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
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Melanie Jarvis
Illinois Environmental Protection Agency
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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), PETITIONER'S OPPOSITION TO MOTION TO DISMISS, 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 24th of September, 2013.

Respectfully submitted,
ESTATE OF GERALD D. SLIGHTOM, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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PETITIONER'S OPPOSITION TO MOTION TO DISMISS

NOW COMES Petitioner, ESTATE OF GERALD D. SLIGHTOM (hereinafter "the Estate"), by its undersigned attorneys, pursuant to Section 101.500(d) of the Board's Procedural Rules (35 Ill. Adm. Code § 101.500(d)) in opposition to the Motion to Dismiss filed by Respondent Illinois Environmental Protection Agency (hereinafter "the Agency"), stating as follows:

1. This matter arises from an application for payment in the amount of $83,912.58 for work performed and approved by the Agency. (Petition for Review, Ex. A (Agency's final decision)). While a $10,000 deductible had been applied from previous payments, the Agency determined that a $100,000 deductible applied and thus no payment was due and in fact, the Agency claimed that over $6,000 was owed the LUST Fund. (Id.)

2. On December 6, 2010, the Estate filed its Petition for Review of this decision, and requested in its prayer for relief:

> **(a) the Agency produce the Record; (b) a hearing be held; (c) the Board find the Agency erred in its decisions, (d)** ***the Board direct the Agency to approve the payment in full, (e) the Board award payment of attorney's fees;*** **and (f) the Board grant the Estate such other and further relief as it deems meet and just.**

(Petition for Review, p. 4 (emphasis added))

3. The Agency produced the written record herein, and the Board denied the Agency's motion for summary judgment on November 17, 2011, denied the Agency's motion for reconsideration on January 19, 2012, denied the Agency's motion for leave to file an interlocutory appeal to the Illinois Appellate Court on April 19, 2012, and denied another summary judgment motion on November 1, 2012.

4. On September 4, 2013, the Agency unilaterally issued a new determination, stating in relevant part:

> **Re-review of the October 29, 2010 decision is warranted under information presented in an appeal filed with the Illinois Pollution Control Board December 6, 2010 and assigned case number PCB 2011-25 . . ..**
>
> **This letter addresses all issues presented in the aforementioned appeal in favor of the applicant. As a result of Illinois EPA's re-review of this application for payment, a voucher for $89,908.73 will be prepared for submission to the Comptroller's Office for payment.**

(Mot. Dism. Ex. A)

5. On September 9, 2013, the Agency unilaterally issued a new determination, revising the dollar amount to $83,908.73.

6. On September 10, 2013, the Agency filed the subject motion to dismiss, arguing that "[t]he contested issues presented in the Petition for Review have been rendered moot by the September 9, 2013 Illinois EPA letter.

7. The original application for payment sought $83,912.58, and while payment of $83,908.73 is substantially what was requested, it is not in fact what was requested. More importantly, the Petition for Review requested attorney's fees which are substantial in this case (over $30,000), and therefore not all issues presented have been rendered moot.

ARGUMENT

"An issue is moot if no actual controversy exists or where events occur which make it impossible for the court to grant effectual relief." United States Steel v. IEPA, PCB No. 10-23, (Feb. 2, 2012) (denying Agency motion to dismiss on the grounds that the Agency had failed to prove there is no actual controversy or it was impossible for the Board to grant effective relief after a new permit was issued).

The tender of payment in full prior to the filing of a lawsuit may make it impossible for a court to grant effectual relief. Hayman v. Autohaus on Edens, 315 Ill. App. 3d 1075, 1078 (1st Dist. 2000). In Hayman, the purchaser of an automobile was overcharged $299 and while the auto retailer initially rejected the claim, the auto retailer mailed the customer a check for $299 a few days after the sale. Id. at 1076. The following month the plaintiff filed a four-count complaint for fraud and conversion, which was dismissed as moot because the plaintiff had received payment for the money wrongfully kept, there was no statutory provision for attorney's fees, and the amount of interest for $299 over three days was too trivial to justify an imposition upon the administration of civil justice. Id. at 1077-78. The Court also distinguished the situation in which payment in full is tendered from an attempt to settle the case, which raises issues of fact to be resolved by trial. Id. at 1078.

For purposes of the present issues, the important proviso in Hayman is that there was no statutory entitlement to attorney's fees,[1] and subsequent reported decisions have uniformly refused to dismiss cases as moot where attorney's fees are authorized by statute for the prevailing

[1] Curiously, the plaintiff in Hayman had originally filed a count for statutory consumer fraud, which has an attorney-fee provision, but abandoned that count on appeal.

party. Jones v. William Buick, 337 Ill. App. 3d 339, 343 (1st Dist. 2003) (distinguishing Hayman where a prevailing party under the Consumer Fraud Act[2] may be awarded attorney's fees); Bates v. William Chevrolet/Geo, 337 Ill. App. 3d 151, 162 (1st Dist. 2003) (attempting to tender amount owed before trial failed to moot action where attorney fees recoverable under the Consumer Fraud Act); Dickson v. W. Koke Mill Vill. P'Ship, 329 Ill. App. 3d 341, 347 (4th Dist. 2002) (tendering late interest payment did not moot cause of action where attorney fees available under the Security Deposit Interest Act); see also Huss v. Sessler Ford, 343 Ill. App. 3d 835 (1st Dist. 2003) (finding that since the exact amount of plaintiff's attorney's fees are uniquely in the knowledge of plaintiff's attorney, a defendant may request evidence of the legal fees incurred in order to offer to make payment in full which addresses attorney's fees).

