

ILLINOIS POLLUTION CONTROL BOARD
June 2, 2011

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

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

Watertower Marina, Inc. (petitioner) filed a petition asking the Board to review a final determination of the Illinois Environmental Protection Agency (Agency). The determination concerns the petitioner's leaking underground storage tank (UST) site, which is located at 3112 West Lincoln Road in McHenry, McHenry County. The Agency has filed a motion to dismiss the appeal. For the reasons below, the Board grants the Agency's motion and dismisses this case with prejudice.

In this order, the Board first sets forth an abbreviated procedural history of the case before turning to the Agency's motion for dismissal.

PROCEDURAL HISTORY

On September 14, 2007, the petitioner filed the petition for review of the Agency's May 11, 2007 determination. On September 20, 2007, the Board accepted the appeal for hearing. On September 25, 2007, the petitioner filed an open waiver of the Board's decision deadline. Since then, the hearing officer has conducted numerous telephonic status conferences with the parties. The case has not been to hearing. On April 7, 2011, the Agency filed a motion to dismiss this appeal (Mot.). No response has been filed to the Agency's dismissal motion.

DISCUSSION

In moving to dismiss this appeal, the Agency states that United Science Industries, Inc. (USI) was the environmental consultant remediating the petitioner's facility when the petition for review was filed. Mot. at 1. According to the Agency, USI filed for Chapter 11 Bankruptcy in the United States Bankruptcy Court for the Southern District of Illinois, Case No. 09-41525, on September 15, 2009. *Id.* On September 28, 2010, the Agency continues, the bankruptcy case was converted to a Chapter 7 Bankruptcy and the next day, the trustee of the bankruptcy estate was appointed. *Id.* The Agency adds that the bankruptcy case is still pending. *Id.*

The Agency maintains that since the September 2009 bankruptcy filing with the court, the petitioner has not made any effort to either litigate or settle the appeal before the Board. Mot. at 1. The Agency argues that because “it does not appear that this situation will change,” this UST appeal cannot be resolved “by either adjudication on its merits or agreed settlement.” *Id.* The Agency concludes its dismissal motion with the following:

To ensure that parties potentially interested in USI’s involvement with this facility are not prejudiced by this Motion, the Motion is being provided to the owner/operator of the facility as identified in Illinois EPA records, the trustee of the bankruptcy estate, and counsel for Marshall and Ilsley Bank, which acquired Southwest Bank and is the secured party with interest in payments from the Illinois EPA. *Id.* at 2.

The Board notes that Section 101.500(d) of the Board’s procedural rules provides in relevant part:

Within 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion. 35 Ill. Adm. Code 101.500(d).

The Agency represents that it served the dismissal motion upon the owner/operator, the bankruptcy trustee, and the secured party with interest in payments. No response has been filed to the Agency’s motion. Accordingly, any objection to the Board granting the Agency’s motion for dismissal is waived. *See* 35 Ill. Adm. Code 101.500(d).

Under all of the circumstances described above, the Board grants the Agency’s motion to dismiss this appeal. As the time period for appealing the Agency’s final determination (415 ILCS 5/40(a)(1) (2008)) expired long ago, this dismissal is necessarily with prejudice. Through separate orders, the Board today is likewise granting uncontested and substantively identical motions to dismiss filed by the Agency in 12 other UST appeals involving USI.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board’s procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 2, 2011, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

John Therriault, Assistant Clerk
Illinois Pollution Control Board