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

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PLEASE TAKE NOTICE that I have today, on behalf of the Illinois Environmental Protection Agency, filed with the office of the Clerk of the Pollution Control Board an SUR-OBJECTION TO PETITIONER'S MOTION TO COMPEL and an, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

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Dated: August 8, 2011

BEFORE THE POLLUTION CONTROL BOARD
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SUR-OBJECTION TO PETITIONER'S MOTION TO COMPEL AND

MOTION TO STRIKE

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, 101.502, 101.616, and 101.622 hereby respectfully moves the Illinois Pollution Control Board ("Board") to DISMISS or in the alternative DENY the Petitioner's Motion to Compel Deposition and STRIKE all argument non-responsive to the Motion to Compel. In support of said motion, the Illinois EPA states as follows:

I. ARGUMENT

As stated many times by the Illinois EPA, this case is very simple and straight forward. It is a case where the relevant facts are not in dispute. Even though the Petitioner tries to muddy the water, once the muck is waded through we remain with that fact that one deductable applies for one release, regardless of whether there is a new owner.

The Petitioner's argument of estoppel applying in this case has merit, in that, if anyone is estopped in this case, it is the Petitioner. Once a determination is made for the eligibility of the tanks, that determination follows that release and that incident. A determination was made for

Lust Incident Number 912456, and a $100,000 deductible applied. That decision was legally sound. A new release was not found at the site. The $100,000 deductible follows the incident number, no matter how many owners elect to proceed. Deposing an Illinois EPA employee will not shed any light, whatsoever, on the issue of why or whether Petitioner was, as it suggests, unaware of the other determination. Whether it was aware or unaware is irrelevant to the issue at hand. For what purpose would Petitioner knowing about the first deductible be relevant? A determination of $100,000 was made, it follows the incident number, and under Illinois law, it is the deductible that applies at the site for this release.

Moreover, what can be said regarding an appeal of a LUST matter is that, when a decision is made, the Illinois EPA will file a record indicating its basis for the decision. It is uncontroverted that the basis for the challenged decision has been included within the record. (PCB Regulation 35 Ill. Adm. Code 105.410 and AR, p. 13 and AR, p.29) The record reflects the exact facts in this case.

Thus, the question is simply, which of Petitioner's determinations should have been applied. The Illinois EPA answered this question already and specified its conclusion for Petitioner within its decision letter. As such, when the Illinois EPA issued its decision, Petitioner knew (and continues to know) which determination Illinois EPA applied to its application. Petitioner was entitled to challenge whether the Illinois EPA applied the correct determination, which it did. However seeking discovery on this issue is unwarranted since the issue has become solely a matter of law (i.e., was the correct determination applied).

1. Petitioner attempts to muddy the water.

In response to Petitioner's Reply in support of its Motion to Compel Deposition, the Illinois EPA must first, once again, question whether this matter will proceed with regard to any of the typical procedural rules and form.

Petitioner appears to take the opportunity to offer argument on the merits – not to offer a Reply to the Illinois EPA's Objection relative to its Motion to Compel. For example, in Subsection I of its reply, Petitioner offers that "the estate is not the decedent." Then, Petitioner claims in its first sentence that "the Agency erroneously argues that the Estate is one and the same as the decedent…" This contention cannot be found within the Illinois EPA's Objection. It is false.

What the State has argued, to date, is the fact that two deductibles, **relating to one incident/release**, are within the Illinois EPA's file and the Illinois EPA applied the higher deductible consistent with State law. No fair reading of the State's pleading could bring a reasonable person to the conclusion that the State has argued that the decedent and the Estate are "…one and the same…" and the Board should recognize this fact and strike Petitioner's argument. Moreover, assuming you even get to the argument offered by Petitioner, the Board is left with answering the following: how is that in any manner instructive on deposing an Illinois EPA technical staff member? Short answer, it does not justify such a move.

What Petitioner has attempted to do with this reply is provide argument on the merits of the case in arguing a discovery motion. Even if the Petitioner had properly used these same arguments in an answer to the Illinois EPA's pending Motion for Summary Judgment, they would be unpersuasive. Yet, these arguments are being offered in blatant disregard for any of the accepted procedural requirements. That Illinois EPA, and the Board for that matter, is being asked to address arguments on the merits of the case, instead of addressing the matter which Petitioner itself raised: Should a Motion to Compel be granted? It speaks to the merits of the Petitioner's arguments on its Motion to Compel that it has to muddy the water in what should be a clear cut motion as to whether discovery should be granted in this case.

While the Illinois EPA admires the bravado with which Petitioner argues some of its points, they are none the less unpersuasive. Just for example, Petitioner contends that an estate does not know about lawsuits pending against the decedent at the time of death unless formally notified of them. Then a mere four sentences later, Petitioner notes that it, itself, on February 22, 2008 knew to elect to proceed as owner. Now, let us be clear, Petitioner, itself, elected to proceed. Yet mere 85 words earlier, Petitioner seemingly contends that it should not be deemed to have knowledge of any of the events relative to its election to proceed. The Illinois EPA could, and may in the future, elect to spend quite a bit of time reflecting upon this argument. But, at present, it does not appear to hold any merit in the Motion to Compel context.

