

ILLINOIS POLLUTION CONTROL BOARD

July 16, 2020

LANDFILL 33, LTD.,)	
)	
Petitioner,)	
)	
v.)	PCB 20-18
)	(Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by C.M. Santos):

Landfill 33, Ltd. (Landfill 33) applied to the Illinois Environmental Protection Agency (IEPA or Agency) to modify the permit for its municipal solid waste landfill at 1713 South Willow Street, Effingham, Effingham County. Landfill 33 seeks to modify the final cover of its facility and provide additional disposal capacity.

IEPA determined that the application was incomplete because it did not include (1) new local siting approval from the Effingham County Board and (2) proof that the application was signed by a duly authorized agent of the owner. On October 10, 2019, Landfill 33 filed a petition for review asking the Board to review IEPA's determination that its proposed modification requires new site approval.¹

The parties filed cross motions for summary judgment, and the Board has received a response and a reply from both parties. The Board agrees with the parties that the material facts are not in dispute and that summary judgment is appropriate. For the reasons below, the Board grants IEPA's motion for summary judgment. The Board finds the Landfill 33's proposed modification is a "new pollution control facility" that requires site approval by the Effingham County Board and that Landfill 33 has not provided evidence of site approval for its proposed modification. Accordingly, the Board denies Landfill 33's motion for summary judgment.

PROCEDURAL HISTORY

On October 9, 2019, Landfill 33 filed its petition for review, attached to which were eight exhibits (Exhs. A-H). The Board accepted the petition for hearing on October 17, 2019. On December 5, 2019, IEPA filed the administrative record (R.).

¹ In its response to Landfill 33's motion for summary judgment, IEPA agreed that Landfill 33 "had provided adequate information that an authorized agent of the owner signed the application." IEPA concluded that the issue of ownership is moot and that the Board's review of that element of its determination is unnecessary.

On January 14, 2020, Landfill 33 filed a request to admit facts and genuineness of documents (Req. Admit). IEPA responded (Resp. Admit) on February 10, 2020.

On April 17, 2020, the Board received a motion for summary judgment from Landfill 33 (Pet. Mot. SJ) and IEPA (IEPA Mot. SJ). On May 12, 2020, both Landfill 33 (Pet. Resp.) and IEPA (IEPA Resp) filed a response. On May 20, 2020, both Landfill 33 (Pet. Reply) and IEPA (IEPA Reply) filed a reply in support of its motion. In its reply, Landfill 33 moved, to the extent the Board finds it necessary, to supplement the administrative record with disputed exhibits. Pet. Reply at 2-7. On June 3, 2020, IEPA responded to Landfill 33's motion.

On June 1, 2020, the Board received a public comment submitted by Mr. Dan Borries (PC 1).

FACTS

The parties agree that the material facts are not in dispute. *See* Pet. Mot. SJ at 3; IEPA Mot. SJ at 19; Pet. Reply at 2.

Landfill

Landfill 33 owns, in part, and operates a municipal solid waste landfill in Effingham County. R. at 6; *see id.* at 1859 (permit history), 1907. "The development and operating permits for this landfill were issued on February 8, 1979 and December 7, 1981, respectively." *Id.* at 1840 (application log).

Application for Site Approval

On September 27, 1999, Landfill 33 submitted to the Effingham County Board a request for site approval of a vertical expansion. Pet., Exh. A. Notice of Intent to Request Siting Approval stated that "[t]he waste footprint of approximately 41 acres will remain unchanged. The Applicant intends to expand the capacity by reconfiguring the top of the disposal unit." *Id.*

Addressing need for the proposed modification, the application states that it would provide approximately 1.2 million cubic yards of additional waste disposal capacity. Pet., Exh. A; *see* R. 21 ("1.20 million CY sited"). Landfill 33's Drawing A2-3, Proposed Final Contours, "depicts proposed final grade if vertical expansion is permitted." It shows elevation rising from approximately 590 feet at the south end of the facility to approximately 640 feet near the northwest corner. Pet., Exh. A; *see* R. 33 (Existing Permitted Final Cover Grades). Cross sections in Drawings A2-4 and A2-5 show increases to the maximum elevation. Pet., Exh. A; *see* R. 35-38.

Site Approval

Following a public hearing on Landfill 33's request, the Effingham County Board on February 21, 2000, approved by a vote of 9-0 Findings of Fact that Landfill 33's request for

vertical expansion met applicable statutory criteria. R. at 29, 1901-02; Pet., Exh. B; *see* Resp. Admit at 2-3 (¶6); Req. Admit at 2 (¶6; Exh. B).

Also on February 21, 2000, by a vote of 9-0, the Effingham County Board adopted a resolution “that the request of the applicant Landfill 33, LTD for a vertical expansion of an existing facility is hereby GRANTED”. R. 28; Pet., Exh. B; *see* Resp. Admit at 2 (¶4); Req. Admit at 2 (¶4; Exh. B). The County Board resolution does not include volumetric calculations. Resp. Admit at 3 (¶8); Req. Admit at 3 (¶8; Exh. B). The resolution neither includes nor refers to siting conditions. *See* R. 28. On September 19, 2000, the Effingham County Clerk executed a Certification of Siting Approval on IEPA Form LPC-PA8. Pet., Exh. C; *see* Resp. Admit at 3 (¶9); Req. Admit at 3 (¶9; Exh. C).

Permitting History

On June 29, 2001, Landfill 33 submitted to IEPA its original application to modify its permit. IEPA designated the application with Log No. 2001-248. R. 1860 (Permit History); *see* Pet., Exh. D; Resp. Admit at 3 (¶10); Req. Admit at 3 (¶10).

