

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PETITION OF LANDFILL 33, LTD.)	
)	
Petitioner,)	PCB 2020–018
)	(Permit Appeal – Land)
)	
v.)	
)	
ILLINOIS ENVIRONMENTAL PROTECTION)	
AGENCY,)	
)	
Respondent.)	

MOTION FOR SUMMARY JUDGMENT

NOW COMES LANDFILL 33 LTD, (“Landfill 33”) by and through its attorneys, HINSHAW & CULBERTSON LLP, and files its Motion for Summary Judgment, and in support thereof, states as follows:

I. INTRODUCTION

The September 16, 2019 determination of the Illinois Environmental Protection Agency (“Agency”) that the April 5, 2019 Application for Significant Modification as to the final cover of the landfill PCB Log. No. 2019-119 (“Application”) was incomplete was erroneous and should be reversed and remanded, because evidence of appropriate local siting approval was provided to the Agency and the Application was signed by the authorized representatives of the owner and operator. The Agency erred in determining that the Application to modify final contours (which would increase internal capacity) was an application for a “new pollution control facility”, thus requiring a new County siting hearing. The proposed revised contours would not expand the physical parameters of the Facility beyond the sited boundaries approved by the Effingham County Board on February 21, 2000, including the maximum vertical height of 644 feet above mean sea level (“MSL”). The *Brickhouse* case establishes that a new local siting approval is not required

when a proposed permit modification merely increases the internal capacity of a pollution control facility without increasing the physical boundaries beyond those previously approved by a local siting authority. *Brickyard Disposal and Recycling, Inc v. Illinois Env't'l Protection Agency*, PCB No. 16-66, 2016 Ill. Env. Lexus 220, (*aff'd.* by the 4th Dist. Appellate Court at 218 Ill.App.4th 170114).

II. STANDARD

Summary judgment shall be entered when the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 35 Ill.Admin.Code §101.516(b). The Illinois Pollution Control Board's standard is the same standard used in trial court proceedings. *IEPA and Village of New Lennox v. PCB*, 386 Ill.App.3d 375, 391 (3rd Dist. 2008). The Illinois Pollution Control Board ("Board") is to consider the pleadings and the permit record to determine whether there is any genuine issue as to any material fact. *Brickyard Disposal and Recycling, Inc. v. Illinois Environmental Protection Agency*, PCB No. 16-66, 2016 Ill. Env. Lexus 220, *8 (citing *Continental Casualty v. Coregis Insurance Company*, 316 Ill.App.3d 1052, 1062 (1st Dist. 2000)). While the burden of proof is on the petitioner pursuant to 415 ILCS 5/40(a)(1), the ultimate question of whether the application is complete is a question of law and accordingly the Agency determination on the matter is not binding nor entitled to deference. See *Illinois Environment Protection Agency v. Illinois Pollution Control Board and Brickyard Disposal and Recycling, Inc.*, 218 Ill.App. (4th) 170144, 218 Ill.App. Lexus 805 at *P21. Further, because the Agency rejected the Application, without considering its merits, if the Board finds the Application is complete then the matter should be remanded back to the Agency to consider the merits. *Brickyard*, 2016 Ill. Env. Lexus 220,*9.

III. FACTS

All of the relevant facts relied upon in this motion are not in dispute, as such are either contained within the Agency's Administrative Record or are contained in a pleading previously filed in this case such as the Petition for Review.

A. Landfill 33 Application for Sig Mod Permit to Modify Final Cover

Landfill 33 Ltd. owns and operates a permitted municipal solid waste landfill, located in Effingham County, Illinois. (R6, R1907).¹ On April 5, 2019 Landfill 33, by and through Andrews Engineering, filed the Application for a Significant Modification Permit "to modify the final cover of Landfill 33 Disposal Facility" which at the present time is permitted for a 40.6 acre horizontal waste operations footprint and a maximum vertical elevation of 644 MSL. (R1). Landfill 33 is "requesting a final cover modification to revise the final cover contours and stay below the permitted defined maximum elevation of 644 MSL". (R1). The Application explicitly provided "in the opinion of the Effingham County Board, the proposed final cover modification is consistent with the previous Siting Approval [of February 21, 2000] so long as the final maximum elevation of 644 MSL is not exceeded. Attachment 3 contains information submitted to the Effingham County Board." (R1-2). The Application explicitly provided that the "proposed final cover modification will not increase the waste footprint or final height of the existing landfill and all slopes remain at a 4H:1V as permitted." (R1). Diagrams were attached to the Application as Attachments 2 and 6 which explicitly showed that neither the permitted horizontal landfill footprint nor the 644 foot mean seal level (MSL) maximum height be expanded by the proposed 2019 modification. (R22, R24, and R33-38).

¹ The Record on Appeal shall be referred to as "R" and page number

B. County of Effingham Local Siting Approval

The Application contained the required Agency permit application forms LPC-PA1, LPC-PA16, LPC-PA8, and the 39i Certification. (R1, R5-18). Attachment 3 to the 2019 Application is the Certification of Siting Approval (LPC-PA8) signed by the Effingham County State's Attorney Brian Kibler dated March 28, 2019 which certifies under oath that on November 19, 2018 the Effingham County Board of Effingham County "approved the site location suitability of final cover modification of Landfill 33". (R26-27; *see also* updated version of the LPC-PA8 form dated June 4, 2019 R1895-96). Also included in Attachment 3 to the Application was the Effingham County Board Resolution to Approve Landfill Expansion dated February 21, 2000. (R28). That Resolution was executed by Leo Gobczynski, who was the Chairman of Effingham County Board on February 21, 2000, and explicitly provides that pursuant to 415 ILCS 5/39.2(d) a "public hearing was held on January 20, 2000 at which hearing testimony and exhibits were presented concerning the said request". (R28). The Resolution ultimately provides that it was "resolved by the members of the Effingham County Board in session on this 21 day of February, 2000, that the findings of fact are hereby adopted and that the request of the applicant Landfill 33 LTD for vertical expansion of an existing landfill is hereby GRANTED." (R28). The Resolution was passed by a unanimous vote of 9 to 0, and explicitly adopted the Findings of Fact and approved the siting request. (R28).

