BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE

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PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board **ILLINOIS EPA'S POST-HEARING BRIEF**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

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ILLINOIS EPA POST-HEARING BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and hereby submits its Response to the Petitioner's Post-Hearing Brief to the Illinois Pollution Control Board ("Board").

I. INTRODUCTION

This matter cannot be considered in a light other than favorable to the Illinois EPA's decision. But, to frame the matter most precisely it must be noted that the law is unequivocally clear on the issue of what deductible must be applied when two have been assessed against a site. These issues have already been extensively briefed in the numerous pleadings in this matter. Despite the Board's insistence upon requiring the parties to have a hearing on this matter, whose only purpose was to get to a point where attorney fees could be awarded, it is important to stress that **no new relevant facts** were presented at the hearing. It is clear from the record in this case and the testimony at hearing that the October 29, 2010 decision of the Illinois EPA should be upheld.

II. BURDEN OF PROOF

Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)) provides that the burden of proof shall be on a Petitioner. In reimbursement appeals, appeals that would be under Section 105.112(a), the applicant for reimbursement has the burden to demonstrate that costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

As the Board itself has noted, the primary focus of the Board must remain on the adequacy of the permit application and the information submitted by the applicant to the Illinois EPA. John Sexton Contractors Company v. Illinois EPA, PCB 88-139 (February 23, 1989), p. 5. Further, the ultimate burden of proof remains on the party initiating an appeal of an Illinois EPA final decision. John Sexton Contractors Company v. Illinois Pollution Control Board, 201 Ill. App. 3d 415, 425-426, 558 N.E.2d 1222, 1229 (1st Dist. 1990).

Thus, Estate of Slightom, as Petitioner, must demonstrate to the Board that it has satisfied this high burden before the Board can enter an order reversing or modifying the Illinois EPA's decision under review. In this matter, the Petitioner cannot meet this burden, for a number of reasons, but notably based upon the fact that the Illinois EPA **correctly** assessed the proper deductible in this matter under current law and Petitioner could present no evidence to the contrary.

III. STANDARD OF REVIEW

Section 57.8(i) of the Environmental Protection Act ("Act") grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/57.8(i)). Section 40 of the Act (415 ILCS 5/40) is the general appeal section for permits and has been used by the legislature as the basis for this type of appeal to the Board. When

reviewing an Illinois EPA decision on a submitted corrective action plan and/or budget, the Board must decide whether or not the proposals, as submitted to the Illinois EPA, demonstrate compliance with the Act and Board regulations. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

The Board will not consider new information not before the Illinois EPA prior to its determination on appeal. The Illinois EPA's final decision frames the issues on appeal. Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p.4; Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must therefore look to the documents within the Administrative Record ("Record"), along with relevant and appropriate testimony provided at the hearing held on April 10, 2014, in this matter.[1]

IV. STATEMENT OF FACTS

The facts in this case are presented within the Illinois EPA's administrative record already on file with the Board. Those facts have not changed. As a matter of 'fact,' so to speak, the characterization of events that occurred did not change following presentation of testimony at hearing. The facts in the Illinois EPA record supporting this motion are as follows:

1. On December 6, 1991, the Illinois EPA received an Application for Reimbursement from Gerald Slightom. (AR, p.1)

2. Pursuant to the December 6, 1991 submittal, the date the owner became aware of the release was August 30, 1991. (AR, p.2)

3. The December 6, 1991 submittal indicated that there were 5 tanks on site, that one was leaking, that the tank was installed in 1977, that it was removed on August 30, 1991, and that the

[1] Citations to the Administrative Record will hereinafter be made as, "AR, p. ___." Further, parts of the AR on disk will be referenced by document number. References to the transcript of the hearing will be made as, "Transcript, p. ___."

service station had ceased operation. The UST was registered with the Office of the State Fire Marshal ("OFSM") on April 18, 1990. (AR, p.2) The Notification for Underground Storage tanks showing the registration on April 18, 1990 can be found at AR, p.24.

