

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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SEP 28 2006

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

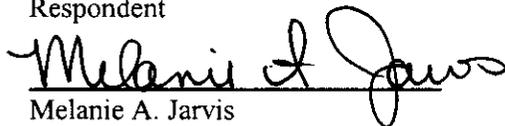
Bradley Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

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 a MOTION FOR LEAVE TO FILE REPLY TO RESPONSE AND MEMORANDUM OPPOSING IEPA'S MOTION FOR SUMMARY JUDGMENT and a REPLY TO PETITIONERS' RESPONSE AND MEMORANDUM OPPOSING IEPA'S MOTION FOR SUMMARY JUDGMENT, 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: September 25, 2006

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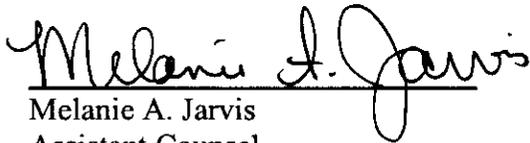
**MOTION FOR LEAVE TO FILE REPLY TO RESPONSE AND
MEMORANDUM OPPOSING IEPA'S MOTION FOR SUMMARY JUDGMENT**

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 Section 101.500(e) of the Illinois Pollution Control Board's ("Board") procedural rules (35 Ill. Adm. Code 101.500(e)), hereby files a motion for leave to file a reply to the Petitioner's Response and Memorandum Opposing IEPA's Motion for Summary Judgment. In support of this motion for leave, the Illinois EPA provides as follows.

1. The Illinois EPA filed its Motion for Summary Judgment on September 1, 2006.
2. The Petitioner filed its Response on September 18, 2006.
3. The issue in this case is one of first impression and material prejudice may result if the Illinois EPA is not allowed to reply.
4. The Petitioner's arguments, including one that mentions a prior Board case, require a full reply from the Illinois EPA so that the Board can be fully briefed when making its decision on the case.

5. For the reasons stated herein, the Illinois EPA hereby respectfully requests that the Hearing Officer allow the Illinois EPA to file a reply to the Petitioner's response to prevent material prejudice.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Melanie A. Jarvis
Assistant Counsel
Special Assistant Attorney General
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Dated: September 25, 2006

This filing submitted on recycled paper.

BEFORE THE POLLUTION CONTROL BOARD
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STATE OF ILLINOIS
Pollution Control Board

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

**REPLY TO PETITIONERS' RESPONSE AND MEMORANDUM OPPOSING IEPA'S
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(e), hereby respectfully replies to the Response and Memorandum Opposing IEPA's Motion for Summary Judgment ("Petitioners' response") filed by the Petitioners, FedEx Ground Package System, Inc. In reply to the Petitioners' response, the Illinois EPA states as follows:

I. INTRODUCTION

The Petitioner argues in its response that the Illinois EPA's interpretation of 35 Ill. Adm. Code 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 Illinois Environmental Protection Act ("Act"). The Illinois EPA strongly disagrees with the Petitioner's assertion.

For the reasons that will be explained below, the Illinois EPA's decision comported with the law and facts as presented, and the Illinois Pollution Control Board ("Board") should affirm the Illinois EPA's decision.

II. APPLICABLE LAW

415 ILCS 5/57.10 Professional Engineer or Professions Geologist certification; presumptions against liability.

(a) Within 120 days of the Agency's receipt of a corrective action completion report, the Agency shall issue to the owner or operator a "no further remediation letter" unless the Agency has requested a modification, issued a rejection under subsection (d) of this Section, or the report has been rejected by operation of law.

(b) By certifying such a statement, a Licensed Professional Engineer or Licensed Professional Geologist shall in no way be liable thereon, unless the engineer or geologist gave such certification despite his or her actual knowledge that the performed measures were not in compliance with applicable statutory or regulatory requirements or any plan submitted to the Agency.

(c) The Agency's issuance of a no further remediation letter shall signify, based on the certification of the Licensed Professional Engineer, that:

(1) all statutory and regulatory corrective action requirements applicable to the occurrence have been complied with;

(2) all corrective action concerning the remediation of the occurrence has been completed; and

(3) no further corrective action concerning the occurrence is necessary for the protection of human health, safety and the environment.