The relevant portions of the "Request for Local Siting Approval for Vertical Expansion of Landfill 33" submitted to the Effingham County Board in September 1999 and approved on February 21, 2000 are attached to the Petition for Review which was filed in this case and include certain drawings. Drawing A2-3 was the final contour drawing which was proposed to the Effingham County Board at the public hearing and explicitly shows that the maximum proposed

contour height was 644 feet MSL. (See Petition for Review Exhibit A, Drawing A2-3; for convenience an additional copy of the relevant portion of Drawing A2-3 is attached to this Motion as Exhibit 1).

Also contained with Attachment 3 to the 2019 Application was the the February 21, 2000 “Effingham County Board Findings of Fact Regarding Request For Expansion of Existing Landfill Facility Submitted by Landfill 33 Ltd”. (R29). Those findings explicitly provide that a “public hearing [was] held on January 20, 2000” and that each of the criteria enumerated in 415 ILCS 5/39.2(a) were met, and that the proposed expansion was necessary to accommodate the waste needs of Effingham County and designed to protect the public health, safety and welfare. (R29). Also included in Attachment 3 was the correspondence from Andrews Engineering to Landfill 33 dated March 7, 2018 explaining that “[b]ased upon our review of the Siting Application (submitted to the Effingham County Board on September 27, 1999), the Effingham County Board Resolution to Approve the Landfill Expansion (approved February 21, 2000) and the Application for Vertical Expansion and Permit Renewal (Log No. 2001-248, submitted on June 29, 2001 and approved on June 28, 2002), it is the opinion of Andrews the existing permitted contours of the landfill may be modified to allow for additional airspace, provided the maximum elevation of 644 mean sea level (MSL) is not exceeded.” (R30).

Also provided during the Application review process was the November 19, 2018 Effingham County Board Resolution entitled “Resolution, County of Effingham, Landfill 33 Application to Seek Significant Modification” which provides that “the Effingham County Board acknowledges Landfill 33 current Sig Mod proposal is consistent in all respects with its previous grant of siting approval on February 21, 2000 and hereby authorizes the County Board Chairman to execute the letter attached hereto.” (R1885). The letter of the same date from the Effingham

County Board Chairman James Nieman was also provided to the Agency and confirmed that “on September 27, 1999 a siting application was submitted to the Effingham County Board to expand the existing facility which included a map and certain proposed final contours”. (R1883). Chairman Nieman explained that the 1999 application and map were approved by the County Board in February of 2000, which “*Siting Approval does not include any special conditions imposed by the County Board [as] to maximum waste volume, final contour dimensions or maximum elevation.*” (R1883). (Emphasis added). Mr. Nieman further confirmed that subsequent thereto the Illinois Environmental Protection Agency permitted the final contour dimensions including the maximum elevation of 644 MSF. (R1884).² Finally, Mr. Nieman affirmed “it is the opinion of the Effingham County Board that the revised contours being proposed by Landfill 33 Ltd. In its current Sig Mod Application are in all respects consistent with [the] previous Siting Approval[] ... so long as the final maximum elevation of 644 MSL designated by the IEPA as part of the permit process is not exceeded”. (R1884).

During the 2019 Application process Andrews Engineering also provided a correspondence to the Agency noting that a public local siting hearing occurred on the vertical expansion request in the year 2000 (R1898) and supplied the affidavit of the chairman of the Effingham County Board from that time, Leon Gobczynski. (R1900). Andrews Engineering affirmed to the Agency that all of the procedures and processes of Section 39.2 were “followed with Modification No. 9 to Permit No. 1995-231-LFM, issued June 28, 2002 and was consistent in all respects with the [section 39.2] requirements that existed at that time.” (R1998-99). Mr.

² After receiving the Certifications of Local Siting Approval forms LPC-PA8 in 1999-2000 the Agency granted Modification No. 9 thereby acknowledging that the local siting hearing was sufficient and covered the proposed vertical expansion to a height of 644 feet MSL which was explicitly referenced in the final contour drawings considered by Effingham County.

Gobczynski likewise swore and affirmed under oath that “[a]s Chairman of the Effingham County Board in January 2000, I presided over the Effingham County Board’s consideration of a request for siting approval for a vertical expansion of Landfill 33 being made at that time.” (R1900). He presided over the public hearing and the deliberations for the approval of the vertical expansion that had been requested by Landfill 33, LTD. (R1900). Mr. Nieman confirms that in its siting approval on February 21, 2000 “the Effingham County Board elected to not impose any vertical boundary limitations upon the siting approval granted” and the application being considered in 2019 to “reconfigure the top of the existing landfill is consistent in all respects with the Effingham County Board’s determinations in January and February of 2000”. (R1900).

C. On June 28, 2002 the Agency Found that the Siting Approval of February 21, 2000 was Compliant with Section 39.2 and Authorized the Vertical Expansion to 644 feet MSL.