4. On December 20, 1991, the Illinois EPA issued a decision letter that determined that the Petitioner's site was "eligible to seek reimbursement for corrective action costs, accrued on or after July 28, 1989, in excess of $100,000.00." The letter went on to state that "A $100,000.00 deductible applies to sites where the owner or operator had registered none of the underground storage tanks located at the site prior to July 28, 1989. (Section 22.18b(d)(3)(B)(i) of the Illinois Environmental Protection Act). The review of your Application, and or confirmation with the Illinois Office of the State Fire Marshal indicates that none of the tanks at the site were registered prior to July 28, 1989." (AR, p. 13)

5. 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 of Gerald Slightom. In that decision, the OSFM determined that the 5 tanks were "eligible to seek payment of costs in excess of $10,000. (AR, p.29)

7. On January 29, 2009, the Illinois EPA issued a decision letter based upon an application for payment from the Fund. In this letter, the Illinois EPA applied the $10,000 deductible in error based upon the February 6, 2008 OSFM determination. (AR, p.47)

8. On October 29, 2010, the Illinois EPA issued the decision letter currently under appeal. The decision letter was based upon an application for payment from the Fund dated July 14, 2010 and received on July 19, 2010. This letter stated, in part, "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. (AR, p.109)

9. The Estate filed an appeal of the Illinois EPA's October 29, 2010 decision on December 6, 2010 and amended its Petition on January 12, 2011.

10. A hearing was held on April 10, 2014.

V. ISSUE

It is clear that the Illinois EPA's final decision must frame the issues on appeal. Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p. 4; Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). The issue presented is 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? Based upon the express language of this Section and the facts presented, the answer is YES.

VI. ARGUMENT

- **Which Deductible?**

Pursuant to Section 415 ILCS 5/57.9(b), one deductible of $10,000 applies to the Underground Storage Tank Fund costs, except in three situations. When no tanks are registered prior to July 28, 1989, such tanks have a deductible of $100,000. (*See*: 415 ILCS 5/57.9(b)(1)). If any underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release prior to that date, a deductible of $50,000 is assessed. (*See*: 415 ILCS 5/57(b)(2)) When one or more, but not all, of the underground storage tanks were

registered prior to July 28, 1989, and the State received notice of the confirmed release on or after that date, a deductible of $15,000 applies.

In this matter, all tanks (and the only release identified at this site in 1991 was the Used Oil tank) had been assigned a deductible of $100,000, under the December 6, 1991 Application. Since "none" of the 5 underground storage tanks identified were registered prior to July 28, 1989, the deductible in Subsection (b)(1) applied. The January 24, 2008 application appears to correctly state the facts in this case, however, the OSFM, through error, issued a deductible determination of $10,000. See Testimony of Brian Bauer, Transcript p. 60 to 61. In this case, the $100,000 remains applicable for a number of reasons.

Initially, Section (b)(1) is specific in noting that if none of tanks were registered prior to July 28, 1989, whether there was a confirmed release or not[2], a deductible of $100,000 applies. All tanks within December 6, 1991 Application were not registered prior to that date for this deductible to apply. (See A.R. p. 15) At hearing the Petitioner made a laughable suggestion that because one of the tanks was a heating oil tank that then all of the tanks were exempt from the statute that would apply the $100,000 deductible. This is simply not the case. If the constituents of concern were heating oil related, and if only the heating oil tank had a release, then the heating oil tank would be considered. However, that is not the case here where the tank that had the release was a Used Oil tank. (See A.R. p. 15) (It is interesting to note, that the January 4, 2008 application stated that all of the tanks, which were removed in 1991, had had a release while the contemporary filing stated that just the Used Oil tank had released product.) It seemed

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It is important to note that the General Assembly drafted Subsection (b) (1) without use of the phrase "... and the State received notice of the confirmed release prior to (*on or after*) July 28, 1989." This would suggest that, unlike Subsections (b) (2) and (3), for purposes of Subsection (b) (1) it is not important when the release occurs if there were no registered tanks prior to ("before") the date of July 28, 1989. As such, in this matter, the date of the release may be irrelevant to this review.

throughout the hearing that the Petitioner made one specious argument after another in order to see if any of them would stick.

