

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 RECONSIDERATION, 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 19th of December, 2013.

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

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.)	

PETITIONER’S MOTION FOR RECONSIDERATION

NOW COMES Petitioner, ESTATE OF GERALD D. SLIGHTOM (hereinafter “the Estate”), by its undersigned attorneys, pursuant to Section 101.520 of the Board’s Procedural Rules (35 Ill. Adm. Code § 101.520) in opposition to the Motion to Dismiss filed by Respondent Illinois Environmental Protection Agency (hereinafter “the Agency”), moves the Board to reconsider November 14, 2013 order, stating as follows:

1. On September 4, 2013, and September 9, 2013, the Agency unilaterally issued a new determination, approving substantially the \$83,912.58 originally requested in 2010.
2. At the same time, the Agency moved to dismiss this appeal as moot. The Estate objected to the motion to the extent it sought to foreclose its request for reimbursement of its attorney’s fees, and asked the Board to allow Petitioner to submit its request for reimbursement of attorney’s fees.
3. Shortly after the new determinations were made, the State of Illinois issued a check for \$83,908.73 made out to, and delivered to, CSD Environmental, Inc., the consultant that performed the work approved by the Agency.

4. Subsequently, the Board issued an order on November 7, 2013, received by the Estate on November 14, 2013, denying the Agency's motion to dismiss the case as moot, as well as the Petitioner's request that it be allowed to prove up its attorney fees.

5. Because the Board was not appraised of the fact of actual payment to the consultant, and because the Board addressed a legal theory not addressed in the briefing of the parties, Petitioners respectfully requests the Board reconsider its decision.

6. It is also believed likely that in light of the Board's opinion, the Agency will initiate steps to collect the amount paid, further complicating this matter.

7. Furthermore, and as argued more fully in the Memorandum of Law hereinafter, Petitioner asserts the following legal propositions:

A. The Agency, through its legal counsel, had inherent authority to pay the amount claimed in order to compromise the litigation. This is the right of legal counsel in general, and the Attorney General in particular, only constrained by the requirement that such payment cannot moot a lawful attorney fee claim.

B. The holding in Reichold Cemicals v. IEPA, 204 Ill. App. 3d 674 (3rd Dist. 1990) only precludes the Board from denying the applicant its statutory right to hearing on the basis of an information reconsideration process not contemplated in the statute. The decision did not preclude the Agency from voluntarily reconsidering its decision.

MEMORANDUM OF LAW

A. THE AUTHORITY OF LEGAL COUNSEL TO FACILITATE COMPROMISE OR PAYMENT OF A CLAIM AS PART OF AN ADJUDICATION.

The IEPA is represented in this proceeding by a “Special Assistant Attorney General.” (Appearance of Melanie Jarvis (June 16, 2011)). “[T]he Attorney General is the chief legal officer of the State; that is, he or she is the law officer of the people, as represented in the State government, and its only legal representative in the courts. Environmental Protection Agency v. Pollution Control Board, 69 Ill. 2d 394, 398 (1977). Furthermore, “neither the legislature nor the judiciary may deprive the Attorney General of his common law powers under the Constitution.” Id. at 399. The Attorney General, like State’s Attorneys, has inherent power to compromise litigation, In re County Collector for Delinquent Taxes, 225 Ill. App. 3d 741, 744 (4th Dist. 1992), the power of prosecutorial discretion, People ex rel. Thompson v. Anderson, 119 Ill. App. 3d 932, 939 (3d Dist. 1983), the power to appeal permitting proceeding to which it was not a party, Pioneer Processing v. EPA, 464 N.E.2d 238, 247 (1984), and the power “to dismiss a suit brought by [herself], either with or without any stipulation.” People ex rel. Stead v. Spring Lake Drainage & Levee Dist., 253 Ill. 479, 504 (1912). “The Attorney General’s responsibility is not limited to serving or representing the particular interests of State agencies, including opposing State agencies, but embraces serving or representing the broader interests of the State.” EPA v. PCB, 69 Ill. 2d at 401.

