BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

Melanie Jarvis
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

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 PETITIONER'S POST-HEARING REPLY BRIEF, 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 3rd day of June, 2014.

Respectfully submitted,
ESTATE OF GERALD D. SLIGHTOM, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323
Telephone: 217/528-2517
Facsimile: 217/528-2553

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ESTATE OF GERALD D. SLIGHTOM, Petitioner,	)	
v.	)	PCB No. 11-25
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITIONER'S POST-HEARING BRIEF

NOW COMES Petitioner, Estate of Gerald D. Slightom (hereinafter "the Estate"), for its Post-Hearing Reply Brief, states as follows:

I. RELEASES OF GASOLINE, USED OIL AND FUEL WERE REPORTED FROM ALL FIVE TANKS.

Paragraphs 2 and 3 of the Illinois EPA's Statement of Facts is incorrect or incomplete for want of reference to the notification to the Illinois Emergency Management Agency about the nature and timing of the incident. On August 30, 1991, Gerald Slightom reported a release, that had been discovered the previous day, of "gasoline & used oil & fuel oil" from all five underground tanks. (Rec. No. 4) This was reported with a representative of OSFM present, and consistent with his notes of a "significant" and "widespread" contamination at this site, including tank floors, walls and pipe trench. (Rec. No. 3) The Illinois EPA claims there was only a release from the used oil tank, but it is not connected or near the pipe trench. (Rec. 16, at p. 12) With Agency oversight and approval, the Estate of Slightom has been remediating gasoline, used oil and fuel oil releases reported to the Illinois Emergency Management Agency. See, e.g. Rec. No.

13 (45-day report identifying releases from all five tanks); Rec. P121 (subject application for payment).

II. THE ILLINOIS EPA CORRECTLY IDENTIFIES STANDARDS OF REVIEW WITHOUT APPLYING THEM TO ITS OWN ARGUMENTS.

The Burden of Proofs and Standard of Review stated by the Illinois EPA are correct, but the Illinois EPA:

> **As the Board itself has noted, the primary focus of the Board must remain on the adequacy of the permit application and the information submitted by the applicant to the Illinois EPA.**

(IEPA Brief, at p. 2 (citing John Sexton Contractors Co. v. IEPA, PCB No. 88-139 (Feb. 23, 1989) (emphasis added)

> **[T]he Board must decide whether or not the proposals, as submitted to the Illinois EPA, demonstrate compliance with the Act and Board regulations.**

(IEPA Brief, at p. 3 (citing Broderick Teaming Co. v. IEPA, PCB No. 00-187 (Dec. 7, 2000) (emphasis added))

The Illinois EPA's decision was based upon a document that was not submitted as part of the request for payment, and the Illinois EPA has offered no precedent for changing the boilerplate law it has cited. These standards are inapposite to the unsupported claim of the right to review such documents in its possession that it wishes (or purposely ignore those records when it wishes as well). Perhaps, the Illinois EPA could have responded to its discovery by rejecting the application as incomplete for want of all information required by law, including all eligibility and deductibility determinations. The problem with this approach would be, and still is, that the Act specifically states that "a complete application" contains a "copy of the Office of the State

Fire Marshal's eligibility and deductibility determination." (415 ILCS 5/57.8(a)(6)(C)) In any event, the Illinois EPA waived this argument by agreeing that the application was complete in its final decision, (Rec. p. 109-110), and is precluded from claiming the submittal was incomplete. Environmental Protection Agency v. Pollution Control Bd., 86 Ill. 2d 390, 405 (1981).

Similarly, the Illinois EPA states that "[i]n reimbursement appeals, . . . the applicant for reimbursement has the burden to demonstrate that costs are related to corrective action, properly accounted for, and reasonable." (IEPA Brief, at p. 2 (citing Rezmar Corp. v. IEPA, PCB 092-91 (April 17, 2003)) There is no dispute as to any of these things, as none of these deficiencies is raised in the denial letter. The costs for which reimbursement is sought are the same costs approved as part of the previously approved plans and budgets, which included the applicable eligibility and deductibility determination. The purpose of the plan and budget is revealed by the Board's warning about the potential consequences of not submitting a plan or budget. 35 Ill. Adm. Code § 734.335(d) (applicant "may not be entitled to full payment from the Fund"). That is, the purpose is to give the operator assurance of full payment from the Fund, if the corrective action work performed and the expenses incurred are consistent with those in the plan or budget.

