

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LANDFILL 33, LTD.,)	
)	
Petitioner,)	
)	
v.)	PCB No. 20-18
)	(Land - Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on May 12, 2020, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, Notice of Filing and Respondent's Response to Petitioner's Motion for Summary Judgment, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

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Dated: May 12, 2020

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

Respondent, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), hereby responds to Petitioner Landfill 33's ("Landfill 33" or "Petitioner") Motion for Summary Judgment.

I. INTRODUCTION

On April 5, 2019, Landfill 33 applied for a permit to "modify the final cover" of its landfill located in Effingham County ("Facility"). The Facility is currently permitted to accept waste up to elevations ranging from 590 to 640 feet above mean sea level ("MSL"), with a 644 MSL maximum elevation confined to a discrete section of the Facility's northwest corner. (R33-38; Resp. Mot. at 3-5). Landfill 33 proposes to place additional waste on top of the landfill up to 644 MSL across the entire Facility, thereby placing waste in an area not currently permitted to accept it. (*Id.*). The Agency rejected the application as incomplete, explaining that the request sought an expansion of the boundaries of the Facility, and thus required local siting approval pursuant to Section 39(c) of the Act, 415 ILCS 5/39(c) (2018). On October 10, 2019, Landfill 33 filed a Petition for Review of the Agency's September 6, 2019 decision rejecting the application as incomplete.

Landfill 33 argues that it does not need local siting approval for this newly proposed modification, based on the Effingham County Board's approval in 2000 of an application for expansion submitted in 1999. In support of its current permit application, Landfill 33 submitted to the Agency some information related to the 2000 approval, including an affidavit from a chairman of the Effingham County Board (R1900), to attempt to bolster its theory that its currently proposed expansion was contemplated in the Effingham County Board's siting approval conducted for the 1999 application. The Agency still rejected the application as incomplete, as none of the information provided indicated that Landfill 33 had ever received local siting approval for placement of waste across the entire top of the landfill up to 644 MSL, as would be required for the currently proposed expansion.

Because Landfill 33 failed to provide proof to the Agency that the location of waste in that area had been approved by the Effingham County Board in accordance with Section 39.2 of the Act, 415 ILCS 5/39.2, the Agency properly rejected Landfill 33's application as incomplete pursuant to Section 39(c) of the Act, 415 ILCS 5/39(c). Landfill 33's Motion therefore should be denied.

II. PETITIONER'S ARGUMENTS REGARDING MATERIALS THAT WERE NOT TIMELY PRESENTED TO THE AGENCY SHOULD BE STRICKEN AND DISREGARDED.

As an initial matter, Landfill 33's Motion improperly discusses materials relating to the Effingham County Board's earlier local siting process that are not in the record filed by the Agency on December 5, 2019 and that were not presented to the Agency in connection with Landfill 33's application. *See* Pet. Mot. at 4 ("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”); 4-5 (Exhibit A to the Petition; also attached as Exhibit 1 to Petitioner’s motion); 7 (Exhibit D to the Petition, which relates to the previous permit and was not submitted by Petitioner in its application, and as such is not located in the record at R1860, as Petitioner cites); and 8 (Exhibit C to the Petition).

Landfill 33’s attempts to introduce extra-record materials should be rejected. In reviewing a permit application, the Agency is limited to what is presented by the applicant, and, in reviewing the denial of a permit, the sole question before the Board is whether the application *as submitted to the Agency* demonstrates that the facility will not cause a violation of the Act. *Illinois Env’tl. Prot. Agency v. Illinois Pollution Control Bd.*, 118 Ill. App. 3d 772, 780 (1st Dist. 1983) (emphasis in original). Petitioner cannot credibly ask this Board to find that the Agency erred in its September 6, 2019 permitting decision based on materials that Petitioner never presented to the Agency in its permit application.

