ILLINOIS POLLUTION CONTROL BOARD
March 21, 2002

THE LOCKFORMER COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 02-86
	)	(SRP Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by C.A. Manning):

On December 26, 2001, Lockformer Company (Lockformer) filed this appeal of an Illinois Environmental Protection Agency (Agency) decision to terminate Lockformer's Site Remediation Program (SRP) Review and Evaluation Services Agreement (Agreement). The SRP Review and Evaluation Services Agreement pertains to Lockformer's metal fabrication and manufacturing facility located in DuPage County. The Board accepted this appeal on January 10, 2002.

This matter is currently before the Board on a January 28, 2002 motion to dismiss filed by the Agency. Lockformer filed its response on February 25, 2002.[1]

For the reasons stated herein, the Board will construe the Agency's motion as a motion for summary judgment. The Board grants the motion. The Board affirms the Agency's decision to terminate Lockformer's Agreement, and the docket is closed.

BACKGROUND

This is the first appeal the Board has had from a decision made pursuant to the Board's SRP regulations. Under the SRP regulations, a remedial applicant (such as Lockformer) may appeal from a variety of Agency determinations. For example, a remedial applicant may appeal the following: (1) denial of an SRP Application or Agreement (35 Ill. Adm. Code 740.215); (2) denial of a request for modification of an Application or Agreement (35 Ill. Adm. Code 740.220); (3) termination of an Agreement (35 Ill. Adm. Code 740.230); (4) the reasonableness of Agency costs under an Agreement (35 Ill. Adm. Code 740.310); (5) denial or modification of SRP plans and reports (35 Ill. Adm. Code 740.505); (6) voidance of a No Further Remediation Letter (35 Ill. Adm. Code 740.625); and (7) denial or modification of application for final review of remediation costs (35 Ill. Adm. Code 740.715).

[1] Due to problems with service of the motion to dismiss, Lockformer did not receive a copy of the motion until February 11, 2002. Thus, the February 25, 2002 response was timely.

In this instance, Lockformer asks the Board to review the Agency's termination of its SRP Agreement pursuant to 35 Ill. Adm. Code 740.230 and Section 40(a)(1) of the Environmental Protection Act (Act) (415 ILCS 5/40(a)(1) (2000)), which mandate that appeals of Agency decisions be made to the Board.

PROCEDURAL HISTORY

Lockformer operates a metal fabrication and manufacturing facility at 711 Ogden Avenue, Lisle, DuPage County, Illinois. Pet. at 1.[2] As part of its operations, Lockformer has utilized chlorinated solvents. *Id*. In the early 1990's, Lockformer discovered contamination at the site that was allegedly the result of "the filling procedures of the supplier of the solvents." *Id*. In 1994, Lockformer's site was enrolled in the Site Remediation Program (SRP). Pet. at 2. Lockformer renewed that enrollment in 1998. *Id*.

Pursuant to SRP regulations, Lockformer is required to reimburse the Agency for all reasonable costs incurred by the Agency in overseeing Lockformer's remediation activities. *See generally* 415 ILCS 5/58.7(b)(1)(D) (2000); 35 Ill. Adm. Code 740.310; 35 Ill. Adm. Code 740.235. As detailed below, the Agency has tendered invoices for services rendered which Lockformer has not paid. The two invoices at issue total approximately $19,000.

On June 15, 2001, the Agency sent Lockformer a revised invoice (No. A41-2RR) for costs, which the Agency believed were reasonably the result of its oversight of Lockformer's remediation activities. This invoice was the second revised invoice for these particular costs issued to Lockformer by the Agency. The first invoice (No. A41-2) was issued on March 19, 2001. Rather than appeal the reasonableness of the costs contained in that invoice (No. A41-2), Lockformer entered into negotiations with the Agency in an attempt to reduce the costs. Despite the negotiations and ultimate revisions in the invoice, Lockformer still disputes the reasonableness of some of the costs and has refused to reimburse the Agency for those costs. Likewise, on August 27, 2001, the Agency sent Lockformer another invoice (No. A41-3), which Lockformer again disputes and has not paid.

