BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on September 16, 2016, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: /s/ David G. Samuels

DAVID G. SAMUELS
Assistant Attorney General
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031
dsamuels@atg.state.il.us
ebs@atg.state.il.us

Dated: September 16, 2016

CERTIFICATE OF SERVICE

I hereby certify that I did on September 16, 2016, before 5:00 p.m., cause to be served by electronic mail, a true and correct copy of the following instruments entitled NOTICE OF FILING and RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT upon the following persons:

Pollution Control Board, Attn: Clerk
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218
(Via Electronic Filing)

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
Springfield, Illinois 62794
Carol.Webb@illinois.gov
(Via Email)

Claire A Manning, Esq.
William D. Ingersoll, Esq.
Brown, Hay & Stephens LLP
205 S. 5th Street, Suite 700
P.O. Box 2459
Springfield, IL 62705
(217) 544-8491
cmanning@bhslaw.com
wingersoll@bhslaw.com
(Via Email)

Signed: /s/ David. G. Samuels
DAVID G. SAMUELS
Assistant Attorney General
Attorney Reg. No. 6317414
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031
dsamuels@atg.state.il.us
ebs@atg.state.il.us

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RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Respondent Illinois Environmental Protection Agency, under 35 Ill. Adm. Code 101.500, hereby responds to Petitioner Brickyard Disposal & Recycling, Inc.'s Motion for Summary Judgment.

INTRODUCTION

Brickyard wants to expand its landfill in Vermilion County. Specifically, Brickyard wants to place municipal solid waste in "Zone A," an area not currently permitted for waste disposal. The Agency rejected Brickyard's permit application because it did not include current siting approval or an updated groundwater impact assessment (GIA) with an approved contaminant transport model. Brickyard appealed the Agency's rejection, and the parties have filed cross motions for summary judgment.

Brickyard has not met its burden for summary judgment. First, it has failed to satisfy its burden of production. Brickyard has not produced evidence from the record to support its claims. The record, in fact, refutes Brick-

yard's allegations. Second, it has not shown it is entitled to judgment as a matter of law. Brickyard cannot do so with facts contradicted by the record, and an argument muddling two distinct issues. In light of these shortcomings, Brickyard is not entitled to summary judgment. Finally, although not relevant to summary judgment, Brickyard has lodged several objections to the administrative record. None have merit or legal basis. The Board should therefore deny Brickyard's motion.

STANDARD OF REVIEW

In a permit appeal, the ultimate burden of proof is on the petitioner. 415 ILCS 5/40(a)(1). "Where a [petitioner] has moved for summary judgment, the materials relied upon must establish the validity of the [petitioner]'s factual position on *all* the contested elements of the [appeal]." *Triple R Dev., LLC v. Golfview Apartments I, L.P.*, 2012 IL App (4th) 100956, ¶ 7 (emphasis in original). For each issue on appeal, the petitioner has the dual burdens of production and persuasion. To meet its burden of production, the petitioner must "com[e] forward with competent evidentiary material which, if uncontradicted, entitles [it] to judgment as a matter of law." *City of Quincy v. Illinois Envtl. Prot. Agency*, PCB 08-86 (June 17, 2010), slip op. at 23 (quoting *Groce v. S. Chicago Comty. Hosp.*, 282 Ill. App. 3d 1004, 1010–11 (1st Dist. 1996)). This burden entails showing there is no genuine issue of material fact, along with entitlement to judgment as a matter of law. *Loschen v. Grist Mill*

Confections, Inc., PCB 97-174 (Sept. 18, 1997) (quoting *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 249 (1994)).

When the parties move for summary judgment at the same time on a particular legal issue, they implicitly agree there are no issues of genuine fact. Their disagreement is about the legal consequences of those facts.[1] Raising a genuine issue of fact by either cross-movant in response to the other would be self-defeating in this procedural context. But when a party introduces facts not found in the record, those groundless facts do not create a genuine issue of material fact. *Scott v. Harris*, 550 U.S. 372, 381 (2007). A responding cross-movant must therefore direct its response to the other party's burden of producing evidence, and whether the movant is entitlement to judgment as a matter of law.

Here, as the petitioner, Brickyard must ultimately prove the permit it seeks would not violate the Act or Board regulations. To prevail on its motion, Brickyard must produce evidence from the record showing why it had, or did not need, the information the Agency believes is missing. There can be no genuine issues of material fact as to this evidence. Likewise, Brickyard must prove the uncontested evidence entitles it to judgment as a matter of law. Summary judgment is only appropriate where Brickyard has done this for each of the issues on appeal.

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[1] However, as the Board has noted, "the mere filing of cross-motions for summary judgment does not preclude a determination that triable issues of fact remain." *Estate of Slightom v. Illinois Envtl. Prot. Agency*, PCB 11-25 (Nov. 1, 2012), slip op. at 13 (quoting *Village of Oak Lawn v. Faber*, 378 Ill. App. 3d 458, 462 (1st Dist. 2007)).

ARGUMENT

Brickyard has not shown it is entitled to summary judgment. First, it has not met its burden of production. It has not produced evidence from the record supporting its asserted facts. To the contrary, the record directly contradicts the facts Brickyard alleges. Second, Brickyard has not shown it is entitled to judgment as a matter of law. Finally, Brickyard's grievances with the record are misplaced. Brickyard relies on incorrect law and fails to show the harm it alleges. For these reasons, Brickyard's motion should be denied.

