BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONSE TO ILLINOIS EPA'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, BFI WASTE SYSTEMS OF NORTH AMERICA, LLC ("BFI"), by and through its attorney, Scott B. Sievers of Brown, Hay + Stephens, LLP, and, pursuant to 35 Ill. Adm. Code 101.500(d) and 35 Ill. Adm. Code 101.516(a), responds to Respondent Illinois Environmental Protection Agency's Motion for Summary Judgment as follows:

I. INTRODUCTION

In its summary judgment motion, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") attempts to justify its unauthorized actions by pointing to the hazardous waste deposited in the Phase I unit of Petitioner BFI's Davis Junction Landfill as well as to the generated leachate and even to the landfill's liner. The Agency, however, did not deny Petitioner the permit modifications it sought for any of these conditions; instead, it granted Petitioner a permit with conditions that accepted all of them. Illinois EPA did so because its arguments concerning these site conditions are red herrings raised to justify its September 25, 2023, decision after the fact.

The permit modifications Petitioner submitted that are the subject of the Agency's September 25, 2023, decision did not ask Illinois EPA to reject the pro-rated post-closure period and financial assurance protocol that the Agency had approved when it issued Petitioner its 2018 permit. In approving the 2018 permit, the Agency necessarily found that this protocol did not violate the Illinois Environmental Protection Act or this Board's regulations, as Illinois EPA could not issue a permit otherwise. (*See* 415 ILCS 5/39(a)). The permit modifications Petitioner sought in the instant matter likewise did not violate the Act or Board regulations, and thus the Agency acted without lawful authority and unnecessarily when it imposed a new, rolling 30-year post-closure care period and financial assurance protocol through its September 25, 2023, decision that bypassed this Board's procedures. Consequently, the Board should deny Illinois EPA's motion as it is not entitled to summary judgment as a matter of law and grant summary judgment to Petitioner.

II. ARGUMENT

A. THE PERMIT MODIFICATIONS SUBMITTED BY PETITIONER DID NOT VIOLATE THE ACT OR BOARD RULES, AND THUS ILLINOIS EPA'S IMPOSITION OF A NEW, ROLLING 30-YEAR POST-CLOSURE CARE AND FINANCIAL ASSURANCE CONDITION WAS ARBITRARY, UNNECESSARY AND UNREASONABLE.

The Illinois Environmental Protection Act ("Act") provides for appeals of permit denials. *See*, *e.g.*, 415 ILCS 5/40(a)(1). For purposes of review, the imposition of conditions upon a permit is regarded as a permit denial. *Illinois EPA v. Pollution Control Bd.*, 118 Ill. App. 3d 772, 775 (1st Dist. 1983).

When Illinois EPA permit modifications are appealed to the Pollution Control Board, both the Act and Board rules place the burden of proof upon the petitioner. 415 ILCS 40/(a)(1); 35 Ill. Adm. Code 150.112(a). The petitioner's burden is to show that its

proposed plan would not result in violation of the Act or that the modification is not necessary. *Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board*, 179 Ill. App. 3d 598, 607 (2d Dist. 1989). "The standard of review in a permit appeal where conditions are challenged is whether absent the challenged conditions there will be no violation of the Act or the Board's rules." *Jersey Sanitation Corp. v. Illinois EPA*, PCB No. 00-82 at 9 (June 21, 2001) (granting petitioner's summary judgment motion and finding that, absent conditions imposed by Agency, permit would not violate Act or Board regulations). A petitioner must "show that the modifications imposed by the Agency were not necessary to accomplish the purposes of the Act, or, stated alternatively, [petitioner] had to establish that its plan would not result in any future violation of the Act and the modifications, therefore, were arbitrary and unnecessary." *Id.* at 603. If Illinois EPA granted the permit with conditions to which the petitioner objects, the petitioner must prove the conditions are not necessary to accomplish the purposes of the Act "and therefore were imposed unreasonably." *Illinois EPA v. Pollution Control Bd*., 118 Ill. App. 3d 772, 780 (1st Dist. 1983). However, once the petitioner has established its *prima facie* case, the Agency cannot do nothing and still prevail: "If such were the case, the Agency could never lose!" *See id.* at 602, 607.

Summary judgment means the disposition of an adjudicatory proceeding without hearing when the record, including pleadings, depositions, and admissions on file, together with any affidavits, shows no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. 35 Ill. Adm. Code 101.202; 35 Ill. Adm. Code 101.516(a). 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. *E.g.*, *People v.*

Lee Trucking, Inc., 2024 WL 2964339 (PCB No. 23-122) (June 6, 2024). However, where reasonable persons could draw divergent inferences from undisputed facts, summary judgment should be denied and the trier of fact should decide the issues. *People v. Longwell*, 2024 WL 150193, at *6 (PCB No. 23-50) (Jan. 4, 2024).

