BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PETITION OF BRICKYARD DISPOSAL & RECYCLING, INC.,	)	PCB No. 16-66
	)	(Permit Appeal- Land)
Petitioner,	)	
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board the Petitioner's Motion for Summary Judgment. Copies of these documents are hereby served upon you, via electronic filing or service.

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Dated: August 24, 2016

Respectfully submitted,

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Petitioner,	)	
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent	)	

PETITIONER'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, BRICKYARD DISPOSAL & RECYCLING, INC. ("Brickyard") and, pursuant to Section 2-1005 of the Code of Civil Procedure, 735 ILCS 6/2-1005, and Section 101.516 of the Board's Procedural Rules, 35 Ill. Adm. Code Section 105.516, moves the Illinois Pollution Control Board ("Board") to grant summary judgment in its favor and against Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("IEPA" OR "Agency"). There are no genuine issues of material fact in this case and Brickyard is entitled to judgment as a matter of law. In support of its motion, Brickyard states as follows:

I. STATEMENT OF FACTS

A. Brickyard Landfill.

Brickyard owns and operates a municipal solid waste landfill facility in Vermilion County, located at 601 Brickyard Road, Danville, Illinois. The facility occupies a landfill waste area that is approximately 152-acres within a 293-acre site. Brickyard was originally developed and permitted, in Permit No. 1972-20-DE/OP, prior to the promulgation of the new federal landfill rules, known as Subtitle D.

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B. Local Siting of Brickyard Landfill.

In 1991, Brickyard sought to expand its landfill facility. On September 18, 1991, it filed a Request for Siting Approval with the Vermilion County Board, seeking authorization for an expansion of an existing landfill, as depicted in Drawings Nos. 89-115-4 and No. 89-115-5. *See* R. at 47032 – 47038; R. at 47211 - 47496.[1] The Request for Site Approval addressed all of the relevant statutory criteria for consideration by local governments in decision-making pursuant to Section 39.2 of the Act. The Request for Site Approval contained a depiction of the final landform (the drawings referenced above, entitled "Final Site Conditions"). The drawings included cross-sections that delineated waste disposal areas under the entire landform. While the siting application referred to the Request for Site Approval as a request for "volumetric expansion", it did not detail any specific volumetric capacity. The Vermilion County Board granted siting on February 11, 1992; the siting decision did not include volumetric restrictions, but referenced the contours of the drawings as the "expansion area" being authorized at siting. *See* R. at 47497-47499. It included only the following two conditions:

> *2(A) The expansion area shall be as shown on the attached drawings, which are incorporated herein by reference; and*
>
> *2(B) All leachate from within the expansion areas approved by this resolution shall be collected and disposed of through the leachate collection system designed for the expansion area, as required by the rules and regulations promulgated by the Illinois Pollution Control Board. This condition is not intended to impose any technical or design standards other than those applicable to new sanitary landfills.*

As evident above, and in the Petitioner's application that is the subject of this appeal (see further discussion below), the county siting decision authorized an expansion of the existing landfill, such that the expanded waste area would be contiguous to the existing unit and the entire

[1] While this document, and many large documents, appear in the record in multiple places, in order to avoid further confusion, Brickyard will provide only one citation. This citation is from the documents submitted to the Agency in the permit application that is the subject of this appeal.

landfill facility would constitute one coterminous landform. In granting the request for landfill siting, the County Board issued a resolution finding that the proposed expansion met the statutory factors relevant to local government decision-making pursuant to Section 39.2 of the Act.

C. Permitting History of Brickyard Landfill.

As with most Illinois landfills, Brickyard Landfill has a long permit history. *See* R. at 47553-47566. Throughout the entirety of such permitting, however, Brickyard Landfill has been, and is today, considered one landfill facility, as expanded via siting. Brickyard Landfill, both Unit 1 and Unit 2, occupy one IEPA Bureau of Land facility identification number: IEPA Bureau of Land I.D. #1838040029.

Following approval of the siting application, in June 1992, Brickyard submitted a supplemental permit application (Log No. 1992-188), detailing the vertical expansion authorized by Vermilion County. *See* R. at 00036 and following. The Agency issued Supplemental Permit No. 1992-188-SP on October 22, 1992, and reissued it on November 13, 1992. *See* R. at 00001 – 00041. Agency Form LPC-PA8 ("Certificate of Siting Approval"), dated and executed by then Vermilion County Board Chairman on February 25, 1992, accompanied the application. Attached to the LPC-PA8 were the relevant siting documents, including the legal description that corresponds to the configuration of the expansion, and the maps again depicting one coterminous waste facility.