In response to both invoices, Lockformer maintains that it contacted the Agency with the intention of resolving any issues with the invoice and of paying all costs determined to be reasonable. Pet. at 4-6. Lockformer did not appeal or seek an extension of the appeal period with regard to any of the above-mentioned invoices. The parties do not dispute that any applicable appeal period with regard to these 2001 invoices has expired.

On October 9, 2001, the Agency sent Lockformer a notice of intent to terminate the Agreement. Pet. at 3. On November 13, 2001, Lockformer "sent its formal objection to IEPA's notice." *Id*. On November 16, 2001, the Agency sent Lockformer a formal notice of termination of the Agreement.

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[2] Lockformer's petition is referred to as "Pet. at __." The Agency's motion to dismiss is referred to as "Mot. at __." Lockformer's response to the Agency's motion to dismiss is referred to as "Resp. at __."

The Agency's notice of termination cited two grounds as the basis for termination of the Agreement. First, the Agency alleges that Lockformer has failed to pay costs incurred by the Agency pursuant to the Agreement. Pet. at 4. Second, in reliance upon an October 4, 2001 administrative order of the United States Environmental Protection Agency (USEPA), the Agency maintains that Lockformer's remedial activities may be contrary to the terms of USEPA's order.

On December 26, 2001, Lockformer filed this appeal of the Agency's termination decision.

AGENCY'S MOTION TO DISMISS

On January 28, 2002, the Agency filed a motion to dismiss (motion) Lockformer's appeal. The Agency argues that Lockformer's appeal should be dismissed because Lockformer failed to timely appeal the reasonableness of the costs contained in Agency invoices No. A41-2RR and No. A41-3. Mot. at 2. The Agency maintains that a remedial applicant (RA), such as Lockformer, may appeal the reasonableness of any request for payment pursuant to Section 740.310(c) of the Board's SRP regulations. Section 740.310(c) provides:

> Within 35 days after the receipt of a request for payment, the RA may appeal the reasonableness of any request for payment. Appeals of any request which do not exceed, in the aggregate, the Agency's cost estimate provided under Section 740.210(c)(5) or $5,000, whichever is greater, shall be limited to the grounds that the services on which the request is based were not actually performed. Appeals to the Board shall be in the matter provided for the review of permit decisions in Section 40 of the Act. In lieu of an immediate appeal to the Board, the RA may file a joint request for a 90-day extension of the time to file an appeal in the manner provided for extensions of permit decisions in Section 40 of the Act [415 ILCS 5/40]. 35 Ill. Adm. Code 740.310(c).

The Agency argues that because Lockformer failed to avail itself of the appeal procedures of Section 740.310(c), it has now waived any objection to the reasonableness of the costs for which reimbursement is sought by the Agency. Accordingly, the Agency maintains that Lockformer cannot now challenge the Agency's reliance on its non-payment of costs as a basis for termination of the Agreement. Mot. at 3. Specifically, the Agency argues that, "[b]ecause the reasonableness issue has been waived, Lockformer is left with no argument in its Petition against the Illinois EPA's decision to terminate Lockformer for failure to pay costs, and this claim should be dismissed." *Id.*

Because the Agency believes that it appropriately terminated the Agreement based on Lockformer's failure to pay costs, the Agency does not address Lockformer's challenge to the Agency's reliance on USEPA's administrative order as a basis for termination of the Agreement. The Agency maintains that it is not necessary to do so.

LOCKFORMER'S RESPONSE

Lockformer's response to the Agency's motion is based on the voluntary nature of the language in 35 Ill. Adm. Code 740.310(c). Specifically, Lockformer argues that because the language of Section 740.310(c) merely states that a remedial applicant "may" appeal the reasonableness of an invoice, that there was no requirement that Lockformer appeal the reasonableness of costs to the Board. Resp. at 1.