III. THERE ARE NOT TWO APPLICABLE DEDUCTIBLES.

Perhaps the most significant dispute between the parties briefs is in the Illinois EPA's assumption that there are two equally applicable deductibles. There are not two legally relevant deductibles, as one of the Board decisions cited by the Illinois EPA held. In Mick's Garage v. IEPA, PCB 03-126 (Dec. 18, 2003), there were three deductible determinations made to Mick's Garage: (I) a $50,000 deductible determination made by the Illinois EPA in 1992; (ii) a $15,000

deductible determination made by OSFM in May of 2000; (iii) a $10,000 deductible determination made by OSFM in September of 2000. (Id. at pp. 2-3) The Board did not frame the dispute as "which deductible?," but instead started with determining what law applied. The key finding was that "[b]ecause Mick's reported the release in 1991 and did not elect to proceed under the new law, the applicable law is Section 22.18b of the Act.." (Id. at p. 6) Under Section 22.18b of the Act "the Agency makes the deductible determination," and "the OSFM does not have authority to determine the applicable deductible." (Id. at p. 6)[1] There, as well as here, there is only one deductible under applicable law, though in this case the applicable law is Title XVI. Not only did the Estate elect to proceed under Title XVI of the Act. (Rec. No. 12), which provides that only the OSFM has authority to determine the deductible (415 ILCS 5/57.8(a)(4)), the transition provisions that once allowed UST operators to continue to operate under old law no longer exist. (415 ILCS 5/57.13)

IV. THE CORRECT DEDUCTIBLE IS $10,000.

As the Illinois EPA promised in its opening argument, it argues that the Board should find that the $100,000 deductible was correct. While the Board has generally refused to review the correctness of a deductible determination in any proceeding not involving a direct appeal of that determination (e.g., Mick's Garage), Petitioner feels it incumbent to defend the $10,000

[1] Mick's Garage arose from an appeal of a January 10, 2003, final decision, at which time the Board's "higher deductible" rule was in place. (R01-26, effective June 1, 2002) In the R01-26 proceedings, the Illinois EPA testified that the concern motivating the "higher deductible" rule was that "different deductibles have been applied by the Illinois Office of the State Fire Marshal." (R01-26 (Feb. 27, 2001 Hrg. Transcript), at p. 41) The rule was not ever intended to apply to different deductibles by different agencies, since that situation cannot legally occur, as the Illinois EPA successfully argued in Mick's Garage.

under the unique circumstances of this case.

"The base deductible amount in the Act is $ 10,000, except that the deductible increases to $ 15,000, $ 50,000 or $ 100,000 under certain circumstances." A.K.A. Land v. IEPA, PCB No. 90-177 (March 14, 1991). Where a statutory provision is constructed as a general rule, subject to exceptions, the exceptions will be narrowly construed. Comm'r v. Clark, 489 U.S. 726, 739 (1989)("In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision")

The Illinois EPA argues that the following exception applies:

> **(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.**

(415 ILCS 5/57.9(b) (emphasis added))

All of the tanks were registered prior to July 1, 1992, including "tank #4 used for heating oil on premises." (Rec. P24-P26) The Illinois EPA argues that there was only a release from the used oil tank, which is factually incorrect, as explained in Section I supra. The Illinois EPA further argues that implicit in the exception is a requirement that "only the heating oil tank had a release," (IEPA Brief, at p. 6), which is not grounded on any language in the text, which is concerned solely with when tanks were registered.

The Illinois EPA also incorrectly and repeatedly argues that the Illinois EPA correctly applied *Section 57.9 of the Act* in 1991. (IEPA Brief, at pp. 7-8) That is impossible. Not only

did Section 57.9 of the Act not exist, it did not contain any of the provisions regarding heating oil or conditions where tanks need only be registered prior to July 1, 1992.[2] The law has changed, the decisionmaker has changed, and the standards have changed. In particular, the treatment of heating oil tanks varied considerably for several years, with the rules sometimes changing within the same year. Ultimately, the question of what is the proper deductible is subsumed by the question of who gets to decide, and under Title XVI, the OSFM is the authority that decides.

