BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ESTATE OF GERALD D. SLIGHTOM, Petitioner,	)	
v.	)	PCB No. 11-25
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

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

Melanie Jarvis
Illinois Environmental Protection Agency
1021 North Grand Avenue East
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), a MOTION FOR INTERLOCUTORY APPEAL FROM HEARING OFFICER ORDER DENYING MOTION TO COMPEL, 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 6th of September, 2011.

Respectfully submitted,
ESTATE OF GERALD D. SLIGHTOM, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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MOTION FOR INTERLOCUTORY APPEAL
FROM HEARING OFFICER ORDER DENYING MOTION TO COMPEL

NOW COMES Petitioner, Estate of Gerald D. Slightom (hereinafter "the Estate"), pursuant to Section 101.518 of the Board's Procedural Rules (35 Ill. Admin. Code 101.518), moves for an interlocutory appeal from the Hearing Officer Order Denying the Motion to Compel, stating further as follows:

INTRODUCTORY MATERS

1. Pending before the Board is the Agency's motion for summary judgment, which was filed on June 16, 2011, which is the same day the Agency belatedly filed its administrative record in this case.

2. In response, Petitioner asked the Agency to make the project reviewer available for a short deposition, which request was denied. On June 29, 2011, Petitioner filed (1) Petitioner's Motion to Compel Deposition Directed to Hearing Officer ; and (2) Petitioner's Motion for Extension of Time to Respond to Motion for Summary Judgment Directed to Hearing Officer.

3. On July 19, 2011, the Hearing Officer entered into a briefing schedule with regard to the Motion to Compel, and continued generally the deadline to respond to the pending motion for summary judgment until the discovery issue was resolved.

4. On August 10, 2011, the Hearing Officer denied the motion to compel, which is the order Petitioners seek to appeal to the Board by this filing.

5. Petitioner has extended the decision deadline in this matter an additional 180-days as requested in the August 10, 2011 order.

6. With all due respect to the Hearing Officer, Petitioner feels it has little choice but to ask the Board to rule on the discovery issues so that the resolution of this case can proceed free and clear from uncertainty. At the center of the dispute is the relevance of the project reviewer's testimony and discovery, which in turn bears on the merits of the case that is the Board's ultimate province.

7. Petitioner incorporates its Response to the Motion for Summary Judgment for the factual background to this motion and for a description of many of the legal issues presented in this appeal.

I. Summary Judgment Proceedings Should be Stayed In Order for Legally Relevant Evidence to be Obtained through Discovery.

8. "The Board has indicated that, if discovery is considered necessary to respond to a motion for summary judgment, then a party should demonstrate that need through an affidavit that meets the requirements of Illinois Supreme Court Rule 191(b)." Des Plaines River Watershed Alliance v. IEPA, PCB 04-88 (April 21, 2005), at p. 5.

9. Supreme Court Rule 191(b) provides for a continuance to respond to a motion for summary judgment if "a party cannot obtain an affidavit containing material facts if the party's affidavit names the persons and shows why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief." Williams v. Covenant Med. Ctr., 316 Ill. App. 3d 682, 692 (4th Dist. 2000); see also Des Plaines River, PCB 04-88 (April 21, 2005) (denying relief for failing to "name a single person from whom discovery is sought"). Nonetheless, to the extent court practice in applying Supreme Court 191(b) is relevant, it is important that compliance with Rule 191(b) will not be required where a party moves for summary judgment before discovery is taken and the respondent may not know specifically what the witness will testify to. Williams v. Covenant Med. Ctr., 316 Ill. App. 3d 682, 692 (4th Dist. 2000).

10. Petitioner filed a verified motion to compel and motion for continuance, seeking to conduct a discovery deposition of Catherine S. Elston of the Agency, whose testimony cannot be procured by affidavit since she is an employee of the opposing party, and who is expected to testify as to the circumstances surrounding the apparent investigation and discovery leading to the 1991 document relied upon by the Agency and previously unknown to Petitioner and apparently the Agency. Petitioner made this request shortly after receiving the Agency's record, which did not provide such information. In fact, the Agency record barely contains any of the customary reviewer notes that often provide the necessary background. (Rec. 113 & 115)

11. There has been no objection to the form of Petitioner's motion; there has been substantial dispute as to the legal relevance of such testimony. Because the objection raised by the Agency and affirmed by the Hearing Officer is to the legal relevance of the testimony, the

legal issues in the case are themselves relevant.

