ILLINOIS POLLUTION CONTROL BOARD
January 19, 2012

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

ORDER OF THE BOARD (by J.A. Burke):

The Estate of Gerald D. Slightom (Estate) appeals an October 29, 2010 determination of the Illinois Environmental Protection Agency (Agency) denying the Estate's request for reimbursement from the Underground Storage Tank Fund. The Estate's application concerns a location at 103 North Third Street, Girard, Macoupin County (Site).

The Estate appeals on the grounds that the Office of the State Fire Marshal's $10,000 deductibility determination of 2008, rather than the Agency's $100,000 deductibility determination, applies to the site. Alternatively, the Estate contends that the Agency is estopped and barred by laches from changing legal positions upon which the Estate relied to its prejudice.

The Agency filed a motion for summary judgment on June 16, 2011. On November 17, 2011, the Board denied the Agency's motion for summary judgment.

On December 13, 2011, the Agency filed a motion for reconsideration of the Board's November 17, 2011 order. For the reasons described below, the Board denies the Agency's motion for reconsideration.

PROCEDURAL HISTORY

On December 6, 2010, the Estate filed a petition asking the Board to review the Agency's October 29, 2010 determination applying a $100,000 deductible to its UST reimbursement claim. On December 16, 2010, the Board accepted the petition as timely but directed the Estate to file an amended petition by January 17, 2011. The amended petition was filed on January 12, 2011 and included two exhibits: (A) letter from the Agency to the Estate dated October 29, 2010; and (B) a printout of the Agency's LUST database purportedly printed on November 3, 2010. The Board accepted the amended petition for hearing on January 20, 2011.

On June 16, 2011, the Agency filed the Agency Record (AR) accompanied by a motion for summary judgment. On June 29, 2011, the Estate filed a request for an extension of time to respond to the motion for summary judgment along with a motion to compel deposition. The

Agency filed its objection to the motion for an extension of time and motion to compel deposition on July 8, 2011.

On July 18, 2011, the Estate filed a notice of deposition. The Agency filed a motion to quash the subpoena on July 19, 2011. The Estate filed a reply in support of its motion to compel deposition on July 29, 2011. The Agency filed a sur-objection to the Estate's motion to compel on August 8, 2011. On August 10, 2011, the hearing officer issued an order denying the Estate's motion to compel deposition and granting the Agency's motion to quash the subpoena.

On September 6, 2011, the Estate filed a motion for interlocutory appeal from the August 10, 2011 hearing officer order denying the motion to compel deposition. Also on September 6, 2011, the Estate filed a response to the motion for summary judgment. On September 13, 2011, the Agency filed a reply to the Estate's motion for summary judgment and a response to the Estate's motion for interlocutory appeal.

On September 27, 2011, the Estate filed a motion for leave to file a surreply in opposition to the motion for summary judgment, along with the surreply. The Agency filed its objection to the Estate's motion for leave to file a surreply on October 3, 2011.

In a November 17, 2011 Order, the Board denied the motion for summary judgment, denied the motion for interlocutory appeal and denied the motion to file a surreply.

On December 13, 2011, the Agency filed a motion for reconsideration of the Board's November 17, 2011 Order denying the motion for summary judgment (Motion). The Estate filed a response to the motion for reconsideration (Response) on December 28, 2011.

AGENCY'S MOTION FOR RECONSIDERATION

The Agency filed its motion for reconsideration on December 13, 2011, stating that the Board erred in its application of existing law. Mot. at 2. The Agency states that this error relates to statutory and regulatory law. *Id.* at 3.

In support of its position, the Agency notes that the Board, in considering a motion for reconsideration, will consider various factors, including "error in the previous decision and facts in the record that were overlooked." Mot. at 2, citing Dewey's Service, Inc. v. IEPA, PCB 99-107 (May 6, 1999). The Agency states that the intended purpose of a motion to reconsider is to bring the court's attention, in part, to errors in the court's previous application of existing law. *Id.* (citations omitted).

The Administrative Record should not include Information not before the Agency at Time of Decision

The Agency cites Section 105.212 of the Board's regulations as setting forth the requirements of the Agency's record. That section states that the record must include:

a) Any permit application or other request that resulted in the Agency's final decision;

b) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application;

c) The permit denial letter that conforms to the requirements of Section 29(a) of the Act or the issued permit or other Agency final decision;

d) The hearing file of any hearing that may have been held before the Agency, including any transcripts and exhibits; and

e) Any other information the Agency relief upon in making its final decision. Mot. at 3, citing 35 Ill. Adm. Code 105.212.

