BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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| 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
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

Melanie Jarvis
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

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 PETITIONER'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 29th of June, 2012.

Respectfully submitted,
ESTATE OF GERALD D. SLIGHTOM, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323
Telephone: 217/528-2517
Facsimile: 217/528-2553

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**PETITIONER'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), stating further as follows:

## STATEMENT OF FACTS

### A. PRIOR OWNER – GERALD SLIGHTOM

Gerald Slightom owned a service station property commonly known as the Robinson Service Station in Girard, which was leased and operated by Michael Robinson from at least 1977 to August of 1990. (Rec. P18; P24-P25)[1] In April of 1990, the Office of the State Fire Marshal ("OSFM") issued an administrative order, directing Slightom to register all six of the tanks at this location and remove those no longer in operation. (Ex. 2 (Thorpe Aff.)) On April

[1] Citations to the original record filed by the Agency are cited to the pages. (Rec. P___) On December 13, 2011, the Agency supplemented the record with omitted pages, which are also cited in reference to the pagination used (Rec. ____A) On March 2, 2012, the Agency supplemented the record with additional documents, received by Petitioner in digital format, and cited by Petitioner to the file number on the disk. (Rec. No. _____) A chronological index is attached hereto as Exhibit 3.

18, 1990, Gerald Slightom registered all five underground storage tanks, including a heating oil tank, with the OSFM. (Rec. P24-P25) The OSFM later advised Slightom that the administrative order's requirements for registration had been performed. (Ex. 2 (Thorpe Aff.))

On August 30, 1991, Slightom reported a release of gasoline, used oil and heating oil from all underground storage tanks to the Illinois Emergency Services and Disaster Agency. (Rec. No. 4) On the same date, all tanks were removed from the site, and the on-site OSFM representative indicated that there had been a significant release to the tank floor, walls and pipe trench and that contamination was "widespread at this location." (Rec. No. 3) On October 19, 1992, notification was given that all of the tanks had been removed. (Ex.2 (Thorpe Aff.)) The OSFM has never taken any action to rescind or revoke the registration of any of the tanks on the property, (Ex. 2 (Thorpe Aff.)), and indeed as will be discussed later, the OSFM issued an eligibility and deductibility determination confirming the registration of all tanks on the property.

On or about December 6, 1991, Gerald Slightom applied to the IEPA for reimbursement from the LUST Fund of approximately $40,000 in estimated corrective action costs incurred to date, indicating that all of the tanks had been registered on April 18, 1990. (Rec. No. 6; Rec. P17) The application was reviewed on around December 17, 1991 and the IEPA reviewer found that all tanks, including the heating oil tank had indeed been registered on April 18, 1990, and all fees were paid. (Rec. P15 - P16)[2] The record contains a document purporting to find a $100,000 deductible applied to the incident because none of the underground storage tanks were registered prior to July 28, 1989. (Rec. P13) No proof of receipt is shown in the record; no appeal was

[2] In December of 1991, heating oil tanks for consumptive purposes were required to be registered, but were not required to pay a registration fee. (P.A. 87-323, § 4 (effective Sept. 6, 1991))

taken. (Rec. P13)

On October 15, 1993, Meredosia Bancorporation submitted a Freedom of Information Act request to the Agency seeking "whatever reports, information, etc. you have available on the above named property." (Rec. No. 1) On October 25, 1993, the Illinois EPA provided nine pages. (Rec. No. 1) As shown by the attached Index, there are at least 34 pages of responsive documents dated prior to 1993. (Ex. 3)

## B. LEGISLATIVE AND REGULATORY CHANGES TO LUST PROGRAM FROM 1990 TO 2007.

Over the course of the next several years, the laws and regulations governing the LUST Fund changed considerably and constantly. The Board is well aware of this history, but given the nature of the regulatory issues presented by this appeal, the Estate believes it is useful to identify three of the important changes that occurred from 1990 to 2007.

On September 13, 1993, the Illinois General Assembly repealed the various provisions of the Act concerning leaking underground storage tanks, including the eligibility and deductibility provisions. P.A. 88-496, § 95 (repealing 415 ILCS 5/22.18b et al.). In its place, the General Assembly enacted a new Title XVI, commonly known as the Leaking Underground Storage Tank Program. (415 ILCS 5/57-57.17) The new program modified the eligibility criteria,[3] gave the OSFM responsibility for making eligibility and deductibility determinations, and gave the Illinois Pollution Control Board authority to review certain OSFM determinations. Under the

[3] New criteria included prior notification of IEMA of a confirmed release (415 ILCS 5/57.9(a)(4)), and that the costs must not have already been paid under private insurance, agreement or court order (415 ILCS 5/57.9(a)(5)).

legislation's transition provisions, releases reported on or after September 13, 1993 were subject to Title XVI, while those reported prior to that date remained subject to the repealed laws unless and until an election to proceed under the new program was submitted to the Agency. Since the Board's regulations promulgating the new program were codified in Part 732, the filing is commonly known as an Election to Proceed Under Part 732.

In 2002, Title XVI was substantially amended, P.A. 92-554 (effective June 24, 2002), and the resulting new rules were codified in Part 734. Once again, the legislation included a transition provision, allowing previously reported releases to remain governed by previous law unless an Election to Proceed Under Part 734 is filed. (415 ILCS 5/57.13)

In 2006, the General Assembly expanded the definition of an "owner" of underground storage tanks to include new owners of property in which one or more tanks had been removed, but corrective action had not yet been completed. P.A. 94-275, § 5 (codified at 415 ILCS 5/57.2) (effective Jan. 1, 2006). To elect to become a new owner, one must submit a written election to proceed as owner. (Id.)

## C. NEW OWNER – THE ESTATE

On September 5, 2007, Gerald Slightom died, and on September 20, 2007, Richard D. Slightom was appointed the executor of the Estate. (Ex. 1 (Nichelson Aff.) In the process of marshaling the assets of the estate, the subject property was identified with an assessed value of $59,707, if it were cleaned-up. (Ex. 1 (Nichelson Aff.)) The Estate did not have any record of a prior eligibility and deductibility determination ever having been made in relationship to the property, (Ex. 1 (Nichelson Aff.)), and there was no indication in the OSFM's files or the

Agency's website of any such activity. (Ex. 2 (Thorpe Aff.); Rec. P116)[4]

The Estate engaged a consultant to determine whether cleanup of the property would be eligible for payment from the LUST Fund. On or around January, 24, 2008, the Estate applied for an eligibility and deductibility determination from the Office of the State Fire Marshal (hereinafter "OSFM"). (Rec. P31) In 2008, the eligibility standards provided as follows:

> **A deductible of $100,000 shall apply when none of the underground storage tanks were registered prior to July 28, 1989, except in the case of underground storage tanks used exclusively to store heating oil for consumptive use on the premises where stored and which serve other than farms or residential units, a deductible of $100,000 shall apply when none of these tanks were registered prior to July 1, 1992.**

(415 ILCS 5/57.9(b)(1))

Since the former commercial site contained a heating oil tank used for consumptive purposes, OSFM did not apply the $100,000 deductible, but on February 6, 2008, found that the Estate of Slightom was "eligible to seek payment of costs in excess of $10,000." (Rec. P29) In reliance on the determination, the Estate paid a $10,000 deductible to its consultant (Rec. P108), and submitted three documents to the Agency on February 22, 2008:

- Election to Proceed under Part 734
- Election to Proceed as "Owner;" and
- 45-Day Report with Stage 1 Certification

(Rec. No. 12)

Also, in reliance upon the eligibility and deductibility determination, the Estate paid all of the bills of creditors identified that timely responded to the published notice and distributed all

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[4] The Agency's database only identified that a notice of release letter was sent in 1991. (Rec. P116) No other activity is shown that year or the next.

remaining assets to the heirs, except for the subject property. (Ex. 1 (Nichelson Aff.)) The Estate would not have elected to cleanup the property if it had known that the Agency would apply a $100,000 deductible, given that the site is not worth $100,000. (Ex. 1 (Nichelson Aff.)) There are no assets in the Estate other than the subject property. (Ex. 1 (Nichelson Aff.))

