

ILLINOIS POLLUTION CONTROL BOARD  
December 21, 2006

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

ORDER OF THE BOARD (by A.S. Moore):

On September 1, 2006, the respondent, the Illinois Environmental Protection Agency (Agency) filed a motion for summary judgment. The petitioner, FedEx Ground Package System, Inc. (FedEx), in a petition filed August 21, 2006, sought the Board's review of an Agency determination rejecting an amended remediation budget for FedEx's underground storage tank site in Bedford Park, Cook County. On December 18, 2006, FedEx filed a cross-motion for summary judgment. FedEx also sought, in a motion filed November 28, 2006, to consolidate this matter for the purpose of decision with another matter before the Board. For the reasons discussed below, the Board denies FedEx's motion for consolidation, grants the Agency's motion for summary judgment, and denies FedEx's cross-motion for summary judgment. The Board also grants the parties' motions to supplement the administrative record.

This opinion first reviews the procedural history and factual background of the case before addressing FedEx's motion for consolidation and the two motions to supplement the administrative record. The opinion then discusses and rules on the cross-motions for summary judgment.

**PROCEDURAL HISTORY**

On August 21, 2006, FedEx timely filed a petition (Pet.) seeking the Board's review of a July 17, 2006 determination of the Agency. In that determination, the Agency rejected a proposed amended budget regarding remediation of an underground storage tank site at 6767 West 75th Street, Bedford Park, Cook County.

On September 1, 2006, the Agency filed the administrative record (R.) in this proceeding. Also on September 1, 2006, the Agency filed a motion for summary judgment (Mot.). In an order dated September 7, 2006, the Board accepted FedEx's petition for hearing. Although that order noted that the Agency had filed its motion for summary judgment, the Board reserved ruling upon it. On September 18, 2006, FedEx filed a response and memorandum opposing the Agency's motion for summary judgment (Resp.).

On September 27, 2006, the Agency filed a motion for leave to file a reply to the response and memorandum opposing the Agency's motion for summary judgment, accompanied by a reply (Reply). FedEx has filed no response to the Agency's motion for leave. The Board grants the Agency's motion and accepts the Agency's reply.

On November 6, 2006, the Agency filed a motion for leave to supplement the administrative record (Mot. Supp. 1). Accompanying the motion were specific documents sought to be added to the record.

On November 28, 2006, FedEx filed a motion to consolidate for purpose of decision. Specifically, FedEx moved that the Board consolidate this case with Broadus Oil. v. IEPA, PCB 04-31, 05-43 (cons.). On December 8, 2006, the Agency filed its objection to petitioners' motion to consolidate for purpose of decision.

On December 18, 2006, FedEx filed a motion to supplement administrative record (Mot. Supp. 2). Also on December 18, 2006, FedEx filed petitioner's cross-motion for summary judgment (Cross Mot.).

### **FACTUAL BACKGROUND**

FedEx owns a truck terminal facility (the Facility) located at 6767 West 75th Street in Bedford Park, Cook County. R. at 7. FedEx acquired the property in 2002 from Consolidated Freight Services, which had also used the property as a truck terminal. *Id.*

On April 3, 2003, FedEx notified the Illinois Emergency Management Agency (IEMA) of a leak from an underground storage tank located at the Facility. *See* R. at 78. IEMA assigned that notification Incident Number 20030468. *Id.* On April 26, 2004, FedEx provided IEMA another notification regarding that tank. *See id.* IEMA assigned that notification Incident Number 20040575. *See id.*

In a letter dated May 23, 2003, the Illinois State Fire Marshal determined that FedEx was eligible to seek reimbursement of corrective action costs stemming from IEMA Incident Number 20030468. R. at 72-74. On May 5, 2005, the Agency approved a payment of \$11,327.77 for Incident Number 20030468 and applied that payment to the claim's deductible of \$15,000. Cross Mot. at 5, Attachment 2. In a letter dated June 20, 2005, the Illinois State Fire Marshal determined that FedEx was eligible to seek reimbursement of corrective action costs stemming from IEMA Incident Number 20040575. R. at 75-77. On October 21, 2005, the Agency approved a payment of \$3,865.19 for Incident Number 20040575 and applied that payment to the claim's deductible of \$15,000. Cross Mot. at 5, Attachment 3.

On June 22, 2005, FedEx submitted to the Agency a Corrective Action Plan (CAP) regarding IEMA Incident Numbers 20030468 and 20040575. R. at 3-19. FedEx also submitted a proposed budget addressing those two incident numbers (R. at 20-55) and a professional engineer's certification regarding that budget (R. at 56). In a letter dated July 14, 2005, the Agency approved FedEx's proposed CAP without modification. R. at 57-58. The Agency also

approved FedEx's budget for amounts totaling \$321,151.37 in six categories: investigation costs, analysis costs, personnel costs, equipment costs, field purchases and other costs, and handling charges. R. at 57-59. In a letter dated January 11, 2006, the Agency approved specified amounts in an amended budget for Incident Numbers 20030468 and 20040575. Cross Mot. at 5, Attachment 4. The third paragraph of that letter in its entirety states "NOTE: Amended plans and/or budget must be submitted and approved prior to issuance of a No Further Remediation (NFR) Letter. Costs associated with a plan or budget that have not been approved prior to the issuance of an NFR Letter will not be reimbursable." Cross Mot., Attachment 4.

