

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BFI WASTE SYSTEMS)	
OF NORTH AMERICA, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB No. 24-29
)	
ILLINOIS ENVIRONMENTAL)	(Permit Appeal -RCRA)
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF FILING

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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the attached **MOTION TO SUPPLEMENT RECORD ON APPEAL**, a copy of which is herewith served upon you.

DATED: April 18, 2024

Respectfully submitted,

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BFI WASTE SYSTEMS
 OF NORTH AMERICA, LLC,

 Petitioner.

 BY: /s/Scott B. Sievers
 Scott B. Sievers
 Attorney for Petitioner

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ILLINOIS ENVIRONMENTAL)	(Permit Appeal -RCRA)
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MOTION TO SUPPLEMENT RECORD ON APPEAL

NOW COMES Petitioner, BFI WASTE SYSTEMS OF NORTH AMERICA, LLC, by and through its attorney, Scott B. Sievers of Brown, Hay + Stephens, LLP, and, pursuant to 35 Ill. Adm. Code 101.500, moves this honorable Board to order Respondent, Illinois Environmental Protection Agency, to supplement its Record on Appeal. In support, Petitioner states the following:

1. On March 13, 2024, Respondent Illinois Environmental Protection Agency (“Illinois EPA”) filed its Record on Appeal in this matter along with an Index of Record and Certification of Record.
2. Section 105.116(a) of the regulatory provisions applicable to this matter provides that Illinois EPA “must file with the Board the entire record of the Agency’s ... decision[.]” 35 Ill. Adm. Code 101.202, 105.116(a); *see also* 35 Ill. Adm. Code 105.212(a) (“The Agency must file its entire Agency record of decision with the Clerk[.]”) This Board has held that “[t]he record must include all documents that the Agency either relied on or ‘reasonably should have relied on’ and it is the Agency’s responsibility to file the complete

record.” *KCBX Terminals Company v. Illinois EPA*, 2014 WL 1598132, at *11 (PCB No. 14-110) (Order of April 17, 2014).

3. Section 105.212(b) of those provisions states that Illinois EPA’s record must include:

- 1) Any permit application or other request that resulted in the Agency's final decision;
- 2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application;
- 3) The permit denial letter that conforms to the requirements of Section 39(a) of the Act or the issued permit or other Agency final decision;
- 4) The Agency public hearing record of any Agency public hearing that may have been held before the Agency, including any transcripts and exhibits; and
- 5) Any other information the Agency relied upon in making its final decision.

35 Ill. Adm. Code 105.212(b).

4. Upon information and belief, the Record on Appeal filed by Illinois EPA on March 13, 2024, does not constitute the entire record of its decision, as several documents specifically referenced in the existing Record on Appeal as well as documents known to, or almost certain to, exist have not been included in the Record on Appeal.

5. The Record on Appeal specifically references documents but does not include them. Review Notes state in pertinent part as follows:

As many hazardous waste management facilities are nearing the 30-year mark from the date their post-closure care began, Illinois EPA, other States, and USEPA began to examine and evaluate the applicable requirements in the regulations to determine whether and how the completion of the required post-closure can be met.

The afore-mentioned permit conditions and requirements regarding post-closure care of a hazardous waste landfill were developed based on the following applicable regulations and reference materials:

...

d. USEPA's **Guideline for Evaluating Post-Closure Care Period, dated December 16, 2016;**

b. [sic] ASTSWMO¹ **Position Paper, dated July 20, 2022 "Post-Closure Care Beyond 30 Years at RCRA Subtitle C Facilities";** and

c. **Illinois EPA's recent decisions regarding extending post-closure care at other RCRA facilities in Illinois.**

