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 Response to Respondent's Motion for Summary Judgment. Copies of these documents are hereby served upon you, via electronic filing or service.

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Dated: September 16, 2016

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Respectfully submitted,

BRICKYARD DISPOSAL & RECYCLING, INC

By: /s/Claire A. Manning

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

NOW COMES Petitioner, BRICKYARD DISPOSAL & RECYCLING, INC. ("Brickyard") and for its Reply to Respondent's, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("IEPA" OR "Agency") MOTION FOR SUMMARY JUDGMENT states as follows:

I. UNDISPUTED FACTS

Brickyard asserts that the following material facts are either undisputed or not reasonably disputed:

1. In September of 1991, the landfill applied for an expansion of the Brickyard facility (BOL ID # #1838040029) by seeking Siting from Vermilion County, pursuant to Section 39.2 of the Act. See R. at 47212. The purpose of the Siting Application was to obtain the County's approval of the "location and suitability" of a "volumetric expansion" of the landfill. See R. at 47372.

2. Vermilion County granted Siting Approval for a "lateral and vertical" expansion on February 11, 1992, subsequent to public hearing. See R. at 47498.

3. Vermilion County did so in a duly authorized ordinance (RES092-476), which reflects the County's determination that the Applicant met each of the statutory requirements found in Section 39.2, including the Notice requirements. See R. at 47498-47499.

4. The Siting Application defined the authorized expansion of the facility boundary in terms of final landfill contours, not cubic yards of waste: "The volumetric expansion calls for a forty foot (40') vertical increase in height of the existing facility over a 90-acre portion of the total 293-acre facility. This raises the ceiling from 675 to 715 feet above sea level." See R. at 47372.

5. The permit application at issue is consistent with the expansion sought at siting, as described above. See R. at 47549 (Agency Permit Reviewer Notes: "The siting application ultimately approved by the [Vermilion County Board] included a conceptual design that would join Unit I and Unit II into one contiguous waste mass.")

6. Despite a lengthy permitting history, wherein which the parties contemplated (since the late 1980's) staged development in phases of two units[1], the final contours of the landfill were consistently permitted to "form a single final mound." See Agency Motion for Summary Judgment ("Agency Motion"), at p. 2 ("As permitted, the two units will form a single final mound, but will remain two separate and distinct units managed under different regulations.")

7. The landfill operator timely "made application to the Agency for permit to develop the site" in accordance with Section 39.2(f) of the Illinois Environmental Protection Act, 415 ILCS 5/39.2(f), thereby statutorily preserving the expansion authorized by siting.[2]

[1] Supplemental Permit No. 1987-024-SP divides the landfill into two units, "with Unit 1 consisting of the southern portion of the facility and Unit 2 consisting (sic) the northern portion, as shown on Plan Sheet 1, dated December 15, 1987 of this application." See R. p. 6521.

[2] Section 39.2(f) requires that, unless the landfill applies for a development permit from the Agency within three years of the siting decision, siting expires. See Atkinson Landfill v. IEPA, PCB 13-08 (June 20, 2013) and Saline County Landfill v. IEPA, PCB 04-117 (May 6, 2004).

8. The initial permits for the construction and development of the landfill, post-siting, were: Permit Log Nos. 1992-188-SP (for Unit 1) and 1993-057-LF (for Unit 2).

9. The application for Permit Log No. 1992-188-SP, submitted immediately after siting, contained illustrations ("Development Plans") depicting the existing permitted areas, waste areas, and areas of expansion authorized via siting – as well as the final landform – for both Unit 1 and Unit 2. R. at 00335-00376. The existing permitted areas, as well as the areas of expansion, for purposes of waste deposition, include the area now known as "the wedge". See R. 47037.

10. On October 22, 1992, the Agency issued Supplemental Permit No. 1992-188-SP. That permit states: "Specifically, this Supplemental Permit approves modifications to the groundwater monitoring network, revised closure plans, *revised final contours for the facility within the approval granted by the Vermilion County Board* and changing the facility name from H&L Disposal Corp. to Brickyard disposal and Recycling, Inc. 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 [Agency]." (emphasis added) See R. at 00001.

