ILLINOIS POLLUTION CONTROL BOARD
November 1, 2012

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

ORDER OF THE BOARD (by J.A. Burke):

The Estate of Gerald D. Slightom (Estate) appeals an October 29, 2010 determination of the Illinois Environmental Protection Agency (Agency) denying the Estate's request for reimbursement from the Leaking Underground Storage Tank Fund. The Estate's application concerns property at 103 North Third Street, Girard, Macoupin County.

On May 14, 2012, the Agency filed a motion for summary judgment. On June 29, 2012, the Estate filed its own motion for summary judgment. For the reasons stated below, the Board denies the parties' cross-motions for summary judgment. The Board further directs that the parties proceed to hearing.

PROCEDURAL HISTORY

On December 6, 2010, the Estate filed a petition asking the Board to review the Agency's October 29, 2010 determination applying a $100,000 deductible to its reimbursement claim. The Estate filed an amended petition on January 12, 2011. On January 20, 2011, the Board accepted the petition for hearing.

On June 16, 2011, the Agency filed the Agency Record accompanied by a motion for summary judgment. On June 29, 2011, the Estate filed a request for an extension of time to respond to the motion for summary judgment along with a motion to compel deposition. The Agency filed its objection to the motion for an extension of time and motion to compel deposition on July 8, 2011.

On July 18, 2011, the Estate filed a notice of deposition. The Agency filed a motion to quash the subpoena on July 19, 2011. The Estate filed a reply in support of its motion to compel deposition on July 29, 2011. The Agency filed a sur-objection to the Estate's motion to compel on August 8, 2011. On August 10, 2011, the hearing officer issued an order denying the Estate's motion to compel deposition and granting the Agency's motion to quash the subpoena.

On September 6, 2011, the Estate filed a motion for interlocutory appeal seeking Board review of the August 10, 2011 hearing officer order denying the motion to compel deposition. Also on September 6, 2011, the Estate filed a response to the motion for summary judgment. On September 13, 2011, the Agency filed a reply to the Estate's response to the motion for summary judgment and a response to the Estate's motion for interlocutory appeal.

On September 27, 2011, the Estate filed a motion for leave to file a surreply in opposition to the motion for summary judgment, along with the surreply. The Agency filed its objection to the Estate's motion for leave to file a surreply on October 3, 2011.

In a November 17, 2011 Order, the Board denied the motion for summary judgment, denied the motion for interlocutory appeal, and denied the motion to file a surreply.

On December 13, 2011, the Agency filed a motion for reconsideration of the Board's November 17, 2011 Order denying the motion for summary judgment. The Estate filed a response to the motion for reconsideration on December 28, 2011. On January 19, 2012, the Board denied the Agency's motion for reconsideration.

On March 2, 2012, the Agency filed a motion requesting a finding or ripeness of a ruling for interlocutory appeal and a motion requesting a ruling on the Agency's motion for summary judgment. The Agency also filed a copy of all documents within the Bureau of Land's Underground Storage Section's possession relating to the site's land pollution control number, under objection. The Estate filed a response to the Agency's motion on March 16, 2012. The Agency's reply was filed on March 26, 2012. On April 19, 2012, the Board denied the Agency's motion requesting a finding or ripeness of a ruling for interlocutory appeal and denied the motion for summary judgment.

On May 14, 2012, the Agency filed a new motion for summary judgment (Agency motion). On May 30, 2012, the Board's hearing officer granted the Estate's May 29, 2012 motion for an extension of time to respond to the Agency's motion. On June 12, 2012, the Estate filed its response to the Agency's motion (Estate response). The Agency filed its reply to the Estate's response (Agency reply) on June 22, 2012.

On June 29, 2012, the Estate filed a motion for summary judgment (Estate motion). The Agency filed its response to the Estate's motion (Agency response) on July 10, 2012.

CITATIONS TO THE RECORD

The original Agency record was filed on June 16, 2011. This original record was supplemented on December 13, 2011. On March 2, 2012, the Agency filed

> 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. Estate of Slightom v. IEPA, PCB 11-25, *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, page 1 (Mar. 2, 2012).

Because the June 16, 2011 filing contains documents not located in the March 2, 2012 filing, the Board cites to both versions of the record. The June 16, 2011 record is referred to as "Rec. 1" and the March 2, 2012 record is referred to as "Rec. 2."

