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 November 4, 2016, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois RESPONDENT'S REPLY IN SUPPORT OF RESPONDENT'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

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Dated: November 4, 2016

CERTIFICATE OF SERVICE

I hereby certify that I did on November 4, 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 REPLY IN SUPPORT OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT upon the following persons:

Pollution Control Board, Attn: Clerk
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RESPONDENT'S REPLY IN SUPPORT OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Respondent Illinois Environmental Protection Agency, under 35 Ill. Adm. Code 101.500(e), hereby replies in support of its Motion for Summary Judgment.

INTRODUCTION

Petitioner, Brickyard Disposal & Recycling, Inc., seeks to increase the capacity of its landfill in Vermilion County, but it has not obtained approval from the County to do so. Respondent, the Illinois Environmental Protection Agency, rejected Brickyard's permit application as incomplete in part because it lacked proof of current siting approval from the County. Brickyard appealed the Agency's decision. The Parties filed cross-motions for summary judgment and responses to the respective motions. Thereafter, the Hearing Officer granted the Parties leave to file replies to the respective responses, along with a set of stipulated facts.

Brickyard's response to the Agency's motion does not show that the Agency is not entitled to judgment as a matter of law. Brickyard has not cited relevant facts or legal authority to rebut the Agency's arguments. Nor does Brickyard articulate any basis for rejecting the Agency's legal authorities. Instead, Brickyard relies on immaterial facts, unsupported conclusory assertions, and an incorrect understanding of Illinois siting law. These misguided responses do not refute the Agency's entitlement to judgment as a matter of law. Likewise, they do not raise any genuine issues of material fact. The Board should therefore grant the Agency's motion.

STANDARD OF REVIEW

When parties move for summary judgment on a particular legal issue at the same time, they implicitly agree there are no genuine issues of material fact. Their disagreement is about the legal consequences of those facts. A responding cross-movant must therefore direct its response to refuting that the other party has raised facts entitling it to judgment as a matter of law.

ARGUMENT

I. The Agency Rejects the "Undisputed Facts" Brickyard Alleged in Its Response To the Agency's Motion

At the outset, for the sake of clarification, the Agency rejects the alleged "undisputed facts" Brickyard stated in its response. The Agency disagrees with Brickyard's contention that those "facts" are "either undisputed or not reasonably disputed." Pet'r's Resp. 1. The joint filing of stipulated facts renders this portion of Brickyard's response moot. Nevertheless, the Agency

seeks to dispel any notion that the "undisputed facts," as presented in the Brickyard's response, are in fact undisputed.

II. The Agency is Entitled to Summary Judgment Because Brickyard Failed to Rebut That It Proposed a "New Pollution Control Facility" Requiring New Siting Approval

A. There Are No Genuine Issues of Material Fact

The material facts of Brickyard's proposed expansion are not in dispute. First, the Parties agree about the purpose and impact of the proposal in Brickyard's application for a significant permit modification. The Parties agree that, in its application, "Brickyard propose[d] a modification to its permit to allow disposal of municipal solid waste in Zone A." Stipulated Fact ¶ 8. The Parties also agree Brickyard's application stated,

> 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} The documented estimated remaining life expectancy of Brickyard Disposal and Recycling Landfill is 16 years. . . . 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.

Stipulated Facts ¶ 8.[1] Therefore, although it artfully characterizes its volumetric expansion as a "redesign," Brickyard agrees its application stated that it sought to increase the landfill's waste-disposal capacity by more than

[1] The "Waste Capacity" section of the application similarly states, "The resultant total Unit 2 waste capacity of Brickyard Disposal and Recycling, Inc. Landfill 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.

1,000,000 cubic yards over its currently permitted maximum, thereby extending the landfill's life expectancy by five more years.

Second, Brickyard does not refute that it is not currently permitted to dispose of municipal solid waste in Zone A. In its response, Brickyard acknowledged it previously submitted a permit application that "set forth a design that would allow for an area of separation between Unit 1 and Unit 2," and that "[a]s proposed and permitted, the design was to fill the area with inert material, not [m]unicipal [s]olid [w]aste . . . ." Pet'r's Resp. 4. This "wedge area" is the Zone A wedge Brickyard now seeks to convert from inert fill material to municipal solid waste. Brickyard further stated that "[t]he wedge area was included as part of the development in the 1994-419-LFM permit . . . ." *Id.* at 5; *see also* Stipulated Facts ¶ 7(b) (quoting permit condition requiring a "separate berm" between the units). Therefore, there is no dispute that Brickyard is not currently permitted to dispose of municipal solid waste in Zone A. Thus, there are no genuine issues as to the material facts that Brickyard seeks to place municipal solid waste in an area not permitted for such use, and that doing so will increase the landfill's capacity and lifespan.