On June 28, 2002, the Agency permitted the vertical expansion, and, in doing so, noted *“there is no change to the acreage of the waste footprint of the 40.6 acre disposal unit” and the “revised maximum final elevation approved is 644 MSL”*. (R1860, Ex. D to the Petition, pg. 2, the authenticity of which was admitted by the Agency in Respondent’s Response to Requests for Admission No. 11) (emphasis added). Moreover, the Agency explicitly noted Modification No. 9 was a “renewal of Permit No. 1995-231-LFM, a vertical expansion” (R1860) and issued the modification of the permit to allow the vertical expansion for the “operation (i.e. waste disposal) within the permitted boundaries of the existing landfill unit”. (June 28, 2002 Permit, pg. 2, attached to petition for review as Ex. D). Prior to the issuance of the permit approving Modification No. 9 a Certification of Siting Approval (LPC-PA8) form dated September 19, 2000 was filed by the Effingham County Clerk on behalf of the Effingham County Board certifying and swearing under oath that the County Board had “approved the site location suitability of vertical expansion of Landfill 33” “in accordance with Section 39.2 of the Illinois Environmental

Protection Act”. (See September 19, 2000 Certification of Siting Approval (LPC-PA8), attached to the Petition for Review as Exhibit C, the authenticity of which was admitted by the Agency in Respondent’s Response to Requests for Admission No. 9).

D. The Agency later concludes the 2019 Application (which does not exceed the Sited Boundaries Approved in 2000) is Incomplete for Allegedly Not Having Evidence of Local Siting Approval.

Despite the fact that the Agency was provided irrefutable evidence that the April 5, 2019 Application did not seek to expand the physical boundaries of the pollution control facility sited by Effingham County on February 21, 2000, including the 644 MSL maximum height as depicted on the approved application drawings, and despite the fact that the Agency had already permitted that vertical height expansion on January 28, 2002, on May 3, 2019 the Agency provided a determination that the Application was incomplete based on five separate grounds, but primarily relying on its conclusion that a new local siting approval was required. (R1833-1836). The primary basis for the determination was the Agency’s conclusion that “[t]he proposed increase in the waste disposal capacity will result in an expansion beyond the currently permitted boundary” and thus in the Agency’s opinion under Section 3.330(b)(2) the request is for a “new pollution control facility” requiring proof of local siting approval. (R1833). The Agency also asserted that the application was incomplete because “the application does not provide proof that Ms. Martin is a duly authorized agent of Landfill 33 Ltd and Mr. Deibel”. (R1834).

Landfill 33 provided a response through Andrews Engineering on June 7, 2019, addressing all of the purported areas of incompleteness and tendered “the Resolution and the November 19, 2018 letter to the Illinois EPA from the Effingham County Board”, which explicitly informed the Agency that a previous local siting approval was received on February 21, 2000 for the vertical expansion of the pollution control facility and that the IEPA had in fact issued a permit allowing the expansion to a vertical height of 644 MSL. (R1877-1896). Further, Andrews Engineering

explained to the Agency that under Illinois law, and, specifically the PCB case of *Brickyard Disposal and Recycling, Inc. v. Illinois Environmental Protection Agency*, PCB No. 16-66, 2016 Ill. Env. Lexus 220, (*aff'd* by the 4th Dist. Appellate Court at 218 Ill.App.4th 170114) “a mere increase in internal volume within an existing facility does not constitute a ‘new pollution control facility’ requiring new local siting approval”. (R1879). Andrews Engineering elaborated that *Brickyard* held “the statute says ‘boundaries’ of a ‘currently permitted pollution control facility’ not ‘permitted boundaries’”, and thus if the Application does not change the physical boundaries of the local siting approval, then no new siting hearing is required. (R1878-1880). Andrews Engineering also correctly informed the Agency that the *Brickyard* court held that “*M.I.G. Investments* does not establish a “volumetric boundary” or trigger local siting review for changes in waste volume within boundaries of existing landfills” (R1880). Finally, Andrews addressed the Agency claim that the Application was incomplete for not having proof of a signature of an authorized agent of the property owner by supplying a revised LPC-PA1 with the signature of Mr. Brian Hayes signing as owner and operator for Landfill 33 and Mr. Deibel. (R1891).

On July 5, 2019, the Agency issued a second determination, again asserting that Application was not complete based on three comments instead of the original five. (R1829-1832). In this correspondence the Agency noted that the Sig Mod Application would change “landfill contours and increase the disposal capacity” and that “pursuant to 39.2(f) of the Act, local siting approval for a sanitary landfill expires at the end of 3 calendar years from the date upon which it was granted unless within that period the applicant made application to the Illinois EPA for a permit to develop the site”. (R1830). In the opinion of the Agency “[t]he proposal to expand disposal capacity of the landfill for a second time [after Modification No. 9 was permitted] based on the February 21, 2000 local siting approval constitutes an attempt to develop the site based

upon an expired local siting approval.” (R1830). However, the Agency provided no legal authority for its position. (R1830). In the July 5, 2019 correspondence the Agency did not renew any claim that Application had not been signed by an Owner and Operator. (R1830).

In response, Andrews Engineering provided correspondence and attachments dated August 7, 2019 which included the aforementioned February 21, 2000 Effingham County Board Findings of Fact as well as an Affidavit of Leon Gobczynski. (R1897-1899). Andrews also pointed out to the Agency that “[t]he proposed changes to the contours in application Log. No. 2019-119 will not violate or exceed any site boundary that was approved in the siting expansion in 2000” (R1898). Further, Andrews responded that “[t]he requirement to make an application within 3 years of the siting approval was fulfilled with application Log. No. 2001-248. The entire area sited does not need to be included in the initial application. The capacity is not lost by not including this area in the first application.” (R1899).

