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

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PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board the ILLINOIS EPA'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

_____

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Dated: July 10, 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.	)	

RESPONSE TO PETITIONER'S 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 responds to Petitioner's Motion for Summary Judgment and asks the Illinois Pollution Control Board ("Board") to enter summary judgment in favor of the Illinois EPA pursuant to its previously filed Motion for Summary Judgment 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. PETITIONER'S EXHIBITS

Section 105.212 of the Board's Regulations, 35 Ill. Adm. Code 105.212, sets forth the requirements of the Illinois EPA's record. Subsection (b) states that the record must include the following: Any permit application or other request that resulted in the Agency's final decision; correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application; the permit denial letter that conforms to the requirements of

Section 39(a) of the Act or the issued permit or other Agency final decision; the hearing file of any hearing that may have been held before the Agency, including any transcripts and exhibits; and any other information the Agency relied upon in making its final decision.

The Illinois EPA technical staff did not rely upon the documents the Petitioner is requesting to use in supplementing the record in making its final decision. Obviously, the affidavits and the evidence they purport to insert into the record were not considered by the Illinois EPA at the time the decision was made. The documents the Petitioner marked as exhibits should be excluded from the Illinois EPA record and their mention should be stricken from the Petitioner's Motion for Summary Judgment and any future filings in this case.

II. ESTOPPEL

Under the doctrine of equitable estoppel, an obligation may not be enforced against a party that reasonably and detrimentally relied on the words or conduct of the party seeking to enforce the obligation. See Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 431, 665 N.E.2d 795, 806 (1996). However, the doctrine "should not be invoked against a public body except under compelling circumstances, where such invocation would not defeat the operation of public policy." Gorgees v. Daley, 256 Ill. App. 3d 143, 147, 628 N.E.2d 721, 725 (1st Dist. 1993). As the Illinois Supreme Court has explained, "[t]his court's reluctance to apply the doctrine of estoppel against the State has been motivated by the concern that doing so 'may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials."' Brown's Furniture, 171 Ill. 2d at 431-432, 665 N.E.2d at 806 (quoting Hickey v. Illinois Central R.R. Co., 35 Ill. 2d 427, 447-448, 220 N.E.2d 415, 426 (1966); see also Tri-County Landfill Co. v. Illinois Pollution Control Board, 41 Ill. App. 3d 249, 353 N.E.2d 316 (2d

Dist. 1976) (refusing to estop the Agency from enforcing the Act against various landfills that it had previously approved on the grounds that to do so would violate public policy).

Consistent with this reluctance, the courts have established several hurdles for those seeking to estop the government. Like all parties seeking to rely on estoppel, those seeking to estop the government must demonstrate that their reliance was reasonable and that they incurred some detriment as a result of the reliance. A party seeking to estop the government also must show that the government made a misrepresentation with knowledge that the misrepresentation was untrue. See Medical Disposal Services, Inc. v. Illinois Environmental Protection Agency, 286 Ill. App. 3d 562, 677 N.E.2d 428 (1st Dist. 1997). Finally, before estopping the government, the courts require that the governmental body must have taken some affirmative act; the unauthorized or mistaken act of a ministerial officer will not estop the government. "Generally, a public body cannot be estopped by an act of its agent beyond the authority expressly conferred upon that official, or made in derogation of a statutory provision." Gorgees, 256 Ill. App. 3d at 147, 628 N.E.2d at 725; see also Brown's Furniture, 171 Ill. 2d at 431, 665 N.E.2d at 806 ("The State is not estopped by the mistakes made or misinformation given by the Department's [[of Revenue] employees with respect to tax liabilities."). See, Panhandle Eastern Pipeline Company v. IEPA, PCB 98-102 (January, 21, 1999).

Here an administrative error was made that resulted in the application of the improper deductible by the Illinois EPA. However, just because an error was made, that does not mean that the Illinois EPA is required to continue to make that error ad infinitum. An administrative agency can correct its mistakes. In this case, the $100,000 deductible was overlooked until the entire file was reviewed. Once the $100,000 deductible was found, the Illinois EPA was within its authority as administrator of the Fund to apply the correct deductible and to recoup payment made in error when applying the $10,000 deductible.

The case law clearly supports the Illinois EPA's position that it is entitled to correct a mistake without estoppel being attached.