B. The Expansion is a "New Pollution Control Facility"

Under Section 3.330(b)(2) of the Act, 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) (2014). Brickyard seeks to place municipal solid waste in Zone A, an area outside of where it is permitted to

do so. Brickyard thus seeks to expand the boundaries of its permit to allow municipal solid waste disposal in Zone A. Therefore, Brickyard is seeking approval of a "new pollution control facility."

Brickyard has cited no relevant legal authority to refute this. Brickyard argues it does not seek approval of a new pollution control facility because, it claims, its proposed expansion is consistent with existing siting approval. But as already explained, that theory fails to apply the relevant facts to the relevant law—***prior siting approval*** does not determine whether an expansion is beyond ***currently permitted boundaries***. *See* Resp't's Resp. 16–21; Resp't's Mot. 11–12. In making its argument both in its response and cross-motion, Brickyard has not explained how the term "permitted" can be read out of Section 3.330(b)(2). Likewise, Brickyard has not cited any authority supporting such revision.

At the same time, Brickyard asks the Board to disregard controlling precedent on Section 3.330(b)(2) without explanation or authority justifying doing so. Brickyard argues "[n]one of the court cases related to Section 3.330(b)(2) are dispositive" because "no court case specifically focuses on what the term 'currently permitted [pollution control] facility' means in the context of a landfill that has already expanded via siting . . . ." Pet'r's Resp. 16–17. Brickyard, however, offers no actual rationale or authority for this red herring. It does not explain how or why having siting approval could affect—let alone invalidate—the legal underpinnings of decided cases interpreting the

phrase "boundary of a currently ***permitted*** pollution control facility." 415 ILCS 5/3.330(b)(2) (emphasis added). Nor does it cite any legal authority for its proposition. Brickyard simply concludes, without any basis, that because its landfill has siting, those cases are not controlling as they involved landfills without siting. Absent explanation or authority, that conclusion has as much validity as arguing that those cases are not controlling because the names of the landfills at issue did not begin with the letter "B."

Finally, Brickyard's half-hearted statutory interpretation is flawed. As part of its broader siting-approval-consistency argument, Brickyard contends its expansion is not a "new pollution control facility" because it only seeks to expand within the external boundaries of the entire landfill facility (which Brickyard asserts were set by siting, not the Agency's permit). According to Brickyard, only these boundaries are relevant to understanding the term "boundary" in Section 3.330(b)(2):

> [S]tatutory terms must be given their plain and ordinary meaning. . . . The existing permitted waste areas of discreet [sic] interior cells within a landfill unit . . . 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."

Pet'r's Resp. 17. While giving terms their "plain and ordinary meaning" is a central tenet of statutory construction, Brickyard ignores the broader context in which that principle operates.

Context is a crucial part of statutory construction. As the Illinois Supreme Court explained, "The terms in a statute are not to be considered in a vacuum. They must be construed in the context of what they define." *M.I.G. Investments, Inc. v. Illinois Evntl. Prot. Agency*, 122 Ill. 2d 392, 400 (1988). In interpreting what is now Section 3.330(b)(2), the court further explained,

> While the terms "area" and "boundary" may typically refer to lateral limitations, the nature of a landfill contemplates more than a mere surface utilization of the land. Indeed, the permit granting the plaintiff the right to operate its landfill sets out proposed boundaries that include both surface measurements and vertical elevation figures. Too, there is nothing in the language of the statute which limits the term "boundary" to the lateral dimensions of an existing facility. To impose such a limitation would be inconsistent with section 2(c) of the Act, which provides that "the terms and provisions of this Act shall be liberally construed so as to effectuate the purposes of this Act."

Id. (citing 415 ILCS 5/2(c)).

Therefore, per *M.I.G.*, the term "boundary" in Section 3.330(b)(2) must be construed in the context of the kinds of boundaries in a landfill permit. The term must further be construed liberally to effectuate the purposes of the Act, which in the context of landfill siting, is "to give local governmental authorities a voice in landfill decisions that affect them." *Id.* As part of having that "voice," the Act vests those authorities with "the right to assess . . . the impact of alterations in the scope and nature of previously permitted landfill facilities." *Id.*

The guidance in *M.I.G.* indicates that the term "boundary" must be given a broader scope than Brickyard suggests. Landfill permits often contain both exterior boundaries for the entire landfill site and landform, as well as internal waste boundaries for regulating where waste disposal may occur within the site. There is also nothing in Section 3.330(b)(2) which limits term "boundary" to the external dimensions of a landfill. These are strong indications that "boundary" may be read to include permitted waste boundaries.