The Agency admits that an oversight resulted in the Agency's October 29, 2010 final decision letter not being included in the record, and attaches the document to its motion for inclusion. Mot. at 3. The Agency also includes additional missing pages that the Agency states resulted from a copying error. *Id.* at 3-4.

The Agency states that its technical staff did not rely upon documents in the record that show a tracking system listing every document filed with the Agency. Mot. at 4. The Agency contends that a mention of other documents in the record does not mean that the Agency considered those documents in making its final decision and that all documents that were the subject of the October 29, 2010 final decision have been submitted in the record. *Id.*

The Agency states that the record would "become vast and contain superfluous documents" if the Agency is required to include in the record every document pertaining to the site. Mot. at 4. This would result in the Agency supplementing the record further with related documents in order to aid the Board's understanding. *Id.* The Agency contends that requiring it "to file numerous copies of records containing all of the documents within its file" would overload the Agency's resources. *Id.*

The Agency states that the documents were not considered when making its decision and therefore should be excluded from the record. Mot. at 4. The Agency contends that this is consistent with previous Board holdings that documents not considered by the Agency when making its decision should not be included in the record. *Id.*, citing Knapp Oil v. Illinois EPA, PCB 2006-052 (June 21, 2007); Novean Inc. v. Illinois EPA, PCB 2004-102 (Feb. 4, 2008); State Bank of Wittington v. Illinois EPA, PCB 1992-152 (June 3, 1993).

Error in Denying Motion for Summary Judgment

The Agency disagrees with the Board's decision that summary judgment is inappropriate and states that the Estate has "successfully muddied the issues to distract the Board from the clear and straight forward issue in this case." Mot. at 4. The Agency states the issue as being, when there are two deductibles for a site, which deductible applies? *Id.* at 4-5. The Agency

believes that the statute and regulations are clear that the highest deductible applies to the site, regardless of whether different owners related or not and regardless of varying circumstances. *Id.* at 5. The Agency states that this "simple, straightforward" statement fully explains its position in this case. *Id.*

The Agency concludes that the Board erred in not granting summary judgment based on the facts in this case and requests that the Board reconsider its November 17, 2011 decision. *Id.*

THE ESTATE'S RESPONSE IN OPPOSITION TO THE MOTION FOR RECONSIDERATION

The Estate filed its response to the Agency's motion on December 28, 2011, citing two arguments for why the motion should be denied.

The Administrative Record should include the Entire File

The Estate contends that this case evolves from a decade-old document overlooked by the Agency until the entire file was reviewed. Resp. at 2. The Estate believes that this Agency admission is reason enough to compel production of the entire Agency file on the site. *Id.* In support of this position, the Estate cites the Board decision in KCBX Terminals Co. v. IEPA, PCB 10-110 (Apr. 21, 2011), stating that "documents [that] were before IEPA in reaching its permit determination" which predated the determination were relevant. *Id.*

The Estate disputes the Agency's position that the record in this case would become vast and superfluous if every document at the site is included, noting that very little activity has occurred at the site following the 1991 incident and until a new owner took over the clean-up in 2008. Resp. at 3. The Estate also notes that the Agency has previously submitted entire, lengthier files in other LUST appeals. *Id.*, citing Prime Location Properties, LLC v. IEPA, PCB 09-067. The Estate contends that the issues in this case compel a similar approach. *Id.*

The Board's Adjudicatory Independence Requires Strict Scrutiny of the Agency's Representations as to the Record

The Estate contends that the Board's position of basing permit proceedings "on the record" before the Agency has been influenced by federal administrative law, specifically referencing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971), which the Estate notes has been cited by the Board in the past. Resp. at 3-4, citing Ash v. Iroquis County Board, PCB 87-29 (July 16, 1987). The Estate states that the Court in Citizens identified the "whole record" as follows:

> [R]eview is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary . . . to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.

> The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decision-makers is usually to be avoided. And where there are administrative findings that were made at the same time as the decision, . . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings, and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves. Resp. at 4, citing Citizens, 401 U.S. at 420.

The Estate further contends that Board decisions specific to the scope of the record similarly hold that the content of the record is a central issue to be resolved in a case. The Estate cites Owens-Illinois, Inc. vs. EPA, PCB 77-288 (Feb. 2, 1987), in which the Board stated:

> It is proper to inquire, and discovery should be allowed, to insure that the record filed by the Agency is complete and contains all of the material concerning the permit application that was before the Agency when the denial statement was issued. Resp. at 4.

