

SEP 18 2006

STATE OF ILLINOIS
Pollution Control Board

FEDEX GROUND PACKAGE SYSTEM, INC,)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

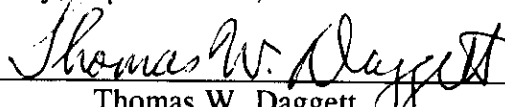
PCB 07-012
(UST Fund Appeal)

NOTICE OF FILING AND PROOF OF SERVICE

TO: Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 W. Randolph Street, Suite 11-500
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Division of Legal Counsel
Illinois Environmental
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Springfield, IL 62794-9276

PLEASE TAKE NOTICE that on September 18, 2006, I filed with the Clerk of the Illinois Pollution Control Board the original and nine (9) copies of the attached (1) RESPONSE AND MEMORANDUM OPPOSING IEPA'S MOTION FOR SUMMARY JUDGMENT in this action. I hereby certify that true and accurate copies of that document and this Notice are being served upon the Hearing Officer and the Respondent at the addresses shown above, by depositing it in the U.S. Mail in Chicago, IL, with First Class Postage prepaid, on this day, September 18, 2006.


Thomas W. Daggett
Attorney for Petitioner FedEx Ground

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SEP 18 2006

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FEDEX GROUND PACKAGE SYSTEM, INC.,)	
)	
Petitioner,)	
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v.)	PCB 07-012
)	(UST Fund Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

**RESPONSE AND MEMORANDUM OPPOSING
IEPA'S MOTION FOR SUMMARY JUDGMENT**

Petitioner, FEDEX Ground Package System, Inc. ("Petitioner"), by its attorney, Thomas W. Daggett of the Daggett Law Firm, respectfully submits this Response and Memorandum opposing the Illinois Environmental Protection Agency's (IEPA) Motion for Summary Judgment ("Response"), as authorized by Board rules at 35 Ill. Adm. Code 101.504 & 101.516, and states as follows:

STANDARD OF REVIEW

Summary judgment is proper only when the pleadings, affidavits, admissions and other items in the record demonstrate that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Waste Management of Illinois v. IEPA*, PCB 94-153 (July 21, 1994) at p. 2; *Solomon v. American Nat'l Bank & Trust Co.*, 243 Ill.App.3d 132, 612 N.E.2d 3 (1st Dist. 1993). The IEPA's denial letter frames the issues on this appeal; therefore, in deciding this motion for summary judgment, the Board must determine as a matter of law whether the

Agency's denial reasons contained in its letter of July 17, 2006, require the disapproval of Petitioner's May 30, 2006 Budget Amendment. See *Kathe 's Auto Service Center v. IEPA*, PCB 96-102 (Aug. 1, 1996) at p. 27.

ISSUES BEFORE THE BOARD

The issues before the Board are:

(1) whether IEPA's approval of Petitioner's May 30, 2006 Budget Amendment for an Underground Storage Tank Fund (UST Fund) reimbursement is controlled by 35 Ill. Adm. Code 734.335(d), which addresses the situation where an owner has elected to proceed with corrective action before submitting a Corrective Action Plan (CAP) or budget, or by 35 Ill. Adm. Code 734.335(e), which explicitly addresses amended budgets; and

(2) whether IEPA's July 17, 2006 final action, which rejected Petitioner's May 30, 2006 Budget Amendment and associated reimbursement request solely because it was submitted twenty (20) days after IEPA issued Petitioner a No Further Remediation (NFR) letter, was required by applicable provisions of the Illinois Environmental Protection Act and Board regulations.

UNDISPUTED MATERIAL FACTS

The undisputed facts in the administrative record that was before the IEPA at the time of its final action, and that are material to IEPA's motion and this Response, are as follows:

Petitioner is owner of a facility at 6767 West 75th Street, Bedford Park, Cook County, Illinois, 60638 (the Facility.)