However muddied the Petitioner tries to make the issues in this case, one fact remains. Two legally binding deductibles were assessed to this site. Thus, the question becomes, if two different deductible determinations were issued under the same set of facts, which deductible applies? Clearly, pursuant to Board regulations, the higher deductible applies. Again, Subsection (b) of the Act states that the deductible for a release is $10,000, unless you have tanks on-site prior to the date of July 28, 1989. Regarding the date of July 28, 1989, you can either have: (1) no tanks registered prior to that date, (2) any tanks registered prior to that date, or (3) a tank or more, but not all, registered prior to that date.

The Board has specifically spoken on this very issue and could not have spoken more expressly and clearer on the outcome of multiple deductible determinations. Section 732.603(b)(4) of the Board's regulations states:

> ***"Where more than one deductible determination is made, the higher deductible shall apply."***

When acting on the submittal of the December 6, 1991 Application, the Illinois EPA, whose duty included eligibility determinations at that time, made a deductible determination of $100,000. (AR, p.13) Again, this provision applies when no tanks on-site had been registered prior to a date certain. Section 57.9 of the Act states as follows:

> ***"A deductible of $100,000 shall apply when <u>none</u> of the underground storage tanks were registered <u>prior to</u> July 28, 1989, except in the case of underground storage tanks used exclusively to store heating oil for consumptive use on the premises where stored and which serve other than***

farms or residential units, a deductible of $100,000 shall apply when none of these tanks were registered prior to July 1, 1992." (Emphasis added)

Following the December 6, 1991 Application, which found the above provision applicable, the Estate sought yet another eligibility and deductibility determination from OSFM. (AR, p.29) Even assuming that the February 6, 2008 OSFM decision of a second lower deductible determination is correct (which the Illinois EPA does not concede), it is a binding decision. Section 732.603(b)(4) of the regulations would control the outcome of the Illinois EPA'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.

It is undisputed that two deductibles have been issued for this site. One was issued by the Illinois EPA when it had the authority to issue said deductibles. The deductibles issued by the Illinois EPA did not vanish once the Office of State Fire Marshal started to administer the deductible program. Those deductibles remained in effect. There is no question that the Illinois EPA had the authority to issue the deductible under the law at the time it was issued. Nothing in Illinois law and certainly no legal precedent pointed out by the Petitioner, nullified the legal authority of these deductibles. Merely because the Illinois EPA's authority to issue deductibles was given to another state agency, does not mean that the deductibles issued properly under Illinois law are invalid. Under the above case law, final decisions of the Illinois EPA cannot be altered outside of the permit appeal process. In order to nullify a final decision of an agency an explicit provision in the law would have to be provided. No such provision exists. The final decisions of the Illinois EPA, issued when it had the authority to issue deductibility determinations, are valid. See, Fiatallis North American v. IEPA, PCB 93-108, (October 21, 1993) for discussion on finality of agency decisions. The law in question at the time of the decision was Title XVI of the Act and Part 734 of the Board's regulations.

It is clear from the law currently in effect that where two deductibles are issued for a site that the highest deductible shall be applied. That is what happened in this case and the Illinois EPA correctly followed the law and applied the higher deductible.

- **Hearing Testimony and Petitioner's Brief**

The Illinois EPA disputes the characterization that the Petitioner asserts on Page 9 of its brief. The Petitioner states that Brian Bauer contacted OSFM to challenge their decision to make the $10,000 deductible. However that is not true and not reflective of the testimony. Mr. Bauer called them to verify the deductible the Illinois EPA issued. After discussion with OSFM it was determined by OSFM that their deductible decision was in error. (Transcript p. 61 to 62)

