ILLINOIS POLLUTION CONTROL BOARD
June 19, 2014

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

PATRICK D. SHAW, MOHAN, ALEWERT, PRILLAMAN & ADAMI, APPEARED ON BEHALF OF THE ESTATE OF GERALD D. SLIGHTOM; and

MELANIE A. JARVIS, ASSISTANT COUNSEL, DIVISION OF LEGAL COUNSEL, APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by J.A. Burke):

The Estate of Gerald D. Slightom (Estate) appeals an October 29, 2010 determination of the Illinois Environmental Protection Agency (Agency) denying the Estate's request for reimbursement from the Leaking Underground Storage Tank Fund (Fund). The Estate's application concerns property at 103 North Third Street, Girard, Macoupin County (site).

A hearing was held on April 10, 2014. For the reasons below, the Board affirms the Agency's October 29, 2010 decision.

PROCEDURAL HISTORY

On December 6, 2010, the Estate filed a petition asking the Board to review the Agency's October 29, 2010 determination applying a $100,000 deductible to its reimbursement claim. The Estate amended its petition (Pet.) on January 12, 2011 to correct a procedural deficiency. On January 20, 2011, the Board accepted the amended petition for hearing.

On June 16, 2011, the Agency filed the Agency record accompanied by a motion for summary judgment. On September 6, 2011, the Estate responded to the Agency's motion for summary judgment. On September 13, 2011, the Agency filed a reply to the Estate's response to the motion for summary judgment. In a November 17, 2011 Order, the Board denied the Agency's motion for summary judgment.

On December 13, 2011, the Agency moved to reconsider the Board's Order denying the Agency's motion for summary judgment. The Estate responded to the motion for

reconsideration on December 28, 2011. On January 19, 2012, the Board denied the Agency's motion for reconsideration and directed the parties to hearing.

On May 14, 2012, the Agency filed a new motion for summary judgment. On June 12, 2012, the Estate responded to the Agency's motion. The Agency filed its reply to the Estate's response on June 22, 2012. On June 29, 2012, the Estate moved for summary judgment. The Agency responded to the Estate's motion on July 10, 2012. On November 1, 2012, the Board denied the cross-motions for summary judgment and directed the parties to hearing.

On September 10, 2013, the Agency filed a motion to dismiss. The Estate responded on September 24, 2013. On October 2, 2013, the Agency filed its reply. On October 11, 2013, the Estate moved for leave to file a surreply with the Estate's surreply attached. On November 7, 2013, the Board denied the Agency's motion to dismiss. The Estate filed a motion for reconsideration on December 19, 2013. The Board denied the Estate's motion on January 23, 2014.

HEARING

A hearing was held on April 10, 2014 in Springfield (Tr.). The Estate called the following witnesses: Shane Thorpe, a senior project manager with CSD Environmental Services in Springfield; Catherine Elston, an Account Tech II with the Agency; and Brian Bauer, an Environmental Protection Specialist III with the Agency. The Agency called one witness: Hernando Albarracin, a Leaking Underground Storage Tank Section Manager with the Agency.

The Estate offered nine exhibits into evidence. The Agency did not object to the admission of any exhibits. The public comment deadline was set for April 24, 2014. The Board did not receive any public comments.

CITATIONS TO THE RECORD

The original Agency record was filed on June 16, 2011. This record was supplemented on December 13, 2011. On March 2, 2012, the Agency filed

> all of the documents within the Bureau of Land's Leaking Underground Storage [Tank] Section's possession that relate to this site's Land Pollution Control Number. Slightom, PCB 11-25, Motion Requesting a Finding or Ripeness of a Ruling for Interlocutory Appeal and Motion Requesting a Ruling on the Illinois Environmental Protection Agency's Motion for Summary Judgment, page 1 (Mar. 2, 2012).

Because the record filings do not contain the same documents, the Board has combined the three filings into a single record (Rec.) for purposes of this order (*i.e.*, the June 16, 2011 filing begins at page 1 of the record, the December 13, 2011 filing begins at page 216 of the record, and the March 2, 2012 filing begins at page 230 of the record).

FACTS

Facility Background

Gerald Slightom owned property at 103 North Third Street[1] in Girard, Macoupin County. Rec. at 18. Mr. Slightom leased the property to Michael Robinson from some time prior to 1977 until August 1990. *Id.* On April 18, 1990, Mr. Slightom registered five underground storage tanks at the site with the Office of the State Fire Marshal (OSFM), including three gasoline tanks, one fuel oil tank, and one used oil tank. *Id.* at 24-25. The tanks had been installed between 1956 and 1977. *Id.* at 248-253. The fuel oil was used for heating, and the used oil tank was used to store waste oil. *Id.* at 9, 12. The record contains conflicting evidence on how many tanks were reported to be leaking. On August 30, 1991, Mr. Slightom reported a release from only the used oil tank, which was installed in 1956. *Id.* at 11-12, 15. However, the record also includes documentation noting a leak of "gasoline [and] used oil [and] fuel oil" and that a release occurred from all five tanks *Id.* at 32, 244. All five tanks were removed on August 30, 1991. *Id.* at 242.

Agency $100,000 Deductible Determination

On December 6, 1991, the Agency received from Mr. Slightom an application for reimbursement. Rec. at 1-12. A December 20, 1991 Agency letter determined that the site was eligible to seek reimbursement for corrective action costs, accrued on or after July 28, 1989, in excess of $100,000. *Id.* at 13.

