

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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

NOTICE

John Therriault, Acting Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

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

Patrick Shaw
Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a MOTION FOR SUMMARY JUDGMENT copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: May 14, 2012

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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

MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency (“Illinois EPA”), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, 101.508 and 101.516, hereby respectfully moves the Illinois Pollution Control Board (“Board”) to enter summary judgment in favor of the Illinois EPA and against the Petitioner, Estate of Gerald D. Slightom (“Estate”), in that there exist herein no genuine issues of material fact, and that the Illinois EPA is entitled to judgment as a matter of law with respect to the following grounds. In support of said motion, the Illinois EPA states as follows:

I. STANDARD FOR ISSUANCE AND REVIEW

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose no genuine issue as to any material fact and 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); McDonald’s Corporation v. Illinois Environmental Protection Agency, PCB 04-14 (January 22, 2004), p. 2.

Section 57.8(i) of the Illinois Environmental Protection Act (“Act”) (415 ILCS 5/57.8(i)) grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40

of the Act (415 ILCS 5/40). Section 40 of the Act, the general appeal section for permits, has been used by the legislature as the basis for this type of appeal to the Board. Thus, when reviewing an Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund, the Board must decide whether or not the application, as submitted, demonstrates compliance with the Act and Board regulations. Rantoul Township High School District No. 193 v. Illinois EPA, PCB 03-42 (April 17, 2003), p. 3.

In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must look to the documents within the Administrative Record ("Record" or "AR"). The Illinois EPA asserts that the Record and the arguments presented in this motion are sufficient for the Board to enter a dispositive order in favor of the Illinois EPA on all relevant issues. Accordingly, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA's decision.

II. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

III. ISSUE

The issue presented is whether, pursuant to 35 Ill. Adm. Code Section 732.603(b)(4), the higher deductible shall apply when more than one deductible determination is made? Based upon the express language of this Section and the facts presented, the answer is YES.

IV. FACTS

The facts in the Illinois EPA record supporting this motion are as follows:

1. On December 6, 1991, the Illinois EPA received an Application for Reimbursement from Gerald Slightom. (AR, p.1)
2. Pursuant to the December 6, 1991 submittal, the date the owner became aware of the release was August 30, 1991. (AR, p.2)
3. The December 6, 1991 submittal indicated that there were 5 tanks on site, that one was leaking, that the tank was installed in 1977, that it was removed on August 30, 1991, and that the service station had ceased operation. The UST was registered with the Office of the State Fire Marshal (“OSFM”) on April 18, 1990. (AR, p.2) The Notification for Underground Storage tanks showing the registration on April 18, 1990 can be found at AR, p.24.
4. On December 20, 1991, the Illinois EPA issued a decision letter that determined that the Petitioner’s site was “eligible to seek reimbursement for corrective action costs, accrued on or after July 28, 1989, in excess of \$100,000.00.” The letter went on to state that “A \$100,000.00 deductible applies to sites where the owner or operator had registered none of the underground storage tanks located at the site prior to July 28, 1989. (Section 22.18b(d)(3)(B)(i) of the Illinois Environmental Protection Act). The review of your Application, and or confirmation with the Illinois Office of the State Fire Marshal indicates that none of the tanks at the site were registered prior to July 28, 1989.” (AR, p. 13)
5. On February 6, 2008, the OSFM issued a decision letter based upon a Reimbursement Eligibility and Deductible Application they received on January 24, 2008 from the Estate of Gerald Slightom. In that decision, the OSFM determined that the 5 tanks were “eligible to seek payment of costs in excess of \$10,000. (AR, p.29)

7. On January 29, 2009, the Illinois EPA issued a decision letter based upon an application for payment from the Fund. In this letter, the Illinois EPA applied the \$10,000 deductible in error based upon the February 6, 2008 OSFM determination. (AR, p.47)
8. On October 29, 2010, the Illinois EPA issued the decision letter currently under appeal. The decision letter was based upon an application for payment from the Fund dated July 14, 2010 and received on July 19, 2010. This letter stated, in part, "Pursuant to 35, Ill. Adm. Code Part 734.615(b)(4) where more than one deductible determination has been made, the higher deductible shall apply. On December 20, 1991, the Illinois Environmental Protection Agency issued an Eligibility and Deductibility Determination of \$100,000.00 for this site. A second Eligibility and Deductibility Determination of \$10,000.00 was issued on February 6, 2008 by the Office of the State Fire Marshal. The Illinois Environmental Protection Agency has determined that the \$100,000.00 deductible applies to this site. (AR, p.109)
9. The Estate filed an appeal of the Illinois EPA's October 29, 2010 decision on December 6, 2010 and amended its Petition on January 12, 2011.

