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

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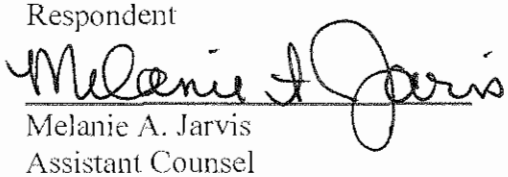
PLEASE TAKE NOTICE that I have today, on behalf of the Illinois Environmental Protection Agency, filed with the office of the Clerk of the Pollution Control Board a REPLY TO PETITIONER'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT and a RESPONSE TO PETITIONER'S MOTION FOR INTERLOCUTORY APPEAL, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Dated: September 13, 2011

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

REPLY TO PETITIONER'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, 101.502, 101.616, and 101.622 hereby respectfully moves the Illinois Pollution Control Board ("Board") to **GRANT** summary judgment to the **Illinois EPA**. In support of said motion, the Illinois EPA states as follows:

I. ARGUMENT

1. One Deductible Applies

There exists no genuine issue of material fact or law. Pursuant to Section 415 ILCS 5/57.9(b), one deductible of $10,000 applies to the Underground Storage Tank Fund costs, except in three situations. When no tanks are registered prior to July 28, 1989, such tanks have a deductible of $100,000. (*See*: 415 ILCS 5/57.9(b) (1)). If any underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release prior to that date, a deductible of $50,000 is assessed. (*See*: 415 ILCS 5/57(b) (2)) When one or more, but not all, of the underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release on or after that date, a deductible of $15,000 applies.

In this matter, all tanks (and the only release identified at this site) had been assigned a deductible of $100,000, under the December 6, 1991, application. Since "no ne" of the 5 underground storage tanks identified were registered prior to July 28, 1989, the deductable in Subsection (b)(1) applied.

Section (b)(1) is specific in noting that if none of tanks were registered prior to July 28, 1989, whether there was a confirmed release or not1, a deductible of $100,000 applies. All tanks within the December 6, 1991, application and the January 24, 2008, application were not registered prior to that date and therefore, the $100,000 deductable applies. In short, there is no issue of fact, nor law and as such, the Illinois EPA's Motion for Summary Judgment should be granted. The Illinois EPA clearly has presented a justiciable matter in its motion, and as such, the Board need consider not more facts or argument. However, should the Board entertain discussion; the Illinois EPA provides the following arguments.

2. If Two Deductibles Exist, Which Applies?

Let us just assume for argument's sake that the second deductible has some legal force, which it does not. In such a case, the Board note that it has already specifically spoken on this very issue and could not have spoken more expressly and clearer on the outcome of multiple deductible determinations. Section 732.603(b) (4) of the Board's regulation s states:

> ***"Where more than one deductible determination is made, the higher deductible shall apply."***

When acting on the submittal of the December 6, 1991, application, the Illinois EPA, whose duty included eligibility determinations at that time, made a deductible determination of $100,000. (AR, p.13) Again, this statutory provision applies when no tanks on-site had been registered prior to a

1 It is important to note that the General Assembly drafted Subsection (b) (1) without use of the phrase "... and the State received notice of the confirmed release prior to (*on or after*) July 28, 1989." This would suggest that, unlike Subsections (b) (2) and (3), for purposes of Subsection (b) (1) it is not important when the release occurs if there were no registered tanks prior to ("before") the date of July 28, 1989. As such, in this matter, the date of the release may be irrelevant to this review.

date certain. Section 57.9 of the Act states as follows:

> ***"A deductible of $100,000 shall apply when none of the underground storage tanks were registered prior to July 28, 1989, except in the case of underground storage tanks used exclusively to store heating oil for consumptive use on the premises where stored and which serve other than farms or residential units, a deductible of $100,000 shall apply when none of these tanks were registered prior to July 1, 1992." (Emphasis added)***

Following the December 6, 1991, application, which found the above provision applicable, the Estate, acting upon the same release that the decedent had already sought a determination upon, sought yet another eligibility and deductibility determination from OSFM. (AR, p.29) Now, once again, even assuming that the February 6, 2008, OSFM decision of a second lower deductible determination is valid (which the Illinois EPA does not concede), Section 732.603(b)(4) of the regulations controls the outcome of the Illinois EPA's actions on review of costs associated with a release (attributable to tanks already removed) since this regulation is specific in stating that the larger of the two deductibles shall control.

As stated many times by the Illinois EPA, this case is very simple and straight forward. It is a case where the relevant facts are not in dispute. The fact remains that one deductable applies for one release, regardless of whether there is a new owner.2

3. The Question of Estoppel

a. Petitioner's argument regarding estoppel is unpersuasive.