Regardless, the Agency issued its third determination of incompleteness dated September 6, 2019, referencing only two comments, as all other purported instances of incompleteness had apparently been addressed to the satisfaction of the IEPA. (R1826-1828). Specifically, the Agency (without explanation) stated that “Mr. Gobczynski’s Affidavit and other information provided in the August, 2019 addendum does not in any way change Illinois EPA’s earlier determinations that ‘the area of expansion beyond the boundary of a currently permitted pollution control facility is a new pollution control facility subject to additional local siting approval’”. (R1826). The Agency did not address the decisions of the PCB and its affirmance by the Fourth District in *Brickyard*, nor did it in any way refute or respond to Andrews/Landfill 33’s evidence that the physical boundary that was approved by the local siting authority in 2000 was not proposed to be expanded by the 2019 Application. The only other alleged purported basis by the Agency

for its September 6, 2019 incompleteness determination was a renewed assertion that the Application “does not provide proof that Mr. Hayes is a duly authorized representative of Mr. Deibel’s estate.” (R1828).

On October 11, 2019, Andrews Engineering responded to the Agency’s September 6, 2019 correspondence, addressing those final two comments for the fourth time. (R1904). Again, Andrews pointed out that because the proposed final cover modification was consistent with the prior local siting approval and did not expand the 644 MSL maximum vertical boundary, no new siting approval was necessary. Andrews further provided additional LPC-PA1 and 39i forms with the signature of Ms. Julia Hayes as Executor of the Mr. Richard Deibel Estate and Letters of Office dated December 18, 2018 proving her authority to execute on the estate’s behalf. Because the Agency did not agree to join a 90 day extension, a Petition for Review was filed by Landfill 33 on October 9, 2019 (see Group Ex. H to Petition for Review). At no time has the Agency responded to the October 11, 2019 correspondence from Andrews Engineering.

IV. APPLICABLE LAW

415 ILCS 5/39 (2019) provides the requirements for the Agency to issue a permit for the construction, installation or operation of pollution control facilities. Section 39(c) provides that “No permit for the development or construction of a new pollution control facility may be granted by the Agency unless the Applicant submits proof to the Agency that the location of the facility has been approved by the County Board of the county...in accordance with Section 39.2 of this Act”. 415 ILCS 5/39(c). The Illinois Environmental Protection Act explicitly defined a “new pollution control facility” as “the area of expansion beyond the boundary of a currently permitted

pollution control facility”.³ 415 ILCS 5/3.330(b)(2). Therefore, the seminal question in this case is whether the April 5, 2019 Significant Modification Application seeks the “expansion beyond the boundary” of the “pollution control facility”.

V. ARGUMENT

A. The April 5, 2019 Significant Modification Permit Application to Amend the Contours is Not for a New Pollution Control Facility as Defined by the Statute Because it does Not Seek to Expand the Physical Boundary of the Facility Approved by the Local Siting Authority, and the Fact that More Capacity Will Result is Irrelevant.

The Illinois EPA’s primary basis for its erroneous assertion that the Application is incomplete is its conclusion that “[t]he proposed increase in the waste disposal capacity will result in an expansion beyond the currently permitted boundary” and thus in the Agency’s opinion under Section 3.330(b)(2) the request is for a “new pollution control facility”, requiring proof of local siting approval. (R1833). That conclusion was repeated in substance in each of the review letters of the Agency. However, the Agency’s position has already been addressed and expressly rejected by the Pollution Control Board, as well as the Illinois Courts which have held that only a proposed increase in the physical boundaries of the pollution control facility approved by the local siting authority (Effingham County) requires a new Section 39.2 hearing and approval. *Brickyard Disposal and Recycling, Inc. v. Illinois Environmental Protection Agency*, PCB No. 16-66, 2016 Ill. Env. Lexus 220; *Illinois Environmental Protection Agency v. Ill. Pollution Control Board and Brickyard Disposal and Recycling, Inc.*, 218 Ill.App.4th 170114 (4th Dist. 2018). An increase in the IEPA’s permitted capacity, or even its Agency permitted waste boundary, does not trigger the need for new local siting when an overall pollution control facility boundary which was previously approved by a local siting authority is not proposed to be exceeded. *Id.*

³ There are two additional definitions of a new pollution control facility under 415 ILCS 5/3.330(b) which are irrelevant to this case.

Andrews Engineering and Landfill 33 provided the Agency with the exact language of the controlling *Brickyard* PCB case that held “a mere increase in internal volume with an existing facility does not constitute a ‘new pollution control facility’ requiring new local siting approval”. *Brickyard Disposal and Recycling, Inc v. Illinois Env’tl Protection Agency*, PCB No. 16-66, 2016 Ill. Env. Lexus 220 (*aff’d* by the 4th Dist. Appellate Court at 218 Ill.App.4th 170114). Section 39(c) only requires local siting approval of a “new pollution control facility”. That term is explicitly defined in Section 3.30(b)(2), and has been interpreted by both the Illinois Pollution Control Board and the Illinois courts which have held that “the Act’s definition of ‘new pollution control facility’ refers to an expansion beyond ‘the boundary of a currently *permitted facility*,’ *not ‘the currently permitted boundary.*’” *Brickyard v. IEPA*, 216 Ill. Env. Lexus 220, *20 (siting 415 ILCS 5/3.330(b)(2)(emphasis added).

