BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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| 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
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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 RESPONSE TO MOTION FOR SUMMARY JUDGMENT, 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 12th of June, 2012

Respectfully submitted,
ESTATE OF GERALD D. SLIGHTOM, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

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**RESPONSE TO MOTION FOR SUMMARY JUDGMENT**

NOW COMES Petitioner, Estate of Gerald D. Slightom (hereinafter "the Estate"), pursuant to Section 101.516 of the Board's Procedural Rules (35 Ill. Admin. Code 101.516(a)), in response to the motion for summary judgment filed by the Illinois Environmental Protection Act (hereinafter "Agency"), stating further as follows**:**

**INTRODUCTION**

The Agency has refiled substantially the same motion for summary judgment as it filed on June 16, 2011, purporting to change two of the three deficiencies identified by the Board's order denying the motion. In particular, the revised motion fails to address the issue of estoppel, recognized by the Board as properly raised and insufficiently addressed by the original motion. (Order of Nov. 17, 2011) By making no attempt to address the issue of estoppel in the revised motion, the law of the case requires the Board to deny this motion for summary judgment as well. In addition, the Estate challenges the adequacy of the two deficiencies purportedly addressed in the revised motion, as well as re-raises deficiencies the Board did not previously address, nor did it need to address, given that the previous motion for summary judgment had at least three deficiencies.

## I. THE LAW OF THE CASE REQUIRES DENIAL OF THE MOTION FOR SUMMARY JUDGMENT.

On June 16, 2011, the Agency filed a motion for summary judgment, which like the present motion for summary judgment, did not address the affirmative defense of estoppel raised in the Petition for Review. The Estate responded that the summary judgment motion cannot be granted for failure to address the affirmative defenses of estoppel and waiver raised in the Petition for Review. (Resp. Mot. S.J., at pp. 19-20 (citing West Suburban Mass Transit Dist. v. Conrail, 210 Ill. App. 3d 484, 488 (1st Dist. 1991) ("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."). On November 17, 2012, the Board agreed with the motion for summary judgment was deficient for failing to prove there are no disputed facts regarding the affirmative defense of estoppel:

> **In determining a motion for summary judgment, the Board must take the pleadings in favor of the nonmovant. The 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. Without a more clear set of facts, the Board cannot grant summary judgment.**

(Order of Nov. 17, 2012, at p. 10)

"Generally, the law of the case doctrine provides that 'a rule established as controlling in a particular case will continue to be the law of the case in the absence of error or a change of facts.'" Elmhurst Memorial Healthcare v. Chevron USA, PCB 2009-066 (July 7, 2011) (finding that Board order denying motion to strike affirmative defense was binding as the law of the case

as to a subsequent motion to strike the affirmative defense). The motion for summary judgment does not address the estoppel issue, and therefore simply does not present any error or change of facts. Consequently, the motion for summary judgment should be denied on this ground alone.

## II. WHAT LAW APPLIES IS STILL DISPUTED.

The Board also denied the previous motion for summary judgment because it was not clear "as to whether either Part 732 or Part 734 applies, as well as insufficient facts in the record to make either determination." (Order of Nov. 17, 2011, at p. 8) The Agency has clarified that Part 734 applies, which is to say current law. However, the motion for summary judgment does not explain by what authority the Agency can ignore current law by requiring compliance with the laws repealed.

Specifically, the Agency's denial letter claims its decision stems from the authority of Section 57.8(a)(4) of the Act. (Rec. P109A) That provision states:

> **Any deductible, as determined pursuant to the Office of the State Fire Marshal's eligibility and deductibility final determination in accordance with Section 57.9, shall be subtracted from any payment invoice paid to an eligible owner or operator. Only one deductible shall apply per underground storage tank site.**

(415 ILCS 5/57.8(a)(4) (emphasis added)

The Office of the State Fire Marshal determined that the deductible was $10,000, and was the only such determination made herein. Under Section 22.18(b) of the Act, the Agency itself was authorized to assess a deductible pursuant to different standards, but this authority was repealed in 1993. P.A. 88-496, § 15 (repealing 415 ILCS 5/22.18b et al.) Under the transition provisions, Section 22.18(b) was still controlling until an election was made. (415 ILCS 5/57.13)

Once the election was made, the old law no longer applied, with the exception of costs already incurred under previous law, but there are no such costs at issue in this appeal; they all arose to the election.