The strongest evidence, however, is ensuring that the Act is effectuated. The only way for local governments to exercise their right to assess alterations to existing landfills is through the local siting process. Only alterations constituting a "new pollution control facility" trigger the need for local siting approval. Therefore, it matters whether only alterations that expand the property boundaries or final height of a landfill constitute a new pollution control facility. If that is the case, siting authorities have no voice in alterations within those boundaries, even if they impact the scope and nature of a facility. To impose such a limitation on "boundary" would be inconsistent with the Act as interpreted in *M.I.G.* Indeed, it would allow for the situation here where a landfill operator seeks to add over 1,000,000 cubic yards of new municipal solid waste to an area of its facility not permitted for municipal solid waste disposal. According to Brickyard, the community has no say in that matter. A broader conception of "boundary" is clearly required.

The "boundary" at issue in Section 3.330(b)(2) must be read to include permitted waste boundaries. That is a "boundary" of a permitted pollution control facility, as the statute contemplates. It is also much more attuned to addressing the purpose of the Act's siting provisions, which are intended to give communities a voice in not just the location of landfills, but also changes to the scope and nature of such facilities.

Interpreting "boundary" to include boundaries other than the external boundaries of a facility would also be consistent with precedent. The Act previously distinguished between "regional" and "non-regional" pollution control facilities based on the geographic boundaries of a facility's service area. Only regional facilities required local siting approval, but non-regional facilities seeking to "regionalize" were required to get siting approval. *See United Disposal of Bradley, Inc. v. Illinois Envtl. Prot. Agency*, PCB 03-235 (June 17, 2004) (citing *Continental Waste Indus. of Illinois, Inc. v. City of Mount Vernon*, PCB 94-138 (Oct. 27, 1994)). The only "boundary" expanded by regionalization was the geographic service area of the facility, not the facility's physical external boundaries. The term "boundary" in Section 3.330(b)(2) has therefore been interpreted to mean a boundary other than a facility's physical external boundaries.

Therefore, when the proper statutory analysis is applied to Section 3.330(b)(2), Brickyard's limited view of "boundary" must fail. The context and intent of Section 3.330(b)(2) supports a broader interpretation of "boundary"

than Brickyard offers. Indeed the permitted waste boundaries of a pollution control facility falls within the scope of the statute. Therefore, because Brickyard seeks to dispose of waste in an area currently outside of its permitted waste boundaries, its proposal constitutes a "new pollution control facility."

C. The Expansion Requires New Siting Approval

As explained by the Illinois Supreme Court, approval of the location of where waste may be disposed is a necessary, but not necessarily sufficient, condition to providing proof of siting approval. As explained in *M.I.G. Investments, Inc. v. Illinois Environmental Protection Agency*, local siting authorities have "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 landfill facilities." *Id.* at 400. New siting is therefore required when a change to the "scope and nature" of a facility impacts the criteria local siting authorities consider under Section 39.2 of the Act, 415 ILCS 5/39.2 (2014). *Id.*

Here, Brickyard needs new siting approval because it seeks to change the scope and nature of its landfill. According to the supreme court, increases in a landfill's capacity "surely" impact the siting criteria local authorities consider. *Id.* But Brickyard has offered no argument to refute this. It has offered only an understanding of siting approval that is contrary to settled law.

To be sure, the Vermilion County Board did not include a limit on the volume or lifespan of the landfill in its 1992 siting approval. Brickyard is incorrect, however, that it has therefore received a blank check from the Coun-

ty Board to cram as much waste as it can into the approved expansion, for as long as it wants. That cabined view of siting approval focuses solely on the location of the area approved for waste disposal. Indeed, Brickyard has not once addressed *M.I.G.*'s instruction that location is a necessary, but not necessarily sufficient, component of siting review. The phrase "scope and nature" is nowhere in Brickyard's response, nor is it substantively addressed in its motion. Brickyard has simply ignored the most important case in Illinois siting law.

D. The Agency Is Entitled to Summary Judgment

Brickyard has failed to demonstrate that its proposed expansion is not a "new pollution control facility." Brickyard has also not shown why the volumetric expansion it proposes does not change the "scope and nature" of its landfill in such a way that requires new siting approval. Therefore, the Board should enter summary judgment for the Agency.

III. The Agency Has Not Given New Reasons In Its Motion For Rejecting Brickyard's Permit Application

Brickyard is mistaken that Sections II and III of the Agency's motion offer new rationales for the Agency's rejection of Brickyard's the permit application. Instead, the Agency has presented arguments—offered in the alternative were the Board to find new siting is not required—to address an issue raised by Brickyard in this proceeding. In its Petition, Brickyard put the validity and scope of its 1992 Siting Approval at issue. *See* Pet. ¶ 15.D. The Agency has simply addressed Brickyard's inability to rely on that approval to

make that case on appeal. In doing so, the Agency has not expanded the rationales for its decision to reject Brickyard's permit application as incomplete. The Board should therefore not strike or ignore Sections II and III.