In *Brickyard* the Agency argued, just as it has here, that “because section 3.330(b)(2) refers to a ‘currently permitted’ facility boundary, the proposed design change must be evaluated to determine whether it expands ‘beyond the currently permitted waste boundaries as set by the agency – not the ‘currently sited’ boundaries”. *IEPA v. IPCB and Brickyard*, 2018 Ill.App.4th 170144 at *P31. However, in *Brickyard*, the 4th District squarely rejected the Agency interpretation, and specifically held “we agree with Brickyard that the Agency’s interpretation adds words into the statute. Section 3.330(b)(2) plainly applies to a request to expand ‘beyond the boundary of a currently permitted *pollution control facility*’, not ‘currently permitted waste boundaries’”. *Id.* at *P33. The Brickyard court then correctly held that “when the general Assembly said ‘pollution control facility’ it meant the entire facility and not the boundaries of waste collection.” *Id.* The court further held that “Contrary to the State’s argument, *M.I.G.*

Investments does not establish a “volumetric boundary” or trigger local siting review for changes in waste volume within boundaries of existing landfills.” *Id.* at *P34.

The *Brickyard* court also found that the Agency’s reliance on *Bi-State Disposal, Inc. v. IEPA*, 203 Ill.App.3d 1023, (5th Dist. 1990) was misplaced. The Agency argued that *Bi-State* requires the Agency to review the landfill as “currently permitted” by the Agency to determine the boundaries of the facility. The Court rejected that argument holding that the “currently permitted” language in Section 3.330(b)(2) was only to differentiate Section (b)(1) which speaks to facilities which are in the development stage from Section (b)(2) which refers to operating facilities. *Brickyard* also pointed out that *Bi-State* involved siting that occurred before 1981 when Section 39.2 became effective and thus no local siting hearing had ever occurred before Bi-State’s proposed expansion.

Here, unlike *Bi-State* the landfill at issue has been through local siting under section 39.2 of the Act after 1981. Further, here, as in *Brickyard*, the proposed 2019 modification does not seek to go beyond the physical boundaries which the County Board of Effingham approved at that siting hearing in 2000. In 2000 Effingham County reviewed the proposed final site drawings, which included the 644 MSL height final contour drawing and approved the expansion on February 21, 2000 imposing no restrictions or conditions and thus explicitly approved the vertical height boundary of 644 MSL. The only question now is whether the current 2019 application is within the boundaries approved in the February 21, 2000 siting – and it clearly is. Further, even if *Bi-State* could be read to somehow require local siting approval if the boundary as permitted by the agency is exceeded (which it cannot per *Brickyard*), here the 2019 Application does not seek to go beyond the 644 MSL vertical maximum height which was permitted by the Agency on June

28, 2002 and thus it could not be clearer that this is merely an internal adjustment of the facility workings which does not increase any previously-sited boundary.

The Agency in this case (just like it did in *Brickyard*) asserts that “the changes proposed in the current application, log number 2019-119, will vertically increase the landfill final contours [as permitted by the Agency] and increase the disposal capacity by approximately 483,000 cubic yards.” (R1830). However, the Agency has not, and cannot, deny that the 2019 Sig Mod Application does not seek to go beyond the 40.6 acre horizontal waste footprint boundary nor exceed the 644 MSL vertical expansion approved by the local siting authority on February 21, 2000. Further, the Application does not seek to go beyond the 644 MSL vertical maximum height that the IEPA itself permitted on January 28, 2002 based upon the 2000 local siting approval. Indeed, the record contains an internal email of April 17, 2019 from IEPA inspector Dustin Burger to several other IEPA employees which provides that Landfill 33 “recently submitted a permit application ***that keeps the current permitted maximum height***, but changes the contours to gain over 400,000 yards capacity.” (R1876)(emphasis added). Thus it is clear that the IEPA admits and acknowledges that the maximum physical boundaries of the facility are unchanged from those approved by the County Board on February 21, 2000 and expressly permitted by the IEPA on June 28, 2002. The *Brickyard* case and the language of the Act make clear that it does not matter that the contours of the current agency permit are proposed to be amended nor that such final contour amendment will result in additional capacity. The physical facility boundary approved by Effingham in 2000 is not being proposed to be expanded, and thus there is no need for any new local siting hearing or approval.

In the *Brickyard* case the Board explicitly held “***the Agency cannot*** through a permit condition ***retroactively narrow siting boundaries approved by the County Board.***” *Brickyard*, ,

2016 Ill. Env. Lexus 220, *20 (emphasis added). Here, the IEPA permitted contours on June 28, 2002 and the capacity that was generated by those contours that were within the boundary of the 40.6 acres and the 644 MSL vertical height approved by the local siting authority. Those 2002 permit conditions relating to contours and interior capacity cannot retroactively narrow or reduce the facility siting boundaries approved by the County Board in 2000 and regardless, the current application does not even seek to exceed the 644 MSL which the Agency permitted in 2002.

The PCB and 4th District *Brickyard* cases are the only cases directly on point and are controlling precedent that must be followed. *See Tuite v. Corbitt*, 224 Ill.2d 490, 505 (Ill. Sct. 2006)(“[t]he doctrine of *stare decisis* expresses the policy of courts to stand by precedent and to avoid disturbing settled points.”). These cases establish that an increase in capacity from an internal amendment of contours does not create a need for new siting approval.

B. Ample Evidence of the February 21, 2000 Local Siting Approval of the Pollution Control Facility was Provided to the Agency.