Shortly thereafter, on February 1, 1993, a significant modification application was submitted (Log No. 1993-057-LF) pursuant to the Board's then new federally driven landfill rules at 35 Ill. Adm. Code 811-815, which applied to the area of expansion (Unit 2). The permit issued on April 14, 1994. *See* R. at 00386- 00423. On November 18, 1994, a modification of that permit was issued (Modification No. 1, Log No. 1994-505), authorizing, *inter alia*, the development of Cells 1-3 of the newly expanded area. *See* R. at 003182 - 003219.

On September 9, 1994, Brickyard submitted another significant modification application (Log No. 1994-419), seeking further development of the landfill. This application also included the relevant siting documents and, as well, depicted the final contours identical to those depicted in Log No. 1993-057. The Agency review notes for that application acknowledged that the horizontal and vertical limits contained in the application had been approved by Vermilion County in its siting decision. *See* R. at 47503.[2] The permit issued on May 4, 1995. *See* R. at 4879 – 4928. The permit itself authorized, *inter alia*, further development of the landfill, including Cells 4 – 7 and also Zone A and Phase 2 of Unit 2, the area between Unit 1 and the expansion (Unit 2). It also approved the Groundwater Impact Assessment for Unit 2. Since that time, this permit has been the subject of extensive permit modifications. *See* R. at 47553-47566.

During the permitting process, the application set forth a design that would allow for a vertical area of separation between Unit 1 and Unit 2 (known as Zone A or "the wedge"). It also stated that this area would be filled with clean inert material and other materials approved by the Agency. As acknowledged by the Agency in permit review notes dated November 7, 2012: "it is presumed that this configuration resulted from Agency interpretations in the early days of implementation of Parts 810-814 and RCRA Subtitle D." *See* R at 46985. Zone A is entirely within the sited and permitted boundaries of the landfill facility.

The 1994-419 permit itself does not specifically address Zone A. It does contain the following standard language: "all final plans, specifications, application and supporting documents as submitted and approved shall constitute part of this permit and are identified on the records of the Illinois Environmental Protection Agency, Bureau of Land by the permit number(s) and log number(s) designated in the heading above." *See* R. at 4879. The permit also states that: [T]he

[2] Again, these notes appear at several different locations in the record; this citation is from Brickyard's permit application that is the subject of this appeal.

site shall be operated in accordance with the terms and conditions of this Permit No. 1994-419-LFM dated May 4, 1995, and in accordance with the terms and conditions of Permit No. 1993-057-LF, dated April 14, 1994, except as modified in the above document." *See* R. at 4923.

D. Permitting Decision Subject to this Appeal.

The most recent request for permit modification (Permit Log No. 2015-421), the subject of this appeal, was filed on August 31, 2015. In it, Brickyard seeks to modify its permit as it relates to Zone A (also known as "the wedge"), via a redesign that will allow for the placement of municipal solid waste in that area as originally contemplated at siting, instead of clean fill. The technical rationale and support for the redesign, as well as the regulatory rationale, was included in detail in the permit application (including: Separation Layer and Liner System, Section 3.1; Leachate Collection System, Section 3.2; Slope Stability, Section 3.3; Mass Stability, Section 3.4 and Gas Collection, Section 3.5). *See* R. at 46997- 47003; 47044- 47052.[3] A groundwater analysis was also included in this application. (Section 5, Groundwater Monitoring). *See* R. at 46999-47003. The redesign is consistent with siting and, Brickyard contends, the regulatory framework of Parts 810-814 and Subtitle D. As the Agency acknowledges in its permit review notes: "There is nothing in [the siting] that prohibits waste disposal in the 'wedge fill' that is the subject of this file review." *See* R. at 46988.

On September 24, 2015, the Agency issued a permit decision declaring the application incomplete for, among other things, lack of siting. *See* R. at 47571-47573. In response, on October 30, 2015, Brickyard submitted an amended application, entitled "Additional Information for Log No. 2015-421: Zone A Redesign", which addressed the denial points and provided further information related to the 1992 siting of Brickyard Landfill. *See* R. at 47204 - 47520. The Agency

[3] This August 2015 permit application also appears in the record at p. 4279 which is part of the approximate 40,000 pages labelled simply "Permit No. 1994-419 LFM and related documents and drawings and is dated July 5, 2011.

again issued a decision on November 25, 2015 deeming the application incomplete. *See* R. at 47531 – 47532. In its entirety, the Agency permit decision letter states, as its rationale, the following:

