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
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Melanie Jarvis
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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 PETITIONER'S POST-HEARING BRIEF, 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 day of May, 2014.

Respectfully submitted,
ESTATE OF GERALD D. SLIGHTOM, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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PETITIONER'S POST-HEARING BRIEF

NOW COMES Petitioner, Estate of Gerald D. Slightom (hereinafter "the Estate"), for its Post-Hearing Brief, states as follows:

INTRODUCTION

Pursuant to Section 57.9 of the Act, the Office of the State Fire Marshal (hereinafter "OSFM") determined that the Estate was eligible for reimbusement from the Leaking Underground Storage Tank ("LUST") Fund, subject to a $10,000 deductible. Neither the Illinois Environmental Protection Agency (hereinafter "IEPA" or "the Agency"), nor any administrative rule, can modify this decision.

STATEMENT OF FACTS

In September of 2007, Gerald D. Slightom died, leaving behind property once operated as the Robinson Service Station. (Pet's Ex. 7)[1] In 1991, Slightom had reported a release of gasoline,

[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

used oil and heating oil from all underground storage tanks, for which incident number 912456 was assigned.. (Rec. No. 4)

In November of 2007, the Estate, through its attorney, Bill Nichelson, contacted CSD Environmental, an environmental consulting firm, for assistance in cleaning-up the property and obtaining a No Further Remediation letter, if it could be performed for no more than $15,000. (Hrg. Trans. at pp. 9-10) Shane Thorpe, senior project manager for CSD Environmental, with eighteen years of experience with underground storage tank remediation, testified at the hearing about the work performed before and after they were retained. (Hrg. Trans. at pp. 8-9)

Thorpe initially set out to determine whether the Estate would be eligible to remediate the incident for no more than a $15,000 deductible. (Hrg. Trans. at p. 11) First, he reviewed the IEPA's online Leaking Underground Storage Tank Incident tracking database (Hrg. Trans. at p. 10),[2] a copy of the database he printed out at the time was admitted into evidence as Petitioner's Exhibit 1, though he didn't print out the "claims" page because there was no information on it. (Hrg. Trans. at p. 11; compare with Pet's Ex. 9 (print-out of database, including claims page, from November 3, 2010) What the tracking database informed Thorpe was that not much had been done at the site, not even a 45-day report. (Hrg. Trans. at p. 11)

Next Thorpe reviewed the Office of the State Fire Marshal's database and its files. (Hrg.

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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. _____) Citations to exhibits admitted at hearing are cited by exhibit number. (Pet.'s Ex. ____)

[2] According to the Manager of the LUST Section, the LUST Incident tracking database contains "most of the information" that the Agency sees, other than matters involving enforcement. (Hrg. Trans. at pp. 78-79) The claims reviewer testified that she prints out the database for every review, and makes her notes on them. (Hrg. Trans. at pp. 46)

Trans. at p. 11) Based upon his review of OSFM's response to his Freedom of Information Act request, Thorpe believed the Estate would be eligible for a $15,000 deductible, particularly due to the registration of the heating oil tank for consumptive use on the premises. (Hrg. Trans. at pp. 13 & 29) There was no evidence of a prior eligibility and deductibility determination in the OSFM records. (Hrg. Trans. at p. 13)

After this initial investigation, the Estate decided to retain CSD Environmental to submit an application and the necessary documents to obtain a deductible of $15,000 or less. (Hrg. Trans. at pp. 15-16) The retention agreement was contingent upon receiving a deductible in that range. (Id.) Thereafter, the Estate applied for an eligibility and deductibility determination from OSFM. (Pet.'s Ex. 7; Rec. P31) According to the IEPA, the application materials were forwarded to the IEPA when the OSFM made its final decision. (Hrg. Trans. at p. 63) There has been no question raised about the accuracy of the application, though there apparently is a dispute as to the legal consequence of registering the heating oil tank on April 18, 1990. On February 6, 2008, the OSFM issued its final determination, finding that the Estate was eligible to access the LUST Fund, and furthermore it was eligible to seek payment of costs in excess of $10,000. (Rec. P29) The final decision was forwarded to the IEPA. (Hrg. Trans. at p. 63)

