BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ESTATE OF GERALD D. SLIGHTOM, Petitioner,	)	
v.	)	PCB No. 11-25
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

To: Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North 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), a MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT DIRECTED TO BOARD, a copy of which is herewith served 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 counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 27th of September, 2011.

Respectfully submitted,
ESTATE OF GERALD D. SLIGHTOM, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
MOHAN, ALEWELT, PRILLAMAN & ADAMI
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MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT INSTANTER DIRECTED TO THE BOARD

NOW COMES Petitioner, Estate of Gerald D. Slightom (hereinafter "the Estate"), pursuant to Section 101.500 of the Board's Procedural Rules (35 Ill. Admin. Code 101.500), moves for leave to file a Surreply in Opposition to Motion for Summary Judgment Instanter, stating further as follows:

1. Respondent Illinois Environmental Protection Agency has filed a motion for summary judgment herein.

2. On September 6, 2011, the Estate filed (i) a response to the motion for summary judgment and (ii) an appeal from an order of the Hearing Officer denying a request for discovery before the summary judgment motion is ruled upon.

3. On September 13, 2011, Respondent filed a reply in support of its motion for summary judgment and a response to the appeal from the Hearing Officer order.

4. The Reply contains new evidence and new legal arguments, to wit: an affidavit from an Agency employee, some unsupported factual allegations in the reply and brand new legal

arguments concerning estoppel.

5. Since the Estate did not have an opportunity to respond to the new evidence and new legal arguments made for the first time in the reply, it would be materially prejudiced if it was not given an opportunity to respond to them before the Board either ruled on the motion for summary judgment or the related discovery issues.

6. The Board has previously authorized a surreply to be filed where it would help to provide a complete briefing of the issues in the case. Ozinga Transportation Services, v. Illinois EPA, PCB No. 00-188, at p. 18 (Dec. 20, 2001).

7. The current decision deadline in this case is May 14, 2012, and Petitioner is willing to extend the decision deadline to allow for the surreply if needed.

WHEREFORE, Petitioner, ESTATE OF GERALD D. SLIGHTOM, prays for leave to file the Surreply in Opposition to Motion for Summary Judgment Instanter, or for such other and further relief as it deems meet and just.

ESTATE OF GERALD D. SLIGHTOM,
Petitioner

By its attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI

By: /s/ Patrick D. Shaw

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Respectfully submitted,
ESTATE OF GERALD D. SLIGHTOM, Petitioner

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SURREPLY IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, Estate of Gerald D. Slightom (hereinafter "the Estate"), pursuant to Section 101.500 of the Board's Procedural Rules (35 Ill. Admin. Code 101.500), and presents this Surreply in Opposition to Motion for Summary Judgment, stating as follows:

I. THE AFFIDAVIT OF BRIAN BAUER SHOULD BE STRICKEN OR ALTERNATIVELY, LEAVE TO DEPOSE BAUER SHOULD BE ALLOWED.

While the Agency claims that this is a simple legal issue, its filing of the affidavit of Brian Bauer, evidences factual issues remain surrounding its development of the record.

First, an affidavit in support of summary judgment must be made on the "personal knowledge of the affiant[]." (S. Ct. R. 191(a)) Bauer's deposition lacks adequate foundation to demonstrate personal knowledge of the conclusions alleged. According to the Agency record, Catherine Elston was the reviewer of this submittal. (Rec. at 111) Bauer's affidavit does not allege that he reviewed and rejected the payment application at issue, so there is no credible

information establishing personal knowledge of the events described. See Cole Taylor Bank v. Corrigan, 230 Ill. App. 3d 122, 129 (2nd Dist. 1992) (striking affidavit of vice president for lack of facts demonstrating familiarity with events described). As in Cole Taylor Bank, the Agency seeks to use a summary judgment motion to prevent access to information solely in its possession, and as in that case, the motion should be denied and the cause continued. Id. at 128 (finding that trial court violated fundamental fairness by refusing a motion to allow discovery and by granting summary judgment on the basis of bank officer's conclusive affidavit).

Second, the affidavit is conclusory and fails to address the specific issues raised in these proceedings. The Agency tells the Board (though Bauer does not) that the subject document "was overlooked until the entire file was reviewed." (Reply at p. 4 (emphasis added)) Yet, the Estate has submitted an affidavit from its consultant identifying documents that certainly should have been in "the entire file" (Resp. M.S.J., Ex. 1 (affidavit of Thorpe), Ex. B (application to IEPA), Ex. C (approval by IEPA), & Ex. D (excerpt from report submitted to IEPA). Since the counteraffidavit does not expressly challenge the affidavit of Thorpe, the only logical assumption at this time (without witnesses testimony) is that (a) the Agency's claim that it reviewed the entire file and (b) Bauer's claim that the record contains "the only documents that were relied upon by the Illinois EPA in reviewing the submittal," is that the documents reviewed by the Agency and the documents relied upon by the Agency are not coterminous groups. The claims made by the Agency in its Reply are not supported by Bauer's affidavit.