On June 28, 2002, IEPA issued Modification No. 9, which renewed Permit 1995-231-LFM and approved “a vertical expansion of 1,160,000 cubic yards of in-place waste capacity, all in accordance with Application Log No. 2001-248. The revised maximum final elevation approved is 644 msl. . . . There is no change to the acreage of the waste footprint of the 40.6 acre disposal unit approved by 1995-231-LFM and by Modification No. 9.” Pet. Exh. D; *see* R. 33 (Existing Permitted Final Cover Grades); 1840-41 (application log); 1860 (permit history); Resp. Admit at 4 (¶11); Req. Admit at 3 (¶11), Exh. D. Andrews Engineering refers to the 1.16 million cubic yards of permitted volume as a loss of 40,000 cubic yards from the “1.2 million CY sited.” R. at 21 (2019 Volume Calculation Worksheet).

Permitted final cover rises from approximately 590 feet to approximately 640 feet in the northwest corner of the facility. R. at 33 (EX-1). Cross sections show increases in the “currently permitted top of final cover”. *Id.* at 35-36 (EX-3, EX-4).

Requested Permit Modification

Siting Review by Andrews Engineering

In a letter to Landfill 33 dated March 7, 2018, Andrews Engineering reviewed the vertical expansion of the facility IEPA approved in 2002. R. 31-32. Andrews Engineering considered the application for site approval submitted to the Effingham County Board in 1999, the County Board’s resolution approving the landfill expansion in 2000, and the permit modification approved by IEPA in 2002. *Id.* at 31.

In 1999, Andrews Engineering requested for Landfill 33 “a vertical expansion for an approximately 1.2 million additional cubic yards of waste and included a map with final contours.” R. at 31. The County Board approved the request “without any additional conditions

related to waste volume, final contours or a maximum elevation.” *Id.* Andrews Engineering characterized the County Board resolution approving the site as “vague and not detailed.” *Id.*

Andrews Engineering noted that IEPA permitting approved a maximum elevation of 644 MSL and additional waste capacity of 1.16 million cubic yards. R. at 31; *see id.* at 33 (Existing Permitted Final Cover Grades). It concluded that “approximately 1.2 million cubic yards of airspace was approved during the siting process and was not meant to be absolute.” *Id.* at 32. Andrews Engineering concluded that, if Landfill 33 remained below the maximum elevation of 644 MSL, it could reconfigure the final contours without obtaining additional site approval. R. 32.

Application for Modification

On April 5, 2019, Andrews Engineering on behalf of Landfill 33 submitted to IEPA an application for a significant modification of the permit. R. 1-2; *see* Resp. Admit at 4 (¶13); Req. Admit at 4 (¶13); Pet., Exh. E. The application requested “to modify the final cover” of its facility “and stay below the permitted defined maximum elevation of 644 MSL.” R. at 1, 7. The application included revised drawings of the requested modification. R. at 34-38; *see id.* at 196, 201 (Revised Plan Drawings). The application “did not seek or request to expand the 40.6 acre horizontal facility boundary.” Resp. Admit at 5 (¶18); Req. Admit at 4 (¶18).

Andrews Engineering reported that Landfill 33 “has developed the entire facility” and is expected “to reach capacity in 2023 or 2024.” R. 1; *see id.* at 33. Landfill 33 “is in the early stages of planning a new lateral waste unit/new landfill” requiring four to five years for siting, permitting, and development. *Id.* at 1. Because the existing facility is expected to close at about the same time that a new facility could begin operating, Landfill 33 sought to extend the operating life of its existing facility and “allow a smooth transition to the new landfill.” *See id.*

The proposed final cover added 483,164 cubic yards of disposal capacity. R. 23-24. The application attributed a loss of approximately 62,350 cubic yards of disposal capacity to permitting and construction. R. 21-23 (Revised Waste Capacity Calculations); *see id.* at 1. In calculating capacity, Andrews Engineering refers to capacity lost to construction and permitting based on “1.20 million CY cited.” *Id.* at 21. Andrews Engineering projected that the modification would increase the waste disposal capacity of the facility by approximately 420,650 cubic yards. *Id.* at 1, *see id.* at 23-24 (Revised Waste Capacity Calculations).

In its Application Log, IEPA stated that “[t]he application acknowledges that the 420,065 cubic yards of additional waste disposal capacity is in excess 1.2 million cubic yards requested in the Siting Application submitted to the Effingham County Board in September 27, 1999.” R. 1841; *see id.* at 21.

Attached to the application was IEPA form LPC-PA8, Certification of Siting Approval on November 19, 2018. R. at 26-27; *see id.* at 1.

Review of Previous Siting by Effingham County Officials

In a letter to IEPA dated November 19, 2018, the Effingham County Board Chair stated that the County Board had received Landfill 33's application for a modification. R. 1883. The Chair notes that Landfill 33 in 1999 requested that the County Board approve a vertical expansion of approximately 1.2 million cubic yards. *Id.* The Chair states that the County Board's approval "does not include any special conditions imposed by the County Board relating to maximum waste volume, final contour dimensions or a maximum elevation." *Id.* The Chair adds that, in a 2002 permit modification, IEPA approved "final cover contours with a defined maximum elevation of 644 MSL." R. 1884; *see id.* at 1840 (review notes), 1860 (permit history).