This subsection (c) does not apply to off-site contamination related to the occurrence that has not been remediated due to denial of access to the off-site property.

(d) The no further remediation letter issued under this Section shall apply in favor of the following parties:

(1) The owner or operator to whom the letter was issued.

(2) Any parent corporation or subsidiary of such owner or operator.

(3) Any co-owner or co-operator, either by joint tenancy, right-of-survivorship, or any other party sharing a legal relationship with the owner or operator to whom the letter is issued.

(4) Any holder of a beneficial interest of a land trust or inter vivos trust whether revocable or irrevocable.

(5) Any mortgagee or trustee of a deed of trust of such owner or operator.

(6) Any successor-in-interest of such owner or operator.

(7) Any transferee of such owner or operator whether the transfer was by sale, bankruptcy proceeding, partition, dissolution of marriage, settlement or adjudication of any civil action, charitable gift, or bequest.

(8) Any heir or devisee or such owner or operator.

(9) An owner of a parcel of real property to the extent that the no further remediation letter under subsection (c) of this Section applies to the occurrence on that parcel.

(e) If the Agency notifies the owner or operator that the "no further remediation" letter has been rejected, the grounds for such rejection shall be described in the notice. Such a decision shall be a final determination which may be appealed by the owner or operator.

(f) The Board shall adopt rules setting forth the criteria under which the Agency may require an owner or operator to conduct further investigation or remediation related to a release for which a no further remediation letter has been issued.

(g) Holders of security interests in sites subject to the requirements of this Title XVI shall be entitled to the same protections and subject to the same responsibilities provided under general regulations promulgated under Subtitle I of the Hazardous and Solid Waste Amendments of 1984 (P.L. 98-616) of the Resource Conservation and Recovery Act of 1976 (P.L. 94-580). (Emphasis added)

35 Ill. Adm. Code 734.710 Contents of a No Further Remediation Letter

A No Further Remediation Letter issued pursuant to this Part must include all of the following:

- a) An acknowledgment that the requirements of the applicable report were satisfied;
- b) A description of the location of the affected property by adequate legal description or by reference to a plat showing its boundaries, or, for the purposes of Section 734.715(d) of this Part, other means sufficient to identify the site location with particularity;
- c) A statement that the remediation objectives were determined in accordance with 35 Ill. Adm. Code 742, and the identification of any land use limitation, as applicable, required by 35 Ill. Adm. Code 742 as a condition of the remediation objectives;
- d) **A statement that the Agency's issuance of the No Further Remediation Letter signifies that:**
 - 1) *All statutory and regulatory corrective action requirements applicable to the occurrence have been complied with;*
 - 2) *All corrective action concerning the remediation of the occurrence has been completed; and*
 - 3) *No further corrective action concerning the occurrence is necessary for the protection of human health, safety and the environment [415 ILCS 5/57.10(c)(1)-(3)], or, if the No Further Remediation Letter is issued pursuant to Section 734.350(e) of this Part, that the owner or operator has demonstrated to the Agency's satisfaction an inability to obtain access to an off-site property despite best efforts and therefore is not required to*

perform corrective action on the off-site property in order to satisfy the corrective action requirements of this Part, but is not relieved of responsibility to clean up portions of the release that have migrated off-site;

- e) The prohibition under Section 734.715(e) of this Part against the use of any site in a manner inconsistent with any applicable land use limitation, without additional appropriate remedial activities;
- f) A description of any approved preventive, engineering, and institutional controls identified in the plan or report and notification that failure to manage the controls in full compliance with the terms of the plan or report may result in avoidance of the No Further Remediation Letter;
- g) The recording obligations pursuant to Section 734.715 of this Part;
- h) The opportunity to request a change in the recorded land use pursuant to Section 734.715(e) of this Part;
- i) Notification that further information regarding the site can be obtained from the Agency through a request under the Freedom of Information Act [5 ILCS 140]; and
- j) Any other provisions agreed to by the Agency and the owner or operator.
(Emphasis added)