The Board notes that, while Rec. 1 included page numbers, Rec. 2 did not. The Estate states in its motion that citations to Rec. 2 by the Estate are made in reference to the file number of that document on the disk provided by the Agency to the Estate. In this order, the Board cites to the paper copy of the record as filed by the Agency, with "1170455005_Robinsons Service Station_Index.pdf" as page 1, "BOL File Categories.pdf" as pages 2-3, and the remainder of the disk files (1 through 29), beginning on page 4 and continuing through page 738.

FACTS

Undisputed Facts

On April 18, 1990, Gerald Slightom registered at least one of the five underground storage tanks at the subject property, which included a heating oil tank, with the OSFM. Agency Mot. at 3, Estate Mot. at 2, Rec. 1 at 24-25. On August 30, 1991, Mr. Slightom reported a release from at least one of the underground storage tanks. Agency Mot. at 3, Estate Mot. at 2, Rec. 2 at 14-15. At least one of the tanks was removed on the same day. Agency Mot. at 3, Estate Mot. at 2, Rec. 2 at 13. On December 6, 1991, the Agency received an Application for Reimbursement from Gerald Slightom. Agency Mot. at 3, Estate Mot. at 2, Rec. 1 at 1-13.

A December 20, 1991 Agency decision letter determined that the site was eligible to seek reimbursement for corrective action costs, accrued on or after July 8, 1989, in excess of $100,000. Agency Mot. at 3, Rec. 1 at 13.

On February 6, 2008, the OSFM issued a decision letter "based upon a Reimbursement Eligibility and Deductible Application they received on January 24, 2008" from the Estate. Agency Mot. at 3, Estate Mot. at 5, Rec. 1 at 29-30. The OSFM determined that the five tanks on the site were eligible to seek payment of costs in excess of $10,000. *Id*.

The Estate performed an approved Stage 1 Site Investigation Plan and Budget, and submitted an application for payment for the work on October 20, 2008. Estate Mot. at 6, Rec. 1 at 55, 82, Rec. 2 at 138-139. On January 29, 2009, the Agency issued a decision letter applying the $10,000 deductible to the Estate's $29,239.08 reimbursement request and noted that the Estate would be reimbursed $19,239.08. Agency Mot. at 4, Estate Mot. at 6, Rec. 1 at 47.

The Estate also submitted a series of Stage 3 Site Investigation Plans and Budgets, which were approved by an Agency reviewer. Estate Mot. at 6-7, Rec. 2 at 262-264, 347-349, 735-738. The Estate's Site Investigation Completion Report included the actual costs for all Stage 2 site investigation activities. Estate Mot. at 7, AR2 at 444-738. The Agency approved the $82,057.28

requested for the Stage 3 site investigation, plus additional handling charges. Estate Mot. at 7, Rec. 2 at 438-443.[1]

On July 19, 2010, the Estate filed an application for payment in the amount of $83,912.58. Estate Mot. at 8, Rec. 1 at 120-215. On October 29, 2010, the Agency issued the decision letter currently under appeal. Agency Mot. at 4, Estate Mot. at 8-9, Rec. 1 at 109. The Estate appealed this decision on December 6, 2010.

Disputed Facts

The parties dispute circumstances surrounding the $100,000 deductible determination letter issued by the Agency. The Agency contends that, on December 20, 1991, it issued a decision letter determining that the Estate's site was "eligible to seek reimbursement for corrective action costs, accrued on or after July 8, 1989, in excess of $100,000." Agency Mot. at 3, Rec. 1 at 13. The Estate acknowledges that

> [t]he 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. Estate Mot. at 2, *citing* Rec. 1 at 13.

However, the Estate contends that no proof of receipt is shown in the record and no appeal was taken. Estate Mot. at 2-3.

The Agency also contends that it applied the $10,000 deductible on January 29, 2009 "in error" in a decision letter based upon an application for payment from the fund. Agency Mot. at 4. The Agency includes neither a record citation nor an affidavit in support of this position.

The Estate states that, 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." Estate Mot. at 3, *citing* Rec. 2 at 1. The Agency provided 9 pages of response, but the Estate claims that there were at least 34 pages of responsive documents prior to 1993. Estate Mot. at 3, *citing* Rec. 2 at 4-5, Estate Mot. Exh. 3.