On March 3, 2008, the Agency approved the election to become "owner," stating in part:

> **As the new owner, you may be eligible to access the Underground Storage Tank Fund for payment of costs related to remediation of the releases. For information regarding eligibility and the deductible amount to be paid, please contact the Office of the State Fire Marshal at 217/785-5878.**

(Rec. No. 14)[5]

At that time, the Agency also approved the Stage 1 Site Investigation Plan and Budget, and again indicated that LUST Fund "eligibility requirements [are] as determined by the Office of the State Fire Marshal." (Rec. No.15) This work was performed and the Estate submitted an application for payment for the work on October 20, 2008, including a copy of the Estate's eligibility and deductible determination. (Rec. P55 & P82) The Agency reviewer noted the inclusion of a copy of "the $10,000 deductible which applied to the site," (Rec. P51), and issued its final decision approving the amount requested ($29,239.08), before subtracting the $10,000 deductible "as determined pursuant to the Office of the State Fire Marshal's eligibility and deductibility final determination in accordance with Section 57.9 of the Act," resulting in a total voucher payment of $19,239.08. (Rec. P47)

Meanwhile, the Estate through its consultant submitted and obtained approval of a series of Stage 3 Site Investigation Plans and Budgets, which were then performed and the results

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[5] It appears unlikely that the Agency would have known that the Estate in fact had already obtained the eligibility and deductibility determination from OSFM.

reported in the Site Investigation Completion Report:

| DOCUMENT | SUBMITTED | APPROVED |
|---|---|---|
| Site Investigation Stage 3 Plan and Budget | 8/27/08 (Rec. No. 16) | 10/1/08 (Rec. No. 2) |
| Site Investigation Stage 3 Plan and Budget | 3/4/09 (Rec. No. 11) | 3/25/09 (Rec. No. 19) |
| Site Investigation Stage 3 Plan and Budget | 7/2/09 (Rec. No. 20) | 7/24/09 (Rec. No. 22) |
| Site Investigation Stage 3 Plan and Budget | 11/5/09 (Rec. No. 23) | 11/25/09 (Rec. No. 25) |
| Site Investigation Completion Report | 6/11/10 (Rec. No. 27) | 7/8/10 (Rec. No. 29) |

Each of the above submittals included a copy of the OSFM eligibility and deductibility determination issued to the Estate. With the exception of the first submittal, the technical reviewer noted in each instance that "The OSFM's eligibility letter (2/6/08) is included," before approving each of the submittals. (Rec. Nos. 18, 21 & 28)[6]

After the work was performed, the results of the Site Investigation were reported in the Site Investigation Completion Report, which was approved subject to some additional delineation of the plume to be performed during corrective action. (Rec. No. 29) The Site Investigation Completion Report included the actual costs for all Stage 3 site investigation activities. (Rec. No. 27; No. 28) The Agency approved the $82,057.28 requested for the Stage 3 site investigation, plus whatever handling charges are determined at the time a billing package is reviewed. (Rec. No. 29) In summary, the budgets for the Stage 3 Site Investigation activities were pre-approved before the work was performed and all of the actual costs (except handling charges) were approved after the work was performed.

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[6] Since each budget must include "a copy of the eligibility and deductibility determination of the OSFM ," (35 Ill. Admin. Code § 734.310(b), it is presumed that the project reviewer confirmed the presence of the determination in each instance, whether he wrote it in his notes or not.

On July 19, 2010, the Estate filed an application for payment in the amount of $83,912.58, (Rec. P120-P215), which included (i) bills and invoices substantiating the actual costs incurred, (ii) a copy of the Agency's final determination approving the actual costs (Rec. P202), (iii) a copy of the OSFM's eligibility and deductibility determination of $10,000 (Rec. P209), (iv) proof that the deductible had already been applied in prior payments (Rec. P206), and (v) the federal taxpayer identification number for the Estate. (Rec. P214) The Agency's internal records, at least as of August 4, 2010, indicate that the site had a $10,000 deductible, which had previously been applied. (Rec. P118)

By October 28, 2010, however, the Agency had conducted some sort of investigation,[7] and determined that the proper deductible was $100,000 (Rec. P111 & P115) While the Agency's review notes indicate that the application for payment contained all mandatory documents, including the "Copy of OSFM Eligibility/ Deductibility Letter" and concluded "[n]o accounting deductions" should be made, (Rec. P112) for the first time the Agency identified a $100,000 deductible purportedly issued to the decedent in December of 1991 as the proper deductible.

On October 29, 2010, the Agency issued its decision herein, finding that "the Illinois EPA received your complete application for payment, [but] a voucher cannot be prepared for submission to the Comptroller's office for payment." In relevant part the denial letter stated that

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[7] As an offer of proof of evidence that the Estate believes it could present at hearing, but cannot present formally in this motion for summary judgment due to lack of access to the Agency personnel by deposition, Brian Bauer contacted the OSFM in an effort to persuade OSFM that its deductibility determination was wrong and should be rescinded, and at this time, Bauer requested and obtained some documents from the OSFM file. OSFM refused to rescind its $10,000 deductible determination.

> **Pursuant to Section 57.8(a)(4) of the Act, any deducible, as determined pursuant to the Office of the State Fire Marshal's eligibility and deductibility final determination in accordance with Section 57.9 of the Act, shall be subtracted from any payment invoice paid to an eligible owner or operator.**

(Rec. P109a (emphasis added))

> **Pursuant to 35 Ill. Adm. Code Part 734.615(b)(4) where more than one deductible determination has been made, the higher deductible shall apply. On December 20, 1991 the Illinois Environmental Protection Agency issued an Eligibility and Deductibility Determination of $100,000.00 for this site. A second Eligibility and Deductibility Determination of $10,000.00 was issued on February 6, 2008 by the Office of the State Fire Marshal. The Illinois Environmental Protection Agency has determined that the $100,000.00 deductible applies to this site.**

(Rec. P109)

Furthermore, the Agency determined that the previous payment of $19, 239.08 was an excess payment that should not have been made, and stated that the remaining balance of $6,091.27 will be deducted from future payments. The Estate timely appealed this decision.

## LAW

"Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." Outboard Marine Corp. v. Liberty Mut. Ins. Co., 154 Ill. 2d 90, 102 (1992). For purposes of this motion for summary judgment, the Estate assumes no useful testimony could or would be obtained from the Agency project reviewer(s) that it has so far been denied an opportunity to examine. Based upon the law and the facts herein, the Board would be authorized to grant summary judgment in the Estate's favor without such testimony.

## I. SECTION 57.8(A)(4) OF THE ACT REQUIRES THE AGENCY TO ONLY SUBTRACT DEDUCTIBLES DETERMINED BY THE OSFM.

"[T]he burden of proof is on the petitioner to prove that the Agency's denial reason was insufficient to warrant affirmation." Rosman v. IEPA, PCB No. 91-80 (Dec. 19, 1991). "The Agency's denial letter frames the issues on appeal." Dickerson Petroleum v. IEPA, PCB No. 9-87, at p. 74 (Feb. 4, 2010) Here, the Agency's denial letter expressly relies upon legal authority that contradicts its own actions:

> **Pursuant to Section 57.8(a)(4) of the Act, any deducible, as determined pursuant to the Office of the State Fire Marshal's eligibility and deductibility final determination in accordance with Section 57.9 of the Act, shall be subtracted from any payment invoice paid to an eligible owner or operator.**

(Rec. P109A (emphasis added))

The Agency has not acted in accordance with the legal authority asserted in its own denial letter. Since 1993, the Agency has only been authorized to make deductions from payments as

determined by the OSFM pursuant to Section 57.9 of the Act:

> **Any deductible, as determined pursuant to the Office of the State Fire Marshal's eligibility and deductibility final determination in accordance with Section 57.9, shall be subtracted from any payment invoice paid to an eligible owner or operator. Only one deductible shall apply per underground storage tank site.**

(415 ILCS 5/57.8(a)(4))

This law requires the Agency to deduct no more than the $10,000 previously deducted from the first payment invoice. The Agency's attempt to identify and subtract any deductible other than one determined by the OSFM pursuant to Section 57.9 of the Act violates the law.

The non-OSFM determination was purportedly made by the Agency pursuant to Section 22.18(b) of the Illinois Environmental Protection Act, which was repealed in 1993. (P.A. 88-496, § 15 (repealing 415 ILCS 5/22.18b et al.) (eff. September 13, 1993)). The repeal of this "Old Law" included a transition provision which continued the applicability of the "Old Law" to releases reported prior to September 13, 1993, while also giving such owners the option to elect into the new Title XVI. P.A. 88-496, § 15 (codified at 415 ILCS 5/57.13) If the owner made such an election, "all costs incurred in connection with the incident prior to notification shall be reimbursable in the same manner as was allowable under then existing law." (Id.) While the Estate's election was not made pursuant to this particular transition, it was this transition that most substantially changed the LUST Program by repealing the Agency's authority to make eligibility and deductibility determinations, as well as changing the eligibility requirements.[8]

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[8] New eligibility criteria included prior notification of IEMA of a confirmed release (415 ILCS 5/57.9(a)(4)), and that the costs must not have already been paid under private insurance, agreement or court order (415 ILCS 5/57.9(a)(5)). These were not eligibilty requirements under the "Old Law." (415 ILCS 5/22.18b(a))

Unlike the Agency herein, the General Assembly was obviously concerned about fundamental fairness to owners who have "costs incurred" under one set of expectations and did not want those reasonable expectations to be arbitrarily defeated. When the law was substantially changed again in 2002, the previous transition provision was updated:

> **If a release is reported to the proper State authority prior to the effective date of this amendatory Act of 2002, the owner or operator of an underground storage tank may elect to proceed in accordance with the requirements of this Title by submitting a written statement to the Agency of such election. If the owner or operator elects to proceed under the requirements of this Title all costs incurred in connection with the incident prior to notification shall be reimbursable in the same manner as was allowable under the then existing law. Completion of corrective action shall then follow the provisions of this Title. Owners and operators who have not elected to proceed in accordance with the requirements of this Title shall proceed in accordance with the law in effect prior to the effective date of this amendatory Act of 2002.**

P.A. 92-554, § 5 (codified at 415 ILCS 5/57.13(b)) (effective June 24, 2002).

