ILLINOIS POLLUTION CONTROL BOARD
April 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 Leaking Underground Storage Tank Fund. The Estate's application concerns property at 103 North Third Street, Girard, Macoupin County.

On June 15, 2011, the Agency filed a motion for summary judgment. The Board denied the Agency's motion on November 17, 2011. The Agency filed a motion for reconsideration of the Board's November 17, 2011 order. On January 19, 2012, the Board denied the Agency's motion.

On March 2, 2012, the Agency filed its "Motion Requesting a Finding or Ripeness of a Ruling for Interlocutory Appeal and Motion Requesting a Ruling on the Illinois Environmental Protection Agency's Motion for Summary Judgment" (Motion). In addition, the Agency filed "all of the documents within the Bureau of Land's Leaking Underground Storage Section's possession that relate to this site's Land Pollution Control Number." Mot. at 1. The Agency states that it filed these documents under objection and the Agency "wishes to maintain the issue for appeal either interlocutory or following a ruling by the Board on this matter." *Id.* at 1-2.

For the reasons stated below, the Board denies the Agency's motion. The Board declines to certify an interlocutory appeal of the Board's January 19, 2012 order. Further, the Board denies the Agency's motion requesting a ruling on the Agency's June 15, 2011 motion for summary judgment because the Board previously denied that motion. To the extent the Agency incorporated its June 15, 2011 motion for summary judgment in its March 2, 2012 motion, the Board again denies the motion for summary judgment.

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 reimbursement claim. The

Estate filed an amended petition on January 12, 2011. On January 20, 2011, the Board accepted the petition for hearing.

On June 16, 2011, the Agency filed the Agency Record accompanied by a motion for summary judgment (June Mot.). 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 seeking Board review of 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 (Sept. Resp.). On September 13, 2011, the Agency filed a reply to the Estate's response to the motion for summary judgment (Sept. Reply) 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 (Mot. Reconsider). The Estate filed a response to the motion for reconsideration on December 28, 2011. On January 19, 2012, the Board denied the Agency's motion for reconsideration.

On March 2, 2012, the Agency filed a motion requesting a finding or ripeness of a ruling for interlocutory appeal and a motion requesting a ruling on the Agency's motion for summary judgment. The Agency also filed a copy of all documents within the Bureau of Land's Underground Storage Section's possession relating to the site's land pollution control number, under objection. The Estate filed a response to the Agency's motion (Resp.) on March 16, 2012. The Agency's reply (Reply) was filed on March 26, 2012.

SUMMARY OF PREVIOUS BOARD ORDERS

To thoroughly review the Agency motion currently pending before the Board, it is important that the Board discuss two previous orders relating to the Agency's June motion for

summary judgment and the Agency's December motion to reconsider the Board's denial of its motion for summary judgment.

Board Order Denying Summary Judgment

The Board gave several reasons for denying summary judgment to the Agency. First, it was unclear from the record whether 35 Ill. Adm. Code Section 732.603(b)(4) or Section 734.615(b)(4) applied to this reimbursement claim. Estate of Slightom v. IEPA, PCB 11-25, slip op. at 6-8 (Nov. 17, 2011) (Nov. Order). The Agency moved for summary judgment that a $100,000 deductible applies to the Estate's reimbursement claim because Section 732.603(b)(4) requires the higher deductible shall apply when more than one deductible determination is made. June Mot. at 3. However, the Agency's October 29, 2010 final determination letter cited to Section 734.615(b)(4) and the Board noted other discrepancies in the record on this issue. Nov. Order at 7-8. Accordingly, the Board held "[t]hese discrepancies as to whether either Part 732 or Part 734 applies, as well as insufficient facts in the record to make either determination, preclude judgment at this time." *Id.* at 8.

Second, the incomplete record filed by the Agency precluded summary judgment. Nov. Order at 8-10. The Board discussed various missing pages in the record but also specifically mentioned that the parties dispute the validity and effect of a December 20, 1991 letter. *Id.* at 9. The Agency's requested summary judgment that a $100,000 deductible applies was based on the 1991 letter. June Mot. at 3. The Estate challenged that "the [Agency] record lacks any evidence that the 1991 document was ever sent or issued by the Agency, or received by the prior owner." Sept. Resp. at 5. Accordingly, the Board held "[t]he parties' dispute over the 1991 letter means summary judgment is not proper at this time." Nov. Order at 9.

Third, the Board denied summary judgment because the parties dispute the facts surrounding the Agency's application of the $100,000 deductible. Nov. Order at 10. Because of this dispute, the Board could not determine whether equitable estoppel applies to the Agency's actions. *Id.* The Board stated "[t]he facts are unclear at this time regarding the circumstances surrounding the application of OSFM's deductible determination, the Agency's later application of the $100,000 deductible, and whether the Agency affirmatively misled the Estate." *Id.*

In addition to denying summary judgment, the Board ordered the Agency to file a complete record. Nov. Order at 1. The Board quoted the relevant rule, Section 105.410, setting forth the requirements for the record:

> (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 submitted or other request;

> (3) The final determination letter; and
>
> (4) Any other information the Agency relied upon in making its determination.