Then Petitioner expresses the argument that boils down a contention, again, unfounded, that the Illinois EPA is somehow claiming that the Estate was involved or knew of events prior to decedent's death. (Reply at 4). **WHAT?** Illinois EPA's Objection being considered here, makes no such claim and it cannot, once again, be fairly interpreted from the March 3, 2008 Illinois EPA letter.

For that matter, let us look closer at the main contention made by Petitioner in Subsection I which appears to be that Illinois EPA believes that a new owner/operator must obtain their own eligibility and deductibility determination. (Reply at 4) Again, the Petitioner takes the opportunity to place words within the State's mouth. In support of this claim, Petitioner offers the following, part of a letter:

> "As the new owner, you may be eligible to access the Underground Storage Tank Fund for payment of costs related to remediation of the release. For information regarding eligibility and the deductible amount to be paid, please contact the Office of the State Fire Marshall at 217.785-5878."

Illinois EPA will grant that the words "eligibility" and "deductible" appear in these two sentences. However, to contend that the Illinois EPA has any other meaning than to provide that information on those topics can be gained from contacting OSFM is unsupportable. And it does

not mean that the Illinois EPA informed Petitioner that it required its own eligibility and deductable determination. For that matter, where is the directive that Petitioner "must" do anything? This provision does not even go so far as to insure payment of costs – other than to provide that Petitioner, as new owner, may be eligible for payment relative to a release.

Truly, Illinois EPA should be allowed the procedural protection of requiring the Petitioner to follow even the tiniest form of procedural practice – and at that time, the Illinois EPA will be more than happy to reply to these spurious contentions. The Illinois EPA asks the Board, through its Hearing Officer to strike such arguments.

2. Wells is inapplicable in LUST cases.

The Petitioner cited to no cases where a Wells letter has ever been applied to LUST appeals. In fact, the Petitioner notes that the requirement was specifically removed from the regulations as not applying to the LUST program. The Petitioner attempts to paint a picture of Illinois EPA doing something nefarious. To the contrary.

The Illinois EPA does not dispute the Petitioner's allegation that the correct deductible of $100,000 was not included in the Petitioner's application for reimbursement. It was not. The Illinois EPA does not dispute that it looked at its files to determine if the correct deductible was being applied. It did. I am sure that if Illinois EPA's review of the file had determined a finding in the Petitioner's favor, it would not be complaining about the review, but would be grateful that the Illinois EPA was diligent. Unfortunately for the Petitioner, the review of the application and file was not in its favor. The Illinois EPA is allowed to review the entire Illinois EPA file when reviewing applications to make sure that the applications are complete and not misleading. Again, the facts are clear and a deposition is not necessary based on these or any other facts. There are no issues of **material** fact left in this case and discovery is therefore unwarranted.

3. The Administrative Record is complete.

Section 105.410 details what is required to be included in the Administrative Record. Subsection (b) states specifically as follows:

> "b) The record must include:
>
> 1) The plan or budget submittal or other request that requires an Agency decision;
>
> 2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the plan or budget submittal or other request;
>
> 3) The final determination letter; and
>
> 4) Any other information the Agency relied upon in making its determination.

The Illinois EPA has complied with this Section of the Board's regulations and has submitted a complete Administrative Record with all of the documents that it relied upon when making its determination. Any other documents proffered by the Petitioner are not documents relied upon by the Illinois EPA when making this decision and as such do not belong in the Administrative Record.

4. Discovery is not warranted when a Motion for Summary Judgment is pending.

Discovery in a case such as this would be wasteful and is harassing to the Illinois EPA. The Board has determined that it will not entertain discovery when a Motion for Summary Judgment is pending. In the case of Des Plaines River Watershed Alliance v. IEPA, PCB 04-88 (Nov. 17, 2005), the Board didn't decide whether discovery was warranted until after it ruled on the Motion for Summary Judgment. The Illinois EPA suggests that such an outcome was reasonable when a dispositive motion is on file. The same reasoning should be applied to these facts and Petitioner's Motion should be dismissed.

5. The Board is to decide the Case based exclusively upon the Administrative Record.

Presuming arguendo, that the Board finds some credible rationale to entertain a discussion of the matter raised within Petitioner's Motion to Compel, the Board should consider the fact that the Administrative Record has been filed in this matter and, based upon precedent rationale the Petitioner's Motion to Compel must be DENIED.

Section 105.214(a) of the Board's regulations states, "… the hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record pursuant to Section 40(d) of the Act. If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with respect to the issue of fact." In this case, a Motion for Summary Judgment has been filed and there is no material issue of fact upon which a hearing needs to be held. Therefore, as Section 105.214(a) states, the Board is to decide the case based exclusively upon the record before the Illinois EPA at the time the decision was made.

