

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	Melanie Jarvis
	Illinois Pollution Control Board	Illinois Environmental Protection Agency
	1021 North Grand Avenue East	1021 North Grand Avenue East
	P.O. Box 19274	P.O. Box 19276
	Springfield, IL 62794-9274	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), PETITIONER'S MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO MOTION TO DISMISS INSTANTER, 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 11th of October, 2013

Respectfully submitted,
ESTATE OF GERALD D. SLIGHTOM, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

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**PETITIONER'S MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO
MOTION TO DISMISS INSTANTER**

NOW COMES Petitioner, ESTATE OF GERALD D. SLIGHTOM (hereinafter "the Estate"), by its undersigned attorneys, pursuant to Section 101.500 of the Board's Procedural Rules (35 Ill. Adm. Code § 101.500), moves for leave to file Surreply In Opposition to Motion to Dismiss *instanter*, stating as follows:

1. On September 10, 2013, the Agency filed a motion to dismiss as moot this appeal.
2. On September 24, 2013, the Estate filed a response in opposition to said motion.
3. On October 2, 2003, the Agency filed a reply thereto.
4. While the Reply failed to cite any new authority, the Reply contains an evidentiary claim that it made "good faith efforts to settle the case" without evidence of the same, and makes unsupported legal claims concerning the nature of the attorney-fee award herein.
5. If the Agency is allowed to reply with new arguments without opportunity to respond, The Estate would be prejudiced.
6. Attached hereto is Petitioner's Surreply in Opposition to Motion to Dismiss, which The Estate asks the Board to accept *instanter*.

WHEREFORE, Petitioner, ESTATE OF GERALD D. SLIGHTOM, prays for an order granting Petitioner leave to file the attached Surreply in Opposition to Motion to Dismiss *instanter*, and 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

By: /s/ Patrick D. Shaw

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**PETITIONER’S MOTION FOR LEAVE TO FILE SURREPLY IN OPPOSITION TO
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NOW COMES Petitioner, ESTATE OF GERALD D. SLIGHTOM (hereinafter “the Estate”), by its undersigned attorneys, for its Surreply in Opposition to Motion to Dismiss, stating as follows:

The IEPA states that the Board should consider that it has made “good faith efforts to settle the case,” which is legally irrelevant and not supported by any evidence.

As an initial matter, the IEPA is wrong to claim that the fee-shifting provision is “quasi-punitive.” Supreme Court Rule 137 sanctions are an example of a penal fee-shifting provision. Cretton v. Protestant Mem'l Med. Ctr., 371 Ill. App. 3d 841, 864 (5th Dist. 2007). Supreme Court Rule 137 specifically requires findings as to the motivations of the attorney; and his or her client, such as whether positions are taken in “good faith,” or “to harass or to cause unnecessary delay or needless increase in the cost of litigation.” (S. Ct. R. 137) The result of a Rule 137 sanction is to take money out of the pocket of either the attorney, his or her client, or both for abuse of the adjudicatory process.

In contrast, the fee-shifting statute here makes no reference to good faith or bad faith (415 ILCS 5/57.8(1)), and the Board has never treated the award as “quasi punitive.” E.g., IEPA v. Ill. Pollution Control Bd., 2012 Ill. App. Unpub. LEXIS 462, 15 (5th Dist. 2012) (finding that the Board did not abuse discretion in awarding fees). This award is simply compensation for costs incurred in order to perform corrective action, and are taken from the LUST Fund, which *inter alia* paid the costs associated with the Agency’s actions herein. (415 ILCS 5/57.11(a)(5)) As set forth in more detail in the Estate’s objection to the motion to dismiss for mootness, the reason the legislature provides for such a fee-shifting provision is to encourage petitioners to bring lawsuits.

As such, there is no legal relevance to the Agency’s claim that it negotiated in good-faith, but there is also no evidence other than the Agency’s own self-serving conclusion. Without making an argument for or against such a finding, the Estate will simply state that a good time for the Agency to have settled this case would have been back in early 2011 when The Estate provided several waivers of the statutory deadline to give legal division an opportunity to determine whether they would be willing to settle this case. See, e.g., Hrg Officer Order of May 17, 2011 (“The parties still hope to resolve this matter without hearing.”) We would not be here today, but for the IEPA’s decision to instead file motions for summary judgment and refuse discovery. See Verified Motion for Extension of Time (June 29, 2011) The IEPA clearly thought it had arguments that would prevail, but they did not, and the IEPA concedes it did not want to spend more resources in defending itself before the Board, in any appeal it would bring, or by “including another state agency in its litigation of this matter,” i.e., the Office of the Fire Marshal, the state agency that makes and *withdraws* deductibility determinations. The IEPA only sought to capitulate after almost all issues had been briefed and argued, and the only matter remaining

was a short hearing in which The Estate would call representatives from the IEPA and the OSFM regarding the substance of their communications during the application review process.

Finally, the IEPA's statement about incentives is nonsensical. There was no settlement in this case, and thus the Board's ruling won't make the Agency more or less likely to settle. If anything, an award of fees would encourage the Agency to fully pursue settlement negotiations early, before substantial fees are incurred by petitioners. If the Board denies the availability of fees, then future petitioners will have greater incentive to avoid settlement and go straight to hearing.

WHEREFORE, Petitioner, ESTATE OF GERALD D. SLIGHTOM, prays for an order denying the motion to dismiss, leave for the Estate to file proof of its attorney's fees incurred, and 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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