

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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**STATE OF ILLINOIS
Pollution Control Board**

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

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**MOTION REQUESTING A FINDING OR RIPENESS OF A RULING FOR
INTERLOCUTORY APPEAL AND MOTION REQUESTING A RULING ON THE
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR SUMMARY
JUDGMENT,**

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, 101.508 and 101.516, hereby respectfully moves the Illinois Pollution Control Board ("Board") to enter summary judgment in favor of the Illinois EPA and against the Petitioner, Estate of Gerald D. Slightom ("Estate"), in that there exist herein no genuine issues of material fact, and that the Illinois EPA is entitled to judgment as a matter of law with respect to the following grounds or in the alternative pursuant to 35 Ill. Adm. Code 101.908, hereby respectfully moves the Illinois Pollution Control Board ("Board") to certify their January 19, 2012 order for interlocutory appeal. In support of said motion, the Illinois EPA states as follows:

VIII. ARGUMENT AND ANALYSIS

Today, as directed expressly by the Board's order of January 19, 2012, the Illinois EPA files all of the documents within the Bureau of Land's Leaking Underground Storage Section's possession that relate to this site's Land Pollution Control Number. The Illinois EPA does so, under objection, and

wishes to maintain the issue for appeal either interlocutory or following a ruling by the Board on this matter.

A: The Board's January 19, 2012, decision reversed, without explanation, a long history of case law.

It has been well-settled law for over thirty years that the Administrative Record in such proceedings consists only of the information/documents upon which the Illinois EPA relied upon in making a permitting decision. See: Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 516 N.E.2d 275 (5th Dist. 1987); Joliet Sand & Gravel v. PCB, 163 Ill. App. 3d 830, 516 N.E.2d 955 (3rd Dist. 1987). The Board has previously denied motions, in other cases, to supplement the Administrative Record with information that the Illinois EPA did not, should not, or could not have considered. See: CWM Chemical Services, Inc. v. IEPA, PCB 89-177 (July 11, 1991); United Disposal of Bradley, Inc., and Municipal Trust & Savings Bank as Trustee Under Trust 0799 v. IEPA, PCB 03-235 (June 17, 2004)

In this case, the Illinois EPA filed the entire Administrative Record consisting of all documents upon which staff relied upon in rendering the Agency's decision. The Illinois EPA included an affidavit testifying to this effect. Constraining the Administrative Record to such documents serves many key State interests while also not infringing at all upon the Petitioner in these actions. Without explanation, the Board casts aside the above cases and principals of Stare Decisis and forges a new path. At the very least, some discussion of this departure should be allowed. And, further complicating the matter, the Board uses its ruling on the Illinois EPA's Motion to Reconsider to further broaden the burden it now places upon the Illinois EPA in filing an Administrative Record. (See: adding the concept of "exculpatory" only found within the Board Order on Reconsideration).

The Illinois EPA's Leaking Underground Storage Section is charged with the duty of insuring that a person required to remediate the impacts of a release of gasoline complies with a very vast and complex set of regulatory requirements. While generating limited documents on its own, such releases, in general, require the submission of vast quantities of documentation and information from an owner or operator of a facility subject to compliance with the regulations. In such cases, generally, the owner or operator of the facility (and registered owner/operator of the regulated tanks) has itself, through consultant(s) it has personally hired, submitted the bulk of documents within the Illinois EPA's possession. As such, the Petitioner prior to filing its appeal has access to every document relating to a release at issue, and for those it may not, the Illinois EPA's files are open to a FOIA review. And, most importantly, the issue under appeal may not, and many times will not, include a review of other information/documents submitted regarding technical compliance with regulations. So, the Petitioner is not without access to even more information than may be at issue in a proceeding it files before the Board. As well as, the focusing of the Administrative Record to those documents/information relied upon in issuing a decision on the issue serves judicial economy and focuses the issue relevant for review.

In this particular case, it is instructive to note that the Petitioner had indeed filed a Freedom of Information Act ("FOIA") request and had a copy of all of the documents within the Illinois EPA relating to that site. As such, Petitioner was not deprived of any information, even information which does not relate to the issue at large, and the Illinois EPA, pursuant to existing case law, correctly identified all documents relied upon in rendering its decision. If information was not considered, or conversely should other information have been considered (which typically is under the exclusive control of Petitioner to put before the Illinois EPA), Petitioner is welcome to present such within Pleading or at hearing – and as such no prejudice has now or will befall Petitioner.

B: The Board’s January 19, 2012, places an additional burden on the Illinois EPA which does not exist under law by requiring that the Illinois EPA identify “exculpatory” evidence and provide such within the Administrative Record.

The Board’s ruling expands and places a burden upon the Illinois EPA requiring that it must anticipate will or may be argued by Petitioner. Requiring the Illinois EPA in essence to anticipate Petitioner’s possible claims is tantamount to asking the Illinois EPA to act as both the Respondent and the Petitioner to an appeal of its decision. How is the Illinois EPA supposed to know what is “exculpatory” in the context of an Administrative Hearing?