(R. 000223–000224) (emphasis added). Despite Illinois EPA's reliance upon these documents in developing permit conditions and requirements and thus "relied upon in making its final decision," 35 Ill. Adm. Code 105.212(b)(5), the Record on Appeal contains only subjective summaries of the U.S. EPA guideline and the ASTSWMO position paper but not the actual U.S. EPA guideline and ASTSWMO position paper. The Record also only contains single-paragraph summaries of Illinois EPA's recent decisions to extend post-closure care at other Illinois RCRA facilities rather than copies of the decisions themselves. (R. 000229) (referencing decisions on City of North Chicago, RCH Newco, and CID sites). To ensure compliance with Illinois EPA's obligation to file "its entire Agency record of decision," 35 Ill. Adm. Code 105.212(a), including "[a]ny ... information the Agency relied upon in making its final decision," 35 Ill. Adm. Code 105.212(b), the Board should order Illinois EPA to supplement the Record on Appeal to include both the U.S. EPA guideline and the position paper as well as the recent decisions it references in the Review Notes.

¹ Association of State and Territorial Solid Waste Management Organization. (R. 000228).

6. Review Notes further state that “[i]nternal discussion with lead workers and co-workers in the RCRA unit determined that the ‘pro-rating’ of post-closure care which has been historically included in the RCRA permits is not the correct manner in which to require cost estimates of post closure care.” (emphasis added). Despite Illinois EPA’s reliance upon these internal discussions “in making its final decision,” 35 Ill. Adm. Code 105.212(b)(5), the Record on Appeal contains no documentation of these internal discussions, such as memoranda, emails, or text messages. On information and belief, Agency staff largely have been working remotely since the beginning of the COVID-19 pandemic in March 2020, thereby making the likelihood that no documentation by email or otherwise exists of these internal discussions highly doubtful. To ensure compliance with Illinois EPA’s obligation to file its entire Agency record of decision, including any information it relied upon in making its final decision, the Board should order Illinois EPA to supplement the Record on Appeal to include all documentation of these discussions, including—but not necessarily limited to—emails.

7. Review Notes further state, “It has been advised by the Illinois EPA DLC [Division of Legal Counsel] that above sections are written to be applied for facility to initial extending of the post closure care. Thus, it is applicable when the facility requests for extending of post-closure care.” (R. 000225). To ensure compliance with Illinois EPA’s obligation to file its entire Agency record of decision, including any information it relied upon in making its final decision, the Board should order Illinois EPA to supplement the Record on Appeal to include all documentation of this advice, including—but not necessarily limited to—memoranda and emails. To the extent Illinois EPA may contend that such documentation contains attorney-client privileged communications protected

from disclosure, the Agency's inclusion of this advice in the Record on Appeal filed with this Board waived that privilege. *Center Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 35 (“The basic, well-settled rule is that when a client discloses to a third-party a privileged communication, that particular communication is no longer privileged and is discoverable or admissible in litigation.”); *also Permian Corp. v. United States*, 665 F.2d 1214, 1219–1222 (D.C. Cir. 1981).

8. Review Notes further state in pertinent part as follows:

When **questions were raised regarding the extending of Post-Closure** at other States during the USEPA-Lead Post-Closure Care Implementation Group (which met generally on a Bi-Weekly biases [*sic*] in 2022 through April 2023), **it was general concurrence among USEPA and States representatives** that if the waste remains in place, post-closure care must continue to be implemented. Among those States that have extended the post-closure care beyond 30-years were Wisconsin (which is one of Region 5 States) and Florida. **In response to this reviewer's inquiry** about how these states implemented extending of post-closure care ta [*sic*] RCRA sites, the following responses were received both on 4/23/2023:

- Doug Coenen, P.E. of Wisconsin Department of Natural Resources called initially to discuss on the phone. He indicated that WI Statute requires long-term care (a.k.a. Post-Closure Care) to be implemented in perpetuity. He indicated that this is why they do not even need to address extending of post-closure care [*sic*] as if the waste remains in place, post-closure care continues and there is not need to address post-closure care period. However, WI still uses rolling 30-years for financial assurance. **He then sent me an email to quote [*sic*] the Statute [*sic*] of WI (289.41(1.m)(c).**
- Merline Russell, P.G. of Florida Department of Environmental Protection has indicated they have extended post-closure care in a couple of ways. One is to simply add another 30-years to initial 30-years and requires 60-years of Post-Closure care. In another way, FL requires the facility to have “rolling” 30-years, which means it always have 30 years as required post-closure care period regardless of how many years of post-closure care the facility completed. This rolling 30-year is also reflected in the financial assurance requirements.