> 1. The application did not include current Certification of Siting Approval form (LPC-PA8). The proposed landfill modification meets the definition of a "New Pollution Control Facility" pursuant to Section 3.330(b)(2) of the Illinois Environmental Protection Act ("Act"), as it includes an area of expansion beyond the boundaries of a currently permitted pollution control facility. Therefore, the applicant must submit proof to the Agency that the location of the facility has been approved by the County Board, pursuant to Section 39(c) of the Act.
>
> 2. The application does not include a new/updated Groundwater Impact Assessment ("GIA"). Pursuant to Part 811, Subpart C, Section 811.317(a)(1), the facility is required to submit to the Illinois EPA or review a GIA which adequately represents the facility redesign/expansion including minimum design standards for slope configuration, cover, liner, leachate drainage and collection system. In accordance with Section 811.317(c)(1), the facility is required to have an approved contaminant transport model that represents groundwater flow under the proposed expanded facility. Therefore, the applicant must submit a new/revised GIA as part of a complete permit application for facility expansion.

The Agency's above decision (considered an "Incompleteness Determination") was made prior to any technical review of the merits of the permit application, as the Agency has declined to review those merits unless and until Brickyard seeks and obtains further siting approval from the County of Vermilion.

II. RELEVANT LAW AND REGULATIONS

The Agency's decision cites two provisions relevant to its permit decision, Section 3.330(b)(2) of the Act and Section 811.317(a)(1) and 811.317 (c)(1) of the Board's rules. Those provisions are as follows:

415 ILCS 5/3.330(b)(2): New Pollution Control Facility

(b) A new pollution control facility is:

* * *

(2) the area of expansion beyond the boundary of a currently permitted pollution control facility;

Section 811.317 Groundwater Impact Assessment

The impacts of the seepage of leachate from the unit shall be assessed in a systematic fashion using the techniques described in this Section.

a) Procedures for Performing the Groundwater Impact Assessment

1) The operator shall estimate the amount of seepage from the unit during operations which assume:

A) That the minimum design standards for slope configuration, cover, liner, leachate drainage and collection system apply; and

B) That the actual design standards planned for the unit apply. Other designs for the unit may be used if determined by the operator to be appropriate to demonstrate the impacts to groundwater, pursuant to subsection (b).

* * *

c) Standards for the Contaminant Transport Model

1) The model shall have supporting documentation that establishes its ability to represent groundwater flow and contaminant transport and any history of its previous applications.

Also relevant to this matter are the following sections of Section 39 of the Act, 415 ILCS 5/39.

Section 39 (c) states:

[N]o permit for the development or construction of *a new pollution control facility* may be granted by the Agency unless the applicant submits proof to the Agency that the location of the facility has been approved by the County Board of the county if in an unincorporated area, or the governing body of the municipality when in an incorporated area, in which the facility is to be located in accordance with Section 39.2 of this Act. (emphasis added)

415 ILCS 5/39(c) (West 1994).

Section 39 (a) states:

If the Agency denies any permit under this Section, the Agency shall transmit to the applicant within the time limitations of this Section specific, detailed statements as to the reasons the permit application was denied. Such statements shall include, but not be limited to the following:

(i) the Sections of this Act which may be violated if the permit were granted;

(ii) the provision of the regulations, promulgated under this Act, which may be violated if the permit were granted;

(iii) the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and

(iv) a statement of specific reasons why the Act and the regulations might not be met if the permit were granted.

415 Ill. Comp. Stat. Ann. 5/39 (emphasis added)

III. ISSUES ON APPEAL

The issues on appeal are as follows:

***Permit Denial Point #1*:** Should the Agency's permit decision be reversed and remanded for technical review because the application does not propose a "new pollution control facility" as defined by Section 3.330 of the Act?

Permit Denial Point #2: Do the Board rules cited by the Agency in denial point #2, which are relevant to new "units", require that Brickyard present an entirely new/updated Groundwater Impact Assessment ("GIA") model specific to the area of redesign, prior to technically reviewing the merits of its application?

IV. STANDARD OF REVIEW

Generally, the Board's standard of review in a permit appeal is a preponderance of the evidence. More specifically, the Board's determination in a permit appeal is whether the petitioner has demonstrated that the permit, if issued, would not violate the Act or the Board regulations. 415 ILCS 5/40 (2010). Section 40(a)(1) of the Act and Section 105.112(a) of the Board regulations place the burden of proof on the petitioner in permit appeals. 415 ILCS 5/40(a)(1) 2007. *See* Atkinson Landfill v. IEPA, PCB 138 (June 20, 2013), citing Browning-Ferris Industries of Illinois, Inc. v. PCB, 179 Ill. App. 3d 598, 534 N.E. 2d 616 (2d Dist. 1989).