As the Board stated in its decision in **White and Brewer Trucking v. Illinois EPA**, PCB 96-250 (March 20, 1997), "The doctrine of equitable estoppel may be applied when a party reasonably and detrimentally relies on the words or conduct of another. (See **Brown's Furniture, Inc. v. Wagner,** 171 Ill. 2d 410, 431, 665 N.E.2d 795, 806 (1996).) However, the doctrine "should not be

2 Note: The Illinois EPA has not briefed the issue of whether an administrator of an estate is in the legal sense a "new" owner but offers this statement purely to differentiate the two deductibles. The Illinois EPA does note however, that it would be simplistic to argue that the estate of a decedent should not be allowed to somehow avail itself to a differing determination than the decedent himself had been able to establish under the same exact facts and law. This argument is presented in more detail below.

invoked against a public body except under compelling circumstances, where such invocation would not defeat the operation of public policy." (**Gorgees v. Daley**, 256 Ill. App. 3d 143, 147, 628 N.E.2d 721, 725 (1st Dist. 1993).) As the Illinois Supreme Court has explained, "[t]his court's reluctance to apply the doctrine of estoppel against the State has been motivated by the concern that doing so 'may impair the functioning of the State in discharge of its government functions, and that valuable public interests may be jeopardized or lost by negligence, mistakes or inattention of public officials.'" (**Brown's Furniture**, 171 Ill. 2d at 431-432, 665 N.E.2d at 806 (quoting **Hickey v. Illinois Central R.R. Co.**, 35 Ill. 2d 427, 447-448, 220 N.E.2d 415, 426 (1966)); see also **Tri-County Landfill Company v. Pollution Control Board**, 41 Ill. App. 3d 249, 353 N.E.2d 316 (2d Dist. 1976) (refusing to estop the Agency from enforcing the Act against various landfills that it had previously approved on the grounds that to do so would violate public policy).)"

Here an administrative error was made that resulted in the application of the improper deductible by the Illinois EPA. However, just because an error was made, that does not mean that the Illinois EPA is required to continue to make that error ad infinitum. An administrative agency can correct its mistakes. In this case, the $100,000 deductible was overlooked until the entire file was reviewed. Once the $100,000 deductible was found, the Illinois EPA was within its authority as administrator of the Fund to apply the correct deductible and to recoup payment made in error when applying the $10,000 deductible. The case law clearly supports the Illinois EPA's position that it is entitled to correct a mistake without estoppel being attached.

b. Regarding principles of estoppel, at best, Petitioner itself must be estopped.

The Petitioner's argument of estoppel applying in this case has merit, only in the fact that, if anyone is estopped in this case, it is the Petitioner. Once a determination is made for the eligibility of the tanks, the determination follows the release and the incident. A determination was made for Lust Incident Number 912456, the only release relative to this action and the Illinois EPA applied a

$100,000 deductible. That decision was not challenged and thus is legally binding. Again, no new release was reported or identified at the site. The $100,000 deductible follows the incident number, no matter how many owners elect to proceed. A determination of $100,000 was made, it follows the incident number, and under Illinois law, it is the deductible that applies at the site for this release. In short, Petitioner, or in this case the estate of Petitioner does not get a second bite of the apple.

From a standpoint of equity, Petitioner's estate cannot establish any facts that would suggest that it somehow should be allowed to sit in a better position than the decedent did when alive. No new facts are present. No new incident exists. In a legal sense, regarding the principles of estoppel, it is the Petitioner itself whom must be estopped from claiming that it should now have the lower deductible apply.

What the Illinois EPA has argued, to date, is the fact that two deductibles, **relating to one incident/release**, are within the Illinois EPA's file and the Illinois EPA applied the higher deductible consistent with State law.

4. Petitioner's claim it was directed to seek a new determination is not credible

The Petitioner contends that Illinois EPA believes that a new owner/operator must obtain their own eligibility and deductibility determination. Again, the Petitioner takes the opportunity to place words within the State's mouth. In support of this claim, Petitioner offers the following, part of a letter:

> "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 Marshall at 217.785-5878."

Illinois EPA will grant that the words "eligibility" and "deductible" appear in these two sentences. However, to contend that the Illinois EPA has any other meaning than to provide that information on those topics can be gained from contacting OSFM is unsupportable. And it does not mean that the Illinois EPA informed Petitioner that it required its own eligibility and deductable

determination. For that matter, where is the directive that Petitioner "must" do anything? This provision does not even go so far as to insure payment of costs – other than to provide that Petitioner, as new owner, may be eligible for payment relative to a release. Petitioner's argument is wholly without merit or credibility.