Further complicating this new burden thrust upon the Illinois EPA is the fact that the Board cites to no case law on-point or even case law lending some intuitive support for this ruling, nor does it shed any light as to why such a finding serves public policy or protects this or any other Petitioner’s rights under such proceedings.

For the above reasons, the Illinois EPA initially objected to the Board’s ruling and deems it once again necessary to object to this latest ruling including the concept of “exculpatory” information. However, it is possible that the Illinois EPA has misinterpreted the combined rulings, in that , the original and further expanded rulings on the record issue may be limited to a directive that the Illinois EPA consider the record again to make sure that it did not miss any document relied upon when the decision was made. If so, as the Board will see, the Illinois EPA has gone out of its way to provide any and all information within the LUST Section’s handling of this entire release issue, and no additional information relevant to the Illinois EPA determination is to be found. If this interpretation is indeed the correct rationale for the ruling in the two orders, then the Illinois EPA respectfully seeks an Order

clarifying such and thus the Illinois EPA will no longer need a ruling allowing for interlocutory appeal. If not corrected, the Illinois EPA must seek further review on appeal.

The Illinois EPA must seek appeal of the Board's finding within its January 19, 2012, Order since it provides that the Illinois EPA must tender all "exculpatory" evidence; which surely blurs line between criminal disclosure and civil Administrative actions. No rights similar to those protected against State action are present within this or other LUST appeal actions. Further, the Board provides no analysis or rationale for expanding such a request upon the Illinois EPA in this or any other LUST appeal.

What if criminal actions are pending against a potential Petitioner, a prior owner or operator or another party? The Illinois EPA can see no reason why such investigative information should be provided within the context of a non-similar matter or issue. Should the Illinois EPA be subject to contempt for breaking a gag order or alter proceedings before a grand jury to provide exculpatory information on a non-related issue just because the Petitioner has appealed some non-related Illinois EPA decision?

C: The Board's January 19, 2012, Order shifts the burden of proof improperly to the Illinois EPA.

It is not the Illinois EPA's burden of proof. The Illinois EPA is the respondent, not the Petitioner. Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9. Nevertheless, all of the documents in the Illinois EPA's control are subject to FOIA and were handed over to the Petitioner in this case. By requiring the Illinois EPA to not only defend its final

decision, but to also provide the Petitioner with its arguments is unreasonable and contrary to all accepted practice of Administrative Law.

D: Illinois EPA's request for a ruling on its previously filed Motion for Summary Judgment.

Again, there are no issues of material fact present in this matter and the Illinois EPA is entitled to a finding as a matter of law. This matter is very simple, and the previously filed Motion addresses the issue presented and mandates that relief be granted in favor of the Agency.

Since the Illinois EPA has filed documents requested by the Board pursuant to the January 19, 2012, Order in this matter, and since, through this pleading, the Illinois EPA incorporates its June 15, 2011, Motion for Summary Judgment in total, which is currently awaiting a ruling, the Illinois EPA respectfully request a ruling thereon.

X. CONCLUSION

BY THIS PLEADING, the Illinois EPA, respectfully request that the Board issue the following rulings:

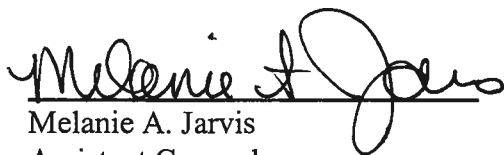
(1) A finding that the ruling mandating that additional documents be included within the Administrative Record, issue issued within its January 19, 2012, Order is a final determination ripe for appeal or in the alternative certify that such ruling is proper for appeal or finally an Order clarifying that the Illinois EPA has complied with a request that it identify any further information which it may have relied upon and that such was complied with and that prior decisions on-point are still intact; and

(2) A ruling on the Illinois EPA's previously filed Motion for Summary Judgment in this matter.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

A handwritten signature in black ink, appearing to read "Melanie A. Jarvis", written over a horizontal line.

Melanie A. Jarvis

Assistant Counsel

Special Assistant Attorney General

Division of Legal Counsel

1021 North Grand Avenue, East

P.O. Box 19276

Springfield, Illinois 62794-9276

217/782-5544

217/782-9143 (TDD)

Dated: February 28, 2012

This filing submitted on recycled paper.

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STATE OF ILLINOIS
Pollution Control Board

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on February 28, 2012, I served true and correct copies of a ILLINOIS EPA FILE, a MOTION REQUESTING A FINDING OR RIPENESS OF A RULING FOR INTERLOCUTORY APPEAL AND MOTION REQUESTING A RULING ON THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR SUMMARY JUDGMENT 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:

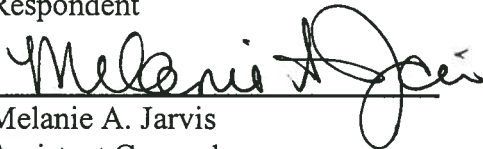
John Therriault, Acting Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

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

Patrick Shaw
Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent


Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)