No genuine issue of material fact exists that no change in law or in site conditions at BFI Davis Junction Landfill's Phase I unit prompted Illinois EPA to reject the pro-rated post-closure care and financial assurance protocol it had approved in Petitioner's 2018 permit and impose a new, rolling 30-year post-closure care and financial assurance condition in its September 25, 2023, decision on appeal. The post-closure care and financial assurance protocol that did not violate the Act or Board regulations in 2018 also did not violate them in 2023, and thus Illinois EPA's unilateral imposition of this condition upon Petitioner's permit was arbitrary, unnecessary, and unreasonable. Accordingly, the Agency's summary judgment motion should be denied and summary judgment should be entered for Petitioner.

B. WHILE IT COMPLAINS OF VARIOUS CONDITIONS AT THE LANDFILL, ILLINOIS EPA DOES NOT CONTEND THEY VIOLATED THE ACT OR BOARD RULES, AND THUS THE PERMIT CONDITIONS THE AGENCY IMPOSED WERE NEITHER NECESSARY NOR REASONABLE.

In its summary judgment motion, Illinois EPA complains of various conditions at BFI Davis Junction Landfill Phase I.

The Agency criticizes the landfill's base liner as "an antiquated design in-situ clayey soils liner" that falls short of current standards, but it does not contend that the liner violates the Act or Board regulations. (IEPA Mot. for Summ. J. at 4, 11–12).

Illinois EPA notes that Petitioner had two options when it closed the landfill more than 40 years ago: (1) remove all hazardous waste and decontaminate the landfill or (2) become fully permitted, leave the hazardous waste in place, and perform post-closure care. (IEPA Mot. for Summ. J. at 7). The Agency's motion suggests it wished Petitioner had chosen the former option to shift its problem to another location rather than choose the latter. Regardless, Illinois EPA makes no claim that by choosing that second option, Petitioner violated the Act or Board rules; to the contrary, the Agency repeatedly has permitted the landfill despite its apparent distain for Petitioner's lawful choice.

While conceding that only two (2) percent of the waste disposed in the landfill was hazardous, Illinois EPA nonetheless leverages the so-called "mixing rule"—a legal construct—to conclude that all its waste is hazardous waste, thereby making the landfill "a serious threat to human health and the environment." (IEPA Mot. for Summ. J. at 3–7). Again, though, the Agency does not contend the landfill has violated the Act or Board rules by containing such waste.

Illinois EPA's motion does claim that Petitioner has not complied with select Board rules, including 35 Ill. Adm. Code 724.244 and 724.245, but its September 25, 2023, decision at issue makes no such assertions in support of the imposed modifications at issue. The Supreme Court of Illinois has not looked favorably on after-the-fact efforts to justify prior decisions, noting that Section 39 of the Act requires the Agency to provide specific, detailed reasons for the denial of a permit application, such as non-compliance with a particular Board rule, and that absent such reasoning the Agency may "be precluded from raising that issue." *Environmental Protection Agency v. Pollution Control Bd.*, 86 Ill. 2d 390, 405 (1981).

Finally, the Agency's motion argues that ongoing leachate generation at Phase I of Petitioner's Davis Junction Landfill justifies its imposition of a rolling 30-year post-closure care and financial assurance obligation. The motion's focus on leachate begins with its first sentence, then goes on to repeatedly characterize it as "hazardous waste leachate." (IEPA Mot. for Summ. J. at 1, 10, 12–13, 21, 24). The Agency states that Petitioner's landfill "generate[s] significant quantities of leachate, a listed hazardous waste." (IEPA Mot. for Summ. J. at 11).

While its motion may focus its argument on leachate generation, Illinois EPA's decision at issue did not. The Agency's September 5, 2023, decision addressed five permit modifications Petitioner submitted, then set forth in four numbered paragraphs "the following conditions and modifications," none of which even mentioned leachate. (R. 000131–000134). Attachment A to that decision set forth changes to Petitioner's RCRA Post-Closure Permit, but its only mention of leachate is in a table of estimated post-closure care costs. (R. 000135–000136). And the phrase "hazardous waste leachate" cannot be found in Illinois EPA's decision, in Attachment A to that decision, or in the approved RCRA Post-Closure Permit. (R. 000131–000187).

There, of course, is good reason for this. As the Agency noted in its decision but seemingly overlooked in its summary judgment motion, Petitioner sought an adjusted standard concerning leachate generated at Davis Junction Landfill's Phase I unit. (R. 000143; *In the Matter of: Petition of BFI Waste Systems of North America, Inc. for Waste Delisting* (PCB No. AS 08-5) (Dec. 4, 2008)). As this Board noted in that proceeding, once delisted, a petitioned waste no longer is considered a listed hazardous waste and may be

managed as a non-hazardous solid waste. *In the Matter of: Petition of BFI Waste Systems of North America, Inc. for Waste Delisting* at 2 (PCB No. AS 08-5) (Dec. 4, 2008).

