONS OBVIATE THE NEED FOR A HEARING.

The Agency incorrectly claims that the pending summary judgment motion obviates the need for discovery, when in fact, discovery is an essential component of this type of motion. A motion for summary judgement is based upon "the record, including pleadings, depositions and admissions on file, together with any affidavits." (35 Ill. Admin. Code § 101.516(b)) These

---

[2] Exhibit B was not selected by the Agency to be in the administrative record.

[3] Exhibit C was not selected by the Agency to be in the administrative record, although the date of the Estate's "opt in" is noted in various places in the administrative record. (E.g., Rec. 119)

materials serve "as a substitute for testimony at trial." Robidoux v. Oliphant, 201 Ill. 2d 324, 335 (2002). 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. 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." Metropolitan Pier and Exposition Authority v. IEPA, PCB 10-37 (July 7, 2011). A summary judgment motion is only appropriate if the evidence that would be presented at hearing is such that a hearing would not be necessary.

There are two procedural problems with going forward with the motion for summary judgment at this time. The first is that the Board will not have in it's possession all of the evidence that would be heard on the issues raised in the Amended Petition. The implicit holding in Des Plaines River Watershed Alliance v. IEPA, PCB 2004-088, at p. 5 (April 21, 2005) is that a continuance should be granted if specific persons are identified from whom affidavits cannot be procured. Petitioner will further address this point in the next section.

The second procedural problem is the motion for summary judgment is incomplete on it's face. "The summary judgment movant is obligated to demonstrate the absence of factual dispute with respect to all issues raised by the pleadings, including the absence of factual dispute regarding an affirmative defense raised by the party's opponent." West Suburban Mass Transit Dist. v. Conrail, 210 Ill. App. 3d 484, 488 (1st Dist. 1991) (emphasis added). The Agency did not respond to the issues raised in Petitioner's Amended Petition, and in particular it did not address the affirmative defenses of estoppel and laches raised therein. (Amend. Pet. ¶ 18) In other words, even if we assume for the sake of argument that the Agency correctly states the law

in it's motion for summary judgment, it still might also be true that the Agency is barred by estoppel and waiver from succeeding on this point due to prior Agency actions. The purpose of summary judgment is to seek to try the issues presented in the pleadings in order to save time and money, if the pending motion does not address all of the issues, then there will no savings in time and money.

While Petitioner does not expect the Hearing Officer to rule on the merits of the motion for summary judgment, we do wish Petitioner's concerns to be understood. Absent the ability to provide the evidence it would present at hearing, as well as motions addressing all of the issues in the pleadings, there is a substantial risk of multiple briefings and Board reviews, when, with a small amount of effort, Petitioner would be in a position to file a cross-motion for summary judgment, which would raise a strong presumption that all evidence and issues are before the Board.

III. PETITIONER IS SEEKING DISCOVERY AND EVIDENTIARY FOUNDATION FOR THE NEW INFORMATION RELIED UPON BY THE AGENCY.

Petitioner's need for evidence from the Agency stems primarily from the Agency's failure to follow it's own practices and comport with Board procedures. As stated in the Agency's own motion for summary judgment, the only question before the Board is "whether or not the application as submitted demonstrates compliance with the Act and Board regulations." (Mot. S.J. at p. 3 (citing Rantoul Township H.S. Dist. No. 193 v. IEPA, PCB 03-42 (April 17, 2003)).

The Agency relied upon information that was not submitted in the application. The subject application for payment contained the only deductibility determination ever issued to the Petitioner. (Rec. 209-210) The application also included the Agency's prior decision in which the $10,000 deductible was applied. (Rec. 206-208) If the Agency had acted on the basis

of the application as submitted, there would be no evidentiary issues. However, it appears that some time between August 4, 2010 and October 28, 2010, the Agency conducted some sort of investigation of files at the Agency and the OSFM, the details of which are known only to the Agency. Counsel for the Agency states that the administrative record it selected to file with the Board "consists of the entire Fiscal File regarding this site." (Obj. To Mot. Compel, at p. 1) Assuming this statement is true, it is revealing. Pages 37 through 215 of the administrative record appears to be the core fiscal file, consisting of applications for payment, review notes and decisions. Pages 1 - 36, however, consists of something different. These appear to be documents pulled from a selective investigation of other Agency and OSFM files. These are mostly dated from 1990-1991, but it also appears that the Agency has attempted to look behind the OSFM final eligibility determination issued to Petitioner by obtaining some, but not all, of the application materials. (Rec. 31-34)