Office of State Fire Marshal $10,000 Deductible Determination

Gerald Slightom died on September 5, 2007, and Richard D. Slightom was appointed the executor of the Estate. *See* Rec. at 33. The Estate took over the site on September 20, 2007. *Id.* at 31. In the process of evaluating the estate of Mr. Slightom, the Estate identified and valued the site at $59,707 if cleaned up. Bill Nichelson Affidavit, attached as Exhibit 1 to Estate Motion for Summary Judgment (June 29, 2012). The Estate contracted CSD Environmental Services, Inc. to assist in cleaning up the property. Tr. at 9. CSD Environmental agreed to take the work contingent upon OSFM applying a deductible of $15,000 or less. Tr. at 16-17. On November 19, 2007, CSD requested from OSFM all information pertaining to the site. Tr. at 12, Pet. Exh. 2. OSFM did not provide an earlier deductible determination as part of these records. Tr. at 13. The Agency's public website also did not reference that an Agency determination had been made on the amount of deductible. Tr. at 58-59, Pet. Exh. 1, 9.

[1] The initial application for reimbursement references the address as 109 N. 3rd Street. However, other documents indicate an address, as referenced earlier in this order, of 103 N. 3rd Street. Other documents also reference an address of 3rd and Center Street. The Board construes any references to "109 N. 3rd Street" or "3rd and Center Street" as referring to the subject property located at 103 N. 3rd Street.

On January 24, 2008, the Estate submitted a Fund Eligibility and Deductible Application to OSFM. Rec. at 31. The Estate's application noted that the release was discovered on August 29, 1991. *Id.* at 32. The application also cited the same incident number used in Gerald Slightom's December, 1991 reimbursement application. *Id.* at 15, 32. On February 6, 2008, OSFM issued a letter to the Estate based upon the application. *Id.* at 29-30. OSFM determined that the five identified tanks on the site were eligible to seek payment of costs in excess of $10,000. *Id*.

The Estate paid $10,000 to CSD on February 19, 2008. Rec. at 108. The Estate further paid bills of identified creditors and distributed remaining assets to heirs, except for the subject property. Nichelson Affidavit. There are no assets in the Estate other than the subject property. *Id.* The Agency approved the Estate's election to proceed as owner on March 3, 2008. Rec. at 363.

Site Clean-Up and Reimbursement Denial

The Estate performed an approved Stage 1 Site Investigation Plan and Budget which was approved by the Agency on March 12, 2008. Rec. at 367. The Estate submitted a reimbursement request on October 20, 2008. *Id.* at 55. On January 29, 2009, the Agency issued a decision letter applying the $10,000 deductible to the Estate's $29,239.08 reimbursement request and noted that the Estate would be reimbursed $19,239.08. Rec. at 47.

The Estate also submitted a series of Stage 3 Site Investigation Plans and Budgets, which the Agency approved. *See, e.g.*, Rec. at 494, 579, 964. The Estate's Site Investigation Completion Report included the actual costs for all Stage 3 site investigation activities. *Id.* at 673. The Agency conditionally approved reimbursement of $82,057.28 requested for the Stage 3 site investigation, plus additional handling charges. Rec. at 667-669.

In 2008, the Agency was addressing a backlog of tank claims. Tr. at 75. Employees were recruited internally to assist in reviewing the claims. *Id.* at 74-75. During this time, the review process was streamlined, with employees receiving on-the-job training. *Id.* at 55, 75. The claims reviewer who received the Estate's 2008 application reviewed the claim that had been submitted to the Agency and compared it to the approved budget. *Id.* at 76-77. The Estate's 2008 application contained only the $10,000 deductible determination letter. *Id.* at 85. This review resulted in the Agency's January 29, 2009 decision letter noting that the Estate would be reimbursed $19,239.08. Rec. at 224.

In 2009, there was an internal change in the Agency claims review process, whereby the tank program's technical employees became more involved in the process. Tr. at 77. On July 19, 2010, the Estate filed an application for payment in the amount of $83,912.58. Rec. at 119. At this time, Mr. Bauer, an Environmental Protection Specialist III in the Agency's Tank section, screened claims as they came in and assigned them to different reviewers. Tr. at 51. Mr. Bauer became aware of the Agency's December 20, 1991 $100,000 deductible determination letter while screening the Estate's July 19, 2010 claim, and brought it to the attention of Ms. Elston, an Account Tech II with the Agency, who had been assigned that claim. *Id*. at 41, 54.

On October 29, 2010, the Agency issued the letter currently under appeal that noted both the Agency's December 20, 1991 determination of a $100,000 deductible and the OSFM's February 6, 2008 determination of a $10,000 deductible for the site. Rec. at 227. The October 29, 2010 Agency letter applied the $100,000 deductible to the Estate's reimbursement claim. *Id.* The Agency letter further determined that the previous payment of $19,239.08 was an excess payment and stated that the remaining balance of $6,091.27 will be deducted from future payments. *Id.* at 228. The Estate appealed this decision on December 6, 2010.

ESTATE POST-HEARING BRIEF

The Estate sets forth six arguments in support of its position, which the Board summarizes below.

Section 57.8(a)(4) of the Act

The Estate contends that the Agency's denial letter "expressly relies upon legal authority that contradicts its own actions." Estate Br. at 11. The denial letter referenced Section 57.8(a)(4) of the Environmental Protection Act (Act). *Id.*, citing Rec. at 228.. The Estate notes the requirements of Section 57.8(a)(4) of the Act, which 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. *Id.*, citing 415 ILCS 5/57.8(a)(4) (2012).