The Estate notes that Gerald Slightom died on September 5, 2007, and on September 20, 2007, Richard D. Slightom was appointed the executor of the Estate. Estate Mot. at 4, *citing* Estate Mot. Exh. 1. The Estate states that the subject property was identified to have an assessed value of $59,707 if it were cleaned up. *Id.* The Estate

> did not have any record of a prior eligibility and deductibility determination ever having been made in relationship to the property, . . . and there was no indication

[1] The Estate cites to this record document as number 29 on the disk copy provided by the Agency to the Estate. The Board notes for reference purposes that in the paper copy of the record, this document falls between disk items 26 and 27.

> in the OSFM's files or the Agency's website of any such activity. Estate Mot. at 4-5, *citing* Estate Mot. Exh. 1, Estate Mot. Exh. 2, Rec. 1 at 116.

According to the Estate, the Estate paid a $10,000 deductible to its consultant and submitted three documents to the Agency on February 22, 2008, in reliance on the OSFM's $10,000 deductible determination. Estate Mot. at 5, *citing* Rec. 1 at 108, Rec. 2 at 12. These documents were (1) election to proceed under Part 734, (2) election to proceed as owner, and (3) 45-day report with Stage 1 certification. Estate Mot. at 5, *citing* Rec. 2 at 125. The Estate contends that, in further reliance on the OSFM's determination, the Estate paid all of the bills of identified creditors and distributed remaining assets to heirs, except for the subject property. Estate Mot. at 5-6, *citing* Estate Mot. Exh. 1. The Estate contends that it "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." Estate Mot. at 6, *citing* Estate Mot. Exh. 1. There are no assets in the Estate other than the subject property. *Id.* The Agency approved the Estate's election to proceed as owner on March 3, 2008. Estate Mot. at 6.

The Estate states that, on July 19, 2010, the Estate filed an application for payment in the amount of $83,912.58. Estate Mot. at 8, *citing* Rec. 1 at 120-215. On October 29, 2010, the Agency issued its current decision. Estate Mot. at 8-9, *citing* Rec. 1 at 109. The Estate also states that the Agency determined that the previous payment of $19,239.08 was an excess payment and stated that the remaining balance of $6,091.27 will be deducted from future payments. Estate Mot. at 9.

AGENCY'S MOTION FOR SUMMARY JUDGMENT

On May 14, 2012, the Agency filed its motion for summary judgment, stating that there exists no genuine issue of material fact and that the Agency is entitled to judgment as a matter of law. Agency Mot. at 1. The Agency believes that the administrative record and the arguments in the Agency's motion are sufficient for the Board to enter an order affirming the Agency's decision. *Id.* at 2.

In its motion, the Agency describes the issue as whether, "pursuant to 35 Ill. Adm. Code Section 732.603(b)(4), the higher deductible shall apply when more than one deductible determination is made." Agency Mot. at 2. The Agency believes that, based upon the language of that section and the facts in this case, the higher deductible applies. *Id.*

Arguments

The Agency contends that no genuine issue of material fact exists. Agency Mot. at 7. All tanks had been assigned a deductible of $100,000 under the December 6, 1991 application. *Id.* The Agency believes that the OSFM's January 24, 2008 deductible determination of $10,000 was issued "presumably through error." *Id.* The Agency therefore argues that the $100,000 remains applicable. *Id.*

The Agency contends that Section (b)(1) notes that, if none of the tanks were registered prior to July 28, 1989, then a $100,000 deductible applies whether or not there was a release. Agency Mot. at 7. Therefore, the date of the release is irrelevant to this review. *Id.* at 8.

The Agency also notes that Part 734 applies to this site, correcting an error from an earlier Agency motion. Agency Mot. at 8. Section 734.615(b)(4) states, "[w]here more than one deductible determination is made, the higher deductible shall apply." *Id.* The Agency contends that,

> [e]ven assuming that the February 6, 2008 OSFM decision of a second lower deductible determination is valid (which the [Agency] does not concede), Section 734.615(b)(4) of the regulations would control the outcome of the [Agency]'s actions on review of costs associated with a release (attributable to tanks already removed) since this regulation is specific in stating that the larger of the two deductibles shall control. *Id.* at 9.

The Agency concludes that its October 29, 2010 determination letter informing the Estate that the higher $100,000 deductible applies to the site pursuant to the Board regulations is correct under current law. Agency Mot. at 9.

