

ILLINOIS POLLUTION CONTROL BOARD

October 4, 2007

WATERTOWER MARINA, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 07-138
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by T.E. Johnson):

This is an appeal of an Illinois Environmental Protection Agency (Agency) decision denying reimbursement from the Underground Storage Tank (UST) Fund. The appeal was filed by Watertower Marina, Inc. (petitioner). Petitioner applied to the Agency for reimbursement concerning petitioner’s leaking petroleum UST site located at 3112 West Lincoln Road in McHenry, McHenry County. This order does not address the merits of the appeal, but rather rules on petitioner’s motion to consolidate this appeal with 14 other pending UST Fund appeals. For the reasons below, the Board denies the motion to consolidate. In this order, the Board first sets forth the brief procedural history of this case before turning to the motion.

PROCEDURAL HISTORY

On September 14, 2007, petitioner filed a petition asking the Board to review a May 11, 2007 determination of the Agency. The Agency denied petitioner reimbursement from the UST Fund in the amount of \$1,049.19. On September 20, 2007, the Board accepted the appeal for hearing. On September 25, 2007, petitioner filed an open waiver of the Board’s decision deadline. See 415 ILCS 5/40(a)(2) (2006), 35 Ill. Adm. Code 101.308, 105.114. The Agency has not yet filed the administrative record of its determination.

On September 12, 2007, petitioner filed a motion to consolidate (Mot.) this appeal with 14 other pending UST Fund appeals. The 15 appeals are docketed and captioned as follows: PCB 07-63 PMA & Associates, Inc. v. IEPA; PCB 07-76 2F, Inc. v. IEPA; PCB 07-82 Bob’s Service Center, Inc. v. IEPA; PCB 07-85 T-Town Drive Thru, Inc. v. IEPA; PCB 07-99 L. W. Paul Supply Co., Inc. v. IEPA; PCB 07-108 Reed’s Service v. IEPA; PCB 07-119 Mahr’s Service & Sales v. IEPA; PCB 07-120 Ruth Oil Co., Inc. v. IEPA; PCB 07-126 Gateway FS, Inc. v. IEPA; PCB 07-127 Pioneer Oil Company v. IEPA; PCB 07-128 Jahraus Oil Company, Inc. v. IEPA; PCB 07-129 Yesley Service Company, Inc. v. IEPA; PCB 07-130 Gallaher’s Shell v. IEPA; PCB 07-137 Russell Oil company, Inc. v. IEPA; and PCB 07-138 Watertower Marina, Inc. v. IEPA. All 15 petitioners are represented by John T. Hundley and Mandy L. Combs of the Sharp Law Firm, P.C. On September 27, 2007, the Agency filed a response (Resp.) opposing the motion.

DISCUSSION

Petitioner's Motion to Consolidate

Petitioner seeks to consolidate 15 UST Fund appeals “for briefing, hearing and decision of motions for summary judgment.” Mot. at 7. Petitioner argues that there is an “identity of the issues for review” in the appeals. *Id.* at 4-5. Specifically, petitioner maintains that each appeal involves the Agency’s reimbursement denial of the respective petitioner’s “analysis costs” based on a lack of supporting invoices. *Id.* at 3. According to petitioner, in each appeal, the denied amounts “had been approved for analysis costs in a previously-approved budget” and are “established as reasonable” under Parts 732 and 734 of the Board’s UST regulations (35 Ill. Adm. Code 732.Subpart H, 734.Subpart H). *Id.* at 3-4. Petitioner notes also that the consultant for each petitioner has been United Science Industries, Inc. *Id.* at 6, n.2.

Petitioner emphasizes that the “essentially legal nature” of the dispute in the 15 appeals makes them appropriate for summary judgment. Mot. at 4. According to petitioner, the same issue is presented in 41 other UST Fund matters pending before the Agency, “for which the date for the Agency to issue a decision has been extended so that the Agency can apply to said matters the result which is obtained” in the 15 appeals pending before the Board. *Id.* at 5.

Petitioner asserts that “[s]eparate briefing will result in duplicative effort and filings, as the bulk of the memoranda in each appeal will be identical.” Mot. at 6. Counsel for the 15 petitioners therefore propose to file “brief motions for summary judgment” in the appeals, other than in T-Town Drive Thru, Inc. v. Illinois EPA, PCB 07-85, where that petitioner has already moved for summary judgment. *Id.* Petitioners’ counsel would “limit[] those motions to establishment of the factual showing in the particular case, and then [] file a single consolidated legal memorandum in support thereof.” *Id.* Petitioner argues that this approach “will result in a more expeditious and complete determination of the issues,” will “not prejudice any party,” and “likely will result in savings in paperwork and effort for the Agency analogous to those for Petitioners.” *Id.* at 7.