The Estate argues that the completeness of the record is a substantial issue in this case for numerous reasons. Resp. at 4. The Estate questions whether materials the Agency based its decision on exceeded the Agency's scope of review and the extent of the record. *Id.* at 4-5 (citation omitted). The Estate contends that the Agency's reason for denial is inconsistent with previous Agency decisions. *Id.* at 5. The Estate also believes that a legal question exists regarding what law applied to the various events at the site at different times and states that the Board should consequently have access to information on the site from the various times. *Id.*

The Estate illustrates its concern over this last point by using the Board's previous order as an example, contending that the Board erroneously overlooked an exception to the $100,000 deductible application for heating oil tanks registered prior to July 1, 1992. Resp. at 5, citing 415 ILCS 5/57.9(b)(1). The Estate believes this to be relevant because one of the tanks from which a release occurred was a heating oil tank registered on April 18, 1990. *Id.* The Estate further cites three cases in support of its position that the Agency not be allowed to only submit what information it wishes, stating that doing so may allow the Agency to withhold unfavorable evidence and would hinder the Board's ability to engage in a substantial inquiry. *Id.* at 6 (citations omitted). The Estate contends that the entire administrative record consists of all documents and materials directly or indirectly considered by the Agency, including evidence contrary to the Agency's position. *Id.* (citation omitted).

The Estate states that it is the Board, not the Agency, that acts as the finder of facts, through the record filed and the record developed before the Board. Resp. at 7. The Estate argues that the Agency is constraining the Board's fact-finding duty by limiting access to the Agency's files that were before the Agency at the time its determination was made. *Id.*

The Estate concludes by stating that no new facts or arguments were submitted by the Agency in support of its motion to reconsider and therefore the motion should be denied. Resp. at 7.

BOARD DISCUSSION

Standard of Review

In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902. "The intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." Citizen's Against Regional Landfill v. County Board of Whiteside County, PCB 93-156 (Mar. 11, 1993) (quoting Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E. 2d 1154, 1158 (1st Dist. 1992).

The Agency's Motion For Reconsideration

The Agency does not present new evidence or a change in the law, but rather contends that the Board "erred in its application of existing law, both statutory and regulatory, and therefore the Board's order . . . should be reconsidered and reversed in part." Mot. at 3.

As stated by this Board in its November 17, 2011 order, discrepancies in the Agency Record required the Board to deny the motion for summary judgment. Estate of Slightom v. IEPA, PCB 11-25, slip op. at 8 (Nov. 17, 2011). As set out above, the Agency states that Section 105.212 of the Board's procedural rules sets forth the requirements of the Agency's record. Mot. at 3, citing 35 Ill. Adm. Code 105.212. While it is Section 105.410 that applies in this instance, the same procedural argument applies. The Agency contends that documents alluded to by the Board in its November 17, 2011 order "were not considered when making the [Agency's] decision and should be excluded from the [Agency] record." Mot. at 4. However, only Section 105.410(b)(4) alludes to "any other information the Agency relied upon" in making its final decision. With regards to Sections 105.410(b)(1)-(3), the language of the Board's procedural rules does not limit the required documents to those that the Agency relied upon. Similarly, while Section 105.212(b)(5) requires "any other information relied upon" by the Agency, Sections 105.212(b)(1)-(4) also do not limit the required documents to those that the Agency relied upon. *See generally* KCBX Terminals Co. v. IEPA, PCB 10-110 (May 19, 2011).

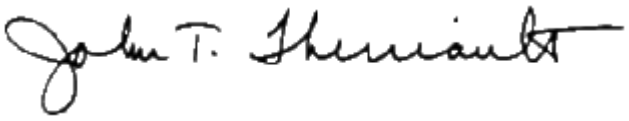
As stated by the Board in its November 17, 2011 order, "[b]ecause the record appears incomplete at this time, the Board cannot grant the motion for summary judgment." Estate of Slightom, PCB 11-25, slip. op at 10 (Nov. 17, 2011). The Board is not persuaded by the Agency's argument that this position should be changed.

CONCLUSION

The Board has reviewed the Agency's arguments regarding the Board's application of existing law and finds the arguments to be unpersuasive. Therefore, the Board denies the Agency's motion to reconsider its November 17, 2011 decision.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 19, 2012, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board