On April 3, 2003, Petitioner notified the Illinois Emergency Management Agency (IEMA) of a leak from an underground tank at the Facility, and was assigned Incident No. 20030468; on April 26, 2004, Petitioner made another notification concerning this leaking tank and was assigned Incident No. 20040575. (both referenced at AR. p. 78.)

On May 23, 2003, the Illinois State Fire Marshal granted Petitioner's May 6, 2003 application for a determination of reimbursement eligibility for corrective action to address IEMA Incident 20030468. (AR. 72-73.)

On June 20, 2005, the Illinois State Fire Marshal granted Petitioner's May 6, 2005 application for a determination of reimbursement eligibility for corrective action to address IEMA Incident 20040575. (AR. 75-76.)

On June 22, 2005, Petitioner submitted to IEPA a proposed CAP (AR. 2 – 20) and a proposed Budget with a budget certification by a licensed professional engineer (L.P.E.) (AR. 21-56), for IEMA Incident Nos. 20030468 and 20040575.

On July 17, 2005, IEPA approved Petitioner's proposed CAP without modification, and approved Petitioner's Budget for six categories of costs totaling \$325,151.37. (AR. 57-61.)

On April 20, 2006, Petitioner submitted a Corrective Action Completion Report, with a certification from a L.P.E. that the corrective action had been completed in compliance with the CAP and all legal requirements. (Referenced at AR. 62.) This included the removal of the subject diesel underground storage tank, for which Petitioner obtained additional Incident No. 20060145.

On May 10, 2006, IEPA accepted the Corrective Action Completion Report as indicating the satisfactory completion of the CAP, and granted Petitioner a No Further Remediation (“NFR”) letter covering LUST Incidents Nos. 20030468, 20040575, and 20060145 (AR. 62-68) which was received by Petitioner on May 15, 2006. (AR. 69-70.)

On May 30, 2006, Petitioner sent IEPA reimbursement claims with documentation, and a proposed Budget Amendment (AR. 71-98), with a certification from a L.P.E. that all costs in the Budget Amendment are necessary costs for work under the CAP, that they are not for corrective action beyond the minimum requirements, and that none of the costs included are ineligible for reimbursement from the UST Fund under applicable law. (AR. 99) The proposed Budget Amendment requested IEPA approval for \$72,878.75 of additional costs, but the proposed new total was only \$39,122.55 higher than the total in the previously approved budget because Petitioner had completed certain CAP tasks under budget. (AR. 80-81.)

On July 17, 2006, IEPA issued its final action rejecting Petitioner’s request, stating as its sole reason that:

“The 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 procedures contained in Subpart E of 35 Ill. Adm. Code 734 prior to the issuance of a No Further Remediation Letter.”

(AR.107-111).

RELEVANT LAW

35 Ill. Adm. Code 734.335

* * *

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.

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. (emphasis added)

415 ILCS 5/57.7. (As amended by P.A. 92-574, P.A. 92-651 and P.A. 92-735)
Leaking underground storage tanks; physical soil classification, groundwater investigation, site classification, and corrective action.

* * *

(e) (1) Notwithstanding the provisions of this Section, an owner or operator may proceed to conduct physical soil classification, groundwater investigation, site classification or other corrective action prior to the submittal or approval of an otherwise required plan. If the owner or operator elects to so proceed, an applicable plan shall be filed with the Agency at any time. Such plan shall detail the steps taken to determine the type of corrective action which was necessary at the site along with the corrective action taken or to be taken, in addition to costs associated with activities to date and anticipated costs.

(2) Upon receipt of a plan submitted after activities have commenced at a site, the Agency shall proceed to review in the same manner as required under this Title. In the event the Agency disapproves all or part of the costs, the owner or operator may appeal such decision to the Board. The owner or operator shall not be eligible to be reimbursed for such disapproved costs unless and until the Board determines that such costs were eligible for payment.