11. In the application for Permit No. 1993-057-LF, Brickyard stated it wished to "preserve" what it had achieved via siting. See R., at 00505; R., at 0521; and R. at 00726 (March 22, 1993 letter from Andrews Engineering to Agency, which reads: "…we provided final contour and invert design details for the entire facility after all future anticipated filling is completed to preserve S.B. 172 siting. However, in the March 3, 1993 letter from the IEPA-DLPC, it was stated that the existing landfill and the proposed expansion area were designed as one Unit and therefore, it would be necessary to file an application for Significant Modification of Permit for the existing unit.").

12. On April 14, 1994, the Agency issued Permit No. 1993-057-LF. In it, the Agency confirmed that Brickyard was being permitting for the entire area sited for expansion as the permit "acknowledges that the application filed and approved by this permit meets the criteria in Section 39.2(f) of the Environmental Protection Act with regard to local siting for capacity increase over *approximately 95.8 acres* of the total waste boundary." See R. at 00386.

13. On May 4, 1995, the Agency issued Permit No. 1994-419-LFM which allowed for, *inter alia*, the closure of Unit 1 under the Board's Subpart D rules, and continued future development of Unit 2, in phases, under the Board's new Subpart C rules. See R. at 04879.

14. The permit 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.

15. Permit No. 1994-419-LFM describes the facility boundaries as follows: "a footprint area of approximately 152 acres within the 293-acre site, will have a final peak elevation of 716 feet above mean sea level (MSL) and all waste placement in Unit II shall be above elevation 530.0 MSL."

16. Numeric volumetric capacity figures were established through permitting, not siting. Those figures are estimates: "The remaining capacity of Unit I *is estimated at* 350,000 airspace cubic yards. Unit II has *approximately* 14.2 million airspace cubic yards capacity."

17. During the permitting process, based upon discussions with the Agency, the application set forth a design that would allow for an area of separation between Unit 1 and Unit 2. As proposed and permitted, the design was to fill the area with inert material, not Municipal Solid Waste ("MSW"), subject to future permitting.

18. 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. See also at 47547, ("I am fairly certain that the clean fill separation between Unit 1 and Unit 2 was required by the IEPA as necessary for approval of the initial Part 814 sig mod for the facility, since a vertical expansion on the north side of Unit 2 would not be allowed").[3]

19. Nothing in Permit No. 1994-419-LFM prohibits a revision of the above-referenced design, so long as the units can be separately monitored for groundwater impact:

a. Condition XII.1 of the 1994-419-LFM permit ("Monitoring Programs")[4] simply states: "[A] separate berm shall be maintained between Unit I and Unit II which will allow independent groundwater monitoring". See R. at 004898-004899 and 08664-08665.

b. Permit No. 1994-419-LFM states that "[T]he 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, dated April 14, 1994, except as modified in the above document." See R. at 004923.

c. The wedge area was included as part of the development in the 1994-419-LFM permit, and is still subject to further permitting prior to operation (*i.e.*, use);

[3] The Agency has not articulated, in its permit decision or in its Motion, where in the Board's rules (or in RCRA Subpart D) a waste-free separation barrier, in the form of a wedge of inert material between a Subpart C unit and a Subpart D unit, is required. Brickyard has found no support for such regulatory interpretation and, in fact, believes that the Act specifically authorizes waste placement on a side slope, as proposed here. See 415 ILCS. 5/3.275.

[4] The Agency incorrectly represents Condition XII.1, by implying that the condition itself requires Zone A as a "waste-free area". See Agency Motion, at. p. 5.

accordingly, nothing in the Act or regulations prohibits a revision of that design in future permitting.

20. The permit application that is the subject of this review, both the original application (See R. at 46992) and the supplemental application (R. at 47204), seeks to revisit the permitted design to allow for placement of MSW (instead of inert material) in Unit 2 up to the side slopes of Unit 1. The application includes an independent monitoring demonstration, as Brickyard believes that the units are separately monitorable.

21. The Agency has not reviewed the above-referenced permit application or monitoring demonstration on its merits; instead, it summarily rejected the groundwater demonstration, providing as rationale two regulations that apply to new Subpart C units, when Brickyard only seeks to redesign an area that is part of an already permitted Subpart C unit, in an already permitted landfill, that has already achieved siting.