On April 21, 2006, the Agency received from FedEx a Corrective Action Completion Report (CACR). See R. at 62; SR at 1-166. FedEx also filed an engineer's certification with the Agency. See R. at 62, citing 415 ILCS 5/57.7(b)(5) (2004), 35 Ill. Adm. Code 734.135(d). The CACR encompassed Incident Numbers 20030468 and 20040575 as well as additional Incident Number 20060145. See R. at 62. In a letter dated May 10, 2006, the Agency acknowledged receiving FedEx's CACR and granted FedEx's request for a No Further Remediation (NFR) letter with regard to Incident Numbers 20030468, 20040575, and 20060145. R. at 62-70. FedEx received that letter on May 15, 2006. R. at 69-70. On May 17, 2006, FedEx recorded the NFR letter with the Cook County Recorder of Deeds. R. at 112-19.

By a letter dated May 30, 2006 (R. at 71), FedEx submitted a proposed budget amendment and claim for reimbursement (R. at 78-98) to the Agency. FedEx also submitted an engineer's certification to the Agency. R. at 99. The proposed amended budget sought approval of additional costs in the amount of \$72,878.75. R. at 80. Because FedEx had spent less than the originally budgeted amount on some of its costs, FedEx sought reimbursement of \$39,122.55 in addition to the original budget amount of \$333,980.67. R. at 81. In a cover letter, FedEx's consultant stated that it submitted the amended budget "to cover costs for removal of the 15,000-gallon diesel fuel underground storage tank, demolition and removal of a canopy, asphalt pavement of the excavated areas, abandonment of existing monitoring wells and recording of the No Further Remediation Letter." R. at 71.

In a letter dated June 21, 2006, the Agency rejected FedEx's proposed amended budget. As its basis for doing so, the Agency stated that:

[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. R. at 100-04.

In a letter dated July 3, 2006, MACTEC Engineering and Consulting, Inc. (MACTEC), an environmental consultant retained by FedEx, requested that the Agency review and approve FedEx's amended budget. R. at 105-06. In a letter dated July 17, 2006, the Agency rejected FedEx's proposed amended budget. As its basis for doing so, the Agency again stated that

[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. R. at 107-11.

## **MOTION TO CONSOLIDATE**

### **FedEx Motion**

On November 28, 2006, FedEx filed a motion to consolidate for purpose of decision (Mot. Cons.). Specifically, FedEx moved that the Board consolidate this case with Broadus Oil v. IEPA, PCB 04-31, 05-43 (cons.).

FedEx states that, in performing research in order to oppose the Agency's motion for summary judgment, it "has determined that the legal issue presented is apparently a matter of first impression before the Board." Mot. Cons. at 2. FedEx notes, "however, that another Petition for Review of Underground Storage Tank Fund Reimbursement Determination by an unrelated entity, currently pending before the Board, raises the same legal issue, with certain different factual details." *Id.*, citing Broadus Oil v. IEPA, PCB 04-31, 05-43 (cons.). FedEx states that, while cross-motions for summary judgment are now pending in Broadus (Mot. Cons. at 2), it "has committed to file its own cross-motion for summary judgment by December 15, 2006." Mot. Cons. at 1.

FedEx argues that "[d]enial of this motion could cause extreme material prejudice to Petitioner FedEx because the Board could rule upon the relevant legal issue of first impression in the Broadus case before it reviews FedEx's legal arguments in its cross-motion for summary judgment," which it has committed to file by December 15, 2006. Mot. Cons. at 2. FedEx further argues that consolidation would be convenient and expeditious. *Id.* at 3; *see* 35 Ill. Adm. Code 101.406. While acknowledging that consolidation may delay a decision on the cross-motions for summary judgment in Broadus, "it would provide the Board a more complete briefing of the legal issues, and additional factual circumstances to use in explaining its interpretation of the regulation at issue to IEPA and the regulated community in its consolidated Opinion." Mot. Cons. at 3. Finally, FedEx states its understanding that "Broadus is in agreement with this motion and will be filing a similar motion . . ." *Id.* The Board notes that, on December 6, 2006, Broadus Oil filed a motion to consolidate its consolidated UST appeals with this case. Broadus Oil v. IEPA, PCB 04-31, 05-43 (cons.) (Dec. 6, 2006).

### **Agency Response and Objection**

On December 8, 2006, the Agency responded to FedEx's motion by filing its objection to petitioners' motion to consolidate for purpose of decision (Obj.). The Agency argues that consolidation of this case with the consolidated Broadus Oil appeals "is inappropriate and will cause material prejudice to the Illinois EPA." Obj. at 1; *see* Broadus Oil v. IEPA, PCB 04-31, 05-43 (cons.). Specifically, the Agency claims that it "would be materially prejudiced by any

further delay in the Broadus Oil case.” Obj. at 2. Accordingly, the Agency states that “[t]he cases should be tried separately and on their own merits.” *Id.*

In support of its response to FedEx’s motion, the Agency argues that the petitioners in this case and in the Broadus Oil case “are unrelated parties.” Obj. at 1. The Agency further argues that “[t]he underlying facts in each case do not arise from the same act or occurrence” and that “[t]he sites at issue are not the same nor are they related in any manner.” *Id.* The Agency further argues that it “issued each Petitioner its own decision letters based upon the facts and circumstances presented in each distinct case.” *Id.* The Agency continues by arguing that it reached the decisions in the two cases under two separate parts of the Board’s underground storage tank (UST) regulations. Obj. at 2; *see* 35 Ill. Adm. Code 732, 35 Ill. Adm. Code 734. The Agency also claims that the Broadus Oil case includes the denial of a request for reimbursement, which this case does not include. Obj. at 2.