I. Brickyard's Motion Should Be Denied Because It Has Not Produced Evidence from the Record For its Alleged Facts, And Cannot Do So As Its Alleged Facts are Directly Contradicted By Its Own Documents

Brickyard has not produced evidence supporting its alleged facts. Instead, Brickyard has merely asserted facts favorable to its desired outcome. Even if it could generally meet its burden of production with bald assertions, the specific facts alleged find no support in the record (the only source of evidence). Brickyard has therefore failed to meet its burden of production, and is not entitled to summary judgment. As Brickyard has not met its initial burden of production, the burden has not shifted to the Agency to show a genuine issue of material fact. And because Brickyard's refuted facts do not create a genuine issue, the Agency's entitlement to summary judgment is unaffected. The Board may therefore still grant the Agency's motion for summary judgment, but should deny Brickyard's.

A. Brickyard Has Failed to Produce Affirmative Evidence From the Record to Support Its Facts

A petitioner seeking summary judgment bears the initial burden of production on its motion. This is "the burden of producing evidence sufficient to establish each element of the [petitioner's] claim." *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 430 (2009) (citing *Thacker v. UNR Indus., Inc.*, 151 Ill. 2d 343, 354 (1992)). At the heart of this burden is the affirmative production of evidence rather than the mere allegation of naked fact. This is so because "a plaintiff meets the burden of production with regard to a given element of proof 'when there is some evidence which . . . would allow a reasonable trier of fact to conclude the element to be proven.'" *Id.* (quoting *Thacker*, 151 Ill. 2d at 354); *see also Burgess v. Illinois Envtl. Prot. Agency*, PCB 15-186 (Feb. 4, 2016), slip op. at 5 ("petitioner has the burden of presenting sufficient evidence with which the Board can determine" an issue).[2]

On summary judgment, the movant's burden of production is "the burden of coming forward with competent evidentiary material which, if uncontradicted, entitles [it] to judgment as a matter of law." *City of Quincy v. Illinois Envtl. Prot. Agency*, PCB 08-86 (June 17, 2010), slip op. at 23 (quoting *Groce v. S. Chicago Cmty. Hosp.*, 282 Ill. App. 3d 1004, 1010–11 (1st Dist. 1996)). In the context of a permit appeal, the only way of "coming forward"

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[2] *See also Sierra Club v. Ameren Energy Medina Valley Cogen, LLC*, PCB 14-134 (Nov. 6, 2014), slip op. at 20 ("present[ing] sufficient evidence to make a *prima facie* case"); *Illinois Envtl. Prot. Agency v. Bliss*, PCB 83-17 (Aug. 2, 1984), slip op. at 6–7 ("present[ing] a sufficient quantum of evidence to prove a proposition").

with evidence is by pointing out documents in the administrative record. Therefore, a petitioner seeking summary judgment in a permit appeal must cite to its permit application, and other documents in the record, to satisfy its burden of production.

Here, Brickyard has not pointed to any documents in the record to support its critical facts. Brickyard claims its proposed volumetric expansion (1) is within its currently approved boundaries;[3] (2) will not increase the landfill's capacity;[4] and (3) will not increase the landfill's lifespan.[5] By its own arguments, if these facts are not true, Brickyard cannot succeed in its appeal. Yet, despite the material importance of these facts, Brickyard has merely alleged them without pointing to any supporting evidence in the record.

Brickyard has therefore failed to produce evidence of its asserted facts to satisfy its burden of production. Simply alleging a fact does not have the effect of producing evidence of that fact. *See Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624–25 (1st Dist. 2007) ("bare assertion . . . failed to meet burden of production"); *Williams v. Covenant Med. Ctr.*, 316 Ill. App. 3d 682, 690 (4th Dist. 2000) (burden not met by "bare assertion" lacking evidentiary support). Brickyard must "come forward" with evidence of its facts. It is fundamental

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[3] *See* Pet'r's Mot. at 19 ("There is simply no expansion of any boundaries of the 'facility' being sought."); *see also id.* at 17 ("the relevant boundary of the landfill was established at siting and that facility 'boundary' is permitted.").

[4] *See id.* at 14 ("increase . . . its disposal capacity . . . beyond the limits set out in the initial permit issued by the Agency"); *see also id.* at 19 (suggesting "proposed design change [is] a 'technical design change' that . . . would not increase landfill capacity").

[5] *See id.* at 14 ("expansion will not "extend the life of the landfill"); *see also id.* at 19 (suggesting "proposed design change [is] a 'technical design change' that . . . would not increase landfill . . . life").

that "[i]f the movant has the burden of proof at trial, the movant must produce ***affirmative evidence*** . . . to carry the original burden of production on the motion." *Farmers Auto. Ins. Ass'n v. Burton*, 2012 IL App (4th) 110289, ¶ 15 (quoting Richard A. Michael, 4 Ill. Prac., Civil Procedure Before Trial § 40:3 (2d ed. 2011)) (emphasis added). Brickyard cannot satisfy its burden of production with allegations in lieu of actual evidence.

Brickyard likewise cannot shift its burden to the Board after the fact. Without citations to the record, Brickyard has left the Board to comb through the record to substantiate its alleged facts. Although the Board reviews the record when weighing summary judgment, the movant still bears the burden of production. Where a movant "has not cited to any specific pages of the record in support of its contentions[,] [t]he Board will not search the record in order to support a movant's contentions." *Concerned Citizens of Williamson Cnty. v. Bill Kibler Dev. Corp.*, PCB 92-204 (April 8, 1993). Only Brickyard can satisfy its burden, and it has not done so.