415 ILCS 5/57.8. Underground Storage Tank Fund; payment; options for State payment; deferred correction election to commence corrective action upon availability of funds

If an owner or operator is eligible to access the Underground Storage Tank Fund pursuant to an Office of State Fire Marshal eligibility/deductible final determination letter issued in accordance with Section 57.9, the owner or operator may submit a complete application for final or partial payment to the Agency for activities taken in response to a confirmed release. An owner or operator may submit a request for partial or final payment regarding a site no more frequently than once every 90 days.

(a) Payment after completion of corrective action measures. The owner or operator may submit an application for payment for activities performed at a site after completion of the requirements of Sections 57.6 and 57.7, or after completion of any other required activities at the underground storage tank site.

* * *

(5) In the event that costs are or will be incurred in addition to those approved by the Agency, or after payment, the owner or operator may submit successive plans containing amended budgets. The requirements of Section 57.7 shall apply to any amended plans. (emphasis added)

ARGUMENT

The IEPA argues that the Board should interpret the second sentence of 734.335(d) as prohibiting the IEPA from reviewing a UST Fund Budget Amendment submitted after the issuance of a NFR Letter. IEPA presents its interpretation of this

sentence as if it is obvious. (IEPA Motion, p. 8.) In so doing, it ignores the immediately preceding sentence of that subsection, ignores the entire immediately following subsection 734.335(e), and ignores certain provisions of Section 57.8 of the Environmental Protection Act (the Act.) As explained below, the IEPA's interpretation of 734.335(d) as prohibiting it from approving Petitioner's May 30, 2006 Budget Amendment is contrary to the interpretation of that provision in the context of Part 734 read as a whole, and read in conjunction with Section 57.8 of the Act.

ARGUMENT I. PETITIONER HERE OBTAINED IEPA APPROVAL FOR ITS CORRECTIVE ACTION PLAN AND BUDGET PRIOR TO CONDUCTING THE CORRECTIVE ACTION, SO SUBSECTION 734.335(D) DOES NOT APPLY

When interpreting a single sentence in a regulatory subsection, as IEPA has done here, the sentence must be read as part of the whole regulation, and in light of its overall purpose. See *County of Dupage v. E & E Hauling*, PCB AC 88-76, 88-77 (Feb. 8, 1990) p. 3, citing *People v. Jordan*, 103 Ill. 2d 192, 469 N.E. 2nd 569 (1984.) A reading of the entire Section 734.335 (quoted in full in IEPA's motion, pages 4-7), shows that most subsections address situations where the owner submits a CAP and Budget to IEPA for approval before conducting the corrective action, just as Petitioner did here. Subsection 734.335(d) is the only exception to this normal situation, as shown by its introductory language, as follows:

“Notwithstanding any requirement under this Part for the submission of a [CAP] or a corrective action budget,...an owner or operator may proceed to conduct corrective action activities...prior to the submission or approval of an otherwise required [CAP] or budget. However, *any such plan or budget* must ...” (emphasis added).

This subsection 734.335(d) only applies where an owner has elected to proceed with corrective action before submitting a CAP or budget. This subsection is not triggered and has no effect in the more common situation where an owner submits its plan and budget for approval before doing the work, like Petitioner has done. Notably, 734.335(d) never mentions *amended* budgets at all. Amended budgets are explicitly addressed in 734.335(e), which is discussed in Argument III., below.

**ARGUMENT II. THE SECOND SENTENCE OF 734.335(D) LIMITS
IEPA'S AUTHORITY TO PAY COSTS OR ISSUE NFR LETTERS,
NOT ITS AUTHORITY TO REVIEW PLANS OR BUDGETS**

Even where 734.335(d) is triggered because an owner has chosen to conduct its corrective action before it submits any CAP and Budget to IEPA (which are not the facts here), the second sentence of 734.335(d) does not prohibit IEPA from reviewing a Budget Amendment. Instead, it prohibits IEPA from payment of any costs (even partial payment), or issuance of a NFR Letter (even a narrowly focused one), until a plan and budget is submitted in accordance with the Subpart E review process.