Furthermore, Lockformer argues that the "statute does not mandate the exact manner in which an RA may appeal the reasonableness of an invoice." Resp. at 2. Lockformer contends that it did appeal the reasonableness of the costs. *Id*. Lockformer suggests that its written letters, sent to the Agency in response to the controversial invoices, constitute an "appeal" pursuant to Section 740.310(c). *Id*. Lockformer states that it "timely appealed the reasonableness of the two invoices at issue to Illinois EPA in accordance with Section 740.310(c) because it appealed in writing 35 days of receipt of the invoices." *Id*.

Lockformer disagrees with the Agency's motion because:

> Illinois EPA is attempting to create a technicality in the regulations where none exists. Lockformer should not be denied the opportunity to argue the reasonableness of the invoices in this appeal because it appealed the reasonableness of the invoices directly to the Illinois EPA rather than appealing to the Board and allaying Board resources. Resp. at 2.

Lockformer believes that it has complied with Section 740.310(c) and that its appeal should be allowed to proceed forward. Lockformer asks that the Board deny the Agency's motion to dismiss.

DISCUSSION

As an initial matter, the Board observes that the Agency's motion, while characterized as a motion to dismiss, essentially seeks judgment on the pleadings as a matter of law without the hearing otherwise required under 35 Ill. Adm. Code 740.230 and Section 40 of the Act (415 ILCS 5/40 (2000)). Accordingly, the Board construes the Agency's motion as a motion for summary judgment.

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party if entitled to judgment as a matter of law. *See* Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should only be granted when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its

pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Alleged Unreasonableness of Agency Costs Waived Due to Lockformer's Inaction

The only factual dispute between the parties relates to the reasonableness of the unpaid invoices. As a matter of law, the Board finds that Lockformer has waived its right to appeal the reasonableness of the costs contained in the Agency invoices No.A41-2RR and No.A41-3. Despite its arguments to the contrary, Lockformer did not avail itself of the appeal procedures of Section 740.310(c). By failing to file a timely appeal to the Board of the reasonableness of the Agency's costs, Lockformer has waived any challenge to those costs. *See* Panhandle Eastern Pipe Line Company v. IEPA, 314 Ill. App. 3d 296, 734 N.E.2d 18 (4th Dist. 2000). The Board cannot allow Lockformer to challenge those costs here in the context of this termination appeal.

Lockformer's argument that it should not be penalized for failing to file an appeal because the appeal procedures of Section 740.310(c) are permissive rather than mandatory is without merit. In Panhandle, the court affirmed the Board's decision to uphold an Agency denial of a permit to Panhandle. In its affirmation of the Board's order, the court concluded that many statutory provisions are permissive, but that the permissiveness "is not beneficial to petitioner." Panhandle, 314 Ill. App. 3d 296, 304, 734 N.E.2d 18, 24. The court recognized that the petitioner:

> correctly points out that the statute allowing the filing of such a petition for Board review is couched in permissive rather than mandatory language [citation omitted] . . . so is the filing of a petition for administrative review in this court . . . [t]he corollary rule, of course, is that such challenges may not be filed beyond the limitation periods contained in the statutes . . . and if a notice of appeal is not timely filed [citation omitted], the judgment [or permit] becomes final. *Id*.

We conclude that the reasoning utilized by the Panhandle court is applicable here. The permissive wording of the appeal language in Section 40(a)(1) of the Act does not relieve Lockformer of its obligation to timely appeal the Agency's costs if, in fact, it wishes to challenge them. Since Lockformer did not appeal the costs to the Board, the invoice amounts became final.

Unpaid Costs Justify Agency Termination of the Agreement

The next issue is whether the Agency termination of the Agreement was proper due to Lockformer's undisputed failure to pay the Agency's costs as reflected in the invoices.

The Agreement that is the subject of the termination appealed herein requires the remedial applicant to "[a]gree to pay any reasonable costs incurred and documented by the Illinois EPA in providing such services [site visits and site evaluations]." R. at 2.[3]

[3] The Agency's Administrative Record, filed on January 28, 2002, is referred to as "R. at __."