The Estate was pleased with the result, and in reliance upon the OSFM's deductibility determination, the Estate filed the necessary documents to elect to proceed as owner of the cleanup. (Hrg. Trans. at p. 18) The determination was issued specifically to the Estate:

> **It has been determined that <u>you</u> are eligible to seek payment of costs in excess of $10,000.**

(Rec. P29 (emphasis added))

Next, the consultant prepared the forms necessary for the Estate to elect to proceed as "an 'owner' under Title XVI of the Environmental Protection Act." (Rec. 12) Also, at this time the Estate filed an Election to Proceed under 35 Ill. Adm. Code 734, and a 45-Day Report with Stage 1 Certification. (Rec. 13) The election to proceed under Part 734 also requires the owner/operator making the election "to proceed in accordance with Title XVI of the Environmental Protection Act." (Rec. 13)

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)[3]

According to IEPA testimony at the hearing, the IEPA keeps "information regarding eligibility and the deductible amount to be paid" that is different from that of the OSFM, and the IEPA does not share its information with the OSFM. (Hrg. Trans. at p. 60)

The Agency also approved the 45-Day Report, which included 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) The Stage 1 Site Investigation included drilling and sampling soil and groundwater at the site, the results of which revealed contamination present at one or more of the property boundaries. (Hrg. Trans. at pp. 19-

[3] The Manager of the LUST Section testified that when people call to ask him about electing to proceed as owner of a cleanup, he tells them to "check with the fire marshal before you sign this form to elect to proceed because they may tell you what the deductible might be if there isn't one already and if there is one already, they will tell you what the deductible will be." (Hrg. Trans. at p. 87)

20)

After this on-site investigation work was performed, the Estate submitted an application for payment for the work on October 20, 2008, including a copy of the Estate's eligibility and deductibility determination. (Rec. P55 & P82) According to the Manager of the LUST Section, the IEPA was only doing completeness reviews at that time:

> **[The claims reviewer] looked at a few things. Compare to what was approved in the budget. There were certain things that definitely had to be checked. We were not -- for example, we would not pay more than what was approved in the budget. So that was one thing to check, but it was basically looking at what was in front of him and I believe, you know, he didn't have to pull the file.**

(Hrg. Trans. At pp. 76-77)

The Agency reviewer noted the inclusion of a copy of "the $10,000 deductible which applied to the site," (Rec. P51), and issued the 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 to determine the extent of offsite contamination onto neighboring property, including a residence to the North. (Hrg. Trans. at pp. 21-22) There were actually four separate Stage 3 Site Investigation Plans approved and performed, as each time the consultants had to go further from the source to determine the extent of contamination. (Hrg. Trans. At p. 22) When the extent of offsite contamination had been delineated, a Site Investigation Completion Report was submitted. (Hrg. Trans. at p. 22)

During the Stage 3 Site Investigation, each of the following plans, budgets, and reports were submitted with the OSFM E&D letter, and approved without challenge to the deductible:[4]

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)

With the exception of the first Stage 3 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) The Site Investigation Completion Report contained an accounting of all of the actual costs of performing the Stage 3 investigation ($82,057.28, plus handling charges), which was approved without any reductions for the amount requested. (Hrg. Trans. at p. 24) The approval of the Site Investigation Completion Report was conditioned on further delineation of the extent of the contamination during the corrective action phase. (Rec. No. 29)

Only after the Stage 3 investigation was complete, could reimbursement be sought for the

[4] Investigating the extent of contamination on the neighboring residence was difficult. At times taking samples from the monitoring well was impeded by a large dog, and another monitoring well was destroyed by repairs to a sewer line. (Rec. No. 27, at p. 2) The IEPA denied the cost to install a replacement monitoring well in the budget, though one was created without seeking reimbursement. (Id.)

