ILLINOIS POLLUTION CONTROL BOARD
May 1, 1997

KEAN OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	PCB 97-146
v.	)	(UST - Reimbursement)
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Yi):

On March 5, 1997 Kean Oil Company (Kean Oil or petitioner) filed a petition for appeal of the January 29, 1997 Illinois Environmental Protection Agency's (Agency) final underground storage tank (UST(s)) reimbursement determination denying petitioner's reimbursement request.[1] The Agency filed a motion to dismiss on March 27, 1997. As of the date of this order no response has been filed by petitioner.[2]

In its motion to dismiss, the Agency claims that petitioner is attempting to resubmit a January 1995 reimbursement application for which a previous Agency final determination had been issued and which had been fully litigated. The Agency requests the Board to dismiss this action.

For the reasons stated below, we find that petitioner has previously submitted this application for reimbursement and it has been fully litigated. The motion to dismiss is accordingly granted.

BACKGROUND

The Agency states that on January 31, 1995 it received an application for payment from the petitioner dated January 20, 1995. (Mot. at 2.) The Agency maintains that petitioner sought payment from the Underground Storage Tank Fund (UST-Fund) of $161,356.99 for costs incurred between June 10, 1994, and January 31, 1995, at 10255 Southwest Highway located in the City of Chicago Ridge, Cook County, Illinois (Chicago Ridge facility), and

[1] The Board notes that Kean Oil states that the petition is filed pursuant to "Sections 22.18(b)(g) and 40(a)(1) of the Illinois Environmental Protection Act" (Act). (415 ILCS 5/22.18(b) and 5/40(a)(1).) However, Section 22.18(b) was repealed by P.A. 88-496 effective September 13, 1993. Sections 57 *et seq*. of the Act replaced Section 22.18(b) of the Act. (415 ILCS 5/57 *et seq*.)

[2] The Agency's motion to dismiss will be referenced to as (Mot. at .)

assigned Leaking Underground Storage Tank Incident Number (LUST Incident No.) 941290. (Id.) The Agency asserts that on September 11, 1995 it issued a final determination in response to the petitioner's January 20, 1995 application for payment. (Id.) The Agency maintains that its September 11, 1995 final determination letter: notified petitioner that, of the $161,356.99 submitted costs "incurred at LUST Incident No. 941290 between June 10, 1994 and January 31, 1995, $10,000.00 had been deducted as the applicable deductible amount; that a voucher for $77,055.70 would be prepared and submitted to the Illinois Comptroller's Office for payment as funds become available; and identifying and itemizing $74,301.29 of the submitted costs as not being reimbursed and articulating the basis for the nonpayment of those costs." (Id.)

Kean Oil and the Agency jointly reserved an appeal docket before the Board which was opened as PCB 96-88 on November 2, 1996 based on the Agency's September 11, 1995 final determination. (See Kean Oil Company v. IEPA, (November 2, 1995), PCB 96-88.) On December 20, 1995 the Board issued an Order stating, "[n]o petition has been filed. This matter is dismissed and the docket is closed as unnecessary." (Kean Oil Company v. IEPA (December 20, 1995), PCB 96-88.)

On January 19, 1996 the petitioner filed a motion for reconsideration requesting the Board to reconsider its December 20, 1995 order, which dismissed the matter and closed the docket. (Kean Oil Company v. IEPA (March 7, 1996), PCB 96-88.) On March 7, 1996 the Board denied the petitioner's motion for reconsideration and informed the petitioner that, "Section 41 of the Illinois Environmental Protection Act (415 ILCS 5/41) provides for the appeal of final Board orders within 35 days of the date of service of this order." (Id.) The petitioner did not file an appeal of the Board's March 7, 1996 order. (Id.)

As to the instant appeal, the Agency states that it received petitioner's October 3, 1996 reimbursement request on October 8, 1996. (Mot. at 4.) The Agency claims that Kean Oil's October 3, 1996 submittal is a resubmission of "that portion of its January 20, 1995 application seeking reimbursement for those costs that the Illinois EPA previously denied in its September 11, 1995 final determination." (Id.) The Agency states that the resubmitted request for payment of costs totaled $74,301.29 and represented costs incurred between June 10, 1994 and January 31, 1995 at petitioner's Chicago Ridge facility associated with LUST Incident No. 941290. (Id.) The Agency argues that the October 3, 1995 resubmitted costs were the identical costs denied by the September 11, 1995 final determination letter. (Id.) The Agency states that on January 29, 1997, it simply reissued its September 11, 1995 final determination denying payment. (Id.)