12. The Response to the Motion for Summary Judgment raises substantial questions as to the status of the 1991 determination to this proceeding. It is insufficient to merely rely upon the Hearing Officer's conclusion that the 1991 determination was "found," without evidence in the record or even a statement from the project reviewer to that effect. Nor is there anything in the record (such a signed green card) showing that the 1991 determination was ever issued by the Agency or delivered to the prior owner.

13. As explained by the U.S. Supreme Court, review of an agency decision is limited to the record before the agency at the time of the decision, but not simply limited to that which the agency elected to put to writing. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971) ("since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.") Similarly, there is no evidence in the bare record explaining why the Agency believes it was justified in conducting an extra-application investigation, including apparently review of OSFM files.

II. The Agency's Procedural Violations or Irregularities Define The Scope of Review and Impose Requirements of Fundamental Fairness on the Board's Proceedings.

14. In its Response to the Motion for Summary Judgment, Petitioner has detailed the procedural irregularities in the Agency's pre-decision review.

15. The purpose of the Board's review of the Agency decisionmaking is to give

parties the opportunity to cross-examine and "to test the validity of the information the Agency relie[d] upon in denying its application." EPA v. Pollution Control Board , 115 Ill. 2d 65, 70 (1986); see also Soil Enrichment Materials Corp. v. EPA, 5 Ill. PCB 715 (1972) ("the appellant is entitled to a hearing to determine whether or not such material was relied upon and further to explore what it discovers").

16. Due process requires fundamental fairness in administrative proceedings, a right that is "not by legislative grace, but by constitutional guarantee." Lyon v. Dep't of Children & Family Servs., 335 Ill. App. 3d 376, 384 (4th Dist. 2002) (holding that while fundamental fairness may require provision for discovery, but mere delays in discovery do not violate due process).

17. If the Agency is allowed to rely upon information that was not submitted or relied upon by the applicant, and immunize review of that information before the Board, these proceedings will be fundamentally unfair and fail to serve the purpose for which they were intended to serve.

III. The Agency Record is Incomplete.

18. As demonstrated by the evidence attached to the Response to the Motion for Summary Judgment, the record is incomplete as to matters that should be before the Board. The project reviewer's file inexplicably does not contain copies of the budgets that payment was sought for. Such incompleteness is usually addressed through the discovery process where it is often learned that certain documents were actually reviewed, but inadvertently not filed.

19. On the other hand, the Agency's record contains a sampling of documents from

OSFM and from IEPA files unrelated to the application for payment process. They are certainly incomplete as to OSFM's files, and it is not clear from the record whether reviewed all or some of OSFM's files.

20. It may be argued that Petitioner can seek to supplement the record with additional information in its possession. Since the nature of the record is often disputed and is often contingent upon what the project reviewer knew or should have known at the time of the decision, prohibiting access to the project reviewer places such attempts at risk without the prior deposition.

21. The Board has historically allowed discovery that was intended for the purposes of completing or explaining the record, so long as it is not an attempt to provide evidence that did not previously exist:

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

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

> **Land and Lakes argues that the file's contents are beyond the scope of this Section 40(a) review. White Fence Farms, Inc. contends that the Agency included part of this file in this proceeding's record and it is, therefore, properly a subject of discovery. If so filed, this indicates to the Board that the Agency did rely on the development permit file, at least in part, when deciding to issue the permit. Therefore, pursuant to Procedural Rule 313, this material is relevant to pending action and discovery of the same may reasonably lead to admissible evidence. White Fence Farm, Inc. is allowed discovery.**

Land and Lakes v. IEPA, PCB 81-48 (May 13, 1982).

22. The Board has also historically accepted deposition testimony to explain the

record. See, e.g., Saline County Landfill v. Illinois EPA, PCB 02-108 (May 16, 2002) (affirming hearing officer admission of deposition testimony of agency employees which explained the administrative record of the permit appeal).

WHEREFORE, Petitioner, ESTATE OF GERALD D. SLIGHTOM, prays that the Agency be compelled to submit Catherine S. Elston to discovery deposition on the nature and circumstances of the 1991 document, or for such other and further relief as it deems meet and just.

ESTATE OF GERALD D. SLIGHTOM,
Petitioner

By its attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI

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