35 Ill. Adm. Code 105.410(b). The Board listed examples of missing pages in the record as initially filed. Nov. Order at 8-9. Specifically, the Board stated:

> Most notably, the October 29, 2010 letter, which is the Agency's final determination at issue in this appeal, is incomplete in the Agency Record as required by Section 105.410(b)(3). *See* AR at 109. Several individual pages of multi-page documents also appear to be missing from the Agency Record: page 2 of the letter from the Agency to the Estate dated March 25, 2009 (AR at 41-42); page 2 of the letter from the Agency to the Estate dated October 1, 2008 (AR at 44-45; a complete copy of the document appears to be found at AR 102-106); page 2 of the letter from the Agency to the Estate dated January 29, 2009 (AR at 47-48; a complete copy of the document appears to be found at AR 206-208); and page 2 of the letter from the Agency to the Estate dated October 29, 2010 (AR at 109-110). Nov. Order at 9.

The Board also noted other possible discrepancies in the record as initially filed:

> Additionally, there are several items listed on page 116-117 of the Agency Record which were not included as part of the filed record, as well as documents identified in the factual summary above which were not included in the record. Nov. Order at 9.

It was not clear to the Board whether these documents existed or were required to be included pursuant to Section 105.410(b). Accordingly, the Board stated, "[t]hese documents *appear* to pre-date the Agency's October 29, 2010 decision and *may be required* under Section 105.410(b)(1) or (b)(2)." Nov. Order at 9 (emphasis added).

Board Order Denying Motion to Reconsider

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. On January 12, 2012, the Board issued an order denying the Agency's motion for reconsideration. Estate of Slightom, PCB 11-25 (January 12, 2012) (Jan. Order). In the motion, the Agency cited to Section 105.212 of the Board's regulations as setting forth the requirements of the Agency's record. Mot. Reconsider at 3. 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 relied upon in making its final decision. *Id.*, citing 35 Ill. Adm. Code 105.212.

The Board noted that, although Section 105.410 is the section that applies in this instance, under both sections the documents required for the record are similar. Jan. Order at 6. The Agency's argument that it need only include in the record documents relied upon in making its decision ignored the requirements of Section 105.212 (a), (b), (c), (d) and the corollary requirements in Section 105.410(b) (1), (2), (3). *Id.* In denying the Agency's motion to reconsider, the Board held:

> 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." [Nov. Order at 10]. The Board is not persuaded by the Agency's argument that this position should be changed. *Id.*

AGENCY'S MOTION

The Agency's current motion makes two requests of the Board: (1) "to certify [the Board's] January 19, 2012 order for interlocutory appeal" or, alternatively, (2) to grant summary judgment in favor of the Agency. Mot. at 1.

Interlocutory Appeal Concerning Administrative Record

The Agency asks the Board "to certify [the Board's] January 19, 2012 order for interlocutory appeal." Mot. at 1. The Agency also describes its request as seeking "appeal of the Board's finding within its January 19, 2012, Order since it provides that the Illinois EPA must tender all 'exculpatory evidence'" (*Id.* at 5) and "a finding that the ruling mandating that additional documents be included within the Administrative Record, issued within [the Board's] January 19, 2012, Order is a final determination ripe for appeal or in the alternative certify that such ruling is proper for appeal . . . ." *Id.* at 6. The Agency makes three arguments to support its request.

The Agency argues that the record in this proceeding should consist only of the documents which the Agency relied on in making its October 29, 2010 decision. Mot. at 2. The Agency claims that it "filed the entire Administrative Record consisting of all documents upon

which staff relied upon in rendering the Agency's decision." *Id.* The Agency contends that "[c]onstraining the Administrative Record to such documents serves many key State interests while also not infringing at all upon the Petitioner in these actions." *Id.* The Agency states that a person remediating a gasoline release submits "vast quantities" of documents to the Agency and, therefore, is already in possession of much of the Agency's file. *Id.* at 3. For those documents not generated by the owner or operator, the Agency's files are available through the procedure set forth in the Freedom of Information Act. *Id.* The Agency concludes, "focusing of the Administrative Record to those documents/information relied upon in issuing a decision of the issue serves judicial economy and focuses the issue relevant for review." *Id*. The Agency also alleges that the Estate "had a copy of all the documents within the [Agency]" relating to the site as a result of the Estate submitting a request for the files pursuant to the Freedom of Information Act. *Id*.

The Agency further argues that the Board's January Order "places an additional burden on the Illinois EPA which does not exist under law by requiring that the Illinois EPA identify 'exculpatory' evidence and provide such within the Administrative Record." Mot. at 4. The Agency contends that the Board's January Order requires the Agency to anticipate the Estate's arguments. *Id.* The Agency states that if it was the Board's intention to direct the Agency to review the record to make sure it did not miss any document which the Agency relied on in making its decision, then the Agency seeks an order clarifying the Board's intent. *Id.* at 4-5. If not corrected, the Agency has concluded that it "must seek appeal of the Board's finding within its January 19, 2012 Order since it provides that the [Agency] must tender all exculpatory evidence." *Id.* at 5.