The Agency notes that Broadus Oil filed its first appeal on December 15, 2003. Obj. at 2. The Agency further notes that Broadus Oil filed its second appeal on September 2, 2004. *Id.* The Agency further notes that it filed its motion for summary judgment in the consolidated Broadus Oil cases on May 8, 2006. *Id.* The Agency argues that Broadus Oil did not respond to that motion until September 22, 2006, after receiving “several extensions of time by which to file a response.” *Id.* The Agency further argues that, after the Agency filed its reply on September 28, 2006, Broadus Oil filed no further pleadings. *Id.* The Agency claims that consolidating the cases provides Broadus Oil “another opportunity to argue its case through the pleadings in the FedEx case. This opportunity has long expired.” *Id.*

### **Board Analysis**

Section 101.406 of the Board’s procedural rules provides that, on the motion of any party, “[t]he Board will consolidate the proceedings if consolidation is in the interest of convenient, expeditious, and complete determination of claims, and if consolidation would not cause material prejudice to any party.” 35 Ill. Adm. Code 101.406.

Well before receiving FedEx’s motion to consolidate, the Board recognized that the Broadus case appears to raise the legal issue raised in this proceeding. *See Broadus Oil v. IEPA*, PCB 04-31 (Sept. 15, 2003) (Request for Ninety Day Extension of Appeal Period). The Board also notes a third case appearing to raise the same legal issue and in which the Agency on November 22, 2006, filed a motion for summary judgment. *See Village of Wilmette v. IEPA*, PCB 07-27.

Because this proceeding and the Broadus case involve different parties, different facts, and different UST sites, the Board is not persuaded that consolidation furthers “the interest of convenient, expeditious, and complete determination of claims.” *See* 35 Ill. Adm. Code 101.406. Although FedEx suggests that granting this motion to consolidate would avoid “extreme material prejudice” (Mot. at 2) to FedEx, the Board is not persuaded that prejudice would result from proceeding to decide the merits of the cross-motions for summary judgment in Broadus before FedEx files its own cross-motion for summary judgment. Accordingly, FedEx’s motion to consolidate is denied.

### **MOTIONS TO SUPPLEMENT ADMINISTRATIVE RECORD**

On November 6, 2006, the Agency filed a motion for leave to supplement the administrative record. Accompanying the motion were specific documents sought to be added to the record. The Agency states that “[t]he request to supplement the record is by mutual agreement of the parties,” (Mot. Supp. 1 at 1) and the Board notes that FedEx has filed no response to the motion. *See* 35 Ill. Adm. Code 101.500(d). The Board grants the Agency’s motion and supplements the record (SR 1-174).

On December 18, 2006, FedEx filed a motion to supplement administrative record. FedEx states that, in a letter to the Agency dated October 24, 2006, it requested that the Agency add specified items in its file to the Administrative Record in this matter. Mot. Supp. 2 at 2. FedEx further states that the Agency did not include three letters in its November 6, 2006 motion to supplement. *Id.*, Attachments 2 (Agency letter to FedEx dated May 2, 2005), 3 (Agency letter to FedEx dated October 21, 2005), 4 (Agency letter to FedEx dated January 11, 2006). FedEx further states that these letters from the Agency to FedEx “are relevant and material to legal arguments made by Petitioner in its Cross Motion for Summary Judgment.” Mot. Supp. 2 at 2.

The Board’s procedural rules provide that, “[u]nless undue delay or material prejudice would result, neither the Board nor the hearing officer will grant any motion before expiration of the 14 day response period except in deadline driven proceedings where no waiver has been filed.” 35 Ill. Adm. Code 101.500(d). The Board notes that FedEx has filed a second waiver of its decision deadline to June 17, 2007. However, the Board notes that the material facts are not in dispute in this matter. *See* Mot. at 7, Cross Mot. at 3. Having received FedEx’s cross-motion for summary judgment, the legal issue in this proceeding is now squarely before the Board. Because undue delay would result from expiration of the 14 day response period, the Board grants FedEx’s motion and supplements the administrative record with FedEx’s Attachments 1-4.

### **CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Below, the Board summarizes FedEx’s petition for review before providing the applicable statutes and regulations and the standard of review. Next, the opinion summarizes the Agency’s motion for summary judgment, FedEx’s response, the Agency’s reply, and FedEx’s cross-motion for summary judgment. Finally, the opinion provides the Board’s analysis of and conclusions on the motions for summary judgment.

#### **FedEx’s Petition for Review**

FedEx states that the Agency on July 14, 2005, approved a CAP and budget for Incident Numbers 20030468 and 20040575 at the Facility. Pet. at 2. FedEx further states that, in the year following that approval, MACTEC implemented the approved CAP. *Id.* FedEx also states that it obtained Incident Number 20060145 for removal of the diesel fuel underground storage tank that is the subject of this proceeding and that MACTAC also performed this removal. *Id.* FedEx

notes that, after MACTEC submitted a CACR, the Agency on May 10, 2006, granted FedEx an NFR letter covering Incident Numbers 20030468, 20040575, and 20060145. Pet. at 2.