V. APPLICABLE LAW

A. ENVIRONMENTAL PROTECTION ACT:

415 ILCS 5/57.9. Underground Storage Tank Fund; eligibility and deductibility, states, in part, as follows:

- (a) The Underground Storage Tank Fund shall be accessible by owners and operators who have a confirmed release from an underground storage tank or related tank system of a substance listed in this Section. The owner or operator is eligible to access the Underground Storage Tank Fund if the eligibility requirements of this Title are satisfied and:
 - (1) Neither the owner nor the operator is the United States Government.
 - (2) The tank does not contain fuel which is exempt from the Motor Fuel Tax Law.

- (3) The costs were incurred as a result of a confirmed release of any of the following substances:
 - (A) "Fuel", as defined in Section 1.19 of the Motor Fuel Tax Law.
 - (B) Aviation fuel.
 - (C) Heating oil.
 - (D) Kerosene.
 - (E) Used oil which has been refined from crude oil used in a motor vehicle, as defined in Section 1.3 of the Motor Fuel Tax Law.
- (4) The owner or operator registered the tank and paid all fees in accordance with the statutory and regulatory requirements of the Gasoline Storage Act.
- (5) The owner or operator notified the Illinois Emergency Management Agency of a confirmed release, the costs were incurred after the notification and the costs were a result of a release of a substance listed in this Section. Costs of corrective action or indemnification incurred before providing that notification shall not be eligible for payment.
- (6) The costs have not already been paid to the owner or operator under a private insurance policy, other written agreement, or court order.
- (7) The costs were associated with "corrective action" of this Act.

If the underground storage tank which experienced a release of a substance listed in this Section was installed after July 28, 1989, the owner or operator is eligible to access the Underground Storage Tank Fund if it is demonstrated to the Office of the State Fire Marshal the tank was installed and operated in accordance with Office of the State Fire Marshal regulatory requirements. Office of the State Fire Marshal certification is prima facie evidence the tank was installed pursuant to the Office of the State Fire Marshal regulatory requirements.

- (b) ***An owner or operator may access the Underground Storage Tank Fund for costs associated with an Agency approved plan and the Agency shall approve the payment of costs associated with corrective action after the application of a \$10,000 deductible, except in the following situations:***
 - (1) ***A deductible of \$100,000 shall apply when none of the underground storage tanks were registered prior to July 28, 1989, except in the case of underground storage tanks used exclusively to store heating oil for consumptive use on the premises where stored and which serve other than farms or residential units, a deductible of \$100,000 shall apply when none of these tanks were registered prior to July 1, 1992. (Emphasis added)***

- (2) A deductible of \$50,000 shall apply if any of the underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release prior to July 28, 1989.
- (3) A deductible of \$15,000 shall apply when one or more, but not all, of the underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release on or after July 28, 1989.

A deductible shall apply annually for each site at which costs were incurred under a claim submitted pursuant to this Title, except that if corrective action in response to an occurrence takes place over a period of more than one year, in subsequent years, no deductible shall apply for costs incurred in response to such occurrence.

- (c) Eligibility and deductibility determinations shall be made by the Office of the State Fire Marshal.
 - (1) When an owner or operator reports a confirmed release of a regulated substance, the Office of the State Fire Marshal shall provide the owner or operator with an "Eligibility and Deductibility Determination" form. The form shall either be provided **onsite** or within 15 days of the Office of the State Fire Marshal receipt of notice indicating a confirmed release. The form shall request sufficient information to enable the Office of the State Fire Marshal to make a final determination as to owner or operator eligibility to access the Underground Storage Tank Fund pursuant to this Title and the appropriate deductible. The form shall be promulgated as a rule or regulation pursuant to the Illinois Administrative Procedure Act by the Office of the State Fire Marshal. Until such form is promulgated, the Office of State Fire Marshal shall use a form which generally conforms with this Act.
 - (2) Within 60 days of receipt of the "Eligibility and Deductibility Determination" form, the Office of the State Fire Marshal shall issue one letter enunciating the final eligibility and deductibility determination, and such determination or failure to act within the time prescribed shall be a final decision appealable to the Illinois Pollution Control Board.