Upon receiving the OSFM eligibility and deductibility determination of a $10,000 Deductible, the Estate elected to become the new "owner" of the cleanup and elected to proceed under this new amendatory Act of 2002. While "Old Law" continued to apply to "all costs incurred in connection with the incident prior to notification," the amendatory Act of 2002 applied to costs incurred subsequently. All of the Estate's costs were incurred subsequent to the election, and therefore the "Old Law" has no legal relevance in this appeal. The "Old Law" might have theoretical applicability to the approximately $40,000 or more that the prior owner incurred as of 1991, but the Estate has not sought, nor does it know how it could, seek reimbursement for the prior owner's estimated costs.

Under Title XVI, "[e]ligibilty and deductibility determinations shall be made by the Office of the State Fire Marshal." (415 ILCS 5/57.9(c)) That is the law today and should be applied by the Board herein to reverse the Agency's disregard of it.

## II. RECENT STATUTORY AMENDMENTS CONFIRM THE REPEAL OF "OLD LAW."

The conclusions drawn in the previous section are re-enforced by subsequent legislation, which has effectuated the final repeal of all elements of "Old Law." P.A. 96-908 (codified at 415 ILCS 5/57.13) (effective June 8, 2010). Elections are no longer authorized; owners and the Agency are required to follow Title XVI. Pursuant to these legislative amendments, the Board repealed Part 732. In the Matter Of: Amendments under P.A. 96-908 to Regulations of Underground Storage Tanks (UST) and Petroleum Leaking Ust: 35 Ill. Adm. Code 731, 732 and 734, PCB No. R11-22 (Mar. 15, 2012).

The Board "should apply the law as it exists at the time of the appeal, unless doing so would interfere with a vested right." First of Am. Trust Co. v. Armstead, 171 Ill. 2d 282, 289 (1996). The wisdom of this approach is never more apparent than when confronted with "the 'fantastic labyrinths' of the UST statutory scheme." Township of Harlem v. EPA, 265 Ill. App. 3d 41, 44 (2nd Dist. 1994). The changes in the laws and regulations since the program started are immense, and the cost and time imposed in keeping track of these are significant on those charged with enforcing it, complying with it and adjudicating disputes under it. Furthermore, adherence to a rule of law requires the ability of people subject to the law to find it. The Agency's authority under Section 22.18b of the Act to make eligibilty and deductibility

determinations has not been in an official statutory reporter since 1993.

The legislature has an ongoing right to amend a statute. First of Am. Trust Co. v. Armstead, 265 Ill. App. 3d at 291. It can increase or decrease the deductible at any time it wants, so long as a vested right is not harmed. The Agency's interpretation of the Board's regulation runs counter to the legislature's fundamental right to change the law since any time the legislature made a lower deductible determination available, the Agency would refuse to apply it. Pursuant to the most recent amendments, the Board should refrain from giving any force and effect to determinations made under laws repealed and superceded by Title XVI.

## III. ALTERNATIVELY, THE APPLICATION WAS STATUTORILY COMPLETE AND THE AGENCY WAS WITHOUT AUTHORITY TO SUPPLEMENT IT.

"The Board must decide whether the submittals to the Agency demonstrated compliance with the Act." Wheeling/GWA Auto Shop v. IEPA, PCB No. 10-70 (July 7, 2011) The question before the Board is "whether the application, as submitted to the Agency, would not violate the Act and Board regulations." Metropolitan Pier and Exposition Authority v. IEPA, PCB 10-73, at p. 51 (July 7, 2011).

The Agency's determination was based upon a document that was not submitted in the application. The application for payment included a copy of the OSFM eligibility and deductibility determination (Rec. 209-210), in accordance with the requirements of the Act. (415 ILCS 5/57.8(a)(6)(C) ("a complete application shall consist of . . . [a] copy of the Office of the State Fire Marshal's eligibility and deductibility determination") The completeness of the

application submitted cannot be disputed; the Agency found that the application was complete as submitted. (Rec. P109; P112)

Undersigned counsel has been unable to find any precedent for what the Agency is attempting to do here, which is to deny a submittal that is deemed complete by statute based upon a document not submitted by the applicant. Indeed, the Agency testified in the Part 734 proceeding that it would never go beyond the content of the application, so as to ever necessitate a Wells letter:

> **The purpose of a Wells letter in the permit program is to notify the applicant of a potential denial of a permit because of information beyond the contents of a permit application. This situation does not occur in the UST program.**

In re Proposed Amendments To: Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 734), R04-22 & R04-23 (Feb. 17, 2005).

Since the Agency's denial was based upon information extrinsic to the application which was statutorily complete as to the amount of the deductible, Petitioner has met its burden in this proceeding.

## IV. ALTERNATIVELY, THE AGENCY EXCEEDED ITS PERMISSIBLE SCOPE OF REVIEW OF THE APPLICATION FOR PAYMENT.

In order to receive payment for the Stage 3 Site Investigation activities, the Estate filed with the Agency the $10,000 deductible determination numerous times. Before the work was performed, the Estate submitted four plans for Stage 3 Site Investigation activities, each of which included the $10,000 deductible, pursuant to the requirements of the Part 734 regulations. (35 Ill. Admin. Code § 734.310(b)) Each of these submittals was approved by the Agency. Clearly,

the purpose of submitting the eligibility and deductibility determination prior to performing the work is to provide assurance that if the work is performed there will be no dispute as to the deductible. There is no justifiable reason to modify those expectations after the work is performed.

Under this system of pre-approval of work and costs, the Agency's review at the application for pay stage is severely limited:

> **Agency approval of any plan and associated budget . . . shall be considered final approval for purposes of seeking and obtaining payment from the Underground Storage Tank Fund if the costs associated with the completion of any such plan are less than or equal to the amounts approved in such budget.**

(415 ILCS 5/57.7(c)(1))

> **In the case of any approved plan and budget for which payment is being sought, the Agency shall make a payment determination within 120 days of receipt of the application. Such determination shall be considered a final decision. The Agency's review shall be limited to generally accepted auditing and accounting practices. In no case shall the Agency conduct additional review of any plan which was completed within the budget, beyond auditing for adherence to the corrective action measures in the proposal. . . .**

(415 ILCS 5/57.8(a)(1) (emphasis added))

When, as here, a billing package is submitted for work done consistent with plans and budgets that the Agency has approved, the Agency is without authority to make deductions that could have been made at the time of the approval of the plan and budget. Evergreen FS, Inc. v. IEPA, PCB 11-51 & 12-61, at pp. 20-21 (June 21, 2012). "[T]he Agency, having approved a . . . plan and budget, cannot later reconsider the merits of the approved tasks and costs just because the reimbursement application is submitted." T-Town Drive Thru v. IEPA, PCB 07-85, at pp. 24-25 (2008). The Estate submitted three plans and budgets that were approved with a $10,000

deductible, and after the work was performed, submitted the actual costs which were also approved with a $10,000 deductible. The reimbursement application was consistent with these approvals, and there was no dispute raised as to the completeness of the reimbursement application or any issues pertaining to the cost, with the obvious exception of the $10,000 deductible that had been approved in at least four previous submittals. "When an application requests reimbursement for costs that are at or under the amounts of Subpart H and the approved budget, and provides documentation demonstrating that the costs were actually incurred for approved work, the Agency cannot 'second-guess' whether the requested reimbursement is reasonable." T-Town Drive Thru v. IEPA, PCB 07-85 (2008).

This is particularly true as to the issue of the deductible, for which the Act specifically states that the OSFM determination is conclusive.

> **If an owner or operator is eligible to access the Underground Storage Tank Fund pursuant to an Office of State Fire Marshal eligibility/deductible final determination letter issued in accordance with Section 57.9, the owner or operator may submit a complete application for final or partial payment to the Agency for activities taken in response to a confirmed release.**

(415 ILCS 5/57.8) (emphasis added)

> **For purposes of this Section, a complete application shall consist of:**
>
> . . .
>
> **(C) A copy of the Office of the State Fire Marshal's eligibility and deductibility determination.**

(415 ILCS 5/57.8(a)(6)(C))

The Agency clearly exceeded its scope of review at the payment stage by reconsidering its prior approvals, and failing to consider the copy of the OSFM determination as conclusive.