The Agency argues that the Estate, not the Agency, has the burden "to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable" to obtain reimbursement. Mot. at 5, citing 35 Ill. Adm. Code 105.112(a) and Rezmar Corp. v. Illinois EPA, PCB 02-91, slip op. at 9 (April 17, 2003). The Agency claims that the Board's January Order shifts the burden of proof from the Estate to the Agency. Mot. at 5.

Summary Judgment

The Agency requests a ruling "on its previously filed motion for summary judgment," asserting that its June 15, 2011 motion for summary judgment "is currently awaiting a ruling." Mot. at 6. The Agency also incorporates its June 15, 2011 motion for summary judgment in the instant motion and requests a ruling. *Id.*

ESTATE'S RESPONSE

The Estate filed its response objecting to the Agency's motion on March 16, 2012.

Interlocutory Appeal Concerning Administrative Record

The Estate states that it does not understand the Agency's contention that the Administrative Record should not contain "information that the [Agency] did not, should not, or could not have considered." Resp. at 3, quoting Mot. at 2. The Estate points out that the

documents filed "under objection" by the Agency were in the Agency files at the time the decision was made and could have been considered by the Agency. *Id.* The Estate disputes that the Agency has identified all the information the Agency relied on and alleges that the Agency relied on information obtained from the Office of the State Fire Marshal (OSFM). *Id.* at 3-4. Thus, the Agency did not solely review information submitted by the applicant. *Id.* at 4.

The Estate contends that the Agency "misapprises the nature of its burden in this proceeding." Resp. at 2. The Estate states that it has the burden of proving its case at hearing. *Id.* However, as the movant for summary judgment, the Agency has the burden to show an absence of a factual dispute as to all issues raised in the pleadings. *Id.* at 2-3, citing West Suburban Mass Transit Dist. v. Conrail, 210 Ill. App. 3d 484, 488 (1991). The Estate, in contrast, is not required to prove its case in response to the Agency's summary judgment motion but must present evidence to support its cause of action. *Id.* at 3, citing Jordan v. Knafel, 378 Ill. App. 3d 219, 227 (2007).

The Estate notes that Section 101.908 of the Board's rules authorizes an interlocutory appeal pursuant to Supreme Court Rule 308. Resp. at 5. The Estate contends that Supreme Court Rule 308 does not authorize an appeal of a motion but rather of a legal question as to which there is a substantial ground for difference of opinion and an immediate appeal would materially advance termination of the litigation. *Id.* The Estate argues that the Agency's motion does not identify such a legal question. *Id.*

Summary Judgment

The Estate states that the Board denied summary judgment to the Agency due to "discrepancies as to whether either Part 732 or Part 734 applies, as well as insufficient facts in the record to make either determination at this time." Resp. at 2 quoting Nov. Order at 8. The Estate further points to the November Order stating that "the parties specifically dispute the validity and effect of the December 20, 1991 letter as it poses a genuine issue of material fact," and disputed issues of fact concerning the Estate's estoppel defense. *Id.* The Estate contends that the Agency has not addressed the discrepancies that were partially the basis of the Board's denial of summary judgment nor did the Agency address the disputed issues of fact. *Id.* Rather, the Agency has only addressed the completeness of the record. *Id.*

The Estate disputes the Agency's contention that there is a motion for summary judgment "currently awaiting ruling." Resp. at 4. The Estate argues that the Board denied the motion and denied the Agency's motion to reconsider the Board's denial. *Id.* The Estate further argues that the additional legal arguments and evidence submitted by the Agency, including the affidavit attached to the Agency's September reply, the documents submitted with the Agency's motion for reconsideration, and the documents submitted by the Agency with the instant motion, do not resolve genuine issues of material fact. *Id.* at 5.

The Estate concludes its response by requesting that the Board deny the Agency's motion. Resp. at 6. In the event that the motion is granted, the Estate requests that the Board reconsider the Board's previous order striking the Estate's surreply and request to conduct discovery or for "such further and other relief as the Board deems meet and just, including

direction and authorization for the Petitioner to file its own motion for summary judgment herein." *Id.*

AGENCY'S REPLY

The Agency file its reply on March 26, 2012.

Interlocutory Appeal Concerning Administrative Record

The Agency states that the Board's January 19, 2012 order "required the [Agency] to file all of the documents in possession of the Leaking Underground Storage Tank Section of the [Agency] relating to this site's Land Pollution Control Number." Reply at 1. The Agency further states that the Board's January 19, 2012 order "was a final and appealable decision." *Id.* at 2.

The Agency believes that the Board's January 19, 2012 order reverses a long history of case law which limits the information contained within the administrative record to only the information which the Agency considered in making its permitting decision. Reply at 2 (citations omitted). The Agency contends that the Board has denied motions in other cases to supplement the administrative record with information that the Agency did not or should not have considered. Reply at 2 (citations omitted). The Agency states that it "intends to appeal the Board's decision reversing this long established case law." Reply at 2.