Having failed to meet its burden of production, Brickyard's motion must fail. "If the movant fails to carry the initial burden of production on [a summary judgment] motion, the motion must be denied." Michael, 4 Ill. Prac., § 40:3; *see also Country Mut. Ins. Co. v. Hilltop View, LLC*, 2013 IL App (4th) 130124 (summary judgment denied where movant "ignored" burden of production); *City of Chicago v. Illinois Workers' Compensation Com'n*, 373 Ill. App. 3d 1080, 1090–91 (1st Dist. 2007) ("The failure of the party with the

initial burden [of production] to make out a prima facie case requires the trial court to rule for the opposing party as a matter of law."). Without producing evidence to satisfy the issues on appeal, Brickyard is not entitled to summary judgment. *See Am. Access Cas. Co. v. Griffin*, 2014 IL App (1st) 130665, ¶ 20; *Chicago Transit Auth. v. Clear Channel Outdoor, Inc.*, 366 Ill. App. 3d 315, 326–27 (1st Dist. 2006).

The Board should deny Brickyard's motion.

B. Brickyard's Alleged Facts Are Refuted by the Record

Even if Brickyard could generally satisfy its burden of production on factual allegations alone, it could not meet its burden with the particular facts alleged here, because they are refuted by the administrative record. As noted, Brickyard's alleges its expansion: (1) will not expand beyond its currently approved boundaries; (2) will not increase the disposal capacity of the landfill; and (3) will not extend the life of the landfill. It likewise claims the expansion is consistent in every way with its existing siting approval.

Specifically, Brickyard states it "does not seek to extend the life of the landfill." Pet'r's Mot. at 14. Likewise, Brickyard asserts it "does not here seek to increase . . . its disposal capacity . . . beyond the limits set out in the initial permit issued by the Agency." *Id.* at 16 (emphasis omitted). Brickyard reiterates these points, suggesting its "proposed design change [is] a 'technical design change' that . . . would not increase landfill capacity or life." *Id.* at 19.

Further, Brickyard takes the position that "the relevant boundary of the landfill was established at siting and that facility 'boundary' is permitted." *Id.* at 17. And its permit, Permit No. 1994-419, "does not specifically address Zone A." *Id.* at 4. Therefore, according to Brickyard, Zone A is within both its siting and permit boundaries.

Only two documents in the record could contain information supporting these facts and conclusions. First, the rejected permit application details the impact of the proposed expansion, and contains the original siting materials Brickyard relies on. Second, Permit No. 1994-419 sets Brickyard's current waste-disposal boundaries for Zone A. Rather than support Brickyard's alleged facts, however, these documents explicitly contradict them.

Quite clearly, Brickyard's permit application refutes the alleged neutral impact of its expansion. In stark contrast to what Brickyard has represented to the Board, Brickyard told the Agency:

> The ***total waste volume*** of the Brickyard Disposal and Recycling Landfill ***will be increased*** by approximately 1,010,000 yd^3[,] thereby ***providing a*** total Unit 2 ***waste volume of 15,210,000 yd^3*** fill capacity ***as opposed to the currently permitted 14,200,000 yd^3 capacity***. The documented estimated remaining life expectancy of Brickyard Disposal and Recycling Landfill is 16 years per the January 1, 2015 Annual Landfill Capacity Certification. With the addition of 1,010,000 yd^3 of waste capacity in the "Zone A" Fill Area[,] ***the life expectancy of the landfill increases*** to approximately 21 years.

R. at 47069 (emphasis added).[6] The true impact of the expansion is clear: placing waste in an area not currently permitted for waste disposal will increase disposal capacity beyond the currently permitted amount, and increase the landfill's lifespan by over 30%. That is why Brickyard sought a modification of its permit in the first place. If its permit currently allowed disposal of an extra 1,000,000 cubic feet of waste, and waste disposal in Zone A, Brickyard would not need to modify anything.

Equally clearly, Permit No. 1994-419 directly addresses Zone A. Special Condition XII.1 of the permit requires that "a separate berm shall be maintained between Unit I and Unit II." R. at 04879, 04898–99. By requiring a "separate" berm between two waste-disposal areas, Permit No. 1994-419 places Zone A outside of the permit's waste boundaries. This is the exact waste-free "design improvement[]" Brickyard requested in its permit application at the time. *See* R. at 05140, 05253. Thus, contrary to Brickyard's claim, the approved siting boundaries do not set its permit boundaries with regard to Zone A; its permit expressly addresses Zone A; and its permit places Zone A outside of the authorized waste-disposal boundaries.

The record is definitive. The material facts Brickyard alleges in its motion are simply not there. Even if Brickyard could meet its burden of produc-

[6] Brickyard states these conclusions throughout its application. *See, e.g.*, R. at 46999 ("The resultant total Unit 2 waste capacity . . . will be 15,210,000 cubic yards as a result of this permit modification, as compared to an airspace of 14,200,000 cubic yards previously permitted for Unit 2 defined in Permit No. 1994-419-LFM."); R. at 46999 (proposed changes including "municipal solid waste placement in lieu of the clean inert material . . . in the Zone A fill area" "results in a waste volume (airspace) of approximately 1,051,000 cubic yards").

tion by simply stating these facts without citation, the record—the only source of evidence available—refutes them. Brickyard has therefore not "com[e] forward with competent evidentiary material" that can satisfy its burden of production. *City of Quincy*, PCB 08-86, slip op. at 23. A party cannot prevail with facts contradicted by the evidence. *Cf. Johnson Press of America v. Northern Ins.*, 339 Ill. App.3d 864 (1st Dist. 2003) (upholding summary judgment for defendant where "plaintiff's argument [wa]s contradicted by the record."). The Board should therefore deny Brickyard's motion.

