BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

Please take note that on May 3, 2024, I filed Illinois EPA's Response to Motion to Supplement Record, a copy of which are attached and served upon you.

Respectfully Submitted,

BY: /s/ CHRISTOPHER GRANT
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Certificate of Service

I, CHRISTOPHER GRANT, an attorney, do hereby certify that, today, May 3, 2024, I caused to be served on the individuals listed below, by electronic mail, a true and correct copy of Respondent's Motion to Extend Time for Filing Records, and Notice of Filing.

/s/ CHRISTOPHER GRANT

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RESPONDENT, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO PETITIONER'S MOTION TO SUPPLEMENT RECORD

Now comes Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by KWAME RAOUL, Attorney General of the State of Illinois, and hereby responds to Petitioner's Motion to Supplement Record on Appeal ("Motion"). For the reasons set forth herein, Respondent agrees to supplement the Record with the two USEPA guidance documents requested by Petitioner, but objects to the other materials requested by Petitioner. As further described herein, the requested materials are not relevant to the September 25, 2023 permit decision ("Permit Decision") in this case, and inclusion in the Record is contrary to established Board precedent.

At the outset Respondent notes that in its Motion, Petitioner has not attached any proposed documents to its Motion that it seeks to include in the Record, . Instead (with the exception of the USEPA guidance specifically identified). Respondent's Motion reads more like written discovery requests. As explained herein, this is improper in a Motion to Supplement the Permit Record.

A. Respondent Agrees to Partially Supplement in Accordance with Paragraph 5.

In Paragraph 5 of the Motion, Petitioner requests inclusion of two documents, USEPA's Guideline for Evaluation Post-Closure Care Period dated December 16, 2016, and ASTSMO

Position Paper, dated July 20, 2022 (together, "USEPA Guidance Documents"). Without agreeing that Illinois EPA relied on these documents in this particular permit decision, the documents do provide USEPA's guidance to delegated states regarding post-closure care for hazardous waste landfills, such as Petitioner's landfill. Accordingly, Illinois EPA does not object to inclusion of these two documents in the Record, and upon approval by the Hearing Officer or the Board, Respondent may supplement the Record with these two documents.

B. Illinois EPA Permit Decisions for Other Facilities are not Part of the Permit Record

Respondent strenuously objects to Petitioner's request to supplement the Record with "recent decisions regarding extending post-closure care at other RCRA facilities in Illinois." (Motion, p.4). Information regarding other permits and permit decisions can have no relevance to the Permit Decision in this case. The Board has recognized this repeatedly and prohibited inclusion of other permit actions into the Record or for use at hearing. In *Land and Lakes Company v. Illinois EPA*, PCB 90-118 (November 8, 1990), the Petitioner sought to supplement the permit record with earlier permits from four other landfills, claiming that they was relevant to the contested condition. The Board noted that the sole question before the Board was whether the application at issue in the appeal demonstrates compliance with the Act. *Id. slip op,* at 7. The Board denied the request to supplement the record, stating "[t]he Board will not put itself in the position of second-guessing the Agency's permit decision based upon information in other permit files in the Agency's possession". *Id. slip op.* at 8.

In *White & Brewer v. Illinois EPA*, PCB 96-250, (March 20, 1997), the Board rejected the Petitioner's attempt to supplement the permit Record with documents related to another of its permit applications, claiming that it was necessary "to give the Board a complete record". The Board stated "[t]here is no basis …for requiring the Agency record include correspondence relating

to other permit applications, and including such information could confuse the record." *Id*., slip op. at 11. Petitioner's Motion to Supplement was denied.

Similarly, in another permit appeal, the Board affirmed the Hearing Officer's ruling at hearing, holding that other permit information was not admissible. *In Community Landfill Company et al v. Illinois EPA*, PCB 01-170, (December 6, 2001), *aff'd sub nom*, 331 Ill. App. 3d 1056 (3rd Dist. 2002), the Board found that documents relating to a second permit issued the same year for the same landfill were outside the record, and the Board "….finds no reason to grant an exception to the general rule prohibiting the admission of information outside of the Agency record." *Id.*_Thus, even though the second permit was for the same site, and proximate in time to the permit at issue in this permit appeal, the Board found it was not relevant and excluded from consideration.

Petitioner's Motion goes far beyond the cases cited above. Petitioner seeks "recent decisions regarding extending post-closure care at other RCRA facilities in Illinois." (Motion, p.4). In other words, all decisions for all hazardous waste storage, treatment or disposal facilities in the State, regardless of geographical location, type of facility, history, hazardous waste stream, or enforcement history. Not only would such information be irrelevant to the issues in this case, which deal only with Illinois EPA's Permit Decision, it would absolutely confuse the Record with irrelevant information. Petitioner's request to add this information to the permit Record must be denied.

C. Prior Permit Modifications for Petitioner's Landfill Should Not Be Included in the Record of this Permit Action

The sole permit decision at issue in this case is Illinois EPA's Permit Decision regarding post-closure financial assurance. In its Motion (pp. 7-8), Petitioner seeks to include nine prior permit modifications to the Record. The nine permit modifications were issued over a ten year

period, beginning in 2008.

As discussed above, prior permits for a facility are not properly included in the Record of a subsequent permit that is the subject of an appeal. *White & Brewer v. Illinois EPA*, PCB 96-250, slip op. at 11(March 20, 1997); *Land and Lakes Company v. Illinois EPA*, PCB 90-118 (November 8, 1990), slip op. at 8 ("the Board will not put itself in the position of second-guessing the Agency's permit decision based on information in other permit files in the Agency's possession").