Further, Petitioner has failed to file a motion to supplement the administrative record, instead improperly implying that it is authorized to dictate the contents of the record in a permit appeal. Under Board rule, the Agency prepares and files the record of its decision. *See* 35 Ill. Adm. Code 105.116, 105.212. The Board hearing is then based exclusively on that record. 35 Ill. Adm. Code 105.214(a). In this proceeding, the Agency filed its record over five months ago. If Petitioner had any reason to believe that additional materials should have been included, Petitioner had ample time to file a motion to supplement the administrative record laying out its rationale, but failed to do so. Any arguments that the Board should consider extra-record materials are both untimely and unfounded. Thus, Respondent respectfully requests that any information submitted by Landfill 33 in support of its Motion that is not in the record, including attachments to the Petition to Review and Landfill 33’s Motion for Summary Judgment, be

stricken and disregarded by the Board in this proceeding.

Landfill 33's Motion also improperly makes arguments regarding the ownership of the Facility, based in part on submissions that post-dated the September 6, 2019 decision for which it has sought the Board's review. (Pet. Mot. at 22) (citing to materials provided to the Agency dated October 11, 2019). Landfill 33's October 10, 2019 Petition for Review raised only one issue on appeal, that the Agency's requirement of new local siting approval was erroneous and must be reversed. Pet. at 5. By contrast, Landfill 33 **did not** challenge the Agency's September 6, 2019 decision to the extent it found that Landfill 33's application contained insufficient evidence that an authorized agent of the owner had signed the application. Instead, after filing its Petition for Review, Landfill 33 continued to submit materials to the Agency relating to its requested expansion, including a signature from a new individual asserted to be the duly authorized representative of one of the owners. Based on the timing of the Agency's filing of the record, some of the material submitted by Landfill 33 after the challenged decision was inadvertently included within the record (R1904-1914). Additionally, Landfill 33 submitted the Richard E. Deibel Revocable Trust on December 27, 2019, and requested the transfer of ownership from the Richard E. Deibel Estate to the Trust.

Such "subsequently acquired information not available to the Agency" at the time of its September 6, 2019 decision is not relevant to reviewing that decision, though. *Env. Prot. Agency v. Poll. Cont.*, 118 Ill. App. 3d at 781. Moreover, the Agency's most recent decision relating to Landfill 33's requested expansion was issued November 7, 2019. In that decision, based on the information submitted on October 11, 2019, the Agency agreed that Landfill 33 had provided adequate information that an authorized agent of the owner signed the application. To be clear: the Agency's November 7, 2019 decision is not up for review before

the Board and, indeed, is no longer reviewable given Landfill 33's failure to timely seek review of it. Given that the Agency agreed that Landfill 33 provided adequate information of ownership as of November 7, 2019, though, the issue of ownership as raised in the September 6, 2019 decision is moot, and the Board's review of the Agency's September 6, 2019 decision in that respect is unnecessary. See Dep't of Cent. Mgmt. Servs. v. Illinois Labor Relations Bd., State Panel, 388 Ill. App. 3d 319, 334 (4th Dist. 2009) ("A case on appeal is moot to the extent that the reviewing court's decision could have no practical effect on the parties."). To the extent that pending and future requests by Landfill 33 may change the Agency's decision, any such request would need to be the basis of a new appeal, as a decision has not yet been made by the Agency on the most recent request to transfer ownership from the Richard E. Deibel Estate to the Richard E. Deibel Revocable Trust. See ILCS 5/40(c) (review of a permit denial is based on the Agency's decision and review of that decision is based exclusively on the record compiled in the Agency proceeding).

III. PETITIONER HAS NOT MET ITS BURDEN FOR SUMMARY JUDGMENT BECAUSE IT HAS FAILED TO PRESENT PROOF OF LOCAL SITING APPROVAL FOR ITS REQUESTED EXPANSION.

Landfill 33 has not met its burden for summary judgment. First, it has failed to satisfy its burden of production. Landfill 33 has not produced evidence from the record to support that local siting conducted in 2000 approved the currently proposed expansion. Instead, Landfill 33 attempts to characterize its request in a way to avoid the plain language of the Act and case law requiring local siting approval for its requested expansion. Without providing evidence that the requirements of Section 39(c) are satisfied through its application, it has not shown it is entitled to judgment as a matter of law. The Board should therefore deny Landfill 33's motion and grant Respondent's motion.