Section 740.230(a)(2) of the Board's SRP regulations provides that the Agency may terminate the Agreement if the remedial applicant "violates any terms or conditions or fails to fulfill any obligations of the Agreement." 35 Ill. Adm. Code 740.230(a)(2).

Upon receipt of an objectionable invoice, a remedial applicant must file an appeal with the Board if it wants to challenge the reasonableness of the costs contained therein. *See* 415 ILCS 5/40(a)(1) (2000); 35 Ill. Adm. Code 740.310(c). Lockformer misinterprets the meaning of 35 Ill. Adm. Code 740.310(c) by arguing that it satisfied the appeal procedures by "appealing" the reasonableness of costs to the Agency. The appeal contemplated in Section 740.310(c) and in Section 40(a)(1) of the Act, is an appeal to the Board.

The filing of an appeal does not, however, preclude the remedial applicant from working further with the Agency in an attempt to resolve some of the issues on appeal. *See* E & L Trucking Co. v. IEPA, PCB 02-101 (Mar. 7, 2002). Pursuant to Section 40(a)(1) of the Act (415 ILCS 5/40(a)(1) (2000)), the Agency and the remedial applicant may petition the Board for a 90-day extension of the appeal period. The Board has recognized that this 90-day extension provides an opportunity for further negotiations and a narrowing of issues to be presented to the Board on appeal. *Id*. In the present case, Lockformer should have preserved its appeal rights by either filing an appeal or by seeking an extension of the appeal period; neither of which would have precluded continuing negotiations with the Agency.

Lockformer did not appeal the reasonableness of costs contained in the Agency's invoices. By failing to appeal these costs, Lockformer waived any challenge to the reasonableness of the costs. Panhandle, 314 Ill. App. 3d 296, 734 N.E.2d 18. Pursuant to Section 740.315 of the SRP regulations, unless the reasonableness of costs is appealed, "payments for costs incurred by the Agency for the performance of services under this Part [740] shall be submitted to the Agency within 45 days after receipt of the request for payment." 35 Ill. Adm. Code 740.315. More than 45 days has passed since Lockformer's receipt of the Agency invoices and Lockformer admits that it has not reimbursed the Agency for its costs. By failing to reimburse the Agency, Lockformer failed to fulfill its obligations under the Agreement. In light of Lockformer's failure to fulfill its obligations under the Agreement, the Agency is authorized, pursuant to 35 Ill. Adm. Code 740.230, to terminate the Agreement.

United States Environmental Protection Agency's (USEPA)Administrative Order

Because the Agency's termination of the Agreement is supported on the basis that Lockformer failed to pay costs, it is unnecessary for the Board to consider the merits of the appeal based on the Agency's reliance on a USEPA administrative order.

CONCLUSION

The Board construes the Agency's motion to dismiss as a motion for summary judgment. The Board grants summary judgment in favor of the Agency. As a matter of law, the Board finds that Lockformer waived its right to challenge the reasonableness of the Agency's costs by failing to timely appeal Agency invoices pursuant to Section 35 Ill. Adm. Code 740.310(c).

Since there is no dispute that the costs are unpaid, the Board affirms the Agency's termination of the Review and Evaluation Services Agreement.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

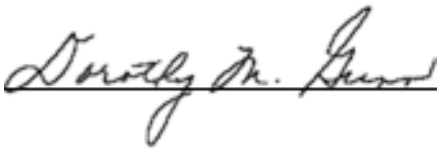
The Board grants summary judgment in favor of the Agency and affirms its November 16, 2001 termination of Lockformer's Site Remediation Program Review and Evaluation Services Agreement. This docket is closed.

IT IS SO ORDERED.

Board Member T.E. Johnson dissented.

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 5/40(a) (2000); *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, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the Board adopted the above opinion and order on March 21, 2002, by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board