

ILLINOIS POLLUTION CONTROL BOARD
May 16, 2024

BFI WASTE SYSTEMS OF NORTH)
AMERICA, LLC,)
)
Petitioner,)
)
v.) PCB 24-29
) (Permit Appeal – RCRA)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

HEARING OFFICER ORDER

On February 15, 2024, the Board accepted petitioner’s, BFI Waste Systems of North America (BFI), permit appeal. BFI Waste Systems of North America v. IEPA, PCB 24-29 (February 15, 2024). BFI appeals the Illinois Environmental Protection Agency’s (Agency) issuance of a renewed Resource Conservation and Recovery Act Post-Closure Permit with conditions for the Davis Junction Landfill in Ogle County. *Id.* slip op. at 1. “BFI appeals on the grounds that the Agency misconstrues regulatory provisions and its authority in extending post-closure care requirements including financial assurance.” *Id.* On April 18, 2024, BFI filed a motion to supplement the Record on Appeal (Record) (Mot.). On May 3, 2024, the Agency filed its response (Resp.).

BFI Motion To Supplement

BFI argues that the Agency’s reasons for the permit conditions and requirements for the permit issued on September 25, 2023, are not entirely included in the Record. (Mot. at 3-8). BFI states that the record “specifically references documents but does not include them”. *Id.* at 3. First, BFI cites the record and in pertinent part: “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”: *Id.* at 4. (R 000223-224)

d. USEPA’s Guideline for Evaluating Post-Closure Care Period, dated December 15, 2016;

b.[sic] ASTSWMO 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.

BFI explains that “The Record on Appeal contains only subjective summaries of the U.S. EPA guideline and the 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." *Id.* (R 000229)

Next BFI, without citation to the Record, observes that the review notes found in the record 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." Mot. at 5.

I cannot locate the above passage and BFI failed to include the citation to the Record. Consequently, BFI's argument will not be addressed.

Next, BFI cites to the record where the Review Notes 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 post-closure care." (R. 000225) *Id.* at 5. BFI generalizes and casts a wide net requesting "all documentation of this advice, including-but not necessarily limited to-memoranda and emails." *Id.* BFI argues that this requested material is not protected by attorney-client privilege. In support, BFI cites to Center Partners, Ltd. V. Growth Head GP, LLC, 2012 IL 113107 ("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.") *Id.* at 6.

Next, BFI observes that the Review Notes disclose that the reviewer discussed with authorities from Wisconsin and Florida regarding their respective implementation of extending post-closure care at RCRA sites post-closure care. *Id.* at 6-7. BFI argues that the Record "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 such documentation of the Florida and Wisconsin communications." *Id.* at 7.

Finally, BFI requests that the Record be supplemented to include nine 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 at the facility." *Id.* at 7-8. The revised permits/permit renewal Log Numbers and decision dates are as follows:

- (a) Log No. B-142R-M-1, 3/29/2008
- (b) Log No. B-142R-M-4, 3/29/2010
- (c) Log No. B-142R-M-9, 11/21/2011
- (d) Log No. B-142-M-13, 8/31/2012
- (e) Log No. B-142R-M-14, 10/8/2013
- (f) Log No. B-142R-M-15, 10/21/2014
- (g) Log No. B-142R-M-17, 10/21/2015
- (h) Log No. B-142R-M-18, 11/23/2016
- (i) Log No. B-142R2, 9/26/2018

Agency Response

The Agency does not object to the Record being supplemented with two of the documents referenced in BFI's motion found in BFI's motion at paragraph 5; USEPA's Guideline for Evaluating Post-Closure Care Period, dated December 16, 2016, and ASTSWMO Position Paper, dated July 20, 2022 "Post-Closure Care Beyond 30 years at RCRA Subtitle C Facilities". Resp. at 1-2.

The Agency does object to BFI's request to supplement the Record with the document entitled "Illinois EPA's recent decisions regarding extending post-closure care at other RCRA facilities in Illinois." *Id.* at 2. The Agency argues that "[i]nformation regarding other permits and permit decisions can have no relevance to the Permit Decision in this case." *Id.* In support, the Agency cites three cases where the Board rejected petitioner's attempt to supplement the record with other permit documents or other permit applications. Land and Lakes Company v. Illinois EPA, PCB No. 90-118 (November 8, 1990) (Board denied request to supplement- finding other permits from four other landfills not relevant to the contested permit at issue); White & Brewer v. Illinois EPA, PCB 96-250 (March 20, 1997) (Board denied request to supplement record with documents related to another of its permit applications stating it "could confuse the record"); Community Landfill Company and the City of Morris v. Illinois EPA, PCB No. 01-170 (December 6, 2001) slip op. at 2-3 (Board denied request to supplement the record with documentation of a second permit for the same site where it found that requested documentation was not relevant to the permit at hand).

Next, the Agency objects to BFI's request to supplement the Record with nine earlier BFI Davis Junction permits decisions regarding post-closure financial assurance. Resp. at 3. The Agency argues, as above, that the prior permits for the facility are not relevant and are not to be included in the Record. *Id.* at 4. Furthermore, the Agency continues, "that 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." *Id.* The requested earlier permit modifications are not relevant and "would absolutely confuse the relevant Record in this matter..." *Id.* (citing White & Brewer, slip op. at 11).

The Agency notes that "[t]he 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." *Id.* The Agency notes that "[w]hile 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 the USEPA have engaged in discussions regarding the correct interpretation of the Federal Hazardous Waste regulations for many years." *Id.* at 4-5.