## V. ALTERNATIVELY, THE BOARD'S "HIGHEST DEDUCTIBLE" RULE DOES NOT, NOR SHOULD NOT, APPLY.

Section 57.8(a)(4) of the Act expressly requires the Agency to subtract the final deductible determination made by the OSFM pursuant to Section 57.9 of the Act. (415 ILCS 5/ 57.8(a)(4)) To avoid the clear and simple outcome dictated by the Act, the Agency relies on the Board's regulation to apply the "highest deductible" in order to apply a different deductible. (35 Ill. Admin. Code § 734.615(b)(4) ("Where more than one deductible determination is made, the higher deductible must apply.") The Agency has created a sham conflict between what it presumes to be two entirely equivalent deductible determinations, to be resolved solely by resort to the highest deductible. These two deductible determinations are not equivalent:

| | Dec. 20, 1991 Determination | February 6, 2008 Determination |
|---|---|---|
| Issuer | IEPA | OSFM |
| Owner/Operator | Gerald Slightom | The Estate |
| Authority/Standard | 415 ILCS 5/22.18b (repealed by P.A. 88-496, § 95 (effective September 13, 1993)) | 415 ILCS 5/57.9 |
| Proof of Receipt | No. | Yes. |
| Correct? | No. | Yes. |

The language of the Act does not treat deductible determinations made by different agencies under different standards as equivalent. Instead, the Act states there is only one deductible, and it is determined by the OSFM pursuant to Section 57.9 of the Act. (415 ILCS

5/57.8(a)(4)) "Where an administrative rule conflicts with the statute under which it was adopted, the rule is invalid" Hadley v. Ill. Dep't of Corr., 224 Ill. 2d 365, 385 (2007). The Board's regulation should not be interpreted so as to require the application of a deductible other than the one designated by statute. Presley v. P&S Grain Co., 289 Ill. App. 3d 453, 462 (5th Dist. 1997) (where multiple interpretations are available, interpretation of a law that raises substantial questions as to its validity should be avoided).

Furthermore, the Estate was not issued any eligibilty and deductibility determination other than the February 6, 2008 determination made by the OSFM. The denial letter states that the site has two eligibility and deductibility determinations. However, such determinations are personal to the *owner*, not to the location. The Estate became a "new owner" under the amendatory provisions that for the first time allowed subsequent owners of abandoned or uncompleted cleanups to become an owner under "a written election to proceed under this Title." (415 ILCS 5/57.2 (provision added by P.A. 94-275, § 5, effective Jan. 1, 2006))[9] The Board has previously explained the laudatory purpose of the new owner election is to "provide an incentive to purchase and remediate properties of this nature." Zervos Three v. IEPA, PCB 10-54, at 31 (Jan. 20, 2011). Upon accepting the election to proceed as owner, the Agency informed the Estate that "you" may be eligible for reimbursement and to contact the OSFM. (Rec. No. 14) The Estate certainly would not have elected to cleanup this property had it known that a deductible under the repealed program would be applied. The Board should interpret its regulation, passed long before the "new owner" amendments enacted by P.A. 94-275, to apply

[9] Notably, the new owner elects to proceed under the current Title, not the repealed laws that the Agency seeks to enforce.

solely to situations in which more than one deductible determination has been made by the same agency to the same owner.

Finally, the Agency's $100,000 deductible determination is incorrect. The Estate feels it necessary to point this out, not because this is an appeal of an eligibility and deductibility determination (it is not), but because the absurdity of the outcome sought by the Agency would be to impose an incorrect deductible by highly indirect means. There is no question that the heating oil tank, which was used for consumptive purposes by the service station, was registered on April 18, 1990. (Rec. P24-P25) There is also no question that this registration was never repealed or rescinded by the OSFM. Cf. OK Trucking Co. V. Armstead, 274 Ill. App. 3d 376 (1st Dist. 1995) (adjudicating appeal of OSFM letter rescinding registration of tank). The Act has long provided that a $100,000 deductible does not apply in these circumstances:

> **A deductible of $100,000 shall apply when none of the underground storage tanks were registered prior to July 28, 1989, except in the case of underground storage tanks used exclusively to store heating oil for consumptive use on the premises where stored and which serve other than farms or residential units, a deductible of $100,000 shall apply when none of these tanks were registered prior to July 1, 1992.**

(415 ILCS 5/57.9(b)(1) (emphasis added))

The heating oil tank, used by a service station to heat its building, was registered prior to July 1, 1992, and as a result, the $100,000 deductible should not apply.

The regulatory history of this rule indicates that it was not intended to apply to circumstances such as presented here, but rather problems involving sites with multiple incidents. The rule was proposed in the R01-26 proceedings with the following explanation given by the Agency:

> **[W]e have had occasions where eligibility determinations have been issued, say, <u>for two separate incidents</u> where different deductibles have been applied by the Illinois Office of the State Fire Marshal.**

R01-26 (Feb. 27, 2001 Hrg. Transcript), at p. 41 (emphasis added).

Doug Clay of the Agency further explained how this could occur:

> **[I]f I could respond to your question about could you have multiple deductibles at a given site, the answer is yes. If – I mean, if they are in different years and they are separate occurrences. What we were trying to clarify here is that if you have got two determinations on the same occurrences but different incident numbers and maybe years apart and there have been two different deductibles assessed, we just wanted to clarify that we would be going by the highest deductible.**

R01-26 (Feb. 27, 2001 Hrg. Transcript), at p. 43.

The explanation of the rule makes sense in the common situation where an eligibility and deductibility determination is made at a site in which all known tanks were timely registered (generally a $10,000 deductible), but during excavation, a previously unknown unregistered tank is discovered and identified as also having experienced a release. The second incident is reported to the OSFM and a deductible determination is made based upon the most recent information that not all of the tanks at the site were timely registered, and thus a higher deductible is applied to the second incident. In that context, applying the highest deductible makes sense as it is based upon new, additional information that was not available when the first deductible determination was made. However, that is not because the highest deductible should always apply, its because the most recent deductible will generally be the proper one since it will have applied the most recent law to the most recent facts.

The regulatory history further confirms that there is no statutory support for the highest deductible rule; it is simply how the Agency has decided to utilize its discretion:

**Q. What is the basis for going by the highest deductible and not the lowest deductible?**

**A. The highest deductible indicates that not all of the tanks were registered, timely registered, and I guess just being conservative.**

**Q. But there is . . . no statutory requirements that the highest deductible applies as opposed to the lowest deductible?**

. . .

**A. No.**

R01-26 (Feb. 27, 2001 Hrg. Transcript), at pp. 43-44.

So, in the face of a conflict between Section 57.8(a)(4) of the Act which requires use of the OSFM determination, and a regulation that is unsupported by statutory authority and merely appears to be a rule of convenience, the statute should prevail. There is certainly nothing in the "highest deductible" rule that requires its application to determinations made by different agencies, pursuant to different legislation, and directed to different owners.

## VI. THE AGENCY SHOULD BE ESTOPPED FROM DEDUCTING COSTS IN A MANNER INCONSISTENT WITH ITS PRIOR APPROVALS AND REPRESENTATIONS.

The Statement of Facts in the record, even without the testimony of the Agency reviewers, demonstrateS a course of action, which induced the Estate's reliance on the belief that the approved work would be paid subject only to a $10,000 deductible.

First, the Estate elected to become a new owner in reliance upon the OSFM's eligibility and deductibility determination. The Agency approved the election to proceed as the new owner,

expressly confirming that the OSFM was the proper body to determine the proper deductible. (Rec. No. 14)

Second, the Estate conducted the Stage 1 Site Investigation with the pre-approval of the Agency, expending $29,239.08 in the process. The Agency paid the application after subtracting $10,000 for the deductible and this final decision was never appealed. Had the Estate known that the Agency would later attempt to reconsider that payment and treat it as an overpayment, the Estate would not have performed the work since it did not have the money to do so.

Third, the Estate conducted the Stage 3 Site Investigation, in reliance on the previous approvals and communications from the Agency. Specifically, the Estate submitted three plans and budgets that incorporated the $10,000 deductible, which the Agency approved before the plans were performed. The Estate also submitted a Site Investigation Completion Report that incorporated the $10,000 deductible and presented the actual costs of the Stage 3 Site Investigation work. The Agency approved the Report and costs, subject to a prove up of the bills and invoices substantiating the actual costs. Had the Estate known that the Agency would refuse to pay for the Stage 3 Site Investigation work, it would not have performed the work; it would not have had any money to perform the work.