work performed. (Hrg. Trans. at pp. 22-25) 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) As of August 4, 2010, the LUST Incident Tracking database showed that a $10,000 deductible applied. (Hrg. Trans. at pp. 43-44; Rec. P118)

The reimbursement request was handled by Catherine Elston, who testified that her job is to "check on the claims, the math on them, ensuring that they're within the Subpart H rates. I prepare the documentation for the payments." (Hrg. Trans. at p. 36) Typically, when she first receives a new reimbursement claim she prints off the budgets and the OSFM determination letter. (Hrg. Trans. at p. 39) However, she could remember few, if any, details about this claim. (Hrg. Trans. at pp. 48-49)

Brian Bauer, an Environmental Protection Specialist III, testified that he screened the claim before giving it to Elston, and directed her to apply a $100,000 deductible, based upon an Agency determination he had identified. (Hrg. Trans. at pp. 50 & 54) Bauer testified that he has responsibilities on both the technical side and the reimbursement side, but mostly on the reimbursement portion these days. (Hrg. Trans. at p. 52) Bauer testified that he located an IEPA letter to Gerald Slightom in the LUST Claims file, which state that "you are eligible to seek reimbursement for corrective action costs . . in excess of $100,000." (Hrg. Trans. at pp. 54-55; Rec. P13) This letter was written in response to an application for reimbursement for $40,000,

made under the pre-Title XVI program. (Rec. P12) Bauer was unaware of any evidence that showed Slightom ever received the letter. (Hrg. Trans. at p. 65)

There is no reference to either of these documents in the Agency's database, and the database appears to be set up specifically with the Title XVI program in mind, as neither the application for reimbursement, nor the IEPA response are referenced on the database. (Pet's Ex. 1) Also, the database has a specific page for "Title XVI." (Pet.'s Ex. 1) The Agency did not contact the consultant at this time, (Hrg. Trans. at pp. 26-27), but Bauer did contact Deanne Locke, the person at OSFM that made the eligibility and deductibility determination, to challenge OSFM's decision to make a $10,000 deducible, but OSFM was unwilling to reconsider its decision. (Hrg. Trans. at p. 61-62)

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) 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

> **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 would never have started the cleanup of this property had the deductible actually been $100,000. (Hrg. Trans. at p. 27) The Estate timely appealed this decision.

ARGUMENT

I. SECTION 57.8(A)(4) OF THE ACT REQUIRES THE AGENCY TO ONLY SUBTRACT THE DEDUCTIBLE DETERMINED BY THE OSFM PURSUANT TO TITLE XVI OF THE ACT.

"[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 language in the denial letter is largely in accord with Section 57.8(a)(4) 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))

In the record there is only one deductible that meets the requirements of Section 57.8(a)(4) of the Act, and that is the $10,000 deductible determination of the OSFM made pursuant to Section 57.9 of the Act.

One of the fundamental principles of statutory construction is to view all provisions of an

enactment as a whole. “Words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute." Raintree Homes, Inc. v. Vill. of Long Grove, 209 Ill. 2d 248, 255-256 (2004). The statutory provision that mandates that there be only one deductible per underground storage tank site also states that the deductible shall be determined by OSFM in accordance with Section 57.9 of the Act. The Agency had no authority under the Act as it currently appears to subtract any deductible other than that of the OSFM. "[A]n administrative agency is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it is created. Granite City Div. of Nat'l Steel Co. v. Illinois Pollution Control Bd., 155 Ill. 2d 149, 171 (1993).

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)). While there were some transition provisions at the time of the 1993 repeal, these have been superceded by successive transition provisions as the LUST Program has constantly been amended over time. As currently framed, the transition provision states “costs incurred . . . shall be payable from the UST Fund in the same manner as allowed under the law in effect at the time the costs were incurred.” 415 ILCS 5/57.13. “As with any statutory scheme, the legislature has an ongoing right to amend the Act when it sees fit to do so.” Big Sky Excavating, Inc. v. Ill. Bell Tel. Co., 217 Ill. 2d 221, 242 (2005).