5. Other Red Herring Arguments by Petitioner

The Petitioner seems to throw in everything and the proverbial Constitutional3 kitchen sink. We find these arguments to be specious and meant for harassment only. The fact remains that the issue in this case is simple. The Petitioner seems to think that if it gets the Board off track that the Board will ignore the plain reading of its own regulations and find in the Petitioner's favor. The Illinois EPA addresses some of these arguments below.

a. Wells is inapplicable in LUST cases.

The Petitioner knows that the Wells letter does not apply to LUST appeals, yet it has once again brought up the issue knowing it cannot cite to any cases where a Wells letter has ever been applied to LUST appeals. In fact, the Petitioner notes that the requirement was specifically removed from the regulations as not applying to the LUST program. The Petitioner attempts to paint a picture of Illinois EPA doing something nefarious. To the contrary.

The Illinois EPA does not dispute the Petitioner's allegation that the correct deductible of $100,000 was not included in the Petitioner's application for reimbursement. It was not. The Illinois EPA does not dispute that it looked at its files to determine if the correct deductible was being applied. It did. I am sure that if Illinois EPA's review of the file had determined a finding in the Petitioner's favor, it would not be complaining about the review, but would be grateful that the Illinois EPA was diligent. Unfortunately for the Petitioner, the review of the application and file was not in its favor.

3 Petitioner does not provide if he is concerned with any specific constitution either federal or state, however, either seem as inapplicable as the other. For that matter, it is difficult to assert a right to fundamental fairness as a penumbra for a right claimed in this case.

The Illinois EPA is allowed to review the entire Illinois EPA file when reviewing applications to make sure that the applications are complete and not misleading. The Illinois EPA did its due diligence when reviewing the Petitioner's application and will not apologize for doing so. There are no issues of **material** fact left in this case and discovery is therefore unwarranted.

b. Zervos Three is not applicable.

The Petitioner cites to a relatively new Board decision, **Zervos three v. Illinois EPA**, PCB 10-54 (January 20, 2011) for the proposition that Petitioner should be unjustly enriched. **Zervos Three** involved a situation where a party failed to elect to proceed under the act prior to commencing work on a site. It did not involve the issue at hand in this case: Which deductible should apply when two are issued for the same incident? The question here is simple. The Board's regulations could not be clearer. One incident, one deductible and if two are issued for the same incident, then the higher deductible applies. Here there is a Petitioner that is the continuation of the prior owner after death. Not an independent third party trying to do a good deed by cleaning up another's mess. By grasping at straws in citing the **Zervos Three** case, Petitioner is again asking to be unjustly enriched. It is not equitable to have a new owner treated in a manner that the prior owner would not be treated but for not the change in ownership.

c. No principle of Fundamental Fairness is offrunted and no Constitutional issue is present.

Finally the Petitioner, in a series of separate arguments, argues what boils down to that the Board's regulation is unconstitutional because it is fundamentally unfair. As stated above, it is not equitable to have a new owner treated in a manner that the prior owner would not be treated but for not the change in ownership. The Board's regulation was intended to stop confusion when a party, sometime the same party would apply for multiple eligibility and deductibility determinations from the OSFM in order to get a more favorable determination. The Board is well aware of situation where a

pseudo tank was place in the ground momentarily in order to subvert the legislative intent of this section. That is not the case here. However, it is not fair to allow new owners to be treated in a more advantageous manner than the prior owner. That is what the Petitioner urges the Board to hold. It would lead to more litigation and place the LUST program back into the uncertainty that existed prior to the current regulations being promulgated. While the Board's regulations are not fundamentally unfair, what the Petitioner is asking the Board to hold is.

6. The Administrative Record is complete.

Section 105.410 details what is required to be included in the Administrative Record. Subsection (b) states specifically as follows:

"b) The record must include:

1) The plan or budget submittal or other request that requires an Agency decision;

2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the plan or budget submittal or other request;

3) The final determination letter; and

4) Any other information the Agency relied upon in making its determination.

What can be said regarding an appeal of a LUST matter, is that, when a decision is made, the Illinois EPA will file a record indicating its basis for the decision. The record filed in this case contains what is required by Board regulations. The record contains the documents relied upon by the Illinois EPA in making its decision. (See the Affidavit of Brian Bauer, attached.) It is uncontroverted that the basis for the challenged decision has been included within the record. (PCB Regulation 35 Ill. Adm. Code 105.410 and AR, p. 13 and AR, p.29) The record reflects the exact facts in this case.