However, as the Board recognized in Atkinson, *Id., slip op.* at 8, "[i]n reviewing the Agency's decision on a permit appeal, the courts have held that the Board does not review the Agency's decision using a deferential manifest-weight of the evidence standard." As here, Atkinson involved a question of law as to siting applicability: whether the Act required that Atkinson Landfill again seek siting prior to the Agency's review and issuance of a landfill permit application. Atkinson had argued that it had timely "made application" for a permit (subsequent to siting) pursuant to Section 39.2(f), while the Agency contended that it did not. In rejecting the Agency's interpretation in favor of the one asserted by Atkinson Landfill, the Board stated that "[it] will consider the Agency's arguments on statutory construction, but the Agency's arguments are not considered with any greater or lesser weight than the Atkinson's arguments." *Id., citing* <u>Village of Fox River Grove v. Pollution Control Bd.</u>, 299 Ill. App. 3d 869, 878, 702 N.E.2d 656, 662 (2nd Dist. 1998). Here, that same standard should apply to Brickyard in this case. Essentially, where the question before it is a question of statutory construction, the Board is correct to apply a *de novo* review standard.

Summary judgment "shall be rendered without delay if the pleadings, depositions, and admissions on file together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c). Summary judgment is particularly appropriate where, as here, the question posed involves a statutory interpretation. 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." <u>Dowd & Dowd, Ltc. v. Gleason</u>, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). Parties asserting a motion for summary judgment, or responding to such motion, must "present a factual basis which would arguably entitle [it] to judgment." <u>Gauthier v. Westfall</u>, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

In the specific context of the Board's review of an Agency permit decision, it is well established that the information contained in the Agency decision letter frames the issues on review. (Ill.Rev.Stat.1989, ch. 111 1/2, par. 1039(a); Centralia Environmental Services, Inc. v. IEPA, PCB 89-170 at 6 (May 10, 1990); City of Metropolis v. IEPA, PCB 90-8 (February 22, 1990). As the Board stated in Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142 (December 20, 1990), the information contained in the denial statement is necessary in order to "satisfy principles of fundamental fairness because it is the applicant who has the burden of proof before the Board to demonstrate that the reasons and regulatory and statutory bases for denial are inadequate to support permit denial." (Technical Services Co. v. IEPA, PCB 81-105, at 2 (November 5, 1981). The Section 39(a) denial statement requirements are consistent with the Act's mandate that the Agency issue a permit upon proof by the applicant that its facility will not cause a violation of the Act or regulations, 415 ILCS 5/39. The intent of Section 39(a) is to require that the Agency issue its decision in a timely manner with information sufficient for the applicant to determine the basis for the Agency's determination. Centralia Environmental Services Inc. v. IEPA, PCB 89-170 (May 10, 1990), 1990 WL 271325, at slip op. p. 5, citing City of Metropolis v. IEPA, PCB 90-8 (February 22, 1990).

Here, the Agency has issued a two-paragraph incompleteness decision letter and, in support thereof, submitted an administrative record that exceeds 47,000 pages. On review, this Board should hold the Agency to the limited citations and determinations it made in that letter: (a) that Section 3.330 requires Brickyard to seek additional siting; and (b) that the application was incomplete because it did not include an entirely new GIA specific to the area of impact. The Petitioner should not be in the position, as it is here, of ascertaining the nuances of the Agency's decision by combing through its voluminous, cumbersome and duplicative record to ascertain what the Agency believes to be legally binding permit obligations. As the Board wisely observed

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in Centralia Environmental Services, Inc.: "[I]n order for an applicant to adequately prepare its case in a permit review before the Board the applicant must be given notice of what evidence it needs to establish its case." *Id*. Nevertheless, in order to move this rather straightforward matter to a Board decision, so that the permit application might be reviewed on its technical merits, Petitioner's Motion for Summary Judgment is appropriate and warranted.

V. THE FILED RECORD DOES NOT COMPLY WITH THE BOARD'S RULES AND DOES NOT CONSTITUTE AN ADMINISTRATIVE RECORD IN SUPPORT OF THE AGENCY'S PERMIT DECISION

In the context of status conferences with the Hearing Officer preceding this filing, the Hearing Officer authorized Brickyard to raise its objections to the record in the context of this motion, giving the Board the opportunity to address those objections in the context of this appeal. An administrative record is the information an agency relies upon in support of an administrative decision. Here, the Agency has taken the concept of an administrative record to a completely new realm. As support for its two paragraph, two-page decision, the Agency has presented the Board with an administrative record that totals 47,578 pages, formatted and presented in a manner that ignores the very spirit of the Board's rules regarding the filing of agency records – and that lacks any reasonable sense of organization.