The pragmatic reason for applying the law as it now exists is well illustrated in this case. Substantial testimony was taken in which it was clear that people very experienced with the LUST Program solely have Title XVI in mind when discussing the LUST program. The Section

Manager advises people considering an election to cleanup a site to check with OSFM as to the deductible (Hrg. Trans. at p. 87), a position restated in the Agency's own letters. (Rec. No. 14) Catherine Elston, who appears to be the Section's longest-serving claims reviewer testified that when she gets a new file, she prints off the OSFM letter. (Hrg. Trans., at p. 39) Brian Bauer testified that not every Agency claims reviewer has received sufficient training to know about IEPA determinations under the previous program. (Hrg. Trans. at pp. 55-56) Meanwhile, the Agency's database is expressly "Title XVI" specific, and the Agency has never created a system to share its pre-Title XVI determinations with OSFM. By their statements and action, the IEPA recognizes that pre-Title XVI is no longer the operative law.

The LUST Section Manager also testified that he advised people thinking about entering the program to seek the advise of an attorney. (Hrg. Trans, at p. 87) The Illinois legal system does not recognize "environmental" attorneys as an area of speciality, though there are obviously some that are more experienced in environmental issues than others. The lawyer has, or should have, access to Illinois statutory law as it exists in its present form, specifically the most current edition of the Illinois Compiled Statutes, in which case, there would be no notice that the IEPA has ever made deductible determinations. (415 ILCS 5/57.8(a)(4)) Lawyers do not look to superceded statutes to give counsel, because superceded laws have been superceded by current law. For example, in Envirite Corp. V. IEPA, 158 Ill.2d 210 (1994), Peoria Disposal was found to have potentially violated the Act by the Illinois Appellate Court, but while the lawsuit was on further appeal, the Act was amended, and the citizen suit was dismissed since the reviewing court looks only to the law as it then exists, not as it was when the decision was made by the lower court. Id. at 215.

The law cited by the IEPA in its denial letter is unambiguous – the Agency may only offset a deductible determination made by OSFM under Title XVI, and there is no legal basis for the Agency to make any other deduction.

II. 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 by using an extrinsic document to "override" the document required by the Act. 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.

III. ALTERNATIVELY, THE AGENCY EXCEEDED ITS PERMISSIBLE SCOPE OF REVIEW OF THE APPLICATION FOR PAYMENT BY RE-REVIEWING ITS BUDGET APPROVALS.

Before there can be payment, the budget must be approved, and the Agency repeatedly approved budgets including a $10,000 deductible without complaint. Specially, the Estate submitted four successive Stage 3 Site Investigation Plans and Budgets, each of which included "a copy of the eligibility and deductibility determination of the OSFM" as required by the Board's rules. (35 Ill. Admin. Code § 734.310(b)) Each of these submittals was approved by the Agency in all relevant respects. 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 in accordance with the plan and budget, there will be no dispute as to the amount received.

The Manager of the LUST Section testified that when the budget is reviewed and approved, the reviewer does not ever "review or look at the deductible." (Hrg. Trans. at p. 91)

However, he previously testified that the technical review of the budget includes confirming that the correct determination *from OSFM* has been submitted:

> **Q. . . . Aren't the technical submittals required to have attached eligibility deductibility determinations?**
>
> **A. Yes. Every budget that is submitted to us must contain this application from the fire marshall and we use it to compare to what we received from the fire marshall before that. Every claim has to have that eligibility determination also, again, to compare to what we have from the fire marshall.**

(Hrg. Trans. at p. 84)

In other words, part of the budget review is making sure that the OSFM determination submitted is the same as the OSFM determination the IEPA has in its file. This is a review -- though perhaps not much of a review, but it is a reasonable review in the context that current law only references the OSFM determination.