ESTATE'S RESPONSE TO AGENCY'S MOTION FOR SUMMARY JUDGMENT

The Estate states that the Agency's motion is "substantially the same motion" as the Agency filed on June 16, 2011, noting also that the Agency's motion has not addressed the Estate's estoppel argument. Estate Resp. at 1. Therefore, the Estate contends that the law of the case requires that the Board to deny the Agency's motion for summary judgment. *Id.* at 1-2.

The Estate argues that, while the Agency has clarified that Part 734 applies to this case, the Agency's motion "does not explain by what authority the Agency can ignore current law by requiring compliance with the laws repealed." Estate Resp. at 3. The Estate states that the Agency was authorized to assess a deductible under Section 22.18(b) of the Act, but that this authority was repealed in 1993. *Id.*, *citing* P.A. 88-496, § 15. The Estate continues,

> [u]nder the transition provisions, Section 22.18(b) was still controlling until an election was made. (415 ILCS 5/57.13)[.] Once the election was made, the old law no longer applied, with the exception of costs already incurred under previous law, but there are no such costs at issue in this appeal; they all arose to the election. Estate Resp. at 3-4.

Therefore, the Estate contends that "determinations made under laws repealed by the legislature are not enforceable by the Agency." *Id.* at 4.

The Estate further argues that, while the written record appears substantially complete, the Estate does not agree that the entire record is complete. Estate Resp. at 4. The Estate states that

> [t]he record does not include the testimony of the Agency reviewers who have been represented to have "found" the document from 1991 heretofore unknown, and whom communicated with the [OSFM] and supplemented the Agency files with additional information therefrom. It does not include testimony as to those conversations. *Id.* at 5.

The Estate further contends that, as stated by the Agency, "the question before the Board is 'whether the application, as submitted to the Agency, would not violate the Act and Board regulations.'" Estate Resp. at 6, *citing* Metropolitan Pier and Exposition Authority v. IEPA, PCB 10-73, slip op. at 51 (July 7, 2011). The Estate's application for payment included a copy of the only OSFM eligibility and deductibility determination. Estate Resp. at 6. The Estate believes that the Agency's motion should therefore be denied because it is "premised on materials not submitted in the application." *Id.*

The Estate also argues that it complied with the Act by submitting the copy of the OSFM determination and the Agency is without authority to disregard it. Estate Resp. at 6. The Estate states that

> [a]fter the work was completed in accordance with the approved plans and budgets, the Estate reported the results of the work and the actual costs incurred, and again attached the required OSFM determination of a $10,000 deductible, which was again approved. It was only when the final bill was to be paid, did the Agency interject a new standard, not based upon any authority in the statute. *Id.* at 8.

The Estate argues that, once the Agency has determined that an application is complete, as happened in this case, the Agency's review "is restricted to an audit of the subsequent costs incurred." Estate Resp. at 8. The Estate therefore believes that the Agency exceeded its permissible review of the payment application. *Id.*

The Estate next believes that its application did not violate Part 734. Estate Resp. at 9. The Estate argues that the Board's regulations cannot be used to trump the enabling statute. *Id.* There are not two deductibles as far as Section 57.8(a)(4) is concerned. *Id.* If the OSFM had made two deductible determinations, then perhaps Part 734 would apply in deciding which governs. *Id.* The Estate contends that Section 734.615(b)(4) was based upon the problem of two incidents at a site, noting the rules were proposed with the following explanation:

> We have had occasions where eligibility determinations have been issued, say, for two separate incidents, where different deductibles have been applied by the Illinois [OSFM]. *Id.* at 9-10, *citing* R01-26, Hearing Transcript at 41 (Feb. 27, 2001).

The Estate also quotes Doug Clay of the Agency who testified

> [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. Estate Resp. at 10, *citing* R01-26, Hearing Transcript at 43 (Feb. 27, 2001).

The Estate contends that the present case

> is not within the contemplated intent of the rule. There was only one occurrence or incident. There was only one OSFM determination. There was only one eligibility and deductibility determination made as to Petitioner. Estate Resp. at 10.

Lastly, the Estate contends that there is a strong likelihood that the rule itself in invalid or at least will be found invalid in various situations, noting that the Agency conceded during the rulemaking that there was no statutory authority for the rule. Estate Resp. at 10.