C. Brickyard's Blatantly Contradicted Facts Do Not Affect the Agency's Summary Judgment Posture Because They Do Not Require Nor Create a Genuine Issue of Fact

Brickyard's reliance on material facts not supported by the record does not affect the Agency. First, the burden of production on Brickyard's motion has not shifted to the Agency. Second, the apparent factual discrepancy with the Agency's motion does not preclude summary judgment for the Agency. The Agency remains entitled to summary judgment despite Brickyard's reliance on a differing set of facts.

1. The Burden of Production Has Not Shifted to the Agency Because Brickyard Did Not Meet Its Burden

Brickyard's failure to meet its initial burden of production is dispositive of its motion. The Agency is therefore not required to present a genuine issue of material fact in response. "[W]here no evidence [is] provided in support of [a] motion for summary judgment, [the] nonmovant is under no obligation to present evidentiary material that establishes a genuine issue of ma-

terial fact." *City of Quincy v. Illinois Envtl. Prot. Agency*, PCB 08-86, slip op. at 23 (June 17, 2010) (citing *Levitt v. Hammonds*, 256 Ill. App. 3d 62, 66 (1st Dist. 1993)). Because Brickyard failed to meet its burden, the burden never shifted, and the Agency is not required to introduce a genuine issue of material fact. Nor would it be appropriate to in light of the parties' cross-motions.

2. The Agency Is Still Entitled to Summary Judgment Because Brickyard's Refuted Facts Do Not Create a Genuine Issue of Material Fact

Brickyard's facts do not preclude summary judgment for the Agency. Any conflict created by Brickyard's material facts is purely illusory. The record roundly rejects those facts. The Agency, meanwhile, amply cited to those portions of the record that support its set of material facts. Faced with a similar situation, the U.S. Supreme Court instructed that "[w]hen opposing parties tell two different stories, one of which is ***blatantly contradicted*** by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 381 (2007) (emphasis added).

Accordingly, the Board should consider only facts based on evidence in the record. Only those evidence-based facts determine whether there is a genuine issue of material fact. *Freedom Oil Co. v. Illinois Envtl. Prot. Agency*, PCB 03-54 (Feb. 2, 2006), slip op. at 66 ("[a] naked assertion . . . does not itself raise any genuine issues of material fact that would preclude a grant of summary judgment"); *cf. O'Brien Co. v. Highland Lake Constr. Co.*, 9 Ill. App.

3d 408, 412 (1st Dist. 1972) ("Mere denials of fact in pleadings . . . do not create a genuine issue which will preclude the entry of summary judgment."). As the U.S. Supreme Court explained, "[T]he mere existence of some *alleged* factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there *be* no genuine issue of material fact." *Scott*, 550 U.S. at 381 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (emphasis added)). Thus Brickyard's contradicted allegations do not create a genuine issue with the Agency's evidence-based facts. The Board may therefore still grant the Agency's cross-motion for summary judgment despite Brickyard's "facts."

II. Brickyard's Motion Should Be Denied Because It Does Not Show That It Is Entitled to Judgment as a Matter of Law

To prevail on its motion, Brickyard must demonstrate that it is entitled to judgment as a matter of law. It has not done so. Rather than disproving Brickyard's case, the Agency need only show why Brickyard has failed to meet this burden. First, as a general matter, facts not supported by evidence cannot entitle Brickyard to judgment as a matter of law. Second, Brickyard is specifically not entitled to judgment on its GIA argument because its key allegation is wrong. Finally, Brickyard is not entitled to judgment as a matter of law on its siting argument because it has not applied the correct facts to the correct law. Therefore, the Broad should deny Brickyard's motion.

A. Brickyard Is Not Entitled To Judgment As a Matter of Law Because It Relies on Facts Refuted by the Record

As a general principle, Brickyard is not entitled to judgment as a matter of law on either of its arguments because both are premised on flawed facts. As already discussed, the administrative record directly contradicts the facts Brickyard relies upon. Facts refuted by the evidence do not entitle anyone to judgment as a matter of law. Brickyard is therefore not entitled to summary judgment, and the Board should deny its motion.

B. Brickyard Is Not Entitled To Judgment as a Matter of Law on Whether It Needs A New Groundwater Impact Assessment Because It Cannot Make Its Case Without Its Contradicted Version of the Facts

Brickyard's argument for why it does not need a new or updated groundwater impact assessment highlights why relying on contradicted facts is fatal. Brickyard's entire argument is contained in three sentences:

> The application does not seek to expand the existing Brickyard facility . . . [beyond] the permitted landfill/landform design. . . . 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. * * * [Because] the permit application is not a request for a new facility or a new unit, a new/revised GIA was not [required].