V. BRIAN BAUER CONTACTED OSFM TO CHALLENGE THEIR DECISION.

The Illinois EPA argues that Brian Bauer did not contact OSFM to challenge their decision, but "verify the deductible the Illinois EPA issued." (IEPA Brief, at p. 9) This claim makes no sense. The Illinois EPA did not share its deductible determinations with OSFM, so what would be verified? Bauer testified that he called "to question why they issued the $10,000 deductible" and had multiple conversations about OSFM changing its decision. (Hrg Trans. at p. 60) It is odd that the LUST Division does not have time to issue a Wells letter when it plans on relying upon extrinsic evidence, but it does have time to make multiple calls to OSFM whose lower deductible decision they claim is simply irrelevant.

[2] In 1991, the predecessor of Section 57.9(b)(1) of the Act stated: "If prior to July 28, 1989, the owner or operator had registered none of the underground storage tanks at the site on that date, the deductible amount under subparagraph (A) of paragraph (3) of this subsectin (d) shall be $100,000 rather than $10,000. After the $100,000 deductible amount has been paid, the deductible amount shall thereafter be as provided under subparagraph (a) of paragraph (3) of this subsection (d)."

VI. THE ESTATE APPROPRIATELY ELECTED TO PROCEED AS OWNER, THOUGH IT DID NOT HAVE TO DO SO.

The Illinois EPA makes a number of misstatements about probate law. When Gerald Slightom died, title to his property immediately passed to his heirs or devisees, subject to the requirements of the Probate Act. In re Estate of Stokes, 225 Ill. App. 3d 834, 839 (4th Dist. 1992). There are at least three important conditions imposed by the Probate Act. First, the Administrator takes possession of any real property during the administration of the estate. (755 ILCS 5/20-1(a)) Second, the Administrator may sell any real property if the assets are insufficient to satisfy debts. (755 ILCS 5/20-4; In re Stokes, 225 Ill. App. 3d at 840) Third, any heir or devisee may disclaim ownership of the property, (755 ILCS 5/2-7), under the rule that nobody can become owner of property without their consent. People v. Flanagin, 331 Ill. 203, 208 (1928). In summary, a dead person holds no title to real property under the common law, and instead, title vests immediately in the heirs, whether known, unknown or yet to be determined, but in the interim, the Administrator is in possession of the property during the administration of the estate.

The Manager of the LUST Division recommends that people interested in electing to proceed as owner, first find out from the OSFM, what their deductible would be. (Hrg. Trans. at p. 87) In order to obtain an OSFM deductibility determination, the Estate was required to submit proof to the OSFM that Gerald Slightom was dead (death certificate), and letters of office, showing that Richard D. Slightom is authorized to take possession of and collect the estate of the decedent. (Pet's Ex. 7) The death certificate established that Gerald Slightom no longer owned the property, and that the Administrator was in possession. The Illinois EPA makes a number of

claims about OSFM's reasoning that are not in the record, but the two items of proof requested by OSFM are consistent with probate law.

The Illinois EPA approved the Estate's election to proceed as owner, which necessarily meant for purposes of the Act, the Estate is "any person who has submitted to the Agency a written election to proceed under this Title and has acquired an ownership interest in a site." (415 ILCS 5/57.2) There is no question that an estate is a "person" (415 ILCS 5/3.315), and the Illinois EPA's approval constitutes its agreement that the Estate has an ownership interest in the site. If, as legal counsel now argues, the election to proceed was unnecessary for an estate, then the election would have been rejected outright.

Furthermore, the Manager of the LUST division indicated that it is normal for estates to obtain an election to proceed as owner:

Q. . . . In a situation in which -- to your knowledge, has the agency ever rejected a submittal by an estate because it needs to get an election to proceed first?

A. I'm sure we have.

Q. Do you know what kind of circumstances that would come into play?

A. Kind of. We have issues with the state -- with the comptroller getting claims paid. They have to produce a W-9. If the comptroller doesn't accept the W-9 for whatever reason, sometimes they do elections of estates and go under a FEIN number to get paid.

(Hrg. Trans. at p. 67)

As the Manager points out, in order to get paid the underground storage tank operator must submit a "federal taxpayer identification number and legal status disclosure certification on a form prescribed and provided by the Agency." The form prescribed by the Agency is the W-9, which is an Internal Revenue Service document. Under the Internal Revenue Code, estates are

separately taxed entities from the decedent and are required to obtain their own taxpayer identification number.[3] The request for a W-9 further creates a reported tax incident, which has to be accounted for by the proper taxpayer.