ARGUMENTS

The Agency argues that this matter should be dismissed because: 1) petitioner's petition for review is barred by *res judicata*; 2) petitioner failed to file its petition for review within the statutory appeal period; and 3) that its "correspondence" of January 29, 1997 is not a final appealable decision. (Mot. at 5-20.)

The petitioner's petition for review is barred by *res judicata*.

Citing to Torcasso v. Standard Outdoor Sales, Inc., 193 Ill. Dec. 192, 626 N.E.2d 225 (1993) and Rodney B. Nelson, M.D. v. Kane County Board et al. (May 18, 1995), PCB 95-56, the Agency explains that pursuant to the "doctrine of *res judicata*, a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and the claim, demand, or cause of action." (Mot. at 14.) The Agency explains further that *res judicata* "bars all matters that were actually raised or could have been raised in the prior proceeding." (Id.) The Agency states that "where there is identity of parties, subject matter, and cause of action, *res judicata* extends not only to every matter that was actually determined in the prior suit but to every other matter that might have been raised and determined in it." (Id.) The Agency also states that *res judicata* bars a cause of action, or re-litigation of issues based on a previous determination rendered in an administrative proceeding. (Mot. at 14-15.) The Agency argues, citing to Powers v. Arachnid, Inc., 187 Ill. Dec. 407, 617 N.E.2d 864, 248 Ill. App.3d 134, (2nd Dist. 1993), that *res judicata* and collateral estoppel apply to administrative decisions that are adjudicatory, judicial, or quasi-judicial in nature. (Mot. at 15.)

The Agency states that there are three elements required in order for the doctrine of *res judicata* to apply: (1) there was an identity of parties or their privies; (2) there was an identity of cause of action; and (3) there was a final judgment on the merits rendered by a court of competent jurisdiction. (Mot. at 15.) The Agency argues that Kean Oil's petition for review of the Agency's January 29, 1997 response is "barred under the doctrine of *res judicata* based upon the Board's prior adjudication of the identical cause of action between the very same parties resulting in a final judgment upon a full adjudication of the merits in Kean Oil Company v. IEPA, (March 7, 1996) PCB 96-88." (Mot. at 15.) The Agency asserts that in the instant matter the three elements of the doctrine of *res judicata* are met. (Mot. at 15-19.)

The Agency claims that in this action and in Kean PCB 96-88 the named parties are identical and represent every party in interest. (Mot. at 16.) The Agency asserts that "[t]here are no other parties, potential or otherwise to either of these causes of action" and that petitioner has identified itself in each of the applications as the relevant owner/operator. (Id.) Thus the Agency concludes that the first element is met. (Id.)

As to the second element, the Agency maintains that "[e]xamining the facts in this matter under both of the traditional tests, employed to prove that the cause of action presently before the Board is the same for purposes of *res judicata*, as the prior action before the Board in Kean PCB 96-88, clearly demonstrates that they are identical to one another." (Id.) The Agency states that the two tests used by the courts are, the "same evidence" and "transactional" tests. (Id.) The Agency also asserts that the "same evidence" test is generally employed and that test is whether the evidence needed to sustain the second cause of action would have sustained the first. (Mot. at 16-17.) The Agency argues, that based on the evidence, these appeals are on the same decision, which denied the same costs for the exact same reasons, based upon the exact same information, and the requested relief for each party is exactly the same. (Mot. at 17.) The other test employed, the "transactional" approach,

considers whether both suits arise from the same transaction, incident or factual situation. (Id.) The Agency argues that "[e]ach were derived from the same costs incurred by the Petitioner on the exact same dates and times, arising from the same activities at LUST Incident No. 941290, and each cause of action has been brought before the Board pursuant to 415 ILCS 5/57.8(i) of the Act based upon the Illinois EPA's denial of the Petitioner's request for reimbursement thereof." (Id.) The Agency states that the cause of action here is identical to that before the Board in Kean, PCB 96-88, as its basis for denial were or could have been included and challenged in the original matter, and as the relief requested and available in each action to the petitioner as well as the Agency is identical. (Id.)

The Agency states that the third element has been met by the Board's December 20, 1995 order Kean Oil Company v. IEPA, PCB 96-88 which dismissed the matter and closed the docket because of petitioner's failure to file within the statutory appeal period a petition for review. (Mot. at 17-18.) The Agency asserts that "[w]here the time for the appeal of an Illinois EPA final determination has expired a dismissal must be with prejudice because under Section 40 of the Act any subsequent petition would be time barred." (Mot. at 18.) Citing to People v. Chicago & Illinois Midland Ry, Co., 196 Ill. Dec. 369, at 371, 629 N.E.2d 1213, (5th Dist. 1994), the Agency recites that "[i]n Illinois an order dismissing a suit with prejudice is considered a final judgment on the merits for purposes of applying res judicata." (Mot. at 18.)