The review process before the Agency is conducted by project reviewers who are not licensed attorneys and their final decision is not signed by legal counsel. Once an appeal is filed, a special assistant attorney general is typically appointed to represent the Agency. E.g.,

Wheeling/GWA Auto Shop v. IEPA, PCB 10-70, at p. 3 (July 7, 2011). Occasionally, this has meant proceedings wait for the appointment to be made, resulting in a late appearance and filing of the administrative record. E.g., Prime Location Properties, LLC v. IEPA, PCB 9-67, at pp. 25-26 (Aug. 20, 2009). As discussed by the Board in Prime Location, however, the proceeding before the Board is adjudicatory in nature and its participants are required to be represented by lawyers before the dispute may move forward. Id. A lawyer's skill is needed to present "arguments and precedents" to the Board, as well as for "the giving of advice" to the client. In re Petition of Recycle Technologies, AS 97-9, at 8 (July 10, 1997)

While the technical staff of the Agency may be well equipped to address many of the environmental and administrative tasks the Act and Board's regulations expect of them, they lack the lawyer's skill to address the implications of past legal precedents, to understand the rules of evidence and burdens of proof, or to analyze the interplay of other Constitutional, statutory or common law requirements that may not be found in the Act or regulations. Therefore, it would not seem unreasonable for situations to arise where the lawyer on behalf of any client, whether governmental or non-governmental, may review a client's case with fresh eyes and give advise to compromise or capitulate. Indeed, there may be cases where the lawyer must necessarily refuse to assert the claims that the client may wish to make, such as where the lawyer believes that the claims are untrue or without reasonable basis in existing law or a good-faith argument therefrom. (5 ILCS 100/10-55(a); S. Ct. Ru. 137) In summary, and before turning to the issue of Agency reconsideration, there does not appear to be any legal basis that an attorney, particularly one operating on behalf of the Attorney General, can not as a matter of course in the exercise of professional judgment, compromise or refuse to defend a case, or advise their clients to do so.

All that is asserted here is the right of a lawyer to compromise or pay a claim as part of an adjudicatory process.¹ In paying the claim, the lawsuit is rendered moot, unless there is an attorney-fee provision, in which case only the issue of attorney fees remain to be resolved.

Hayman v. Autohaus on Edens, 315 Ill. App. 3d 1075, 1078 (1st Dist. 2000).

B. THE CONSISTENCY OF PAYMENT WITHIN THE STATUTORY SCHEME.

In the underlying appeal, the IEPA approved the work performed and budget subject to a \$10,000 deductible (previously paid) and then after the work was performed and payment was sought, the IEPA *reconsidered* its earlier decisions and imposed a \$100,000 deductible on the Estate. (Petitioner's Mot. S.J., at pp 6-7) Instead of receiving over \$80,000 for corrective action, the Estate received a bill instead. Following extensive briefing of the legal issues before the Board in which the IEPA received adverse rulings, the IEPA reconsidered its desire to defend this case and paid the consultant for the work.

In Reichhold Chemicals, v. PCB, 204 Ill. App. 3d 674, 679 (3rd Dist. 1990), the Agency denied an air permit, while soliciting a re-evaluation of the application if additional information was submitted addressing the Agency's stated concerns. Id. at 676. The applicant responded to the entreaty, while also timely filing an appeal from the final decision to preserve its appeal rights. Id. This was inconsistent with Board practice at the time which allowed an applicant to either appeal a final determination to the Board or engage in reconsideration with the Agency and the Board dismissed the appeal upon the motion of the Agency. Id. at 679. The Court reversed

¹ There may be other complications where the permitting process implicates third-party rights, but those are not relevant to leaking underground storage tank decisions.

the Board, finding that there was no statutory basis for dismissing the appeal to allow reconsideration of the Agency's decision, particularly as "no rules establishing a rehearing procedure with time limits, notice requirements, and other customary provisions have been cited to us." Id. at 678. The lack of a procedural framework placed the applicant at risk that if it didn't file an appeal to the Board, a court might subsequently decide that appeal rights had been waived, or if the applicant asked the Agency to reconsider its decision, the Agency may never act with finality to give the applicant back its right to appeal to the Board. The practice was prejudicial to the applicant and inconsistent with the statute.

Notwithstanding broad language suggesting the contrary, the Appellate Court in Reichhold did not actually hold that the Agency could not actually reconsider its decision. By the time, the final opinion was published, the Appellate Court had received a second appeal arising from the Agency's denial of the reconsideration that had created dual proceedings. Id. at 680. The Appellate Court did not hold that the second appeal was a nullity because the Agency cannot reconsider its decision, but instead held that while "overlapping proceedings" may cause practical difficulties, these were insufficient to deprive Reichhold of the right to a review of the decision denying it a permit. Thus, the proper holding to take from Reichhold is not necessarily that the Agency can never reconsider its decision, but that its willingness to do so is not grounds to prejudice the applicant's statutory right to review a final decision.

Similarly, while the Agency was authorized to order payment of the claim it had initially approved, it could not do so as to prejudice the Estate's statutory claim to attorney's fees. See Petitioner's Opposition to Motion to Dismiss, at pp. 3-4.

CONCLUSION

For the above reasons, the Estate asks the Board to deny the Agency's Motion to Dismiss, give 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

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