II. PROCEDURAL MATTERS

In the context of this case, Brickyard must address a few procedural points of law prior to turning to the merits of the immediate issue before the Board: whether or not Brickyard has to achieve further siting approval from Vermilion County in order for the Agency to review, on its technical merits, Brickyard's proposed redesign of Brickyard Unit 2.

Regarding permits, the Act provides that it "shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility … will not cause a violation of this Act or of regulations hereunder." 415 ILCS 5/39(a). In granting such permit, "(T)he Agency may impose such other conditions as may be necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board hereunder." *Id*. When denying such permit, however, Section 39(a) of the Act explicitly provides that the Agency must "transmit to

the applicant … *detailed statements* as to the reasons the permit application was denied." *Id*. (emphasis added). Specifically:

> 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 ILCS 5/39(a)(i)-(iv) (emphasis added).

The question before the Board in a permit appeal is whether the applicant has met its burden of proving that, if granted, the requested permit would not violate the Act or regulations. Oscar Mayer v. IEPA, PCB 78-17, 30 PCB 397, 398 (June 8, 1978); John Sexton Contractors Company v. IEPA, PCB 88-139, 96 PCB 191, 195 (February 23, 1989); Browning-Ferris Industries of Illinois, Inc. v. IPCB, 179 Ill. App. 3d 598, 607, 534 N.E. 2d 616, 622 (2nd Dist. 1989). In turn, the Agency must provide sufficient specificity in its decision letter, consistent with Section 39(a), to allow the applicant to meet this burden. See Wells Mfg, Co. v. IEPA, 195 Ill. App. 3d 593, 597, 552 N.E.2d 1074, 1077 (1st Dist. 1990) (finding that an applicant must have "an opportunity to present evidence" in support of its position prior to a denial and, in order to do so, the Agency must provide the specificity required by the Act).

It is also well-settled that the Board's review is limited to the information submitted by the Agency during the Agency's review period, and not based upon information developed by the permit applicant (or by the Agency) after the Agency's decision. See West Suburban Recycling

and Energy Center v. IEPA, PCB 95-119 and 95-125 at *4 (October 17, 1996), citing Alton Packaging Corporation v. IPCB, 162 Ill. App. 3d. 731, 738, 516 N.E. 2d 275, 280 (5th Dist. 1987).

Here, in contravention of Section 39(a)(i) – (iv) of the Act, the Agency's one-page permit decision consists of two paragraphs and is totally devoid of any "statement of specific reasons" why the issuance of the application would violate the Act, as required by Section 39(a)(iv). As to denial point #1 (lack of proof of siting) the Agency provided no specific factual or legal rationale as to why it decided siting was required, leaving the applicant and Board to sort it out in the basis of an unwieldy record, that itself does not reflect compliance with the Board's procedural requirements for records. See Petitioner's Motion for Summary Judgment, at pp. 11-13. That is not statutorily sufficient.

An Agency's refusal to review a permit is tantamount to a permit denial. Atkinson Landfill v. IEPA, PCB 13-08 (June 20, 2013). If the Agency bases its decision on a legal conclusion, as it did here, it is incumbent upon the Agency in the decision letter to explain *why* it has made that conclusion, 415 ILCS 5/39(a)(iv) – and what information the permit applicant should provide to correct the deficiency, 415 ILCS 5/39(a)(iii). Otherwise, it is free to develop legal arguments based upon "facts" it alleges post-decision, to support it. As it does here, both in regards to its notice argument and in regards to its claim, in Section III of the Agency Motion, that a specific area of the wedge below 675' was not part of the expansion authorized via siting. These factual assertions and arguments belie the permit history and extensive documents in the record; moreover and importantly, they are not part of (or consistent with) the Agency's analysis in reviewing this permit. Companies have a statutory right to appeal the Agency's decision when permit review is denied; they have a statutory right to know the specifics as to why, instead of hearing them for the first time before the Board, on appeal. Accordingly, these assertions and arguments violate the

express language (and spirit) of Section 39(a) and should be stricken and/or disregarded by the Board. Nevertheless, in the interests of moving this matter forward, Brickyard addresses the contentions made by the Agency in its Motion.