The Estate argues that the $10,000 OSFM deductible determination is the only deductible in the record that meets the requirements of Section 57.8(a)(4) of the Act. Estate Br. at 11. The Estate also argues that the Agency "had no authority under the Act as it currently appears to subtract any deductible other than that of the OSFM." *Id.* at 12. This is because "[t]he statutory provision that mandates that there be only one deductible per underground storage tank site also states that the deductible shall be determined by OSFM in accordance with Section 57.9 of the Act." *Id.*

The Estate states that the Agency's prior deductible was made pursuant to Section 22.18(b) of the Act, which was repealed in 1993. Estate Br. at 12. While there have been transition provisions in the Act's language since the repeal, the current transition language provides "costs incurred . . . shall be payable from the [Fund] in the same manner as allowed under the law in effect at the time the costs were incurred." *Id.* The Estate contends that it is reasonable to apply the law as it now exists, stating that people experienced with the underground storage tank program "solely have Title XVI in mind when discussing" the program. *Id.* at 12-13. In addition, the Agency maintains a database on Title XVI and has never created a system to share its pre-Title XVI determinations with OSFM. *Id.* at 13. The Estate also notes Mr. Albarracin's testimony that he advises potential program entrants to seek the advice of an attorney, but that attorneys do not look at superseded laws to give counsel. *Id.* The Estate argues therefore that the law cited in the Agency denial letter is clear, *i.e.*, that "the

Agency may only offset a deductible determination made by OSFM under Title XVI, and there is no legal basis for the Agency to make any other deductible." *Id.* at 14.

Agency Authority to Supplement the Application

The Estate contends that the Board is required to decide "whether the submittals to the Agency demonstrated compliance with the Act" and "whether the application, as submitted to the Agency, would not violate the Act and Board regulations." Estate Br. at 14, citing Wheeling/GWA Auto Shop v. IEPA, PCB 10-70 (July 7, 2011), Metropolitan Pier and Exposition Authority v. IEPA, PCB 10-73, slip op. at 51 (July 7, 2011). The Estate contends that the Agency found the application to be complete as submitted. *Id.*, citing Rec. 1 at 112, 227. However, the Agency determination was based on a document not submitted in the application. *Id.* The Estate contends that, "[s]ince the Agency's denial letter was based upon information extrinsic to the application which was statutorily complete as to the amount of the deductible, [the Estate] has met its burden in this proceeding." *Id.* at 15.

Agency Scope of Review of the Application for Payment

The Estate argues that the Agency exceeded its permissible scope of review of the application for payment by re-reviewing its budget approvals. Estate Br. at 15. The Estate notes that the Agency "repeatedly approved budgets including a $10,000 deductible without complaint." *Id.* The Estate contends that "the purpose of submitting the eligibility and deductibility determination prior to performing the work is to provide assurance that if the work is performed in accordance with the plan and budget, there will be no dispute as to the amount received." *Id.* The Estate further contends that the Agency's ability to deny payment at the reimbursement stage is constrained by the Act, which provides

> Agency approval of any plan and associated budget . . . shall be considered final approval for purposes of seeking and obtaining payment from the Underground Storage Tank Fund if the costs associated with the completion of any such plan are less than or equal to the amounts approved in such budget. *Id.* at 16, citing 415 ILCS 5/57.7(c)(1) (2012).

The Act also provides

> 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 . . . . *Id.* at 16-17, citing 415 ILCS 5/57.8(a)(1) (2012).

The Estate argues that the Agency may not now "second-guess" the amount to be paid at the reimbursement stage, and that the Agency is without authority to make deductions that could

have been made at the time of the approval of the plan and budget. Estate Br. at 17, citing T-Town Drive Thru v. IEPA, PCB 07-85, slip op. at 24-25 (Apr. 3, 2008), Evergreen FS, Inc. v. IEPA, PCB 11-51 & 12-61, slip op. at 20-21 (June 21, 2012). The Agency has therefore "exceeded its scope of review at the payment stage by reconsidering its prior approvals" and failing to apply OSFM's $10,000 deductible determination. *Id.*

"Highest Deductible" Rule

The Estate contends that the "highest deductible" rule does not apply. Estate Br. at 17. While Section 57.8(a)(4) states there can only be one deductible per site, "this statement is in reference to deductible determinations made by OSFM." *Id.* at 17-18.

The Estate states that OSFM has tank registration information that the Agency does not have. Estate Br. at 18. Further, the determination "made to the subsequent owner is the only one of which the subsequent owner has notice and an opportunity to challenge." *Id.* Finally, the OSFM determination is the only determination made under current law. *Id.* at 19. The Act currently provides "a process by which a new person or entity can elect to become an owner, and consequently the [*sic*] is required to get an eligibility and deductibility determination specific to itself and use its own taxpayer identification number." *Id.* The Estate argues that the "highest deductible" rule was not intended to apply in this situation. *Id.* Rather, the rule "was intended for circumstances in which during an ongoing remediation additional unregistered tanks are discovered on the site." *Id.* at 20.

The Estate further argues that the rule "was clearly not promulgated to alter the statutory requirement that the OSFM determination is the only one that can be deducted, nor could the rule conflict with the statute." Estate Br. at 20, citing Hadley v. Ill. Dept. of Corrections, 224 Ill. 2d 365, 385 (2007). The Estate points to regulatory history to argue that the "highest deductible" rule is not supported by statute, but "is simply how the Agency has decided to utilize its discretion." *Id.* The Estate states that, "[i]n the face of a conflict between Section 57.8(a)(4) of the Act which requires use of the OSFM determination, and a regulation that is not authorized by statute, the statutory language must control." *Id.* at 21.