(R. 000229–000230) (emphasis added). Despite Illinois EPA’s reliance upon discussions with, and an alleged concurrence among, U.S. EPA and states representatives as part of the “USEPA-Lead Post-Closure Care Implementation Group” as well as upon communications with Florida and Wisconsin public officials that included email messages “in making its final decision,” 35 Ill. Adm. Code 105.212(b)(5), the Record on Appeal fails to include documentation of these discussions, of the alleged concurrence, and of these communications, such as minutes or summaries from group meetings, emails comprising group discussions, and emails or other documentation of the Florida and Wisconsin communications. To ensure compliance with Illinois EPA’s obligation to file its entire Agency record of decision, including any information it relied upon in making its final decision, the Board should order Illinois EPA to supplement the Record on Appeal to include all documentation of these discussions, of the alleged concurrence, and of these communications between Illinois EPA and Florida and Wisconsin public officials as well as among the USEPA-Lead Post-Closure Care Implementation Group.

9. Finally, Petitioner seeks to include in the Record on Appeal the following BFI Davis Junction permit modification decisions and the Agency’s accompanying review notes for each, as these modifications evidence the Agency’s long-established precedent for calculating and requiring financial assurance for post-closure care for this facility:

- (a) Log No. B-142R-M-1, revised permit dated 10/31/2008;
- (b) Log No. B-142R-M-4, revised permit dated 3/29/2010;
- (c) Log No. B-142R-M-9, revised permit dated 11/21/2011;
- (d) Log No. B-142R-M-13, revised permit dated 8/31/2012;
- (e) Log No. B-142R-M-14, revised permit dated 10/8/2013;

- (f) Log No. B-142R-M-15, revised permit dated 10/21/2014;
- (g) Log No. B-142R-M-17, revised permit dated 10/21/2015;
- (h) Log No. B-142R-M-18, revised permit dated 11/23/2016; and
- (i) Log No. B-142R2 – Permit Renewal dated 9/26/2018.

To ensure compliance with Illinois EPA's obligation to file its entire Agency record of decision, including any information it relied upon in making its final decision, the Board should order Illinois EPA to supplement the Record on Appeal to include all documentation of these permit modification decisions, including the Agency's accompanying review notes.

WHEREFORE, Petitioner, BFI WASTE SYSTEMS OF NORTH AMERICA, LLC, moves this honorable Board to order Illinois EPA to supplement the Record on Appeal as set forth above and grant Petitioner such other and further relief as the Board may deem appropriate.

DATED: April 18, 2024

Respectfully submitted,

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BFI WASTE SYSTEMS
OF NORTH AMERICA, LLC,

Petitioner.

BY: /s/Scott B. Sievers
Scott B. Sievers
Attorney for Petitioner

BFI Waste Systems of North America, LLC v. Illinois EPA
Pollution Control Board No. 24-29

CERTIFICATE OF SERVICE

Scott B. Sievers of the law firm of Brown, Hay + Stephens, LLP herein certifies that on April 18, 2024, from Springfield, Illinois, he electronically submitted for filing the foregoing **MOTION TO SUPPLEMENT RECORD ON APPEAL** with the Pollution Control Board by using the Clerk's Office On-Line (COOL) eFile system. Scott B. Sievers further certifies that, at approximately 2:00 p.m. on April 18, 2024, he served the other parties in this case with a copy of the foregoing document by transmitting the one (1) page document by e-mail to the parties' representatives, who are identified below, at their designated e-mail addresses of record:

Senior Assistant Attorney General Christopher J. Grant
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VERIFICATION BY CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters herein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

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BY: /s/Scott B. Sievers
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Attorney for Petitioner