Beyond the specific federal requirements that are implicated by the use of the W-9 form, the practical reality is that to perform corrective action under the LUST Program, the owner must continually sign numerous documents, one of which is the W-9, and if the owner is dead, the owner cannot do so. The Estate is the only legal entity that can conduct or oversee the cleanup and sign the documents, but it cannot do so by signing the decedent's name. Furthermore, the owner's name on the W-9 must match the owner's name on the eligibility and deductibility determination. (Hrg. Trans. at pp. 68-69)[4] Now, it may be possible that a cleanup may have progressed to a point where new signatures are not required, and payment can be made to the decedent and properly accounted for by the Administrator as either a pre- or post- death event. At some point, however, the Estate needs to proceed as an owner on its own behalf. (Hrg. Trans. at p. 69) And the Illinois EPA will reject submittals by an estate having not filed an election. (Hrg. Trans. at p. 67)

The bottom line is that the Estate only filed an election to proceed as owner under Title XVI in reliance upon the approval of the only agency authorized to make deductible determinations under Title XVI. Had the OSFM determined that a $100,000 deductible applied, then the Estate would not have not spent $10,000 from the meager estate as a downpayment on

---

[3] Pursuant to the W-9 form, "you are considered a person if you are . . . [a]ny estate (other than a foreign estate) or trust." (Rec. P61)

[4] The specific exception given of a corporation disregarding the corporation's existence is not relevant here.

the cleanup that it did not have the resources to complete; instead the heirs would have disclaimed interest in the property as an obvious liability, and allow it to be abandoned to the State.[5]

VII. ILLINOIS EPA FAILS TO ADDRESS ESTOPPEL PRECEDENTS.

The Illinois EPA has declined to address any of the legal precedents that Petitioner has identified as controlling. First, that the Illinois EPA in its administration of the LUST Fund is acting in a proprietary manner, in which case the precedents cited by the Illinois EPA are simply irrelevant. This is a public insurance program created to take the place of a private insurance program that regulators were uncertain existed for pollution liabilities over twenty years ago. Given the context of why this Fund was created, it is simply inexcusable for the insurance program to offer an inferior means of financial assurance, the worst of both private and public insurance. Private insurers are also bureaucracies that make mistakes, but they are not free to ignore the consequences of those relying on their mistakes.

Alternatively, the precedent of Wachta v. Pollution Control Board, 8 Ill. App. 3d 436 (2nd Dist. 1972), is directly applicable here, as unlike the cases cited by the Illinois EPA, it involves prior environmental approvals relied upon by the permittee, which the government could not simply ignore.

While the Illinois EPA uses its estoppel response to shoehorn irrelevant and scandalous

[5] There is no evidence in the Illinois EPA file that a claim was made on the Estate, let alone a timely one, and so the Estate was not obligated to pay the Illinois EPA anything. (755 ILCS 5/18-12) Had the Illinois EPA made a timely claim, its recovery would have been limited by the extent of assets in the estate, as well as higher priority payments. (755 ILCS 5/18-13)

criticisms of the Estate's consultant, these merely reinforce that the Illinois EPA does not know the difference between estoppel and waiver. Estoppel is about "prejudicial reliance," National Tea Co. v. Commerce & Industry Ins. Co., 119 Ill. App. 3d 195, 205 (1st Dist. 1983), and the consultant did what the Manager of the LUST Division recommends people do when thinking about electing to proceed as owner:

> **check with the fire marshall before you sign this form to elect to proceed because they may tell you what the deductible might be if there isn't one already and if there is one already, they will tell you what the deductible will be.**

(Hrg. Trans. at p. 87)[6]

The Manager also suggested consulting an attorney, who would agree with the Manager since the OSFM is the only body authorized under existing law to determine the deductible. As far as the law is concerned, the Illinois EPA determination is a secret program.