Summary Judgment

The Agency states that, assuming the Board did not hold the Agency's motion for summary judgment while awaiting the record, the Agency "submits its prior motion on this issue is a new motion for summary judgment." Reply at 2. The Agency contends that there is no genuine issue of material fact and that the Estate has not once pointed to one. *Id.*

The Agency next points to the history of the site determination. Reply at 2. The Agency states that it issued a decision letter on December 20, 1991, that determined that the site was "eligible to seek reimbursement for corrective action costs, accrued on or after July 28, 1989, in excess of $100,000.00." *Id.* The Agency next states that, on February 6, 2008, the Office of the State Fire Marshall issued a decision letter determining that the five tanks on the site were "eligible to seek payment of costs in excess of $10,000." *Id.* at 2-3. The Agency cites 35 Ill. Adm. Code 732.603(b)(4), which states in part:

> b) The following rules shall apply regarding deductibles:
>
> 4) *Where more than one deductible determination is made, the higher deductible shall apply*. (Emphasis added by Agency). Reply at 3.

The Agency states that the Estate has continued to argue that it should be able to have discovery but that "both the hearing officer and the Board have denied that request." Reply at 3. The Agency concludes by stating that, "[s]ince the Board made the filing of the documents in

question a requirement before the Board would rule on [the Agency's] Motion for Summary Judgment, the [Agency] complied, under objection and request for interlocutory appeal." *Id.* The Agency again requests that the Board either rule on its motion for summary judgment or certify the Board's January 19, 2012 decision regarding the Administrative Record for interlocutory appeal. *Id.*

BOARD DISCUSSION

Interlocutory Appeal Concerning Administrative Record

The Agency phrases its request in various ways for an immediate appeal pursuant to Section 101.908 of the Board's regulations. *See* page 5, *infra*; Mot. at 1, 5, 6. The Agency asks the Board "to certify [the Board's] January 19, 2012 order for interlocutory appeal." Mot. at 1. The Agency also describes its request as seeking interlocutory appeal of the Board's directive in the January Order "to tender all 'exculpatory evidence.'" *Id.* at 5. The Agency also asks the Board to certify for interlocutory appeal the ruling in the January Order "mandating that additional documents be included within the Administrative Record." *Id.* at 6. As discussed below, taking these requests together, and considering the language of Section 101.908, the question of law which the Agency asks the Board to certify for immediate appeal appears to be whether the Board can "mandat[e] that additional documents be included within the Administrative Record." *Id.* The Board denies this motion.

The Board's rules allow the Board to consider an interlocutory appeal under Illinois Supreme Court Rule 308. 35 Ill. Adm. Code 101.908. Illinois Supreme Court Rule 308 provides in part:

> (a) When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Such a statement may be made at the time of the entry of the order or thereafter on the court's own motion or on motion of any party. The Appellate Court may thereupon in its discretion allow an appeal from the order. Ill. S. Ct. Rule 308(a) (Eff. Feb. 26, 2010).

In addition, the Board's authority to certify interlocutory appeals has been recognized by the Illinois Appellate Court. *See* People v. PCB (Santa Fe Park Enterprises, Inc., Petitioner), 129 Ill. App. 3d 958, 473 N.E.2d 452 (1st Dist. 1984). Rule 308 appeals are to be allowed only in certain exceptional circumstances. *Id.* at 456, *citing* People v. Carey, 74 Ill.2d 527, 387 N.E.2d 325, *cert. denied* 444 U.S. 940 (1979). Rule 308 should be strictly construed and sparingly exercised. *Id*.

Before the Board can certify an issue for interlocutory appeal, the Board must determine that a two prong test is satisfied: (1) whether the Board's decision involves a question of law involving substantial ground for a difference of opinion; and (2) whether the immediate appeal

may materially advance the ultimate termination of the litigation. People v. State Oil Co., *et al.*, PCB 97-103 (May 16, 2002). However, even after the trial court has made the required finding and the application has stated why an immediate appeal is justified, allowance of an appeal is discretionary. Voss v. Lincoln Mall Management Co., 166 Ill. App. 3d 442, 445, 519 N.E.2d 1056 (1st Dist. 1988).

Furthermore, Section 308(e) states:

> (e) **Stay.** The application for permission to appeal or the granting thereof shall not stay proceedings in the trial court unless the trial court or the Appellate Court or a judge thereof shall so order. Ill. S. Ct. Rule 308(e) (Eff. Feb. 26, 2010).

Based on this provision, the Board has previously denied certifying a question for interlocutory appeal when the Board's decision is subject to statutory deadline. West Suburban Recycling and Energy Center v. IEPA, PCB 95-119, 95-125 (consolidated), slip op. at 2-3 (March 7, 1996). If there is insufficient time for the appellate court to review the certified question prior to the Board's decision deadline, the Board must continue its hearing process to avoid issuance of the permit by operation of law under Section 40 of the Act. *Id.*

The Board finds that the Agency has not shown that an interlocutory appeal is warranted as to the ruling in the January Order "mandating that additional documents be included within the Administrative Record." The Agency's arguments regarding the administrative record present no question of law involving substantial ground for a difference of opinion and an immediate appeal will not materially advance the ultimate termination of the litigation. The Board addresses each of the Agency's three arguments in the sections below.