Agency's Response

The Agency opposes petitioner’s motion to consolidate. Resp. at 1. After noting that motions for summary judgment are already pending in PMA and in T-Town, the Agency states that it agrees with petitioner that “the same or similar legal arguments would be presented” in the other 13 appeals “if each case had to proceed separately.” *Id.* at 2. The Agency also acknowledges that “some time and resource savings would result from Petitioner’s concept for proceeding in these cases.” *Id.* at 3.

The Agency states, however, that with petitioner’s proposal:

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. Resp. at 3.

The Agency also questions whether there may be a “factual nuance” in some of the 13 appeals that would preclude summary judgment in those instances. *Id.* According to the Agency, 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.” *Id.*

The Agency states that it had instead “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.” Resp. at 4, citing Turner v. Williams, 326 Ill.App.3d 541, 547, 762 N.E.2d 70, 76 (2nd Dist. 2001) (“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”). The Agency explains:

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. Resp. at 4.

The Agency concludes that “[i]f the Board takes any action, it should consider staying the balance of the appeals until a ruling on the supporting documentation question is issued.” *Id.*

Board’s Analysis

Section 101.406 of the Board’s procedural rules addresses the consolidation of claims:

The Board, upon the motion of any party or upon its own motion, may consolidate two or more proceedings for the purpose of hearing or decision or both. The Board will consolidate the proceedings if consolidation is in the interest of convenient, expeditious, and complete determination of claims, and if consolidation would not cause material prejudice to any party. The Board will not consolidate proceedings where the burdens of proof vary. 35 Ill. Adm. Code 101.406.

Based on the information before the Board at this time, the Board cannot find that petitioner’s proposed consolidation satisfies Section 101.406. The 15 UST Fund appeals involve 15 different petitioners and 15 different UST sites in various counties. *See Broadus Oil v. IEPA*, PCB 04-31, PCB 05-43 (Consol.), slip op. at 9 (Dec. 21, 2006) (motion to consolidate UST appeals denied based on “different parties, different facts, and different UST sites”). In addition, as the Agency correctly points out, any number of the appeals may involve genuine issues of material fact, making the summary judgments contemplated by counsel for petitioners inappropriate. *See* 35 Ill. Adm. Code 101.516(b) (standard for summary judgment). It is the Board’s experience that such a “factual nuance” (Resp. at 3) is not uncommon in a UST Fund appeal.

Nor is it clear that granting petitioner's motion would significantly aid efficiency. Even assuming the same legal issue is presented in each case and that summary judgment could result in each one, 15 different sets of facts would still have to first be pled by the parties and then found by the Board. Such Board findings of fact would necessitate the Board's review of 15 different administrative records, all before summary judgment rulings could be reached. Moreover, the 15 appeals are not presently in the same procedural posture. Two of the appeals, PMA and T-Town, already have summary judgment motions pending. See Village of Wilmette v. IEPA, PCB 07-48, slip op. at 1 (March 15, 2007) (denying motion to consolidate UST appeals where a summary judgment motion was pending in one but not the other), *appeal docketed sub nom. Village of Wilmette v. PCB and IEPA*, No. 1-07-2439 (1st Dist.). Petitioners' counsel describe their T-Town summary judgment motion as "a more thorough motion" than what they propose for the balance of the appeals. Mot. at 6.

Under these circumstances, the Board denies petitioner's motion to consolidate. The Board appreciates, however, the parties' thoughtful considerations on how best to bring about the "convenient, expeditious, and complete determination" of the 15 pending UST Fund appeals, without causing "material prejudice to any party." 35 Ill. Adm. Code 101.406. The Board makes no finding at this time that there is an identity of issues in the 15 appeals, but notes that according to the Agency, it may be appropriate to have a "test case" proceed to a final decision on the merits. Resp. at 4. Petitioner suggests as much when it indicates that a Board decision on the 15 appeals may resolve the 41 matters with the "same issue" pending before the Agency. Mot. at 5.

Based on the representations in the pleadings, the Board encourages the parties to consider filing, singly or jointly, motions to stay 14 of the 15 pending UST Fund appeals. See 35 Ill. Adm. Code 101.514. To that end, the Board hearing officer is available to facilitate discussion among the parties. Presently, the hearing officer has set a telephonic status conference for October 29, 2007, at 10:30 a.m. in the 15 appeals. Additionally, petitioner in each appeal has already filed an open waiver of the Board's decision deadline. If the claimed identity of issues does exist among the appeals, a final Board decision in a single case would then serve as precedent for the other appeals, enhancing the prospects for their most efficient resolution.

CONCLUSION

The Board denies petitioner's motion to consolidate this UST Fund appeal with 14 other pending UST Fund appeals, each of which is identified in the procedural history of this order. In separate orders, the Board today is likewise denying nearly identical motions to consolidate brought by the respective petitioners in the other 14 appeals.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 4, 2007, by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John Therriault, Assistant Clerk
Illinois Pollution Control Board