The Estate concludes that

> [t]he deductible the Agency wishes to apply here, in contrast, was made (1) by an administrative agency whose authority in this area was repealed in 1993, (2) under legal standards that were repealed in 1993, (3) to a prior owner, instead of the current owner, and (4) incorrectly, or without knowledge of the circumstances surrounding the hearing oil tank registered in 1990. To interpret the Board's regulation as requiring imposition of such a deductible in the fact of the legal problems with doing so would be to construe the regulation in a way that would clearly be invalid. Estate Resp. at 11.

AGENCY'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The Agency opens its reply by stating that it "has corrected all deficiencies noted by the Board in prior rulings." Agency Reply at 1. Regarding estoppel, the Agency contends that in this case, "an administrative error was made that resulted in the application of the improper deductible by the [Agency]." *Id.* at 3. The Agency contends, however, that just because an error was made, the Agency should not be required "to continue to make that error ad infinitum." *Id.*

The Agency argues that the Estate should be estopped because, "once a determination is made for the eligibility of the tanks, the determination follows the release and the incident." Agency Reply at 3. The Agency notes that a determination was made for the only release relative to this action, that the Agency applied a $100,000 deductible, and that the decision was not challenged. *Id.* Therefore, that decision is legally binding. *Id.*

The Agency notes a previous Board decision where the Board held that a condition imposed in a permit, not appealed to the Board under Section 40(a)(1) of the Act, may not be appealed in a subsequent permit. Agency Reply at 4, *citing* Panhandle Eastern Pipe Line Co. v.

IEPA, PCB 98-102, slip op. at 30 (Jan. 21, 1999). The Agency also quotes a previous Board decision in which the Board was concerned that there was

> an attempt by petitioner to misuse the submittal process in order to remedy its failure to properly appeal the first decision by the Agency concerning this matter. The Board cannot allow the potential misuse of the reimbursement system and as the Agency has properly identified, it does not have the authority to reconsider a final determination. Agency Reply at 4.

The Agency reiterates that no new release was reported at the site, stating

> A determination of $100,000 was made, it follows the incident number, and under Illinois law, it is the deductible that applies at the site for this release. Agency Reply at 4-5.

The Agency contends that deductibles issued by the Agency are not invalid under Illinois law merely because the Agency's authority to issue deductibles was given to another state agency. Agency Reply at 5. Final decisions issued by the Agency when it had authority to issue deductible determinations are valid. *Id.*, *citing* Fiatallis North American v. IEPA, PCB 93-108 (Oct. 21, 1993). The Agency states that the law in question at the time of its decision was Title XVI of the Act and Part 734 of the Board's regulations. *Id.*

The Agency also contends that the record in this case is complete and sufficient to allow the Board to determine the issues at hand, stating that the Estate "once again uses this opportunity to argue for discovery when discovery has been denied." Agency Reply at 5-6. The Agency states that, while the permit reviewer recommends the final decision, "it is not the permit reviewer who makes the final decision." *Id.* at 6. It is the Agency final decision that is at issue in this case. *Id.* The Agency made final decisions and whether the project manager made representations to the consultant is irrelevant. *Id.* For these above reasons, the Agency contends that the Estate's estoppel argument "does not meet the high standard when a government agency is involved." *Id.*

The Agency argues that it is entitled to consider an entire file when making a final decision, stating that everything reviewed by the Agency "consisted of documents either submitted by the [Estate] or generated by the [Agency]." Agency Reply at 7.

The Agency also argues that it did not disregard the OSFM's $10,000 deductible decision when making its determination that the $100,000 deductible applies, but that the Agency was following Illinois law in applying the higher deductible. Agency Reply at 7. The Agency agrees with the Estate that the error of the deductibles was not found by the technical units of the Agency. *Id.* However, when the reimbursement unit received the paperwork, the deductible issue was reviewed. *Id.* When the Agency was presented with the two deductibles, it

> could not disregard the portion of the law that states that when two deductibles are issued for a site that the higher deductible applied merely because an error had been previously made. *Id.*

The Agency contends that the Board has previously held that "errors made by the [Agency] are best addressed by correction and not perpetuation." *Id.* at 8, *citing* Fiatallis, PCB 93-108 (Oct. 21, 1993).