The Agency states that petitioners had a full and fair opportunity to address all of the same issues before the Board that it now seeks to address by attempting to cure its failure to exercise that right in the previous proceeding. (Mot. at 19.) The Agency asserts that to allow the reinstatement of time-barred actions will place the Agency and the Board and any further reviewing body in the position of a revolving door which places no restrictions on its users. (Id.)

Petitioner failed to file its petition for review within the statutory appeal period.

Citing to Section 40(a)(1) of the Act the Agency also argues that petitioner failed to petition for review within the statutory appeal period. The Agency states that "the petitioner did not file a petition for review of the Board's dismissal and closing of its docket, nor did the Petitioner file a new application for payment with the Illinois EPA." (Mot. at 12.) The Agency states that petitioner instead resubmitted the portion of its January 20, 1995 application for payment of the identical costs that were denied by the Agency in its September 11, 1995 final determination. (Mot. at 13.) The Agency claims that the submission "provided no new or additional information addressing any of the Illinois EPA's previous denial points."[3] (Id.) The Agency argues that "the Board must find that this did not constitute a new application, but rather, constituted only a re-submission of a portion of a previous application for payment that

[3] The Agency included an affidavit of Mr. Davidson, the Agency employee who reviewed both of Kean Oil's applications, which stated that Kean Oil provided no new or additional documentation or any other information or evidence which addressed the denial points identified by the Agency's September 11, 1995 final determination.

had previously been denied" and that "[p]etitioner's resubmittal constitutes nothing more than asking the Illinois EPA to reconsider its previous denial, a request that both the Appellate Court and the Board have repeatedly reminded the Illinois EPA that it is powerless to grant." (Mot. at 13-14.) The Agency concludes that "any decision or response by the Illinois EPA cannot constitute an appealable final determination." (Id.)

The Agency's January 29, 1997 correspondence is not appealable.

The Agency in its motion to dismiss cites to several cases and discusses the law concerning the difference between a court and an administrative agency, and the case law surrounding the law which establishes the prohibition against the Agency reconsidering its final determinations. (Mot. at 5-7.)

The Agency compares the instant matter to a similar matter in O'Brien Tire and Battery Service v. IEPA (January 9, 1992), PCB 91-212. (Mot. at 7.) In O'Brien, the Agency states that "the applicant sought reimbursement from the UST Fund and received a final decision from the Illinois EPA which determined that some of the applicant's request constituted reimbursable costs, but the remainder was not reimbursable." (Mot. at 7.) The Agency claims that, as here, the applicant in O'Brien failed to file a timely petition of the Agency's final determination denying a portion of the costs requested to be reimbursed and after the 35 day appeal period had run, the applicant contacted the Agency challenging the basis for its denial. (Mot. at 7.) The Agency maintains that it responded in writing and O'Brien sought Board review. (Id.) The Agency claims that the Board likened the attempt by the petitioner in O'Brien, that as a request for the Agency to reconsider its decision. (Id.) The Agency maintains that the Board in O'Brien stated that the only option of the applicant for reimbursement are to start over with a new application to the Agency or to petition the Board for review. (Id.) The Agency argues that "[a]fter denial of an application by the Illinois EPA, a subsequent attempt by the applicant to directly raise the very same issues and relief in the very same form before the Illinois EPA amounts to nothing more than a motion for reconsideration." (Id.) The Agency claims that it has no authority to reconsider its final determination, and therefore the reimbursement applicant is not able to reinstate a final decision. (Id.) The Agency therefore concludes that Kean Oil's failure to timely petition the Board for review resulted in Kean Oil attempting the activity cautioned against and prohibited by the Board in O'Brien, the resubmitting of the same reimbursement request. (Id.)

The Agency argues that "[s]ubsequent to the Illinois EPA's September 11, 1995 final determination the Petitioner did not file a petition for review with the Board" and "the Petitioner also failed to file a 'new' application for payment with the Illinois EPA." (Mot. at 8.) The Agency claims that petitioner instead "resubmitted that portion of its January 20, 1995 application for payment for the same costs that had been previously denied in the Illinois EPA's September 11, 1995 final decision." (Id.) The Agency maintains that Kean Oil's October 8, 1996 application contains no new or additional information addressing any of the Illinois EPA's previous denial points, and supports this claim by affidavit of Mr. Davidson the Agency employee reviewing Kean Oil's application. (Id.) The Agency argues that petitioner's "resubmission of the costs previously submitted for reimbursement and denied does not

constitute a new application, but rather constitutes an attempt to require the Illinois EPA to alter or reconsider its September 11, 1995 final decision, and is tantamount to an attempt to re-confer subject-matter jurisdiction upon the Board after failing to file a timely petition for review of the Illinois EPA's September 11, 1995 final decision denying the reimbursement of these very same costs." (Id.) The Agency maintains that petitioner's petition for review does not provide any authority that would allow the Agency to reconsider September 11, 1995 final decision denying the reimbursement for those costs. (Mot. at 9.)