III. DENIAL POINT #2

The Agency cites to two Board regulations that are only relevant to new Subpart C units, but provides no rationale for why they are necessary in the context of this permit application, which seeks to redesign an area already permitted. Section 811.317 ("Groundwater Impact Assessment" or "GIA") details the requirements and procedures for performing a GIA. Brickyard already has a GIA. The permit application provided information as to why the existing GIA is sufficient to accommodate the requested redesign. The Agency did not review the information, but instead summarily declared the application insufficient, apparently because Brickyard did not include an entirely new GIA.

The other regulation cited in denial point #2 is Section 811.317(c) ("Standards for the Contaminant Transport Model") which requires that "(T)he model shall have supporting documentation that establishes its ability to represent groundwater flow and contaminant transport and any history of its previous applications." Again, Brickyard has not presented a new GIA with this application for redesign. The application itself demonstrates that the existing groundwater monitoring system is sufficient to accommodate the design and allow for separate and independent monitoring of Unit 2 (from Unit 1), with the redesign. The Agency has declined to review it however, declaring it insufficient, apparently as a matter of law.

Brickyard's permit application proposes a lateral separation between Unit 1 and Unit 2, such that the side slopes of Unit 2 would overlay a portion of Unit 1 – yet with an adequate separation. The MSW of Unit 2 will not be contiguous or commingled with the MSW of Unit 1,

as an adequate layer of separation is proposed. The Agency has not articulated in its decision letter any regulatory rationale explaining why Brickyard must retain a significant waste-free barrier between the two units. Instead, the permit review notes cite to an earlier permit application where the parties' believed, without regulatory citation, that this barrier was required in order for Unit 1 to close as a Subpart D facility. See R. at 47545-47551. Again, Brickyard sees no requirement for this interpretation and, accordingly, seeks to revisit it. The Agency cites to no regulatory rationale that would prohibit the proposed redesign. Instead, the Agency review notes appear to indicate its belief that permit implementation of the redesign would somehow require that Unit 1 now be subject to regulation as a Subpart C facility. See R. at 47567-46569. Brickyard disagrees. The Act and Board regulations implicitly authorize the approach Brickyard proposes. Section 3.275 of the Act excludes from the definition of "lateral expansion" any area of MSW that is placed on the side slopes. 415 ILCS 5/3.275. The Board's rules mirror this statutory definition. See 35 Ill. Adm. Code 810.103.

As the Agency has presented no information related to its rationale for these denial points, and the Agency's denial preceded any technical review, Brickyard cannot possibly address denial point # 2 any further than explained above. Yet, the Agency's Motion requests summary judgment for this denial point, asserting that Brickyard has not met "its burden" of explaining why the Act is not violated if the redesign permit is granted. Brickyard requests that whatever the Board's decision is related to the siting, it must address this denial point so that regulatory clarity is achieved in order for Brickyard to responsibly move forward.

IV. RESPONSE TO AGENCY'S ARGUMENT

The Agency makes three arguments in its Motion for Summary Judgment. Agency Motion, p. 10. First, the Agency states that Brickyard "did not secure approval for its proposed expansion

as required by law." Second, the Agency states: "even if Brickyard could rely on an earlier approval, the Siting Approval from 1992 is invalid because Brickyard failed to comply with public notice requirements for that approval." Finally, the Agency states: "even if it were valid, the Siting Approval did not sanction waste disposal for the entire area of the proposed expansion." Brickyard addresses each argument, albeit in slightly different order.

A. The Agency's Assertion that the 1994 Siting Approval is Invalid for Improper Notice Lacks Merit.

The Agency's assertion that the 1994 Siting is invalid for improper notice is disingenuous and lacks merit – both as a matter of law and as a matter of fact. The Board should flatly reject (or strike) this argument. The Agency (which itself has no role in the statutory siting procedure prescribed in Section 39.2 of the Act) here asks the Board to invalidate a duly authorized Vermilion County Ordinance that the County issued twenty-four years ago pursuant to its statutory and constitutional authority. In that Ordinance the County specifically determined: "WHEREAS, the procedural requirements of Illinois Revised Statutes, 1989, Chapter 111 ½, section 1039.2 [now 415 ILCS 5/39.2] and the Ordinance for Approval of Pollution Control Facility Siting in Vermilion County, Illinois *have been complied with,* (italics added) and a public hearing on the siting request was held on December 23, 1991." Further, the Agency has itself issued dozens of construction and operational permits to Brickyard, over the course of a twenty-four year period, appropriately in reliance on this County Ordinance.