If the Agency continues to argue that the evidence of the local siting approval was not provided to it during the 2019 Application process such argument should be rejected as is easily refuted. The original May 3, 2019 determination of incompleteness by the Agency asserted that “the Application does not provide proof that the local siting approval, following the format and procedures described in Section 39.2 of the Illinois Environmental Protection Act (Act), has been granted by the Effingham County Board.” (R1833). The Agency argument is obviously specious, as ample evidence was contained in the Application of a Section 39.2 compliant local siting hearing held on January 20, 2000 with County Board approval on February 21, 2000. (See Section III(B) *supra*; R1, 2, 26, 27, 28, 29, 30, 1878, 1882, 1883, 1884, 1885, 1898, 1899 and 1900).

Specifically, as detailed in Section III B above, all of the following evidence was tendered to the Agency with the 2019 Application, and each show that an appropriate Section 39.2 local siting approval was achieved on February 21, 2000:

1. April 5, 2019, June 7, 2019, August 7, 2019, September 6, 2019, and October 11, 2019 Andrews Engineering letters and attachments which provide that the Effingham County Board held a section 39.2 hearing on January 20, 2000 and approved the application for vertical expansion on February 21, 2000 and that the Agency then in turn approved a modification permit on June 28, 2002 for vertical expansion and adjustment of contours with a maximum height of 644 MSL. (R1-2, 26-30; 1877-1880; 1882-1885; 1894-1896; 1897-1899; 1900; 101-1902; 1903; 1904-1905).

2. LPC-PA8 forms signed by the Effingham County State's Attorney Brian Kibler certifying that on November 19, 2018 the Effingham County Board approved the site location suitability and passed a resolution, which was also included in the Application, that the Board found that the Sig Mod proposal was consistent with the previous grant of local siting approval in the year 2000. (R26-27; R1895-96).

3. Effingham County Board Resolution to Approve Landfill Expansion dated February 21, 2000 which explicitly states that a public hearing was held on January 20, 2000 at which hearing testimony and exhibits were presented on the 39.2(e) criteria. (R28).

4. February 21, 2000 Effingham County Board Findings of Fact Regarding Request For Expansion of Existing Landfill Facility Submitted by Landfill 33 Ltd finding each of the Section 39.2(e) criteria were met. (R29).

5. November 19, 2018 Effingham County Board Chairman James Nieman letter which confirmed that on February 21, 2000 local siting approval occurred and that there were no restriction placed upon the maximum waste value nor final contour dimensions nor maximum elevation of 644 MSF. (R1883- 1884).

6. Affidavit of the Chairman of the Effingham County Board from the year 2000, Leon Gobczynski, providing all of the procedures of Section 39.2 were followed at the January 20, 2000 public hearing and the February 21, 2000 County Board local siting approval. (R1900).

If that were not enough, attached as Exhibit A to the Petition for review filed herein are the relevant portions of the actual application filed in 1999, as well as the notices that were issued and the drawings contained within that application. Those drawings explicitly show that the maximum vertical height proposed by Landfill 33 during the local siting hearing was 644 MSL. (See Ex. A to Petition for Review, Drawing A2-3; an enlarged copy of relevant portion of Drawing A2-3 is attached hereto as Exhibit 1). Moreover, if that were not enough, the LPC-PA8

Certification of Siting approval form dated February 21, 2000 and executed by the Effingham County Clerk is attached as Exhibit C to the Petition for Review, and explicitly provides that Effingham County approved the site location suitability of the vertical expansion of Landfill 33 on February 21, 2000.

It is simply undeniable that in 2019 the Agency was provide ample evidence and was well aware that a local siting hearing occurred on January 20, 2000 pursuant to Section 39.2 and that an approval was issued and findings of fact made on February 21, 2000. As a matter of fact, the Agency acknowledged such in its July 5, 2019 determination letter when the Agency argues that “the proposal to expand disposal capacity of the landfill for a second time based on the February 21, 2000 local siting approval constitutes an attempt to develop the site based on expired local siting approval.” (R1830). Therefore, the Agency has admitted that there was indeed local siting approval issued on February 21, 2000, and it cannot in good faith now argue that the Application was incomplete based upon an alleged failure to provide evidence of the local siting Approval on February 21, 2000.

C. The February 21, 2000 Local Siting Approval did not “Expire”.

The Agency has made a novel (and completely unsupported) argument that “the proposal to expand the disposal capacity of the landfill for a second time based on the February 21, 2000 local siting approval constitutes an attempt to develop the site based on an expired local siting approval.” (R1830). The only citation that the Agency provides is Section 39.2(f) of the Illinois Environmental Protection Act which provides “a local siting approval granted under this Section shall expire...at the end of three calendar years from the date upon which it was granted...unless within that period the applicant has made application to the Agency for a permit *to develop* the site.” 415 ILCS 5/39.2(f) (emphasis added). In this case, the Agency has completely ignored the fact that well within three years of local siting approval for vertical expansion, the required

application was submitted to the Agency, and that application was even approved within the three year period in question.

