ILLINOIS POLLUTION CONTROL BOARD
June 19, 2014

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

DISSENTING OPINION (by D. Glosser):

I respectfully dissent from the majority opinion in this case. I believe that the plain language of the law, the doctrine of estoppel, and sound public policy all support a finding that the $10,000 deductible established by the Office of State Fire Marshal (OSFM) should have been applied in this instance.

The facts of this case establish that the Illinois Environmental Protection Agency (IEPA) approved a corrective action plan and budget, applying the $10,000 deductible. Petitioner sought reimbursement and IEPA approved the reimbursement to the petitioner in the amount of $19,239.08, again applying the $10,000 deductible. Only when the petitioner sought reimbursement for the remainder of the work, under the approved budget, did IEPA "discover" the December 20, 1991 letter and decide to apply at $100,000 deductible.

While I agree with the majority that the statute supports a $100,000 deductible in this case, I do not believe that IEPA can change its mind in the middle of the process and alter the deductible amount. I believe this particularly as OSFM is now charged with making deductible determinations, not IEPA. The record demonstrates that the OSFM did not have the benefit of IEPA's determination from 1991 when it made its deductible determination. Based on the information before OSFM, it applied a $10,000 deductible. No one raised an issue with that determination.

Petitioner proceeded and presented IEPA with a corrective action plan and budget, which IEPA approved applying the $10,000 deductible. Section 57.7(c)(1) of the Act (415 ILCS 5/57.7(c)(1) (2012)) provides that IEPA "approval of any plan and associated budget, as described in this subsection (c), 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." Section 57.8(a)(1) of the Act further states IEPA's "review shall be limited to generally accepted auditing and accounting practices. In no case shall the IEPA conduct additional review of any plan which was completed within the budget, beyond auditing for adherence to the corrective action measures in the proposal. . .." 415 ILCS 5/57.8(a)(1) (2012)).

In interpreting these statutory provisions the Board stated in Evergreen FS v. IEPA, PCB 11-51, 12-61 (consld.) (June 21, 2012):

> In addition to the plain language of Section 57.8(m) of the Act (415 ILCS 5/57.8(m) (2010)), the Board notes that Section 57.8(a)(1) of the Act (415 ILCS 5/57.8(a)(1) (2010)) also supports a finding that the Agency's decision was in error. Section 57.8(a)(1) of the Act (415 ILCS 5/57.8(a)(1) (2010)) specifically limits that Agency's review when payment is sought for an approved plan or budget to "auditing for adherence to the corrective action measures in the proposal." *Id*. Here, when Evergreen submitted a billing package for work done consistent with plans and budgets that the Agency had approved, only then did the Agency determine that apportionment was required. The Board finds that the Act dictates that such a decision is beyond the scope of review that the Agency may undertake when payment is sought for "any approved plan and budget". Any Agency apportionment determination would be appropriate at the time of approval of the plan and budget, not at the payment stage. Therefore, the Board finds that the Agency's decision to apply apportionment of the payment when the billing package was submitted is not supported by law and was in error. *Id*. at slip op. 20.

IEPA argues that apportionment is different than applying a deductible amount and that anytime a claim application is made "a full review is necessary". IEPA's position is simply not supported by the plain language of the statute. Clearly the statute envisions that once a corrective action plan and budget are in place, no further substantive review is taken. If IEPA is allowed to perform "a full review" at the reimbursement stage, owners and operators performing clean up are at risk, and what happened in this case could happen again. That is, an owner or operator could follow an approved plan and budget, only to be told that IEPA has found a reason not to reimburse them for those actions, which IEPA already approved and agreed to reimburse. The legislature did not intend such result and the plain language of the statute does not allow such a result. I believe that Sections 57.7(c)(1) and 57.8(a)(1) of the Act (415 ILCS 5/57.7(c)(1) and 57.8(a)(1) (2012)) support a finding for the petitioner.

Even if the plain language of the statute did not support a finding for petitioner I would apply the doctrine of estoppel in this case. Generally, the doctrine of estoppel's elements include "a party's reasonable and detrimental reliance on the words or conduct of another (Dill v. Widman, 413 Ill. 448, 455-56, 109 N.E.2d 765 (1952))-must be supplemented here with the additional restriction that a public body will be estopped only when that is necessary to prevent fraud or injustice (Hickey v. Illinois Central R.R. Co., 35 Ill. 2d 427, 448-49, 220 N.E.2d 415 (1966)), and that is especially true when public revenues are involved (People ex rel. Scott v. Chicago Thoroughbred Enterprises, Inc., 56 Ill. 2d 210, 220, 306 N.E.2d 7 (1973); Austin Liquor Mart, Inc. v. Department of Revenue, 51 Ill .2d 1, 4-5, 280 N.E.2d 437 (1972))." Rockford Life Insurance Company v. Department of Revenue, 112 Ill. 2d 174, 186-87; 492 N.E.2d 1278, 1283(1986).

In this case I believe the actions of IEPA, if allowed, would result in a severe injustice. The record is clear that the petitioner would only undertake clean up if a deductible of $15,000 or less applied, as the property was only worth $59,707 if cleaned up. OSFM applied a $10,000 deductible, which IEPA did not question when approving a corrective action plan and budget. IEPA did not question the deductible when first asked by petitioner for reimbursement. Only after the work was complete, and after petitioner expended over $80,000 did IEPA alter the deductible. Petitioner expended monies petitioner believed would be reimbursed. Thus, petitioner undertook clean up, at costs well over the worth of the property, because petitioner believed that the costs would be reimbursed. IEPA's eleventh hour change in deductible is the only reason for denial of reimbursement. This is unacceptable and I would apply the doctrine of estoppel.

Finally as a matter of sound public policy I believe that the $10,000 deductible should be applied. Petitioner relied on government agencies, agencies that implement the law, to proceed with clean up of a property. As a matter of public policy, citizens of the State should be able to rely on, and not be punished for that reliance, of a state agency. Whatever missteps may have been made by either the OSFM or IEPA, petitioner should not be made to suffer for those missteps. Therefore, I would find that the $10,000 deductible should apply.

For all these reasons, I respectfully dissent from the majority opinion.

Deanna Glosser, PhD

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the above dissenting opinion was submitted on June 19, 2014.

John T. Therriault, Clerk
Illinois Pollution Control Board