As a factual basis for this argument, the Agency points to (a) the statutorily required public notice (published in the local newspaper on August 21, August 28, and September 4, 1991), See R. at 47411, and (b) the Siting Application's cover letter to the Vermilion County Board, See R. at 47212. The publication gave notice of an application filing date of September 20, while the cover letter attached to the application is dated September 18. Assuming the application was filed

on the date of the letter (September 18) it would have been *filed two days earlier* than what the public notice stated. This, argues the Agency, invalidates siting.

First, the Agency's argument, which ignores twenty-four years of agency actions, lacks factual support. As the Board knows, a date on a cover letter is not valid proof of the actual date of submission of anything. Thus, it is not actual evidence of the date of submittal or the date the County accepted the application for filing. The letter could have simply been prepared on September 18, 1991 (a Wednesday), placed in the mail, and received by the County on the 20th. The Applicant could have taken the letter and application to the printer on the 18th, and actually submitted it to the County thereafter, on the 20th. The point is: it does not matter to this permit application whatsoever. No proof is required in this proceeding beyond the very best evidence that can be (and was) provided: the County ordinance, promulgated subsequent to its review at the time of notice, finding adequate statutory notice. Certainly, this is the very evidence the Agency has historically relied upon in issuing permit decisions – to Brickyard and to all landfills. There is simply no reason for the Agency to question this notice in 2016, asserting its invalidity.

Second, the Agency's legal argument has no support in law. The Agency incorrectly relies on Concerned Citizens of Williamson County v. Kibler Dev., PCB 92-204, 142 PCB 573 (May 20, 1993). In Williamson, a group of citizens timely challenged a county's siting decision to the Board; one of the groups' arguments was defective notice. There, the newspaper notice did not give a date of submission, but simply stated that the application would be submitted 14 days from the date of publication, as required by the statute. The applicant filed it twenty-four days after the publication of the notice. The Board framed the issue as follows: "[W]here a newspaper notice states that an application *will be submitted 'in 14 days'*, but the application is *submitted 24 days after publication*, does that notice comply with the provision of Section 39.2(b)?" *Id*., at *4, 142

PCB at 576. The Board found that it did not. First, unlike here, it did not indicate a specific date of submittal, as required by Section 39.2(b). Second, also unlike here, the application was not submitted within the appropriate 14-day window, prescribed in Section 39.2(b) (that the Notice is published no later than 14 days before the county board receives the application), but was ten days late.

Here, Williamson is neither dispositive nor relevant. Even assuming Brickyard submitted the application on September 18, it still would have been submitted within the time prescribed in the Act; on these facts, no citizen could possibly (or did) claim harm or otherwise assert ineffective notice for a filing that may have been two days earlier than reported. Certainly, there can be no reasonable finding that the 1992 siting is invalid for proper notice. Moreover, the Board's authority regarding the siting process is only triggered upon timely appeal of that decision by a person with a right to appeal. See 415 ILCS 5/40.1. That review window is long closed.

B. The Agency's Assertion that the 1992 Siting Approval Did Not Sanction Waste Disposal for the Entire Area of the Landfill, including the Area Now Referred to as "the Wedge" is Misplaced and Belies the Agency's Own Record Review.

Here again, at Section III of its Motion, the Agency makes arguments out of whole cloth – arguments that simply confuse the simple issue before the Board, and are not contained in the lengthy permit history – or Agency record. Moreover, those arguments and assertions are directly contrary to the Agency permit review notes, contained in the record. The Applicant has presented solid evidence that the Siting Approval contemplated one final landform, entirely filled with waste. The Agency permit reviewers confirm such. See R. at 47549 ("The siting application ultimately approved by the [Vermilion County Board] included a conceptual design that would join Unit I and Unit II into one contiguous waste mass.") See also R. at 47549 ("It appears that the proposed modification is not anything outside of that (sic) was proposed in the siting application in 1991.")

See also R. at 47546 ("Based on the copy of the siting application included in this addendum, I must say I agree that the drawings from the siting app do indicate Unit 2 is essentially a lateral expansion of Unit 1").