On page 4 of its brief, Petitioner notes that it "elected to proceed" after receiving the OSFM deductible determination. It is important to point out that it was not necessary for the Petitioner to "elect to proceed" once it received the OSFM determination. On February 6, 2008 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. OSFM would have asked for the election prior to issuing its deductibility determination if it determined that the person asking for such determination was not the owner or operator of the site. By issuing the deductibility determination, OSFM determined, as did the IEPA, that the Estate was the same entity as the decedent, thus making the election to proceed superfluous. The election to proceed as owner was never needed as OSFM had already determined that the Estate of Gerald Slightom was the owner without the election. If the OSFM thought the Estate was a new owner (because the USTs were removed) they would have rejected the eligibility determination and required the election to proceed response letter from the Illinois EPA. It is very clear that both OSFM and

Illinois EPA do not consider the decedent and the estate as two separate parties nor is the estate a new owner under the Act.

On page 10 of its brief, the Petitioner argues that it would not have begun remediation if the deductible was higher than $15,000. Regardless of the claims of the Petitioner, it, as the estate, is responsible under Illinois law to remediate this site. Whether it can gain access to the fund is irrelevant. It has a legal obligation to remediate.

On page 12 of the Petitioner's brief, the Illinois EPA is perplexed by the statement that the Illinois EPA's deductibility determination was "purportedly" made. We surely hope that the Petitioner is not implying that the Illinois EPA constructed such a determination after the fact. This statement should be struck.

The first portion of the Petitioner's argument is that a valid determination of the Illinois EPA is invalid because the Office of State Fire Marshal now determines deductibles. If a decision of a state agency is made under its statutory authority, it is valid. Of course any deductible decisions made by the Illinois EPA after the OSFM was given its authority would be invalid, but those made prior to that time remain in force and effect. Further, Board rules address and refer to Illinois EPA eligibility determinations numerous times. See Section 734.605(b)(3) that states that a complete application for payment includes a copy of the OSFM or Agency eligibility and deductibility determination. Eligibility determinations made by the Illinois EPA were upheld in Mick's Garage v. Illinois EPA, PCB 03-126 (December 18, 2003).

It is not the Illinois EPA's fault that the party responsible for this site did not remediate this site in a timely manner. They should not benefit because of their neglect and due to an error made by OSFM while many others with tanks from that time frame followed the law and were good citizens who remediated the messes they were responsible for.

The next argument of the Petitioner is that by looking at the Petitioner's file, the Illinois EPA went beyond the scope of its review. This is also ludicrous. The Illinois EPA must look at prior submittals to make sure that a fraud is not being perpetuated upon the state. This is especially necessary when claims are made, that may be duplicative or otherwise invalid. The deductible was in the Fiscal File of the Illinois EPA and is something that is routinely looked at when processing claims. It is not something submitted by a third party or outside of the Illinois EPA records, which is the purpose for the Wells letter. In the Well's case, the Illinois EPA went outside of the Illinois EPA and did independent research into the permit being issued. In this case all documents were in the file and available for review. This argument must fail.

The third argument that the Petitioner offers is that by denying the claim due to the deductible issue, the Illinois EPA was in fact re-reviewing its budget decisions. Each application rests on its own laurels. I am pleased to see that the Petitioner argued this in the alternative, because it appears that he is arguing on the one hand that the Illinois EPA can only look at what is submitted to it in its Wells argument, and then turns around to argue that it has to look at all past budget decisions when making a determination for reimbursement. As the Board well knows, any time that a party submits an application, a full review is necessary. Checking that a mandatory requirement is present in budget submittal is entirely different when an application for reimbursement is submitted. At that time a more thorough review is performed before the payment of funds is authorized. This was indicated in the testimony of Hernando Albarracin. (Transcript p. 84). Also, the Illinois EPA is not required to perpetuate a mistake once it finds out that one is made. It is also able to recover any funds paid improperly from the fund. It would be horrible if a mistaken payment of taxpayer's funds could not be recovered, as the Petitioner argument would suggest. As the Petitioner well knows, the Evergreen FS case it cites to was a

case regarding apportionment. In that case, the Board held that apportionment should be done at the budget stage and not at the reimbursement stage. Apportionment is entirely different than checking on the deductible to be assessed when determining reimbursement. Expanding Evergreen to the extent that the Petitioner suggest could result in error and fraud upon the fund.