The Illinois EPA has complied with this Section of the Board's regulations and has submitted a complete Administrative Record with all of the documents that it relied upon when making its determination. Any other documents proffered by the Petitioner are not documents relied upon by the Illinois EPA when making this decision and as such do not belong in the Administrative Record.

II. CONCLUSION

The Board has, through its regulations, promulgated a bright line test as to what deductible applies this situation. This is not the case to dim that bright line. For the reasons stated herein, the Illinois EPA respectfully requests that the Board, **GRANT** the **Illinois EPA's** Motion for Summary Judgment.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

Melanie A. Jarvis
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217/782-5544, 217/782-9143 (TDD)
Dated: September 13, 2011

STATE OF ILLINOIS)
) SS
SANGAMON COUNTY)

AFFIDAVIT

I, Brian Bauer, upon my oath, do hereby state as follows:

1. I am employed as an Environmental Protection Engineer III for the Illinois Environmental Protection Agency ("Illinois EPA").
2. I prepared and have reviewed the Illinois EPA's Administrative Record filed with the Illinois Pollution Control Board in the case of Estate of Gerald D. Slightom v. IEPA, PCB 11-25.
3. The documents contained within the Administrative Record are the only documents that were relied upon by the Illinois EPA in reviewing the submittal at issue in Estate of Gerald D. Slightom v. IEPA, PCB 11-25

FURTHER AFFIANT SAYETH NOT.

Brian Bauer

Subscribed and sworn to before me
this 9th day of September 2011.

Notary Public

OFFICIAL SEAL
MICHAEL E. DURA
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 10-30-2012

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

RESPONSE TO PETITIONER'S MOTION FOR INTERLOCUTORY APPEAL

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, 101.502, 101.616, and 101.622 hereby respectfully moves the Illinois Pollution Control Board ("Board") to DENY the Petitioner's Motion for Interlocutory Appeal. In support of said motion, the Illinois EPA states as follows:

The issues pertaining to the Petitioner's Motion have been extensively briefed by the Illinois EPA and the Petitioner. In order to be brief, the Illinois EPA directs the Board to it prior pleadings and has summarized said positions below for the Board's convenience.

1. Discovery is not Warranted

This case is very simple and straight forward. It is a case where the relevant facts are not in dispute. The Petitioner knew (and continues to know) which determination Illinois EPA applied to its application. It was clear from the Illinois EPA's decision letter. Petitioner was entitled to challenge whether the Illinois EPA applied the correct determination, which it did. However seeking discovery on this issue is unwarranted since the issue has become solely a matter of law (i.e., was the correct determination applied).

2. Discovery is not Warranted When a Motion for Summary Judgment is Pending.

Discovery in a case such as this would be wasteful and is harassing to the Illinois EPA. The Board has determined that it will not entertain discovery when a Motion for Summary Judgment is pending. In the case of Des Plaines River Watershed Alliance v. IEPA, PCB 04-88 (Nov. 17, 2005), the Board didn't decide whether discovery was warranted until after it ruled on the Motion for Summary Judgment. The Illinois EPA suggests that such an outcome was reasonable when a dispositive motion is on file. The same reasoning should be applied to these facts and Petitioner's Motion should be dismissed.

3. The Board is to Decide the Case Based Exclusively Upon the Administrative Record.

The Administrative Record has been filed in this matter and, based upon precedent rationale the Petitioner's Motion for Interlocutory Appeal must be DENIED.

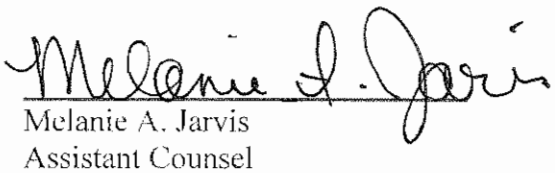
Section 105.214(a) of the Board's regulations states, "... the hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record pursuant to Section 40(d) of the Act. If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with respect to the issue of fact." In this case, a Motion for Summary Judgment has been filed and there is no material issue of fact upon which a hearing needs to be held. Therefore, as Section 105.214(a) states, the Board is to decide the case based exclusively upon the record before the Illinois EPA at the time the decision was made.

III. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board **DENY** the Petitioner's Motion for Interlocutory Appeal.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



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Dated: September 13, 2011

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on September 13, 2011, I served true and correct copies of a REPLY TO PETITIONER'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT and a RESPONSE TO PETITIONER'S MOTION FOR INTERLOCUTORY APPEAL via the Board's COOL system and 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:

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