Having reviewed the eligibility and deductibility determination as part of the budget, the Act constrains the Agency's ability to then deny payment at the reimbursement stage:

> **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))

The Agency is not free to "second-guess" the amount to be paid at the reimbursement stage. T-Town Drive Thru v. IEPA, PCB 07-85, at pp. 24-25 (2008). 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).

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.

IV. ALTERNATIVELY, THE BOARD'S "HIGHEST DEDUCTIBLE" RULE DOES 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 assumes the existence of two deductibles in order to apply the "highest deductible" rule. (35 Ill. Admin. Code § 734.615(b)(4) ("Where more than one deductible determination is made, the higher deductible must apply.") The reason that two deductibles are a problem is that Section 57.8(a)(4) specifically states that there can only be one deductible per site, but this statement is in reference

to deductible determinations made by OSFM.

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

First of all, the OSFM has information about tank registration that the IEPA does not have. The OSFM is in charge of tank registration, so it not only knows when tanks were registered, but also knows the outcome of its inspection and enforcement actions. (E.g., Pet's Exs. 4 - 6) In addition, the determination made to the subsequent owner is the only one of which the subsequent owner has notice and an opportunity to challenge. In particular, the Act was amended relatively recently to add a new type of "owner," eligible to access the LUST Fund:

> **the term "owner" shall also mean any person who has submitted to the Agency a written election to proceed under this Title and has acquired an ownership interest in a site on which one or more registered tanks have been removed, but on which corrective action has not yet resulted in the issuance of a "no further remediation letter."**

(415 ILCS 5/57.2 (provision added by P.A. 94-275, § 5, effective Jan. 1, 2006)) (emphasis added)

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). The Agency argued at hearing that the new owner takes on "all liability for that site," (Hrg. Trans. at pp. 79-80), which is a disturbing claim, particularly as it is quite possible that the previous owner's conduct could be criminal. The new owner is operating as a "Good Samaritan," who has expressly accepted responsibility *under Title XVI* in order to obtain a "no further remediation letter," nothing more, nor less.

Finally, the OSFM determination is the only one made under existing law. The Act has changed in a myriad of ways over the years. Now, there is a process by which a new person or entity can elect to become an owner, and consequently the is required to get an eligibility and deductibility determination specific to itself and use its own taxpayer identification number. (Hrg. Trans. at p. 69) This is not the situation for which the "highest deductible" rule was intended to apply. 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, for two separate incidents 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.

In other words, the rule was intended for circumstances in which during an ongoing remediation additional unregistered tanks are discovered on the site. Although, Petitioner believes the rule should be that the most recent deductible determination applies, the outcome will likely be the same in the situation identified by Doug Clay. The rule was clearly not promulgated to alter the statutory requirement that the OSFM determination is the only one that can be deducted, nor could the rule conflict with the statute. "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 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.

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 not authorized by statute, the statutory language must control.

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

While estoppels may not be favored against the government; "[i]t has, however, been stated with frequency that the State may be estopped when acting in a proprietary, as distinguished from its sovereign or governmental, capacity and even, under more compelling circumstances, when acting in its governmental capacity." Hickey v. Illinois Central R.R. Co., 35 Ill.2d 427, 448 (1966). Here, the IEPA is operating in the capacity of a public insurer as a means of permitting owner/operators of underground storage tanks a means of complying with federal financial assurance mandates. 42 U.S.C. § 6991b(c)(6). The USEPA gave states various options to help UST owner/operators to achieve compliance, including liability insurance, surety bonds, guarantees, letters of credit, self-insurance, trust funds or a state fund. (40 CFR § 280.94 *et seq).* In the event a state fund is relied upon, the USEPA must be satisfied that "the state's assurance is

at least equivalent to the financial mechanisms specified in this subpart." (40 CFR § 280.101(a)) In summary, the IEPA is operating in a proprietary capacity as a liability insurer, and additional compelling reasons exist to apply traditional rules of estoppel as the financial assurance provided by the LUST Fund should not be less protective than that offered by liability insurance.