Petitioner's fourth argument is that the highest deductible rule does not apply. In this argument the Petitioner bases this argument on the contention that the estate and the decedent are two separate owners/operators. As stated above, by issuing the deductibility determination, OSFM determined, as did the IEPA, that the Estate was the same entity as the decedent, thus making the election to proceed superfluous. The election to proceed as owner was never needed as OSFM had already determined that the Estate of Gerald Slightom was the owner without the election. If the OSFM thought the Estate was a new owner (because the USTs were removed) they would have rejected the eligibility determination and required the election to proceed response letter from the Illinois EPA. It is very clear that both OSFM and Illinois EPA do not consider the decedent and the estate as two separate parties nor is the estate a new owner under the Act. The estate should not be placed in a better place than the decedent. There is one deductible per site. There is one site here and one release on that site. The original deductible issued at the time of the release is the deductible that applies. Just because the decedent was not a good citizen and didn't remediate the site in his lifetime, the estate is not allowed to claim that it should now be allowed to have a different deductible than the one originally issued to the site. Regardless of who owns the site, even if an independent third party were to purchase the property, the original deductible would apply. In this case, however, we do not have a new owner, we have a continuation of the owner after his death. There is no third party "Good Samaritan" here. There is an estate of a decedent that is continuing on with the property in an

attempt to better its inheritance. In Zervos, a third party bought the property and assumed liability for the site. The issue in Zervos, was whether that party was required to elect to proceed prior to commencing work at the site. Here, there was not requirement to elect to proceed. The estate became the owner of the property upon the death of the decedent. The estate is not a new owner, just a continuation of the current owner. The higher deductible rule is clearly set forth and there is no need to look at legislative history when a rule or statute is clear on its face. You can get no clearer than the wording of the Board in stating ***"where more than one deductible determination is made, the higher deductible shall apply."*** There is nothing ambiguous about this statement. As stated above, the Illinois EPA is not limited to applying only the deductible determination made by the OSFM. Several portions of the regulations state that either a deductible issued by OSFM or the Illinois EPA should be considered and attached to submittals. Admittedly, there are few Illinois EPA determinations left that are applicable. Most of the older sites have been remediated and most of the sites Illinois EPA deals with are new sites with OSFM determinations. However, as in this case, a few of the older sites have not been remediated due to behavior by their owners and operators that were responsible for the release. Petitioner is the party originally responsible for the release.

- **Estoppel**

The Petitioner has argued estoppel during all stages of this appeal. The copy of the Petitioner's brief that was served upon the Illinois EPA takes this argument to new heights especially since it appears to be written in an alien language, perhaps Klingon. Luckily the copy filed with the Board did not have this translation problem. All levity aside, the Petitioner has argued that estoppel applies in this situation because the Illinois EPA previously applied the incorrect deductible. However, the Board has recognized that the Illinois EPA's prior actions, if

in error, are properly remedied by correcting the error, not perpetuating it. State Bank of Whittington v. Illinois EPA, PCB 92-152 (June 3, 1993); Chemrex, Inc. v. Illinois EPA, PCB 92-123 (February 4, 1993).

Under the doctrine of equitable estoppel, an obligation may not be enforced against a party that reasonably and detrimentally relied on the words or conduct of the party seeking to enforce the obligation. See Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 431, 665 N.E.2d 795, 806 (1996). However, the doctrine "should not be invoked against a public body except under compelling circumstances, where such invocation would not defeat the operation of public policy." Gorgees v. Daley, 256 Ill. App. 3d 143, 147, 628 N.E.2d 721, 725 (1st Dist. 1993). As the Illinois Supreme Court has explained, "[t]his court's reluctance to apply the doctrine of estoppel against the State has been motivated by the concern that doing so 'may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials.'" Brown's Furniture, 171 Ill. 2d at 431-432, 665 N.E.2d at 806 (quoting Hickey v. Illinois Central R.R. Co., 35 Ill. 2d 427, 447-448, 220 N.E.2d 415, 426 (1966); see also Tri-County Landfill Co. v. Illinois Pollution Control Board, 41 Ill. App. 3d 249, 353 N.E.2d 316 (2d Dist. 1976) (refusing to estop the Agency from enforcing the Act against various landfills that it had previously approved on the grounds that to do so would violate public policy).