The County Board Chair concluded that, because the county's site approval did not include special conditions, "and as IEPA only assigned a final absolute maximum elevation as part of the permitting process, it is the opinion of the Effingham County Board" that Landfill 33's proposed final contours "are in all respects consistent" with the previous site approval, "so long as the final maximum elevation of 644 MSL designated by IEPA as part of the permit process is not exceeded." R. 1884.

Also on November 19, 2018, the Effingham County Board adopted a resolution that Landfill 33's proposed modification "is consistent in all respects with its previous grant of siting approval on February 21, 2000." R. at 1885.

On March 28, 2019, the Effingham County Attorney completed an LPC-PA8 certifying that the County Board had on November 19, 2018, "approved the site location suitability of Final Cover Modification of Landfill 33 as a new pollution control facility in accordance with Section 39.2. . . ." R. 26; *see id.* at 1840 (IEPA review notes).

On August 7, 2019 Andrews Engineering submitted to IEPA the affidavit of Mr. Leon Gobczynski, the Chair of the Effingham County Board in 2000. R. 1900. His affidavit states that the Board "elected to not impose any vertical boundary limitations upon the siting approval which was granted." *Id.* Based on his involvement in and knowledge of the County Board's consideration of the application for site approval, the affidavit also stated that the current application "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." *Id.*

IEPA Determination of May 3, 2019

In a letter dated May 3, 2019, IEPA determined that Landfill 33's application was incomplete. R. at 1833; *see* Resp. Admit at 6 (¶20); Req. Admit at 4-5 (¶20), Exh. E2; R. at 1838 (review notes); R. at 1850-53 (Completeness and Initial Review Checklist).

IEPA determined that the application had not provided proof that the Effingham County Board had granted siting approval for "a proposal to increase the waste disposal capacity by approximately 420,650 cubic yards by vertically increasing the final contours of the landfill." R. 1833, citing 415 ILCS 5/39.2 (2018); *see* R. at 1852.

IEPA determined that the proposed capacity increase “has not been demonstrated to be consistent with the siting criteria set forth in Section 39.2.” R. 1833, citing 415 ILCS 5/39.2(a)(i-ix) (2018); *see* R. at 1841-42 (IEPA review notes). IEPA stated that proposed expansion beyond the boundary of the currently permitted facility is a “new pollution control facility” requiring site approval before IEPA issues a development or construction permit. R. at 1833-34, 1842.

IEPA added that the application included a Certificate of Siting Approval referring to approval by the Effingham County Board on November 19, 2018. R. 1834. However, the application did not include documentation complying with the format and procedures required by Section 39.2 of the Act. *Id.*; *see id.* at 1842.

Andrews Engineering Response of June 7, 2019

In a letter dated June 7, 2019, Andrews Engineering responded to IEPA’s May 3, 2019 determination. R. 1877-80; *see* Resp. Admit at 6 (¶22); Req. Admit at 5 (¶22), Exh. F1; Pet. Exh. F.

Andrews Engineering first addressed IEPA’s determination that the proposed waste contours and disposal capacity lacked proof of siting approval. R. 1877. Andrews Engineering responded that it was not necessary to meet siting criteria “since the proposed application is consistent with the previous Siting Approvals.” *Id.* at 1878; *see id.* at 1882-85 (Exhibit A: Effingham County Board Resolution). Andrews Engineering also cited IEPA v. IPCB and Brickyard Disposal and Recycling, 2018 IL App (4th) 170144. R. 1879.

Second, Andrews Engineering addressed IEPA’s position that that application referred to site approval on November 19, 2018, without supplying documentation consistent with Section 39.2 of the Act. R. 1878. The response attached a letter from the Effingham County Board Chair and a County Board resolution. *Id.* at 1882-85 (Exhibit A).

IEPA Response of July 5, 2019

In a letter dated July 5, 2019, IEPA reviewed the completeness of Landfill 33’s April 5, 2019 application and additional information received on June 7, 2019. R. 1829; *see* Resp. Admit at 7 (¶25); Req. Admit at 5 (¶25), Exh. F2; Pet., Exh. F. IEPA again determined that the application was incomplete. R. at 1829; *see id.* at 1843-46 (review notes).

First, IEPA noted that the 1999 application for siting approval “sought a vertical expansion of 1.2 million cubic yards and included a map of the proposed landfill final contours.” R. at 1830. It also noted that the pending application “will vertically increase the landfill final contours and increase the disposal capacity by approximately 483,000 cubic yards.” *Id.* IEPA concluded that Landfill 33’s application “does not demonstrate the proposed vertical waste disposal boundaries and increased disposal capacity was considered by the Effingham County Board . . . during the review of September 27, 1999 application for local siting approval.” *Id.*; *see id.* at 1843, 1845-46 (review notes).

IEPA also addressed the Effingham County Board's 2018 resolution. R. 1883-85. IEPA concluded that the resolution "finds only that the Board would deem whatever information before it to be consistent with and not approved by the Board contemporaneously." *Id.* at 1830, 1844, 1846.

Second, IEPA determined that the application does not document that the site approval followed requirements under Section 39.2, including public notice, comment, and hearing. R. 1830, 1844, 1846.

Third, IEPA determined that local siting approval expires three years after it is granted unless the applicant applies for a development permit. R. 1830, citing 415 ILCS 39.2(f) (2018). IEPA concluded that "[t]he 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." R. 1830, 1844, 1846.

Andrews Engineering Response of August 7, 2019

In a letter dated August 7, 2019, Andrews Engineering responded to IEPA and addressed "the perceived incompleteness deficiencies" cited by IEPA on July 5, 2019. R. 1897; *see* Resp. Admit at 7 (¶26); Req. Admit at 5-6 (¶26), Exh. F3; Pet., Exh. F.