Estoppel

The Estate contends that "the State may be estopped when acting in a proprietary, as distinguished from its sovereign or governmental, capacity and even, under more compelling circumstances, when acting in its governmental capacity." Estate Br. at 21, citing Hickey v. Illinois Central R. R. Co., 35 Ill. 2d 427, 448 (1966). The Estate contends that the Agency here is acting in the capacity of a public insurer "as a means of permitting owner/operators of underground storage tanks a means of complying with federal financial assurance mandates." *Id.*, citing 24 U.S.C. § 6991(c)(6). The Agency is therefore operating "in a proprietary capacity as a liability insurer" and "the financial assurance provided by the [Fund] should not be less protective than that offered by liability insurance." *Id.* at 22.

The Estate notes that, in liability insurance cases, "estoppel does not focus on the conduct or the intent of the insurer, but on the effect of its conduct on the insured." Estate Br. at 22,

citing National Tea Co. v. Commerce & Industry Ins. Co., 119 Ill. App. 3d 195, 205 (1st Dist. 1983). The Estate contends that it detrimentally relied on the actions and decisions of the Agency. *Id.* The Estate did this in part by: electing to become a new owner in reliance upon OSFM's deductibility determination; conducting the Stage 1 Site Investigation with the pre-approval of the Agency, expending $29,239.08 in the process; and conducting several Stage 3 Site Investigations, in reliance on the previous approvals and communications from the Agency. *Id.* at 22-23. The Estate notes the Agency's testimony that the Agency had a copy of the $100,000 deductible letter in its file throughout these events. *Id.* at 23, citing Tr. at 54-55. Further, the Estate "detrimentally relied upon the OSFM determination and the Agency's various letters, approvals and payment that represented that the OSFM determination would be applied, and that the $10,000 deductible had been accepted." *Id.* at 24. The Estate contends that estoppel has been applied to environmental agencies under similar circumstances. *Id.*, citing Wachta v. PCB, 8 Ill. App. 3d 436 (2nd Dist. 1972).

Voluntary Payment Doctrine

The Estate notes that the Agency has substantially paid the amount at issue in this case, and that, under the voluntary payment doctrine, "absent fraud, duress or mistake of fact, money voluntarily paid on a claim of right to the payment cannot be recovered on the ground that the claim was illegal." Estate Br. at 24-25, citing Ramirez v. Smart Corp., 371 Ill. App. 3d 797, 801 (3rd Dist. 2007).

AGENCY POST-HEARING RESPONSE

The Agency states that it correctly assessed the proper deductible. Resp. at 2. The Agency characterizes the issue in this case as "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." *Id.* at 5[2]. The Agency states, based upon this section and the facts of this case, the higher deductible should apply. *Id.*

"Highest Deductible" Rule

The Agency contends that, when no tanks at a site are registered prior to July 28, 1989, such tanks have a deductible of $100,000. Resp. at 5, citing 415 ILCS 5/57.9(b)(1) (2012). The Agency notes that, in this case, all of the tanks had been assigned a deductible of $100,000 under the December 6, 1991 application. *Id.* at 6. This is because none of the five underground storage tanks identified were registered prior to July 28, 1989. *Id.* The Agency also contends that, just because one of the tanks was a heating oil tank, that does not make all of the tanks exempt from applying the $100,000 deductible. *Id.* The Agency also notes that the release in question was from a used oil tank and not a heating oil tank. *Id.*

[2] While the Agency again references Part 732 in its characterization of the issue, the Board notes that the Agency previously stated that this reference is in error and that "Part 734 applies to this site." *See* Slightom, PCB 11-25, Agency Motion for Summary Judgment, page 8 (May 14, 2012).

The Agency states that two legally binding deductibles were assessed to this site. Resp. at 7. Therefore, pursuant to Board regulations, the higher deductible applies. *Id.*, citing 35 Ill. Adm. Code 732.603(b)(4) ("Where more than one deductible determination is made, the higher deductible shall apply."). The Agency, when acting on the submittal of the December 6, 1991 application, made a deductible determination of $100,000 at a time when the Agency's duty included deductible determinations. *Id.* The Agency contends that the Estate then sought another deductibility determination from OSFM. *Id.* at 8. The Agency states, however, that the deductible issued by the Agency when it had the authority to issue the deductible did not disappear when OSFM started to administer the deductible program. *Id.* Rather, those final Agency decisions remain valid. *Id.*, citing Fiatallis North American v. IEPA, PCB 93-108 (Oct. 21, 1993).

The Agency disagrees with the Estate's position that the Estate and the decedent are two separate owners. Resp. at 12. The Agency notes that, by issuing the deductibility determination, OSFM determined that the Estate was the same entity as the decedent. *Id.* Therefore, the Estate's election to proceed as owner was unnecessary. *Id.*

The Agency states "[t]here is one deductible per site. There is one site here and one release on that site. The original deductible at the time of the release is the deductible that applies." Resp. at 12. The Agency argues that the Estate cannot be placed in a better position than the decedent. *Id.* The Agency contends that there is no third party "good Samaritan" here but rather an estate continuing with a property following the death of the owner. *Id.* This is unlike Zervos, where the issue was whether a third party that purchased a property was required to elect to proceed prior to commencing work on the site. *Id.* at 13. The Estate is merely "a continuation of the current owner." *Id.*

Election to Proceed as Owner

The Agency contends that it was not necessary for the Estate to elect to proceed as owner when it received the OSFM determination. Resp. at 9. Rather, OSFM would have asked for this election prior to issuing its deductibility determination if it determined that the Estate was not the owner or operator of the site. *Id.* The Agency states it is clear that both it and OSFM did not consider the Estate and the decedent as two separate parties, and the Estate is not a new owner under the Act. *Id.* at 9-10.