The phrase in the second sentence that IEPA relies upon for its position reads: “prior to payment for any related costs or the issuance of a No Further Remediation Letter.” If IEPA’s interpretation of 734.335(d) were correct, then IEPA also would be prohibited from reviewing any budget amendment after the first partial payment it makes for any costs related to the corrective action. Such an interpretation would put 734.335(d) in direct conflict with the Act.

Provisions of the Act explicitly allow owners who have received IEPA approval for their initial CAP and Budget to seek partial payments as they proceed with implementation of the CAP. Section 57.8 of the Act reads in part as follows:

If an owner or operator is eligible to access the Underground Storage Tank Fund pursuant to an Office of State Fire Marshal eligibility/deductible final determination letter issued in accordance with Section 57.9, the owner or operator may submit a complete application for final or partial payment to the Agency for activities taken in response to a confirmed release. An owner or operator may submit a request for partial or final payment regarding a site no more frequently than once every 90 days.

(a) Payment after completion of corrective action measures. The owner or operator may submit an application for payment for activities performed at a site after completion of the requirements of Sections 57.6 and 57.7, or after completion of any other required activities at the underground storage tank site.” (emphasis added)

415 ILCS 5/57.8 (excerpt.) A subsequent subsection of Section 57.8 explicitly authorizes an owner to submit amended budgets after receiving payment for parts of the corrective action work, as follows:

“(5) In the event that costs are or will be incurred in addition to those approved by the Agency, or after payment, the owner or operator may submit successive plans containing amended budgets. The requirements of Section 57.7 shall apply to any amended plans.” (emphasis added)

415 ILCS 5/57.8(a)(5). Under the position advanced by IEPA however, it would be prohibited from reviewing or approving such successive plans and amended budgets, because they would clearly be submitted after “payment for any related costs or the issuance of a No Further Remediation Letter,” as referenced in the second sentence of 734.335(d).

There is an alternative interpretation of 734.335(d) that does not put it in direct conflict with Section 57.8 of the Act. The first sentence of 734.335(d) authorizes

owners to proceed with UST corrective action before submitting a CAP or Budget without automatically losing all rights to reimbursement; the second sentence limits this authorization, however, by declaring that there shall be no payments for any related costs (even partial costs), nor any NFR Letters issued (even focused ones) before that CAP and Budget is submitted to IEPA for a review under Subpart E.

The Board should adopt this alternative interpretation of 743.335(d) that is consistent with Section 57.8, and reject IEPA's proposed interpretation that conflicts with the Act, and with the following subsection 734.335(e), as explained below.

ARGUMENT III. THE IEPA'S REVIEW OF PETITIONER'S BUDGET AMENDMENT IS EXPLICITLY CONTROLLED BY SUBSECTION 734.335(E) AND SUBPART E, WHICH DO NOT MENTION NFR LETTERS

While the subsection relied upon by IEPA, 734.335(d), does not mention budget amendments, the immediately following subsection, 734.335(e), explicitly addresses them, as follows:

734.335(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.

In contrast to 734.335(d), the first sentence of 734.335(e) matches the facts in this case. Petitioner obtained approval of a CAP and budget in July, 2005, then later

determined that a revised budget was necessary in May, 2006. The Licensed Professional Engineer assisting Petitioner certified that the work covered by the Budget Amendment was necessary and eligible for reimbursement under all UST Fund requirements. (AR-99) Under this subsection 734.335(e), the IEPA is explicitly *required* to review Petitioner's May 30, 2006 Budget Amendment in accordance with Subpart E. There is nothing in 734.335(e) nor in Subpart E (comprised of Board regulations at 734.500, 734.505, and 734.510) that would *require* IEPA to reject Petitioner's Budget Amendment based upon issuance of the May 10, 2006 NFR Letter, or even *allow* it to consider the issuance of a NFR Letter in reviewing Petitioner's Budget Amendment.

