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
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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), a RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION, 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 28h of December, 2011.

Respectfully submitted,
ESTATE OF GERALD D. SLIGHTOM, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION

NOW COMES Petitioner, Estate of Gerald D. Slightom (hereinafter "the Estate"), pursuant to Section 101.500(d) of the Board's Procedural Rules (35 Ill. Admin. Code 101.500 (d)), responds in opposition to the motion for reconsideration, stating as follows:

I. THE ADMINISTRATIVE RECORD SHOULD INCLUDE THE ENTIRE FILE.

This case involves the factual circumstances and legal effect of a decades-old document purportedly discovered by the Agency after numerous contrary decisions because the Agency claims the document "was overlooked *until the entire file was reviewed*." (Reply at p. 4 (emphasis added)) As far as Petitioner is concerned, this admission compels the production of the entire Agency file on this site. 415 ILCS 5/40(e)(3)(Board to hear petition "on the basis of the record before the Agency"); KCBX Terminals Co. v. IEPA, PCB No. 10-110 (April 21, 2011) ("documents were before IEPA in reaching its permit determination" when they predated the determination and were relevant); compare with Knapp Oil v. IEPA, PCB No. (Agency did "not have the OSFM application in its file" and therefore supplementation improper).

The Agency argues that if every document at the site is required to be included in the record, the record would become vast and would contain superfluous documents. First of all, this would appear to be an exaggeration with respect to this site, in which there appears to have been very little activity following the 1991 incident until a new owner elected to "take over" the cleanup in 2008. (Rec. at 116-117) The decision being reviewed purports to deny payment for all of the work approved since 2008, and is thus clearly relevant to the issues in this appeal. Secondly, the Agency has previously submitted its entire file, even when lengthier, in other LUST appeals. E.g., Prime Location Properties, LLC v. IEPA, PCB No. 09-67. As explained further herein, the issues compel a similar approach. Finally, to the extent the Agency seeks to prevent traditional discovery into identifying the information, both verbal and written, both in the Agency's files and from outside parties, the Agency directly or indirectly relied upon, submission of the entire file would go a long way towards simplifying those issues. For instance, the Agency Record contains at least one document it had to have obtained from the Office of the State Fire Marshal. (Rec. 31-34) Is that all of the information, verbal or written, it obtained from OSFM, or is this the only information it wishes to share with the Board?

II. THE BOARD'S ADJUDICATORY INDEPENDENCE REQUIRES STRICT SCRUTINY OF THE AGENCY'S REPRESENTATIONS AS TO THE RECORD.

The issues presented concerning the proper content of the administrative record are recurrent in administrative review proceedings. Prior to the codification of permit proceedings as being based "on the record" before the Agency, the Board appears to have been influenced by similar developments in federal administrative law. Specifically, in Citizens to Preserve

Overton Park v. Volpe, 401 U.S. 402, 420 (1971), the Court indicated that review of an agency proceeding is limited to the record before the agency at the time it made its decision. In identifying what it means by the "whole record," the Court explained:

> **[R]eview is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary . . . to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.**
>
> **The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decision-makers is usually to be avoided. And where there are administrative findings that were made at the same time as the decision,. . . there must be a strong showing of bad faith or improper behavior before such inquiry may be made. But here there are no such formal findings, and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.**

401 U.S. at 420.

The Board has cited from portions of this holding in past cases. Ash, v. Iroquois County Board, PCB 87-29 (July 16, 1987). Furthermore, Board decisions specific to the scope of the record are similar in holding the content of the record is a central issue to be resolved in a case:

> **It is proper to inquire, and discovery should be allowed, to insure that the record filed by the Agency is complete and contains all of the material concerning the permit application that was before the Agency when the denial statement was issued.**

Owens-Illinois, Inc. v. EPA, PCB 77-288 (Feb. 2, 1978).

The completeness of the record has been raised as a substantial issue in this appeal for a variety of reasons. First of all, the Agency's decision was made on the basis of materials not submitted by the applicant, which raises the question of whether materials reviewed by the

Agency exceeded its scope of review. Cf. Metropolitan Pier and Exposition Authority v. IEPA, PCB 10-73, at p. 51 (July 7, 2011)(question for Board is "whether the application, as submitted to the Agency, would not violate the Act and Board regulations"). Second, the Agency appears to have solicited documents from the OSFM.(Rec. 31-34) that similarly raise questions about the scope of the Agency's authority and the extent of the whole record. Third, the Agency's denial reason is inconsistent with its approval of several previous plans, budgets, reports and payments for which the same denial reason could have been given, drawing into question the entirety of the Agency's actions in this clean-up. In particular, this record indicates that the Agency's review of the application for payment did not include a comparison of the previous approved submitals to ensure "adherence to the corrective action measures in the proposal" as required by law, a stunning admission if true. (415 ILCS 5/57.8(a)(1)) Finally, the Board's denial of the summary judgment motion identifies a legal question as to what law applied to the various events at the site at different times and consequently the Board should have access to the information about the site from time to time.

An example of the last problem is reflected in the Board's subject ruling, which contained the following potentially erroneous statement: "The Board agrees that the Act is clear that a $100,000 deductible applies when no USTs are registered before July 28, 1989. 415 ILCS 5/57.9(b)(1)." (Order at p. 10) This statement overlooks the exception in that same statutory provision for heating oil tanks registered "prior to July 1, 1992." (415 ILCS 5/57.9(b)(1)) This is relevant in this case because one of the tanks from which a release occurred was indeed a heating oil tank registered on April 18, 1990. (Rec. 121) This oversight would appear most likely to be due to the incompleteness of the materials filed for understanding of the background

of this clean-up.

Given the numerous issues with this record and the fact that the Agency reviewed its entire file in order to reach its decision herein, the Board should not permit the Agency to simply feed it what information it wishes. In numerous cases following the U.S. Supreme Court's Overton Park decision, the federal courts have guarded against the record becoming a self-serving concept that precludes meaningful review of administrative actions. "The whole administrative record, however, is not necessarily those documents that the agency has compiled and submitted as 'the' administrative record. The 'whole' administrative record, therefore, consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position. "Thompson v. United States Dep't of Labor, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis added). "To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case." Walter O. Boswell Memorial Hospital v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984). "The court cannot adequately discharge its duty to engage in a substantial inquiry if it is required to take the agency's word that it considered all relevant matters." Asarco, Inc. v. U. S. EPA, 616 F.2d 1153, 1160 (9th Cir.1980).

Of course, the Board does not rule as a court of review. "[T]he process involving the EPA and the PCB is an administrative continuum. It became complete only after the PCB had ruled. The EPA permit denial did not involve the issuance of detailed findings of fact and conclusions of law. EPA is only required to give reasons for denial, the basis for which the applicant had no opportunity to challenge." Illinois Environmental Protection Agency v. Illinois Pollution Control Bd., 138 Ill. App. 3d 550, 551 (3d Dist. 1985). In this context, it is the Board,

not the Agency which acts as the formal finder of facts, through both the record filed by the Agency and the record developed before the Board. By limiting access to the Agency's files that were before the Agency at the time the decision was made, the Board's formal fact-finding duty is constrained to relying upon the Agency's self-serving determination of what is relevant. Particularly where, as here, substantial factual and legal briefing was presented to the Board, the information the Board requested be filed is presumptively relevant.

III. SUMMARY JUDGMENT SHOULD NOT BE RECONSIDERED.

No new facts or arguments were submitted in support of reconsidering the summary judgment motion, and therefore should be denied outright.

ESTATE OF GERALD D. SLIGHTOM,
Petitioner

By its attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI

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