FedEx states that, on May 30, 2006, it submitted to the Agency a proposed budget amendment, “including documentation of expenses already incurred in implementing the corrective action plan previously approved by IEPA.” Pet. at 2. FedEx further states that, on July 17, 2006, the Agency issued its final action rejecting the request for approval of the proposed amended budget because the amended “budget was submitted after the issuance of a No Further Remediation Letter.” Pet. at 3 (noting citation to 35 Ill. Adm. Code 734.335(d)); *see* R. at 107-11.

FedEx argues:

that the Board regulations cited in IEPA’s July 17, 2006 final action as its basis for rejecting Petitioner’s submittal do not apply here, where Petitioner obtained approval of IEPA for its Corrective Action Plan and Budget before proceeding with its underground storage tank cleanup, and now only seeks to amend the budget to recover actual costs incurred in implementing the IEPA approved plan. Pet. at 4.

FedEx further argues that “IEPA’s asserted interpretation of certain subsections of the regulations is contrary to [the] meaning of the Board’s Petroleum Underground Storage Tank Regulations read as a whole, and to their statutory basis in the Environmental Protection Act.” *Id.*, citing 415 ILCS 5/57 *et seq.* (2004). FedEx asks that the Board reverse the Agency’s final determination of July 17, 2006 and that the Board direct the Agency to approve FedEx’s proposed budget amendment and request for reimbursement. Pet. at 4.

### **Statutory and Regulatory Provisions**

Section 57.7(e) of the Act, as amended by Public Acts 92-574, 92-651, and 92-735, provides:

- (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 5/57.7(e) (2004).

Section 57.8 of the Act in pertinent part provides:

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. 415 ILCS 5/57.8 (2004)

Section 57.10(c)(1) of the Act provides:

- (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. 415 ILCS 57.10(c)(1) (2004).

Section 732.405(d) of the Board's underground storage tank regulations, addressing releases reported between September 23, 1994 and June 23, 2002, provides:

- 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.

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.

Section 734.335 of the Board's underground storage tank regulations, addressing releases reported on or after June 24, 2002, in pertinent part provides:

- 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. 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. 35 Ill. Adm. Code 734.335.

Section 734.710(d)(1) of the Board's regulations provides:

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

\* \* \*

- 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.* 35 Ill. Adm. Code 734.710(d)(1).

### **Burden of Proof**

Section 105.112(a) of the Board's procedural rules provides that, in appeals of final Agency determinations, "[t]he burden of proof shall be on the petitioner." 35 Ill. Adm. Code 105.112(a). Specifically, the burden is on FedEx to demonstrate that the costs incurred are

related to corrective action, properly accounted for, and reasonable. Beverly Malkey, as Executor of the Estate of Roger Malkey d/b/a Malkey's Mufflers v. IEPA, PCB 02-104, slip op. at 9 (Apr. 17, 2003). When requesting reimbursement from the fund, the owner or operator must provide a budget including an accounting of all costs associated with the implementation and completion of the corrective action plan. *Id.*; 415 ILCS 5/57.7(b)(3) (2004).

### **Standard of Review**

The standard of review under section 40 of the Environmental Protection Act (Act) (415 ILCS 5/40 (2004)) is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at 5 (July 24, 2003); citing Browning Ferris Industries of Illinois v. PCB, 534 N.E.2d 616 (2nd Dist. 1989). The Board will not consider new information not before the Agency prior to its final determination regarding the issues on appeal. Kathe's Auto Service Center v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). The Agency's denial letter frames the issues on appeal. Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

Summary judgment is appropriate when the pleadings, deposition, admissions on file, and affidavits disclose that there is 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). 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." *Id.* Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to relief "is clear and free from doubt." Dowd & Dowd, Ltd. V. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998), citing Purtill v. Hess, 111 Ill. 2d 299, 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 judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

### **Agency's Motion for Summary Judgment**

The Agency argues that "[t]he 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." Mot. at 7.

The Agency stresses the language of section 734.335(d) of the Board's regulations:

any such [corrective action] plan and [corrective action] budget *must be submitted* to the Agency for review and approval, rejection, or modification in accordance with the procedure contained in Subpart E of this part *prior to* payment for any related costs or *the issuance of a No Further Remediation Letter*. Mot. at 7-8 (emphasis in original), citing 35 Ill. Adm. Code 734.335(d).

The Agency argues that the record clearly shows that FedEx received an NFR letter from the Agency on May 10, 2006, and that FedEx recorded this NFR letter on May 17, 2006. Mot. at

8. The Agency notes that “FedEx submitted the Budget Amendment on May 30, 2006.” *Id.* The Agency argues that the record also shows that “FedEx submitted the Budget Amendment after the issuance of a NFR letter.” *Id.*

The Agency argues that this proceeding presents no genuine issue of material fact and that it is entitled to judgment as a matter of law. Mot. at 1. Specifically, because FedEx submitted its amended budget after receiving and recording an NFR letter, the Agency argues that section 734.335(d) of the Board’s regulations prohibits the Agency from reviewing that amended budget. Mot at 8. Accordingly, the Agency requests that the Board affirm its decision on July 17, 2006, to deny FedEx’s request for approval of an amended budget. *Id.*

### **FedEx’s Response**

FedEx states that, when interpreting a single sentence in regulatory language, “the sentence must be read as part of the whole regulation, and in light of its overall purpose.” Resp. at 8, citing *County of DuPage v. E&E Hauling*, AC 88-76, 88-77, slip op. at 3 (Feb. 8, 1990) (citation omitted). FedEx argues that section 734.335 of the Board’s regulations chiefly addresses cases in which the owner submits a CAP and budget for approval by the Agency before beginning corrective action. Resp. at 8; *see* 35 Ill. Adm. Code 735.335. FedEx states that its submission of documents and its corrective action followed that order in this case. Resp. at 8.