The Agency's basic contention is that the local siting did not approve waste placement in the lower part of the vertical expansion – *i.e.*, below 675 feet MSL. The siting involved approval for a single expansion; it simply (and not untypically) consisted of both an elevation of certain areas (vertical) and an extension of other areas (lateral). That expansion simply raised the then permitted ceiling (675 feet) by 40 feet. See Permit No. 1981-24-DE (issued on June 1, 1981); R. at 06535.

Like the Notice issue, the record documents do not articulate the argument the Agency now raises in its Motion; moreover, it is not set out as a rationale for the Agency's incompleteness determination. In fact, the Agency reviewer notes directly contradict the Agency's argument: "I found nothing in these 'siting' plan sheets (drawings and notes) that prohibits waste disposal in the 'wedge fill' that is the subject of this file review." See R. at 46988. The Board should credit the permit reviewer who understands the permit history in his review of the Agency's decision here.

C. The Proposed Application Does Not Constitute a "New Pollution Control Facility" for Which New Siting Is Required.

At last, we get to the meat of the matter: does the wedge area constitute a "new pollution control facility"? The Act, at Section 3.330(b), defines a "new pollution control facility" as:

(1) a pollution control facility initially permitted for development or construction after July 1, 1981; or

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

(3) a permitted pollution control facility requesting approval to store, dispose of, transfer or incinerate, for the first time, any special or hazardous waste.

415 ILCS 5/3.330(b).

Relevant here are Sections 3.330(b)(1) and (2) above. Since Brickyard's current configuration was the result of a vertical and horizontal expansion that occurred after July 1, 1981, siting was required for that expansion. In accordance with Section 39.2, Vermilion County granted siting for the expansion. The landfill then sought development permits for that expansion, in sufficient time to meet the requirements of Section 39(f) of the Act. The *only reasonable conclusion* as to what areas constituted the expansion are those areas the Agency permitted, for expanded development, in those initial permits. Accordingly, one cannot reasonably dispute that Brickyard achieved siting (and was initially permitted) for a landfill that constituted one landform, with a volumetric capacity defined as "a forty foot (40') vertical increase in height of the existing facility over a 90-acre portion of the total 293-acre facility. This raises the ceiling from 675 to 715 feet above sea level", consistent with the drawings presented at siting, and in those initial permit applications.

The real question before the Board in the instant appeal involves an interpretation of Section 3.330(b)(2): does the wedge area that Brickyard seeks to redesign, although it was part of the sited and initially permitted configuration, now constitute "an area of expansion beyond the boundary of a currently permitted pollution control facility"? More specifically, the question is: what is the "boundary of the currently permitted pollution control facility" (*i.e*. Brickyard)? None of the court cases related to Section 3.330(b)(2) are dispositive regarding the issue presented here, in the context of Brickyard and its permitting history. As Brickyard explained in its Motion, the two court cases concerning this statutory phraseology each involved landfills that had not previously been the subject of siting. See M.I.G. Investments, Inc. v. IEPA, 122 Ill. 2d 392, 523

N.E.2d 1 (Ill. 1988), and Bi-State Disposal Inc. v. Envtl. Prot. Agency, 203 Ill. App 3d 1023, 561 N.E.2d 423 (5th Dist. 1990). Accordingly, the court was not in a position to compare what the local government had already done, with what landfill was attempting to do, via permitting. Therefore, the courts looked to the existing permit, as it was the only boundary defining the facility.

The key lesson in M.I.G., is that a vertical boundary is as relevant as a lateral boundary, when necessitating local siting. There, the Supreme Court was faced with a landfill that was never sited by local government and wished to expand vertically (by 50 feet) without seeking local siting approval. M.I.G., 122 Ill. 2d at 395, 523 N.E.2d at 2. The court reviewed the legislative history of Section 39.2, finding that its primary purpose was "to place decisions regarding the *sites* for landfills with local authorities and to avoid having a regional authority (the Agency) in a position to impose its approval of a landfill *site* on an objecting local authority." (emphasis added) *Id*. at 398, 523 N.E.2d at 4 (citations omitted). In the context of the facts before it, the court reversed a finding by the appellate court that "boundary" meant the width and length of the facility as permitted, not the height. *Id*. at 401-02, 523 N.E.2d at 5. It held "that the provisions of Section 39.2 of the Act are to be applied in a proposal to increase vertically the waste disposal capacity of a landfill *beyond the limits set out in the initial permit issued by the Agency*." *Id*. at 401, 523 N.E.2d at 5.