Consistent with this reluctance, the courts have established several hurdles for those seeking to estop the government. Like all parties seeking to rely on estoppel, those seeking to estop the government must demonstrate that their reliance was reasonable and that they incurred some detriment as a result of the reliance. A party seeking to estop the government also must show that the government made a misrepresentation with knowledge that the

misrepresentation was untrue. See Medical Disposal Services, Inc. v. Illinois Environmental Protection Agency, 286 Ill. App. 3d 562, 677 N.E.2d 428 (1st Dist. 1997). Finally, before estopping the government, the courts require that the governmental body must have taken some affirmative act; the unauthorized or mistaken act of a ministerial officer will not estop the government. "Generally, a public body cannot be estopped by an act of its agent beyond the authority expressly conferred upon that official, or made in derogation of a statutory provision." Gorgees, 256 Ill. App. 3d at 147, 628 N.E.2d at 725; see also Brown's Furniture, 171 Ill. 2d at 431, 665 N.E.2d at 806 ("The State is not estopped by the mistakes made or misinformation given by the Department's [[of Revenue] employees with respect to tax liabilities."). See, Panhandle Eastern Pipeline Company v. IEPA, PCB 98-102 (January, 21, 1999).

Here an administrative error was made that resulted in the application of the improper deductible by the Illinois EPA. Contrary to the Petitioner's claim, the Illinois EPA did not "wait in the weeds" to strike like a viper. Such characterizations should be struck from the brief. Just because an error was made does not mean that the Illinois EPA is required to continue to make that error ad infinitum. An administrative agency can correct its mistakes. In this case, the $100,000 deductible was overlooked until the entire file was reviewed. Once the $100,000 deductible was found, the Illinois EPA was within its authority as administrator of the Fund to apply the correct deductible and to recoup payment made in error when applying the $10,000 deductible. The case law clearly supports the Illinois EPA's position that it is entitled to correct a mistake without estoppel being attached.

The Petitioner's argument of estoppel applying in this case has merit, only in the fact that, if anyone is estopped in this case, it is the Petitioner. Once a determination is made for the eligibility of the tanks, the determination follows the release and the incident. A determination

was made for Lust Incident Number 912456, the only release relative to this action and the Illinois EPA applied a $100,000 deductible. That decision was not challenged and thus is legally binding therefore the Petitioner is estopped from arguing that the deductible is not properly applied in this situation. The Petitioner mentions all of the times that it supposedly relied upon the action by OSFM. However, if the Petitioner had done its due diligence, knowing the age of the release, and had FOIA'd the Illinois EPA file it would have found the original determination. The fact that it didn't indicates one of two things – either malfeasance on behalf of the consultant, or knowledge of the prior deductible and a hope to claim ignorance if the original deductible were applied. The consultant claimed 18 years of experience with the LUST program and therefore should have known to check for a prior deductible determination made by the Illinois EPA during that timeframe. It is not a secret within the program that the Illinois EPA was once responsible for that task.

Again, no new release was reported or identified at the site. The $100,000 deductible follows the incident number, no matter how many owners elect or do not elect to proceed. 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. In short, Petitioner, or in this case the estate of Petitioner does not get a second bite of the apple. From a standpoint of equity, Petitioner's estate cannot establish any facts that would suggest that it somehow should be allowed to sit in a better position than the decedent did when alive. No new facts are present. No new incident exists. In a legal sense, regarding the principles of estoppel, it is the Petitioner itself whom must be estopped from claiming that it should now have the lower deductible apply.