The Agency states that Section 734.615(b)(4) has been in place since 2001 and "was intended to clarify the problem when two deductibles were issued as to which one applied." Agency Reply at 8. The Agency concedes that there is no specific provision in the Act stating what is to occur when two deductibles apply, but states that there is a deductibility section and the Board has the authority to clarify that section in order to administer the Act. *Id.* The Part 734 regulation went through a Board hearing and was ultimately adopted. *Id.* The Agency contends that the Estate has not established the invalidity of the regulations promulgated by the Board. *Id.*

ESTATE'S MOTION FOR SUMMARY JUDGMENT

The Estate contends that the Agency "has not acted in accordance with the legal authority asserted in its own denial letter." Estate Mot. at 10. 415 ILCS 5/57.8(a) "requires the Agency to deduct no more than the $10,000 previously deducted from the first payment invoice." *Id.* at 11. The Estate therefore argues that 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. *Id.* The Estate states that the Agency's determination was made pursuant to Section 22.18(b) of the Act, which was repealed in 1993. *Id.*, *citing* P.A. 88-496 § 15 (eff. Sept. 13, 1993). Following another change to the law in 2002, the Estate elected to become the new owner of the cleanup and proceed under the new law. Estate Mot. at 12. The Estate argues that the "old law" continued to apply to "all costs incurred in connection with the incident prior to notification," but the new law applied to costs incurred subsequently. *Id.* The Estate states that all of its costs were incurred subsequent to the election, and therefore the "old law" does not apply. *Id.*

The Estate also states that the legislature has an ongoing right to amend a statute. Estate Mot. at 14, *citing* First of Am. Trust Co. v. Armstead, 265 Ill. App. 3d at 291. The Estate contends that

> the Agency's interpretation of the Board's regulations 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. Estate Mot. at 14.

The Estate states the current question before the Board as "whether the application, as submitted to the Agency, would not violate the Act and Board regulations." Estate Mot. at 14, *citing* Metropolitan Pier and Exposition Authority v. IEPA, PCB 10-73, slip op. at 51 (July 7, 2011). The Estate contends that the Agency's determination was based upon a document that was not submitted in the application. Estate Mot. at 14. The Estate continues that it

> 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. Estate Mot. at 15.

The Estate believes that, since the Agency's denial was based upon extrinsic information, the Estate "has met its burden in this proceeding." *Id.*

The Estate states that, prior to performing the work, it submitted four plans for Stage 3 Site Investigation activities, each of which included the $10,000 deductible, pursuant to the Part 734 requirements. Estate Mot. at 15. The Estate contends that

> 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. *Id.* at 16.

The Estate finds "no justifiable reason" to modify these expectations after the work is performed. *Id.* The Estate further contends that the Agency's review at the application for pay stage is "severely limited." *Id.* The Estate argues that

> [w]hen, 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. Estate Mot. at 16, *citing* Evergreen FS, Inc. v. IEPA, PCB 11-51 and PCB 12-61, slip op. at 20-21 (June 21, 2012).

The Estate continues that "[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." *Id.*, *citing* T-Town Drive Thru v. IEPA, PCB 07-85, slip op. at 24-25 (2008). The Estate argues that the Agency has 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." Estate Mot. at 17.

The Estate alternatively argues that the "highest deductible" rule does not and should not apply, contending that the two deductible determinations in question are not equivalent. Estate Mot. at 18. The Estate contends that the language of the Act "states there is only one deductible, and it is determined by the OSFM pursuant to Section 57.9 of the Act." *Id.* The language of the Act "does not treat deductible determinations made by different agencies under different standards as equivalent." *Id.*

The Estate further states that the February 6, 2008 determination made by the OSFM is the only eligibility and deductibility determination issued to the Estate. Estate Mot. at 19. Even though the denial letter states that the site has two eligibility and deductibility determinations, the Estate contends that such determinations "are personal to the owner, not to the location." *Id.* The Estate states that the Board previously explained that the purpose of the new owner election is to "provide an incentive to purchase and remediate properties of this nature." *Id.*, *citing* Zervos Three v. IEPA, PCB 10-54, slip op. at 31 (Jan. 20, 2011). The Estate states that it would

not have elected to clean up the property had it known that a deductible under the repealed program would be applied. Estate Mot. at 19. The Estate argues that the Board should interpret its regulation to apply "solely to situations in which more than one deductible determination has been made by the same agency to the same owner." *Id.* at 19-20.