FedEx then argues that subsection 734.335(d) provides the only exception to this “normal situation” in which the submission of documents precedes corrective action. Resp. at 8; *see* 35 Ill. Adm. Code 734.335(d). Specifically, FedEx claims that subsection (d) “only applies where an owner has elected to proceed with corrective action before submitting a CAP or budget.” Resp. at 8-9; *see* 35 Ill. Adm. Code 734.335(d). FedEx claims that the introductory language to the subsection itself reflects its nature as an exception: “[n]otwithstanding 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 . . .” Resp. at 8 (emphasis in original), citing 35 Ill. Adm. Code 734.335(d).

FedEx argues that subsection (d) has no application to “the more common situation,” such as its own, in which the owner submits a plan and budget before performing corrective action. Resp. at 9, *see* 35 Ill. Adm. Code 734.335(d). FedEx stresses that subsection “734.335(d) never mentions *amended* budgets at all.” Resp. at 9 (emphasis in original). FedEx further argues that, even when an owner relies on subsection (d) to begin corrective action before submitting a CAP and budget, that provision “does not prohibit IEPA from reviewing a Budget Amendment.” Resp. at 9, *see* 35 Ill. Adm. Code 734.355(d). FedEx claims instead that subsection (d) “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.” Resp. at 9; *see* 35 Ill. Adm. Code 500 *et seq.*

FedEx argues that the Agency supports its interpretation of subsection (d) on the basis of a specific phrase: “prior to payment for any related costs or the issuance of a No Further Remediation Letter.” Resp. at 9, citing 35 Ill. Adm. Code 734.335(d). FedEx further argues that

this interpretation would prohibit the Agency “from reviewing any budget amendment after the first partial payment it makes for any costs related to the correction action.” Resp. at 9. FedEx claims that this position directly conflicts with the language of the Act. *Id.* Specifically, FedEx claims that the Act “explicitly allow[s] owners who have received IEPA approval for their initial CAP and Budget to seek partial payments as they proceed with implementation of the CAP.” Resp. at 10, citing 415 ILCS 5/57.8 (2004). FedEx also claims that the Act “explicitly authorizes an owner to submit amended budgets after receiving payment for parts of the corrective action work.” Resp. at 10, citing 415 ILCS 5/57.8(5) (2004). FedEx argues that the Agency’s interpretation is not consistent with the Act because that interpretation would prohibit that Agency from reviewing or approving successive plans and budgets “because they would clearly be submitted after ‘payment for any related costs or the issuance of a No Further Remediation Letter.’” Resp. at 10, citing 35 Ill. Adm. Code 734.335(d).

FedEx claims that subsection 734.335(d) can be interpreted in a manner consistent with the language of the Act. Resp. at 10; *see* 415 ILCS 5/57.8 (2004), 35 Ill. Adm. Code 734.335(d). Specifically, FedEx argues that the first sentence of the subsection “authorizes owners to proceed with UST corrective action before submitting a CAP or Budget without automatically losing all rights to reimbursement.” Resp. at 10-11; *see* 35 Ill. Adm. Code 734.335(d). FedEx further argues that the following sentence limits this authorization by requiring submission and review of a CAP and budget before the Agency can reimburse costs or issue an NFR letter. Resp. at 11, *see* 35 Ill. Adm. Code 734.335(d). FedEx concludes that the Board should adopt this interpretation of the subsection (d) and should reject the Agency’s interpretation. Resp. at 11; *see* 35 Ill. Adm. Code 734.335(d).

FedEx argues that the Board’s regulations explicitly address amended budgets in subsection 734.335(e). Resp. at 9, 11; *see* 35 Ill. Adm. Code 734.335(e). Noting that it obtained approval of its CAP and budget in July of 2005, before determining in May of 2006, that it needed a revised budget, FedEx claims that “the first sentence of 734.335(e) matches the facts in this case.” Resp. at 11; *see* 35 Ill. Adm. Code 734.335(e). FedEx argues that nothing in subsection (e) or Subpart E “would *require* IEPA to reject Petitioner’s Budget Amendment based upon issuance of the May 10, 2006 NFR Letter.” Resp. at 12 (emphasis in original); *see* 35 Ill. Adm. Code 734.500 *et seq.*, 35 Ill. Adm. Code 734.335(e). FedEx further argues that nothing in subsection (e) or Subpart E would even *allow* it to consider the issuance of a NFR Letter in reviewing Petitioner’s Budget Amendment. Resp. at 12 (emphasis in original); *see* 35 Ill. Adm. Code 734.500 *et seq.*, 35 Ill. Adm. Code 734.335(e). FedEx claims that, under subsection (e), “the IEPA is explicitly *required* to review Petitioner’s May 30, 2006 Budget Amendment in accordance with Subpart E.” Resp. at 12 (emphasis in original); *see* 35 Ill. Adm. Code 500 *et seq.*, 35 Ill. Adm. Code 734.335(e).

FedEx argues that the Agency has cited no case law supporting its interpretation of subsection (d). Resp. at 12; *see* 35 Ill. Adm. Code 734.355(d). FedEx notes that Part 734 of the Board’s UST regulations only recently became effective but that Part 732 addressing releases reported between September 23, 1994 and June 23, 2002 contains very similar language. Resp. at 12-13; *see* 35 Ill. Adm. Code 732.405(d). Specifically, FedEx argues that the second sentences of both subsection 732.405(d) and 734.335(d) “contain the same exact language.”