A. Petitioner mischaracterizes its request for an expansion of boundaries as an “internal amendment of contours.”

Landfill 33 argues that its requested expansion would constitute “an increase in capacity from an internal amendment of contours.” Pet. Mot. at 16. Landfill 33’s application plainly seeks the expansion of the entire top border of the Facility, though—an expansion of all contours or boundaries, not an “internal amendment.” Landfill 33 does not seek to reduce any of the contours or boundaries defining the space of the Facility to make up for the requested expansion, which might then make the characterization of the request as an internal amendment of contours credible. While the application states that the final height will not be changed, the designs submitted by Landfill 33 clearly show that the height across the entire top of the landfill will be significantly higher. *See* Figures at R34-R38.

Landfill 33 argues that its currently proposed expansion does not seek to go beyond the Facility’s 40.6-acre horizontal boundary, nor “exceed the 644 MSL vertical height,” approved by the local siting authority on February 21, 2000. Pet. Mot. at 15. In making its argument, Landfill 33 has relied on a map that depicts the Facility’s currently permitted boundary reaching 644 MSL in one small corner area to argue that its proposed expansion does not exceed the boundaries of the Facility. *See* Figure at R33. However, that map shows exactly why the currently proposed expansion is such a drastic change in design from what was proposed in 1999. The map at R33 depicting the existing permitted final cover grades shows the Facility reaching 590, 600, 610, 620, and 630 MSL, whereas Landfill 33 now seeks to make the entire Facility 644 MSL. Landfill 33 argues that the Effingham County Board reviewed the proposed final site drawings and imposed no restrictions or conditions. It does not follow from imposing no restrictions or conditions on the proposal that the Effingham County Board went *further* in approval of final height, waste disposal capacity, and life of the landfill than Landfill

33 requested at that time. The Effingham County Board approved the expansion *as proposed* by Landfill 33. (R29). Based on what was submitted to the Agency, the currently requested expansion exceeds what the Effingham County Board authorized in 2000 based on Landfill 33's own maps—the same maps that provided the basis for the currently permitted boundaries—by extending the 644 MSL height along the entire length of the Facility, whereas Landfill 33 previously proposed that the Facility would stop receiving waste 14 to 54 feet lower.

Notably, Landfill 33 refers to not exceeding a “horizontal waste footprint boundary” (a brand-new regulatory term coined by Landfill 33) but does not attempt to argue that a “vertical waste footprint boundary” would not be exceeded, because the currently permitted vertical boundaries clearly will be exceeded. Pet. Mot. at 15. Landfill 33's argument appears to hinge on the notion that a landfill's vertical boundaries are subject to revision at any time up to the maximum height at any point in a landfill. This argument is flawed because the Agency does not permit a facility solely based on two dimensions, and the criteria that local government authorities consider in Section 39.2 include aspects of a facility that impact its scope and nature beyond merely the single tallest point and its horizontal waste footprint. *See* 415 ILCS 5/39.2(a).

Landfill 33's argument is also directly contrary to the Illinois Supreme Court's decision in *M.I.G. Investments*, holding 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.” *M.I.G. Investments, Inc. v. Illinois Env'tl. Prot. Agency*, 122 Ill. 2d 392, 401 (1988). Landfill 33 argues that the fact that more capacity will result from its proposed expansion is irrelevant, based on language within

Brickyard where the Fourth District 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. Pet. Mot. at 12-13; *Illinois Env'tl. Prot. Agency v. Illinois Pollution Control Bd.*, 2018 Ill. App. 4th 170144, ¶ 34. Landfill 33 requests a change in waste volume *outside* of the boundaries of the existing landfill, though, thus *M.I.G. Investments* directly applies to this matter. As the Illinois Supreme Court stated in *M.I.G. Investments*, the clear intention of the legislature was to vest local governments with the right to assess not merely the location of proposed landfills, but also the impact of alterations in the scope and nature of previously permitted landfill facilities. *M.I.G. Investments, Inc.*, 122 Ill. 2d at 400. In contrast to *Brickyard*, where the wedge of clean fill was in the most recent permit that Brickyard sought a new permit to cover (and the original local siting approval had considered the wedge covered in waste), here there is no iteration of a permit that differs from the permit granted as a result of what the Effingham County Board approved in 2000 for the expansion proposed in 1999. The sited boundaries and permitted boundaries are the same, and Landfill 33’s current proposal exceeds those boundaries.