In cases involving liability insurance, it has been said that "estoppel does not focus on the conduct or the intent of the insurer, but on the effect of its conduct on the insured.:" National Tea Co. v. Commerce & Industry Ins. Co., 119 Ill. App. 3d 195, 205 (1st Dist. 1983)

> **"Estoppel refers to an abatement, raised by law, of rights and privileges of the insurer where it would be inequitable to permit their assertion; such relinquishment need not be voluntary, intended or desired by the insurer, but it necessarily requires some prejudicial reliance of the insured upon some act, conduct or non-action of the insurer."**

Id.

The Statement of Facts identifies several instances of detrimental reliance on the actions and decisions of the IEPA.

First, the Estate elected to become a new owner in reliance upon the OSFM's eligibility and deductibility determination. See Hickey, 35 Ill. 2d at 449 (equitable estoppel applied where a variety of agents representing different governmental entities made affirmative representations). The Agency approved the election to proceed as the new owner, expressly confirming that the OSFM was the proper body to determine the applicable deductible. (Rec. No. 14) The Agency directs those considering such an election to seek out the deductible amount from the OSFM, (Hrg. Trans. at p. 87), but the Agency has taken no steps to share its own determinations under the repealed program with OSFM. (Hrg. Trans. at p. 60)

Second, the Estate conducted the Stage 1 Site Investigation with the pre-approval of the

Agency, expending $29,239.08 in the process. It is important to recognize that while the Stage 1 Site Investigation was not specifically at issue in the decision letter that is appealed herein, the implication of the subject decision letter is to reconsider that decision and require repayment of the amounts reimbursed as an excess payment. (Rec. P109-P110) According to the Manager of the LUST Section, a conscious decision was made not to completely review payment applications in order to clear a backlog. (Hrg. Trans. at pp. 76-77) However, since the Agency does not feel bound by its decision to pay the Stage 1 Site Investigation claim, they did not clear up a backlog, but engaged in a waiting-in-the-weeds approach, where they will without notice seek their payments back if they change their mind.

Next, the Estate conducted several Stage 3 Site Investigations, in reliance on the previous approvals and communications from the Agency. Specifically, the Estate submitted four 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. The Agency approved the Report and its actual 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.

According to Agency testimony, it had a copy of an Agency $100,000 deductible letter in its file in the LUST division throughout these events. (Hrg. Trans. at pp. 54-55) As such, the Agency had actual, if not imputed, knowledge of the existence of the letter at the time it was directing the Estate to look to the OSFM for the proper deductible and approving submittals and payment with the OSFM deductible attached.

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, and that the $10,000 deductible had been accepted. It would simply be inequitable to impose a new deductible after substantial sums of money had been expended.

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, and further relied to its detriment on the Agency's approvals of the various elections, budgets and payment applications that provided no indication that the Agency had another deductible that it would apply at a time of its choosing.

VII. ALTERNATIVE, THE VOLUNTARY PAYMENT DOCTRINE ESTOPPS THE AGENCY FROM RECONSIDERING ITS VOLUNTARY PAYMENT.

During the pendency of this matter, the Agency paid substantially the amount at issue, and then sought unsuccessfully to dismiss the appeal as moot. "Under the voluntary payment doctrine, absent fraud, duress or mistake of fact, money voluntarily paid on a claim of right to the payment

cannot be recovered on the ground that the claim was illegal." Ramirez v. Smart Corp., 371 Ill. App. 3d 797, 801 (3rd Dist. 2007) While there are exceptions to the doctrine identified in Ramirez, none of them apply to this case, where the payment was part of a legal strategy.

WHEREFORE, the Petitioner prays for an order from the Board, granting judgment in its favor, ordering the Agency to approve the underlying application for payment, directing Petitioner to submit proof of its entitlement and amount of attorney's fees incurred pursuant to 415 ILCS 5/57.8(l), or for such other and further relief as the Board deems meet and just.

ESTATE OF GERALD D. SLIGHTOM,
Petitioner

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