While estoppel against the government is not generally favored, the multiple approvals by the Agency of activities that benefit the environment rise to a clear case of estoppel. In Wachta v. Pollution Control Board, 8 Ill. App. 3d 436 (2nd Dist. 1972), the Illinois Appellate Court found that estoppel applied to environmental agencies under similar circumstances:

> **Here, the State of Illinois, through its Sanitary Water Board, did the positive act of issuing sewer permits to Petitioners which inducted them to continue their construction project. They, in reliance upon the action of the Water**

> **Board, expended substantial sums of money and incurred heavy continuing liabilities which would be lost should the State now be permitted to retract what its officials had done. Under these circumstances right and justice require that the public be estopped.**

Id. at 440.

The Estate similarly detrimentally relied upon the OSFM determination and the Agency's various letters, approvals and payment that represented that the OSFM determination would be applied. Indeed, it is the Estate's contention that the body of statutes and regulations are intended to induce such reliance, particularly by requiring pre-approval of the work and budget prior to performance.

Furthermore, the normal reluctance to enforce an estoppel against the Agency does not apply here because the Agency is acting in the proprietary role of running an insurance program, which could be, as it is in other states, performed by private enterprise. Tri-County Landfill Co. v. Illinois Pollution Control Bd., 41 Ill. App. 3d 249, 255 (2d Dist. 1976). In contrast, it is the owner who is achieving the public policy goal of a healthful environment and therefore an estoppel is favored. Id. Failing to enforce the expectations of new owners like the Estate would be highly detrimental to how reliant the LUST program is on voluntary clean-up efforts. As the record herein demonstrates, many old service station properties are worth less than the cost to clean them up and will sit abandoned for decades. The LUST program can serve a useful purpose in encouraging new ownership to acquire the property and clean it up, but the program also needs to be administered in a way that gives enough certainty to support the creation of financial arrangements between owners, lenders and consultants to take on such a project. If the Agency is not bound by estoppel to act consistently with its final decisions, then it would be

unadvisable for anyone to take on an irrevocable election to proceed as the new owner if the Agency's action can be arbitrarily reconsidered and reversed at any time.

The Estate relied upon the final determination of the OSFM that a $10,000 deductible applied in incurring over $110,000 in clean-up costs. See Hickey v. Illinois C. R. Co., 35 Ill. 2d 427, 449 (1966) (equitable estoppel applied where a variety of agents representing different governmental entities made affirmative representations). The Agency on multiple occasions affirmatively represented that those expectations were correct, and the Agency should be estopped from reversing itself with respect to paying for both site investigation activities.

## VII. IN THE ALTERNATIVE, IF THE BOARD DENIES PETITIONER'S MOTION FOR SUMMARY JUDGMENT, THEN ADDITIONAL EVIDENCE EITHER THROUGH DEPOSITION OR TESTIMONY SHOULD BE MADE AVAILABLE.

To date, the Agency has refused to make its project reviewer(s) available for deposition, nor has the Board compelled them to do so. It was Petitioner's intentions to utilize the deposition to investigate the origin of the December 1991 document, confirm that there is no evidence that it was ever received by the decedent, and examine the scope of information the project reviewers obtained during their investigation verbally, particularly the nature of the conversations with the OSFM. This motion is premised on the assumption that such information, whatever it would show, may not be necessary in order for Petitioner to prevail. However, Petitioner does not waive its right to seek to adduce such testimony if this motion is denied.

WHEREFORE, the Petitioner prays for an order from the Board, granting summary judgment in its favor, or for such other and further relief as the Board deems meet and just.

ESTATE OF GERALD D. SLIGHTOM,
Petitioner

By its attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI

By: /s/ Patrick D. Shaw

Patrick D. Shaw
MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 N. Old Capitol Plaza, Ste. 325
Springfield, IL 62701
Telephone: 217/528-2517
Facsimile: 217/528-2553

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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. | ) | |

**AFFIDAVIT OF BILL NICHELSON**

Bill Nichelson, on oath says:

1. I am over twenty-one years old and a resident of Girard, Macoupin County, Illinois.

2. I am an attorney licensed to practice law in the State of Illinois, and have been the attorney of the Estate of Gerald D. Slightom at all times.

3. Gerald Dean Slightom died September 5, 2007, and on or about September 20, 2007, Richard D. Slightom was appointed executor of his estate filed in Macoupin County, Illinois. A true and correct copy of the "Letters of Office – Decedent's Estate," which I prepared are attached hereto as Exhibit A.

4. In the process of collecting the estate of the decedent, a former gas station property, at 103 North 3rd Street, Girard, Illinois, was identified and valued at $59,707.00 pursuant to property tax assessment which I assume was valued at that figure based upon the property not being contaminated.

5. The property was believed to be contaminated, so I helped arrange for the Estate to hire a consultant, CSD Environmental Services, Inc. to assist in evaluating what could or should be done with the property, including whether the property should be abandoned.

6. When the Office of the State Fire Marshal determined that the Estate would be eligible for reimbursement from the LUST Fund, subject to a $10,000 deductible, the Estate decided to pay the $10,000 deductible and hired CSD Environmental Services, Inc. to clean-up the property.

7. Had the deductible determination been $100,000, the Estate would have immediately abandoned the property since the environmental cost would have been much more than the property was worth.

EXHIBIT
1

8. After paying the bills and expenses of the Estate, including the $10,000 deductible paid to CSD Environmental Services, Inc., and after the six (6) month creditor claim period had expired, the Estate disbursed the residue of the estate (except for the former service station property) to the legatees pursuant to the decedent's last will and testament. At the time of the disbursement, the Estate was without knowledge of any outstanding liabilities.

9. As of October 29, 2010, the date the Illinois EPA indicated a $100,000 deductible applied, there were no assets remaining in the estate other than the former service station.

10. Upon notice of the Illinois EPA decision, the Estate investigated, but was unable to locate, the existence of a previous deductible determination in the papers of the decedent. In fact, prior to even opening the estate on or about September 20, 2007, the executor searched the decedent's possessions and was unable to locate any paperwork relative to the service station.

11. The Estate did not know there was a previous deductible determination of $100,000, and had it known such a determination might apply, the Estate would have abandoned the property long ago.

FURTHER AFFIANT SAYETH NOT.

The undersigned certifies, under penalty of perjury, that the statements set forth in this instrument are true and correct, except as to matters stated to be on information and belief, which the undersigned believes to be true.

Bill Nichelson

**IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT**
**MACOUPIN COUNTY, ILLINOIS**

| | | |
|---|---|---|
| ESTATE OF GERALD DEAN SLIGHTOM, | ) | IN PROBATE |
| | ) | |
| DECEASED | ) | DOCKET NO. 2007-P-137 |

**LETTERS OF OFFICE - DECEDENT'S ESTATE**

RICHARD D. SLIGHTOM has been appointed executor of the Estate of GERALD DEAN SLIGHTOM, who died September 5, 2007, and is authorized to take possession of and collect the estate of the decedent, and to do all acts required of him by law.

WITNESS, 9-20, 2007.

Mike Matthis

Clerk of the Circuit Court

(Seal of Court)

CERTIFICATE

I certify that this a copy of the letters of office now in force in this estate.

Dated: 9-20, 2007.

Mike Matthis

Clerk of the Circuit Court

(Seal of Court)

Prepared by:
Bill Nichelson
Attorney at Law
P.O. Box 290
Virden, IL 62690
(217) 965-1400

EXHIBIT
1-A

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. | ) | |

**AFFIDAVIT OF SHANE THORPE**

Shane Thorpe, on oath says:

1. I am over twenty-one years old and a resident of Sangamon County, Illinois.

2. I am the Senior Project Manager of CSD Environmental Services, Inc.

3. CSD Environmental Services, Inc. was retained by the Estate of Gerald D. Slightom in 2007 to provide environmental consulting services concerning the former service station at 103 North Third Street, Girard, Illinois.

4. As the Senior Project Manager, I prepared or assisted in the preparation of a number of the documents regarding the site, including the documents pertaining to the Estate's election to proceed as Owner.

5. On November 19, 2007, I submitted a Freedom of Information Act request to the Office of the State Fire Marshal for all of their records regarding the site. A true and correct copy of the letter is attached hereto as Exhibit A.

6. On December 7, 2007, I received a response from the Office of the State Fire Marshal, a true and correct copy of the cover letter is attached hereto as Exhibit B.

7. The Office of the State Fire Marshal's response (Exhibit B) did not include any eligibility and deductibility determination, nor any evidence that one had ever been requested or performed.

8. The Office of the State Fire Marshal's response (Exhibit B) did not include any administrative order or other evidence that any of the tanks on the property had had their registration revoked or rescinded.

9. The Office of the State Fire Marshal's response (Exhibit B) included an administrative order, dated April 11, 1990, a true and correct copy of which is

EXHIBIT
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attached hereto as Exhibit C.

10. The Office of the State Fire Marshal's response (Exhibit B) included a notification that the five registered tanks on the site had been removed, a true and correct copy of which is attached hereto as Exhibit D.