Finally the last argument that the Petitioner proffers should be struck. The issue of Illinois EPA's payment is under appeal in a separate case. The Illinois EPA attempted to amicably

end the matter and forgo the additional attorney fees that have now been forced to be incurred by the Board in its insistence to have an unnecessary hearing in this case. The hearing bore no new evidence and went forth for the sole purpose to allow the Petitioner to apply for attorney's fees if they prevail in the case. The Board held that the Illinois EPA didn't have the ability to just give up and therefore the issue of a voluntary payment is moot and should not be considered in this case.

VII. CONCLUSION

For all the reasons and arguments included herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's October 29, 2010 final decision. The Petitioner has not met even its *prima facie* burden of proof, and certainly has not met its ultimate burden of proof. The Board has, through its regulations, promulgated a bright line test as to what deductible applies this situation. This is not the case to dim that bright line. For the reasons set forth in this brief, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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Dated: May 27, 2014

This filing submitted on recycled paper.

ATTACHMENT A

Relevant Law

A. ENVIRONMENTAL PROTECTION ACT:

415 ILCS 5/57.9. Underground Storage Tank Fund; eligibility and deductibility, states, in part, as follows:

(a) The Underground Storage Tank Fund shall be accessible by owners and operators who have a confirmed release from an underground storage tank or related tank system of a substance listed in this Section. The owner or operator is eligible to access the Underground Storage Tank Fund if the eligibility requirements of this Title are satisfied and:

(1) Neither the owner nor the operator is the United States Government.

(2) The tank does not contain fuel which is exempt from the Motor Fuel Tax Law.

(3) The costs were incurred as a result of a confirmed release of any of the following substances:

(A) "Fuel", as defined in Section 1.19 of the Motor Fuel Tax Law.

(B) Aviation fuel.

(C) Heating oil.

(D) Kerosene.

(E) Used oil which has been refined from crude oil used in a motor vehicle, as defined in Section 1.3 of the Motor Fuel Tax Law.

(4) The owner or operator registered the tank and paid all fees in accordance with the statutory and regulatory requirements of the Gasoline Storage Act.

(5) The owner or operator notified the Illinois Emergency Management Agency of a confirmed release, the costs were incurred after the notification and the costs were a result of a release of a substance listed in this Section. Costs of corrective action or indemnification incurred before providing that notification shall not be eligible for payment.

(6) The costs have not already been paid to the owner or operator under a private insurance policy, other written agreement, or court order.

(7) The costs were associated with "corrective action" of this Act.

If the underground storage tank which experienced a release of a substance listed in this Section was installed after July 28, 1989, the owner or operator is eligible to access the Underground Storage Tank Fund if it is demonstrated to the Office of the State Fire Marshal the tank was installed and operated in accordance with Office of the State Fire Marshal regulatory requirements. Office of the State Fire Marshal certification is prima facie evidence the tank was installed pursuant to the Office of the State Fire Marshal regulatory requirements.

(b) ***An owner or operator may access the Underground Storage Tank Fund for costs associated with an Agency approved plan and the Agency shall approve the payment of costs associated with corrective action after the application of a $10,000 deductible, except in the following situations:***

(1) ***A deductible of $100,000 shall apply when none of the underground storage tanks were registered prior to July 28, 1989, except in the case of underground storage tanks used exclusively to store heating oil for consumptive use on the premises where stored and which serve other than farms or residential units, a deductible of $100,000 shall apply when none of these tanks were registered prior to July 1, 1992.*** (Emphasis added)

(2) A deductible of $50,000 shall apply if any of the underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release prior to July 28, 1989.

(3) A deductible of $15,000 shall apply when one or more, but not all, of the underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release on or after July 28, 1989.

A deductible shall apply annually for each site at which costs were incurred under a claim submitted pursuant to this Title, except that if corrective action in response to an occurrence takes place over a period of more than one year, in subsequent years, no deductible shall apply for costs incurred in response to such occurrence.

(c) Eligibility and deductibility determinations shall be made by the Office of the State Fire Marshal.