A. The Agency Rejected Brickyard's Permit Application Solely Because It Lacked Current Siting Approval

The Agency has always maintained that Brickyard's permit application was incomplete because it lacked "current" siting approval. That is what the Agency stated in its official incompleteness letter. R. at 47531 ("The application did not include a current Certification of Siting Approval form"). That is also how the Agency framed the issue in its motion. Resp't's Mot. 9 ("Brickyard's failure to provide current siting approval"). Settled law requires new, current siting approval for the volumetric expansion Brickyard proposes given the expansion's impact on siting criteria. The Vermilion County Board must have an opportunity to review the landfill as Brickyard proposes to expand it. Under such circumstances, prior siting approval that does not address those impacts cannot satisfy Section 39(c) of the Act, 415 ILCS 5/39(c) (2014). That is the one and only siting-related reason the Agency rejected Brickyard's application.

B. Sections II and III Provide Alternative Arguments Addressing Brickyard's Argument, Should the Board Find New Siting Is Not Required

Brickyard confuses Sections II and III of the Agency's motion for rejection rationales. On the contrary, those sections provide alternative arguments in the event that the Board were to disagree with the Agency's deter-

mination that new siting approval is required. Brickyard's position is that it "does not here seek to expand the landfill in any manner not contemplated by the 1992 siting decision." Pet. ¶ 15.D; *see also* Pet'r's Mot. 5, 13–20; Pet'r's Resp. 2, 15–18. The Agency's alternative arguments demonstrate why Brickyard is incorrect, and why it cannot rely on the 1992 siting approval to satisfy its burden on appeal. If Brickyard is unable to rely on that approval, it lacks necessary evidence of siting approval as that approval is the only one in the record. Therefore, Brickyard cannot meet its burden of showing its permit application contained sufficient proof of siting approval. Thus, Sections II and III of the Agency's motion deal with the evidence on appeal rather than the merits of Brickyard's application.

This distinction is evident in the content of each argument. Section I advances the Agency's official incompleteness position that "the law requires Brickyard to secure new siting approval." Resp't's Mot. 16. The section concludes, "Brickyard's permit application lacks the siting approval required by the Act." *Id.* at 17. Therefore, the application was "fundamentally deficient" and "must be denied as a matter of law." *Id.* (quoting *Staunton Landfill, Inc. v. Illinois Envtl. Prot. Agency*, PCB 91-95 (Mar. 26, 1992), slip op. at 4). Thus, the deficiency at issue is with Brickyard's ***permit application***—the threshold deficiency that required the Agency to reject Brickyard's permit application as incomplete.

Sections II and III, however, deal with a different deficiency. Section II contends the Vermilion County Board may not have had jurisdiction to issue the 1992 siting approval. Section III, meanwhile, demonstrates that the 1992 siting approval did not approve waste disposal in all of the area Brickyard now seeks to expand. Both sections begin with the phrase "even if" to indicate the Agency argues them in the alternative (were the Board to find that new siting approval was not required). Even more, the sections respectively conclude that Brickyard "lacks evidence needed to carry its burden on appeal," and "needs evidence it cannot produce on appeal in order to prevail." Resp't's Mot. 19, 23. Thus, as distinct from the merits of Brickyard's application, both Sections II and III deal with deficiencies in the ***evidence on appeal***.

C. The Board Should Not Strike or Ignore Sections II and III

Although the Agency cannot come up with new rationales for its decision, the Board must allow the Agency to test the evidence submitted by the permit application. Documents in the record are not self-validating; their existence in the record does not place them beyond reasoned critique. This is particularly so when the documents are ones central to permit applicant's arguments on appeal, but that were not central to the Agency's official decision.

This testing of evidence does not violate the spirit of Section 39(a) of the Act, 415 ILCS 5/39(a) (2014). As the Board has explained, "The principles of fundamental fairness require that the applicant be given notice of the statutory and regulatory bases for permit denial." *Centralia Envtl. Serv., Inc.*

v. Illinois Envtl. Prot. Agency, PCB 89-170 (May 10, 1990), slip op. at 7. Where an applicant cites evidence to argue it satisfies the statutory and regulatory provisions identified in the Agency's denial letter, there is no unfairness to the applicant. Indeed, their very reliance on the document indicates the Agency has properly informed of the applicant of the issues on appeal. The Board should therefore not strike or ignore Sections II and III of the Agency's motion as no infringement of fundamental fairness has occurred.