11. The Office of the State Fire Marshal's response (Exhibit B) included a follow-up letter to the administrative order, dated January 12, 1995, a true and correct copy of which is attached hereto as Exhibit E.

12. Also, at this time, I checked the on-line underground storage tank database of the Illinois Environmental Protection Agency and found no evidence of any significant activities at the site, and certainly no evidence of an eligibility and deductibility determination.

13. In December of 2007, I submitted the documentation to the Office of the State Fire Marshal in order to obtain an eligibility and deductibility determination for the Estate.

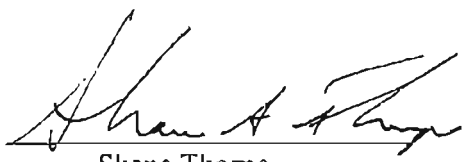
14. Upon receiving the determination of the Office of the State Fire Marshal that the Estate was eligible for reimbursement from the LUST Fund with a deductible of $10,000.00, I prepared the "Election to Proceed as "Owner"," which I submitted to the Agency on February 22, 2008 on behalf of the Estate.

15. Had the deductible been $100,000, the Estate would not have elected to proceed as owner since the property was not worth $100,000.

16. At the time the application for payment for Stage 3 Site Investigation activities was submitted, the OSFM determination was the only known eligibility and deductible determination issued at the site, and it was the only document relied upon by CSD Environmental Services, Inc. for determining the applicable deductible.

FURTHER AFFIANT SAYETH NOT.

The undersigned certifies, under penalty of perjury, that the statements set forth in this instrument are true and correct, except as to matters stated to be on information and belief, which the undersigned believes to be true.



Shane Thorpe

CSD ENVIRONMENTAL SERVICES, INC.



November 19, 2007

Office of the Illinois State Fire Marshal
Division of Petroleum and Chemical Safety
Attn: Ms. Joyce Brunk
1035 Stevenson Drive
Springfield, Illinois 62703-4259

Re: Freedom of Information Act Request

Dear Ms. Brunk:

The purpose of this letter is to place a request, under the Freedom of Information Act (FOIA), for information pertaining to the following location.

| | |
|---|---|
| Site Name: | Robinson Service Station (closed facility) |
| Site Owner: | Gerald Slightom |
| Site Address: | 3rd & Center Street<br>Girard, Illinois 62640 |
| Facility ID: | 5025513 |

CSD Environmental Services, Inc. (CSD) hereby requests from the division all information in the OSFM file related to the above Facility ID Number. Enclosed is a check for the required $ 5.00 fee.

Please contact me at 217-522-4085 or via email at sthorpe@csdenviro.com. Thank you.

Sincerely,

Shane A. Thorpe
Sr. Project Manager

5.00
17155

EXHIBIT
2-A

SPRINGFIELD OFFICE: 2220 Yale Boulevard • Springfield, Illinois 62703 • (217) 522-4085 • Fax (217) 522-4087

CENTRALIA OFFICE: 201 East 3rd Street • Centralia, Illinois 62801 • (618) 533-5953 • Fax (618) 533-8564

Office of the Illinois
**State Fire Marshal**
*"Partnering With the Fire Service to Protect Illinois"*

December 7, 2007

Shane A. Thorpe
CSD Environmental Services, Inc.
2220 Yale Boulevard
Springfield, IL 62703

Re: Response to Freedom of Information Act Request

Dear Shane A. Thorpe:

The Office of the State Fire Marshal (OSFM) received your request for documents on 11/21/2007. Enclosed please find the documents you requested.

Should you have further questions regarding this matter, please contact me.

Sincerely,

Joyce Brunk

FOIA Clerk



EXHIBIT
2-B

Office of the Illinois
State Fire Marshal

General Office
217-785-0969

Divisions
ARSON INVESTIGATION
217-782-6855
BOILER and PRESSURE VESSEL SAFETY
217-782-2696
FIRE PREVENTION
217-785-4714
MANAGEMENT SERVICES
217-782-9889
INFIRS
217-785-1016
PERSONNEL
217-785-1009
PERSONNEL STANDARDS and EDUCATION
217-782-4542
PETROLEUM and CHEMICAL SAFETY
217-785-5878
PUBLIC INFORMATION
217-785-1021

CERTIFIED MAIL - RECEIPT REQUESTED #P 562 333 860

April 11, 1990

Mr. Gerald Slightom
223 N. Wilson Street
Girard, IL 62640

In re: Facility No. NOT REGISTERED
Robinson's Amoco
109 N. Third Street
Girard, MACOUPIN CO., IL

Dear Mr. Slightom:

Storage Tank Specialist(s) Don Neumann made an inspection of the above-captioned premises on 04/10/90. This inspection disclosed the violation(s) as hereinafter set forth, prohibited by Ill. Rev. Stat. 1987, ch. 127½, par. 153 et seq., "an Act to regulate the storage, transportation, sale and use of gasoline, volatile oils and other regulated substances", and as prohibited by 41 Ill. Adm. Code, Part 170, "Storage, Transportation, Sale and Use of Petroleum and Other Regulated Substances", promulgated pursuant to said Act by the Office of the State Fire Marshal.

This inspection revealed the following violation(s) of law:

The owner of any underground storage tank used to store a regulated substance since January 1, 1974 shall register any such tank on forms prescribed by the OSFM. 170.71
(Six registerable tanks at this location).

Underground storage tank(s) abandoned one year shall be removed from the site within the immediate subsequent year. 170.670(a)

System test required to determine if leak exists in the tank and piping. 170.580(a)

You are hereby ordered to remove, or remedy and correct, said violation(s) forthwith, and this Office will make investigations as to compliance within a reasonable period. If you are ordered to remove an underground petroleum storage tank, you are required to obtain a permit from the Springfield Office prior to removal, and you are required to perform a site assessment. Enclosed is a "Notification for Underground Storage Tanks" form. Please complete and return to the Springfield Office within seven days.



EXHIBIT
2-C

Failure to comply with this Order will result in a request to the State's Attorney of Macoupin County to prosecute such refusal as a misdemeanor, and impose any fines and penalties allowed by law.

Sincerely,

Keith H. Immke
Legal Counsel
Division of Petroleum and Chemical Safety

KHI/jrm

cc: Girard Fire Prot. Dist.
Don Neumann, S.T.S.S., OSFM
Facility File

**IL** **Notification for Underground Storage Tanks**

OFFICE USE ONLY

ID NUMBER 5025513

DATE RECEIVED

OCT 19 1992

DIV. OF PETROLEUM & CHEMICAL SAFETY

- A separate form must be used for each site.
- If you have more than five tanks, photocopy pages 1-5 and attach to this notification form.
- Please type, or print in ink; the signature under "certification" (section IX) must be signed in ink.

Facility I.D. # (if known) 5025513 Owner I.D. # (if known) _____

## TYPE OF NOTIFICATION

☐ New Facility ☐ Amended (Changes/Corrections/Additional Tanks) Mark all that apply:

_____ Owner Address Change (this facility only)
_____ Owner Address Change (all facilities owned)
_____ New Owner
X Tank(s) Removed (Permit # 1302-91)
_____ Other _____

_____ Tanks Relined (Permit # _____)
_____ Tanks Installed (Permit # _____)
_____ Tanks Upgraded/Repaired (Permit # _____)
_____ Abandonment Notice (Permit # _____)

## I. Ownership of Tank(s)

Gerald Blackburn
Owner Name (Corp., Individual., Public Agency or other Entity)

Mailing Address
323 N. Wilson
City State Zip
Girard, Ill. 62640

County
Macoupin

Contact Name (Area Code) Phone
G. Blackburn 217-627-2541

## II. Location of Tank(s)

(if same as Section I, Mark box) ☐

Robinson Ser. Sta
Facility Name or Company Site Identifier, as applicable

Bro & Center
Street Address or State Road, as applicable (exact address)
Girard Ill. 62640
City State Zip

Macoupin
County

R. Slighton 217-627-2841
Contact Name (Area Code) Phone

## III. TYPE OF OWNERSHIP (mark all that apply)

X Current Owner of Tanks
Date Purchased / /
☐ Former Owner
☐ Ownership Uncertain
☐ Other _____

EXHIBIT 2-D

## IV. TYPE OF FACILITY

Type of Facility: (Circle correct code)

(A) Service Station
B. Bulk Plant
C. Petroleum Distributor
D. Convenience Store
E. Auto Dealer
F. Commercial/Retail
G. Industrial/Manufacturing
H. Private Institution
I. Residence (Non-Farm)
J. Farm
K. Airport
L. Marina
M. City/Town
N. County
O. State
P. Federal (Military)
Q. Federal (Non-Military)
R. School District
S. Port District
T. Utility District
U. Fire Dept.
V. Other Special Service Districts
W. Other _____ (Please Specify)