In accordance with Section 40(a) of the Illinois Environmental Protection Act, 415 ILCS 5/40(a)(1) (2022), any challenge to the nine listed permit modifications needed to be filed within 35 days, and plainly Petitioner cannot now challenge any of the provisions of these permit modifications. Further, the Record in this matter is currently over 1600 pages and will be larger once the USEPA guidance information is included. Adding information from nine previous permit modifications, which were not previously challenged and without any information from Petitioner as to how they could possibly be relevant to the Permit conditions at issue in this case, would absolutely confuse the relevant Record in this matter, and must be denied.

D. Information Regarding Other States' Policies Cannot be Relevant

The sole issue in this matter is Illinois EPA's decision on post-closure financial assurance, as identified in the Permit Decision. Illinois EPA, not Wisconsin or Florida, is responsible for issuance and management of RCRA permits in the State of Illinois. Notwithstanding this obvious fact, Petitioner seeks to compel Illinois EPA to include emails and other information from discussions with other states in the Record of its Permit Decision.

While contacts with Wisconsin and Florida were listed in the permit reviewer notes, these were plainly in reference to the issues in the USEPA and multistate guidance. USEPA and all

states operating under delegated authority from USEPA have engaged in discussions regarding the correct interpretation of the Federal Hazardous Waste regulations for many years. However, it is only Illinois EPA that had the authority to, and did, make the Permit Decision, which is the only relevant issue in this case. Illinois EPA did not, and legally could not, make its decision based on input from other permitting entities, such as other states. Accordingly, it could not have based its decision on discussions with Wisconsin, Florida, or any other state agency.

Finally, Petitioner is plainly speculating about "what could have happened", and fishing for information. This must be done through the Board's discovery procedure and not through a Motion to Supplement the Record. As the Board held in *Marathon Oil Company v. Illinois EPA*, PCB 92-166, slip op. at 2-3 (March 11, 1993).

> "A motion to supplement the record is not the proper avenue for discovery to take place. Further Marathon does not allege that Section 105.102(b)(5) has not been complied with, but rather that the record does not contain documents the Agency could have or should have considered at the time the Agency reviewed Marathon's application. The Board finds that if Marathon believes that certain documents is possesses may have been considered by the Agency, it may include these documents as exhibits to its petition and argue the merits of their including in the Board's record at hearing."

Petitioner has done no discovery and attaches no documents to its Motion. Instead, Petitioner speculates that there may be information, and attempts to use its Motion to force Respondent to search for likely irrelevant information. Illinois EPA has certified that the Record is complete. If Petitioner wants to venture into speculation, it must seek this information through the Board's discovery procedures. In accordance with these procedures, irrelevant discovery requests, and requests objectionable on the basis of privilege are subject to objection and rulings by the Hearing Officer. Relevant and responsive documents may then be tendered by Petitioner through Motion to Supplement. However, trying to use a Motion to Supplement to initiate discovery is improper.

E. Attorney-Client Privilege has not been Waived.

In another argument more suited to discovery, Petitioner claims that the Permit reviewer's notes, which evidence reliance on advice from Illinois EPA's Division of Legal Counsel ("DLC"), constitute waiver of attorney-client privilege for the entire subject matter of this case: Petitioner's having failed to complete post-closure care of the subject hazardous waste landfill, and the concomitant need for continued post-closure financial assurance. Petitioner's claim is defeated by the very authority cited by Petitioner in its Motion, *Center Partner Ltd. V. Growth Head GP, LLC et al*, 2012 IL 113107. In that case, the Plaintiff's claimed "subject matter waiver", *i.e.* waiver of privilege broadly over the entire subject matter involved in a disclosure. In *Center Partner* the disclosure was made in the course of business negotiations prior to the initiation of litigation. The Supreme Court held that no such waiver had occurred. The Supreme Court held that "extrajudicial disclosures", *i.e.* those not made in the course of litigation, waived only the disclosure itself, and could not be expanded into the subject matter surrounding the disclosure. *Id*., ¶ 60. In our case, the permit reviewer disclosed that DLC supported his interpretation of post-closure care as represented by his recommendation. However, this disclosure was made during the course of his permit evaluation, well before Petitioner initiated this litigation. The fact that litigation eventually resulted does not convert this disclosure into a "judicial disclosure", which could result in waiver of subject matter privilege. *Id,* ¶ 62.

Accordingly, Petitioner's claim that the Record should broadly cover discussions, communications, emails, and other information shared with counsel is unsupportable. No privilege over these matters has been waived. Further, no "communications" with counsel were disclosed, no meeting, emails notes, or other correspondence. All that was disclosed was support from DLC on the permit reviewer's position. In discovery, Petitioner will not be entitled to other information,

which is plainly privileged.

WHEREFORE, Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that the Hearing Officer:

1. Allow Respondent to supplement the Record with the USEPA's Guideline for Evaluation Post-Closure Care Period dated December 16, 2016, and ASTSMO Position Paper, dated July 20, 2022; and

2. Deny Petitioner's Motion to Supplement Record on Appeal in all other respects.

RESPECTFULLY SUBMITTED:

PEOPLE OF THE STATE OF ILLINOIS
by KWAME RAOUL,
Attorney General of the
State of Illinois

BY: /s/ CHRISTOPHER GRANT

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