

**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.)	

REPLY TO PETITIONER'S OPPOSITION TO MOTION TO DISMISS

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel, and, pursuant to 35 Ill. Adm. Code 101.500, 101.506 and 101.508, hereby respectfully moves the Illinois Pollution Control Board ("Board") to **DISMISS** the above case and in support of said motion, the Illinois EPA states as follows:

ARGUMENT AND ANALYSIS

The Illinois Pollution Control Board is granted subject matter jurisdiction over contested cases between the Illinois EPA and the regulated community pursuant to Sections 5 and 40 of the Act. In this case, the contested issues have been resolved and the contested status of this case has been rendered moot. Mootness occurs when a ruling can have no effect on the outcome of the case as in when there is no longer a real controversy. Therefore, due to the mootness of the issues presented, the case must be dismissed. It is the Illinois EPA's full intention to grant the Petitioner the full dollar amount that is the subject of this case and it apologizes for the continued clerical errors in this matter that have gotten the correct dollar amount wrong.

In regards to the attorney's fee issue brought up by the Petitioner, the Board's rules are specific and express on the issue of legal fees and costs. The Board rules provide that "legal fees or

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costs, including but not limited to, legal fees or costs for seeking payment under this Part, unless the owner or operator prevails before the Board and the Board authorizes payment of such costs” are ineligible for reimbursement. See, 35 ILCS 734.650(d)(6) The fact is that legal fees are expressly ineligible unless there is a finding by the Board that authorizes such payment. The award of legal fees should be an extraordinary relief with a higher burden of proof on the claimant and strict scrutiny by the Board. Are not such awards in and of their very nature quasi punitive? How should such awards be justified? Certainly in a situation where the Illinois EPA has made good faith efforts to settle the case and has attempted to allow reimbursement in the full amount requested, it is not justified to award attorney fees.

Further a ruling granting the Petitioner attorney fees in a case such as this would create a situation where Illinois EPA may take all cases to hearing because if attorney fees are to be awarded in all cases filed before the Board, then there is no incentive for Illinois EPA to settle a case. In the case at hand, Illinois EPA has many reasons for capitulating including, costs of litigation, possible costs of appeal and including another state agency in its litigation of the matter. Frankly, the Illinois EPA prefers to defer litigation of the issues presented in this case for another time. However, if attorney fees are to be awarded in these types of cases such legal strategy would not be considered and cases would not be settled.

CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board dismiss this action against the Illinois EPA for mootness and deny the Petitioner’s request for attorney fees.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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Dated: October 2, 2013

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on October 2, 2013, I served true and correct copies of a **REPLY TO PETITIONER'S OPPOSITION TO MOTION TO DISMISS** 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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