## V. Description of Underground Storage Tanks (Complete entire column for each tank)

| Tank Identification Number | Tank No. 1 | Tank No. 2 | Tank No. 3 | Tank No. 4 | Tank No. 5 |
|---|---|---|---|---|---|
| **1. Status of Tanks** | | | | | |
| Currently in use | ☐ | ☐ | ☐ | ☐ | ☐ |
| Temporarily out of use (Section 2 must be completed) | ☐ | ☐ | ☐ | ☐ | ☐ |
| Permanently out of use (Section 2 must be completed) | ☐ | ☐ | ☐ | ☐ | ☐ |
| Removed (Section 3 must be completed) | ☒ | ☒ | ☒ | ☒ | ☒ |
| Abandoned in place (Section 4 must be completed) | ☐ | ☐ | ☐ | ☐ | ☐ |
| **2. Tanks Permanently & Temporarily Out of Use** | | | | | |
| Estimated date last used | / / | / / | / / | / / | / / |
| **3. Tanks Removed** | | | | | |
| Date tank(s) removed | 8/29/91 | 8/29/91 | 8/29/91 | 8/29/91 | 8/29/91 |
| Estimated date last used | 6/20/90 | 6/20/90 | 6/20/90 | 6/20/90 | 6/20/90 |
| **4. Abandoned in Place** | | | | | |
| Date tanks filled | / / | / / | / / | / / | / / |
| Tank filled with: | | | | | |
| Inert materials (sand, etc.) | ☐ | ☐ | ☐ | ☐ | ☐ |
| Water | ☐ | ☐ | ☐ | ☐ | ☐ |
| Unknown | ☐ | ☐ | ☐ | ☐ | ☐ |
| Other (please specify) | | | | | |
| **5. Age of Tank** | | | | | |
| Date tank installed | / / | / / | / / | / / | / / |
| Date product placed in tank | / / | / / | / / | / / | / / |
| **6. Estimated Total Capacity** (gallons) | 2000 | 4000 | 4000 | 320 | 320 |
| **7. Substances Currently or Last Stored:** | | | | | |
| **Petroleum** | | | | | |
| Diesel | ☐ | ☐ | ☐ | ☐ | ☐ |
| Kerosene | ☐ | ☐ | ☐ | ☐ | ☐ |
| Gasoline | ☒ | ☒ | ☒ | ☐ | ☐ |
| Used oil | ☐ | ☐ | ☐ | ☒ | ☒ |
| Other (Please specify) | | | | | |
| **Petroleum Use** (if applicable): | | | | | |
| Heating oil (consumptive use on premises) | ☐ | ☐ | ☐ | ☒ | ☐ |
| Back-up generator | ☐ | ☐ | ☐ | ☐ | ☐ |
| Other (please specify) | | | | | |
| **Hazardous Substance:** | | | | | |
| Name of principal CERCLA substance | | | | | |
| Chemical Abstract Service (CAS No) | | | | | |

## VI. Description of Underground Storage Tanks (Complete entire column for each tank)

| Tank Identification Number | Tank No. 1 | Tank No. 2 | Tank No. 3 | Tank No. 4 | Tank No. 5 |
|---|---|---|---|---|---|
| **1. Material of Construction** (mark all that apply) | | | | | |
| Asphalt coated or bare steel | ☒ | ☐ | ☐ | ☒ | ☒ |
| Cathodically protected steel | ☐ | ☐ | ☐ | ☐ | ☐ |
| Dielectric coated steel | ☐ | ☐ | ☐ | ☐ | ☐ |
| Composite (steel with fiberglass) | ☐ | ☐ | ☐ | ☐ | ☐ |
| Fiberglass reinforced plastic | ☐ | ☐ | ☐ | ☐ | ☐ |
| Lined interior | ☐ | ☒ | ☒ | ☐ | ☐ |
| Double-walled | ☐ | ☐ | ☐ | ☐ | ☐ |
| Secondary containment | ☐ | ☐ | ☐ | ☐ | ☐ |
| Steel STI-P3 | ☐ | ☐ | ☐ | ☐ | ☐ |
| Other (please specify) | | | | | |
| **2. Piping Materials** (mark all that apply) | | | | | |
| Bare steel | ☒ | ☒ | ☒ | ☐ | ☒ |
| Galvanized steel | ☐ | ☐ | ☐ | ☐ | ☐ |
| Fiberglass reinforced plastic | ☐ | ☐ | ☐ | ☐ | ☐ |
| Cathodically protected | ☐ | ☐ | ☐ | ☐ | ☐ |
| Double-walled | ☐ | ☐ | ☐ | ☐ | ☐ |
| Secondary containment | ☐ | ☐ | ☐ | ☐ | ☐ |
| Dielectric coating | ☐ | ☐ | ☐ | ☐ | ☐ |
| Other (please specify) | | | | | |
| **3. Piping Type** (mark all that apply) | | | | | |
| European suction | ☐ | ☐ | ☐ | ☐ | ☐ |
| American suction | ☒ | ☒ | ☒ | ☒ | ☐ |
| Pressure | ☐ | ☐ | ☐ | ☐ | ☐ |
| Gravity feed | ☐ | ☐ | ☐ | ☐ | ☐ |
| Other (please specify) | | | | | |

| Tank Identification Number | Tank No. 1 | | Tank No. 2 | | Tank No. 3 | | Tank No. ___ | | Tank No. ___ | |
|---|---|---|---|---|---|---|---|---|---|---|
| **4. Release Detection** (Mark all that apply) | Tank | Piping | Tank | Piping | Tank | Piping | Tank | Piping | Tank | Piping |
| Manual tank gauging | ☒ | | ☒ | | ☒ | | ☒ | | ☒ | |
| Inventory controls | ☒ | | ☒ | | ☒ | | ☒ | | ☒ | |
| Automatic tank gauging | ☐ | | ☐ | | ☐ | | ☐ | | ☐ | |
| Vapor monitoring | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Groundwater monitoring | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Interstitial monitoring double-walled tank/piping | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Interstitial monitoring /secondary containment | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Tank tightness testing | ☐ | | ☐ | | ☐ | | ☐ | | ☐ | |
| Automatic line leak detector | | ☐ | | ☐ | | ☐ | | ☐ | | ☐ |
| Line tightness testing | | ☐ | | ☐ | | ☐ | | ☐ | | ☐ |
| Automatic shut-off device | | ☐ | | ☐ | | ☐ | | ☐ | | ☐ |
| Continuous alarm system | | ☐ | | ☐ | | ☐ | | ☐ | | ☐ |
| No requirements (european suction) | | ☐ | | ☐ | | ☐ | | ☐ | | ☐ |
| Other (please specify) | | | | | | | | | | |
| **5. Corrosion Protection** (mark all that apply) | Tank | Piping | Tank | Piping | Tank | Piping | Tank | Piping | Tank | Piping |
| Cathodic protection | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Impressed current | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Secondary containment | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Exterior coating | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Fiberglass reinforced plastic | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Double-walled | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ | ☐ |
| Interior lining | ☐ | | ☐ | | ☐ | | ☐ | | ☐ | |
| Other (please specify) | | | | | | | | | | |
| **6. Spill & Overfill Prevention** (Mark all that apply) | | | | | | | | | | |
| Overfill device | ☐ | | ☐ | | ☐ | | ☐ | | ☐ | |
| Automatic shut-off | ☐ | | ☐ | | ☐ | | ☐ | | ☐ | |
| Overfill Alarm | ☐ | | ☐ | | ☐ | | ☐ | | ☐ | |
| Ball float valve | ☐ | | ☐ | | ☐ | | ☐ | | ☐ | |
| Spill containment device | ☐ | | ☐ | | ☐ | | ☐ | | ☐ | |
| Other (Please specify) | | | | | | | | | | |

## VII. Certification of Compliance (Complete for all new, upgraded and relined tanks at this location)

| Installation (mark all that apply) | | | | | |
|---|---|---|---|---|---|
| Installer certified by tank and piping manufacturers | ☐ | ☐ | ☐ | ☐ | ☐ |
| Installer certified or licensed by implementing agency | ☐ | ☐ | ☐ | ☐ | ☐ |
| Installer registered by implementing agency | ☐ | ☐ | ☐ | ☐ | ☐ |
| Installer is the owner of the tank(s) | ☐ | ☐ | ☐ | ☐ | ☐ |
| Installation inspected by a registered engineer | ☐ | ☐ | ☐ | ☐ | ☐ |
| Installation inspected & approved by implementing agency | ☐ | ☐ | ☐ | ☐ | ☐ |
| Manufacturer's installation checklists have been completed | ☐ | ☐ | ☐ | ☐ | ☐ |
| Another method allowed by state agency (please specify) | _____ | _____ | _____ | _____ | _____ |

**OATH:** I certify the information that is provided in section VII is true to the best of my knowledge, and certify that the installation was performed in accordance with all applicable state and federal laws and regulations. **(THIS SECTION MAY ONLY BE COMPLETED BY THE CONTRACTOR. SEPARATE OATH MUST BE SUBMITTED FOR EACH ACTIVITY PERFORMED BY DIFFERENT CONTRACTOR. )**

Tank No. _____ Permit No. _____

Contractor: _____ (Name) _____ (Signature (must be original)) _____ (Date)

_____ (Position) _____ (Company)

## VIII. Financial Responsibility

Mark all that apply:

☐ Self-Insurance ☐ Guarantee ☐ Certificate of Deposit

☐ Commercial Insurance ☐ Surety Bond ☐ Trust Fund

☐ Risk Retention Group ☐ Letter of Credit ☐ Other Method Allowed

(please specify) _____

## IX. Certification (Read and sign after completing all sections)

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this and all attached documents, and that based on my inquiry of those immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete.

