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), a RESPONSE TO MOTION REQUESTING A FINDING OF RIPENESS OF A RULING FOR INTERLOCUTORY APPEAL AND MOTION REQUESTING A RULING ON THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR SUMMARY JUDGMENT, 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 16th of March, 2012.

Respectfully submitted,
ESTATE OF GERALD D. SLIGHTOM, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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RESPONSE TO MOTION REQUESTING A FINDING OF 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 Petitioner, Estate of Gerald D. Slightom (hereinafter "the Estate"), pursuant to Section 101.516 of the Board's Procedural Rules (35 Ill. Admin. Code 101.516(a)), in response to Motion Requesting a Finding of Ripeness of a Ruling for Interlocutory Appeal and Motion Requesting a Ruling on the Illinois Environmental Protection Agency's Motion for Summary Judgment filed by the Illinois Environmental Protection Agency (hereinafter "Agency"), stating further as follows**:**

INTRODUCTION

Before presenting the Estate's objection to the motion, the Estate proposes a constructive approach going forward with this appeal. The Estate's desire in this proceeding has always been to conduct a short deposition of the project reviewer or reviewers to assist in explaining the record, as is customary in underground storage tank and permit appeals. Had the depositions been conducted when requested in July, this case would be over by now; the Estate would have filed its own motion for summary judgment, and the Board would been in a position to rule shortly thereafter, confident that it had all of the legal and evidentiary matters before it. Since the Board has not deemed it necessary to rule on the outstanding discovery dispute that still exists, (Order of Nov. 17, 2011, at pp. 10-11), the Petitioner proposes that the Agency's motion be denied as not

likely to bring this case to an efficient resolution with directions for the Estate to file a motion for summary judgment within thirty days of the Board's order, or pursuant to such other scheduling arrangements as can be worked out though the Hearing Officer. If upon ruling upon the motion, the Board determines there are additional evidentiary matters that the Estate was unable to resolve without the testimony of Agency personnel, then the Estate would request that such Agency personnel be compelled to submit to deposition at that time.

I. MOTION FOR RIPENESS.

The motion for ripeness should be denied as merely a motion for reconsideration of a denial of a motion for reconsideration. There is no legal basis for it, and the Agency is simply protracting and rearguing matters its lost.

The motion for summary judgment was denied due to "discrepancies as to whether either Part 732 or Part 734 applies, as well as insufficient facts in the record to make either determination at this time." (Order of Nov. 17, 2011, at p. 8) Furthermore, the Board found that "[t]he parties specifically dispute the validity and effect of the December 20, 1991 letter as it poses a genuine issue of material fact," (Id. at 9) as well as disputed issues of fact concerning the affirmative defense of estoppel. (Id. At 10) In response to this ruling, the Agency has never addressed the discrepancies that were partially the basis of the Board's denial of the motion for summary judgment, nor address the disputed issues of fact. (Mot. Reconsideration, at pp. 4-5) The Agency has only sought to address the issues pertaining to the completeness of the record.

The Agency also misapprises the nature of its burden in this proceeding. It is true that the Petitioner has the burden of proving its case *at hearing*, but the Agency filed a motion for summary judgment, which places a significant burden on the movant to not only prove its case, but also to prove that petitioner's right to a hearing should be foreclosed for want of any doubt or uncertainty about what the totality of the evidence would show if a hearing were held:

> **Although the use of summary judgment aids in the expeditious disposition of a lawsuit, "summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt."A motion for summary judgment is properly granted, therefore, only when the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. In considering a summary judgment motion, the court has a duty to construe the evidence strictly against the movant and liberally in favor of the nonmoving party.**

Traveler's Ins. Co. v. Eljer Mfg., 197 Ill. 2d 278, 292 (2001).

"The summary judgment movant is obligated to demonstrate the absence of factual dispute with respect to all issues raised by the pleadings, including the absence of factual dispute regarding an affirmative defense raised by the party's opponent." West Suburban Mass Transit Dist. v. Conrail, 210 Ill. App. 3d 484, 488 (1st Dist. 1991) In contrast, the plaintiff, or in this case the petitioner, is not required to "prove his case during a summary judgment proceeding, he must present some evidence to support each element of the cause of action.." Jordan v. Knafel, 378 Ill. App. 3d 219, 227 (1st Dist. 2007).

Furthermore, the Agency imposed additional burdens on itself by refusing discovery. It was certainly within the Agency's right to seek relief from the subpoena, but in doing so the Agency accepted the additional uncertainty about what such testimony would provide.

