

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PMA & ASSOCIATES, INC.	)	PCB No. 07-63
T-TOWN DRIVE THRU, INC.	)	No. 07-85
REED'S SERVICE	)	No. 07-108
2F, INC.	)	No. 07-76
BOB'S SERVICE CENTER, INC.	)	No. 07-82
L.W. PAUL SUPPLY CO., INC.	)	No. 07-99
RUTH OIL CO., INC.	)	No. 07-120
MAHR'S SERVICE & SALES	)	No. 07-119
GATEWAY FS, INC.	)	No. 07-126
PIONEER OIL CO.	)	No. 07-127
GALLAHER'S SHELL	)	No. 07-130
JAHRAUS OIL CO., INC.	)	No. 07-128
RUSSELL OIL CO., INC.	)	No. 07-137
WATERTOWER MARINA, INC.	)	No. 07-138
YESLEY SERVICE CO., INC.,	)	No. 07-129
Petitioners,	)	(UST Appeals)
	)	
v.	)	
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	
	)	

**RESPONSE TO PETITIONER'S MOTION TO CONSOLIDATE**

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of it attorneys, James G. Richardson, Assistant Counsel, and hereby submits to the Illinois Pollution Control Board ("Board") its Response to Petitioner's Motion to Consolidate. The Illinois EPA received Petitioner's Motion to Consolidate ("Motion") on September 13, 2007. The Illinois EPA requests that the Motion be denied.

## **I. ARGUMENT**

Petitioner seeks to consolidate 15 UST appeals for purposes of “briefing, hearing and decision on motions for summary judgment.” Motion at 3. It states that each appeal involves reimbursement denials for analysis costs lacking supporting documentation. Apparently the filing of similar appeals for two additional sites is imminent, and Petitioner indicates that the same issue is present in 41 other matters still in-house at the Illinois EPA. Motion at 5-6. Petitioner proposes that brief motions for summary judgment identifying the applicable facts of each case in the caption be filed, followed by a single brief propounding the party’s legal arguments.

Since the first appeals concerning this issue were filed, the Illinois EPA believed that this issue would ultimately have to be resolved in a ruling from the Board. When discussions with the Petitioner did not change this view, the number of UST submittals and appeals impacted by this issue increased, and no motion for summary judgment was filed by Petitioner, the Illinois EPA decided to file its own motion for summary judgment in PMA & Associates, Inc. v. Illinois EPA, PCB 07-63, as its underlying facts appeared to be concise and straightforward. Petitioner has since filed a motion for summary judgment in T-Town Drive Thru, Inc. v. Illinois EPA, PCB 07-85. The Illinois EPA agrees with the Petitioner that the same or similar legal arguments would be presented in each of the remaining cases referenced in the caption if each case had to proceed separately. Motion at 6.

Pursuant to 35 Ill. Adm. Code 101.406, factors for the Board to consider in ruling on a motion to consolidate involve whether the “consolidation is in the interest of convenient, expeditious, and complete determination of claims, and if consolidation

would not cause material prejudice to any party.” In considering consolidation issues, Illinois courts have employed the examination as follows:

Consolidation has three different applications: (1) where several actions are pending involving substantially the same subject matter, the court may stay proceedings in all but one and see whether the disposition of the one action may settle the others, thereby avoiding multiple trials on the same issue; (2) where several actions involve an inquiry into the same event in its general aspects, the actions may be tried together, but with separate docket entries, verdicts, and judgments, the consolidation being limited to a joint trial; (3) where several actions are pending that might have been brought as a single action, the cases may be merged into one action, thereby losing their individual identity, to be disposed of in one suit. *Ad-Ex, Inc. v. City of Chicago*, 247 Ill.App.3d 97, 187 Ill.Dec. 125, 617 N.E.2d 333 (1993)

Turner v. Williams, 326 Ill.App.3d 541, 547; 762 N.E.2d 70, 76 (2<sup>nd</sup> Dist. 2001)

Although some time and resource savings would result from Petitioner’s concept for proceeding in these cases, work on each individual case would still have to occur. Aside from PMA and T-Town, pleadings generated by 13 mini-motions for summary judgment would have to be filed as well as an omnibus legal memorandum. In addition, is there certainty that all of the 13 remaining appeals can be disposed of by summary judgment? What if a factual nuance exists in one or more of the 13 appeals that would make them unsuitable for summary judgment? For example, in PMA it could be discerned from PMA’s application for reimbursement that a particular laboratory subcontractor performed the chemical analyses. If the application for reimbursement in another appeal did not identify the laboratory subcontractor, the inability to determine whether the laboratory was properly accredited to perform the analyses in question could prevent payment of the analysis costs. With the information currently before the Board, it seems impossible to guarantee that Petitioner’s consolidation proposal and summary judgment will dispose of all 13 appeals.

The Illinois EPA envisioned one appeal proceeding to the Board for a ruling on the supporting documentation issue while activity on the other appeals was held in abeyance. This approach is consistent with the first application identified in Turner. Once a Board ruling was issued, the parties could assess the remaining appeals and in-house submittals to identify which ones could be resolved by agreement and which ones still required further litigation efforts. It is likely that this approach would save more time and resources than the proposal suggested by Petitioner.

## **II. CONCLUSION**

For the reasons stated herein, the Illinois EPA respectfully requests that the Board deny Petitioner's Motion. If the Board takes any action, it should consider staying the balance of the appeals until a ruling on the supporting documentation question is issued.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

/s/ James G. Richardson  
James G. Richardson  
Assistant Counsel

Dated: September 27, 2007

**CERTIFICATE OF SERVICE**

I, the undersigned attorney at law, hereby certify that on September 27, 2007 I served true and correct copies of a RESPONSE TO PETITIONER'S MOTION TO CONSOLIDATE upon the persons and by the methods as follows:

***[Electronic Filing]***

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***[1<sup>st</sup> Class U.S. Mail]***

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