A tribunal "should apply the law as it exists at the time of the appeal, unless doing so would interfere with a vested right." First of Am. Trust Co. v. Armstead, 171 Ill. 2d 282, 289 (1996). The complexity of the leaking underground storage tank law through the lens of continual and apparant never-ending modification provides sound proof of the wisdom of such principles. The legal authority of the Agency to make eligibility and deductibility determinations does not appear in the lawbooks, and hasn't for almost a generation.

The legislature has an ongoing right to amend a statute. Id. at 291. It can increase or decrease the deductible at any time it wants, so long as a vested right is not harmed, such as the right to receive reimbursement for work performed prior to the legislative change. The law has changed, determinations made under laws repealed by the legislature are not enforceable by the Agency.

## III. INSUFFICIENT RECORD.

The Board also rejected the previous motion for summary judgment because the record appears incomplete. While it appears that the written record is substantially complete, the Estate does not agree that the entire record is complete. "A motion for summary judgment can only be granted where there are no genuine issues of material fact and the right of the moving party to judgment is clear and free from doubt. However, where the pleadings, depositions and other evidence before the court in a motion for summary judgment show that at trial a verdict would

have to be directed, entry of summary judgment is proper." Kimbrough v. Jewel Cos., 92 Ill. App. 3d 813, 816-817 (1st Dist. 1981).

The record does not include the testimony of the Agency reviewers who have been represented to have "found" the document from 1991 heretofore unknown, and whom communicated with the Office of the State Fire Marshal and supplemented the Agency files with additional information therefrom. It does not include testimony as to those conversations. The Board has long held that "the appellant is entitled to a hearing to determine whether or not such material was relied upon and further to explore what it discovers." Soil Enrichment Materials Corp. v. EPA, 5 Ill. PCB 715 (1972). Indeed, due process requires the opportunity "to test the validity of the information the Agency relie[d] upon in denying its application." EPA v. Pollution Control Board , 115 Ill. 2d 65, 70 (1986). The Board has also historically accepted testimony at hearing or through deposition to explain the record. See, e.g., Saline County Landfill v. Illinois EPA, PCB 02-108 (May 16, 2002) (affirming hearing officer admission of deposition testimony of agency employees which explained the administrative record of the permit appeal). The purpose of the hearing it to allow Petitioner to "cross-examine and present testimony to challenge the information relied on by the Agency for the denial." Weeke Oil Co. V. Illinois EPA, PCB No. 10-1 (May 20, 2010) (emphasis added).

## IV. THE APPLICANT DID NOT SUBMIT THE 1991 DOCUMENT AND THEREFORE THE AGENCY FAILS TO MEET ITS BURDEN OF PROOF.

As stated in the Agency's Motion for Summary Judgment,[1] the question before the Board is "whether the application, as submitted to the Agency, would not violate the Act and Board regulations." Metropolitan Pier and Exposition Authority v. IEPA, PCB 10-73, at p. 51 (July 7, 2011).

The Agency's motion for summary judgment is premised on materials not submitted in the application. The subject application for payment included a copy of the only OSFM eligibility and deductibility determination (Rec. 209-210), in accordance with the requirements of the Act. (415 ILCS 5/57.8(a)(6)(C))

Pursuant to the Agency's own description of the Board's standard of review, the motion for summary judgment should be denied outright.

## V. THE PETITIONER COMPLIED WITH THE ACT BY SUBMITTING THE COPY OF THE OSFM DETERMINATION AND THE AGENCY IS WITHOUT AUTHORITY TO DISREGARD IT.