Election to Perform Remediation

The Agency argues that the Estate "is responsible under Illinois law to remediate the site" regardless of the Estate's position that it would not have begun cleanup with a deductible above $15,000. Resp. at 10. Rather, the Agency states that the Estate's ability to gain access to the Fund "is irrelevant." *Id.*

Agency Scope of Review

The Agency describes the Estate's argument that it went beyond its scope of review by looking at the Estate's file as "ludicrous." Resp. at 11. The Agency states that it routinely looks at prior submittals "to make sure that a fraud is not being perpetuated upon the state." *Id.* The Agency further states that all of the documents in this case were in the Estate's fiscal file and available for review. *Id.*

Agency Re-review of Budget Decisions

The Agency states that each claim application "rests on its own laurels" and that "any time that a party submits an application, a full review is necessary." Resp. at 11. The Agency contends that "[c]hecking that a mandatory requirement is present in [a] budget submittal is entirely different when an application for reimbursement is submitted." *Id.* Rather, at that time "a more thorough review is performed before the payment of funds is authorized." *Id.*

The Agency argues that it is not required to perpetuate a mistake once it discovers one has been made. Resp. at 11. The Agency further argues that it should be allowed to recover amounts improperly paid from the Fund, noting that this case is different to Evergreen FS, which was a case regarding apportionment. *Id.* at 11-12. The Agency states that "[a]pportionment is entirely different than checking on the deductible to be assessed when determining reimbursement." *Id.* at 12.

Estoppel

The Agency notes that the Board has previously recognized that any prior Agency actions, if in error, are properly remedied by correcting the error and not perpetuating it. Resp. at 13-14, citing State Bank of Whittington v. IEPA, PCB 92-152 (June 3, 1993); Chemrex, Inc. v. IEPA, PCB 92-123 (Feb. 4, 1993). The Agency concedes that, 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." *Id.* at 14. 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.'" *Id.*, citing Gorgees v. Daley, 256 Ill.App.3d 143, 147, 628 N.E.2d 721, 725 (1st Dist. 1993).

The Agency contends that there are "several hurdles for those seeking to estop the government." Resp. at 14. These include: (1) the party demonstrating that their reliance was reasonable and that they incurred some detriment as a result of the reliance; (2) the party showing that the government made a misrepresentation with knowledge that the misrepresentation was untrue; and (3) the governmental body taking some affirmative act rather than an unauthorized or mistaken act. *Id.* at 14-15 (citations omitted). The Agency contends that, in this case, "an administrative error was made that resulted in the application of the improper deductible by the [Agency]." *Id.* at 15.

The Agency argues that the Estate should rather be estopped in this case. Resp. at 15. This is because, once a determination is made for the eligibility of tanks, the determination

follows the release and the incident. *Id.* Here, the Agency applied a $100,000 deductible to the only release relative to this action. *Id.* at 15-16. That Agency decision was not challenged, and therefore the Estate is estopped from arguing that the deductible is not properly applied. *Id.* at 16. The Agency further notes that the consultant, who claimed eighteen years of experience with the Tank program, "should have known to check for a prior deductible determination made by the [Agency] during that timeframe." *Id.* The Agency also argues that the 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." Resp. at 16.

Voluntary Payment

The Agency contends the Estate's voluntary payment argument should be struck, noting that the issue of the Agency's payment is under appeal in a separate case. Resp. at 16.

ESTATE'S POST-HEARING REPLY

Number of Tanks with a Release

The Estate disputes the number of tanks that had a release, contending that, on August 30, 1991, Mr. Slightom reported a release of gasoline and used oil and fuel oil from all five underground tanks. Reply at 1, citing Rec. at 4.

Agency Standard of Review

The Estate contends that the Agency's 2010 decision was based upon a document not submitted as part of the request for payment. Reply at 2. The Estate disputes that the Agency can review any documents in its possession that it wishes. *Id.* The Estate further notes that the Agency agreed the Estate's application was complete in its final decision. *Id.* at 3, citing Rec. at 227.

Only One Deductible

The Estate contends that there is only one legally relevant deductible under applicable law, and that applicable law is Title XVI of the Act. Reply at 3, 4. The Estate continues that, not only did it elect to proceed under Title XVI of the Act "which provides that only the OSFM has authority to determine the deductible," but that transition provisions that once allowed tank operators to continue under the old law no longer exist. *Id.* at 4, citing 415 ILCS 5/57.8(a)(4), 57.13 (2012).

$10,000 Deductible Determination is Correct

The Estate notes the exception at Section 57.9(b) of the Act which states

> (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*. Reply at 5 (emphasis added by Estate).

The Estate notes that all of the tanks were registered prior to July 1, 1992, including the heating oil tank. Reply at 5. The Estate also disagrees with the Agency that the exception requires that only the heating oil tank have a release, stating instead the exception is "concerned solely with when the tanks were registered." *Id.* The Estate also contends that it was impossible for the Agency to have correctly applied Section 57.9 of the Act in 1991 because the section did not exist, and its predecessor did not contain any provisions regarding heating oil or conditions where tanks need only be registered prior to July 1, 1992. *Id.* at 5-6.