The record is clear that the local siting approval occurred on February 21, 2000 and the Application for Permit Modification No. 9 to develop the site consistent with the local siting was brought on June 29, 2001 and permitted by the Agency on June 28, 2002. (R30). The Agency has provided no legal authority for its argument that local siting approvals may only be used to support one permit application as no such authority exists. Instead the language of the Act is plain, and clearly provides that local siting authority expires in three years “**unless**” within that period an application was made for a permit to develop the site. Thus the only requirement to “vest” the siting or avoid its expiration is that an application be brought within three years. In this case a permit modification application to develop the site pursuant to the February 21, 2000 local siting approval was brought on June 29, 2001, which was well within the 3 year period, and thus the local siting approval did not expire. Indeed, the *Brickyard* case itself involved a siting approval that occurred in 1991 with an Agency permit application made and approved in 1992. Then in 2015, some 23 years later, another application to significantly modify that permit was made to the Agency to increase the capacity of the landfill without expanding the previously-sited physical borders of the facility. The PCB and the 4th District both found that the 1991 local siting approval was all that was required for the 2015 Significant Modification Permit Application, and no new siting hearing or approval was needed for the application to be complete. *Brickyard Disposal and Recycling, Inc v. Illinois Env't'l Protection Agency*, PCB No. 16-66, 2016 Ill. Env. Lexus 220 (*aff'd* by the 4th Dist. Appellate Court at 218 Ill.App.4th 170114). In other words, the Board and the 4th District both found that the 1991 siting approval did not expire as it vested once the 1992 application was made.

That is exactly the same situation we have in this case. Just like *Brickyard*, the siting approval “vested” upon the filing of a permit modification application with the Agency within three years. *Brickyard* explicitly held that “*we see no indication from examination of the Act that the General Assembly intended to invoke the long and expensive process of local siting review each time the Agency restricted waste boundaries and the landfill operator sought to remove or expand those boundaries within an existing pollution control facility.*” *Brickyard*, 2018 IL App (4th) 170144 at *P41. (Emphasis added). Likewise, there is no need for Landfill 33 or the County of Effingham to incur the expense and considerable effort involved with local siting approval again, as an application for permit approval based on the 2000 vertical expansion was filed within 3 years and the current request does not exceed the prior expansion approval. It is therefore clear that the application is complete.

D. The Agency was Provided the Evidence that the Applicant was Authorized to Bring the Application.

The only other basis asserted by the Agency for its conclusion that the Application is incomplete is its statement that “proof of the signature of an authorized agent of the owner and operator” must be provided. The Agency is wrong, as the regulations do not require proof beyond the certification or oath contained in the application form itself and a notarization. Section 35 Ill.Adm.Code 812.104(b) provides only that “All permit applications shall be signed by a duly authorized agent of the operator and the property owner, shall be accompanied by an oath or affidavit attesting to the agent's authority to sign the application and shall be notarized.” The April 5, 2019 Application complied with the regulation as LPC-PA1 General Application for Permit form filed by Landfill 33 contained the required oath and affirmation and notarization. The April 5, 2019 Application included a LPC-PA1 form which identified the Owners as Wendt Family Trust, R. Deibel, and Landfill 33 LTD and the Operator as Landfill 33 LTD. The form explicitly

provided that the individual signing did “hereby affirm that all information contained in this application is true and accurate” and “herein swear that I am a duly authorized agent of the owner/operator and I am authorized to sign this permit application form”. (R9, R1910). Lori Martin signed as Owner and Brian Hayes (President of Landfill 33) signed as Operator, and those signatures were duly notarized. (R9). On May 3, 2019 the Agency found incompleteness on the grounds that “the application does not provide proof that Ms. Martin is a duly authorized agent of Landfill 33 Ltd and Mr. Deibel”. (R1834). However, the only proof required by the regulation is the oath or affirmation of the authority to sign the application. The LPC-PA1 form contains that oath and affirmation that Ms. Martin and Mr. Hayes were authorized to sign on behalf of the owner and operator and both signatures were notarized. That is all that was required, and the Application was thus complete.

Despite the fact that the original Application was complete and the only proof required by the regulation (an oath or affirmation) was provided, Landfill 33 provided even more proof to the Agency that the Application was authorized to be brought by the owners and operator by providing an additional LPC-PA1 dated June 4, 2019 wherein Mr. Hayes signed on behalf of the Owner and the Operator wherein he again affirmed and provided an oath of his authority to do so and his signature was again notarized. (R1891). Further, Andrews Engineering provided a June 7, 2019 correspondence which explicitly affirmed Mr. Hayes’ authority to sign on behalf of both the owner and operator.(R1878-79). That was apparently sufficient to the Agency as it did not assert any problem or incompleteness with the signatures in its July 5, 2019 review letter. (R1829-1832).

Despite not raising the issue in its July 5 review letter, the Agency then later argued incompleteness related to signatures again in its September 6, 2019 letter, when it asserted that the application was incomplete because it allegedly “does not provide proof that Mr. Hayes is a duly

authorized representative of Mr. Deibel's estate." (R1827). Once again, that finding is erroneous because all that is required under Sec. 812.104(b) is an oath or affirmation that one is authorized to bring the application on behalf of the owner or operator which was provided on the form itself and the signature was notarized. (R1891). Nonetheless, in the interest of further trying to appease the Agency and compel the Agency to perform its proper function of considering the Application on its merits, Andrews Engineering provided yet another correspondence and new LPC-PA1 form, both dated October 11, 2019. (R1904-1913). Andrews informed the Agency that Julie Hayes had been appointed co-executor of the Richard Deibel Estate (R1904) and provided her signature with the affirmation and oath (R1910) and even provided Letters of Office from the Circuit Court further proving that she was Co-Executor and thus authorized to execute the Application. (R1913).

Thus it is clear that the regulation, which only requires an oath or affirmation and notarization be provided, was followed in the original application filed on April 5, 2019 as that proof was provided. Landfill 33 went much further and provided additional proof of the authority to sign on three other occasions. Neither the Agency, nor any other person, has presented any evidence that the individuals who executed the LPC-PA1 forms were not authorized to do so. Thus the Application is complete in that respect as well.