Documents Constituting the Administrative Record

The Agency addresses two sets of cases regarding its argument on what should constitute the administrative record. Mot. at 2. The Agency first addresses cases relating to its position that the administrative record should only consist of information and documents which the Agency relied upon in making its permitting decision. *Id.* Next, the Agency addresses cases relating to situations where the Board has previously denied motions to supplement the administrative record. *Id.*

Documents relied upon by the Agency in making a Permitting Decision. The Agency asserts "[i]t has been well-settled law for over thirty years that the Administrative Record in such proceedings consists only of the information/documents upon which the Illinois EPA *relied upon* in making a permitting decision." Mot. at 2 (emphasis added). The Agency cites to cases involving two permit denials upheld by the Board and upheld by the Illinois Appellate Court: Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 516 N.E.2d 275 (5th Dist. 1987), *appeal denied* 119 Ill.2d 553, *cert. denied* 488 U.S. 891 (1988) and Joliet Sand & Gravel v. PCB, 163 Ill. App. 3d 830, 516 N.E.2d 955 (3rd Dist. 1987). *Id.* at 2. The Board previously has cited to these two cases for the proposition that "it is well-settled that the Agency record in a permit appeal consists only of the information which the Agency *considered or should have considered*

in making its permitting decision." *See* United Disposal of Bradley, Inc., et al. v. IEPA, PCB 03-235, slip op. at 2 (June 17, 2004), *appealed* United Disposal of Bradley Inc. v. PCB, 363 Ill. App. 3d 243, 842 N.E.2d 1161 (3d Dist.), *appeal denied on other grounds* 219 Ill.2d 599, 852 N.E.2d 249, *cert. denied on other grounds* 549 U.S. 955 (2006); CWM Chemical Services, Inc. v. IEPA, PCB 89-177, slip op. at 1 (July 11, 1991) (emphasis added). A discussion of these cases is warranted to analyze whether the Board's January Order involves a question of law as to which there is substantial ground for difference of opinion.

In Alton Packaging, a facility filed an application with the Agency to renew its operating permit for its boilers. 162 Ill. App. 3d at 733. The Agency denied the facility's request for the permit renewal and the facility filed an appeal of the Agency's denial with the Board. *Id.* at 734. The Board held a hearing which included testimony from three Agency employees. *Id.* at 734-735. During examination and cross-examination of the Agency witnesses, the facility questioned the factual basis for the Agency's denial and sought to discredit the Agency. *Id.* at 737. The Board considered this testimony and affirmed the Agency's denial of the permit. *Id.* at 737. The Appellate Court concluded that there was sufficient evidence to support the Board's findings and affirmed the Board. *Id.* at 738.

In the appellate court proceeding, the facility also argued that the Board's decision should be remanded to give the facility the opportunity to present additional evidence to the Board. 162 Ill. App. 3d at 738. The facility wanted the Board to consider a modeling study. *Id.* The facility had previously filed the modeling study with the Board in a separate variance proceeding but not in the permit appeal proceeding. *Id*. An Agency witness testified that the modeling study was not part of the Agency record in the permit appeal and that the Agency witness had not relied on the study in denying the permit renewal. *Id.* at 735. The appellate court found that the facility was given adequate opportunity during the Board hearing to challenge the Agency's permit denial and, therefore, found no basis to remand the case for further hearing to consider the modeling study. *Id.* at 738-739. In this context, the appellate court explained that its discussion in EPA v. PCB (Waste Management, Inc., Petitioner), 138 Ill. App. 3d 550, 486 N.E.2d 293 (1985), *aff'd* 115 Ill.2d 65, 503 N.E.2d 343 (1986) allowing permit applicants the opportunity during a Board hearing to challenge the Agency's reason for denying a permit "should not be construed to allow the supplementing of the record with new matter not considered in the Agency's denial of the permit application." *Id.* at 738.

In Joliet Sand, a facility filed an application with the Agency to renew an operating permit for its crushers. 163 Ill. App. 3d at 832. The Agency denied the facility's request for the permit renewal and the facility filed an appeal of the Agency's denial with the Board. *Id.* at 832-833. The Board affirmed the Agency's denial of the permit renewal and the facility appealed the Board's decision to the appellate court. *Id.* at 834. One of the facility's arguments to the appellate court was that the Agency withheld important documents from the facility. *Id.* at 835. The documents at issue were "Enforcement Decision Group Memoranda" which contained Agency discussion on whether to bring an enforcement action. *Id.* at 836. The appellate court held that the documents were properly excluded from evidence because "the documents pertained to a possible enforcement proceeding and, as such, were not related to the present application proceeding." *Id.*

The Agency cites to Alton Packaging and Joliet Sand to support its request to seek immediate appeal of the Board's January Order "mandating that additional documents be included within the Administrative Record." Mot.at 2. As an initial matter, the Agency's interpretation of the January Order is incorrect. In that order, the Board denied the Agency's motion for reconsideration as to its motion for summary judgment because of factual disputes between the parties. Jan. Order at 6. The Board did not "mandat[e] that additional documents be included within the Administrative Record" as the Agency suggests.