Pet'r's Mot. at 21. Brickyard's permit application, however, expressly says the expansion will volumetrically increase the landfill's waste-disposal capacity. *See* R. at 47069. Converting Zone A to waste-disposal will result in a "waste

volume of 15,210,000 yd^3 fill capacity as opposed to the currently permitted 14,200,000 yd^3 capacity," an increase of over 1,000,000 cubic yards. *Id.*

Section 810.103 of the Board's landfill regulations defines a "new facility" or "new unit" as "a landfill with a unit whose maximum design capacity . . . is increased after September 18, 1990." 35 Ill. Adm. Code 810.103. Thus, Brickyard's volumetric expansion is the very definition of a "new facility" and "new unit." It will increase the capacity of the landfill beyond currently permitted maximum design capacity after the relevant date. It does not matter as Brickyard contends, that a prior expansion may have previously triggered the "definitional applicability"—it is not a one-time-only event. The sum of Brickyard's previous expansions brought it to a currently permitted maximum capacity of 14,200,000 cubic yards. R. at 47069. Brickyard now seeks an expansion that will result in "the addition of 1,010,000 yd^3 of waste capacity" above that maximum, meaning it seeks a "new facility" or "new unit." *Id.*

Brickyard has therefore not shown it is entitled to judgment as a matter of law on this issue. The burden on appeal is on Brickyard to prove its permit application demonstrates that the issuance of a permit without a GIA would not violate the Act or Board regulations. By the logic of Brickyard's own argument, if its volumetric expansion creates a "new facility" or "new unit," it needs a new GIA (with an approved contaminant transport model). The record shows that the expansion does, in fact, create a "new facility" or "new unit." Brickyard is therefore not entitled to judgment as a matter of law

as the evidence contradicts the allegation on which its entire argument turns. The Board should therefore deny summary judgment as to the GIA issue.

C. Brickyard Cannot Use Previous Siting Approval To Prove It Does Not Seek a "New Pollution Control Facility"

Regardless of which version of facts Brickyard relies on, its argument on the issue of siting does not entitle it to judgment as a matter of law. Brickyard contends the issue is "solely" one of statutory interpretation. Pet'r's Mot. at 14. Brickyard frames the issue as whether its proposed expansion is a "new pollution control facility" under Section 3.330(b)(2) of the Act, 415 ILCS 5/3.330(b)(2) (2014). The section heading perfectly summarizes Brickyard's point: "[The] permit application does not seek to permit a new pollution control facility; therefore further local siting is not required." *Id.* Brickyard argues that, because the expansion is "consistent" with existing siting approval, its expansion is not a new pollution control facility. Brickyard contends it is therefore not required to submit new siting approval. *Id.*

These arguments, however, are misplaced. Whether Brickyard needs *any* siting approval turns on whether the expansion is a "new pollution control facility" under Section 3.330, which is governed by the Agency's permit boundaries. If Brickyard's expansion is such a facility, the issue then becomes whether Brickyard needs *new* siting approval to satisfy Section 39(c), or whether existing siting approval will suffice. Therefore, only after an expansion is determined to be a "new pollution control facility" does existing siting

approval become legally relevant, and only then to the subsequent issue of satisfying Section 39(c).

Brickyard therefore puts the cart before the horse. It tries to use an existing siting approval to establish that its proposed expansion is not a "new pollution control facility." But an existing siting approval does not determine whether Brickyard is seeking a "new pollution control facility." (*Only its permit does.*) And whether Brickyard's expansion is a "new pollution control facility" only determines whether it generally needs siting approval—not whether Brickyard specifically needs new approval, or may rely on an existing approval. Instead, Section 39(c) of the Act, 415 ILCS 5/39(c), controls whether new approval is necessary for a new pollution control facility, or if an existing approval will do. Thus, to borrow another idiom, Brickyard's argument tries to push a square peg (existing siting approval) through a round hole (the "new pollution control facility" determination).

In doing so, Brickyard fails to properly address either of the issues at play in its argument—whether its expansion is a "new pollution control facility," and, if so, whether it needs new siting approval. Brickyard therefore fails to show it is entitled to judgment as a matter of law on its theory that the expansion is not a "new pollution control facility" under Section 3.330(b)(2), and therefore does not need siting approval. Indeed, application of the correct facts to the relevant law reveals a result contrary to Brickyard's: it has pro-

posed a "new pollution control facility," and it does need new siting approval. The Board should therefore deny Brickyard's motion as to siting.

1. A "New Pollution Control Facility" Is Determined by Agency Permit Boundaries, Not Siting Approval

A "new pollution control facility" is "the area of expansion beyond the boundary of a currently *permitted* pollution control facility." 415 ILCS 5/3.330(b)(2) (emphasis added). A cardinal rule of statutory interpretation is that "[w]ords and phrases . . . should be viewed in light of other relevant provisions of [a] statute." *Id.* It is instructive that Section 3.330(b)(2) refers to a "permitted" facility boundary, not a "sited" facility boundary. This distinction indicates that the operative "boundary" is that of an Agency permit, not of a local siting approval. Indeed, the Illinois Supreme Court looked to a permit's "limits" when interpreting "boundary" under Section 3.330(b)(2). *M.I.G. Investments, Inc. v. Illinois Envtl. Prot. Agency*, 122 Ill. 2d 392, 401 (1988); *see also Waste Mgmt. of Illinois v. Illinois Envtl. Prot. Agency*, PCB 94-153 (July 21, 1994), slip op. at 7 ("expand beyond the permitted boundary").

The Agency's unique role in siting further indicates that Agency-approved permit boundaries are the relevant "boundary." Section 39(c) "bestows upon the Agency the power to determine" whether siting approval is required for an expansion. *City of Waukegan v. Illinois Envtl. Prot. Agency*, 339 Ill. App. 3d 963, 975–76 (2d Dist. 2003). This is specifically because "the Agency's expertise is a necessary part of determining whether a facility constitutes a 'new pollution control facility.'" *Id.* at 976. For the Agency's exper-

tise to be "necessary," the boundary at issue must require something the Agency is uniquely suited to do. No exclusive expertise is required to understand contour drawings or legal property descriptions found in local siting decisions. Interpreting permits to discern their boundaries, however, is something that touches on the Agency's expertise as the administrator of the Act's various permit programs. Therefore, considering *City of Waukegan*, the boundaries governing a "new pollution control facility" must be the Agency's own permit boundaries rather than any set by local siting.