Moreover, none of the statements made by the Agency or Bauer reconcile the presence of documents from OSFM's files in the Agency record. (Rec. at 31-34) Again, the Agency's claim that it reviewed "the entire file" does not comport with the presence of materials from another

unit of government's file, unless the words being used having completely self-serving meanings, i.e. we reviewed tons of documents, but these are only the ones that help our cause.[1]

Nor does the affidavit, or the reply brief, address the authority of the Agency to (a) seek from the Board a determination that OSFM's eligibility and deductibility determination was erroneous, (b) consider information not submitted by the applicant, (c) consider information from OSFM, or (d) reject an application for payment based upon materials previously approved in the related budgets? For that matter, what is the Board's authority to affirm the Agency's decision under these considerations? The facts in the affidavit must align with a cognizable legal authority for those facts to be relevant. Assuming *in arguendo* that these are all of the materials relied upon by the Agency, reliance in and of itself does not determine whether such reliance was legally appropriate. To use a blunt analogy, suppose that an Agency reviewer relied upon a one-thousand dollar personal check in making a determination, and dutifully attaches a copy of the check to the administrative record. The fact that the check was relied upon in reaching the final decision does not moot the need to demonstrate factually and legally that such reliance was proper.

Alternatively, the presence of the affidavit of Bauer raises an additional concern. While the Estate has no way of knowing for sure without discovery, the affidavit suggests that Catherine Elston might not possess personal knowledge of all of the facts and circumstances

[1] If the documents obtained from OSFM are the only ones in the Agency's possession then the most probable reason (again without the benefit of witness testimony) is that Brian Bauer or someone else from the Agency spoke with a representative from OSFM, inquired about the contents of OSFM's files and afterword requested only those documents which it thought useful in seeking to undermine the OSFM's determination. Such an interview, though not reduced to writing, is as much a part of the record of this case as if it had been written down.

surrounding the subject document. In Des Plaines River Watershed Alliance v. IEPA, PCB 04-88, at p. 53 (April 19, 2007), the Board denied discovery for want of specificity, but still indicated that the parties should have offered evidentiary testimony at hearing. If the Board proceeds in that fashion here, Petitioner fears that at hearing it will learn that several people from the Agency and the OSFM are required to testify to understand the totality of the circumstances surrounding the investigation and discovery of said document. An important purpose of discovery is to allow counsel to be prepared for hearing so that the facts and issues can be presented efficiently without undue delays caused by surprise. If the Board decides not to strike the affidavit, Petitioner asks leave to depose Brian Bauer concerning the facts and circumstances surrounding that matters conclusorily stated therein.

II. THE AGENCY HAS NOT ESTABLISHED A LACK OF FACTUAL DISPUTE CONCERNING THE CLAIM OF EQUITABLE ESTOPPEL.

"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). "Whether the doctrine of estoppel may be applied against a municipal corporation in a given case will be determined from a consideration of all the circumstances of the case. If under all of the circumstances the affirmative acts of the public body have created a situation where it would be inequitable and unjust to permit it to deny what it has done or permitted to be done, the doctrine of estoppel may be applied against it." Wachta v. Pollution Control Bd., 8 Ill. App. 3d 436, 439 (2d Dist. 1972).

"We perceive no unique exception to the application of the principle of estoppel, in the proper case, to the Pollution Control Board or the Environmental Protection Agency." Id. at 440. As in Wachta , the Agency committed "the positive act" of approving the project which induced the Estate to continue their cleanup project, expending substantial sums of money and incurring heavy continuing liabilities, and an estoppel would be appropriate to prevent the Agency from retracting what it has done.

Furthermore, the cautionary guidance from Brown's Furniture v. Wager, 171 Ill. 2d 410 (1996), is inapplicable here. There, the Court emphasized that public interests may be jeopardized by "negligence, mistakes or inattention of public officials" by general application of estoppel principles. Id. at 431-32. This is an appeal from the Agency's rejection of an application for payment, for work and budgets previously approved. The legislature has uniquely determined that if the Agency fails to approve the application for payment within 120 days, it is deemed approved by operation of law. (415 ILCS 5/57.8(a)(1)) As such, the legislature has already determined that any mistakes, negligence or inattention by the Agency are less important than issuing payment for work performed.