None of the document discrepancies pointed out by the Board in the November Order directing the Agency to file a complete record are of the type of documents precluded in the cases cited by the Agency. In Alton Packaging, the appellate court held that the case would not be remanded to the Board in order to allow the facility to introduce into evidence a document not previously submitted to the Agency. 162 Ill. App. 3d at 738. The document in Alton Packaging was a report prepared by a third party and not found in the Agency's permit file. *Id.* Here, the Board requested that the Agency file a complete record including missing pages, the final determination letter, and other items listed in Section 105.410(b). Section 105.410(b) clearly sets forth the documents required to be filed by the Agency to complete the Agency record, stating 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. 35 Ill. Adm. Code 105.410(b).

Each of the documents previously requested by the Board is a document submitted to the Agency, prepared by the Agency, or relied upon by the Agency in making its final determination of the Estate's reimbursement claim. Similarly, the documents precluded in Joliet Sand were enforcement documents unrelated to the permit file. 163 Ill. App. 3d at 836. Nothing in Section 105.410(b) would necessarily require such enforcement documents to be included in the record filed with the Board in a reimbursement appeal.

Previous Board Denials to Supplement the Administrative Record. The Agency also asserts that "[the Board] has previously denied motions, in other cases, to supplement the Administrative Record with information that the Illinois EPA did not, should not, or could not have considered." Mot. at 2, citing CWM Chemical Services, Inc. v. IEPA, PCB 89-177 (July 11, 1991) and United Disposal of Bradley, Inc., et al. v. IEPA, PCB 03-235 (June 17, 2004).

In CWM, a facility appealed an Agency decision in September 1989 to deny a Resource Conservation and Recovery Act (RCRA) Part B permit application dated April 28, 1989. CWM, PCB 89-177, slip op. at 2. When submitting the permit application, the facility stated "this revised Part B application is intended to replace the previously submitted documents in entirety." *Id.* During the Board proceeding, the facility sought to supplement the permit appeal record filed by the Agency with documents pre-dating the April 28, 1989 application. *Id.* The Board denied the facility's request to supplement the record with a 1985 application, a 1987 application, and 1987 revisions. *Id.* After reviewing the documents submitted by the facility, the Board found that because the facility stated that the April 28, 1989 application was intended to replace earlier documents in their entirety, the facility "cannot now claim that the Agency did consider or should have considered the earlier documents in making its permitting decision." *Id.* However, the Board allowed the facility to supplement the record with an August 25, 1989 document, which postdated the permit application. *Id.*

In United Disposal, a facility applied for a supplemental permit to modify certain language in its waste transfer station permit. United Disposal, PCB 03-235, slip op. at 1. The Agency denied the application and the facility appealed the denial to the Board. *Id.* The Agency filed the record and later moved to supplement the record simultaneously with its motion for summary judgment. *Id.* at 2. The Agency sought to add (1) the second page of a document incorrectly copied; (2) a letter sent to the Agency; (3) another letter sent to the Agency; and (4) an Agency letter expressing the Agency's final decision to deny the facility's application. *Id.* at 2-3. The Board allowed the Agency to supplement the record as to the first three documents and explained "the documents predate the Agency's final denial letter . . . and were available to the Agency when making its permit decision." *Id.* at 3. The Board denied the Agency's motion as to the fourth document because it already was contained in the initial record filed by the Agency. *Id.*

These prior Board decisions are consistent with the November Order to file a complete record in this case. In CWM, the Board declined to supplement the agency record because the documents pre-dated the application at issue. CWM, PCB 89-177, slip op. at 2. Additionally, the applicant had expressly told the Agency that the application at issue replaced all the prior submittals. *Id.* In this case, the missing pages and the documents required under Section 105.410(b) do not appear to pre-date the reimbursement claim. Rather, the documents appear to be documents which would be found in the Agency's file for this reimbursement claim. Furthermore, in United Disposal, the Agency moved to supplement the record with precisely the type of documents which the Board requested here. The Agency moved to add a missing page due to copying error, missing letters submitted to the Agency, and the final determination letter. United Disposal, PCB 03-235, slip op. at 2-3. The Board allowed the Agency to submit the missing page and letters and found that the final determination letter was duplicative of a document already in the record as filed. *Id.* at 3.

In its November Order, the Board intended that the Agency include the final determination letter as required by Section 105.410(b)(3) and include the missing pages identified by the Board. Nov. Order at 9. The Agency attached these documents to its motion to reconsider filed on December 13, 2011 and explained that it inadvertently omitted these pages

due to copying errors. Mot. Reconsider at 3-4. In addition, the Board intended that the Agency review the requirements in Section 105.410(b) and determine whether any additional documents needed to be included in the record. *Id.* The Agency filed additional documents on March 2, 2012, but did so "under objection." Mot. at 1.