Landfill 33 plainly seeks vertical expansion of the entire Facility currently sited and permitted to rise to boundaries of 590 to 640 MSL, and a corresponding lateral expansion of the approved 644 MSL, currently sited and permitted in a discrete section of the northwest corner, across the entire top of the Facility. This request is not merely an adjustment of internal contours, but a request for an expansion of the boundaries of the Facility pursuant to Section 3.330(b)(2) of the Act, and as such, requires local siting in accordance with Section 39.2 of the Act. 415 ILCS 5/39(c); 415 ILCS 5/3.330(b)(2).

B. Landfill 33 has not provided evidence that either the previous or current Effingham County Board has analyzed the currently proposed expansion’s

impacts on the factors outlined in Section 39.2, nor evidence that notice, opportunity for comment, and a public hearing was held on the currently proposed expansion.

Landfill 33 argues “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.” Pet. Mot. at 16. Some of the evidence submitted by Landfill 33 relates to the 1999 application that ultimately led to the 2002 expansion of the Facility (R28-29, R1898-99). Other evidence submitted by Landfill 33 attempts to connect the currently proposed expansion with what the Effingham County Board considered in 2000 (R1, R5-18, R1883-85, R1900). However, Landfill 33 has not presented evidence that written notice, opportunity for comment, and a public hearing was held regarding the currently proposed expansion, nor has Landfill 33 presented evidence that the impacts of the currently proposed expansion have been analyzed pursuant to Section 39.2, either by the current Effingham County Board or the previous Effingham County Board.

The Effingham County Board Findings of Fact Regarding Request for Expansion of Existing Landfill Facility Submitted by Landfill 33 Ltd (R29) and the Effingham County Board Resolution to Approve Landfill Expansion dated February 21, 2000 (R28) relate to Landfill 33’s 1999 application for expansion, not the 2019 application. Landfill 33 argues that the map it has provided as Exhibit 1 (Drawing A2-03) to its Motion explicitly shows the maximum height proposed by Landfill 33. As noted in Section II, above, this specific drawing was not submitted in the current permit application and accordingly is not in the record before this Board. While a similar drawing was included, and is in the record at R33, the permit application never explained that this drawing was submitted in the siting application submitted in 1999. Furthermore, Landfill 33 fails to establish, by presenting one drawing in a motion for summary

judgment, that this drawing was proposed, presented at the public hearing, or relied upon by the Effingham County Board.

Putting aside Landfill 33's procedural failures, even if the Board were to consider Exhibit 1, it actually cuts against Landfill 33's argument that the Effingham County Board approved its currently proposed expansion in 2000. If this map were indeed submitted in the siting application submitted in 1999, as Landfill 33 argues, this map would support the fact that the Effingham County Board, in approving the expansion in 2000 as proposed by Landfill 33 in 1999, approved an expansion with specifically delineated vertical boundaries. While the Effingham County Board did not add any further restrictions, by approving the expansion *as proposed* by Landfill 33, the Effingham County Board approved the boundaries submitted by Landfill 33. Furthermore, the Effingham County Board specifically analyzed the required Section 39.2 factors based on the proposal of Landfill 33, which, if this map was in front of the Effingham County Board as Landfill 33 argues, included those specific vertical boundaries. Thus, the submittal by Landfill 33 and subsequent approval by the Effingham County Board was not "vague," as Andrews Engineering stated in its March 7, 2018 letter (R32) but included specific elevations for waste throughout the entire Facility—elevations 14 to 54 feet lower than what Landfill 33 now proposes. The basis for the currently proposed expansion is seeking additional capacity that was not previously requested by Landfill 33 or authorized by local siting, and such additional capacity beyond the boundaries of the Facility requires local siting approval.