Resp. at 13; *compare* 35 Ill. Adm. Code 732.405(d) and 35 Ill. Adm. Code 734.335(d). FedEx stresses that the Agency relies upon this sentence for its position in this case. Resp. at 13.

FedEx states that it has located a single Board opinion interpreting the language in section 732.405(d). Resp. at 13, citing Todd's Service Station v. IEPA, PCB 03-2, slip op. at 2 (Jan. 22, 2004); *see* 35 Ill. Adm. Code 732.405(d). FedEx states that, in Todd's, the Agency originally rejected an amended budget submitted on Todd's behalf because it had been submitted after the Agency issued its NFR letter. Resp. at 13, citing Todd's Service Station v. IEPA, PCB 03-2, slip op. at 2 (Jan. 22, 2004). FedEx notes that, in Todd's, "[t]he 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." Resp. at 13, citing Todd's Service Station v. IEPA, PCB 03-2, slip op. at 2 (Jan. 22, 2004) (citations omitted).

FedEx continues by noting that, after discussing the budget rejection with Todd's consultant, the Agency indicated that "it would reconsider the budget amendment denial if it received a written request to do so." Resp. at 13, citing Todd's Service Station v. IEPA, PCB 03-2, slip op. at 2 (Jan. 22, 2004) (citation omitted). FedEx argues that, after Todd's consultant submitted a request for reconsideration, the Agency approved part of the amended budget. Resp. at 13 (noting approval of \$2,806.08 of \$7,483.58 requested), citing Todd's Service Station v. IEPA, PCB 03-2, slip op. at 2 (Jan. 22, 2004). FedEx emphasizes that "[t]he 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." Resp. at 13, citing Todd's Service Station v. IEPA, PCB 03-2, slip op. at 2 (Jan. 22, 2004).

FedEx notes that, in Todd's, the Agency relied on language virtually identical to the language it relies upon in this case to argue that it cannot approve FedEx's budget amendment. Resp. at 13-14. FedEx argues, however, that in Todd's the Agency "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." Resp. at 14 (emphasis in original). FedEx argues that, because the Agency has not consistently interpreted the language in sections 732.405(d) and 734.335(d) (35 Ill. Adm. Code 732.405(d), 734.335(d)), "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." Resp. at 14. Accordingly, "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." Resp. at 2, citing Kathe's Auto Service Center v. IEPA, PCB 96-102, slip op. at 21 (Aug. 1, 1996). Concluding, FedEx argues that, because section 734.335(e) requires the Agency to review the amended budget submitted on May 30, 2006, "the IEPA's motion for summary judgment should be denied." Resp. at 14.

### **Agency's Reply**

The Agency "strongly disagrees" with FedEx's argument that the interpretation of section 734.355(d) relied upon by the Agency in rejecting FedEx's May 30, 2006, budget amendment conflicts with the Part 734 read in its entirety and with section 57.8 of the Act. Reply at 1; *see* 415 ILCS 5/57.8 (2004); 35 Ill. Adm. Code 734.335(d).

The Agency argues that the NFR letter signifies that “[a]ll statutory and regulatory corrective action requirements applicable to the occurrence have been complied with.” Reply at 4, citing 415 ILCS 5/57.10(c)(1-3) (2004), 35 Ill. Adm. Code 734.710(d). In other words, claims the Agency, an owner or operator must comply with the provision of section 57.7 of the Act before the Agency can issue an NFR letter. Reply at 4; *see* 415 ILCS 5/57.7 (2004). Because section 57.7 includes provisions relating to budget approval, the Agency claims that “it is clear that the Act requires that the budget be submitted prior to the issuance of a NFR letter.” Reply at 5, citing 35 Ill. Adm. Code 734.335(d). The Agency clarifies that “reimbursement can be made after the issuance of the NFR letter pursuant to a plan approved prior to issuance of the NFR letter.” Reply at 5.

The Agency notes that FedEx relies upon Todd’s “for proof that the Illinois EPA has reviewed a budget amendment after the issuance of a NFR letter.” Reply at 5, citing Todd’s Service Station v. IEPA, PCB 03-2 (Jan. 22, 2004). The Agency argues that Todd’s “did not decide the issue of whether the Illinois EPA could review a budget amendment after the issuance of a NFR letter” and instead decided whether the Agency’s denial of personnel costs was reasonable. Reply at 5.

The Agency acknowledges that the Board’s opinion in Todd’s refers to the Agency’s review and initial denial of a budget amendment submitted after the issuance of an NFR letter. *Id.*; *see* Todd’s Service Station v. IEPA, PCB 03-2, slip op. at 2 (Jan. 22, 2004). However, the Agency distinguishes Todd’s from the facts of this case. The Agency argues that Todd’s consultant had explained that the Agency’s “project manager told them they could submit a budget amendment after the issuance of a NFR letter”. Reply at 5. Characterizing this as “incorrect advice,” the Agency states that reviewed the budget amendment “in the interest of fairness.” *Id.* “The Illinois EPA did not agree to review the budget amendment because it believed its interpretation of the Act and regulation was incorrect on this issue.” *Id.*

During a status conference with the Board’s hearing officer, Todd’s asked to have prepared for the Agency’s file a memorandum describing the review of this amended budget. Reply at 6 n.1. Attached to the Agency’s reply in this proceeding is a memorandum indicating that “a review of the proposed [budget] amendment will be completed to determine if costs are necessary and reasonable.” Reply at 7. The Agency states that it submits this document “[i]n the interest of saving time in the resolving the issues in this case.” Reply at 6 n.1.