Brickyard has provided no contrary authority to suggest its siting boundaries are relevant in determining whether its proposed expansion is a "new pollution control facility." Although Brickyard cites *Waste Management v. Illinois Environmental Protection Agency* as the "most analogous case" to its factual position, the case clearly does not support its legal position. PCB 94-153 (July 21, 1994). In that case, the Board held that the applicant's "proposed redesign d[id] not constitute an 'expansion beyond the boundary of a currently permitted pollution control facility' within the meaning of [Section 3.330(b)(2)]." *Id.*, slip op. at 6. In so doing, the Board expressly noted that the "modification does not expand beyond the *permitted* boundary" in explaining its decision. *Id.* at 7 (emphasis added). Although the Board noted that the "reconfiguration" would decrease the disposal capacity and lifespan of the landfill, that analysis was to distinguish the "specific circumstances" of the case from "the policy reasons favoring construction of the *M.I.G.* and *Bi-State*

permit requests as 'expansions' within the meaning of [Section 3.330(b)(2)]." *Id.* Evident is that the Board's focus was thus on the term "expansion," not "boundary." The pivotal fact in the case was that the Agency had set the limits of the applicant's permit to be those set by the siting approval. Therefore, the permit's boundaries and the "siting line" were interchangeable for purposes of the Board's "boundary" analysis. And, the modification was entirely within that parallel boundary, making it not an "expansion." The case is therefore of little use to Brickyard on the issue of which "boundary" Section 3.330(b)(2) contemplates.

2. Existing Siting Approval Is Only Relevant to Potentially Meet the Siting Requirements of Section 39(c), Not in Defining a "New Pollution Control Facility" Under Section 3.330(b)(2)

The definition of a "new pollution control facility" does not address siting approval. If the Agency determines a proposed expansion is a new pollution control facility, it is rather Section 39(c) of the Act, 415 ILCS 5/39(c), that then requires an applicant to submit proof of siting approval. If an applicant lacks siting approval for its expansion, it must secure approval under Section 39.2 of the Act, 415 ILCS 5/39.2. But if applicant already has an existing approval, it may potentially rely on that approval to satisfy Section 39(c). *See Saline Cnty. Landfill, Inc. v. Illinois Envtl. Prot. Agency*, PCB 02-108 (May 16, 2012), slip op. at 17 ("Not every single design change made in permitting . . . requires . . . 're-siting'"). If an applicant seeks to rely on existing siting approval, the inquiry turns to the expansion's impact on siting criteria and ad-

herence to the existing approval. *See Waste Management*, PCB 94-153. If the expansion will not impact siting criteria and is consistent with existing approval, that approval will satisfy Section 39(c). *Id.* But if an expansion is either inconsistent with the approval or will impact siting criteria, the applicant must seek new siting approval. *See, e.g., Saline County*, PCB 02-108.

3. Brickyard's Arguments on Siting Do Not Entitle it to Judgment as a Matter of Law

The Agency's incompleteness letter rejecting Brickyard's permit application identified the two siting provisions discussed above. The letter indicated that the expansion was a "new pollution control facility" under Section 3.330(b)(2), and required proof of "current" approval to satisfy Section 39(c). R. at 47531. As the Agency's letter determines the issues on appeal, Brickyard must ultimately prove either (1) it does not need *any* siting approval because its expansion is not a new pollution control facility, or (2) it does not need *new* siting approval for its new pollution control facility because existing siting approval will suffice. In its motion, Brickyard picks the former route, framing the issue on appeal as whether "the Agency's permit decision [should] be reversed . . . because the application does not propose a 'new pollution control facility' as defined by Section 3.330 of the Act." Pet'r's Mot. at 8. Its argument is likewise solely focused on Section 3.330, and makes no mention of Section 39(c). For summary judgment, therefore, Brickyard has hung its hat on showing its expansion does not fall under Section 3.330(b)(2). It

must therefore show that, as a matter of law, it does not meet the definition of a "new pollution control facility."

To make its argument, however, Brickyard muddles the two question of (1) whether its expansion is a "new pollution control facility" under Section 3.330(b)(2), and (2) whether the expansion needs new siting approval under Section 39(c). In doing so, Brickyard fails to show it was entitled to judgment as a matter of law based on Section 3.330(b)(2). That is, Brickyard has not shown, as a matter of law, that its permit application does not seek "an area of expansion beyond the boundary of a currently permitted pollution control facility." 415 ILCS 5/3.330(b)(2).

Brickyard points to three reasons it does not seek such an expansion. Brickyard's first contention is that its expansion is within the boundaries of a (valid) prior siting approval. *See, e.g.*, Pet'r's Mot. at 19 ("There is simply no expansion of any boundaries of the 'facility' being sought."); *id.* ("[Brickyard] does not here seek to increase the boundaries of the landfill . . . beyond the limits of what was sited"). Second, Brickyard states its expansion will not "increase . . . its disposal capacity . . . beyond the limits set out in the initial permit issued by the Agency." *Id.* at 14; *see also id.* at 19 (suggesting "proposed design change [is] a 'technical design change' that . . . would not increase landfill capacity or life"). Third, Brickyard claims its expansion will not "extend the life of the landfill." *Id.* at 14.

