

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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STATE OF ILLINOIS
Pollution Control Board

FEDEX GROUND PACKAGE SYSTEM, INC.,)
Petitioner,)
)
v.) PCB 07-12
) (UST Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
Respondent.)

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

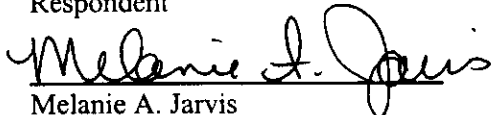
Bradley Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Thomas W. Daggett
Daggett Law Firm
Chicago Title Tower, Suite 4950
161 North Clark Street
Chicago, IL 60601

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board an APPEARANCE, the ADMINISTRATIVE RECORD, and MOTION FOR SUMMARY JUDGEMENT, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: August 31, 2006

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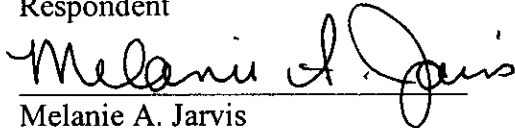
FEDEX GROUND PACKAGE SYSTEM, INC.,)
Petitioner,)
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ILLINOIS ENVIRONMENTAL) (UST Appeal)
PROTECTION AGENCY,)
Respondent.)

APPEARANCE

The undersigned, as one of its attorneys, hereby enters her Appearance on behalf of the Respondent, the Illinois Environmental Protection Agency.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Melanie A. Jarvis
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
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MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, 101.508 and 101.516, hereby respectfully moves the Illinois Pollution Control Board ("Board") to enter summary judgment in favor of the Illinois EPA and against the Petitioner, FedEx Ground Package System, Inc. ("FedEx"), in that there exist herein no genuine issues of material fact, and that the Illinois EPA is entitled to judgment as a matter of law with respect to the following grounds. In support of said motion, the Illinois EPA states as follows:

I. STANDARD FOR ISSUANCE AND REVIEW

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 483, 693 N.E.2d 358, 370 (1998); McDonald's Corporation v. Illinois Environmental Protection Agency, PCB 04-14 (January 22, 2004), p. 2.

Section 57.8(i) of the Illinois Environmental Protection Act (“Act”) (415 ILCS 5/57.8(i)) grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/40). Section 40 of the Act, the general appeal section for permits, has been used by the legislature as the basis for this type of appeal to the Board. Thus, when reviewing an Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund, the Board must decide whether or not the application as submitted demonstrates compliance with the Act and Board regulations. Rantoul Township High School District No. 193 v. Illinois EPA, PCB 03-42 (April 17, 2003), p. 3.

In deciding whether the Illinois EPA’s decision under appeal here was appropriate, the Board must look to the documents within the Administrative Record (“Record” or “AR”). The Illinois EPA asserts that the Record and the arguments presented in this motion are sufficient for the Board to enter a dispositive order in favor of the Illinois EPA on all relevant issues. Accordingly, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA’s decision.

II. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board’s procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

III. ISSUE

The issue before the Board is whether the Illinois EPA can consider a Budget Amendment after the issuance of a No Further Remediation (“NFR”) letter as set forth in the Illinois EPA’s final

decision dated July 17, 2006 (AR, p.107) taking into account the underlying facts and law. As will be argued below, the facts in this case are undisputed and clearly demonstrate that the decision was appropriate and should be affirmed.

IV. THE ILLINOIS EPA IS ENTITLED TO SUMMARY JUDGMENT BASED ON THE FACTS AND LAW

A. Relevant Facts

The facts in the Illinois EPA record supporting this motion are as follows:

On May 10, 2006, the Illinois EPA granted an NFR letter to FedEx. (AR, p.62)

On May 17, 2006, FedEx recorded the NFR letter. (AR, p.112)

On May 30, 2006, FedEx submitted a Budget Amendment. (AR, p. 71)

On June 21, 2006, the Illinois EPA issued a determination letter rejecting the budget because “[t]he budget was submitted after the issuance of a No Further Remediation Letter. Pursuant to 35 Ill. Adm. Code 734.335(d), any corrective action plan or budget must be submitted to the Illinois EPA for review and approval, rejection, or modification in accordance with the procedures contained in Subpart E of 35 Ill. Adm. Code 734 prior to the issuance of a No Further Remediation Letter.” (AR, p.100) This decision was not appealed by FedEx.

On July 3, 2006 FedEx sent in a request that the Illinois EPA reconsider its June 21, 2006 decision. (AR, p.105)

On July 17, 2006, Illinois EPA issued another determination letter based upon the July 3, 2006 request, rejecting the budget because “[t]he budget was submitted after the issuance of a No Further Remediation Letter. Pursuant to 35 Ill. Adm. Code 734.335(d), any corrective action plan or budget must be submitted to the Illinois EPA for review and approval, rejection, or modification in accordance with the procedures contained in Subpart E of 35 Ill. Adm. Code 734 prior to the

issuance of a No Further Remediation Letter.” (AR, p.107)

B. Relevant Law

Section 734.335 Corrective Action Plan

- a) *If any of the applicable indicator contaminants exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants, within 30 days after the Agency approves the site investigation completion report, the owner or operator shall submit to the Agency for approval a corrective action plan designed to mitigate any threat to human health, human safety, or the environment resulting from the underground storage tank release. [415 ILCS 5/57.7(b)(2)].* The corrective action plan must address all media impacted by the UST release and must contain, at a minimum, the following information:
- 1) An executive summary that identifies the objectives of the corrective action plan and the technical approach to be utilized to meet such objectives. At a minimum, the summary must include the following information:
 - A) The major components (e.g., treatment, containment, removal) of the corrective action plan;
 - B) The scope of the problems to be addressed by the proposed corrective action, including but not limited to the specific indicator contaminants and the physical area; and
 - C) A schedule for implementation and completion of the plan;
 - 2) A statement of the remediation objectives proposed for the site;
 - 3) A description of the remedial technologies selected and how each fits into the

overall corrective action strategy, including but not limited to the following:

- A) The feasibility of implementing the remedial technologies;
 - B) Whether the remedial technologies will perform satisfactorily and reliably until the remediation objectives are achieved;
 - C) A schedule of when the remedial technologies are expected to achieve the applicable remediation objectives and a rationale for the schedule; and
 - D) For alternative technologies, the information required under Section 734.340 of this Part;
- 4) A confirmation sampling plan that describes how the effectiveness of the corrective action activities will be monitored or measured during their implementation and after their completion;
 - 5) A description of the current and projected future uses of the site;
 - 6) A description of any engineered barriers or institutional controls proposed for the site that will be relied upon to achieve remediation objectives. The description must include, but not be limited to, an assessment of their long-term reliability and operating and maintenance plans;
 - 7) A description of water supply well survey activities required pursuant to Sections 734.445(b) and (c) of this Part that were conducted as part of site investigation; and
 - 8) Appendices containing references and data sources relied upon in the report that are organized and presented logically, including but not limited to field

logs, well logs, and reports of laboratory analyses.

- b) Any owner or operator intending to seek payment from the Fund must, prior to conducting any corrective action activities beyond site investigation, submit to the Agency a corrective action budget with the corresponding corrective action plan. The budget must include, but is not limited to, a copy of the eligibility and deductibility determination of the OSFM and an estimate of all costs associated with the development, implementation, and completion of the corrective action plan, excluding handling charges. The budget should be consistent with the eligible and ineligible costs listed at Sections 734.625 and 734.630 of this Part and the maximum payment amounts set forth in Subpart H of this Part. As part of the budget the Agency may require a comparison between the costs of the proposed method of remediation and other methods of remediation.
- c) *Upon the Agency's approval of a corrective action plan, or as otherwise directed by the Agency, the owner or operator shall proceed with corrective action in accordance with the plan [415 ILCS 5/57.7(b)(4)].*
- d) Notwithstanding any requirement under this Part for the submission of a corrective action plan or corrective action budget, except as provided at Section 734.340 of this Part, an owner or operator may proceed to conduct corrective action activities in accordance with this Subpart C prior to the submittal or approval of an otherwise required corrective action plan or budget. ***However, any such plan and budget must be submitted to the Agency for review and approval, rejection, or modification in accordance with the procedures contained in Subpart E of this Part prior to***

payment for any related costs or the issuance of a No Further Remediation Letter.

(Emphasis Added)

BOARD NOTE: Owners or operators proceeding under subsection (d) of this Section are advised that they may not be entitled to full payment from the Fund. Furthermore, applications for payment must be submitted no later than one year after the date the Agency issues a No Further Remediation Letter. See Subpart F of this Part.

- e) If, following approval of any corrective action plan or associated budget, an owner or operator determines that a revised plan or budget is necessary in order to mitigate any threat to human health, human safety, or the environment resulting from the underground storage tank release, the owner or operator must submit, as applicable, an amended corrective action plan or associated budget to the Agency for review. The Agency must review and approve, reject, or require modification of the amended plan or budget in accordance with Subpart E of this Part.

BOARD NOTE: Owners and operators are advised that the total payment from the Fund for all corrective action plans and associated budgets submitted by an owner or operator must not exceed the amounts set forth in Subpart H of this Part.

C. No Genuine Issues Of Material Fact Exist

The question in this case is not one of fact, but rather of law. Specifically, the question is whether the Illinois EPA can consider a Budget Amendment after the issuance of a No Further Remediation letter. Section 734.335(d) of the Board's regulations, 35 Ill. Adm. Code 734.335(d) clearly states: "However, any such plan and budget *must be submitted* to the Agency for review and

approval, rejection, or modification in accordance with the procedures contained in Subpart E of this Part *prior to* payment for any related costs or *the issuance of a No Further Remediation Letter.*” (Emphasis added). It is clear from the record that the Illinois EPA issued a NFR letter to FedEx on May 10, 2006. FedEx recorded this NFR letter on May 17, 2006. FedEx submitted the Budget Amendment on May 30, 2006. The record clearly shows that FedEx submitted the Budget Amendment after the issuance of a NFR letter. The Illinois EPA is prohibited from reviewing the Budget Amendment pursuant to Section 734.335(d).

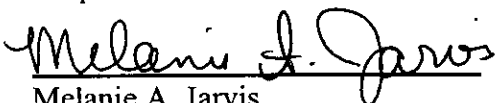
V. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA’s decisions to deny the Budget Amendment in the July 17, 2006 final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



Melanie A. Jarvis
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Dated: August 31, 2006

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

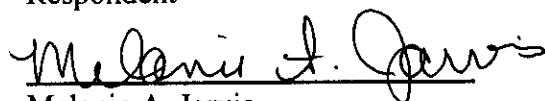
I, the undersigned attorney at law, hereby certify that on August 31, 2006 I served true and correct copies of an APPEARANCE, the ADMINISTRATIVE RECORD, and MOTION FOR SUMMARY JUDGEMENT, by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. Mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Bradley Halloran, Hearing Officer
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