Section 105.116(b) requires that:

> *The record must be arranged in chronological sequence, or by category of material and chronologically within each category*, and must be sequentially numbered with the letter "R" placed before the number of each page. The record must be certified by the State agency. The certification must be entitled "Certificate of Record on Appeal". *The Certificate must contain an index that lists the documents comprising the record and shows the page numbers upon which each document starts and ends.* The Certificate of Record must be served on all parties by the State agency. (Emphasis added.)

Section 105.410 reads, in pertinent part:

b) The record must include:

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1) The plan or budget submittal or other request that requires an Agency decision;

2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the plan or budget submittal or other request;

3) The final determination letter; and

4) *Any other information the Agency relied upon in making its determination.* (Emphasis added)

Here, the "index" identifies overly broad categories and there is no chronological organization within any of those categories. One category alone, identified as Permit No. 1994-419 and related documents and drawings, contains 42,754 pages and is assigned a beginning date of July 5, 2011 – when that permit was issued on May 4, 1995. The July 5 letter is simply a withdrawal notification concerning a permit application (Log No. 2011-119). The text of that letter shows that the application involved groundwater monitoring at a specific well for one specific constituent; it is not information relevant to the Agency's decision here, nor to the Board's review of that decision.

Moreover, various documents appear at several locations in the record, making it nearly impossible to allow for identical, common or complete citations to the record. As just one example, the 1993-057-LF permit, which itself is 31 pages long, appears at least five times in this record. *See* R. at 00386-00417; R. at 02471-02502; R. at 03144-03175; R. at 06443-06474; and R. at 06625-06656. It is as if the Agency simply went to its permit files and duplicated every document in its files related to Brickyard Landfill over the course of the last 24 years, without any regard to *which* documents it relied upon to make its decision – and whether the document appeared elsewhere. Moreover, some of the documents are wholly *irrelevant* to the Agency's decision in this matter and, as such, present information that is confusing, at best, and misleading, at worst. As just one an example, documents relative to a prior Brickyard matter before the Board,

AS 2014-003, wholly irrelevant to this appeal, are included in this record. Some of those documents are prior pleadings before the Board in that matter.

The administrative record filed in this proceeding denies Petitioner an effective opportunity to address the issues raised by the Agency's summary decision.[4] Moreover, it makes it impossible for a reviewing entity, such as the Board or a court, to effectively do its job and make a determination as to the merits of an agency decision. Brickyard is entitled to a record that reflects the documents relied upon by the Agency in its decision, as is the Board; this record does not. Brickyard suggests that the Board require the Agency to refile its record, consistent with Board rules, to reflect only those documents it relied upon in its decision and that it do so in a manner that does not further prejudice the Petitioner.

VI. SUMMARY JUDGMENT ARGUMENT

A. Brickyard's Permit Application does not seek to permit a new Pollution Control Facility; therefore, further local siting is not required.

Section 3.330 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/3.330, defines new pollution control facility as the "area of expansion beyond the boundary of a currently permitted pollution control facility." The Agency's decision to deny review of the permit application is obviously based upon a legal conclusion that the landfill redesign requested by Brickyard constitutes a "new pollution control facility" as defined by Section 3.330 of the Act and, accordingly, requires siting.

Brickyard's position is simply that siting has already occurred consistent with the proposed permit application; therefore, additional siting is not required by the Act. The design change sought in the permit application does not constitute "an area of expansion beyond the boundary of a currently permitted pollution control facility." The boundary of this facility is, and

[4] As set forth earlier in this Motion, the decision itself lacks "a statement of specific reasons why the Act and the regulations might not be met if the permit were granted" as required by Section 39(a)(iv) of the Act.

has been, permitted, and such permitted boundary is completely consistent with that which was sited by the Vermilion County Board. Accordingly, Brickyard seeks to have the Board remand this permit application back to the Agency for a technical permit review. Despite the voluminous record provided by the Agency, it has not conducted a technical review of this application, so there is no technical determination or review for the Board to make, on appeal. The questions presented are solely those of statutory interpretation.

Brickyard's permit application in this matter establishes that siting is not required, as Vermilion County has already granted siting consistent with the design proposed in the permit application and any further siting would be redundant, and not required by the Act. The documents presented in the permit application at issue definitively establish that Vermilion County approved a landfill design that is completely consistent with the instant application: one large landform, with waste placement inside the entirety of the landform. Here, Brickyard does not seek to expand that landform beyond what was sited; it does not seek to place waste in any area of the landfill not contemplated for such placement at the time of siting – or as originally permitted after siting; it does not seek to change the type of waste that will be accepted at the landfill; it does not seek to extend the life of the landfill. It merely seeks to achieve through permitting what it achieved through siting: one large landform with the entirety of its space filled with municipal solid waste.