### **FedEx’s Cross-Motion for Summary Judgment**

In its first argument in support of its cross-motion for summary judgment, FedEx argues that the Agency rejected its May 30, 2006 budget amendment because FedEx submitted that amendment after receiving an NFR Letter. Cross Mot. at 9. FedEx further argues that, although the Agency cited Section 734.335(d) of the Board’s regulations as the basis for that rejection, Section “734.335(d) only applies when ‘an owner or operator [elects to] proceed to conduct corrective action activities . . . prior to the submittal or approval of an otherwise required corrective action plan or budget.’” Cross Mot. at 9, citing 35 Ill. Adm. Code 734.335(d). In this case, FedEx claims that it performed corrective action after submitting its corrective action plan and budget. Cross Mot. at 9, citing R. at 2-56, SR at 1-167. Because it made these submissions



before performing corrective action, FedEx claims that Section 734.335(d) does not apply to it. Cross Mot. at 9.

Second, FedEx argues that, even if Section 734.335(d) applied, the regulation only prohibits the Agency from reimbursing costs or issuing an NFR Letter until the owner or operator submits a plan and budget. Cross Mot. at 10. FedEx further argues that “the second sentence of 734.335(d) does not prohibit IEPA from reviewing a budget amendment.” *Id.* If the Agency claims that the second sentence does limit the submission of plans and budgets after an owner or operator has received a payment or an NFR Letter, then FedEx argues that that interpretation “makes no sense.” *Id.* FedEx claims that such an interpretation would allow an owner or operator to conduct corrective action without submitting a plan or budget to the Agency. Cross Mot. at 11. If the Agency then issued an NFR Letter or reimbursement without receiving a plan or budget, FedEx claims that the owner or operator would be prohibited from submitting them. *Id.*

FedEx further argues that, if the second sentence of the subsection prohibits the submission of any budget amendment after issuance of an NFR Letter, then it must also prohibit the submission of any budget amendment after “‘payment for any related costs,’ which is referenced in the same clause.” Cross Mot. at 11. FedEx claims that this interpretation would conflict directly with the Act, which “explicitly authorizes an owner to submit amended budgets after receiving payment for parts of the corrective action work.” *Id.*, citing 415 ILCS 5/57.8(a)(5) (2004). FedEx further claims that the Agency regularly approves budget amendments after approving partial reimbursement of corrective action costs and has done precisely that in this case. Cross Mot. at 11-12, Attachment 4. FedEx argues that the Agency “has provided no logical explanation for how ‘issuance of a NFR Letter’ could prohibit further budget amendments while ‘payment for any related costs’ does not, despite their identical treatment in the language of 734.335(d).” Cross Mot. at 12, citing 35 Ill. Adm. Code 735.335(d).

After stating that Section 734.335(d) does not refer to budget amendments, FedEx argues that the Section 734.335(e) explicitly addresses them. Cross Mot. at 13; *see* 35 Ill. Adm. Code 734.335(e). FedEx further argues that Section 734.335(e) does not “*require* IEPA to reject Petitioner’s Budget Amendment based on issuance of the May 10, 2006 NFR Letter, or even *allow* it to consider the issuance if a NFR Letter in reviewing Petitioner’s Budget Amendment.” Cross Mot. at 13 (emphasis in original); *see* 35 Ill. Adm. Code 734.335(e).

FedEx notes that the Agency’s July 17, 2006 rejection letter “inaccurately states that Petitioner has submitted a corrective action plan and budget” and rejects both of them. Cross Mot. at 14, citing R. at 107-10. FedEx corrects the Agency by noting that it submitted a reimbursement request and a budget amendment but no amendment to its corrective action plan. Cross Mot. at 14. Because rejection of the amended budget effectively denied its reimbursement request, FedEx has asked the Board to order the Agency to approve the amended budget and the request for reimbursement. *Id.*, citing Pet. at 4 (¶13). FedEx suggests that, because the reimbursement request includes an engineer’s certification, the Board has a sound basis on which to order the Agency to reimburse. Cross Mot. at 14-15, citing R. at 99, SR at 167,

Finally, FedEx incorporates into its cross-motion arguments that it made responding to the Agency's motion for summary judgment. Cross Mot. at 15; *see* Resp. at 8-14. FedEx "also incorporates by reference any additional applicable arguments advanced by the petitioner in the similar pending case Broadus Oil v. IEPA, PCB 04-31 and 05-43 (consolidated), which Petitioner has moved to consolidate with this case for purposes of decision." Cross Mot. at 15.

### **Board Analysis**

The Board's procedural rules provide that "[u]nless undue delay or material prejudice would result, neither the Board nor the hearing officer will grant any motion before expiration of the 14 day response period except in deadline driven proceedings where no waiver has been filed." 35 Ill. Adm. Code 101.500(d). The Board notes that FedEx has filed a second waiver of its decision deadline to June 17, 2007. However, the Board notes that the material facts are not in dispute in this matter. *See* Mot. at 7, Cross Mot. at 3. Having received FedEx's cross-motion for summary judgment, the legal issue in this proceeding is now squarely before the Board. Also, FedEx has noted "the importance of this legal issue to the broader regulated community" (Cross Mot. at 1), suggesting that regulated entities would benefit from expeditious review and determination by the Board. Because undue delay would result from expiration of the 14 day response period, the Board proceeds to analyze and decide FedEx's cross-motion for summary judgment before allowing that 14 day period to elapse.