None of the cases cited by the Agency in its arguments reference either Section 105.410(b), Section 105.212(b), or the Sections' predecessors in cases predating 2001, which is the date that both sections took effect. Revision of the Board's Procedural Rules, R00-20 (Dec. 21, 2000) (Board repealed existing and adopted new procedural rules). Based on the cases cited by the Agency and the express language of Section 105.410(b), the Board's November Order to file a complete record as required by Section 105.410(b) does not involve a question of law as to which there is substantial ground for difference of opinion. The types of document discrepancies described in the November Order were not of the type at issue in the cited cases. Rather, the document discrepancies could be the type of documents "which the Agency considered or should have considered in making its permitting decision." *See* United Disposal, PCB 03-235, slip op. at 2 (June 17, 2004); CWM, PCB 89-177, slip op. at 1 (July 11, 1991). Similarly, the Agency's specific request that the Board certify for interlocutory appeal the ruling in the January Order "mandating that additional documents be included within the Administrative Record" also does not present a question of law as to which there is substantial ground for difference of opinion.

Exculpatory Evidence

The Agency asserts that the January Order "places an additional burden on the Illinois EPA which does not exist under law by requiring that the [Agency] identify 'exculpatory' evidence and provide such within the Administrative Record." Mot. at 4. The Agency contends that the January Order requires the Agency to anticipate the Estate's arguments. *Id.*

The January Order denied the Agency's motion for reconsideration of the Board's denial of summary judgment. Jan. Order at 6. In its motion to reconsider, the Agency cited to Section 105.212 as listing the required documents to be included in the agency record. Mot. Reconsider at 3. In its January Order, the Board discussed the requirements of Section 105.212 and also noted that the correct section which applies to this reimbursement claim is Section 105.410(b). Jan. Order at 6. In its discussion of these two sections, the Board explained that the record in this case is required to include the items listed in Section 105.410(b). *Id.* Under the requirements of Section 105.410(b), these items must be submitted to the Board regardless of any exculpatory ramifications that they may possess.

Ultimately, the Board denied the Agency's motion for reconsideration and explained that *for purposes of summary judgment* the record as filed did not disprove the existence of a genuine issue of material fact.

Burden of Proof

The Agency argues that the Estate, not the Agency, has the burden "to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable" to obtain reimbursement. Mot. at 5. Ordering the Agency to submit a complete record as set forth in

Section 105.410(b) does not shift the burden of proof in the reimbursement appeal from the Estate to the Agency. Section 105.410 requires that "[t]he Agency must file the entire record of its decision with the Board in accordance with Section 105.116 of this Part." 35 Ill. Adm. Code 105.410(a). Section 105.116 provides for the timing of when the Agency will make this filing. 35 Ill. Adm. Code 105.116. Section 105.410(b) then lists four types of documents which the record *must* include. 35 Ill. Adm. Code 105.410(b). As previously stated, this section of the Board's procedural rules as written has existed since January 1, 2001. The Agency has filed such records with the Board in numerous reimbursement appeals, as well as other types of appeals. The filing of the Agency record as required by Section 105.410 is standard procedure in appeals of Agency UST decisions and the Board's previous orders in this case remain consistent with this practice.

The Estate suggests that the Agency may be confusing the standard for granting summary judgment with the burden of proof in the reimbursement appeal. Resp. at 2. As the movant for summary judgment, the Agency was required to show that there was no genuine issue as to any material fact and that it, as 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); *see also* 35 Ill. Adm. Code 101.516(b). As the November Order explained, there were various discrepancies in the administrative record as initially filed which caused the Board to hold that the Agency had not met its burden to show that there is no issue of fact *for purposes of granting summary judgment.* As stated by the Board in its November Order, "[b]ecause the record appears incomplete at this time, the Board cannot grant the motion for summary judgment." Nov. Order at 10.

Board Ruling on Request for Interlocutory Appeal

The Board finds that the Agency has not shown that interlocutory appeal of the ruling in the January Order "mandating that additional documents be included within the Administrative Record" is warranted. Section 105.410(b) of the Board's rules sets forth the documents which should be contained in the agency record for this reimbursement appeal. As explained above, the Board's order that the Agency provide missing pages and the documents listed in Section 105.410(b) is consistent with prior cases cited by the Agency. Therefore, neither the Board's November Order to file a complete record, nor the January Order denying the motion to reconsider, present a question of law involving substantial ground for a difference of opinion. Furthermore, the Agency has not put forth any argument that an immediate appeal will materially advance the ultimate termination of this litigation. Therefore, the Board denies the Agency's motion for interlocutory appeal.

Summary Judgment

The Agency requests a ruling "on its previously filed motion for summary judgment." Mot. at 6. The Agency asserts that its June 15, 2011 motion for summary judgment "is currently awaiting a ruling." *Id.* This assertion is incorrect. In the November Order, the Board denied the Agency's motion for summary judgment. Further, in the January Order, the Board denied the Agency motion to reconsider the denial of summary judgment. Accordingly, as of November 17, 2011, there was no pending motion for summary judgment in this matter and there was no motion for summary judgment "currently awaiting ruling."