All of the is surprising because the Agency has represented to the Board and the Board has agreed that this cannot happen. In the last significant revision to the LUST program's procedural rules, the Agency convinced the Board to remove the requirement of a Wells letter, which had given the applicant the opportunity to respond to new information that the Agency intended to rely upon before a final decision is made. The reason the Wells letter requirement was removed was given as follows:

> **The Agency noted that the Act does not require a draft decision letter prior to denying a request. PC 4 at 22. The Agency argued that the issuance of a draft denial letter in the UST program is not required by Wells Manufacturing Co. v. IEPA, 195 Ill. App. 3d 593, 552 N.E.2d 1074 (1st Dist. 1990). PC 4 at 24-25. The Agency pointed out that, with the UST program, the Agency makes determinations based on the information provided by owner or operator unlike the permit program where information from the public is considered. PC 4 at 26. The purpose of a Wells letter in the permit**

> **program is to notify the applicant of a potential denial of a permit because of information beyond the contents of a permit application. PC 4 at 25. This situation does not occur in the UST program. PC 4 at 26.**

(In re Proposed Amendments To: Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 734), R04-23 (Feb. 17, 2005).

That "situation" occurred here. Petitioner wants to present the testimony from the reviewer to establish beyond a doubt that the Agency relied upon information outside of the application submitted by the Petitioner, the nature and scope of the external investigation performed by the Agency, and the reason why certain documents were included in the administrative record and others (such as those attached hereto) were excluded.

Despite the Agency's claims to the contrary, the Board has traditionally accepted such testimony either at hearing or through deposition. The Board has long held that "the appellant is entitled to a hearing to determine whether or not such material was relied upon and further to explore what it discovers." Soil Enrichment Materials Corp. v. EPA, 5 Ill. PCB 715 (1972). Indeed, due process requires the opportunity "to test the validity of the information the Agency relie[d] upon in denying its application." EPA v. Pollution Control Board , 115 Ill. 2d 65, 70 (1986). The Board has also historically accepted testimony at hearing or through deposition to explain the record. See, e.g., Saline County Landfill v. Illinois EPA, PCB 02-108 (May 16, 2002) (affirming hearing officer admission of deposition testimony of agency employees which explained the administrative record of the permit appeal). The purpose of the hearing it to allow Petitioner to "cross-examine and present testimony to challenge the information relied on by the Agency for the denial." Weeke Oil Co. V. Illinois EPA, PCB No. 10-1 (May 20, 2010) (emphasis added).

Again, Petitioner is not interested in anything the Agency did or knew after its decision was reached, just testimony concerning the information relied upon by the Agency for it's denial.

IV. THIS DISPUTE WAS RIPE.

While this issue may be moot at this point, Petitioner wishes to address the claims of ripeness, so that they are not waived. This motion was filed pursuant to Section 101.616 of the Board's Procedural Rules, which states in relevant part:

> **If the parties cannot agree on the scope of discovery or the time or location of any deposition, the hearing officer has the authority to order discovery or deny requests for discovery.** (35 Ill. Adm. Cod 101.616(c))

The only prerequisite to the hearing officer ordering discovery is the existence of a bona fide discovery dispute. Counsel for the Agency rejected Petitioner's request to set a convenient time for the deposition on the grounds that discovery is inappropriate in this case. "It is a basic legal tenet that the law never requires the performance of a useless or futile act." People v. Cameron, 286 Ill. App. 3d 541, 544 (1st Dist. 1997). Petitioner believes that once the Agency indicated it was objecting to any discovery in this proceeding, preparing and filing documents to schedule the time and place of the deposition was futile and created unnecessary expenses, including the motion to quash.

Without waiving it's position, Petitioner will be filing a response to the motion to quash stating that it does not object to the motion being granted. While the availability of discovery is in dispute, there is no reason for the deposition to go forward.

WHEREFORE, Petitioner prays for an order from the Hearing Officer compelling the Agency to make Catherine S. Elston available for a discovery deposition, or for such other and

further relief as the Hearing Officer deems meet and just.

Respectfully submitted,

ESTATE OF GERALD D. SLIGHTOM, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323
Telephone: 217/528-2517
Facsimile: 217/528-2553

C:\Mapa\CSD Environmental\Slightom\Reply to Obj to Dep.wpd/lck 7/29/11 2:28 pm

THIS FILING SUBMITTED ON RECYCLED PAPER

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
MACOUPIN COUNTY, ILLINOIS

ESTATE OF GERALD DEAN SLIGHTOM,	)	IN PROBATE
	)	
DECEASED	)	DOCKET NO. 2007-P-137

LETTERS OF OFFICE - DECEDENT'S ESTATE

RICHARD D. SLIGHTOM has been appointed executor of the Estate of GERALD DEAN SLIGHTOM, who died September 5, 2007, and is authorized to take possession of and collect the estate of the decedent, and to do all acts required of him by law.