Therefore, this case is not moot because the Illinois Environmental Protection Act contains an attorney fee provision, (415 ILCS 5/57.8(l)), and while its not clear that including a request for attorney's fees in the prayer for relief is obligatory, such a request was made here and thus not all issues presented in the Petition for Review have been addressed. While the Estate does not concede that the Agency actually made full payment of the amount in the original application for payment, the $3.85 shortfall is simply not an amount the Estate could afford to challenge by itself. The amount received, however, constitutes "reimbursement substantially as sought," and even absent an explicit reversal from the Board, an award of attorney's fees is available, contingent upon the Estate submitting proof of reasonable attorney's fees incurred. Dickerson Petroleum v. IEPA, PCB Nos. 09-87 & 10-5, at p. 8 (Sept. 2, 2010).

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[2] Under the Consumer Fraud Act, "the Court . . . may award . . . reasonable attorney's fees and costs to the prevailing party." (815 ILCS 505/10a(c))

The Illinois Supreme Court has explained that the legislature's purpose in providing attorney fee awards is to encourage parties to bring lawsuits:

> **A claim for statutory attorney fees is as much a 'claim for relief' under this rule as is a prayer for damages. Indeed, in consumer fraud cases the attorney fee awards can easily constitute the largest part of a plaintiff's recovery. The legislature realized this when it enacted the fee-shifting provision of the Consumer Fraud Act. That provision is premised on the recognition that plaintiffs would be reluctant to seek redress for consumer fraud if the recovery would be nearly or completely consumed by attorney fees and was designed to encourage plaintiffs who have a cause of action to sue even if recovery would be small.**

Cruz v. Northwest Chyrsler Plymouth Sales, 179 Ill. 2d 271 (1997); see also Citizens Organizing Project v. IDNR, 189 Ill.2d 593, 598-99 (2000) (fee-shifting under the Administrative Procedure Act "is to discourage enforcement of invalid rules and give those subject to regulation an incentive to oppose doubtful rules where compliance would otherwise be less costly than litigation.")

Notably, many of the cases cited above in which the courts refused to dismiss for mootness arise from relatively small claims. Cf. Jones v. William Buick, 337 Ill. App. 3d 339 (1st Dist. 2003) ($500 refund check); Bates v. William Chevrolet/Geo, 337 Ill. App. 3d 151(1st Dist. 2003) ($1,000 downpayment); Dickson v. W. Koke Mill Vill. P'Ship, 329 Ill. App. 3d 341 (4th Dist. 2002)(interest on a $525 security deposit). These are sums that would be difficult to justify legal action without the potential for attorney-fee awards, and if the courts had allowed the defendant to unilaterally moot lawsuits after attorneys had been retained, then the purpose of the fee-shifting provision to encourage suit would be lost.

In past rulemakings, the regulated community has sought alternatives to litigation, in the form of requiring draft denial letters, or opportunities for mediation or arbitration. As one

commentor testified, "[y]ou can't really afford to go and hire an attorney to represent you in front of the Board for a $1,500 problem." In re Proposed Amendments to Regulations of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732 & 734), R04-22 & R04-23 (June 21, 2004 transcript), at p. 102. Given the technical and legal complexity of many environmental cases, those numbers may be optimistic. In Dickerson, it is doubtful that the petitioner would have appealed an Agency decision denying $62,780.63 of reimbursement, which would cost it $53,019.29 in legal expenses, unless encouraged by the fee-shifting provision. See also Zervos Three v. IEPA, PCB No. 10-54 (authorizing reimbursement for $ 73,347.88 in attorney's fees after $97,049.28 in reductions reversed).

The Board has made numerous rulings in this case and while a final decision was not made, the Board has disposed of the basis by which the Agency wished to defend its decision. Specifically, as revealed by the countless filings herein, the Agency sought to defend its decision solely on the evidence of a $100,000 deductible determination letter from an earlier version of this program, and a Board procedural rule (35 Ill. Adm. Code § 732.603(b)(4)). The Agency did not wish to defend this case in the context of expansive documentary and testimonial evidence or argue about the affirmative defenses of estoppel, going so far as asking the Board to certify a question to the Appellate Court, something that appears to have been the first time for the Agency in a LUST case. The Agency's strategy of "one letter/ one rule" failed to persuade the Board, and the Board refused to allow the Appellate Court to direct its scope of review in this matter. The Board directed the Agency to provide the Board with more documents (Order of April 19, 2012, at pp. 24-37), confirmed Petitioner's right to cross-examine Agency personnel and present testimony to challenge the information relied upon by the Agency (Order of Nov. 1,

2012, at p. 36), and found that the Estate had raised genuine issues of material fact by which the Agency could be estopped from applying the $100,000 deductible against it. (Order of Nov. 1, 2012, at p. 33). After these adverse rulings from the Board, the Agency capitulated, much as it did in Dickerson – not because the Board ordered the Agency to pay the amount requested, but because the implications of the Board's orders defeated the Agency's planned approach to the dispute. Dickerson v. IEPA, PCB No. 09-87, at p. 15 (Sept. 2, 2010) (quoting Agency explaining that "parties routinely re-examine their litigation strategies as the case evolves, especially when the decision-maker in the cases makes findings and issues orders.")

The Estate requests that the motion to dismiss be denied, at least in part, to allow the Estate to submit proof of reasonable attorney's fees incurred in this appeal, in a matter consistent with the procedural approach taken in Dickerson.

WHEREFORE, Petitioner, ESTATE OF GERALD D. SLIGHTOM, prays for an order denying the motion to dismiss, leave for the Estate to file proof of its attorney's fees incurred, and for such other and further relief as it deems meet and just.

ESTATE OF GERALD D. SLIGHTOM,
Petitioner

By its attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI

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