IV. Brickyard Has Not Shown It Can Carry Its Burden on Appeal Using Its 1992 Siting Approval Even If the Board Found New Siting Approval is Not Required for Brickyard's Expansion

A. Brickyard Has Not Pointed to Relevant Facts Showing Its Expansion Is Completely Within the 1992 Siting Approval

Brickyard has not pointed to relevant evidence to refute the contention in the Agency's motion that Brickyard's proposed expansion is not completely within the 1992 Siting Approval. Brickyard's only argument is the conclusion that it "has presented solid evidence that the Siting Approval contemplated one final landform, entirely filled with waste." Pet'r's Resp. 13. But Brickyard presented no evidence in its response to that effect—it quoted solely from the Agency's permit review notes. And those notes are evidence only of the personal opinion of the individual permit reviewer. They do not constitute the Agency's official position. *West Suburban Recycling & Energy Ctr., L.P. v. Illinois Envtl. Prot. Agency*, PCB 95-119 (Oct. 17, 1996), slip op. 5–6. Nor do they constitute evidence of what approval Brickyard actually received from the Vermilion County Board in 1992. Brickyard did not cite to either of the

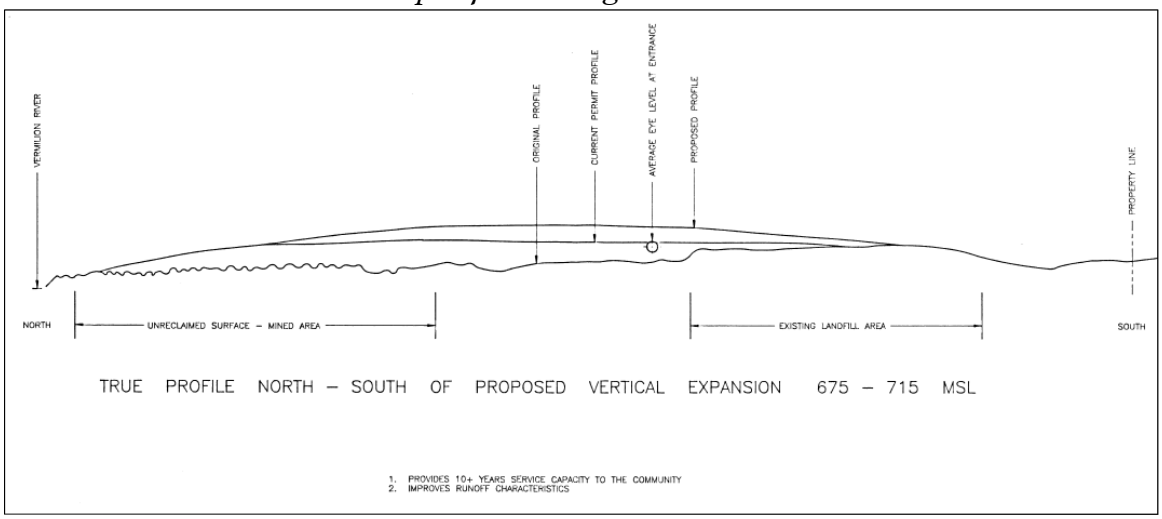
two documents that would contain such evidence: the 1992 Siting Approval and the 1991 Siting Request.[2] Brickyard therefore presented no evidence the 1992 Siting Approval "contemplated one final landform, entirely filled with waste."

To the extent Brickyard made a similar argument in its cross-motion, it failed even there to cite any evidence. Brickyard boldly claimed that "[t]he 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." Pet'r's Mot. 14. But there is no record citation following that statement to any of those documents.

The only evidence Brickyard points to in its motion are Drawings Nos. 89-115-4 and 89-115-5 from its 1991 Siting Application. *Id.* at 2. Neither of those drawings supports Brickyard's contention, as indicated by the fact that both are entitled "True Profile . . . of Proposed Vertical Expansion 675–715 [feet] MSL." *See* R. at 47358–47359; *see also* R. at 00349 (higher-quality version of Drawing No. 89-115-4). The purpose of a "profile" is to show the outline of something, which, not surprisingly given their title, the drawings do.

[2] That is despite the fact that Brickyard argued elsewhere in its response that "[n]o proof [of siting] is required in this proceeding beyond the very best evidence that can be (and was) provided: the County ordinance . . . ." Pet'r's Resp. 12. This is a point on which the Board agrees: "The ordinance itself is the best evidence of the [local siting authority]'s intent regarding the type of facility it sited . . . ." *Village of Robbins v. Illinois Envtl. Prot. Agency*, PCB 04-48 (Sept. 16, 2004), slip op. at 8.

Excerpt of Drawing No. 89-115-4



As seen in the excerpt above, the drawings demonstrate the effect of the vertical expansion on the landfill's profile. The two notes in the excerpt speaks to the advantages of the vertical expansion, further indicating the purpose of the drawing relates to the vertical expansion. And contrary to Brickyard's contention, the drawings do not purport to show "one large landform, with waste placement inside the entirety of the landform." Not only is that not the purpose of the drawings, the excerpt above clearly shows two delimited areas separated by a large gap, only one of which is labeled "landfill area."