B: POLLUTION CONTROL BOARD REGULATIONS:

35 Ill. Adm. Code Section 734.615 Authorization for Payment; Priority List, states, in part, as follows:

- b) The following rules must apply regarding deductibles:
 - 1) Any deductible, as determined by the OSFM or the Agency, must be subtracted from any amount approved for payment by the Agency or by operation of law, or ordered by the Board or courts;
 - 2) Only one deductible must apply per occurrence;

- 3) If multiple incident numbers are issued for a single site in the same calendar year, only one deductible must apply for those incidents, even if the incidents relate to more than one occurrence; and
- 4) ***Where more than one deductible determination is made, the higher deductible must apply.*** (Emphasis added)

VI. ARGUMENT AND ANALYSIS

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

In this matter, all tanks (and the only release identified at this site) had been assigned a deductible of \$100,000, under the December 6, 1991 Application. Since “none” of the 5 underground storage tanks identified were registered prior to July 28, 1989, the deductible in Subsection (b) (1) applied. The January 24, 2008 Application appears to correctly state the facts in this case, however, the OSFM, presumably through error, issued a deductible determination of \$10,000. In this case, the \$100,000 remains applicable for a number of reasons.

Initially, Section (b) (1) is specific in noting that if none of tanks were registered prior to July 28, 1989, whether there was a confirmed release or not¹, a deductible of \$100,000 applies. All tanks within December 6, 1991 Application were not registered prior to that date for this deductible to apply.

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

Thus, the question becomes, if two different deductible determinations were issued under the same set of facts, which deductible applies? Clearly, pursuant to Board regulations, the higher deductible applies. Again, Subsection (b) of the Act states that the deductible for a release is \$10,000; unless you have tanks on-site prior to the date of July 28, 1989. Regarding the date of July 28, 1989, you can either have: (1) no tanks registered prior to that date, (2) any tanks registered prior to that date, or (3) a tank or more, but not all, registered prior to that date.

The Board has specifically spoken on this very issue and could not have spoken more expressly and clearer on the outcome of multiple deductible determinations. The Illinois EPA corrects a mistake that it made in the original Motion for Summary Judgment when it cited the wrong regulation. As stated in the Illinois EPA determination letter, Part 734 applies to this site. **Section 734.615(b)(4)** of the Board's regulations states:

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

When acting on the submittal of the December 6, 1991 Application, the Illinois EPA, whose duty included eligibility determinations at that time, made a deductible determination of \$100,000. (AR, p.13) Again, this provision applies when no tanks on-site had been registered prior to a date certain. Section 57.9 of the Act states as follows:

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

Following the December 6, 1991 Application, which found the above provision applicable, the Estate sought yet another eligibility and deductibility determination from OSFM. (AR, p.29) Even assuming that the February 6, 2008 OSFM decision of a second lower deductible determination is valid (which the Illinois EPA does not concede), **Section 734.615(b)(4)** of the regulations would control the outcome of the Illinois EPA’s actions on review of costs associated with a release (attributable to tanks already removed) since this regulation is specific in stating that the larger of the two deductibles shall control.

VII. SUMMARY

On October 29, 2010, the Illinois EPA issued a determination letter informing the estate that the higher \$100,000.00 deductible applied to the site pursuant to the Board regulations. This decision was correct under current law.

VIII. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board grant summary judgment in favor of the Illinois EPA and affirm the Illinois EPA’s decision to apply the higher deductible as detailed in the October 29, 2010, final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

Melanie A. Jarvis
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: May 14, 2012

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on May 14, 2012, I served true and correct copies of a MOTION FOR SUMMARY JUDGMENT via the Board's COOL system and by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. Mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

John Therriault, Acting Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

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

Patrick Shaw
Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)