The Estate states that it is not seeking to appeal the Agency's $100,000 deductible determination, but notes "the absurdity of the outcome sought by the Agency . . . to impose an incorrect deductible by highly indirect means." Estate Mot. at 20. The Estate contends that "there is no question" that the heating oil tank was registered on April 18, 1990. *Id.*, *citing* AR at 24-25. The Estate states that the Act does not provide for a $100,000 deductible in these circumstances. Estate Mot. at 20. The Estate again cites the R 01-26 hearing transcript to state that the rule was intended to apply to problems involving sites with multiple incidents, not the present situation faced in this case. *Id.* at 20-21. The Estate argues that "there is certainly nothing in the 'highest deductible' rule" requiring its application to determinations made by different agencies, pursuant to different legislation, and directed to different owners. *Id.* at 22.

The Estate further contends that the Agency should be estopped from deducting costs in a manner inconsistent with its prior approvals and representations. Estate Mot. at 22. The Estate argues that the record 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. *Id.* The Estate would not have performed the Stage 3 Site Investigation work had it known that the Agency would refuse to pay for it, because the Estate would not have had the money to perform the work. *Id.* at 23.

The Estate acknowledges that estoppel against the government is not generally favored, but argues that "the multiple approvals by the Agency of activities that benefit the environment rise to a clear case of estoppel." Estate Mot. at 23, *citing* Wachta v. PCB, 8 Ill. App. 3d 436 (2nd Dist. 1972). The Estate contends that, similar to Wachta, it

> detrimentally relied upon the OSFM determination and the Agency's various letters, approvals and payment that represented that the OSFM determination would be applied. Estate Mot. at 24.

The Estate further argues that 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." Estate Mot. at 24, *citing* Tri-County Landfill Co. v. PCB, 41 Ill. App. 3d 249, 255 (2nd Dist. 1976). The Estate contends that "it is the owner who is achieving the public policy goal of a healthful environment and therefore an estoppel is favored." *Id.* The Estate believes that

> [f]ailing 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. Estate Mot. at 24.

The Estate argues that it relied upon the final determination of the OSFM that a $10,000 deductible applied in incurring over $110,000 in clean-up costs. *Id.* at 35, *citing* Hickey v.

Illinois C. R. Co., 35 Ill. 2d 427, 449 (1966). The Estate continues that the Agency "on multiple occasions" represented those expectations as correct, and therefore the Agency should be estopped "from reversing itself with respect to paying for both site investigation activities." Estate Mot. at 25.

The Estate notes that, for purposes of its motion, it "assumes no useful testimony could or would be obtained from the Agency project reviewer(s)." Estate Mot. at 10. The Estate concludes that, should the Board deny its motion, additional evidence through deposition or testimony should be made available. *Id.* at 25.

AGENCY'S RESPONSE TO ESTATE'S MOTION FOR SUMMARY JUDGMENT

The Agency begins its response by requesting that documents marked as exhibits to the Estate's motion be "excluded from the [Agency] record and their mention should be stricken from [the Estate's motion] and any future filings in this case." Agency Resp. at 2. The Agency notes that 35 Ill. Adm. Code 105.212 sets out the requirements for the Agency's record, and explains that the Agency did not rely upon the documents the Estate is requesting to use in supplementing the record when the Agency made its final decision. *Id.* at 1-2.

The remainder of the Agency's response repeats almost verbatim the Agency's reply in support of its motion for summary judgment, and the Board does not repeat that summary here.

BOARD DISCUSSION

Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358 (1998); *see also* 35 Ill. Adm. Code 101.516(b). When ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd & Dowd, 181 Ill. 2d at 483. Summary judgment "is a drastic means of disposing of litigation," and therefore the Board should grant it only when the movant's right to the relief "is clear and free from doubt." *Id*.

Where the parties file cross-motions for summary judgment, "they agree that no issues of material fact exist and invite the court to decide the issues presented as questions of law." Village of Oak Lawn v. Faber, 378 Ill. App. 3d 458, 462, 885 N.E.2d 386 (1st Dist. 2007). "However, the mere filing of cross-motions for summary judgment does not preclude a determination that triable issues of fact remain." *Id*.