The Agency states that its response to petitioner's October 8, 1996 application for reimbursement "was necessary pursuant to the statutory requirement of Section 57.8(a)(1) of the Act (415 ILCS 57.8(a)(1)) that provides, in pertinent part, that, '[i]f the Agency fails to approve the payment application within 120 days, such application shall be deemed approved by operation of law and the Agency shall proceed to reimburse the owner or operator the amount requested in the payment application.'" (Id.) Citing to TNT Holland Motor Express, Inc., v. Office of the State Fire Marshall, (May 18, 1995) PCB 94-133, the Agency claims that Section 57.8(a)(1) of the Act requires it "to respond to any application for payment from the UST-Fund, whether or not it has been previously submitted and denied, or risk the potential consequences of being required to reimburse such requests by operation of law in the event of mistake or error." (Id.)

The Agency states that regardless of whether it issued the January 29, 1997 response to the petitioner's application, it argues that "any decision by an Agency which lacks the statutory power to enter the decision is treated the same as a decision by an agency which lacks personal or subject matter jurisdiction -- the decision are (sic) void." (Mot. at 9-10.) Citing to O'Brien Tire and Battery Service v. IEPA (January 9, 1992), PCB 91-212; Reichhold Chemicals, Inc. v. Pollution Control Board, (1990), 204 Ill. App. 3d 674, 149 Ill. Dec. 647, 561 N.E.2d 1343; and Wallace v. Human Rights Commission, 261 Ill. App. 3d 564, 633 N.E.2d 851, 854 (1st Dist. 1994), the Agency argues that "[u]nlike the Board, the Illinois EPA may not alter or reconsider its final determination regarding applications for payment from the UST-Fund nor may it re-confer jurisdiction upon the Board or the Appellate Courts where no petition for review of an appealable final determination was filed by simply issuing a subsequent determination with the same findings." (Mot. at 10.)

Finally, the Agency raises policy arguments to support why the Board should not allow Kean Oil to resubmit the same reimbursement application. (Mot. at 10.) First, the Agency asserts that if the Board were "to somehow find that the Illinois EPA's January 29, 1997 letter is a final appealable decision, it would be allowing for the subversion of the appeal process described in Section 40 of the Act." (Id.) Additionally, the Agency claims that "[i]f a petitioner is allowed to resubmit a previously reviewed application (or such part of it that was previously denied) without adding new or modified information, presenting new supporting evidence or providing new or expanded supporting explanations, the Illinois EPA's requirement to act upon all applications would pose a substantial dilemma if reissuing the Illinois EPA's prior determination results in an appealable decision." (Mot. at 11.)

To conclude, the Agency states that "[b]ased on the foregoing discussion of the applicable law and the facts of this case, the Board may appropriately dismiss the instant appeal on any one of a number of alternative legal theories." (Mot. at 20.) The Agency states that the Board could "determine that its December 20, 1995 Order dismissing and closing the previous docket -- together with its March 7, 1996 Order denying Petitioner's January 19, 1996 motion to reconsider that order -- rendered a final determination on the merits of the case as to all of those issues that *could have been* raised by the Petitioner had it elected to perfect a timely appeal." (Id.) The Agency states that alternatively the Board could "determine, based upon the facts of this case, that the instant appeal represents nothing more than an effort by Petitioner to reinstate before the Board an appeal that should have been perfected by Petitioner on or before December 11, 1995 -- but was not -- and thus is time-barred by reason of the limitations set forth in Section 40 of the Act." (Id.) Finally, the Agency states that the Board could determine that Kean Oil's October 3, 1996 submittal, with no new information, evidence or explanation supplied, was nothing more than an attempt by petitioner to obtain an unauthorized reconsideration of the Agency's September 11, 1995 final decision. (Id.) The Agency requests the Board to dismiss the petition.