Putting aside, for the moment, that some of these claims are inaccurate, none of them factor into whether Brickyard's expansion is a "new pollution control facility." Brickyard ignores the relevant standard for determining whether an expansion is a "new pollution control facility." That is, Brickyard entirely failed to address the issue of whether its expansion is within the boundaries set in Permit No. 1994-419. As discussed in the Agency's cross-motion, the expansion goes beyond those boundaries, and is therefore a "new pollution control facility." *See generally* Resp't's Mot. at 11–13.

Brickyard has therefore not shown it is entitled to judgment as a matter of law. Its misapplication of an existing siting approval to Section 3.330(b)(2) used the wrong facts to address the wrong issue. The Board should therefore deny Brickyard's motion as to siting.

III. Brickyard's Objection to the Record Is Without Merit

Lastly, Brickyard's complaints about the record are a red herring. They are unrelated and irrelevant to its summary judgment motion. And their placement in the motion merely serves as a smoke screen for the lacking arguments that follow. Despite its claim that the record "ignores the very spirit of the Board's rules," Brickyard itself quotes a wrong rule, misinterprets another, and simply makes a third one up. The "prejudice" allegedly sustained is equally baseless, as shown by Brickyard's own motion and the fact that the "suggested" relief does nothing to remedy the supposed injury. Brickyard has therefore not put forward any reason for the Board to grant the relief sought.

A. Brickyard Misstates What May Properly Be in a Permit Appeal Record

Quite plainly, Brickyard quotes the wrong rule to argue what the record "must include," and what it must not. Pet'r's Mot. at 11–12. Brickyard quotes Section 105.410(b) of the Board's rules, 35 Ill. Adm. Code 105.410(b), as the authority. But that rule governs appeals of leaking underground storage tank decisions. This is a permit appeal. The applicable rule is therefore Section 105.212(b).

The Board's case law on Section 105.212(b) reveals the Agency has discretion in what may be included in the record. As the Board has explained,

> Section 105.212(b) identifies items that *must* be included in the Agency record, and not items that *may* be included in the record. The Board, therefore, looks to the rule for guidance, while recognizing that it does not necessarily provide an exhaustive list of materials that may properly be put into the record. * * * [T]he procedural rule does not by its terms address the items that the record may include.

AmerenEnergy Medina Valley Cogen, L.L.C. v. Illinois Envtl. Prot. Agency, PCB 14-041 (Mar. 20, 2014), slip op. at 8 (emphasis in original). The petitioner in that case unsuccessfully moved to strike a document from the record, arguing the Agency had not relied on the document. The Board found that argument to be "beside the point." *Id.* at 9. This is because "the Board's decision in a permit appeal . . . must be based on the entire record before the Agency." *AmerenEnergy*, PCB 14-041, slip op. at 8. As the document at issue was "part of the record before the Agency," it was properly part of the record

on appeal. *Id.* What is in the record all comes down to the fact that "the Agency must provide the Board with a complete record that includes all documents on which the Agency relied or reasonably should have relied." *Id.* at 9. This includes files in the Agency's possession that inform its decision.

Brickyard "suggests" the Board order the Agency to refile the record to include "only those documents it relied upon in its decision." Pet'r's Mot. at 13. Brickyard cites no legal authority supporting the validity of its suggestion. Its baseless suggestion is both under-inclusive of what documents the Board has said may be in a record, and unreasonable under the circumstances. It is unreasonable because Brickyard does not explain why the record ***may not*** include any particular document. Brickyard offers no explanation whatsoever for why the Agency could not or should not have considered any of the documents in the record's index.[7] Instead, Brickyard offers a conclusory statement that documents are "wholly irrelevant." *Id.*

Because Brickyard fails to back up its bark with any actual bite, it has left the Board and Agency with no discernible way of knowing which documents it actually objects to, or would object to in the future if the Board orders a new record. It is therefore impossible to know what documents should not be included in the new record Brickyard "suggests" should be filed. Ra-

[7] The only "irrelevant" subdocument Brickyard identifies is a pleading from a 2014 adjusted standard. Brickyard's conclusion that the document is "wholly irrelevant to this appeal" grossly misrepresents why it is in the record. The pleading is not included as a standalone document (hence why it is not listed in the index). It is instead part of the file for a larger document, and is part of a long dialogue between the Agency and Brickyard regarding groundwater-monitoring regulations. The document is therefore part of the Agency's collective knowledge regarding the landfill site.

ther than seeking to strike particular portions of the record, Brickyard suggests the Agency completely refile the record to meet Brickyard's unknown threshold of acceptability.

For its part, the Agency filed a compliant record. Although the issues underlying its decision seem clear now, the Agency first had to grapple with decades of permitting history and backstory to arrive at that point. The record contains all of the information the Agency has or should have considered as part reviewing the permit application, and getting up to speed on issues that stretch back over multiple regulatory and permitting decisions. Brickyard's contention is therefore without legal basis or merit.

B. Brickyard Misstates How the Record Must Be Arranged

Brickyard next relies on an incorrect reading of Section 105.116(b) to object that the Agency failed to do something it was not required to do. Section 105.116(b) details how the Agency must organize the record. 35 Ill. Adm. Code 105.116(b). Brickyard objects that the record's index "identifies overly broad categories" with "no chronological organization within any of those categories." Pet'r's Mot. at 12. Section 105.116(b), however, gives the Agency the choice to arrange the record either chronologically ***or*** by category of material (and then chronologically within each category). The Agency was therefore not required to organize the record into categories, nor did it do so.