As stated above, LUST appeals are allowed under Section 40 of the Act. Section 40 of the Act, the general appeal section for permits, has been used by the legislature as the basis for LUST appeals to the Board. The only issue in any LUST appeal must concern whether the Illinois EPA's decision, based solely upon the materials in front of the Illinois EPA, was consistent with the Illinois Environmental Protection Act and the Board regulations, and therefore the only documentation relevant to this or any other purported LUST appeal action is, and would be, the documentation in front of and available to the Illinois EPA at the time a decision is made. The Illinois EPA is under regulatory obligation to provide its "administrative record," which consists of all documents before it relevant to its decision making, and therefore there is no basis for, or authority for, the discovery Petitioners attempt to engage in.

The Petitioners have not elaborated upon the information they believe is relevant, discoverable, and admissible that was not before the Illinois EPA at the time the permit was issued. *See* Prairie Rivers Network v. IPCB, *et al*., 781 N.E.2d 372, 379 (4th Dist. 2002), With the complete Administrative record filed, there is no need or possibility for discovery given that everything that is relevant is already in plain view in the Administrative record

Section 40(e)(3) of the Act requires the Board to "… hear the petition . . . exclusively on the basis of the record before the Agency." 415 ILCS 5/40(e)(3) (2004). The Board's procedural rules reflect this requirement: "[t]he hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued." 35 Ill. Adm. Code 105.214(a). Board cases have also reflected this requirement. "The Board has consistently held that, in permit appeals, its review is limited to the record that was before IEPA at the time the permitting decision was made." Prairie Rivers Network v. IEPA and Black Beauty Coal Company, PCB 01-112, slip op. at 10 (Aug. 9, 2001), citing Alton Packaging Corp. v. IPCB, 516 N.E.2d 275, 280 (5th Dist. 1987) (disallowing introduction of new evidence not presented to the Agency in the permit proceeding); Community Landfill Co. v. IEPA, PCB 01-48, 01-49 (Apr. 5, 2001); Panhandle Eastern Pipeline Co. v. IEPA, PCB 98-102 (Jan. 21, 1999); West Suburban Recycling and Energy Center, L.P. v. IEPA, PCB 95-125, 95-199 (Oct. 17, 1996). Furthermore, the Board's decision "is not based on information developed by the permit applicant, or the Agency, after the Agency's decision." Community Landfill Co. and City of Morris v. IEPA, PCB 01-48,

In Des Plaines River Watershed Alliance v. IEPA, PCB 04-88 (Nov. 17, 2005), the Board noted "that, in one Agency permit appeal, "[d]iscovery in the action was extensive." Waste Management, Inc. v. IEPA, PCB 84-45, PCB 84-61, PCB 84-68 (consolidated), slip op. at 1 (Oct. 1, 1984), *aff'd. sub nom.* IEPA v. IPCB, 503 N.E.2d 343 (1986). The record in the Waste Management case, however, shows significant difficulties in compiling and filing a voluminous

record. *Id*. (including in record more than 2,000 pages of transcripts and ten boxes of documents). A Board order on May 18, 1984, allowed the Agency additional time to file its record. Board orders dated July 19, 1984, and August 10, 1984, allowed the Agency to file additional materials in order to complete the required record. In this case, however, the Board has before it no dispute about the contents of the Agency record. Particularly under those circumstances, the Board finds there is no compelling reason to permit discovery to supplement the Agency record with materials required by Section 105.212 of the Board's procedural rules. 35 Ill. Adm. Code 105.212(b)." This case is very similar to the case in DesPlaines in that the entire record has been filed, it is relatively small, and there is no dispute about the Administrative Record. There is no compelling reason in this case to permit discovery.

This Board has unambiguously ruled that discovery is inappropriate in permit appeals matters, and is unavailable to permit appeal petitioners and respondents alike. Des Plaines River Watershed Alliance v. IEPA, PCB 04-88 (Nov. 17, 2005). Considering this unambiguous ruling, and with no good faith argument for the extension, modification, or reversal of the existing law, discovery should be denied in this case.

6. **Motion for Extension of Time should be Denied.**

Since the Petitioner includes several arguments that would be better placed in a response to the Motion for Summary Judgment filed by the Illinois EPA, it is clear that it needs no further time to file a response to said motion. As such, the Motion for Extension of Time should be dismissed and the Petitioner directed to file a response within 7 days.

II. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board, through its hearing officer, DISMISS or in the alternative DENY the Petitioner's Motion to Compel and STRIKE all argument nonresponsive to the Motion to Compel.

Illinois EPA reserves the right to argue further in response to any Motion for Summary Judgment or other Motion filed by the Petitioner.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

_____

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Dated: August 8, 2011

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on August 8, 2011, I served true and correct copies of an SUR-OBJECTION TO PETITIONER'S MOTION TO COMPEL and an, via the Board's COOL system and by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. Mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

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