The Act requires the owner or operator seeking reimbursement from the LUST Fund to obtain an eligibility determination from the OSFM:

> **If an owner or operator is eligible to access the Underground Storage Tank Fund pursuant to an Office of State Fire Marshal eligibility/deductible final**

[1] "[W]hen 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 the Board regulations." (Mot. S.J., at p.2) (emphasis added)

> **determination letter issued in accordance with Section 57.9, the owner or operator may submit a complete application for final or partial payment to the Agency for activities taken in response to a confirmed release.**

(415 ILCS 5/57.8) (emphasis added)

> **For purposes of this Section, a complete application shall consist of:**
>
> . . .
>
> **(C) A copy of the Office of the State Fire Marshal's eligibility and deductibility determination.**

(415 ILCS 5/57.8(1)(C))

As pointed out earlier, the provision relied upon by the Agency in its denial letter limits the Agency's authority to subtract the amount of the OSFM determination:

> **Any deductible, as determined pursuant to the Office of the State Fire Marshal's eligibility and deductibility final determination in accordance with Section 57.9, shall be subtracted from any payment invoice paid to an eligible owner or operator. Only one deductible shall apply per underground storage tank site.**

(415 ILCS 5/57.8(a)(4))

These provisions work in tangent. Before performing the work, the Estate submitted multiple budgets that contained the OSFM determination. In fact, this was done four times before the Stage 3 Plan and Budget was performed:

| DOCUMENT | SUBMITTED | APPROVED |
|---|---|---|
| Site Investigation Stage 3 Plan and Budget | 8/27/08 (Rec. No. 16) | 10/1/08 (Rec. No. 2) |
| Site Investigation Stage 3 Plan and Budget | 3/4/09 (Rec. No. 11) | 3/25/09 (Rec. No. 19) |
| Site Investigation Stage 3 Plan and Budget | 7/2/09 (Rec. No. 20) | 7/24/09 (Rec. No. 22) |
| Site Investigation Stage 3 Plan and Budget | 11/5/09 (Rec. No. 23) | 11/25/09 (Rec.No. 25) |
| Site Investigation Completion Report | 6/11/10 (Rec. No. 27) | 7/8/10 (Rec. No. 29) |

After the work was completed in accordance with the approved plans and budgets, the Estate reported the results of the work and the actual costs incurred, and again attached the required OSFM determination of a $10,000 deductible, which was again approved. It was only when the final bill was to be paid, did the Agency interjected a new standard, not based upon any authority in the statue.

## VI. THE AGENCY EXCEEDED ITS PERMISSIBLE REVIEW OF THE PAYMENT APPLICATION.

Once the owner/operator submits a complete application for payment, the Act imposes strict limits on the scope of the Agency's review of that application. Without such constraints owner/operators would be reluctant to perform the approved work and budget for fear of arbitrary Agency rejections.

> **In the case of any approved plan and budget for which payment is being sought, the Agency shall make a payment determination within 120 days of receipt of the application. Such determination shall be considered a final decision. The Agency's review shall be limited to generally accepted auditing and accounting practices. In no case shall the Agency conduct additional review of any plan which was completed within the budget, beyond auditing for adherence to the corrective action measures in the proposal. . . .**

(415 ILCS 5/57.8(a)(1) (emphasis added))

Once the Agency has determined that the application is complete, as it did here, the Agency's review is restricted to an audit of the subsequent costs incurred. "When an application requests reimbursement for costs that are at or under the amounts of Subpart H and the approved budget, and provides documentation demonstrating that the costs were actually incurred for approved work, the Agency cannot 'second-guess' whether the requested reimbursement is

reasonable." T-Town Drive Thru v. IEPA, PCB 07-85 (2008). While the Board went on to rule that the owner/operator could be required to submit backup invoices in order for the payment application to be complete, the reasoning does not extend to eligibility and deductibility issues which the Act specifically provides are deemed complete by supplying a copy of the OSFM determination in the application. (415 ILCS 5/57.8(a)(1)(C))

