

ILLINOIS POLLUTION CONTROL BOARD
April 22, 1993

RTC INDUSTRIES, INC.)
)
 Petitioner,)
)
 v.) PCB 93-28
) (UST Fund)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by B. Forcade):

This matter is before the Board on a March 19, 1993 motion for summary judgment filed by the Illinois Environmental Protection Agency (Agency) and RTC Industries' (RTC) "Cross-Motion for Summary Judgment" filed on April 7, 1993. RTC did not file a response to the Agency's motion and the Agency did not file a response to RTC's motion. On April 15, 1993, the Agency filed a motion to strike RTC's cross motion.

The Agency claims that the RTC's cross-motion should be stricken because it was not filed twenty days prior to the April 22, 1993 hearing as required by 35 Ill. Adm. Code 101.245(a). RTC has filed a motion to reschedule the hearing, therefore the Board denies the motion to strike.

RTC filed its petition for review with the Board on February 10, 1993. The petition seeks review of the Agency's January 19, 1993 denial of eligibility for a 10,000 gallon heating oil tank. The Agency found the tank to be ineligible "because the tank is not registered and the fees are not paid." RTC claims that the tank was registered on December 18, 1989 and applicable fees paid. (Pet. at 3.) Attached to RTC's petition is a registration form which includes the 10,000 gallon heating oil tank.

The Agency contends that the only issue raised for review is the ineligibility determination for the 10,000 gallon heating oil tank. The Office of State Fire Marshall (OSFM) informed the Agency that the oil tank was exempt from registration and therefore no fee was required. (Ag. Fiscal File at 91.) The Agency argues that based on notification from OSFM that the tank was not registered, the Agency determined the tank was ineligible. The Agency notes that the Board has previously held that OSFM registration determinations are not reviewable by the Board.

RTC claims that summary judgment should be granted in favor of RTC. RTC claims that the tank was registered pursuant to 41 Ill. Adm. Code 170 in effect at the time RTC filed its

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Notification of Underground Storage Tank with the OSFM. RTC also argues that the Agency's reliance on the affidavit from OSFM was erroneous because it presents a legal conclusion which is not an appropriate subject matter for an affidavit. RTC notes that it has filed an appeal with the OSFM of its determination.

In the alternative, RTC requests the Board to stay these proceedings until the conclusion of RTC's appeal of the OSFM's determination.

The Board finds that the only issue on review is the Agency's denial of eligibility of the 10,000 gallon oil tank because the tank was not registered. To be eligible to receive money from the Underground Storage Tank Fund, the owner or operator must have registered the tank and paid all applicable fees. (415 ILCS 5/22.18b(4) (1992).)¹ Under the statutory division of authority, the OSFM is the agency with the authority to register tanks. (430 ILCS 15/4 (1992).)² In Village of Lincolnwood v. IEPA (June 4, 1992), PCB 91-83, ___ PCB ___, the Board held that it "has no authority over registration of USTs and, therefore, the issue of whether the ... USTs, could, should, or might be registered is not material to the Board's review.." Any determination of registration is made by the OSFM and is not reviewable by the Board. (Martin Oil Marketing v. IEPA (August 13, 1992), PCB 92-53.)

As the registration of the tank is presently being appealed to the OSFM, the Board denies the Agency's motion for summary judgment and RTC's cross-motion for summary judgment.

RTC has requested a stay of the proceedings until the conclusion of its appeal to the OSFM. RTC has provided a waiver of the decision deadline in this matter until October 4, 1993. The Board notes that it has previously granted stays in UST cases where the issue of the registration of tanks is being appealed to the OSFM. (See Weyerhaeuser Co. V. IEPA (September 17, 1992), PCB 92-105, Reichhold Chemical v. IEPA (December 3, 1993), PCB 92-165.) The Board also notes that in Community Consolidated School District No. 15 v. IEPA, PCB 91-75 and OK Trucking v. IEPA, PCB 92-105, the petitioners have appeals before OSFM.

The stay as requested by RTC is not for a definite period, the stay is contingent upon the OSFM reaching its decision on RTC's appeal of registration. RTC has provided no estimated time

¹ Previously codified at Ill. Rev. Stat. 1991, ch. 111½, par. 1022.18b(4).

² Previously codified at Ill. Rev. Stat. 1991, ch. 127½, par. 156.)

when OSFM may reach a decision or indicated that the OSFM's decision would occur prior to the decision deadline. The Board will not grant a stay for an indeterminate period or a contingent stay. The waiver of the decision deadline, as provided by RTC, is insufficient for the Board to stay this matter for any length of time. Therefore, the motion for stay is denied.

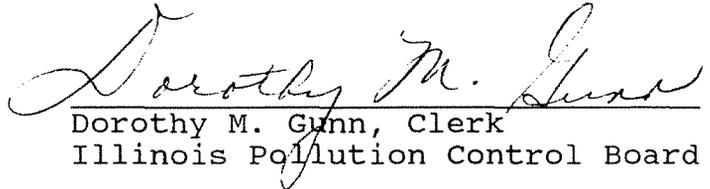
It is the responsibility of the petitioner to provide adequate waivers and proceed with the matter in a timely fashion, yet not to cancel hearings after notice has been published without substantial justification.

Failure to provide the Board with an adequate waiver or cancellation of noticed hearings may subject this matter to dismissal for want of prosecution.

The hearing officer has ordered the parties to report the status of this case to the hearing officer on June 1, 1993. The hearing officer also noted that hearing must be set on or about July 15, 1993 to meet the decision deadline. The Board notes that this schedule creates a very short time frame for the completion of hearings and may affect the filing of briefs and limit the Board's time for deliberation in this matter.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 22nd day of April, 1993, by a vote of 6-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board