“[T]he county board hearing, which presents the only opportunity for public comment on the proposed site, is the most critical stage of the landfill site approval process.” *Kane County Defenders, Inc. v. Pollution Control Bd.*, 139 Ill. App. 3d 588, 593 (2d Dist. 1985).

The authority given to the county board or governing body to assess the propriety of landfill facilities within their communities is to analyze proposals based on the Section 39.2 factors, after the applicant has submitted its application, provided notice, allowed for comments, and had a public hearing. *See* 415 ILCS 5/39.2.

That process has never occurred for Landfill 33's current proposal to accept waste up to 644 MSL across the entire Facility. Thus, the Effingham County State's Attorney certification that the Effingham County Board in 2018 approved the site location's suitability and passed a resolution that the Board found the currently proposed expansion "consistent with the previous grant of local siting approval in the year 2000" is not appropriate. (R26-27). Under Section 39.2 of the Act, county boards have authority only to review the proposals put before them, in compliance with the Section's requirements. 415 ILCS 5/39.2. County boards do not have the authority to retroactively determine that a newly proposed expansion is consistent with a previous siting approval, when that expansion contemplates placing waste in new locations that had never been previously considered by the county board.

The affidavit from former Chairman Leon Gobiczynski and the November 19, 2018 letter from Chairman James Nieman asserting that the County Board's 2000 approval did not contain special conditions as to maximum waste volume, final contour dimensions, or maximum elevation do not change the fact that the Effingham County Board's February 21, 2000 resolution had specifically approved of the application for expansion *as proposed* by Landfill 33. (R29). Furthermore, two individuals, one from a previous Effingham County Board and one from the current Effingham County Board, are not competent to speak for interested parties, the members of the public, or what the other members of the current Effingham County Board believe. The boundaries within the maps presented by Landfill 33

are the boundaries Landfill 33 previously requested and received. Any commentary regarding what approvals the Effingham County Board *would have* made in 2000, had Landfill 33 presented its current designs at that time, are merely speculation regarding a hypothetical event that never occurred—not “proof to the Agency that the location of the facility has been approved,” as required by Section 39(c) of the Act, 415 ILCS 5/39(c).

Neither can the Effingham County Board’s November 19, 2018 Resolution be considered a new siting approval meeting the requirements of Section 39.2. Even if the Effingham County Board believed that its analysis of the Section 39.2 factors would not change with this currently proposed expansion, no matter what the notice to interested parties and any comments received or comments made at a public hearing as a result of such notice might have provided, the November 19, 2018 Effingham County Board Resolution does not contain findings of fact analyzing the impacts of the currently proposed expansion on the Section 39.2 factors. To the extent Landfill 33 now seeks an expansion of the Facility’s vertical boundaries, aside from the narrow northwest corner, and to add 483,000 more cubic yards of waste, Landfill 33 is required to provide the County Board’s analysis of the impacts of such expansion on the Section 39.2 factors, after providing the proposal for notice, comment, and a public hearing. It is improper and runs counter to the Section 39 requirements to allow a new county board, twenty years after the fact, to authorize a redesigned facility, adding waste disposal to a previously clean area on a map, but not allow new citizens who may be impacted by a new height or longer lifespan of a landfill the opportunity to provide comment on the proposal ahead of that county board’s new determination.

Landfill 33 argues that the Agency has acknowledged the validity of the local siting that led to the findings of fact made on February 21, 2000 in its July 5, 2019 determination

letter explaining that the proposal to expand for a second time based on the February 21, 2000 local siting approval is an attempt to develop the site on expired local siting. Pet. Mot. at 18. The Agency permitted development in 2002, based on local siting conducted on February 21, 2000. Landfill 33 appears to argue that it cannot be expected to provide proof of that local siting in the current application because there was development previously authorized based upon that local siting. In reviewing and approving permit applications, the Agency is not assessing the validity of the local siting conducted or authorizing the use of that local siting for future applications. The Agency reviews the application to determine whether local siting was conducted based on what the applicant is proposing. The procedure for assessing whether local siting was properly conducted would be an appeal pursuant to Section 40.1. *See* 415 ILCS 5/40.1. However, any appeal to challenge local siting must be brought within 35 days. *Id.* Landfill 33 seeks to circumvent procedure that protects third parties by trying to rely on decades-old siting for their expansion.