STANDARD OF REVIEW

The courts have stated that a motion to dismiss a pleading should be granted where the well-pleaded allegations, considered in the light most favorable to the non-movant, indicate that no set of facts could be proven upon which the petitioner would be entitled to the relief requested. (See Uptown Federal Savings & Loan Assoc. v. Kotsiopoulos (1982), 105 Ill. App. 3d 444, 434 N.E.2d 476.) The Board has stated "[a] motion to dismiss, like a motion for summary judgment, can succeed where the facts, taken in a light most favorable to the party opposing the motion, prove that the movant is entitled to dismissal as a matter of law." (BTL Specialty Resins v. Illinois Environmental Protection Agency (April 20, 1995), PCB 95-98.)

DISCUSSION

The Board grants the Agency's motion to dismiss. Kean Oil's failure to file a response has left the Board in the position of weighing the facts as presented by the Agency in light most favorable to petitioner, without petitioner challenging any of those facts. Additionally, pursuant to the Board's own procedural rules at 35 Ill. Adm. Code 101.241(b) Kean Oil is deemed to have waived objection to the grant of the Agency's motion. Nevertheless the Board will review the merits of the Agency's motion to dismiss.

The Agency argues that this matter should be dismissed on three grounds as stated previously. All of the Agency's arguments hinge on whether the Board finds that petitioner's petition for review is indeed requesting the Agency and this Board to reconsider the Agency's denial of costs associated in the amount of $74,301.29 as set forth in the Agency's September 11, 1995 final determination. Based on the review of the Agency's exhibits 1-4 contained in its motion, the affidavit of Mr. Davidson, and the filings in Kean PCB 96-88, the Board finds that petitioner has resubmitted an application for those costs which were denied by the Agency

final reimbursement decision of September 11, 1995. Having made this finding, the Board now turns to the arguments of the Agency.

The Board agrees with the Agency that this action is barred by *res judicata*. As argued by the Agency, there are three elements to *res judicata*: (1) an identity of parties or their privies; (2) an identity of cause of action; and (3) a final judgment on the merits rendered by a court of competent jurisdiction. As to the first and third elements, the Board finds that the parties are the same and that the Board's order dismissing Kean PCB 96-88 was a final judgment on the merits rendered by a court of competent jurisdiction. As to the second element of *res judicata*, applying either the "same evidence" or "transactional" test, the Board concludes that these causes of action are the same. When employing the "same evidence" test the Board finds that the same evidence would have sustained either or both of these matters. Both matters attempt to appeal the Agency's final determination concerning Kean Oil's application for reimbursement from the UST Fund for $74,301.29 for the same claimed corrective actions and for the same reasons. Reviewing under the "transactional" test, Kean Oil's application here and in Kean PCB 96-88 are the same; thus the same factual situation is involved: the request for reimbursement. Therefore, the Board finds that this matter is barred by *res judicata*.

The Board also agrees with the Agency that petitioner failed to file its petition within the statutory time period and that the Agency cannot reconsider a final determination. Kean Oil has resubmitted a portion of an application upon which the Agency had made a final determination on September 11, 1995. Kean Oil has not provided any new information with the resubmission. Pursuant to Sections 57 and 40 of the Act, Kean Oil had 35 days to appeal the Agency's September 11, 1995 determinations and it did not do so. In fact, Kean Oil and the Agency were granted an extension of time for which Kean Oil would have to file its petition and still it failed to file a petition. To allow Kean Oil to resubmit an application that the Agency had made a final determination would allow applicants who do not appeal within the statutory appeal period to circumvent the established statutory time period for appeal. Furthermore, even if Kean Oil was allowed to resubmit the same application, the Agency cannot reconsider its decision. As the court in Reichhold found, and the Board in O'Brien, the Agency is without authority to reconsider a final decision. To allow the Agency to reconsider a decision on the same application for reimbursement would be inconsistent with the plain statutory language allowing for one appeal from a final Agency decision and undermine the regulated community's ability to rely on an Agency final determination.

CONCLUSION

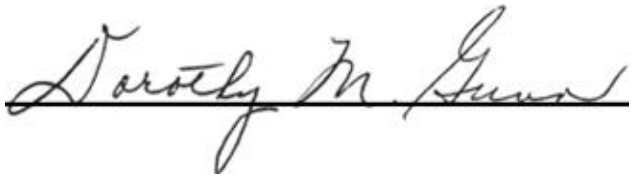
The Agency's motion to dismiss is granted and the docket is closed. While the Board is not prohibiting Kean Oil from submitting a new application to the Agency that provides additional information or evidence, this appears to be an attempt by petitioner to misuse the submittal process in order to remedy its failure to properly appeal the first decision by the Agency concerning this matter. The Board cannot allow the potential misuse of the reimbursement system and as the Agency has properly identified it does not have the authority to reconsider a final determination.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill.Adm.Code 101.246 "Motions for Reconsideration.")

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 1st day of May, 1997, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board