The Estate has presented a meritorious case of estoppel based solely upon the record. The Agency made several approvals (the election to proceed as owner, four site investigation budgets, and the last site investigation report) which the Estate relied upon to its detriment. The Estate believes additional evidence would also show the circumstances under which the new document was discovered, the failure to identify the document on the Agency's on-line database, and the circumstances surrounding the OSFM's 1990 administrative order, which directed the prior owner to register the hearing oil tanks prior to July 1, 1992. Mendota v. Pollution Control Bd.,

161 Ill. App. 3d 203, 209 (3d Dist. 1987) ("whether the doctrine of equitable estoppel may be applied against a municipal corporation in a given case depends on the totality of the circumstances.")

Furthermore, the Agency's claim that once a determination is made "the determination follows the release and the incident" (Reply at p. 4), is contrary to the Agency's own decisions denying reimbursement to a new owner, who submits the eligibility and deductibility determination made to the prior owner. (See, e.g., Exhibit A) Indeed, this claim is contrary to the reason given in the denial letter herein, which presumes the existence of more than one deductibles, but seeks to apply the rule of the worst deductible controls. In any event, the Agency's claim that no facts are present overlooks the fact that the laws and regulations have changed dramatically over a generation. The OSFM was required to make the determination based upon existing law and information in its possession, including its previous treatment of the heating oil tank registered prior to July 1, 1992. None of this is to continence the Agency's improper attempt to collaterally attack the OSFM's final determination.

Accordingly, the Estate's claim that equitable estoppel should apply against the Agency has not been established to be without merit, and therefore even if the motion for summary judgment is deemed meritorious, the affirmative defenses should be considered through discovery and hearing.

III. THE AGENCY HAS NOT ESTABLISHED A LACK OF FACTUAL DISPUTE CONCERNING THE CLAIM OF LACHES.

The Estate also alleged the affirmative defense of laches in paragraph 18 of its Amended

Petition, which has not been addressed in the Agency's reply. When the doctrine of laches is applied, it is not so dependent on the specific act or omission of one party and the reliance of the other. In laches, there occurs inaction or delay that, coupled with a change of circumstances, would render it unfair to make a claim. "The two fundamental elements of *laches* are lack of due diligence by the party asserting the claim and prejudice to the opposing party." Van Milligan v. Fire & Police Comm'rs, 158 Ill. 2d 85, 89 (1994). While there is also some reluctance to apply laches against the government, the doctrine will, as in the case of equitable estoppel, apply in the right circumstances. Id. at pp. 90-91.

The totality of the circumstances which made up the Agency's delay in claiming a different deductible are known only by the Agency, and consequently in the event the Board agrees with the Agency's motion for summary judgment, the cause should be continued for discovery and hearing on the issues estoppel and laches.

IV. THE ATTEMPT TO WORK AN ESTOPPEL AGAINST THE ESTATE IS NONSENSICAL.

The Agency's claim that Petitioner, or something called "the estate of Petitioner" should instead be estopped is nonsensical. Estoppel is premised by a positive act by one party that induces prejudicial reliance on the opposing party. See Patrick Engineering v. City of Naperville, 2011 Ill. App. 2d 100695, ¶ 32 (2d Dist. 2011) ("estoppel focuses on the effect of the first party's actions that are alleged to have misled the other party and the prejudice that allegedly arose from the other party's reliance on those actions.")

The Agency has not identified any action taken by Petitioner, which it relied upon to its

detriment. First of all Petitioner is the Estate and not the prior owner. The Agency appears to be suggesting, without stating, its belief that the Estate and the decedent are one in the same. See Reply, at p. 5 ("the estate of Petitioner does not get a second bite of the apple.") To the extent that a question is raised on the separateness of the legal identities of the current and past owner, Petitioner incorporates by reference its arguments already on file in this matter. (Petitioner's Reply in Support of Motion to Compel Deposition, at pp. 2-4)

Second, the Estate, unlike the Agency, followed the letter of the law by electing to be the new owner, obtaining an eligibility and deductibility determination from the OSFM, and attaching a copy of the OSFM determination with every budget, report and application for payment made in this case. The facts show that the Agency did not rely upon any action by Petitioner to its prejudice, but relied upon its own "found" document. It ignored Petitioner's positive action, while ignoring the requirements of the Act at the same time.

To the extent the Agency is actually arguing that the equities do not favor application of estoppel in favor of Petitioner, then that argument should have been made and should be assessed by the totality of the factual circumstances following discovery and hearing.