FedEx argues that subsection 734.335(d) applies only "where an owner has elected to proceed with corrective action before submitting a CAP or budget." Resp. at 9, Cross Mot. at 9. After careful reading of subsection (d) in the context of the entire UST rules, the Board disagrees. The Board finds that the applicability of subsection (d) is not limited to sites at which corrective action is performed before any corrective action plan or budget is submitted or approved. Instead, subsection (d) applies to the extent that an owner or operator performs corrective action activities or incurs corrective action costs for which there is no Agency pre-approval. That is, subsection (d) applies to the extent that activities go beyond the scope of the approved corrective action plan or that costs go beyond the approved corrective action budget.

FedEx's claim that subsection (d) applies only where there is no approved plan or budget ignores that subsection 734.335(d) begins with "[n]otwithstanding any requirement under this Part for the submission of a corrective action plan or corrective action budget." *Compare* 35 Ill. Adm. Code 732.405(d) and 35 Ill. Adm. Code 734.335(d). Subsection 734.335(e), a requirement under this Part, requires amendments to plans or budgets. *See* 35 Ill. Adm. Code 734.500. Subsection (d) does, therefore, contemplate an existing and approved plan or budget, which this case involves. Applying the Board's reading of subsection (d) in this case, FedEx proceeded under subsection (d) by incurring costs beyond amounts contained in the approved budget without first receiving Agency approval of an amended budget. Thus, the budget amendment must be submitted before the Agency issues an NFR letter in order for the Agency to review that budget amendment. In addition, the caution expressed in the Board Note attached to subsection (d), that owners or operators proceeding under subsection (d) may not be entitled to full payment from the UST Fund, applies not only to those who proceed with no approved plan or budget, but also applies to those who go beyond the scope of an approved plan or who incur costs that go beyond the approved corrective action budget.

With regard to the UST rules, subsection (d) is an exception to the general rule that plans and budgets must be submitted to the Agency before performing the work. Subsection (e) clearly requires amendments to remediation plans or budgets when revised procedures or cost estimates are necessary. That is why it is necessary for subsection (d) to specify that any such “after-the-fact” plan or budget must be submitted before the Agency issues an NFR letter. The second sentence of subsection (d) is not a “stand-alone” ban on all post-NFR submission of plans and budgets. There is no need for such a broad ban because, for sites not proceeding under subsection (d), the owner or operator submits remediations plans or budgets before corrective action begins.

The Board notes FedEx’s claim that the Agency’s interpretation of subsection 734.335(d) would allow the Agency to issue an NFR Letter or a reimbursement without seeing a plan or budget and then prohibit the owner or operator from submitting a plan or budget. The Board believes that this claim fundamentally misunderstands the UST program and that it is based upon hypothetical circumstances that conflict with the Board’s regulation. Specifically, the UST regulations provide that the Agency must review applications for payment to determine “whether the amounts sought exceed the amounts approved in the corresponding budget.” 35 Ill. Adm. Code 734.610(a)(3). The regulations further provide that “[c]osts exceeding those contained in a budget or amended budget approved by the Agency” are ineligible for payment from the UST Fund. 35 Ill. Adm. Code 734.630(m). Furthermore, the issuance of an NFR letter hinges on the Agency’s approval of a corrective action completion report (CACR). 35 Ill. Adm. Code 734.705(a). Acceptance of the CACR in turn hinges on the completion of a corrective action plan. 35 Ill. Adm. Code 734.345(a). In spite of FedEx’s claim, the UST regulations would not allow the Agency to issue an “NFR Letter or partial payment before seeing the owner’s plan or budget.” Cross Mot. at 11.

The Board further notes FedEx’s argument that, “if the second sentence of subsection 734.335(d) prohibits the submission and review of any budget amendment after issuance of an NFR Letter, then it follows logically that it must also prohibit the submission and review of any budget amendment after ‘payment for any related costs,’ which is referenced in the same clause.” Cross Mot. at 11. This argument effectively reads the term “related” out of the language of the regulation. In this case, the Agency has approved the reimbursement of costs related to a previously-approved budget.

The Board finds that the Agency properly rejected requests for budget amendments regarding corrective action at FedEx’s site because the Agency received the budget amendment after it issued an NFR letter for the site.

### **CONCLUSION**

The Board denies FedEx’s motion to consolidate and grants the parties’ motion to supplement the administrative record. The Board finds that there are no issues of material fact and that the Agency is entitled to judgment as a matter of law. The Board grants the Agency’s motion for summary judgment and denies FedEx’s cross-motion for summary judgment. The

Board finds that the Agency properly rejected an amended budget under Section 734.335 of the Board's regulations.

**ORDER**

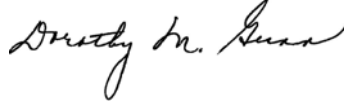
1. The Board denies FedEx's motion to consolidate.
2. The Board grants the Agency's motion for leave to supplement the administrative record.
3. The Board grants FedEx's motion to supplement the administrative record.
4. The Board grants the Agency's motion for summary judgment.
5. The Board denies FedEx's cross-motion for summary judgment.

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 5/41(a) (2004); *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, certify that the Board adopted the above order on December 21, 2006, by a vote of 3-1.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board