VIII. THE PAYMENT DOCTRINE IS PROPERLY BEFORE THE BOARD.

In its motion to dismiss as moot, the Illinois EPA filed with the Board evidence that it had subsequently paid substantially the amount denied in its decision. Thus, substantial payment is an officially notable fact (as is the related pending appeal). Since this Board's final decision is itself reviewable on the basis of all questions of law or fact in the Board's record, 735 ILCS 5/3-110; S.Ct. R. 335(i)(2), there is no bar from the Board entering findings of fact and conclusions of law as to the application of the payment doctrine. At the very minimum, the Board should

[6] It is also worth mentioning again that Freedom of Information Act request from Meredisia in October 15, 1993 for all Illinois EPA documents, resulted in the production of only 9 pages, when there were 34 pages of responsive documents at the time. (Rec. No. 1)

ignore the numerous objections that suggest it would be unimaginable for the Illinois EPA to pay the reimbursement application.

WHEREFORE, the Petitioner prays for an order from the Board, granting judgment in its favor, ordering the Agency to approve the underlying application for payment, directing Petitioner to submit proof of its entitlement and amount of attorney's fees incurred pursuant to 415 ILCS 5/57.8(l), or for such other and further relief as the Board deems meet and just.

ESTATE OF GERALD D. SLIGHTOM,
Petitioner

By its attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI

By: /s/ Patrick D. Shaw

Patrick D. Shaw
MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 N. Old Capitol Plaza, Ste. 325
Springfield, IL 62701
Telephone: 217/528-2517
Facsimile: 217/528-2553

INDEX OF DOCUMENTS

	[Missing Page]	*44A
	[Missing Page]	*45A
10/1/2008	IEPA Approval w/ mods Stage 3 Site Inv. Plan (7 pp)	No. 2
10/20/2008	Stage 1 Reimbursement Request (CSD)	P55-P108
?	Tracking Summary for Stage 1 Site Investigation Costs	P43
	2009	
1/27/2009	Review Docs re 1/29/2009 determination	P50-P52
?	Tracking Summary for Site Investigation Costs	P53
?	Queue Date Tracking Sheet for Payment	P54
1/29/2009	IEPA Ltr Approving Payment subject to $10k ded.	P47-P49
	[Missing Page 2]	*47A
3/4/2009	Amended Stage 3 Site Investigation Work Plan & Budget (85 pp)	No. 11
3/17/2009	LUST Technical Rev. Notes (Amended Stage 3 – Ex. 11) (3 pp)	No. 18
3/25/2009	IEPA Ltr reviewing Stage 3 Site Investigation Plan	P41-P42
	[Missing Page 2]	*41A
3/25/2009	IEPA Approval of Amended Stage 3 (Ex.11) (5 pp)	No. 19
7/2/2009	Amended (2) Stage 3 Site Investigation Work Plan & & Budget (77 pp)	No. 20
7/22/2009	LUST Technical Rev. Notes (Amended (2) Stage 3 – Ex. 20) (3 pp)	No. 21
7/24/2009	IEPA Approval of Amended (2) Stage 3 (Ex. 20), w/ mods. (6 pp)	No. 22
11/4/2009	Amended (3) Stage 3 Site Investigation Work Plan & Budget (71 pp)	No. 23
11/18/2009	LUST Technical Review Notes(Stage 3 – Ex. 23) (3 pp)	No. 24
11/25/2009	IEPA Approval of Amended (3) Stage e (Ex. 24) (3 pp)	No. 25
11/25/2009	IEPA Approval (Ex. 25) w/ mail certificates (5 pp)	No. 26
	2010	
6/10/2010	Site Investigation Completion Report (291 pp)	No. 27
6/30/2010	LUST Technical Review Notes (SICR – Ex. 27) (4 pp)	No. 28
7/8/2010	IEPA Approval of SICR (Ex. 27)	P38-P40
7/8/2010	IEPA Approval of SICR (Ex. 27) (6 pp)	No. 29
7/19/2010	Stage 3 Reimbursement Request	P120-P215
8/4/2010	Lust Claims Tracking System Printout ($10k deductible)	P118
?	Tracking Summary for Stage 3 Site Investigation Costs	P37
?	Tracking Summary for Stage 3 Site Investigation Costs	P114
?	Queue Date Tracking Sheet	P119
10/28/2010	Review Docs re 10/29/2008 determination	P111-P113
10/28/2010	Screen-Print Out	P115-P117
10/29/2010	IEPA Ltr Denying Payment due to $100k deductible	P109-P110
	[Missing Page 2]	*109A

NOTES:

P = Documents Originally Filed as the Administrative Record, identified by page number.

* = Documents appended to the Administrative Record by motion to [missing pages].

No. = Digital Documents later used to Supplement the Record.