Agency Challenge of OSFM Decision

The Estate contends that it "makes no sense" that the Agency contacted OSFM to "verify the deductible the [Agency] issued." Reply at 6, citing Resp. at 9. The Estate argues that there was nothing to verify because "the [Agency] did not share its deductible determinations with OSFM." *Id.*

Election to Proceed as Owner

The Estate argues that title to Mr. Slightom's property immediately passed to his heirs or devisees upon his death, subject to requirements of the Probate Act. Reply at 7, citing *In re* Estate of Stokes, 225 Ill.App.3d 834, 839 (4th Dist. 1992). The Estate argues that

> 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. Reply at 7.

The Estate notes that the manager of the Agency's tank section recommends that people interested in electing to proceed as owner first find out from OSFM what their deductible would be. *Id.*, citing Tr. at 87. The Estate also states that the manager "indicated that it is normal for estates to obtain an election to proceed as owner." *Id.* at 8, citing Tr. at 67. The Estate contends that owners are required to continually sign numerous documents to perform corrective action under the tank program. *Id.* at 9. The owner cannot do so if he is dead, and the Estate cannot sign the decedent's name. *Id.* Therefore, "[a]t some point, . . . the Estate needs to proceed as an owner on its own behalf." *Id.*

The Estate also notes that it only elected to proceed as owner in reliance on the $10,000 deductible determination issued by the OSFM. Reply at 9. The Estate contends that, had OSFM determined that a $100,000 deductible applied, the Estate would not have made the $10,000 down payment on a cleanup that it did not have the resources to complete. *Id.* at 9-10. Rather, "the heirs would have disclaimed interest in the property as an obvious liability, and allow it to be abandoned to the State." *Id.*

Estoppel

The Estate again argues that the Agency in its administration of the Fund "is acting in a proprietary manner, in which case the precedents cited by the [Agency] are simply irrelevant." Reply at 10. The Estate further argues that the Fund was created to take the place of a private insurance program and that "it is simply inexcusable for the insurance program to offer an inferior means of financial assurance." *Id.* The Estate continues that the precedent of Wachta "is directly applicable here, as unlike the cases cited by the [Agency], it involves prior environmental approvals relied upon by the permittee, which the government could not simply ignore." *Id.*, citing Wachta, 8 Ill.App.3d 436 (2nd Dist. 1972).

The Estate argues that estoppel is about "prejudicial reliance" (National Tea Co. v. Commerce & Industry Ins. Co., 119 Ill.App.3d 195, 205 (1st Dist. 1983)) and that its consultant "did what the Manager of the [Tank] Division recommends people do when thinking about electing to proceed as owner," *i.e.*, "check with the fire marshal 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." Reply at 12, citing Tr. at 87. Lastly, the Estate notes that the manager of the Tank program suggested consulting an attorney, whom the Estate contends would agree to consult with OSFM because it "is the only body authorized under existing law to determine the deductible." *Id.*

Voluntary Payment Doctrine

The Estate argues that the substantial payment made by the Agency "is an officially notable fact" because the Agency raised evidence of the payment in its motion to dismiss this action as moot. Reply at 12. The Estate contends that the Board may enter findings of fact and conclusions of law as to the application of the payment doctrine "[s]ince this Board's final decision is itself reviewable on the basis of all questions of law or fact in the Board's record." *Id.*, citing 735 ILCS 5/3-110; S. Ct. R. 335(i)(2). The Estate states that, at a minimum, the Board "should ignore the numerous objections that suggest it would be unimaginable for the [Agency] to pay the reimbursement application." *Id.* at 12.

BOARD DISCUSSION

The Fund was created under the Illinois Environmental Protection Act and may be accessed by eligible tank owners and operators to pay for the environmental cleanup of leaking tanks. 415 ILCS 5/57 (2012). Under Title XVI of the Act, concerning the "Leaking Underground Storage Tank Program," the Agency determines whether to approve proposed cleanup plans and budgets for tank sites. 415 ILCS 5/57.7, 57.8 (2012). A tank owner or operator may appeal such Agency determinations to the Board under Section 40 of the Act, which governs Board review of Agency permit decisions. 415 ILCS 5/40(a)(1), 57.7(c)(4), 57.8(i) (2012); 35 Ill. Adm. Code 105.Subpart D.

The Estate brings this appeal pursuant to Sections 40 and 57.8(i) of the Act. 415 ILCS 5/40, 57.8(i) (2012). Section 57.8(i) of the Act provides that

> [i]f the Agency refuses to pay or authorizes only a partial payment, the affected owner or operator may petition the Board for a hearing in the manner provided for the review of permit decisions in Section 40 of this Act. 415 ILCS 5/57.8(i) (2012).

Section 40 of the Act provides

> If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days after the date on which the Agency served its decision on the applicant, petition for a hearing before the Board to contest the decision of the Agency. 415 ILCS 5/40(a)(1) (2012).

The Estate challenges the Agency's application of a $100,000 deductible to the site, contending that the OSFM's $10,000 deductible should apply.

