

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 20, 2020, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, Notice of Filing and Respondent's Reply in Support of Respondent's Motion for Summary Judgment, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

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Dated: May 20, 2020

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**RESPONDENT’S REPLY IN SUPPORT OF
RESPONDENT’S MOTION FOR SUMMARY JUDGMENT**

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

Respondent first incorporates by reference its Response to Petitioner’s Motion for Summary Judgment and, specifically, re-states its requests that the Board strike evidence submitted by Landfill 33 in its pleadings that is not in the record and disregard Landfill 33’s arguments relying on the extra-record evidence. *See* Pet. Response at 2, 8-9, and 12 (including Drawing A2-03 attached hereto as Exhibit 1, which was also attached as Exhibit A to Petition for Review). Petitioner’s repeated attempts to cite to extra-record materials simply reinforce why its Motion for Summary Judgment challenging the Agency’s September 6, 2019 decision must fail: Petitioner failed to present to the Agency proof that its proposed expansion of its Facility had ever received legally-sufficient local siting approval. Petitioner’s Motion for Summary Judgment should be denied, and the Respondent’s cross-motion should be granted.

ARGUMENT

Landfill 33 relies on the local siting conducted in 2000 not adding any conditions to the 1999 proposal by Landfill 33, and the fact that the Agency later identified the “maximum” final

height as 644 feet above mean sea level (“MSL”) in issuing its permit, for its argument that it is authorized to build its landfill up to that maximum final height along the entire landfill.

However, the Agency permits the boundaries that the applicant requests, if the request creates a stable structure—and those that the applicant has shown it conducted local siting approval for.

Diagrams submitted within Landfill 33’s application at R33-R38 show that the boundary of the landfill has never been proposed to be 644 MSL across the entire top of the landfill, but rather, the “maximum” final height was restricted to the northwest corner. Landfill 33 now seeks to expand the 644 MSL across the entire top of the landfill, thereby increasing the waste disposal capacity and life of the landfill, impacting the Section 39.2 factors that the local government is required to analyze prior to approving or disapproving of an application. Without evidence that the currently proposed expansion has been approved through local siting in accordance with Section 39.2, Respondent respectfully requests that the Board denies Petitioner’s Motion for Summary Judgment and grants Respondent’s cross-motion.

I. In 2000, the Effingham County Board approved a proposal with specifically delineated boundaries that Landfill 33 now seeks to expand.

Landfill 33 is seeking additional waste capacity of 483,000 cubic yards, and an additional 14 to 54 feet of waste in the airspace above the landfill that has not received local siting approval and therefore has not been permitted by the Agency. Landfill 33 argues that, because a map had been presented to Effingham County Board in 2000, with the landfill reaching its maximum height of 644 MSL in one corner of the landfill, the current Effingham County Board is authorized to allow the filling in of waste up to that height across the entire landfill.

As discussed in Respondent’s Response at pages 8 through 10, this argument is meritless. The Agency does not contend that Landfill 33 is seeking to expand its boundaries and increase its disposal capacity by “changing the internal contours of the permitted operating face of the

landfill.” Pet. Response at 4. Rather, Landfill 33’s proposal seeks to expand its boundaries and increase its disposal capacity through a vertical expansion beyond the current boundaries of the facility. Thus, Landfill 33’s request is not a change of the internal contours of the “working face of a landfill.” *Id.* There are no contours of a landfill, nor working face of a landfill, in the airspace above the landfill.

The Agency made the determination that local siting approval is required for the proposed expansion based on Landfill 33’s application that included maps delineating the “currently permitted” boundary (as described by the applicant itself), in comparison to where waste would be filled in highlighted in orange, showing waste being filled in outside of the “currently permitted” boundary. R33-R38. Inspector Dustin Berger noted the permitted “maximum” height of 644 MSL, but also commented that the additional airspace at Landfill 33 would require local siting. R1876. This is because the Act requires local siting for an expansion beyond the boundary of a currently permitted pollution control facility. 415 ILCS 5/39(c); 415 ILCS 5/3.330(b)(2). The boundary of a facility encompasses more than the height at any single tallest point.

Landfill 33’s argument turns on a single word used by Inspector Berger—“maximum”—and the argument is frivolous. While the maximum height at one discrete point in the northwest corner of the landfill would not be exceeded, Landfill 33 requests a vertical expansion of the remaining boundaries of the five-square-acre-facility along the west, south, east, and northeast side, boundaries that were approved through prior local siting, and became the permitted boundaries. The requested vertical expansion of boundaries drastically changes the height, waste disposal capacity, and life of the landfill, impacts the nature and scope of the facility, and thus requires local siting approval consistent with Section 39 of the Act.