Here, the Agency seeks to limit, through permitting, what the Petitioner achieved through siting. In that respect, it is distinct from situations faced previously by the courts on review of Board decisions concerning Section 3.330. While there is a myriad of landfill siting cases that have reached the Board and courts since the passage of Section 39.2 of the Act ("Siting Law"), there are just a handful of pivotal cases related to the construction and application of Section 3.330. Yet, each of those cases is instructive.

The General Assembly clearly intended to include landfill expansions that had not previously been the subject of siting within the reach of Section 3.330. The seminal case on this point is M.I.G. Investments v. IEPA, 122 Ill.2d 392 (Ill. 1988). There, the question was whether a vertical expansion of an existing landfill (permitted in 1972) constituted "area of expansion beyond the boundary of a currently permitted pollution control facility." The landfill operator proposed raising the landfill height (and accordingly its volumetric capacity) by almost 50 feet, but keeping its lateral dimensions the same as originally permitted. Unlike here, the landfill at issue had never before been the subject of siting; this was the first proposed expansion of the M.I.G. landfill, and the landfill submitted the expansion proposal, for permitting, subsequent to the effective date of the new Siting Law. *An Act Related to the Location of Sanitary Landfills and Hazardous Waste Disposal Sites*, P.A. 82-682 (Nov. 12, 1981).

The Court recognized the fundamental principal of statutory construction: to "ascertain and give effect to the legislative intent (citations omitted)". *See* M.I.G. Investments, at p. 397. That purpose, explained by the Court, was "[to give] county and municipal governments *a limited degree of control over new solid waste disposal sites* within their boundaries." (emphasis added) *Id.*, at p. 398. In its holding, the Court reversed a narrower reading of the language by the Second District Appellate Court and held that a vertical expansion of an existing landfill, without any expansion of ground surface area, nonetheless constituted an expansion under the definition, and thereby triggered local siting.

Since the expansion was never before the subject of siting, the Court reviewed the potential relevance of the landfill siting criteria applicable to local government decision-making pursuant to Section 39.2. The Court then stated: "A vertical expansion which significantly increases the height of a landfill facility might have a substantial impact on the surrounding community. There is an obvious difference between a landfill facility which is at ground level

and one which is visible to surrounding landowners due to its height. [citations omitted]" *Id.*, at 401. Accordingly, the Court held that "to increase vertically the waste disposal capacity of a landfill *beyond the limits set out in the initial permit issued by the Agency*" (emphasis added) is an expansion that requires siting approval prior to Agency permitting. *Id.*

The M.I.G. case is both factually and legally distinct from the instant appeal. First, Brickyard did in fact seek siting for its vertical expansion of its landfill. Second, it does not here seek to increase the boundaries of the landfill or its disposal capacity beyond the limits of what was sited or, as framed by the Supreme Court in M.I.G., *beyond the limits set out in the initial permit issued by the Agency*.

The other court case relevant to an application of the Section 3.330 definition is a decision of the Fifth District: Bi-State Disposal, Inc. v. IEPA, 203 Ill. App. 3d 1023 (Fifth Dist., 1990). As in M.I.G., Bi-State had not previously been the subject of a local siting hearing. In Bi-State, the Agency permitted a 40-acre site for development in 1975 and for operations in 1978. The permits allowed for a phased development of a 40-acre site. After the Siting Law became effective but before any siting occurred, Bi-State's consulting engineers sought to modify the facility's permit to eliminate a portion of the area permitted (a "mine cut"). Thereafter, the Agency issued new permits to reflect the change. Thus, unlike here, the facility's first permit following the passage of the Siting Law had eliminated this area from future development of the facility. There, the Court faced an interpretation of the Section 3.330 phraseology "currently permitted" in the context of a landfill that had never previously been sited. Based on M.I.G., and quoting therefrom, the Court found that "the legislature intended to invest local governments with the right to assess not merely the location of proposed landfills, but also the impact of alterations in the scope and nature of previously permitted facilities. 122 Ill. 2d at 400, 119 Ill Dec. at 536, 523 N.E. 2 at 4." *See* Bi-State, at 1027.