## VII. ALTERNATIVELY, THE APPLICATION DID NOT VIOLATE 35 ILL. ADMIN. CODE 734.615(b)(4).

The Agency's motion for summary judgment has sidestepped its own claim of authority in its denial letter from Section 5/57.8(a)(4) to claim the legal issue is framed by Section 734.615(b)(4). Section 57.8(a)(4) of the Act is not mentioned at all in the motion. The Board's regulations clearly cannot be used to trump the enabling statute, or limit the legislature's inherent power to change the law. There are not two deductibles as far as Section 57.8(a)(4) is concerned, unless there are two deductible determinations made by the OSFM pursuant to Section 57.9 of the Act. If arguably the OSFM had made two deductible determinations, then perhaps Section 734.615(b)(4) would apply in deciding which governs, though the Estate believes that such application would have to be consistent with the purpose of that regulation (discussed in the next paragraph) and not used to circumvent legislation.

The regulatory history of Section 734.615(b)(4) reveals that it was based upon the problem of two incidents at a site. The rules were proposed in the R01-26 proceedings with the following explanation:

> **[W]e have had occasions where eligibility determinations have been issued, say, <u>for two separate incidents</u> where different deductibles have been applied by the Illinois Office of the State Fire Marshal**.

R01-26 (Feb. 27, 2001 Hrg. Transcript), at p. 41 (emphasis added).

Doug Clay of the Agency further explained how this could occur:

> **[I]f I could respond to your question about could you have multiple deductibles at a given site, the answer is yes. If – I mean, if they are in different years and they are separate occurrences. What we were trying to clarify here is that if you have got two determinations on the same occurrences but different incident numbers and maybe years apart and there have been two different deductibles assessed, we just wanted to clarify that we would be going by the highest deductible.**

R01-26 (Feb. 27, 2001 Hrg. Transcript), at p. 43.

The explanation of the rule makes sense in the common situation where an eligibility and deductibility determination is made at a site in which all known tanks were timely registered (generally a $10,000 deductible), but during excavation, a previously unknown unregistered tank is discovered and identified as having an incident. What the Agency likes to see as the highest deductible rule prevails, is in actuality a rule that favors the most recent determination based upon the most recent law and facts. The present situation is not within the contemplated intent of the rule. There was only one occurrence or incident. There was only one OSFM determination. There was only one eligibility and deductibility determination made as to Petitioner.

Final consideration should be given to the strong likelihood that the rule itself is invalid or at least will be found invalid in various situations. During the rulemaking, the Agency was asked about the statutory authority for the rule and conceded there was none:

**Q. What is the basis for going by the highest deductible and not the lowest deductible?**

**A. The highest deductible indicates that not all of the tanks were registered, timely registered, and I guess just being conservative.**

**Q. But there is . . . no statutory requirements that the highest deductible applies as opposed to the lowest deductible?**

**. . .**

**A. No.**

R01-26 (Feb. 27, 2001 Hrg. Transcript), at pp. 43-44.

The rule is entirely arbitrary without reference to the circumstances described in the Agency testimony, which would better be described as the most recent deductible applies. The deductible the Agency wishes to apply here, in contrast, was made (1) by an administrative agency whose authority in this area was repealed in 1993, (2) under legal standards that were repealed in 1993, (3) to a prior owner, instead of the current owner, and (4) incorrectly, or without knowledge of the circumstances surrounding the heating oil tank registered in 1990.[2] To interpret the Board's regulation as requiring imposition of such a deductible in the face of the legal problems with doing so would be to construe the regulation in a way that would clearly be invalid. See Laffoon v. Bell & Zoller Coal Co., 65 Ill. 2d 437, 446 (1976) (laws should be interpreted where reasonable to resolve doubts to their validity).

[2] There is no factual dispute that the heating oil tank was registered on April 18, 1990 as used for consumptive purposes on the commercial premises. (Rec. P24-P25) "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. (415 ILCS 5/57.9(b)(1))

**CONCLUSION**

The Estate is currently finalizing its own motion for summary judgment based upon the evidence available to it at this time. It expects to have the needed affidavits and filings prepared within a week.

WHEREFORE, Petitioner, ESTATE OF GERALD D. SLIGHTOM, prays that the Agency's Motion for Summary Judgment be Denied, 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

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