Landfill 33 additionally argues its proposal is authorized because, “the map contained in the siting application specifically notes that the contours may be refined/revised.” R1898. First, in that letter on R1898, submitted on August 7, 2019, Landfill 33 describes a map containing that language, but it never produced the map in its application or subsequent submittals. This type of hearsay description of otherwise available documents does not constitute “proof” under Illinois law. *See* Ill. R. Evid. 1002 (“To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required.”) (also applicable to the affidavit of former County Board Chairman Leon Gobzynski at R1898).

As argued in the Agency’s Response at pages 4 through 6, Landfill 33’s request that this Board consider “the map contained in the siting application” in reviewing the Agency’s September 6, 2019 decision flouts basic principles of administrative law. Landfill 33 did not provide the map to the Agency in its permit application. Accordingly, it is not part of the record and Landfill 33’s reliance on it in this proceeding is baseless.¹

But, even if Landfill 33’s newly-presented map were considered, it **again** cuts against Landfill 33’s position. As presented by Landfill 33 in this proceeding, the map states that: “The final contours and conditions shown here may be refined or undergo minor modifications for the IEPA Developmental Permit Application.” This was entirely accurate: the contours in Landfill 33’s newly-presented map were slightly modified when Landfill 33 applied for its original developmental permit based on the 2000 local siting, resulting in the slightly different “currently

¹ Also baseless are Landfill 33’s repeated references to supposed “admissions” within the Agency’s Statement of Facts in its Motion. *See, e.g.*, Pet.’s Resp. at 7 (arguing that Agency’s mere quotation of two sentences from a submission by Landfill 33 constituted an “admi[ssion]” that evidence had been provided in support of those sentences). There is no principle of Illinois law that supports the premise that a party’s quotation of a document prepared by another party constitutes an admission of any fact, let alone the accuracy of the statements within that document. The Agency’s Statement of Facts speaks for itself.

permitted” boundaries at R33. What Landfill 33 seeks now, though is not a “minor” “refinement” or “revision” of the sited contours: what it seeks is a wholesale elimination of them. Landfill 33 proposes a major expansion to the landfill, that seeks to vertically expand all boundaries of the landfill, aside from the northwest corner, and is the equivalent of stacking a new landfill on top of the current landfill. Landfill 33’s proposed expansion requires local siting approval.

II. The Agency’s permitting function ensures that local siting approval has been conducted.

Landfill 33 alleges that Respondent has completely ignored the *Brickyard* case, where the Fourth Circuit stated that *M.I.G. Investments* does not establish a volumetric boundary or trigger local siting review for changes in waste volume within the boundaries of existing landfills, and that a change in volume without expanding beyond a vertical boundary does not trigger local siting under Section 39(c). Pet. Resp. at 5 (citing *Illinois Env’tl. Prot. Agency v. Illinois Pollution Control Bd.*, 2018 Ill. App. 4th 170144, ¶ 34). However, because Landfill 33 seeks an expansion *outside* of the boundaries of the existing landfill, *M.I.G. Investments* directly applies. *See M.I.G. Investments, Inc. v. Illinois Env’tl. Prot. Agency*, 122 Ill. 2d 392, 401 (1988) (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). The requirements in Section 39.2 also make clear that it is not merely a closed-door county board meeting that satisfies the local siting review, but rather, the applicant must provide notice of an application seeking a significant expansion, opportunity for review and comment, and a public hearing. *See* 415 ILCS 5/39.2.

Moreover, in *Brickyard*, the Board expressly acknowledged that a county board’s absence of defining volumetric capacity by cubic yards of waste does not authorize county boards issuing a blank check to applicants but, further, the county board in *Brickyard* had

previously specifically approved of the design the applicant sought. *Brickyard Disposal v. Illinois Env'tl. Prot. Agency*, PCB 16-66, slip op. at 7-8 (Nov. 17, 2016). Here, Petitioner has only produced evidence showing the difference between what prior local siting approved, and what it is now seeking. The supplemental submittals of statements by individuals explaining how the past county board decision contemplated this future request is speculation, not proof of local siting in accordance with Section 39.2.