The only "definitive" evidence Brickyard musters in its motion are the two profile drawings. Brickyard points to no line in the 14-page narrative portion of its 1991 Siting Request that describes what approval was sought. See R. at 47215-47228. Nor is there any line it could point to—the siting request is clearly for local siting approval of a volumetric expansion, not approval for the then-existing landfill. It would indeed have been illogical for Brickyard to request approval for its then-existing landfill. Because the

Agency initially permitted Brickyard's landfill before July 1, 1981, the then-existing permitted landform did not need siting approval. *See* Stipulated Facts ¶ 2; *see also* 415 ILCS 5/3.330(b)(1) (2014). Brickyard has presented no evidence from its 1991 Siting Request or 1992 Siting Approval that it sought siting approval for areas of its landfill that did not need it.[3]

Simply put, Brickyard has failed to show why the Agency is not entitled to summary judgment on the issue of incomplete siting approval. In its response, Brickyard did not point to a single piece of evidence demonstrating what siting approval it received. Its motion equally failed to introduce evidence that it received siting approval for areas outside of the lateral and vertical volumetric expansions it requested (*i.e.*, the then-existing landform below 675 feet). Finally, Brickyard did not dispute any of the particular factual assertions on which the Agency relied. Brickyard restated the Agency's argument as being that "local siting did not approve waste placement in the lower part of the vertical expansion—*i.e.*, below 675 feet." Pet'r's Resp. 14. But at no point did Brickyard refute that a portion of Zone A is below 675 feet as the Agency argued. The Agency is therefore entitled to summary judgment on this issue.

[3] Although the portion of Zone A below 675 feet was part of the original landfill initially permitted before July 1, 1981—and therefore did not need siting approval—it lost its status as initially permitted before that date when it was removed from waste-disposal use by Permit No. 1994-419-LFM. *See* Resp't's Mot. 11–13 (citing *Bi-State Disposal Inc. v. Illinois Envtl. Prot. Agency*, 203 Ill. App. 3d 1023 (5th Dist. 1990)).

B. Brickyard Has Improperly Disputed the Agency's Argument That Brickyard's 1992 Siting Approval is Invalid

1. Brickyard Judicially Admitted the Date it Submitted its 1991 Siting Request

There can be no issue Brickyard submitted its 1991 siting application on September 18, 1991. Brickyard explicitly stated that in its petition: "On September 18, 1991[,] a Request for Site Approval for a Pollution Control Facility was submitted to the Vermilion County Board . . . ." Pet. ¶5. Generally, absent amendment or withdrawal, "[a]llegations in a pleading are formal, conclusive judicial admissions withdrawing a fact from issue." *Farmers Auto. Ins. Assoc. v. Danner*, 394 Ill. App. 3d 403, 412 (2009); *Roti v. Roti*, 364 Ill. App. 3d 191, 200 (2006). To be a judicial admission, a statement must be a "deliberate, clear, unequivocal statement[] by a party about a concrete fact within that party's knowledge." *Roti*, 364 Ill. App. 3d at 200. Such statements are judicial admissions even if the pleading is unverified and signed by an attorney. *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 558 (1st. Dist. 2005).

Here, Brickyard has judicially admitted the date of submission. The statement in its petition was a "deliberate, clear, and unequivocal" statement within Brickyard's knowledge. Proof of this comes from the fact that Brickyard stated the same thing in its motion: "On September 18, 1991, [Brickyard] filed a Request for Siting Approval with the Vermilion County Board . . . ." Pet'r's Mot. 2. Thus, Brickyard has told the Board on two independent oc-

casions that the date of submission was September 18, 1991. Brickyard has therefore judicially admitted that date.

Brickyard cannot now escape the consequences of its own statements. Although Brickyard contends, "the Agency points to . . . the Siting Application's cover letter" as the "factual basis" for the date of submission, the Agency directly cited the statement in Brickyard's Petition. Pet'r's Resp. 11. So while Brickyard may be correct that the date on the cover letter "is not actual evidence of the date of submittal," the Agency was not required to present such evidence because it relied on Brickyard's judicial admission. *Id.* at 12. Brickyard has withdrawn that fact from issue. Therefore, at this stage of the proceeding, Brickyard cannot argue the date of submittal was anything other than September 18, 1991.

Finally, there is evidence in the record supporting the admission. Brickyard stated it submitted the application on September 18, 1991 no less than five times in its permit application.[4] Brickyard has offered no evidence to the contrary, nor has it addressed its own pleadings and statements. Instead, Brickyard has offered a series of hypothetical situations in which the application might possibly have been submitted on another date. But this should be a fact entirely within Brickyard's knowledge because, as the Board

[4] R. at 46995 ("On September 18, 1991, [Brickyard], requested a site approval for a regional pollution control facility"); R. at 47206 ("[T]he Request for Site Approval for a Regional Pollution Control Facility that was submitted September 18, 1991 to the Vermilion County Board"); R. at 47208 "[T]he Request for Site Approval for a Regional Pollution Control Facility was submitted September 18, 1991"); R. at 47210 ("The Request for Site Approval for a Regional Pollution Control Facility submitted September 18, 1991"); *see also* R. at 47211.

noted, "[a]n applicant has complete control over when an application is submitted to a local decisionmaker." *Concerned Citizens of Williamson County v. Kibler Development*, PCB 92-204 (May 20, 1993), slip op. at 6. Thus, the record supports the date Brickyard has previously put forward, and judicially admitted.