First, regarding proposed final waste contours, Andrews Engineering argued that the proposed change "will not violate or exceed any site boundary that was approved in the siting for vertical expansion in 2000." R. 1898. Andrews Engineering cited the affidavit of Mr. Leon Gobczynski, the Chair of the Effingham County Board in 2000. *Id.*

Second, addressing procedures for site approval, Andrews Engineering argued that IEPA approved the siting process in 2002 with Modification No. 9 and that it "was consistent in all respects with the requirements that existed at that time." R. at 1898-99.

Third, addressing IEPA's position that site approval had expired, Andrews Engineering responded that the landfill met the three-year deadline by applying for Modification No. 9 in 2002. R. at 1899; *see id.* at 1860 (Permit History).

IEPA Response of September 6, 2019

In a letter dated September 6, 2019, IEPA reviewed the completeness of Landfill 33's application and additional information. R. at 1826, citing 35 Ill. Adm. Code 813.103(b); R. at 1877-80, 1987-99; *see* Resp. Admit at 7 (¶27); Req. Admit at 6 (¶27), Exh. G; Pet. Exh. G. IEPA again determined that the application was incomplete. R. at 1826; *see id.* at 1848 (review notes).

IEPA determined that the information including Mr. Gobczynski's affidavit "does not in any way change Illinois EPA's earlier determinations that pursuant to Section 3.330(b)(2) of the . . . Act 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." R. at 1826;

see id. at 1847-48 (review notes), 1900. IEPA concluded that Landfill 33's additional information "does not satisfy the local siting review requirements specified in Section 39.2 of the Act" and cited in IEPA's July 5, 2019 determination. *Id.* at 1827, citing 415 ILCS 5/39.2 (2018); *see R.* at 1848.

Andrews Engineering Response of October 11, 2019

In a letter dated October 11, 2019, Andrews Engineering responded to IEPA. *R.* at 1904-05, citing *id.* at 1877-80, 1897-99.

Andrews Engineering cited the County Board's opinion that the proposed final cover modification is consistent with the previous siting approval, so long as the final maximum elevation of 644 MSL is not exceeded." *Id.* at 1905; *see id.* at 26-27, 1883-85, 1895-96. Andrews Engineering argued that it is therefore not necessary to meet statutory siting criteria. *Id.* at 1905, citing 415 ILCS 5/39.2(a) (2018).

DISCUSSION

In the following subsections, the Board sets forth the summary judgment standard and burden of proof. The Board then addresses the preliminary matter of Landfill 33's pending motion to supplement the administrative record. The Board then reviews the record and the parties' arguments to decide the cross motions for summary judgment.

For the reasons below, the Board grants IEPA's motion for summary judgment. The Board finds that that Landfill's 33's proposed permit modification requires site approval by the Effingham County Board and that its application for approval is incomplete without it. Accordingly, the Board denies Landfill 33's motion for summary judgment.

Summary Judgment Standard

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Adames v. Sheahan, 233 Ill. 2d 276, 295, 909 N.E.2d 742, 753 (2009); Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); 35 Ill. Adm. Code 101.516(b). A genuine issue of material fact precluding summary judgment exists when "the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." Adames, 233 Ill. 2d at 296, 909 N.E.2d at 753; Adams v. Northern Illinois Gas Co., 211 Ill. 2d 32, 43, 809 N.E.2d 1248, 1256 (2004).

When determining whether a genuine issue of material fact exists, the record "must be construed strictly against the movant and liberally in favor of the opponent." Adames, 233 Ill. 2d at 295-96, 909 N.E.2d at 754; Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). Summary judgment "is a drastic means of disposing of litigation, and therefore, should be granted only when the right of the moving party is clear and free from doubt." Adames, 233 Ill. 2d at 296, 909 N.E.2d at 754; Purtill, 111 Ill. 2d at 240, 489 N.E.2d at 871. "Even so, while

the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis, which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

Burden of Proof in a Permit Appeal

This case is an appeal brought under Section 40 of the Act (415 ILCS 5/40 (2018)). In these cases, the petitioner must prove that operating its facility pursuant to the requested permit would not violate the Act or Board regulations. Browning-Ferris Indus. of Ill. v. PCB, 179 Ill. App. 3d 598, 622 (2nd Dist. 1989). The burden of proof is on the petitioner. 415 ILCS 5/40(a)(1) (2018).

However, this case is not a traditional permit appeal because IEPA rejected Landfill 33’s application as incomplete before determining its technical merits. Atkinson Landfill Co. v. IEPA, PCB 13-8, slip op. at 10 (June 20, 2013). Therefore, if Landfill 33 proves that it submitted a complete application, the Board will remand the application to IEPA for a technical determination. *See id.* at 12; *see also* Pet. Mot. SJ at 2.

Preliminary Matter

In its response to Landfill 33’s motion for summary judgment, IEPA argues that Landfill 33 “improperly discusses materials” that were not submitted with Landfill 33’s application and are not part of the record. IEPA Resp. at 2. IEPA refers to Exhibits A, C, and D to Landfill 33’s petition for review. *Id.* at 2-3. IEPA requests that this information be struck and not considered by the Board. *Id.* at 3-4. IEPA’s reply renews the request. IEPA Reply at 1, citing Pet. Resp. at 2, 8-9, 12.

The Board’s procedural rules provide that the record on a motion for summary judgment includes “pleadings, depositions, and admissions on file, together with any affidavits.” 35 Ill. Adm. Code 101.516(b). The Board is not persuaded to strike from its consideration the exhibits attached to Landfill 33’s petition for review, and it denies IEPA’s request.