The Agency also incorporates its June 15, 2011 motion for summary judgment in the instant motion and requests a ruling. Mot. at 6. As explained above, 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 , 181 Ill. 2d at 483, 693 N.E.2d at 370; *see also* 35 Ill. Adm. Code 101.516(b). In ruling, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id.* 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 judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

The Board recognizes that the Agency submitted missing pages and the final determination letter noted by the Board in the November Order and submitted additional documents for the record together with the current motion. However, the Agency has not addressed several issues in the November Order precluding summary judgment, including:

- Factual discrepancies as to whether Section 732.603(b)(4) or Section 734.615(b)(4) applies to the reimbursement appeal.

- Factual disputes between the parties as to the validity and effect of the December 20, 1991 letter.

- Factual disputes between the parties as to circumstances surrounding the application of OSFM's deductible determination, the Agency's later application of the $100,000 deductible, and whether the Agency affirmatively misled the Estate under an estoppel theory.

Accordingly, to the extent the Agency incorporated its June 15, 2011 motion for summary judgment in its March 2, 2012 motion, the Board denies the motion for summary judgment due to the continued existence of a genuine issue of material fact, and the Agency's failure to prove that it was entitled to judgment as a matter of law.

Estate Request for Authorization to File Motion for Summary Judgment

In its response to the motion, the Estate requests of the Board "direction and authorization for the [Estate] to file its own motion for summary judgment herein." Resp. at 6. Section 101.500 of the Board's procedural rules states that "[t]he Board may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure." 35 Ill. Adm. Code 101.500(a). With regards to motions for summary judgment, the Board's procedural rules under Section 101.516(a) state in part:

> Any time after the opposing party has appeared . . . but no fewer than 30 days prior to the regularly scheduled Board meeting before the noticed hearing date, a

> party may move the Board for summary judgment for all or any part of the relief sought. 35 Ill. Adm. Code 101.516(a).

Therefore, the Estate is free, subject to the above time restrictions, to file any motions for summary judgment with the Board that it deems appropriate.

Discovery and Hearing

With the Board having decided the Agency's motion for summary judgment, motion for reconsideration of the Board's denial of summary judgment, and instant motion, the parties may proceed with discovery, further motions, or hearing as the parties deem appropriate and as allowed by Board rules.

In its response, the Estate states "the Board has not deemed it necessary to rule on the outstanding discovery dispute that still exists." Resp. at 1. Along the same lines, the Estate suggests that the "Board should consider the motion to compel the deposition of Agency personnel, and its order striking the surreply, both of which were premised on being moot once the summary judgment was denied." Resp. at 5. Regarding the Estates' continued request for discovery, the Agency states that "both the hearing officer and the Board have denied that request." Reply at 3.

The Board notes that there are no outstanding motions pending before the Board as of this date. Specifically, the Estate's motion for interlocutory appeal of the Hearing Officer's denial of the Estate's motion to compel Agency depositions as well as the Estate's motion to file a surreply were denied in the November Order. Both of these Estate motions were presented by the Estate as necessary for a summary judgment determination. In that context, the Board denied the motions as moot because the Estate sought the discovery prior to the Board's determination on the Agency's motion for summary judgment, which the Board made in its November Order. However, the Board's prior decision on these two Estate motions does not restrict the parties from conducting such discovery in the future, consistent with the decision deadline in this action (currently August 23, 2012).

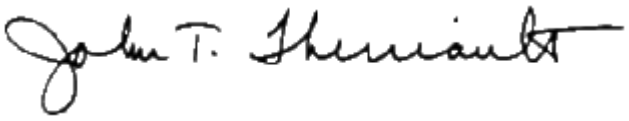
In addition, the Board notes, it is the hearing before the Board that affords the petitioner the opportunity "to challenge the reasons given by the Agency for [the denial] by means of cross-examination and the receipt of testimony to test the validity of the information [relied on by the Agency]." Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280; Waste Management, 138 Ill. App. 3d at 552 (the Board hearing "includes consideration of the record before the [Agency] together with receipt of testimony and other proofs under the panoply of safeguards normally associated with a due process hearing"). Unless a petition is disposed of by a motion for summary judgment, the "hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued." 35 Ill. Adm. Code 105.412. Accordingly, petitioners before the Board "cannot introduce new matters outside the Agency administrative record, but they may cross-examine and present testimony to challenge the information relied on by the Agency for the denial." Freedom Oil Co. v. IEPA, PCB No. 03-54 (consol.), slip op. at 11 (February 2, 2006).

CONCLUSION

The Board denies the Agency's motion requesting a "finding or ripeness of a ruling for interlocutory appeal" and motion requesting a ruling on the Agency's motion for summary judgment. There are no currently pending motions before the Board in this case.

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 April 19, 2012, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board