Again, the situation here is not analogous, for the following key reasons. First, unlike Bi-State, Brickyard achieved siting for its expansion. Second, the expansion decision achieved at siting is consistent with the current permit application. Third, Brickyard timely made application to the Agency to solidify the legal effect of such permit, as required by Section 39.2(f). Fourth, the landfill contours sought today are identical to those achieved at siting. Fifth, Brickyard believes that the Agency based its permit denial on an erroneous interpretation of Board landfill rules (*i.e.*, no portion of a Subpart C unit can overlay a Subpart B unit, even with an effective barrier separating the waste). Sixth, that design detail has nothing to do with local siting (since the siting decision presumed waste in that area) and does not implicate any of the siting criteria. Finally, the design modification requested in the permit application cannot reasonably be construed to be an expansion of a boundary of a currently permitted facility. Unlike Bi-State, where the boundary was established in the permitting process and the question was simply at which time in the permitting process, here the relevant boundary of the landfill was established at siting and that facility "boundary" is permitted. Brickyard does not here seek, and has never sought, to change that boundary.

More relevant to the Board's analysis here are two Board decisions where the Board has applied the above two cases to design changes sought by landfill operators. In one case, Saline County Landfill v. IEPA, PCB 02-108, 2002 WL 1040333, siting was required; in the other, Waste Management v. IEPA, 1994 WL 394695 (July 21, 1994), it was not.

In Saline, the Board was faced with the direct opposite situation of what it has before it here in this appeal. There Saline also sought to redesign its permitted landfill. Unlike here however, Saline had committed to a specific landfill design element in its siting application: "The proposed landfill will consist of two units that will be separated by a minimum 50-foot berm" [T]here will be a 50-foot zone, separation zone, between the two units…" *See* Saline, slip. op. at

p. 3. When the Agency declined to permit the design, as sited, Saline changed its design. It eliminated the separation berm and, in effect, created a one-unit landfill, distinct from the two-unit, two hill landfill sited. The Agency stated that siting was required for the requested modification. Finding that the design was different than that which was sited, and finding that such difference might present "a reasonable likelihood that the design change…would substantially alter the nature and scope of the sited project" the Board found that Section 3.330 was implicated and required siting prior to the modification.

Here, the Brickyard situation is again distinct. Unlike Saline, Brickyard is seeking to permit a design that *is* consistent with the county's siting decision – by modifying design elements that had been the subject of previous permit discussions and decisions. Brickyard believes that the design was based upon an erroneous interpretation of Board landfill rules, and is irrelevant to the issue of what was sited by the County as the "boundary of the facility." Accordingly, to revisit the design is not an expansion.

The most analogous case to Brickyard is Waste Management v. IEPA, 1994 WL 394695 (July 21, 1994). There, like Brickyard (and distinct from M.I.G. and Bi-State), Waste Management had already received siting for an expansion of its Five Oaks facility in Christian County. While Waste Management's siting approval did not establish final design contours and waste limits, it did provide for a maximum elevation of 685 feet above sea level and an area of 212.965 acres. Condition #1 of the permit reiterated these siting approval limits and Condition #2 of the new permit established the final contours. The final contours that were established by the Agency permitting were then memorialized in Special Condition #2 which also included the statement that any "extension of the site" beyond the boundaries of the contours established in that condition would require siting. *See* Waste Management, at slip. op. at p.3.

As here, Waste Management challenged the Agency's conclusion that the Agency permitting served to limit what it had achieved via siting. Waste Management proposed a design detail for the undeveloped area that was different than that detailed in Condition #2 of the existing permit; yet, the new design was consistent with the original siting. As here, the Agency declined to review the permit application for redesign on its merits, taking the position that new local siting was required. Waste Management appealed that decision to the Board.

The Board evaluated both M.I.G. and Bi-State and held that neither applied to the situation presented by Waste Management. As here, Waste Management argued that the proposed design change was a "technical design change" that was consistent with the county siting decision and would not increase landfill capacity or life. Furthermore, Waste Management argued that "to require local siting for this type of design modification would lead to the absurd result of the local unit of government being asked to evaluate its proposed [technical modifications] against nine statutory criteria that are essentially irrelevant." *Id*. The Agency, as here, attempted to require adherence to the footprint Waste Management accepted as a previous permit condition. On that point, the Board stated that the Agency cannot retroactively change the parameters of siting via permit decisions: "An Agency permit is just that – an Agency authorization from which the permit holder may petition the Agency for a modification." *Id., slip. op. at p.7.* Since Waste Management's proposed modification did not expand beyond the facility's boundaries, impact the criteria considered by the siting authority, and was consistent with that approval, siting was not required under Section 3.330 of the Act. Here as well, Brickyard's requested modification does not seek to expand the boundary of the permitted facility. It simply seeks to place waste in an area where the Agency has previously required, through permitting, that clean soil must be placed within facility boundaries that have been sited and permitted. There is simply no expansion of any boundaries of the "facility" being sought.