The Board therefore has ample grounds to find that the date of submission was September 18, 1991. Brickyard has given that date seven times in this proceeding: judicially admitting such in its petition; stating so in its motion; and noting the date five times in its application. It is only now that the Agency seeks to rely on that date that Brickyard second-guesses—or, more accurately, eighth-guesses—its own statements. The Board should find Brickyard submitted the 1991 Siting Request on the date Brickyard said it was submitted: September 18, 1991.

2. Brickyard Misreads *Concerned Citizens*

Brickyard's gloss on *Concerned Citizens* has no basis in the Board's actual holding. PCB 92-204 (May 20, 1993). As the Board summarized, "the statutory provision at issue . . . is not the minimum 14 day notice period, but the requirement that the notice include the date when the request will be submitted." *Id.*, slip op. at 4. The Board expressly found "the notice did include a date when the application was to be submitted," but, fatally, "the application was not submitted on that date." *Id.* at 5. Thus, the Board unequivocally held that "because [the applicant] did not submit its application on the

date contained in the newspaper notice, that notice was void." *Id.* at 6. The siting authority therefore lacked jurisdiction to review the application. *Id.* The Board made clear "prejudice [to the public] is not relevant to a jurisdictional inquiry." *Id.* The only inquiry is compliance with Section 39.2(b), 415 ILCS 5/39.2(b) (2014).

Brickyard's treatment of the case rewrites the Board's clear holding. First, Brickyard erroneously claimed the notice at issue "did not indicate a specific date of submittal." Pet'r's Resp. 13. The Board found it did, based on the notice's language. *Concerned Citizens*, PCB 92-204, slip op. at 5. Second, Brickyard incorrectly frames the issue as whether publishing notice more than 14 days before submission complies with Section 39.2(b) of the Act, 415 ILCS 5/39.2(b) (2014).[5] The Board rejected that framing; the issue was the discrepancy between the notice and the actual date of filing. *Id.* at 4. Finally, Brickyard's claim that "no citizen could possibly (or did) claim harm" ignores the Board's clear direction that prejudice is irrelevant to this issue. Pet'r's Resp. 13.

The simple fact is that *Concerned Citizens* is directly analogous and controlling. In both *Concerned Citizens* and here, "the applicant did not comply with the representations made in [its] notice" regarding the date of sub-

[5] Brickyard also incorrectly describes the "appropriate 14-day window" of Section 39.2(b) as one in which an applicant must submit an application "within." Pet'r's Resp. 13. That is the opposite of what Section 39.2(b) commands. The 14-day period is the ***minimum*** amount of notice an applicant must provide. *See Kane Cnty. Defenders v. Pollution Control Bd.*, 139 Ill. App. 3d 588 (2d Dist. 1985). Brickyard is therefore wrong to contend submission 24 days after publication was "ten days late." Pet'r's Resp 13.

mission. *Concerned Citizens*, PCB 92-204, slip op. at 5. That, according to the Board, voids the published notice and strips the siting authority of jurisdiction. Brickyard has repeatedly told the Agency and Board that its application was "submitted" on a date other than the one represented in its public notice. The notice is therefore void, and so too the 1992 Siting Approval premised on it. The Vermilion County Board lacked jurisdiction to grant the approval. Should the Board find new siting is not required, Brickyard cannot carry its burden on appeal without that approval. The Agency is therefore entitled to summary judgment.

V. The Board Should Ignore Brickyard's Groundwater Impact Assessment Discussion And Limit Its Holding to Siting

A. Brickyard Misrepresents the Agency's Motion

Brickyard misleadingly misstates the aim of the Agency's motion. In Section III of its response, entitled "Denial Pont #2," Brickyard stated:

> . . . Brickyard cannot possibly address denial point # 2 any further than [it has]. 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.

Pet'r's Resp. 10 (emphasis added). Except the Agency's motion did no such thing. The Agency's motion explicitly disclaimed seeking summary judgment on the second incompleteness point, stating only the first incompleteness point (involving siting) was appropriate for summary judgment. Resp't's Mot. 9. That is because the second incompleteness point involves genuine issues of

material fact.[6] *Id.* at n. 5. The Agency went to some lengths to make clear it was only seeking summary judgment on the issue of siting. For Brickyard to claim otherwise materially misrepresents the Agency's motion.