In its reply, Landfill 33 moved, to the extent the Board finds it necessary, to supplement the administrative record with disputed exhibits. Pet. Reply at 2-7. On June 3, 2020, IEPA responded to the motion to supplement. Having denied IEPA’s request to strike, the Board denies the motion as moot.

Landfill 33’s Application for Modification Requires Siting

IEPA denied Landfill 33’s request for a permit modification because the application did not provide proof that the Effingham County Board had approved the site and was therefore incomplete. R. at 1826-27; *see* 415 ILCS 5/39.2 (2018).

Statutory Authorities

Section 39(c) of the Act provides that, with an exception not applicable to this case, “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 if in an unincorporated area . . . in which the facility is to be located in accordance with Section 39.2 of this Act.” 415 ILCS 5/39(c) (2018)

The Act defines a “new pollution control facility” in pertinent part as “the area of expansion beyond the boundary of a currently permitted pollution control facility.” 415 ILCS 5/3.330(b)(2) (2018); *see IEPA v. PCB and Brickyard Disposal & Recycling*, 2018 Ill.App. (4th) 170114; 142 N.E. 3d 737 (4th Dist. 2018).

To decide the cross motions for summary judgment, the Board must determine whether Landfill 33 proposes to expand its facility beyond boundaries approved by the Effingham County Board.

Effingham County 2000 Site Approval

Landfill 33 argues that the Effingham County Board’s 2000 site approval does not include any finding of fact or condition that limits its facility to the current permitted contours. Pet. Reply at 7. In its findings of fact, the County Board determined “in relation to the request by Landfill 33 LTD for approval for a vertical expansion of an existing landfill facility” that the proposed expansion met applicable statutory criteria. R. at 29; *see* 415 ILCS 5/39.2(a) (2018). Landfill 33 asserts that these findings “imposed no limitation or restriction on the height of the vertical expansion.” Pet. Reply at 8.

Landfill 33 also cites the County Board’s resolution to approve its landfill expansion. The resolution states that Landfill 33 filed “a request for approval of a vertical expansion” and that the County Board “studied the proposal” to make findings of fact. The County Board then resolved to grant “the request of the applicant Landfill 33 LTD for a vertical expansion of an existing landfill facility.” R. at 28. Landfill 33 asserts that this resolution also “imposed no restriction on the vertical expansion.” Pet. Reply at 7.

After reviewing the County Board’s siting determinations, Andrews Engineering concluded that the approval “is vague” (R. at 31) and “does not specify any additional conditions in regards to waste volume, final cover contours or a maximum elevation” (*id.* at 32). Andrews Engineering also concluded that the final elevation of the facility is based solely on IEPA permitting. *Id.*

IEPA counters that the Effingham County Board effectively established these limits based on Landfill 33’s request for site approval. The County Board adopted findings of fact relating to a specific request for expansion and resolved to grant that specific request. *See* R. at 28, 29. The County Board did so after considering the Section 39.2 factors “based on what was proposed at the time by Landfill 33.” IEPA Mot. SJ at 10; *see* R. at 29. IEPA argues that the County Board approved an application for “expansion including maps delineating vertical and lateral boundaries and an approximate waste disposal capacity.” IEPA Mot. SJ at 16, citing R. at 31; *see* Pet., Exh. A (1999 request for site approval).

Andrews Engineering states that in 1999 it requested for Landfill 33 “a vertical expansion for an approximate 1.2 million additional cubic yards of waste and included a map with final contours.” R. at 31. Landfill 33’s request to the Effingham County Board included maps showing proposed final contours rising from an elevation of approximately 590 feet near the southern end of the proposed facility to a maximum elevation of approximately 640 feet near the north. Pet., Exh. 2 (Drawing A2-3: Proposed Final Contours; Drawing A2-4: Cross Section).

The Board agrees with IEPA that the Effingham County Board approved an application for site approval including specific limits. The County Board adopted its findings of fact on the statutory siting factors “in relation to the request by Landfill 33 LTD for approval for a vertical expansion of an existing landfill.” R. at 29. The County Board resolved to grant “the request of the applicant Landfill 33 LTD for a vertical expansion of an existing landfill facility.” *Id.* at 28. The County Board’s findings and resolution considered and approved Landfill 33’s request for approximately 1.2 million cubic yards of additional waste capacity following proposed final contours. *See* Pet., Exh. A (1999 request for siting approval). The Board is not persuaded that site approval was “vague” or that the County Board’s approval is broader than the specific request it considered.

Section 39.2 supports this conclusion. Its siting provisions require that the County Board “shall approve or disapprove the request for local siting approval. . . . An applicant for local siting approval shall submit sufficient details describing the proposed facility and evidence to demonstrate compliance, and local siting approval shall be granted only if the proposed facility meets” the statutory criteria. 415 ILCS 5/39.2(a) (2018) (emphasis added). Landfill 33’s application for site approval included specific details supporting IEPA’s determination.

IEPA 2002 Permit Modification

On June 28, 2002, IEPA modified Landfill 33’s permit by approving “a vertical expansion of 1,160,000 cubic yards of in-place waste capacity.” R. at 1860 (permit history); *see* R. at 31. With adjustments of 62,350 cubic yards for construction and permitting (*see* R. at 21), Landfill 33’s sited expansion of 1.2 million cubic yards of waste disposal capacity effectively became the permitted capacity of the facility. *Compare* Pet., Exh. A (proposed final contours) *and* R. at 33 (permitted final cover grades).