The Estate does not understand the Agency's complaint that the Administrative Record should not contain "information that the Illinois EPA did not, should not, or could not have considered." (Mot. Ripeness, at p. 2) The documents the Agency is complaining about, and submitting "under objection" were in the Agency files at the time the decision was made, and thus *could have been considered*, particularly since the Agency has told the Board that "the entire file was reviewed" as part of its decision herein. (Reply M.S.J. at p. 4) The Estate disputes the claim that the Agency has identified all of the "information which it may have relied upon," since it clearly relied upon information it obtained from the Office of the State Fire Marshal ("OSFM"),

and in the course of these communications with OSFM was very likely to have come into possession of non-written information, or knowledge of information in the possession of OSFM that it decided not to request in writing, but which it *could have* requested. This is not a case where the Agency only reviewed the information submitted by the applicant. The Estate is not asking the Board to order the Agency to obtain records from OSFM, but is asking the Board not to issue a ruling which would foreclose the Estate from demonstrating the relevance of such pre-existing documents that it choose not to request from OSFM or verbal information that it choose not to write down.[1]

Finally, the Estate disputes the notion that there is a motion for summary judgment "currently awaiting a ruling." (Mot. Ripeness, at p. 6) The motion was denied, the motion to reconsider that denial was denied. There is no motion. The Board's ruling did not preclude any party, including the Agency, from filing a new motion that addresses the legal and factual issues identified by the Board, but there is no procedural basis for finding that a motion that was denied for legal and factual infirmities is pending a ruling. Even if, the Agency were to file additional evidence and arguments after the ruling on the summary judgment motion, the Board is not required to consider them. Tomlen Group, Ltd. v. Goldfarb, 101 Ill. App. 3d 154, 158 (2d Dist. 1981)("Whether to consider affidavits filed after hearing on the section 48 [summary judgment] motion is discretionary with the trial court. This is based on the reasoning that "[i]t is not intended

[1] The Estate also disputes the repeated insistence that the Estate has received these documents before through FOIA request. There are documents produced in the most recent production that have not been seen before and were not produced in response to its consultants FOIA request. This does not appear to be a recent phenomena either. Among the documents recently filed there is a FOIA request from October 15, 1993, for "whatever reports, information, etc. you have available on the above named property." (Doc 1) On October 25, 1993, the Agency produced nine pages of documents, (Doc 1), whereas there are currently on file with the Board forty-seven pages of Agency documents that existed prior to 1993, including a thirteen page document produced most recently (Doc. 6)

cases should be heard piecemeal under this procedure."). The piecemeal nature of this proceeding is obvious. The motion for summary judgment did not address all of the legal and factual matters required of such a motion, so additional legal arguments and evidence, including testimony by way of affidavit, were submitted in the reply, which the Estate was denied the opportunity to oppose by surreply. Then more documents were submitted with the motion for reconsideration and more documents was submitted in the subject motion, and yet none of the additional evidence is accompanied by argument or explanation of how the evidence resolves the previously identified genuine issues of material fact. Accordingly, the motion to reconsider the Board's previous denial of its motion to reconsider should be denied.

If the motion is to be granted, then Petitioner should be given an opportunity to reply to the new matter. "If further affidavits submit new matter, plaintiff should have an opportunity to reply to them." Gliwa v. Washington Polish Loan & Bldg. Ass'n, 310 Ill. App. 465, 478 (1st Dist. 1941). The Board should also reconsider the motion to compel the deposition of Agency personnel, and its order striking the surreply, both of which were premised on being moot once the summary judgment motion was denied.

II. MOTION FOR INTERLOCUTORY APPEAL

The Pollution Control Board's rules authorize an interlocutory appeal pursuant to Supreme Court Rule 308. (35 Ill. Admin. Code § 101.908) In turn, Supreme Court Rule 308 does not authorize an appeal of a motion, it authorizes discretionary appeals of one or more legal questions "as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." (S. Ct. R. 308) The Agency's motion does not identify a legal question, it does not identify the ground for a difference of opinion other than its own defeated expectations and it does not explain how this case would be materially advanced by an appeal, which if in the unlikely event was accepted by

the Appellate Court, would take years to complete, and still not resolve the affirmative defenses claimed by the Estate.

"Appeals under Rule 308 should be limited to certain 'exceptional' circumstances; the rule should be strictly construed and sparingly exercised." Voss v. Lincoln Mall Management Co., 166 Ill. App. 3d 442, 445 (1st Dist. 1988). The Agency has simply not met its burden of persuading that such exceptional circumstances exist here. In the particular case of appeals from Agency decisions with decision deadlines such an appear would not materially advance the ultimate termination of the litigation faster than a hearing. Cf. West Suburban Recycling & Energy Center v. IEPA, PCB No. 95-119 (Mar. 7, 1996). No grounds for such exceptional recourse have been advanced and thus the motion should be denied.

WHEREFORE, Petitioner prays for an order denying the subject motion, and alternatively, and only in the event the motion is granted, Petitioner prays for an order reconsidering the Board's striking of the surreply and the request to conduct discovery, or such further and other relief as the Board deems meet and just, including direction and authorization for the Petitioner to file its own motion for summary judgment herein.

ESTATE OF GERALD D. SLIGHTOM,
Petitioner

By its attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI

By: /s/ Patrick D. Shaw

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