Neither IEPA's July 17, 2006 letter, nor its motion for summary judgment, asserts any basis for its denial of Petitioner's Budget Amendment other than 734.335(d), which is not triggered under the undisputed facts that are material to IEPA's motion. The Board regulations that explicitly apply under the facts of this case, 734.335(e) and Subpart E, provide no legal basis for IEPA's July 17, 2006 rejection of Petitioner's Budget Amendment or its motion for summary judgment.

ARGUMENT IV. IN THE ONLY PREVIOUS BOARD OPINION MENTIONING THIS ISSUE, THE IEPA APPROVED A BUDGET AMENDMENT, IN PART, AFTER ISSUING A NFR LETTER

The IEPA does not cite any previous Board or judicial decisions supporting its proposed interpretation of 734.335(d). Part 734 became effective only recently, and Petitioner's research similarly has not located any decisions interpreting 734.335(d).

The preceding Board regulations on the UST program at Part 732, however, were in effect for several years, and included a very similar provision, as follows:

732.405(d) “Notwithstanding subsections (a), (b), (e), and (f) of this Section and except as provided at Section 732.407 of this Part, an owner or operator may proceed to conduct Low Priority groundwater monitoring or High Priority corrective action activities in accordance with this Subpart D prior to the submittal or approval of an otherwise required groundwater monitoring plan or budget plan or corrective action plan or budget plan. However, any such plan and budget plan shall 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)

35 Ill. Adm. Code 732.405(d). It is important to note that the second sentence of 732.405(d) contains the same exact language as that found in the second sentence of 734.335(d), which the IEPA relies upon for its position in the current case. Petitioner’s research located only one prior Board Opinion that mentions this earlier analogous provision in a context similar to the current case, as follows:

“The Agency rejected Midwest’s budget amendment in a letter dated May 23, 2002 (AR, at 128), because it was submitted after the Agency issued a No Further Remediation (NFR) letter for the site. Pet. at Exh. B; AR, at 128. The budget rejection letter indicated that, pursuant to 35 Ill. Adm. Code 732.405(d), a budget must be submitted before issuance of an NFR letter. Id.

Midwest and the Agency discussed the Agency’s rejection and the Agency indicated in a memo dated June 3, 2002, that it would reconsider the budget amendment denial if it received a written request to do so. Pet. Br. at 2; AR, at 131. Midwest submitted a request for reconsideration the next day, on June 4, 2002, and the Agency, on June 7, 2002, approved part of the amendment and rejected the rest. Pet. Exh. D. Specifically, the Agency approved \$2,806.08 of the \$7,483.58 requested.” (emphasis added)

Todd’s Service Station v. IEPA, PCB 03-2 (January 22, 2004) p. 2. The budget amendment that IEPA reviewed and partially approved in that case was submitted to IEPA four and one half months after IEPA issued the NFR Letter. *Id.* Significantly, in

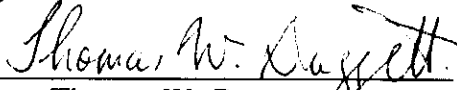
Todd's Service Station, the IEPA specifically focused on the same exact language it relies upon in the current case and ultimately determined that it was *not* prohibited from reviewing a budget amendment submitted after the issuance of a NFR Letter, or from approving it in part. Even though the sentences read exactly the same, the IEPA's interpretation of the second sentence of 734.335(d) which the IEPA is currently advocating to the Board in its motion for summary judgment directly conflicts with its interpretation, in *Todd's Service Station*, of the same language contained in the second sentence of 732.405(d). Therefore, the IEPA's interpretation of 734.335(d) in the current case is not entitled to any deference that the Board might otherwise be inclined to give.

CONCLUSION

The IEPA is not prohibited from reviewing and approving Petitioner's May 30, 2006 Budget Amendment by 734.335(d), which does not apply under the facts of this case. To the contrary, it was required to review it under 734.335(e), under Subpart E, and under Section 57.8 of the Act. For these reasons, the IEPA's motion for summary judgment should be denied.

Respectfully submitted,

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