2019 Application for Permit Modification

Landfill 33 now proposes to modify final waste contours within the current maximum elevation of 644 feet and increase disposal capacity by approximately 420,650 cubic yards. R. at 1. The proposal generates this additional capacity by increasing final cover grades and expanding the current maximum elevation of 644 feet to a larger area of the top of the landfill. *Compare* R. at 33 (existing final grades) *and* R. at 34 (proposed final grades); *see also id.* at 35-38 (cross sections).

Landfill 33 argues that its requested modification does not exceed the maximum elevation of 644 feet approved by the Effingham County Board in 2000 and permitted by IEPA

in 2002. Pet. Mot. SJ at 15. Landfill 33 concludes that it has not proposed to expand the physical boundary of the sited facility, “and thus there is no need for any new local siting hearing or approval.” *Id.*

IEPA counters that Landfill 33’s proposed modification “sharply” increases the vertical boundaries of its facility and extends the maximum elevation of approximately 640 feet “along the entire top of the landfill.” IEPA Mot. SJ at 13, citing R. at 33-38. IEPA argues that the additional disposal capacity that would result from this modification “is over a third more waste than was approved during the prior local siting process.” IEPA Mot. SJ at 13. IEPA asserts that this expands disposal beyond boundaries in Landfill 33’s application to the County Board, which effectively became the permitted waste disposal capacity. *Id.* IEPA characterizes this as a “significant expansion” that requires local siting. *Id.*

As Landfill 33 itself states, “the question that arises is whether the application is for a whole new facility location outside of previously sited boundaries which requires a new local siting approval, as opposed to an amendment of a permit which does not exceed previously sited boundaries. . . .” Pet. Resp. at 5. After reviewing the record, the Board finds that the Effingham County Board’s 2000 findings of fact and resolution to approve a landfill expansion do not encompass and are not sufficient to support Landfill 33’s proposed modification. The Board can only conclude that Landfill 33’s current proposed modification was not considered and approved by the Effingham County Board in 1999-2000. The record in this case provides no basis to expand the County Board’s 2000 site approval to encompass approximately 420,650 cubic yards of additional waste disposal capacity. Landfill 33 proposes to expand beyond its previously sited boundaries. It therefore proposes a “new pollution control facility” requiring new site approval, without which its 2019 application is incomplete.

Landfill 33’s Arguments

The Board has considered Landfill 33’s arguments but is not persuaded that they lead to a different conclusion. The Board recognizes that Landfill 33’s proposed modification keeps the maximum waste elevation below the current maximum sited and permitted level. However, the final waste contours in Landfill 33’s application to the Effingham County Board show waste rising to an elevation of approximately 640 feet in a small area at the northwestern corner of the facility. Pet., Exh. A. The Board agrees with IEPA that “[t]he boundary of a facility encompasses more than the height at any single tallest point.” IEPA Reply at 3, citing R. at 33-38. The Effingham County Board approved siting with waste reaching 644 feet at a specific area of the facility. *Compare* R. at 33 *and* R. at 34. That approval does not authorize adding waste to that level across a much wider area of the facility.

Landfill 33 also cites the map proposing final contours that it submitted with its 1999 application for site approval. Pet. Resp. at 2, 8-9; Pet. Reply at 9. A note to that map states that “[t]he final contours and conditions shown here may be refined or undergo other modifications for the IEPA developmental permit application.” Pet., Exh. A (Exh. A2-3). Andrews Engineering’s waste capacity calculations indicate that modification took place in the permitting process with a reduction of 40,000 cubic yards of capacity. R. at 21. This note does not now provide a basis to increase the facility’s waste capacity by approximately 420,650 cubic yards.

Andrews Engineering described the Effingham County Board's site approval resolution as "vague and not detailed." It stated that the County Board "approved the request without any additional conditions related to waste volume, final contours, or a maximum elevation." R. at 31. The Board acknowledges that the County Board's resolution approving that site does not include explicit restrictions or conditions on Landfill 33's proposal. *See id.* at 28-29. Above, the Board concluded that the Effingham County Board considered and approved Landfill 33's own proposal for approximately 1.2 million cubic yards of additional waste capacity following proposed final contours. The Board cannot now conclude that the County Board implicitly and prospectively approved greater final heights or waste volume than Landfill 33's application actually requested.

Landfill 33's position effectively means that the Effingham County Board prospectively authorized a significant vertical extension over a wide area of the facility and a significant expansion of its waste disposal capacity without then considering applicable statutory factors. Its position establishes no point at which a requested permit modification for a new waste volume, waste contour, or maximum waste elevation would require Landfill 33 to return to the County Board for site approval.

Landfill 33's Materials

The Board's conclusion also finds support in Landfill 33's own materials. Andrews Engineering reports that in 1999 Landfill 33 requested from the Effingham County Board "a vertical expansion for an approximately 1.2 million additional cubic yards of waste and included a map with final contours." R. at 31. Exhibits to Landfill 33's petition include its "Proposed Final Contours." Pet., Exh. A (Exh. A2-3).

Andrews Engineering adds that the County Board approved the request "without any additional conditions related to waste volume, final contours or a maximum elevation." *Id.* In its 2019 calculation of waste volume, however, Andrews Engineering refers to "1.20 million CY sited." *Id.* at 21. The calculation shows that, except for 40,000 cubic yards reduced by permitting and 22,350 cubic yards reduced by construction, IEPA permitted 1.16 million cubic yards – nearly the entire sited capacity of 1.2 million cubic yards. *Id.*; *see* R. at 33 (Existing Permitted Final Cover Grades).