(1) When an owner or operator reports a confirmed release of a regulated substance, the Office of the State Fire Marshal shall provide the owner or operator with an "Eligibility and Deductibility Determination" form. The form shall either be provided on-site or within 15 days of the Office of the State Fire Marshal receipt of notice indicating a confirmed release. The form shall request sufficient information to enable the Office of the State Fire Marshal to make a final determination as to owner or operator eligibility to access the Underground Storage Tank Fund pursuant to this Title and the appropriate deductible. The form shall be

promulgated as a rule or regulation pursuant to the Illinois Administrative Procedure Act by the Office of the State Fire Marshal. Until such form is promulgated, the Office of State Fire Marshal shall use a form which generally conforms with this Act.

(2) Within 60 days of receipt of the "Eligibility and Deductibility Determination" form, the Office of the State Fire Marshal shall issue one letter enunciating the final eligibility and deductibility determination, and such determination or failure to act within the time prescribed shall be a final decision appealable to the Illinois Pollution Control Board.

B: POLLUTION CONTROL BOARD REGULATIONS:

35 Ill. Adm. Code 732.603 Authorization for Payment; Priority List, states as follows:

a) Within 60 days after notification to an owner or operator that the application for payment or a portion thereof has been approved by the Agency or by operation of law, the Agency shall forward to the Office of the State Comptroller in accordance with subsection (d) or (e) of this Section a voucher in the amount approved. If the owner or operator has filed an appeal with the Board of the Agency's final decision on an application for payment, the Agency shall have 60 days after the final resolution of the appeal to forward to the Office of the State Comptroller a voucher in the amount ordered as a result of the appeal. Notwithstanding the time limits imposed by this Section, the Agency shall not forward vouchers to the Office of the State Comptroller until sufficient funds are available to issue payment.

b) The following rules shall apply regarding deductibles:

1) Any deductible, as determined by the OSFM or the Agency, shall be subtracted from any amount approved for payment by the Agency or by operation of law or ordered by the Board or courts;

2) Only one deductible shall apply per occurrence;

3) If multiple incident numbers are issued for a single site in the same calendar year, only one deductible shall apply for those incidents, even if the incidents relate to more than one occurrence; and

*4) **Where more than one deductible determination is made, the higher deductible shall apply.*** (Emphasis added)

c) The Agency shall instruct the Office of the State Comptroller to issue payment to the owner or operator at the address designated in accordance with Section 732.601(b)(8) or (c) of this Part. In no case shall the Agency authorize the Office of the State Comptroller to

issue payment to an agent, designee, or entity that has conducted corrective action activities for the owner or operator.

d) For owners or operators who have deferred site classification or corrective action in accordance with Section 732.306 or 732.406 of this Part, payment shall be authorized from funds encumbered pursuant to Section 732.306(a)(6) or 732.406(a)(6) of this Part upon approval of the application for payment by the Agency or by operation of law.

e) For owners or operators not electing to defer site classification or corrective action in accordance with Section 732.306 or 732.406 of this Part, the Agency shall form a priority list for payment for the issuance of vouchers pursuant to subsection (a) of this Section.

1) All such applications for payment shall be assigned a date that is the date upon which the complete application for partial or final payment was received by the Agency. This date shall determine the owner's or operator's priority for payment in accordance with subsection (e)(2) of this Section, with the earliest dates receiving the highest priority.

2) Once payment is approved by the Agency or by operation of law or ordered by the Board or courts, the application for payment shall be assigned priority in accordance with subsection (e)(1) of this Section. The assigned date shall be the only factor determining the priority for payment for those applications approved for payment.

CERTIFICATE OF SERVICE

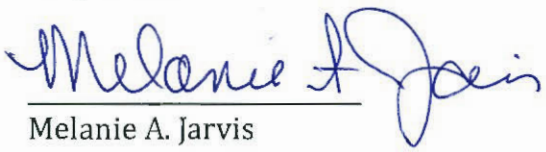
I, the undersigned attorney at law, hereby certify that on May 27, 2014, I served true and correct copies of a **ILLINOIS EPA'S POST-HEARING BRIEF** to the Board by electronic filing through the Board's COOL system and to the Petitioner and Hearing Officer by email and by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. Mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

John Therriault, Acting Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

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

Patrick Shaw
Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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