Landfill 33 argues that the Agency has admitted “a vertical boundary of 644 MSL was approved by the County in 2002 and permitted by no less than the Agency itself in 2002.” Pet. Response at 6. The local siting was conducted by the Effingham County Board in 2000, based on Landfill 33’s application in 1999. The 644 MSL maximum height of the landfill, noted by the Agency through issuing the permit (not the Effingham County Board), was based on the requested boundaries of Landfill 33, a request that also included the lower vertical boundaries of 590, 600, 610, 620, 630, and 640 MSL across the top of the landfill. R33-R38.

Landfill 33 further raises an argument regarding what the “boundary of a currently permitted facility is.” Pet. Response at 6-7. Petitioner’s distinction between what local siting has approved and what the Agency has most recently permitted, while significant to the facts of *Brickyard*, is inapposite to the facts of this matter. Here, the source being used to ascertain boundaries comes directly from the applicant as a result of local siting conducted in 2000. *See* R33. The boundaries Landfill 33 sought in the local siting conducted in 2000 are the boundaries the Agency permitted in 2002 and the boundaries Landfill 33 now seeks to expand. Moreover, it is the Agency, not the local county board, that issues the permit in accordance with Section 39 of the Act. This requires the Agency to conduct a review of whether local siting approval has been obtained. Based on the county board’s analysis of the Section 39.2 factors, the local siting

approval might add conditions to the proposal, that would be reflected in the permit issued by the Agency. A county board cannot, however, satisfy the requirements of Section 39.2 by telling the Agency that a newly-proposed boundary was somehow authorized by a prior county board twenty years earlier that never saw the new boundary; and an applicant cannot argue that local siting approval is not required without showing proof that the prior authorization approved of the specific requested boundaries, as had been the case in *Brickyard*.

Here, the Agency permitted what Landfill 33 proposed, and led to the Agency, upon issuing the permit, establishing that the maximum permitted height was 644 MSL—in one corner of the Facility, with other portions of the Facility having significantly lower permitted heights. The Effingham County Board did not play a part in establishing a maximum height, as evidenced in their findings of fact that do not include the 644 MSL, but approved the expansion as proposed by Landfill 33. R29. The permit issued by the Agency led to defined maximum heights, the same permit that was based upon what Landfill 33 submitted in its application, including the boundaries depicted on R33. By requiring local siting approval for this currently proposed expansion, the Agency is following its obligation under Section 39(c) of the Act to ensure that the local government has approved of the requested expansion in accordance with Section 39.2 of the Act, after providing an opportunity for interested parties and the public to review and comment on the request.

Landfill 33's proposal to increase the height, waste disposal capacity, and life of the landfill beyond what the local siting conducted in 2000 considered requires local siting approval. In *Waste Management*, the facility was seeking a reconfiguration of the final contours of the landfill as it was closing, with some areas higher and some lower than the permitted design approved by the Agency. *Waste Management, Inc. v. Illinois EPA*, PCB 94-153, slip op. at 3

(July 21, 1994). The Board specifically noted that “the reconfiguration proposed here will result in a net loss in volumetric capacity [14,000 cubic yards] to the landfill. The net loss in capacity will accordingly shorten the life of the landfill, decreasing the impacts on the criteria of Section 39.2(a) as previously considered by Christian County.” *Waste Management* at 6-7 (citing *M.I.G. Investments, Inc. v. Illinois EPA*, 122 Ill. 2d 392 (1988)). Here, by contrast, Landfill 33 is seeking to add 483,000 cubic yards of waste, and solely through an expansion of previously approved vertical boundaries. This significant expansion will increase the impacts on the criteria of Section 39.2 as previously considered by Effingham County.

III. Landfill 33 fails to show proof of local siting because it proposes to place waste where previous local siting approval did not contemplate, and where the review by the current government authority did not follow Section 39.2.

First, Landfill 33 argues that there is no support for the argument that the local siting approval obtained in 2000 has expired for the expansion sought now, in 2020. The Agency reincorporates its argument made within its Response at Section III.C, that the Act does not allow for unlimited use of local siting approval. Further, Section 39.2(f) states that a local siting approval granted under this Section shall expire at the end of 3 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. *See* 415 ILCS 5/39.2(f). This provision was more likely included to protect applicants who have gone through local siting, and are waiting for the Agency to review its application, from having to conduct local siting approval again if that review is taking time, than to authorize an applicant who submits an application to develop within 3 years to not need to return for local siting approval twenty years later for a subsequent requested expansion. The expiration provision serves to ensure that local siting approval be outlined within a permit, by requiring an application for a permit to be submitted within three years of the local siting.