Caselaw

Caselaw also support the Board's conclusion. Both parties cite IEPA v. PCB and Brickyard Disposal & Recycling, 2018 Ill.App. 4th 170114 (4th Dist. 2018); *see* Brickyard Disposal & Recycling v. IEPA, PCB 16-66 (Nov. 17, 2016). *See* Pet. Mot. SJ at 12-14; IEPA Mot. SJ at 15-16. In Brickyard, the permit applicant sought to dispose of waste in a "wedge" area of clean fill between two permitted landfill units. Brickyard, PCB 16-66, slip op. at 3. IEPA denied a request for a permit modification as incomplete in part because it did not include new local siting approval. *Id.* The Board concluded that the waste-free wedge resulted from IEPA permitting and not the dimensions established by the County Board's site approval. *Id.* at 8. "The boundaries set by the County encompass a waste-filled wedge. . . . Because filling the

waste with wedge would not expand the landfill beyond the boundaries already approved by the County, the Board finds that Brickyard does not proposed a ‘new pollution control facility’ and therefore is not required to seek new local siting approval.” *Id.*; see Brickyard, 2018 Ill.App 4th 170114 (¶42).

As the Board reviewed above, Landfill 33 submitted to the Effingham County Board a request for site approval that included final waste contours and capacity of 1.2 million cubic yards. IEPA permitting encompassed virtually all of that sited capacity. Landfill 33 now proposed to raise the maximum elevation across a wide area of its facility and increase its disposal capacity by approximately 420,650 cubic yards. This falls well beyond the sited boundaries set by the County Board and distinguishes this case from Brickyard.

The Board recognizes the Appellate Court’s statement that M.I.G. Investments v. IEPA, 122 Ill. 2d 392 (1988), “does not establish a ‘volumetric boundary’ or trigger local siting review for changes in waste volume within boundaries of existing landfills.” Brickyard (¶34). However, the Board concluded above that Landfill 33 seeks to increase maximum elevations and increased volume beyond its sited boundaries. Furthermore, M.I.G. Investments merely rejected the argument that “boundary” refers only to a facility’s lateral boundaries and not the vertical. M.I.G. Investments v. IEPA, 122 Ill. 2d 392, 397 (1988). It does not persuade the Board that Landfill 33’s proposed modification should escape local siting review.

The Board also recognizes the Appellate Court’s statement rejecting the conclusion that “the holding in Bi-State Disposal [203 Ill.App.3d 1023 (5th Dist. 1990)] means this court must examine the Agency’s permits regarding *waste collection* to determine the boundaries of the ‘currently permitted pollution control facility.’” Brickyard (¶38). IEPA’s permitted waste collection encompasses almost the entirety of the boundaries in Landfill 33’s application for siting approved by the Effingham County Board. Landfill 33’s current request for a permit modification extends well beyond those sited boundaries. Bi-State Disposal also does not persuade the Board that the modification escapes local siting review.

Finally, the Board does not accept Landfill 33’s statement that the facts of Waste Management of Ill. v. IEPA, PCB 94-153 (July 21, 1994) “are nearly identical to this case.” Pet. Reply at 10. The operator in Waste Management sought to reconfigure waste contours, all of which would be within the boundaries of local siting and did not increase the facility’s capacity. Waste Management, PCB 94-153, slip op. at 3-4, 6-7. These factors led the Board to conclude in that case that “no additional siting approval is required.” *Id.*, at 7. These are significant differences from Landfill 33’s proposal and again do not persuade the Board that Landfill 33’s proposed modification escapes local siting review.

Evidence of Siting Approval for the Proposed Modification

Landfill 33 states that, after the Effingham County approved its request for siting approval in 2000, it submitted certification of the approval on IEPA Form LPC PA-8. Pet. Mot. SJ at 7-8, citing Pet., Exh. C. Landfill 33 suggests that IEPA found that siting complied with the Act when it approved Permit Modification No. 9 in 2002. See Pet, Mot. SJ at 7-8, citing R. at

1860 (permit history). IEPA “does not argue that the process involved in the hearing held in 2000 was not sufficient.” IEPA Reply at 9.

Landfill 33 argues that it provided ample evidence of the Effingham County Board’s 2000 siting approval. Pet. Mot. SJ at 16-18. The Board does not generally disagree, but the issue is whether that approval in 2000 encompasses the modification Landfill 33 now requests.

Landfill 33 cites the Effingham County Board’s “Finding of Fact Regarding Request for Expansion of Existing Landfill Facility Submitted by Landfill 33. LTD.” Pet. Mot. SJ at 17, citing R. at 29; Pet. Resp. at 12. As the Board found above, this finding relates specifically to Landfill 33’s 1999 application for site approval and does not encompass the modification Landfill 33 now seeks.

Landfill 33 also cites the County Board’s resolution to approve its request for expansion. Pet. Mot. SJ at 7, citing R. at 28; Pet. Reps. at 12. Again, the resolution approves Landfill 33’s 1999 application and does not encompass the modification it now seeks.

Landfill 33 also refers to Andrews Engineering’s March 7, 2018 review of siting. Pet. Mot. SJ at 5, citing R. at 31-32. The review offered the opinion that “no siting is necessary by the County” to reconfigure the final contours of Landfill 33’s facility. *Id.* at 32. This review predates the application for a specific modification. However, the Board concluded above that the modification requested in 2019 is not encompassed by the County Board’s 2000 site approval. The Board cannot agree that siting is unnecessary.