Next, the Agency opines that much of the information BFI seeks to supplement the Record is speculative and could be irrelevant. *Id.* at 5. The Agency argues that the proper method for such procedure is through discovery. *Id.* In support, the Agency cites Marathon Oil Company v. Illinois EPA, PCB 92-166 (March 11, 1993) slip op. at 2-3. (The Board found that

petitioner's motion to supplement is more in the nature of a discovery request- where Marathon alleged that the record does not contain documents the Agency could have or should have considered at the time the Agency reviewed Marathon's application.).

Finally, the Agency addresses BFI's argument that the Agency has waived attorney-client privilege. The Agency disputes BFI's claim because the Permit reviewer's notes evidence his reliance on advice from the Illinois EPA's Division of Legal Counsel, any claim of attorney-client privilege is waived "for the entire subject matter of this case[:]" *Id.* The Agency argues that the case that BFI cited to support its position actually defeats BFI's argument. *Id.*

In Center Partner Ltd., the Agency argues that the Illinois Supreme Court held that disclosures 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.* at 60; Resp. at 6. Since the disclosure here was not made in the course of litigation, the Agency argues, the subject matter cannot be expanded. *Id.* "Petitioner's claim that the Record should broadly cover discussions, communications, emails, and other information shared with counsel is unsupported." Resp. at 6.

Discussion and Ruling

In pertinent part, Sections 105.212 and 105.214 of the Board's procedural rules requires that the Agency Record include:

105.212: The Agency Record

5) Any other information the Agency relied upon in making its final decision.

35 Ill. Adm. Code 105.212(5)

105.214: Board Hearing

a) The hearing will be based exclusively on the Agency record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the Agency record under Section 40(d) of the Act.

35 Ill. Adm. Code 105.214(a)

"Typically, evidence that was not before the Agency at the time of its decision is not admitted at hearing or considered by the Board." Community Landfill Company, PCB 1-170, slip op. at 4. (citations omitted). If there was information in the Agency's possession upon which it actually or reasonably should have relied, the applicant may submit such information to the Board for the Board's consideration. Ameren Energy Resources Generating Company, v. IEPA, PCB 14-41, (March 20, 2014), slip op. at 9. (citations omitted).; Land and Lakes Company, PCB 90-118, slip op. at 4. (citations omitted).

The Agency has no objection to BFI's motion to supplement the Record with the USEPA's Guideline for Evaluating Post-Closure Care Period, dated December 16, 2016, and

ASTSWMO Position Paper, dated July 20, 2022 "Post-Closure Care Beyond 30 Years at RCRA Subtitle C Facilities".

BFI's motion is granted as to the aforesaid documents.

The Agency does object, however to BFI's motion to supplement the Record with "Illinois EPA's recent decisions regarding extending post-closure care at other RCRA facilities in Illinois". Although the document appears to address post-closure care at other facilities in Illinois- documents that are usually barred from being supplemented into the Record and for Board consideration, Land and Lakes, PCB 90-118, slip op. at 8, -the Agency's Review Notes stated that "permit conditions and requirements regarding post-closure care of a hazardous waste landfill were developed based on the following applicable regulations and reference materials" and then references the RCRA facilities at other Illinois sites. (R. 000224).

It is apparent that the Agency's Reviewer relied on this document when reviewing BFI's permit and the subsequent decision. Therefore, the document should be allowed to be a supplement to the Record.

BFI's motion to supplement the Record with the document entitled "Illinois EPA's recent decisions regarding extending post-closure care at other RCRA facilities in Illinois" is granted.

BFI's argument that the Record should be supplemented with the Reviewer's internal discussions with lead workers and co-workers in the RCRA unit is denied. As stated earlier, BFI does not cite to the record regarding this allegation, nor was I able to locate the passage in the Record. Moreover, BFI does not prevail on its waiver of attorney-client claim by citing to Center Partner Ltd., where the Illinois Supreme Court held that disclosures 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.* at 2012 IL 113107 *73.

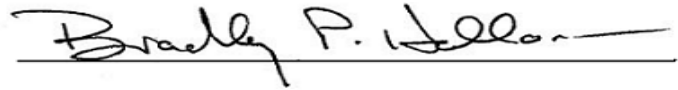
BFI's request to supplement the Record with documents containing advice-memoranda, emails, etc., from the Agency's Division of Legal Counsel is likewise denied. Center Partner Ltd.

BFI's request to supplement the Record with the 9 BFI Davis Junction permit modifications is denied. The facts of those permit decisions are irrelevant to this matter and there is nothing in the Record that demonstrates that the Agency relied on these prior and other permits when issuing the permit at bar. To supplement these additional permit applications could only confuse the Record. White & Brewer Trucking, Inc., PCB 96-250, slip op. at 11; Land And Lakes Company, PCB 90-118, slip op. at 8.

BFI has not proffered any discovery. I agree with the Agency that discovery could flesh out any relevant or irrelevant information and hone BFI's argument regarding the Agency's waiver of attorney-client privilege regarding the broad-brush requests of internal memorandums, emails, documents, and correspondence. See Marathon Oil Company, PCB 92-166, slip op. at 2.

The parties or their legal representatives are directed to participate in a telephonic status conference with the hearing officer on May 20, 2024, at 11:00 a.m. The telephonic status conference must be initiated by the petitioner, and provide a call-in number, but each party is nonetheless responsible for its own appearance. At the status conference, the parties must be prepared to discuss the status of the above-captioned matter and their readiness for hearing.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a horizontal line.

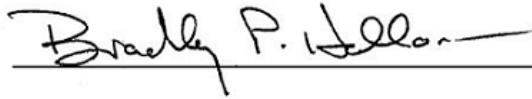
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on May 16, 2024, to each of the persons on the service list below.

It is hereby certified that a true copy of the foregoing order was e-mailed to the following on May 16, 2024:

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