BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 N. Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

Melanie Jarvis
Illinois Environmental Protection Agency
1021 North Grand Avenue East
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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 Motion to Compel Deposition Directed to Hearing Officer, a copy of which is herewith served upon the hearing officer and 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 the hearing officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said hearing officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office mailbox in Springfield, Illinois on the 29th day of June, 2011.

Respectfully submitted,
ESTATE OF GERALD D. SLIGHTOM, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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THIS FILING SUBMITTED ON RECYCLED PAPER
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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITIONER'S MOTION TO COMPEL DEPOSITION DIRECTED TO HEARING OFFICER

NOW COMES Petitioner, Estate of Gerald D. Slightom, pursuant to Section 101.616 of the Board's Procedural Rules (35 Ill. Admin. Code § 101.616), by it's undersigned attorneys, moves to compel the deposition of Catherine S. Elston, stating as follows:

1. Petitioner has asked the Respondent to make Agency Project Reviewer, Catherine S. Elston, available for a deposition at a time and place convenient for the Agency. Petitioner believes that such a deposition would likely take less than an hour, and at the very most two hours should be set aside.

2. In response, the Agency has rejected any discovery in this case. There appear to be fundamental disagreements between the parties as to the proper scope of discovery.

3. The standard of review in appeals of leaking underground storage tank decisions is "whether the application, as submitted to the Agency, would not violate the Act and Board regulations." Zervos Three v. IEPA, PCB 10-54 (Jan. 20, 2011).

4. A critical point in this appeal is that the Agency went beyond the application to reconsider the applicable deductible. Specifically, Petitioner applied for payment of $83,908.73 for approved corrective action work. (Rec. at pp. 120-215) In support of its application, Petitioner attached a

$10,000 deductibility determination made by the Office of the State Fire Marshal. (Rec. at pp. 209-210) Petitioner also attached a previous Agency decision, in which the $10,000 deductible was applied. (Rec. at pp. 206-207) In summary, the application submitted to the Agency evidenced no basis for conditioning payment on a new or different deductible. In rejecting payment, the Agency apparently relied upon a heretofore unknown deductibility determination allegedly made in 1991. (Rec. at pp. 13-14)

5. By relying upon evidence extrinsic to the application, the Agency has either based its decision on improper evidence, or at the very least opened up legitimate issues as to the origin, source and extent of its reliance on extrinsic evidence, which are subject to examination and discovery.

6. Board precedent clearly allows such discovery. "All relevant information and information calculated to lead to relevant information is discoverable . . .." (35 Ill. Admin. Code § 101.616) Since Petitioner seeks to discover evidence surrounding a heretofore unknown document the Agency states it relied upon in making its decision, there can be no doubt that discovery would be relevant or calculated to lead to relevant information.

7. The primary limitation on relevancy in these types of appeals is that "information developed after IEPA's decision typically is not admitted at hearing or considered by the Board." KCBX Terminals Company v. IEPA, PCB Nos. 10-110; 11-43 (May 19, 2011). This principle can be traced back to one of the earliest Board decisions. Soil Enrichment Materials Corp. v. EPA, 5 Ill. P.C.B. 715 (1972). That decision distinguished the relevancy of information relied upon by the Agency, and a party may examine what "material was relied upon and further to explore what it discovers." Material produced by the Agency as part of the administrative record is "relevant . . .

and discovery of the same may reasonably lead to admissible evidence." Land and Lakes v. IEPA, PCB 81-48 (May 13, 1982).

8. In a series of rulings in the case of Des Plaines River Watershed Alliance v. IEPA, PCB 2004-088 (Nov. 17, 2005), the Board disallowed a protracted discovery schedule when the parties failed to justify the need for one given the limited scope of relevancy in appeals. In particular, the Board found it important that there was no dispute about the contents of the record. Id. at p. 39. Here, a central dispute is posed as to the contents of the record given that the Agency is relying upon evidence extrinsic to the application submittal, and nobody appears to have known about this extrinsic evidence prior to the Agency's decision herein. See Amended Petition for Review, at ¶ 16 & Ex. B.

9. In summary, the deposition of the project reviewer as to the circumstances surrounding the discovery of the extrinsic document poses a relevant line of inquiry "calculated to lead to relevant information [which] is discoverable." (35 Ill. Admin. Code § 101.616) If Petitioner is prohibited from such discovery it will be prejudiced. First, Petitioner will be precluded from identifying information that could be used in support of its opposition to the pending summary judgment motion or at hearing. Second, Petitioner will be denied its right to fundamental fairness, guaranteed by these proceedings, "to test the validity of the information the Agency relie[d] upon in denying its application." EPA v. Pollution Control Board , 115 Ill. 2d 65, 70 (1986). Alternatively, if Petitioner is only allowed to examine the witness at the hearing, it will suffer potential prejudice or waste in the event the witness' testimony at hearing discloses the existence of additional relevant evidence heretofore unknown.

WHEREFORE, Petitioner prays for an order from the Hearing Officer compelling the Agency to make Catherine S. Elston available for a discovery deposition, or for such other and further relief as the Hearing Officer deems meet and just.

Respectfully submitted,

ESTATE OF GERALD D. SLIGHTOM, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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