The Bi-State case focuses on the terminology "currently permitted facility"— but again in the context of a landfill that had never before been sited. Bi-State, 203 Ill. App 3d at 1025, 561 N.E.2d at 424. Because an area of the landfill that had not been sited was being proposed for development post-siting, it was required to get siting approval, even though the area was originally part of the landfill as originally permitted by the Agency (in the 1970's). *Id*. at 1024-25, 1028, 561 N.E.2d at 424, 426. There, no question existed as to whether phased Agency permitting in the

development of a landfill, within the siting-authorized and permitted facility boundary itself, can serve to "undo" what *has been already authorized* by the local government via siting. Thus, no court case specifically focuses on what the term "currently permitted *facility*" means in the context of a landfill that has already expanded via siting and the area poised for development was part of that expansion and is within the facility as permitted subsequent to siting.

In the context of a landfill that has already legally achieved expansion through siting, these statutory terms must be given their plain and ordinary meaning. Brickyard is and has always been one *facility*, with one BOL ID#. Its facility boundaries, as expanded via siting, were and are the subject of permits. Brickyard does not seek to change those boundaries, but seeks to redesign within them. The existing permitted waste areas of discreet interior cells within a landfill unit, that are still subject to further development and operational permits, should not be relevant to the statutory analysis. The legislature did not use the terminology "waste boundary." Nor did it utilize the term "unit" or "cell." Here, Brickyard simply wants to revisit a design that the parties crafted two decades ago and has yet to be implemented.

In accordance with the Act and the plain language of Section 39.2, Brickyard was careful to preserve what it had achieved in siting. Since application for the initial permits was timely made, siting did not, and has not, expired. See 415 ILCS 5/39.2(f). The Brickyard permits recognized and memorialized the landfill configuration as sited. The permit determinations made in the 1994-419-LF permit as to design of the wedge, during the early days of new landfill Subpart C regulations, should not serve to invalidate or limit that siting. Accordingly, the Brickyard facility, as permitted, is consistent with siting and the proposed application does not therefore constitute an expansion by the express language of Section 3.330(b).

Brickyard recognizes that in reviewing cases as to the question of siting applicability, the Board will look to the plain language of the Act and, as well, to the legislative policies related to local siting. Brickyard asserts that those legislative policies will not be served by requiring Brickyard to return to Vermilion County on the discreet questions relevant here, as those questions do not involve any location standards or other statutory criteria that have not already been addressed by Vermilion County when it authorized siting of one large landform in 1995. Instead, the redesign of the wedge requires a highly technical review, appropriate for Agency permitting and not appropriate for a local government siting hearing. Such hearings were intended to replace zoning – not technical permitting.

Brickyard also recognizes that one of the considerations in the Board's evaluation of the applicability of the Section 3.330(b) statutory language is whether the proposed development would increase the volumetric capacity or landfill life. See Waste Management of Illinois, Inc. v. IEPA, PCB 94-153 (July 21, 1994). Here, Brickyard points out that Vermilion County did not identify any specific volumetric capacity, nor did it provide for any maximum landfill life, in its siting decision. Here, the volumetric capacity was crafted through permitting, not siting. As such, it should not be relevant to the Board's analysis. The construction and operational need for revisiting this permit design is both compelling and paramount; important here as well, the redesign does not implicate any of the rationale for local siting as envisioned by the legislature when it replaced local zoning with Section 39.2. The design is a creature of permitting; Brickyard seeks to redesign it via permitting, even if such permitting requires that the final contours correspond to existing permitted volumetric capacity. The legislature did not intend that permitting could undo what a company has achieved through siting – and Brickyard's plans will remain within those sited facility boundaries.

V. CONCLUSION

Brickyard requests that the Board find that no genuine issue of material fact exists here to require a hearing on the questions presented in the Agency's incompleteness denial: either siting is required or it is not. Further, in order to ensure regulatory certainty as Brickyard moves forward with its plans for Unit 2, Brickyard requests that, whatever its decision on siting, that the Board also specifically address the legal issue raised by the Agency's denial point #2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 16th day of September, 2016, I have served by the manner indicated below the attached PETITIONER'S RESPONSE TO RESPONDENTS' MOTION FOR SUMMARY JUDGMENT upon the following persons:

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