The Board previously held that a factual discrepancy existed between the parties

> as to circumstances surrounding the application of OSFM's deductible determination, the Agency's later application of the $100,000 deductible, and

whether the Agency affirmatively misled the Estate under an estoppel theory. Slightom, PCB 11-25, slip op. at 16 (April 19, 2012), *see also* Slightom, PCB 11-25, slip op. at 10 (Nov. 17, 2011).

The Agency responded to this discrepancy by stating in its reply in support of its motion for summary judgment that "an administrative error was made that resulted in the application of the improper deductible by the [Agency]." Agency Reply at 3. However, the Agency does not provide any support for this position, whether through citation to the record or through an attached affidavit. This is unlike earlier in this case where the Agency supplemented factual allegations with an affidavit of an Agency employee. Slightom, PCB 11-25, slip op. at 8 (Nov. 17, 2011).

The Board has previously held a parties' silence on a lack of affidavit as a waiver of objection to the lack of support. *See, e.g.*, People v. Pointer, PCB 95-64, slip op. at 3 (Feb. 19, 1998). The Estate did not move to file a sur-reply to the Agency's statement. However, given the Estate's continued contention throughout this case of this particular set of facts, the Board finds it inappropriate to deem the Estate to have waived its contention.

It is clear with regards to the parties' estoppel arguments that genuine issues of material fact are still disputed. Therefore, summary judgment is inappropriate at this time.

Documents Attached to Estate Motion for Summary Judgment

The Agency has requested that the exhibits attached to the Estate's motion for summary judgment be excluded from the Agency record and stricken from the Estate's motion. The Board did not consider these exhibits in reaching its conclusion. However, this does not preclude the Estate from seeking to supplement the Agency record with these documents at a later time, or from attempting to introduce the documents at hearing.

Discovery and Hearing

The Board observes that the parties continue to mischaracterize prior Board orders as to the availability of discovery in this matter. The Board reminds the parties of the history of this case. On November 17, 2011, the Board denied a motion for interlocutory appeal of an August 10, 2010 hearing officer order relating to the Estate's request to depose an Agency witness to respond to the Agency's motion for summary judgment. As the Board previously explained, the Board denied the motion as moot because the Estate sought the discovery for the purpose of responding to the motion for summary judgment and prior to the Board's determination on an Agency motion for summary judgment. *See* Slightom, PCB 11-25, slip op. at 10-11 (Nov. 17, 2011); Slightom, PCB 11-25, slip op. at 17 (April 19, 2012).

The Agency states that the Estate "once again uses this opportunity to argue for discovery when discovery has been denied." Agency Reply at 5-6. However, the Board's decision did not restrict the parties from conducting such discovery after the November 17, 2011 order. For its own part, the Estate states "[t]o date, the Agency has refused to make its project reviewer(s) available for deposition nor has the Board compelled them to do so." Estate Mot. at 25.

However, nearly a year has passed since the Board's first denial of summary judgment yet the Estate, to the Board's knowledge, has not served any written discovery or subpoena for deposition on the Agency during this period. Thus, it appears to the Board that there is no pending discovery request by the Estate to the Agency and there is no pending motion to compel before the Board.

In its November 17, 2011 order and its April 19, 2012 order, the Board noted it is the hearing before the Board that affords the petitioner the opportunity "to challenge the reasons given by the Agency for [the denial] by means of cross-examination and the receipt of testimony to test the validity of the information [relied on by the Agency]." Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); IEPA v. PCB and Waste Management, Inc., 138 Ill. App. 3d 550, 552, 486 N.E.2d 293, 294 (3rd Dist. 1985) (the Board hearing "includes consideration of the record before the [Agency] together with receipt of testimony and other proofs under the panoply of safeguards normally associated with a due process hearing"). The "hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued." 35 Ill. Adm. Code 105.412. Accordingly, petitioners before the Board "cannot introduce new matters outside the Agency administrative record, but they may cross-examine and present testimony to challenge the information relied on by the Agency for the denial." Freedom Oil Co. v. IEPA, PCB 03-54 (consol.), slip op. at 11 (Feb. 2, 2006).

The Board, having found that a genuine issue of material facts exists, orders the parties to hearing. The Board directs the hearing officer to schedule and complete the hearings in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/40(a)(2) (2010)).

CONCLUSION

The Board denies the parties' cross-motions for summary judgment and directs that the parties proceed to hearing.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 1, 2012, by a vote of 4-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board