Landfill 33 stresses the Effingham County Board’s November 19, 2018 resolution that the request for a modification “is consistent in all respects with its previous grant of siting approval on February 21, 2000.” Pet. Mot. SJ at 5, citing R. at 1885; Pet. Reply at 8. The Board gives all due respect to the members of the County Board, who play a very important role in siting facilities. Nonetheless, for the reasons above, the Board concluded that the current request is not consistent with the previous site approval. The Board cannot consider this resolution as site approval for that request. *See* IEPA Resp at 12.

Landfill 33 also includes a November 19, 2018 letter from the Mr. James Niemann, the Chair of the Effingham County Board. He expresses the County Board’s opinion that the current request for modification is “in all respects consistent” with previous site approval so long as the final maximum elevation does not exceed 644 feet. Pet, Mot. SJ at 6, citing R. 1883-84; Pet. Resp. at 12. Again, the Board gives all due respect to Mr. Niemann and the members of the County Board. However, the Board agrees with IEPA that these opinions do not substitute for approving a request for siting under Section 39.2. *See* IEPA Resp. at 11-12; IEPA Reply at 6.

Landfill 33 cites the affidavit of Mr. Leon Gobczynski, who was Chair of the Effingham County Board in 2000. Pet. Mot. SJ at 17, citing R. at 1900; Pet. Resp. at 12. Based on his role in the hearing on Landfill 33’s application and deliberations on it, he states that “the present request to reconfigure the top of the existing landfill is in all respects with the Effingham County Board’s determinations in January and February of 2000.” R. at 1900. Again, the Board gives

all due respect to Mr. Gobczynski and his role in the previous siting procedures. However, the Board believes that the record leads to a different conclusion.

Finally, Landfill 33 cites the Certification of Siting Approval of November 19, 2018 approving its final cover modification. Pet. Mot. SJ at 4, 17, citing R. at 26-27 (original), 1895-96 (revised); Pet. Resp. at 11. Landfill 33 states that it verifies that the County Board approved the location on that date and that the current proposal “was consistent with the previous grant of local siting approval in the year 2000.” Pet. Mot. SJ at 17. The Board found above that the County Board in 2000 approved a specific request that does not encompass Landfill 33’s current request. While the Board gives due respect to the opinions of the County Board and the County Attorney on the 2000 siting approval, it believes that the record does not support those opinions. *See IEPA Resp. at 11 (retroactive determination).*

To the extent that the document certifies site approval in 2018, the record does not indicate that the County Board at that time provided public notice, a public hearing, or consideration of the applicable statutory factors. *See IEPA Mot. SJ at 6-7.* The Board is not persuaded that it provides proof that the County Board duly approved the modification now requested by Landfill 33.

The Board concluded above that Landfill 33’s requested modification expands the sited boundaries of the current facility and is a “new pollution control facility” requiring site approval. The Board has reviewed the record and Landfill 33’s arguments on whether it has provided approval for its modification. For the reasons above, the Board concludes that none of the documents demonstrate that the Effingham County Board received an application for site approval of the current modification or followed the requirements of Section 39.2 to approve one. *See IEPA Resp. at 14.* None of the documents complete Landfill 33’s application for a permit modification.

Expiration of Siting

Section 39.2(f) of the Act provides that “[a] local siting approval granted under this Section . . . for a sanitary landfill operation . . . shall expire at the end of 3 calendar years from the date upon which it was granted, and 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) (2018). In its July 5, 2019 review letter, IEPA concluded that Landfill 33’s proposed modification to increase disposal capacity “constitutes an attempt to develop the site based on an expired local siting approval.” R. at 1830.

Landfill 33 argues that it applied for and IEPA approved a development permit for its facility within the required three-year period. Pet. Mot. SJ at 19; Pet. Resp. at 9-10; *see* R. at 1860 (permit history). IEPA’s response pivots to argue that “Section 39.2 does not provide for unlimited development based on a local siting approval.” IEPA Resp. at 13, citing 415 ILCS 5/39.2(c) (2018). In its reply, IEPA suggests that the case does not present an expiration issue, as Landfill 33’s proposed expansion beyond these boundaries required new local siting approval. IEPA Reply at 8-9.

The record in this case does not persuade the Board that Landfill 33's 2000 siting approval has expired.

CONCLUSION

IEPA denied Landfill 33's application for a permit modification because the application was incomplete without new siting approval by the Effingham County Board. Both Landfill 33 and IEPA filed motions for summary judgment.

For the reasons above, the Board concludes that Landfill 33's proposed modification is a "new pollution control facility" that requires site approval. Landfill 33's 1999 application and the Effingham County Board's 2000 site approval did not encompass the proposed increase of approximately 420,650 cubic yards of waste disposal capacity, and Landfill 33 has not provided evidence of site approval for its proposed modification. The Board finds that there is no genuine issue of material fact and that IEPA is entitled to judgment as a matter of law. Accordingly, the Board grants IEPA's motion for summary judgment and denies Landfill 33's motion.

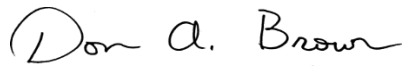
IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2018); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court	
Parties	Board
Illinois Environmental Protection Agency Attn: Christina L. Nannini, Asst. Atty. General 500 S. 2nd St. Springfield, IL 62706 cnannini@atg.state.il.us	Illinois Pollution Control Board Attn: Don A. Brown, Clerk James R. Thompson Center 100 West Randolph Street, Suite 11-500 Chicago, Illinois 60601 don.brown@illinois.gov
Landfill 33, Ltd. Attn: Richard S. Porter and Charles F. Helsten Hinshaw & Culbertson LLC	

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I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on July 16, 2020, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board