III. THE ILLINOIS EPA CANNOT REVIEW A BUDGET AMENDMENT AFTER THE ISSUANCE OF A NO FURTHER REMEDIATION LETTER

Pursuant to the Act and the regulations promulgated thereunder, the Illinois EPA is prohibited from reviewing a budget amendment after the issuance of a No Further Remediation (“NFR”) letter. Even though Petitioner argues several times that the Illinois EPA position is in opposition to the Act and Regulations when they are read as a whole, the Illinois EPA respectfully disagrees. 35 Ill. Adm. Code 734.710(d) discusses what a NFR letter signifies. Section 734.710(d) quotes the statutory language of Section 57.10(c)(1)-(3). These provisions state that the NFR letter signifies that “[a]ll statutory and regulatory corrective action requirements applicable to the occurrence have been complied with.” This means that the provisions of 415 ILCS 5/57.7 have to be finished and complied with prior to the issuance of a NFR letter. If they are not finished a NFR letter cannot be issued. Section 57.7 includes all of

the provisions relating to the approval of budgets and states that the budget needs to be submitted if the owner or operator is seeking reimbursement from the fund and should include an accounting of all costs associated with the implementation and completion of the corrective action plan. Therefore, when reading the Act and regulations as a whole, it is clear that the Act requires that the budget be submitted prior to the issuance of a NFR letter. Section 734.335(d) merely reiterates what the Act already requires; all plans and budgets need to be submitted to the Illinois EPA prior to the issuance of a NFR letter. It should be noted that the reimbursement provisions are a separate section under the Act and it is not required that all reimbursement be issued prior to the issuance of the NFR letter. Reimbursement can be made after the issuance of the NFR letter pursuant to a plan approved prior to issuance of the NFR letter.

III. TODD'S SERVICE STATION V. IEPA

The Petitioner has pointed to *Todd's Service Station v. IEPA*, PCB 03-2 (January 22, 2004) for proof that the Illinois EPA has reviewed a budget amendment after the issuance of a NFR letter. This case is not precedent in deciding the issues in this case. The case did not decide the issue of whether the Illinois EPA could review a budget amendment after the issuance of a NFR letter. The case was about whether a denial of personnel costs was reasonable. However, in the listed facts of the case, it does mention that the Illinois EPA agreed to review the budget amendment which was submitted after the issuance of a NFR letter after an initial May 23, 2004 denial letter was sent out. The facts of *Todd's Service Station* differ from the case at hand. In *Todd's*, the consultant talked with the Illinois EPA after the issuance of the May 23, 2004 denial to explain that the Illinois EPA project manager told them they could submit a budget amendment after the issuance of a NFR letter. Due to the fact that the project manager gave the *Todd's* consultant incorrect advice and in the interest of fairness, the Illinois EPA agreed to review the budget amendment. The Illinois EPA did not agree to review the budget

amendment because it believed its interpretation of the Act and regulations was incorrect on this issue. (See attached June 3, 2002 memorandum mentioned in *Todd's*)¹

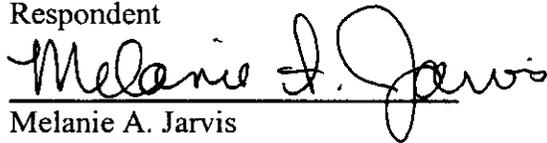
VI. CONCLUSION

For the reasons stated herein, as well as those previously made by the Illinois EPA, the Illinois EPA respectfully requests that the Board affirm its final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



Melanie A. Jarvis
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
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Dated: September 25, 2006

This filing submitted on recycled paper.

¹ The Petitioner requested this document during a Status Conference with the Hearing Officer. In the interest of saving time in resolving the issues in this case, the Illinois EPA is attaching the document to this pleading.

CERTIFICATE OF SERVICE

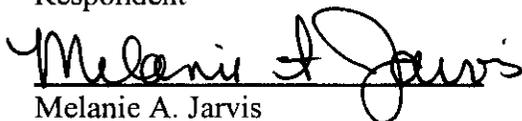
I, the undersigned attorney at law, hereby certify that on September 25, 2006 I served true and correct copies of a MOTION FOR LEAVE TO FILE REPLY TO RESPONSE AND MEMORANDUM OPPOSING IEPA'S MOTION FOR SUMMARY JUDGMENT and a REPLY TO PETITIONERS' RESPONSE AND MEMORANDUM OPPOSING IEPA'S MOTION FOR SUMMARY JUDGMENT, 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
Illinois Pollution Control Board
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