Landfill 33 bears the burden of demonstrating that it provided proof of local siting approval to the Agency in its permit application. Thus, if Landfill 33's position is that the February 21, 2000 local siting supports the currently proposed expansion, it was required to present that information in the permit application, not the Petition for Review. Nevertheless, even the newly-provided map that Landfill 33 alleges was used for local siting in the 1999 application for expansion is not sufficient to show approval of the currently proposed expansion, as Landfill 33 seeks to expand boundaries outlined in the map it provided.

C. The Act requires local siting approval for a development that expands beyond boundaries.

Section 39.2(f) does not provide for unlimited development based on a local siting approval. Once local siting has been conducted for a specific development, an additional

development sought decades later, seeking an expansion beyond the boundaries of a facility, requires new local siting. That is based on the plain language of Section 39.2(c) and Section 3.330(b)(2), that an expansion beyond a boundary of a permitted pollution control facility constitutes a new pollution control facility, requiring local siting approval before the Agency may review the application. The local siting statute gave local governmental authorities a voice in landfill decisions that affect them, *M.I.G. Investments, Inc.*, 122 Ill. 2d at 400, and, contrary to Landfill 33's statement that Effingham County should not need to incur a cost related to this proposed expansion, the cost to ensuring that local siting has been obtained can be charged to the applicant pursuant to Section 39.2(k). *See* 415 ILCS 5/39.2(k).

Furthermore, Section 39(c) supports the fact that local siting is not "one and done," but depends upon what the facility is seeking. For example, when a facility ceases accepting waste and then begins operating again, reapproval by the appropriate county board is required. *See* 415 ILCS 5/39(c). Here, because the currently proposed expansion seeks to place waste in areas outside of boundaries established through previous local siting and permitted by the Agency, local siting specific to that request is required by the Act.

In *Brickyard*, while the applicant similarly relied on local siting conducted decades prior to the applicant's disputed proposal, the Board found that the disputed proposal had been specifically approved through the local siting process previously conducted. *See Brickyard Disposal v. Illinois Env'tl. Prot. Agency*, PCB 16-66, slip op. at 3 (Nov. 17, 2016). Here, there has been no evidence presented that the previous local siting process approved the currently proposed expansion of 483,000 cubic yards of waste filled along and up to 644 MSL across the entire top of the landfill. At least, Landfill 33 has not presented maps showing that. Instead, Landfill 33's map shows the significant difference between the currently proposed expansion

and the expansion approved in 2000, leading to the Agency's determination that the proposed expansion requires local siting approval.

IV. CONCLUSION

Landfill 33 seeks to expand its Facility outside of boundaries approved through previous local siting and permitted by the Agency. The Agency appropriately determined that the application was incomplete for lack of siting. Landfill 33 has not pointed to evidence in the record to support its argument that the currently proposed expansion was approved through the prior local siting procedures. Rather, the diagrams submitted by Landfill 33 as Attachment 3 to the application and included as pages 33 through 38 of the record show the significant changes Landfill 33 seeks to make to its Facility, without going through the procedures required in Section 39.2 for the Agency to review the permit application. Therefore, Respondent Illinois Environmental Protection Agency requests the Board deny Petitioner Landfill 33's Motion for Summary Judgment, and grant Respondent's cross-motion.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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Date: May 12, 2020

CERTIFICATE OF SERVICE

I hereby certify that I did on May 12, 2020, cause to be served by electronic mail, a true and correct copy of the following instruments entitled NOTICE OF FILING and RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT upon the persons listed on the Service List.

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