Indeed, the Agency could not have arranged the record by category under the rule as it existed at the time the record was prepared. Prior to May

20, 2016, the Board's rules only allowed for chronological arrangement. Even with the new version of Section 105.116(b) looming, the Agency had no reason to think it would file the record after May 20, 2016. The only reason the Agency filed the record on May 23, 2016—just three days after that effective date of the new rule—was due to unforeseen technical setbacks in trying to comply with the requirements in then-existing Section 101.302(h) (which only now allows for compliance "to the extent technically feasible"). Were it not for those setbacks, the Agency would have filed the record far sooner, and well before May 20, 2016. Thus, the Agency labored under a rule that only allowed for chronological arrangement, not by category.

In light of the rule as it existed during compilation of the record, the Agency could only have arranged the main documents of the record identified in the index in chronological order. By doing so, the Agency complied with both the previous and new version of Section 105.116(b).[8] Brickyard's argument chiding the Agency for not doing something that it was not required to do is therefore without merit. Likewise, because Brickyard makes no argument that the Agency failed to arrange the record properly under the more general chronological method, it has presented no basis for a valid complaint.

C. The Board's Rules Do Not Require Unified Citations to the Record or that The Agency Eliminate Duplicate Documents in the Record

[8] A determination of which version of Section 105.116(b) applies to the administrative record is not required here. The Agency, however, does not waive any right to address this issue at a more appropriate time, if necessary.

Brickyard's complaint that the record contains the same documents more than once is a "violation" in search of a rule. The main documents identified in the record's index are comprised of multiple subdocuments. Such is the nature of the beast—permit applications often incorporate prior documents (which may in turn incorporate other documents, and so on). That is why "various documents appear at several locations in the record," as Brickyard correctly notes. Pet'r's Mot. at 12. They are simply subdocuments in successive main documents, some with unique Agency notations, and each presented in a different context. This reality is unavoidable.

Brickyard, however, takes issue with this repetition, claiming "it mak[es] it nearly impossible to allow for identical, common or complete citations to the record." *Id.* But no rule requires unified citations. And the Agency is not required to ensure a document only appears once in the record. Not only would such a requirement be onerous on the Agency, it would result in an altered and disjointed record. As Brickyard cites no authority for its grievance, and none exists, it lacks any legal basis or merit.

D. Brickyard Has Not Been Prejudiced By the Record

Finally, Brickyard's claim that the record as filed has somehow prejudiced it is also meritless. The only prejudice Brickyard alleges is the naked assertion that the record "denies [it] an effective opportunity to address the issues raised by the Agency's [permit rejection]." Pet'r's Mot. at 13. Brickyard offers no further insight into how it has been prejudiced by the record.

One thing is clear: Brickyard has not been denied an "opportunity to address the issues raised by the Agency's [permit rejection]." Brickyard's summary judgment motion provides that opportunity. And if necessary, Brickyard may also have the opportunity to address the issues in a hearing. Therefore, the record has not denied Brickyard an "opportunity" to address the issues.

Brickyard has failed entirely to show how this opportunity is not "effective," let alone somehow inconsistent with an actual Board regulation. That the parties' cross-motions turn on the application of the same provisions of law indicates the record has not obscured the issues identified in the Agency's incompleteness letter. More importantly, Brickyard's appeal must rise or fall on its permit application, which must show that a permit will not violate the identified provisions of the Act or Board regulations. In advancing its arguments, Brickyard need only rely on its application to make its case. And indeed, that is what Brickyard did—with the exception of Permit No. 1994, which was both previously known to Brickyard and easily identifiable in the record's index.

The only other conceivable way the record could have denied Brickyard an "effective" opportunity to address the issues is if reviewing the record prevented it from effectively preparing its case. Prejudice might result if Brickyard had to make its case before it was ready to because of outsized record review. Yet, Brickyard faced no immovable deadline forcing it to makes case.

A hearing date has not been set, and Brickyard controls the Board's decision deadline (already extended multiple times). Brickyard was also not required to move for summary judgment when it did, or even at all.

If the record truly hindered Brickyard's ability to move for summary judgment, Brickyard could have objected to the record before so moving to clear that obstacle. Likewise, the parties repeatedly extended the flexible, self-imposed cross-motion deadline. The last extension before the motions were due was solely at Brickyard's request, indicating the extra time it sought was the amount of time it needed to complete its motion adequately.

Brickyard's filing of its motion is therefore strong evidence the record has not denied it an "effective" opportunity to address the issues. There was nothing forcing Brickyard to move for summary judgment before it was ready or able to do so. Its decision to file, and to file without objecting to the record beforehand, indicates Brickyard felt it could effectively make its case at that time.

Brickyard has thus not shown the record has, in any way, "denie[d] [it] an effective opportunity to address the issues raised by the Agency's [permit rejection]." Pet'r's Mot. at 13. Its unsupported claim of prejudice has no merit, and does not warrant the filing of a new record.

CONCLUSION

Brickyard's summary judgment motion fails in multiple ways. First, Brickyard has not met its burden of production. It has presented no evidence

to support its claims, and the actual evidence in the record directly contradicts Brickyard's contentions. Second, Brickyard has not shown that it is entitled to judgment as a matter of law. Its use of refuted facts makes that impossible, as does its flawed misapplication of those facts to controlling law. Finally, although unrelated to summary judgment, Brickyard's objections to the administrative record are without merit or legal basis.

Respondent Illinois Environmental Protection Agency requests the Board deny Petitioner Brickyard Disposal & Recycling, Inc.'s Motion for Summary Judgment, and grant Respondent's cross-motion.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ David G. Samuels
DAVID G. SAMUELS
Assistant Attorney General
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031
dsamuels@atg.state.il.us
ebs@atg.state.il.us

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