Board Review

The Estate contends that the Board is limited to deciding "whether the submittals to the Agency demonstrated compliance with the Act" and "whether the application, as submitted to the Agency, would not violate the Act and Board regulations." Estate Br. at 14. In an appeal of an Agency determination under the Leaking Underground Storage Tank Program, the Agency's denial letter frames the issues on appeal. Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990). The Board's review, therefore, is generally limited to the record before the Agency at the time of its determination. Freedom Oil v. IEPA, PCB 03-54 (consolidated), slip op. at 11 (Feb. 2, 2006). The Board will not consider new information that was not before the Agency prior to its final determination regarding the issues on appeal. Kathe's Auto Service Center v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). At issue in this case is the Agency's October 29, 2010 final determination letter. The December 20, 1991 Agency deductible letter was a part of the Agency file at the time of its October 29, 2010 decision, and is therefore reviewable by the Board.

Applicable Deductible

In the Agency's October 29, 2010 final determination letter, the Agency noted that two deductible determinations had been made: by the Agency in 1991, and by OSFM in 2008. Rec. at 227. As discussed in the post-hearing briefs, Illinois statutes and Board regulations have changed over time with respect to numerous aspects of accessing and administering the Fund. To determine which version applies, the Board looks to the law in effect on the day an application is filed. *See* Vogue Tyre & Rubber Co. v. IEPA, PCB 96-10, slip op. at 8-9 (Oct. 21, 2004).

At the time of the application leading to the 1991 Agency determination, the applicable law was Section 22.18b(d)(3)(B)(i) of the Act. Ill.Rev.Stat.1989, ch. 111½, par. 1022.18b(d)(3)(B)(i) (repealed by P.A. 88-496, also known as H.B. 300, effective Sept. 13, 1993). Under that section, "[i]f prior to July 28, 1989, the owner or operator has registered none of the underground storage tanks in use on that date at the site, the deductible amount . . . shall be

$100,000 rather than $10,000 . . . .” Ill.Rev.Stat.1989, ch. 111½, par. 1022.18b(d)(3)(B)(i) (repealed 1993).

The Estate filed its reimbursement application with OSFM on January 24, 2008. Rec. at 31. At that time, Section 57.9(b) of the Act was in effect and stated

> [f]or releases reported prior to the effective date of this amendatory Act of the 96th General Assembly, 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. 415 ILCS 5/57.9(b)(1).

Gerald Slightom registered five tanks on April 18, 1990. Rec. at 24-25. Therefore, under the Act, both in 1991 and 2008, a $100,000 deductible applies. *See* Ill.Rev.Stat.1989, ch. 111.5, par. 1022.18b(d)(3)(B)(i) (repealed 1993); 415 ILCS 5/57.9(b)(1). The Act in 2008 included an exception for tanks “used exclusively to store heating oil for consumptive use on the premises where stored and which serve other than farms or residential units.” 415 ILCS 5/57.9(b)(1) (2012). Such tanks had until July 1, 1992 to be registered. Here, the heating oil tank was registered prior to July 1, 1992. However, the four other tanks were not being used for heating oil, and the leak did not come exclusively from the heating oil tank. Because the other tanks were not timely registered, a $100,000 deductible applies under Section 57.9(b)(1) of the Act.

Therefore, because the tanks were registered after July 28, 1989, under the current law, under the law in 2008, and under the former Section 22.18b of the Act, a $100,000 deductible should apply to the site.

1991 Agency Deductible Determination

When the Agency made its deductible determination on December 20, 1991, the applicable law at the time was Section 22.18b(d)(3)(B)(i). Ill.Rev.Stat.1989, ch. 111.5, par. 1022.18b(d)(3)(B)(i) (repealed 1993). Under that section, “[i]f prior to July 28, 1989, the owner or operator has registered none of the underground storage tanks in use on that date at the site, the deductible amount . . . shall be $100,000 rather than $10,000 . . . .” Ill.Rev.Stat.1989, ch. 111.5, par. 1022.18b(d)(3)(B)(i) (repealed 1993). None of the tanks had been registered prior to July 28, 1989. *See* Rec. at 1-12. Further, three of the tanks were only taken out of service on June 1, 1990. Rec. at 3-7. Therefore, Section 22.18b(d)(3)(B)(i) was correctly applied to this site and the Agency properly issued a $100,000 deductible determination. The Agency’s decision was never appealed.

2008 Office of State Fire Marshal Deductible Determination

When OSFM made its deductible determination on February 6, 2008, the applicable law was Section 57.9 of the Act. 415 ILCS 5/57.9. The proper deductible amount under Section 57.9(b)(1) of the Act, as discussed above, was $100,000. *See* 415 ILCS 5/57.9(b)(1) . The OSFM $10,000 deductible determination was therefore incorrect. The OSFM deductible determination was never appealed and is a final determination. Thus, the Board is faced with two conflicting final agency determinations. However, under the circumstances of this case, the earlier Agency decision, and the correct decision, applies.

Conflicting Deductibles

In its "Election to Proceed as Owner," the Estate elected to "become subject to all of the responsibilities and liabilities of an 'owner' under Title XVI of the Environmental Protection Act and the Illinois Pollution Control Board's rules at 35 Ill. Adm. Code Part 734." Rec. at 354. The Estate also argues that it elected to become an owner in reliance on OSFM's $10,000 deductibility determination. Resp. at 22-23; Reply at 9. Taking the Estate's position that it elected to proceed under Title XVI of the Act and Part 734 of the Board's regulations, the Estate subjected itself to the language of 35 Ill. Adm. Code 734.615(b), which sets forth rules applying to deductibles.