V. CONCLUSION

The organizational framework of an appeal is based upon the concept of "scope of review" and it applies in this case both to the Agency and the Board. There is a fundamental problem with the motion for summary judgement, and its supporting reply, in that they fail to provide legal justification for the Agency's reliance on the 1991 document. If the scope of

review of the Agency, as well as the Board, is limited to the application as submitted, then there appears to be no question that the Agency's denial reason was in error. This conclusion is buttressed by the totality of the legal framework of the LUST program, with its pre-approved budgets, limited review of applications for payment, and exclusive authority over eligibility and deductibility determinations in the only agency with direct knowledge of the registration history.

If, on the other, it is appropriate for the Agency to utilize this proceeding to seek to overrule the OSFM's determination, then the totality of circumstances needs to be presented, including the entire Agency file, the entire OSFM file, and the testimony of the relevant Agency witnesses and possibly OSFM personnel as to information relied upon, but not reduced to writing.

ESTATE OF GERALD D. SLIGHTOM,
Petitioner

By its attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI

By: /s/ Patrick D. Shaw

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276 • (217) 782-2829
James R. Thompson Center, 100 West Randolph, Suite 11-300, Chicago, IL 60601 • (312) 814-6026

PAT QUINN, GOVERNOR DOUGLAS P. SCOTT, DIRECTOR

217/782-6762

CERTIFIED MAIL #

JAN 0 7 2011

7009 2820 0001 7493 3753

Lakeland Food & Gas, Inc.
Kamlesh Patel
c/o CW^{3}M Company
P.O. Box 571
Carlinville, Illinois 62626

Re: LPC 0290255070—Coles County
Mattoon/ Willaredt Oil Co., Inc.
1420 Lakeland Boulevard
Incident-Claim No.: 922152—59292
Queue Date: September 27, 2010
Leaking UST Fiscal File

Dear Sir or Madam:

The Illinois Environmental Protection Agency (Illinois EPA) has completed the review of your application for payment from the Underground Storage Tank (UST) Fund for the above-referenced Leaking UST incident pursuant to Section 57.8(a) of the Illinois Environmental Protection Act (Act), as amended by Public Act 92-0554 on June 24, 2002, and 35 Illinois Administrative Code (35 Ill. Adm. Code) 734.Subpart F.

This information is dated September 24, 2010 and was received by the Illinois EPA on September 27, 2010. The application for payment covers the period from January 1, 2010 to August 31, 2010. The amount requested is $15,361.26.

On September 27, 2010, the Illinois EPA received your complete application for payment for this claim. As a result of the Illinois EPA's review of this application for payment, a voucher cannot be prepared for submission to the Comptroller's office for payment. Subsequent applications for payment that have been/are submitted will be processed based upon the date subsequent application for payment requests are received by the Illinois EPA. This constitutes the Illinois EPA's final action with regard to the above application(s) for payment.

There are costs from this claim that are not being paid. Listed at the top of page two are the costs that are not being paid and the reasons these costs are not being paid.

EXHIBIT A

$15,361.26, deduction for costs associated with any corrective action activities, services, or materials that were not accompanied by a copy of the eligibility and deductibility decision(s) made for the above-referenced occurrence(s) for accessing the Fund pursuant to Section 57.8 of the Act and 35 Ill. Adm. Code 734.135(a), 734.605(b)(3), and 734.630(s).

The Office of the State Fire Marshal has not issued an Eligibility and Deductibility determination letter for Lakeland Food and Gas. The Eligibility and Deductibility determination letter that was included with the application for payment states that Willaredt Oil Co., Inc. is eligible to seek payment from the Leaking UST fund.

An underground storage tank system owner or operator may appeal this decision to the Illinois Pollution Control Board. Appeal rights are attached.

If you have any questions or require further assistance, please contact Brad Dilbaitis of my staff at (217) 785-8378 or at Bradley.Dilbaitis@illinois.gov.

Sincerely,

Hernando A. Albarracin

Hernando A. Albarracin, Manager
Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

HAA:BD

Attachment: Appeal Rights

c: Leaking UST Claims Unit

Appeal Rights

An underground storage tank owner or operator may appeal this final decision to the Illinois Pollution Control Board pursuant to Sections 40 and 57.7(c)(4) of the Act by filing a petition for a hearing within 35 days after the date of issuance of the final decision. However, the 35-day period may be extended for a period of time not to exceed 90 days by written notice from the owner or operator and the Illinois EPA within the initial 35-day appeal period. If the owner or operator wishes to receive a 90-day extension, a written request that includes a statement of the date the final decision was received, along with a copy of this decision, must be sent to the Illinois EPA as soon as possible.

For information regarding the filing of an appeal, please contact:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph, Suite 11-500
Chicago, IL 60601
312/814-3620

For information regarding the filing of an extension, please contact:

Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
Post Office Box 19276
Springfield, IL 62794-9276
217/782-5544