Each of the above cases speak to a judgment in favor of Brickyard who: (a) has achieved siting for its expansion (in 1992); and (b) seeks a permit design modification consistent with that siting – as did Waste Management in the case referenced above. Here, since the landfill is not seeking a modification that would be in *any* way inconsistent with the original siting, it simply makes no sense to require Brickyard to go back to siting to get permission to place waste in "the wedge" – when such placement was unequivocally contemplated at siting. In sum, Brickyard does not here seek an expansion beyond the permitted (and here sited) boundaries of the facility.

B. The Permit Application does not seek to establish a new facility; the requested design change simply constitutes continued development of an existing unit and, as such, the Agency should technically evaluate the efficacy of the existing GIA prior to concluding a new and independent one is required.

The Agency's actual rationale in denial point #2 is completely lacking; Brickyard believes, however, that it is inextricably linked to the Agency's position on denial point #1. Since the Agency has concluded that the design change constitutes a new pollution control facility, the Agency is treating the requested redesign as if it were an entirely new unit under the Board's rules, not an expansion of the existing unit. Moreover, the Agency appears to be utilizing the terminology "facility" and "unit" interchangeably – and erroneously. This is evident from an internal Agency memoranda dated November 19, 2015, from Michael Summers to Doug VanNattan, *See* R. at 47567:

> Illinois EPA Discussion: Based upon review of the August 31, 2015 submittal, the Illinois EPA project engineer determined that this permit application proposes landfill modifications that meet the definition of a "New Pollution Control Facility" pursuant to Section 3.330(b)(2) of the Illinois Environmental Protection Act ("Act"). This determination was made because the modification includes an area of expansion beyond the boundaries of a currently permitted pollution control facility. The expansion is proposed in the filling of a "wedge" unit between the two landfill forms and combining them into a single landform. The additional space will result in a larger facility than is currently permitted.
>
> Therefore, because the facility is proposing a new pollution control facility, the application must include a new/updated Groundwater Impact Assessment ("GIA"), pursuant to Part 811 Subpart C; Section 811.317(a)(1), for Illinois EPA review.

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> The new/updated GIA should adequately represent the facility redesign/expansion including minimum design standards for slope configuration, cover, liner, leachate drainage and collection system. In accordance with Section 811.317(c)(1), the facility is required to have an approved contaminant transport model that represents groundwater flow under the proposed expanded facility. The following incompleteness point was forwarded to the applicant:
>
> 1. The application does not include a new/updated GIA. Pursuant to Part 811.317(a)(1) the facility is required to submit to the Illinois EPA for review a GIA which adequately represents the facility redesign/expansion including minimum design standards for slope configuration, cover, liner, leachate drainage and collection system. In accordance with Section 811.317(c)(1), the facility is required to have an approved contaminate transport model that represents groundwater flow under the proposed expanded facility. Therefore, the applicant must submit a new/revised GIA as part of a complete permit application for facility expansion.

Brickyard simply seeks technical review of a redesign that would allow placement of municipal solid waste in an area of the facility currently designed to require clean fill and, toward that end, seeks a technical review of the regulatory elements required for such waste placement, within the context of the existing Unit 2, and its existing GIA. The application does not seek to expand the existing Brickyard facility; it seeks to allow for waste in an area that may not yet be developed to accept waste, but is nonetheless within the permitted landfill/landform design, as approved via siting, and as now designated as Unit 2. Nor does the requested modification trigger the application of a "new facility" or "new unit" pursuant to Section 810.103 of the Board's rules, because that definitional applicability has already been triggered – when the facility sought to be, and was, expanded. This facility has been the subject of myriad permit modification decisions by the Agency; Brickyard simply now seeks to modify a portion of the expanded area, now known as Unit 2, with a design modification related to Zone A.

Brickyard is prepared to provide, to the Agency in its technical review, whatever further information it may require related to demonstrating the efficacy of the proposed design change; but since the permit application is not a request for a new facility or a new unit, a new/revised GIA was not included in the application.

VII. CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioner requests that the Petitioner's Permit Application Log No. 2015-421 (Zone A Redesign) be remanded to the Agency for review on its technical merits.

Respectfully submitted,

BRICKYARD DISPOSAL & RECYCLING, INC.

By_____/s/Claire A. Manning____________

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 24th day of August, 2016, I have served by the manner indicated below the attached MOTION FOR SUMMARY JUDGMENT upon the following persons:

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