As discussed above, Mr. Slightom was assigned a $100,000 deductible determination, and the Estate was assigned a $10,000 deductible determination. The two deductible amounts apply to the same incident number at the same site. Rec. at 15, 29.

The Estate has elected to proceed under Part 734 of the Board's regulations.[3] Rec. at 354. The language of Part 734.615(b) anticipates that deductibles may have been issued by OSFM or the Agency. *See* 35 Ill. Adm. Code 734.615(b)(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.") (emphasis added). Further, "[o]nly one deductible must apply per occurrence." 35 Ill. Adm. Code 734.615(b)(2). "Where more than one deductible determination is made, the higher deductible must apply." 35 Ill. Adm. Code 734.615(b)(4). In this case, there have been two deductible determinations made for the same incident. The language of Part 734.615(b)(4) is clear and the $100,000 deductible applies to the site.

Estoppel

For estoppel to apply, a party claiming estoppel "must have relied upon the acts or representations of the other and have had no knowledge or convenient means of knowing the true

[3] The Agency refers to 35 Ill. Adm. Code 732 throughout its post-hearing brief. While the Agency has previously stated that Part 734 is applicable to this case, in any event, the "higher deductible" language is identical in both Parts.

facts." Hickey v. Illinois Central Railroad Co., 35 Ill.2d 427, 447, 220 N.E.2d 415, 425 (1966). The aggrieved party must have detrimentally relied on the misrepresentation. Cities Service Oil Co. v. City of Des Plaines, 21 Ill. 2d 157, 171 N.E.2d 605 (1961). Cases imposing equitable estoppel against the State generally indicate that the State had affirmatively misled the aggrieved party. Hickey, 35 Ill. 2d at 447-48, 220 N.E.2d at 425-26. Further, a party seeking to estop the government must show that the government made the misrepresentation with knowledge that the misrepresentation was untrue. People v. John Crane, PCB 01-76, slip op. at 9 (May 17, 2001), citing Medical Disposal Services, Inc. v. IEPA, 286 Ill.App.3d 562, 677 N.E.2d 428, 433 (1st Dist. 1997). The Illinois Supreme Court explained:

> This 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, Inc. v. Wagner, 171 Ill. 2d 410, 431-32, 665 N.E.2d 795, 806 (1996), citing Hickey, 35 Ill. 2d at 447-48, 220 N.E.2d at 426; *see also* Chemetco, PCB 96-76, slip op. at 11; White & Brewer Trucking, Inc. v. IEPA, PCB 96-250, slip op. at 10 (March 20, 1997).

The Estate maintains that it would not have elected to clean up the property if the $100,000 deductible applied. Nichelson Affidavit. Specifically, the Estate has been negatively impacted by its reliance on the OSFM $10,000 deductible determination because applying the $100,000 deductible means that the Agency has overpaid the Estate by $6,087.42 and the remediation costs paid by the Estate exceed the estimated $59,707 value of the site after clean up.

However, the record and hearing have not established that the Agency knowingly or affirmatively misled the Estate. In 2008, the Agency recruited employees internally to deal with a backlog of claims. Tr. at 74-75. The employee reviewing the Estate's 2008 claim was tasked with reviewing the Estate's application, applying the OSFM's deductible determination, and comparing the application to the approved budget. *Id.* at 76-77, 85. It was later that another Agency employee discovered the previous $100,000 deductible, and applied that deductible. *Id.* at 41, 54. There is no evidence, therefore, that the Agency affirmatively misled the Estate while knowing that such misrepresentations were untrue.

Estoppel also requires that a party "had no knowledge or convenient means of knowing the true facts." In this case, the Estate could have reasonably discovered the correct deductible amount by reading the statute. Under the 1991 Act, the 2008 Act, and even under the current Act, it is clear that $100,000 is the correct deductible amount that should apply in this case.

The Board is mindful of the impact this type of decision may have on relationships between the public and state agencies. The current scenario is not far removed from that faced in Brown's Furniture. *See* Brown's Furniture, 171 Ill.2d 410, 665 N.E.2d 795. In that case, a Missouri-based retail furniture store sought advice from the Department of Revenue of the State of Illinois (Department) on whether it was required to collect a use tax from Illinois residents who made purchases at its store. *Id.* at 416. In a conversation with the Department's tax service

desk, Brown's Furniture was told it did not have to collect the use tax. *Id.* The Department later audited Brown's Furniture and, on the basis of that audit, found that the company was liable for $47,460.62 in uncollected use tax, interest and penalties. *Id.* at 417. The Illinois Supreme Court concluded that the State "is not estopped by the mistakes made or misinformation given by the Department's employees with respect to tax liabilities." *Id.* at 432, citing Austin Liquor Mart, Inc. v. Dept. of Revenue, 51 Ill.2d 1, 5, 280 N.E.2d 437 (1972). Here, as in that case, there is no evidence that the Agency "fraudulently or unjustly misled" the Estate. *Id.* at 433. The Agency is therefore not estopped from applying the $100,000 deductible.

CONCLUSION

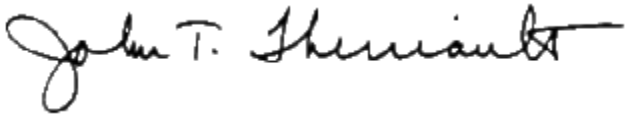
For the reasons discussed above, the Board affirms the Agency's October 29, 2010 decision.

IT IS SO ORDERED.

Chairman Glosser dissented.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2012); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 19, 2014, by a vote of 3-1.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board