The Petitioner's argument of estoppel applying in this case has merit, only in the fact that, if anyone is estopped in this case, it is the Petitioner. Once a determination is made for the eligibility of the tanks, the determination follows the release and the incident. A determination was made for Lust Incident Number 912456, the only release relative to this action and the Illinois EPA applied a $100,000 deductible. That decision was not challenged and thus is legally binding. Reichhold Chemicals, Inc. v. PCB (3d Dist.1990), 204 Ill.App.3d 674, 561 N.E.2d 1343, held that the Illinois EPA has no statutory authority to reconsider a permit decision. Further, it is well established that an administrative agency has no inherent authority to amend or change its decision and may undertake reconsideration only where authorized by statute. (Pearce Hospital v. Public Aid Commission (1958), 15 Ill.2d 301, 154 N.E.2d 691;Reichhold Chemicals Inc. v. PCB (3d Dist.1991), 204 Ill.App.3d 674, 561 N.E.2d 1343.) Although the Board possesses such power, the appellate court has held that the Illinois EPA has no such reconsideration powers. (Reichhold, 561 N.E.2d 1343.) In general, finality, as it pertains to administrative agency decisions, is a decision which "fully terminates proceedings before an administrative body." Taylor v. State Universities Retirement, 111 Ill. Dec. 283;512 N.E.2d 399 (Ill.App. 4 Dist.1987) The Board found in Mick's Garage v. Illinois EPA, PCB 03-126 (December 18, 2003) that it lacked jurisdiction to review the Illinois EPA's February 7, 1992 deductibility determination. The Board stated that it "has held that a condition imposed in a permit, not appealed to the Board under Section 40(a)(1), may not be appealed in a subsequent permit. Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 30 (Jan 21, 1999)".

In Kean Oil v. Illinois EPA, PCB 97-146 (May 1, 1997), the Board held that it was concerned

that there was "an attempt by petitioner to misuse the submittal process in order to remedy its failure to properly appeal the first decision by the Agency concerning this matter. The Board cannot allow the potential misuse of the reimbursement system and as the Agency has properly identified, it does not have the authority to reconsider a final determination."

Again, no new release was reported or identified at the site. The $100,000 deductible follows the incident number, no matter how many owners elect to proceed. A determination of $100,000 was made, it follows the incident number, and under Illinois law, it is the deductible that applies at the site for this release. In short, Petitioner, or in this case the estate of Petitioner does not get a second bite of the apple. From a standpoint of equity, Petitioner's estate cannot establish any facts that would suggest that it somehow should be allowed to sit in a better position than the decedent did when alive. No new facts are present. No new incident exists. In a legal sense, regarding the principles of estoppel, it is the Petitioner itself whom must be estopped from claiming that it should now have the lower deductible apply.

III. APPLICABLE LAW

Two deductibles have been issued for this site. One was issued by the Illinois EPA when it had the authority to issue said deductibles. The deductibles issued by the Illinois EPA did not vanish once the Office of State Fire Marshal started to administer the deductible program. Those deductibles remained in effect. There is no question that the Illinois EPA had the authority to issue the deductible under the law at the time it was issued. Nothing in Illinois law and certainly no legal precedent pointed out by the Petitioner, nullified the legal authority of these deductibles. Merely because the Illinois EPA's authority to issue deductibles was given to another state agency, does not mean that the deductibles issued properly under Illinois law are invalid. Under the above case law, final decisions of the Illinois EPA cannot be altered outside of the permit appeal process. In order to nullify a final decision of an

agency an explicit provision in the law would have to be provided. No such provision exists. The final decisions of the Illinois EPA, issued when it had the authority to issue deductibility determinations, are valid. See, Fiatallis North American v. IEPA, PCB 93-108, (October 21, 1993) for discussion on finality of agency decisions. The law in question at the time of the decision was Title XVI of the Act and Part 734 of the Board's regulations.

IV. SUFFICIENCY OF THE ADMINISTRATIVE RECORD

The Petitioner once again uses this opportunity to argue for discovery when discovery has been denied. The record is complete and sufficient to allow the Board to determine the issues at hand. The Illinois EPA final decision is what is at issue. The Board has held that what a project reviewer thought or did not think is irrelevant the final decision. While certainly the permit reviewer recommends the final decision, it is not the permit reviewer who makes the final decision. See People v. Chemetco, Inc. (February 19, 1998), PCB 96-76, slip op. at 11-12 (party unreasonably relied on an Agency employee's alleged statements about not having to meet certain monitoring requirements in part because the party received a letter from the Illinois EPA stating that the party must meet the monitoring requirements). See, Panhandle Eastern Pipeline Company v. IEPA, PCB 98-102 (January, 21, 1999); White and Brewer Trucking v. IEPA, PCB 96-250 (March 20, 1997), (The Board held that White & Brewer's estoppel claim failed on several grounds. First, its reliance on an Illinois EPA permit reviewer's statements was not reasonable. In advising White & Brewer that it could ignore the plain language of the regulations, the permit reviewer acted beyond his authority, and such acts cannot estop the Illinois EPA. See, Metromedia, Inc. v. Kramer et al., 152 Ill. App. 3d 459, 467, 504 N.E.2d 884, 889 (1st Dist. 1987).) In White & Brewer, the Board held that "any mistaken advice that the permit reviewer gave, while regrettable, could not estop the Illinois EPA. A permit reviewer is not the Illinois EPA and the Illinois

EPA took no official action until it issued the first denial letter to White & Brewer on February 22, 1996."