WITNESS, 9-20, 2007.

Mike Matthies

Clerk of the Circuit Court

(Seal of Court)

.....

CERTIFICATE

I certify that this a copy of the letters of office now in force in this estate.

Dated: 9-20, 2007.

Mike Matthies

Clerk of the Circuit Court

(Seal of Court)

Prepared by:
Bill Nichelson
Attorney at Law
P.O. Box 290
Virden, IL 62690
(217) 965-1400

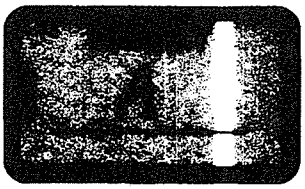

EXHIBIT A

[illegible]

Illinois Environmental Protection Agency

Leaking Underground Storage Tank Program

Election to Proceed as "Owner"

A. Site Identification

IEMA Incident # (6- or 8-digit): 912456 IEPA LPC # (10-digit): 1170455005

Site Name: Former Robinson Service Station (closed facility)

Site Address (Not a P.O. Box): 103 N. 3rd St. (aka 3rd & Center Street)

City: Girard County: Macoupin Zip Code: 62640

Leaking UST Technical File

B. Election

Pursuant to Section 57.2 of the Environmental Protection Act [415 ILCS 5/57.2], I hereby elect to proceed as an "owner under Title XVI of the Environmental Protection Act. I certify that I have acquired an ownership interest in the above-named site, that one or more underground storage tanks registered with the Office of the State Fire Marshal have been removed from the site, and that corrective action on the site has not yet resulted in the issuance of a "no further remediation letter" by the Illinois EPA pursuant to Title XVI of the Environmental Protection Act.

I understand that by making this election I become subject to all of the responsibilities and liabilities of an "owner" under Title XVI of the Environmental Protection Act and the Illinois Pollution Control Board's rules at 35 Ill. Adm. Code 734. I further understand that, once made, this election cannot be withdrawn.

C. Signature

Person electing to proceed as "owner":

Name: Estate of Gerald D. Slightom

Contact: Richard D. Slightom, Executor

Address: %Bill Nichelson, Atty. at Law, P.O. Box 290

City: Virden

State: Illinois

Zip Code: 62690

Phone: 217-965-1400

Signature: [illegible]

Date: [illegible]

Election to Proceed as "Owner"

EXHIBIT B

IL 532 2823
LPC 629 January 2006

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 – (217) 782-3397
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601 – (312) 814-6026

ROD R. BLAGOJEVICH, GOVERNOR DOUGLAS P. SCOTT, DIRECTOR

217/782-6762

CERTIFIED MAIL
7007 0220 0000 0149 6332

MAR 03 2008

Estate of Gerald D. Slightom
P.O. Box 290, c/o Bill Nichelson, Atty at Law
Virden, IL 62690

Re: LPC #1170455005 -- Macoupin County
Girard/Slightom, Gerald
3rd & Center
Leaking UST Incident No. 912456
Leaking UST Technical File

Dear Sir or Madam:

On February 22, 2008, the Illinois Environmental Protection Agency (Illinois EPA) received the Election to Proceed as "Owner" form (electing to proceed under Title XVI of the Act as amended by Public Act 94-0274) dated February 16, 2008 for the above-referenced incident. Citations in this letter are from the Environmental Protection Act (Act) and 35 Illinois Administrative Code (35 Ill. Adm. Code).

By signing the form, you certified that you have acquired an ownership interest in the above-referenced site, one or more underground storage tanks registered with the Office of the State Fire Marshal have been removed from the site, and corrective action on the site has not yet resulted in the issuance of a "no further remediation letter" by the Illinois EPA pursuant to Title XVI of the Act. Based upon this certification, your Election to Proceed as "Owner" is accepted (Section 57.13 of the Act and 35 Ill. Adm. Code 734.105).

As the new owner, you may be eligible to access the Underground Storage Tank Fund for payment of costs related to remediation of the release. For information regarding eligibility and the deductible amount to be paid, please contact the Office of the State Fire Marshal at 217/785-5878.

Please submit all correspondence in duplicate and include the Re: block shown at the beginning of this letter.

EXHIBIT
C
PG. 1 OF 2

If you have any questions or need further assistance, please contact Michelle Bentley at 217/524-6713.

Sincerely,

Douglas W. Clay, P.E., Manager
Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

cc: LCU
Division File

EXHIBIT C
PG.2 of 2