Allowing local siting approval to be relied on decades later creates confusion in ascertaining exactly what the reviewing body had in front of it, particularly if the applicant has not submitted the relied upon materials within the application, because the Agency is not a party to the local siting approval proceedings. But, here, regardless of the interpretation of the expiration provision, because the currently proposed expansion exceeds the boundaries proposed at the local siting conducted in 2000, that led to the 2002 permitted boundaries, Landfill 33 needs to conduct local siting approval specific to that new proposal.

Second, Landfill 33 argues that it has presented sufficient evidence of local siting approval, and the Agency is conflating two arguments – that evidence that Section 39.2 was followed in 2000 has not been provided, and that Landfill 33 has not provided documents to show that the current expansion was part of its 1999 application or considered on February 21, 2000. The Agency does not argue that the process involved in the hearing held in 2000 was not sufficient, as that would be reviewed based on an appeal by a member of the public back then pursuant to Section 40.1, not the Agency. Landfill 33's application shows the difference between the existing boundaries of the landfill, and what Landfill 33 proposes, leading to the Agency's determination that local siting review is required for the currently proposed expansion.

Landfill 33's reliance on Section 39.2 process used in 2000, for the proposed expansion in 2020, cuts out *current* members of the public who might have a comment on the currently proposed expansion, as Section 39.2 procedures including notice, inspection and comment, and a public hearing, have not been followed in 2019-2020 for the currently proposed expansion. Furthermore, the time period for a member of the public to appeal, pursuant to Section 40.1, the procedures done in 2000, has expired. Landfill 33 provides the current Effingham County

Board's alleged perspective on the currently proposed expansion but has not provided the public this same opportunity through the procedures in Section 39.2.

If the local siting approval in 2000 had specifically addressed the expansion Landfill 33 now seeks, and interested parties and the public had the opportunity to review and comment on this specific expansion of 644 MSL across the entire facility, Landfill 33 has not provided any proof of it—not before the Agency's September 6, 2019 decision, and not after it. The Agency has not “admitted that the record shows that the maximum elevation of the landfill which was approved by the County Board was 644 MSL” (Pet. Response at 13), rather, the record shows that the Effingham County Board approved the expansion as proposed by Landfill 33, and that proposal, according to Landfill 33, included at least one map that contained specific vertical boundaries of 590 to 640 across the top of the landfill, with the “maximum” elevation reached only in the northwest corner. This proposal became Landfill 33's permitted boundaries, that Landfill 33 now seeks to expand. Before the Agency can issue the permit, Section 39(c) requires that Landfill 33 obtain local siting approval for this expansion in accordance with Section 39.2. Thus, Respondent requests that the Board deny Landfill 33's motion for summary judgment, and grant the Agency's cross-motion.

Additionally, as Respondent stated within its Response, the issue of ownership of the Facility is currently still pending between Landfill 33 and the Agency, as Landfill 33 continues to submit materials regarding ownership of the landfill. While Landfill 33 had provided the necessary signature of an authorized agent of the Richard E. Deibel Estate as of November 7, 2019, on December 27, 2019, Landfill 33 submitted a request for transfer of ownership from the Estate to the Richard E. Deibel Revocable Trust. The Agency has since denied this request, based on the Trust not being signed.

Because the ownership issue continues to be discussed between the parties, as Landfill 33 continues to submit information and requests, the question of ownership is not squarely presented in the administrative record filed on December 5, 2019, and therefore cannot be adequately argued in this stage of the proceedings. As a result of the further communications between Petitioner and the Agency after the filing of the current Petition, any review of the Agency's decision regarding whether the appropriate owners had signed Petitioner's application as of September 6, 2019 would constitute an academic question serving no practical legal purpose, and the issue is therefore moot for purposes of this proceeding. *See* Resp.'s Resp. at 6-7. As a decision has been made on Petitioner's most recent submittal, Petitioner has 35 days to appeal that decision from that date or submit additional information in response to that letter that might again resolve the ownership issue. *See* 415 ILCS 5/40(c). Therefore, in its Motion, Response, and this Reply, Respondent has focused on the issue of Petitioner not conducting necessary local siting in support of its requested expansion required by Section 39(c) of the Act.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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Date: May 20, 2020

CERTIFICATE OF SERVICE

I hereby certify that I did on May 20, 2020, cause to be served by electronic mail, a true and correct copy of the following instruments entitled NOTICE OF FILING and RESPONDENT'S REPLY IN SUPPORT OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT upon the persons listed on the Service List.

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