VI. CONCLUSION

For the reasons provided herein the Illinois Pollution Control Board should grant this motion for summary judgment and reverse the Agency determination that the April 5, 2019 Application was incomplete and remand the case to the Agency to review the merits of the Application.

Dated: April 17, 2020

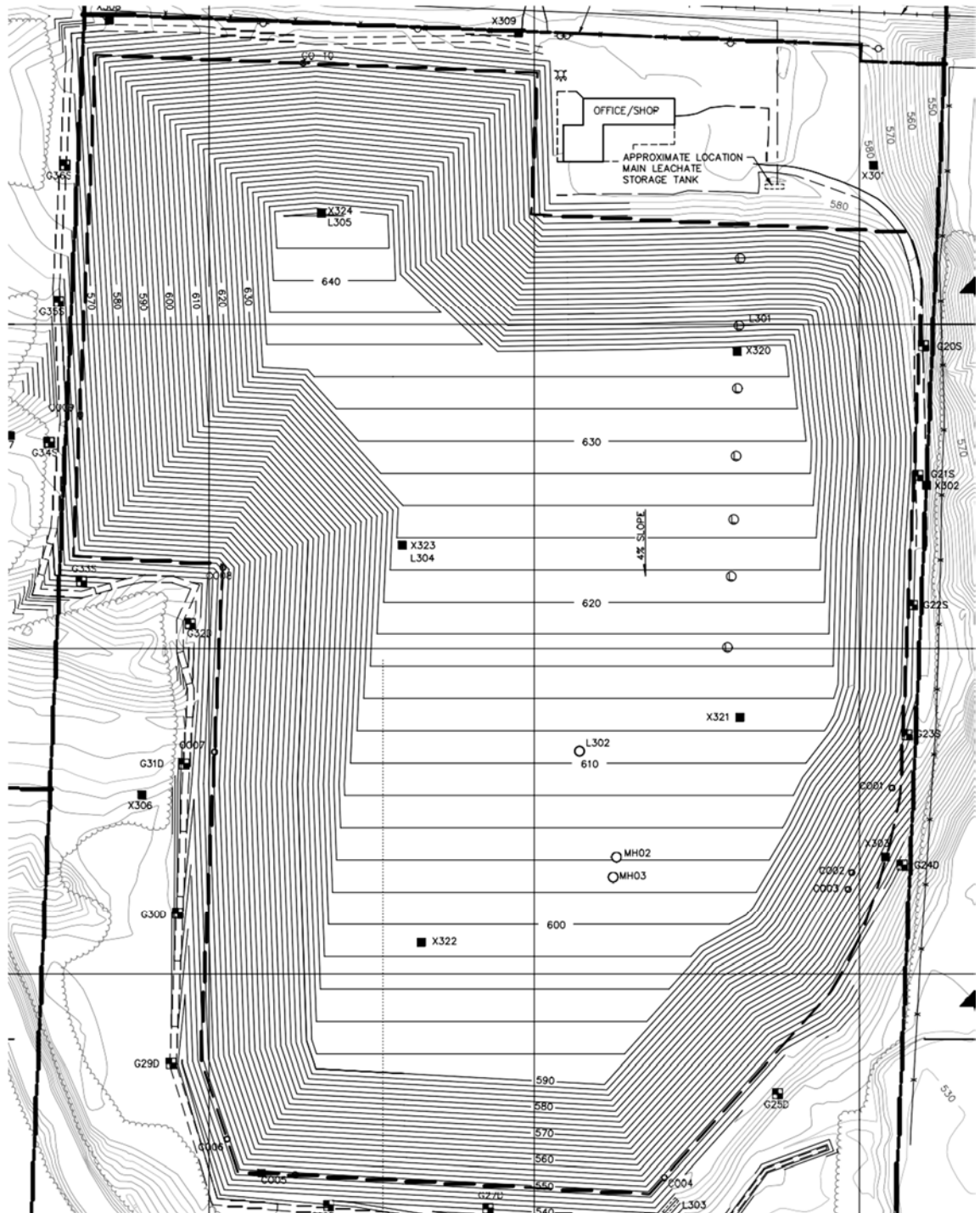
Respectfully submitted,

LANDFILL 33, LTD.

By: /s/ Richard S. Porter
Richard S. Porter

Charles F. Helsten ARDC 6187258
chelsten@hinshawlaw.com
Richard S. Porter ARDC 6209751
rporter@hinshawlaw.com
HINSHAW & CULBERTSON LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

EXHIBIT 1: Copy of Portion of Drawing A2-03 From Landfill 33 Request for Local Siting Approval for Vertical Expansion Filed September 27, 1999 – Also Attached to Petition for Review Within Exhibit A



CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 17th day of April, 2020, I have served the Motion for Summary Judgment upon the following persons via certified mail and electronic transmission.

Don Brown, Clerk of the Board
Illinois Pollution Control Board
Janes R Thompson Center
100 West Randolph, Suite 11-500
Chicago, IL 60601
Don.Brown@Illinois.Gov

Carol Webb
Illinois Pollution Control Board
1021 N. Grand Avenue E
Springfield, IL 62702
Carol.webb@illinois.gov

Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(Certified Mail Only)

Christine Nannini
Assistant Attorney General
Illinois Attorney General's office
100 W. Randolph Street
Chicago, IL 60601
cnannini@atg.state.il.us

/s/ Danita Heaney

Danita Heaney