B. Brickyard Improperly Seeks An Advisory Opinion

Brickyard uses its misrepresentation to bootstrap a discussion of the second incompleteness point, which raises matters outside of this appeal. Brickyard demands that, regardless of the Board's finding on siting, the Board "must address [the second incompleteness] point so that regulatory clarity is achieved . . . ." Pet'r's Resp. 9. Tucked into its argument on this incompleteness point, Brickyard asserts the Agency has made the formal decision that "Brickyard must retain a significant waste-free barrier between the two units." Pet'r's Resp. 10. Consequently, Brickyard offers up its argument for why there is no regulatory reason it cannot eliminate the Zone A separation berm between Units 1 and 2. *See* Pet'r's Resp. 9–10. But the Agency's incompleteness decision did not involve this issue. Brickyard has therefore argued the Board "must address" an issue not squarely before the Board. In so doing, Brickyard asks for an impermissible advisory opinion, which the Board cannot provide. *See Granite City Steel Co. v. Illinois Envtl. Prot. Agency*, PCB 72-34 (Feb. 7, 1972).

[6] This is clear from Brickyard's assertion that its "existing GIA [groundwater impact assessment] is sufficient to accommodate the requested design." Pet'r's Resp. 9. The Agency disagrees with the sufficiency of Brickyard's GIA a demonstrated by the second incompleteness point in the Agency's letter. This is therefore a genuine issue of material fact.

C. The Board Should Strike or Ignore Section III

The bottom line is that Section III was improperly included in Brickyard's response to the Agency's motion. The Agency did not seek summary judgment on the second incompleteness point. Nor did the Agency's motion even address this point. Brickyard's discussion of the second point had no bearing on the issue of siting, *i.e.*, the issue the Agency actually addressed. There is thus no justification for its inclusion in response to the Agency's motion. The Board should therefore ignore, if not strike, Section III of Brickyard's response.

D. The Board Should Enter Summary Judgment on the Issue of Siting

Regardless of whether the Board considers Section III, it should limit its ruling to the issue of siting. There are genuine issues of material fact regarding the second incompleteness point, precluding summary judgment on that issue. The only way to address the second incompleteness point would be at a hearing to resolve the factual disputes. But such a hearing would be pointless if the Board finds the Agency is entitled to summary judgment on siting. A hearing solely to determine factual disputes on a permit application that the Board has already ruled does not satisfy the Act would be a tremendous waste of resources.[7] Thus, as a matter of judicial economy and common

[7] Any ruling on the second incompleteness point would be purely advisory in light of a finding for the Agency on siting. It would be "a decision on the merits [that] cannot result in appropriate relief to the prevailing party." *Berlin v. Sarah Bush Lincoln Health Center*, 179 Ill. 2d 1, 8 (1997). Even if Brickyard prevails on the second point at hearing, the Board would have

sense, the Board should enter a final order if it finds the Agency is entitled to summary judgment on the issue of siting.

A limited holding on siting is a natural consequence of the all-or-nothing nature of permit appeals. The petitioner must carry its burden on every issue on appeal. A finding that new siting is required, or that Brickyard's 1992 Siting Approval is void or insufficient, would be dispositive. The Agency cannot proceed to technical review on a permit application the Board has already ruled would violate the Act. Therefore, as a practical matter, if the Board finds the Agency is entitled to summary judgment on siting, it should enter a final order.

A limited holding on siting would also be consistent with precedent. The Board has so limited its holdings before, deciding only the issue of siting despite other permit denial points. *See Staunton Landfill, Inc. v. Illinois Envtl. Prot. Agency*, PCB 91-95 (Mar. 26, 1992); *Bi-State Disposal, Inc. v. Illinois Envtl. Prot. Agency*, PCB 89-49 (June 8, 1989), *aff'd*, 203 Ill. App. 3d 1023 (5th Dist. 1990). And it has similarly limited its holdings to just one of multiple denial points in other permit appeals. *See ESG Watts, Inc. v. Illinois Envtl. Prot. Agency*, PCB 94-176 (Apr. 20, 2000); *see also Bradd v. Illinois Envtl. Prot. Agency,* PCB 90-173 (May 9, 1991) (upholding Agency denial on one of five issues). Although the Board has on occasion ruled on non-dispositive permit appeal issues for the sake of clarity, this appeal does not warrant

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already rendered the permit application moot because it violates the Act with regard to siting. The Agency could not issue a permit on remand, even if it proceeded to technical review.

that. In this case, the Board could only do so after a hearing, because the second incompleteness issues are not fit for summary judgment. As discussed, a hearing would be a futile exercise. The Board would therefore be well within precedent to limit its holding here to only the issue of sitting.

CONCLUSION

The Agency submitted a motion that supports every fact with a direct citation to the record. Those facts in turn advance cogent arguments supported by ample case law entitling the Agency to judgment as a matter of law. Brickyard, meanwhile, has responded to that motion with little or no legal authority to undermine the Agency's arguments. Brickyard has stipulated to most of the Agency's material facts, and has failed to dispute directly most others. Finally, Brickyard does not support the few facts it disputes with any relevant evidence. The Board should therefore grant the Agency's motion.

Respectfully submitted,

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