Likewise, in this case, the Illinois EPA made final decisions, whether the project manager made representations to the consultant is irrelevant. The Petitioner knew about those final decisions issued to it, and those final decisions of the Illinois EPA could not be reconsidered, as discussed above. Therefore, the Petitioner's discovery/estoppel argument does not meet the high standard when a governmental agency is involved.

V. REVIEW OF ENTIRE RECORD

The Illinois EPA is entitled to look at the entire file when making a final decision on a case. If it couldn't look at the entire file fraud and overpayments would be rampant. The history of a file is as important as what is submitted. Ultimately, everything reviewed by the Illinois EPA consisted of documents either submitted by the Petitioner or generated by the Illinois EPA. If Petitioner's argument were taken literally, the Illinois EPA could not look at how much money had been previously paid out on a site to determine if statutory payment limits had been reached. Nor could it apply a deductible if the Petitioner had previously supplied the documentation to the Illinois EPA but did not include it in the current application. All documents at a site build on one another and it is important to see what has been done at a site to know what still needs to be completed. Otherwise, the Illinois EPA would have to require each applicant to submit all historical documentation with each application made and the waste of natural resources and manpower for both the applicant and the Illinois EPA would reach absurd levels.

VI. NO DOCUMENT DISREGARDED

The Illinois EPA did not disregard the $10,000.00 deductible decision of the Office of State Fire

Marshal when making the determination that the $100,000.00 deductible applied. Merely, it was following state law in applying the higher deductible. The Petitioner is correct that the error of the deductibles was not found by the technical units of the Illinois EPA. When the reimbursement unit received the paperwork, the deductible issue was reviewed. When presented with the two deductibles, the Illinois EPA could not disregard the portion of the law that states that when two deductibles are issued for a site that the higher deductible applied merely because an error had been previously made. It is clear that the Illinois EPA should not further their error by ignoring the plain meaning of the law, but should correct it as was done in this case. The Board has previously held that the errors made by the Illinois EPA are best addressed by correction and not perpetuation. See, Fiatallis North American v. IEPA, PCB 93-108, (October 21, 1993), citing State Bank of Whittington, PCB 92-152, (June 3, 1993) No document was disregarded as the Petitioner claims.

VII. APPLICATION OF 35 Ill. Adm. Code 734.615(b)(4)

Section 734.615(b)(4) has been in place since 2001. It was intended to clarify the problem when two deductibles were issued as to which one applied. The regulation went through a Board hearing and the JCAR process and was ultimately adopted. Under the general authority of the Act, the Board can issue regulations to clarify the Act. While there is no specific provision in the Act stating what is to occur when two deductibles apply, there is a deductibility section and the Board has the authority to clarify that section in order to administer the Act. The Board's rule is not unconstitutional and is allowed under its authority. In Granite City Div. of Nat. Steel v. Illinois Pollution Control Board, 155 Ill.2d 149 (april 15, 1993, the Court noted "that the Board's promulgation of the instant regulations is a quasi-legislative function and will not be disturbed unless the Board's action is clearly arbitrary, unreasonable or capricious. Central Illinois Public Service Co. v. Pollution Control Board(1987), 116

Ill.2d 397, 407, 107 Ill. Dec. 666, 507 N.E.2d 819; Monsanto, 67 Ill.2d at 289, 10 Ill. Dec. 231, 367 N.E.2d 684.) When acting in its quasi-legislative capacity, the Board has no burden to support its conclusions with a given quantum of evidence. Shell Oil Co. v. Pollution Control Board (1976, 37 Ill.App.3d 264, 270-271, 346 N.E.2d 212) Rather, the burden is on the petitioners to establish the invalidity of the regulations."

It is clear that the Petitioner had not established the invalidity of the regulations promulgated by the Board.

VIII. CONCLUSION

The Board has, through its regulations, promulgated a bright line test as to what deductible applies this situation. This is not the case to dim that bright line. For the reasons stated herein, the Illinois EPA respectfully requests that the Board, GRANT the Illinois EPA's Motion for Summary Judgment.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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Dated: July 10, 2012

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on July 10, 2012, I served true and correct copies of a RESPONSE TO PETITIONER'S 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:

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