GERALD SLIGHTOM — Name and official title of owner or owner's authorized representative (print)

G. Slighton — Signature (must be original)

10-13-12 — Date Signed

Office of the Illinois
**State Fire Marshal**

General Office
217-785-0969
FAX
217-782-1062

Divisions
ARSON INVESTIGATION
217-782-6855
BOILER and PRESSURE VESSEL SAFETY
217-782-2696
FIRE PREVENTION
217-785-4714
MANAGEMENT SERVICES
217-782-9889
INFIRS
217-785-1016
PERSONNEL
217-785-1009
PERSONNEL STANDARDS and EDUCATION
217-782-4542
PETROLEUM and CHEMICAL SAFETY
217-785-5878
PUBLIC INFORMATION
217-785-1021

January 12, 1995

Mr. Gerald Slightom
223 N. Wilson St.
Girard, IL 62640

In Re: 5-025513
Robinson Amoco
109 N. Third St.
Girard, MACOUPIN CO., IL

Dear Mr. Slightom

This letter is being sent as a follow-up to our Order dated 4-11-90. After a review of our records it appears that you have complied with this Order; except the following alleged violation is hereby rescinded:

3. System test required to determine if leak exists in the tank and piping. 170.580(a)

Your cooperation in this matter has been greatly appreciated. If we can be of any further assistance, please contact this Office.

Sincerely,

Keith H. Immke
Legal Counsel
Division of Petroleum and Chemical Safety

KHI/gmb

cc: Vincent W. Moreth, State's Attorney
Girard F.P.D.
S.T.S.S., OSFM
Facility File



EXHIBIT
2-E

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| 5/8/1990 | OSFM Recipt of Notification | P27 |
| | **1991** | |
| 7/19/1991 | Invoice – Paid Registration in Full | P28 |
| 7/30/1991 | Application for Permit to Remove USTs | P35 |
| 8/30/1991 | Log of UST Removal | P36 |
| 8/30/1991 | Log of UST Removal (1 pp) | No. 3 |
| 9/4/1991 | Incident Oversight Transfer w/ Release Report (2 pp) | No. 4 |
| 11/12/1991 | 20 Day Certification (1 pp) | No. 5 |
| 11/20/1991 | EXEMPT IN PART DOCUMENT | P22 |
| 11/20/1991 | Federal Taxpayor I.D. Number | P23 |
| 11/20/1991 | Private Insurance Coverage Questionnaire & Affidavit | P19-P20 |
| 11/20/1991 | Application for Reimbursement (13 pp) | No. 6 |
| 11/20/1991 | Application for Reimbursement [missing page] | P1-P12 |
| 11/25/1991 | Affidavit of Gerald Slightom | P18 |
| 12/4/1991 | Cover Letter from Perino Technical re App (Ex. 6) | P17 |
| 12/17/1991 | Handwritten note from Clifford Wheeler re deductible | P16 |
| 12/17/1991 | Reimbursement Application Completeness Checklist | P21 |
| 12/17/1991 | Checklist for Complete Reimbursement Applications | P15 |
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| | **1993** | |
| 10/15/1993 | Meredisia FOIA Req. & Resp. [9 pages sent] (2 pp) | No. 1 |
| 12/15/1993 | IEPA Ltr and LUST Technical Review Notes, requiring 45 Day Report & Site Investigation/CAP timetable (3 pp.) | No. 7 |
| | **1994** | |
| 3/8/1994 | IEPA Memo of Mtg on 2/24/94 re noncompliance (2 pp) | No. 8 |
| | **2003** | |
| 8/20/2003 | Kruse Enterprises Ltr (tenant since '96) seeking legal advise in purchase of property (1 pp) | No. 9 |
| 9/17/2003 | IEPA Opinion ltr of no liability (4 pp) | No. 10 |
| | **2008** | |
| 1/24/2008 | Application for Determination | P31-34 |
| 2/6/2008 | OSFM Eligibilty and ($10,000) Deductible Determination | P29-P30 |
| 2/16/2008 | Election to Proceed as Owner (1 pp) | No. 12 |
| 2/22/2008 | CSD Envt'l Cover Ltr w/<br>Election to Proceed as Owner<br>Election to Proceed under Part 734<br>45-Day Report w/ Stage 1 Certification (8 pp) | No. 13 |
| 3/3/2008 | IEPA Acceptance of Election to Proceed as Owner (4 pp) | No. 14 |
| 3/12/2008 | IEPA Approval of Stage 1 Site Investigation (2 pp) | No. 15 |
| 8/26/2008 | Stage 3 Site Investigation Work Plan & Budget (118 pp) | No. 16 |
| 9/16/2008 | LUST Technical Rev. Notes (Stage 3 – Ex. 16) (4 pp) | No. 17 |

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| 10/1/2008 | IEPA Ltr reviewing Stage 3 Site Investigation Plan | P44-P46 |
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| 10/1/2008 | IEPA Approval w/ mods Stage 3 Site Inv. Plan (7 pp) | No. 2 |
| 10/20/2008 | Stage 1 Reimbursement Request (CSD) | P55-P108 |
| ? | Tracking Summary for Stage 1 Site Investigation Costs | P43 |
| | **2009** | |
| 1/27/2009 | Review Docs re 1/29/2009 determination | P50-P52 |
| ? | Tracking Summary for Site Investigation Costs | P53 |
| ? | Queue Date Tracking Sheet for Payment | P54 |
| 1/29/2009 | IEPA Ltr Approving Payment subject to $10k ded. | P47-P49 |
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| 3/4/2009 | Amended Stage 3 Site Investigation Work Plan & Budget (85 pp) | No. 11 |
| 3/17/2009 | LUST Technical Rev. Notes (Amended Stage 3 – Ex. 11) (3 pp) | No. 18 |
| 3/25/2009 | IEPA Ltr reviewing Stage 3 Site Investigation Plan | P41-P42 |
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| 3/25/2009 | IEPA Approval of Amended Stage 3 (Ex.11) (5 pp) | No. 19 |
| 7/2/2009 | Amended (2) Stage 3 Site Investigation Work Plan & & Budget (77 pp) | No. 20 |
| 7/22/2009 | LUST Technical Rev. Notes (Amended (2) Stage 3 – Ex. 20) (3 pp) | No. 21 |
| 7/24/2009 | IEPA Approval of Amended (2) Stage 3 (Ex. 20), w/ mods. (6 pp) | No. 22 |
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| 11/18/2009 | LUST Technical Review Notes(Stage 3 – Ex. 23) (3 pp) | No. 24 |
| 11/25/2009 | IEPA Approval of Amended (3) Stage e (Ex. 24) (3 pp) | No. 25 |
| 11/25/2009 | IEPA Approval (Ex. 25) w/ mail certificates (5 pp) | No. 26 |
| | **2010** | |
| 6/10/2010 | Site Investigation Completion Report (291 pp) | No. 27 |
| 6/30/2010 | LUST Technical Review Notes (SICR – Ex. 27) (4 pp) | No. 28 |
| 7/8/2010 | IEPA Approval of SICR (Ex. 27) | P38-P40 |
| 7/8/2010 | IEPA Approval of SICR (Ex. 27) (6 pp) | No. 29 |
| 7/19/2010 | Stage 3 Reimbursement Request | P120-P215 |
| 8/4/2010 | Lust Claims Tracking System Printout ($10k deductible) | P118 |
| ? | Tracking Summary for Stage 3 Site Investigation Costs | P37 |
| ? | Tracking Summary for Stage 3 Site Investigation Costs | P114 |
| ? | Queue Date Tracking Sheet | P119 |
| 10/28/2010 | Review Docs re 10/29/2008 determination | P111-P113 |
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| 10/29/2010 | IEPA Ltr Denying Payment due to $100k deductible | P109-P110 |
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NOTES:

P = Documents Originally Filed as the Administrative Record, identified by page number.

* = Documents appended to the Administrative Record by motion to [missing pages].

No. = Digital Documents later used to Supplement the Record.