In the adjusted standard proceeding, Illinois EPA had no objection to the delisting of the Davis Junction Landfill Phase I leachate. (*Id.* at 7). In ultimately granting the delisting petition, this Board concluded in pertinent part as follows:

> Under the specific circumstances presented in this record, the Board finds that **BFI has proven that the leachate generated by the closed Phase I unit of the Davis Junction Landfill in Ogle County is not a RCRA hazardous waste.** The Board therefore grants BFI's petition to delist from the list of hazardous wastes the Phase I unit F039 leachate, subject to the conditions set forth in the order below.
>
> This record demonstrates that (1) the leachate does not meet any of the criteria under which it was listed as a hazardous waste; (2) there is no reasonable basis to believe that factors other than those for which the waste was listed warrant retaining the leachate as a hazardous waste; and (3) the leachate exhibits no characteristics of hazardous waste. **The Board finds that the leachate from the closed Phase I unit does not pose a substantial present or potential threat to human health or the environment.**

(*Id.* at 43) (emphasis added).

Notably, this Board delisted this leachate in 2008, which is a decade prior to the Agency's issuance in 2018 of Petitioner's RCRA Hazardous Waste Permit and 15 years prior to the decision at issue. Thus, Illinois EPA cannot and does not claim that its new, rolling 30-year post-closure care and financial assurance obligation was warranted by any change in law or site conditions.

BFI Davis Junction was generating this leachate when Illinois EPA issued the 2018 RCRA Hazardous Waste Permit in which it imposed a non-rolling, pro-rated post-closure care and financial obligation. In issuing the 2018 permit, the Agency clearly did not find that Petitioner's submittal would result in violation of the Act or Board rules, and Petitioner did not seek to alter the pro-rated post-closure care and financial obligation protocol set

incorporated in that 2018 permit through the five permit modifications that prompted the decision at issue. Thus, the protocol that did not violate the Act or Board rules in 2018 also did not violate them in 2023. Further, the conditions and modifications Illinois EPA imposed in the instant matter did not specifically address leachate generation. Consequently, the generation of leachate by BFI Davis Junction Landfill Phase I was not the impetus for the Agency's conditions and modifications, which were arbitrary, unnecessary, and unreasonable.

C. ILLINOIS EPA ERONEOUSLY CONTENDS IT NEED NOT ABIDE BY THIS BOARD'S PROCEDURES FOR EXTENDING THE POST-CLOSURE CARE PERIOD.

In its summary judgment motion, Illinois EPA characterizes its new rolling, 30-year post-closure care period and financial assurance obligation as merely requiring "minimum increments of 30 years' worth of financial assurance for post-closure care." (IEPA Mot. for Summ. J. at 13). However, Agency staff understand its new policy to impose a perpetual obligation, thus making Illinois EPA's "1,000 years in the future" argument in its motion not so much rhetorical but reality. (Pet'r's Mot. for Summ. J. Ex. 2 (Cooperider dep.) at 46:10–13, 67:7–14; IEPA Mot. for Summ. J. at 13). Modifying the post-closure care period and financial obligations to be perpetual marks a substantial change in public policy, and one that should be a decision for the General Assembly or this Board, not one to be made unilaterally by an administrative agency.

Illinois EPA, though, contends it can bypass the Legislature and this Board and bestow such sweeping authority upon itself. In support of its argument, the Agency points to federal statutes and regulations. In particular, Illinois EPA argues that Section 3006 of the Resource Conservation and Recovery Act, or RCRA, provides that an action taken by

a state under its hazardous waste program has the same force and effect as if taken by the U.S. Environmental Protection Agency Administrator, and then it points to a federal RCRA regulation, 40 C.F.R. § 265.117, to contend the Agency is thus empowered to unilaterally extend the post-closure care period. (IEPA Mot. for Summ. J. at 16–19). Its argument suffers from numerous flaws.

First, the cited regulation refers to the Regional Administrator, not the Administrator him or herself, with the Regional Administrator being a regulatorily defined position separate from the Administrator. *See* 40 C.F.R. § 1.61. Thus, it is not clear that the State "stands in the shoes" of the Regional Administrator.

Further, Section 3006 of RCRA does not say that a State's administrative environmental agency stands in the shoes of the Administrator but that "[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this chapter." 42 U.S.C. § 6926(d). As the Agency apparently wishes to forget, Illinois has not only an Environmental Protection Agency but also a Pollution Control Board. In its motion, Illinois EPA cites the Illinois provision that closely tracks the cited federal regulation. (IEPA Mot. for Summ. J. at 15–16). That provision, 35 Ill. Adm. Code 724.217, differs in a key way from its federal counterpart, however: Rather than delegate the authority to an agency administrator, Section 724.217 establishes that this Board possesses the authority to shorten or extend the post-closure care period through issuance of an adjusted standard. 35 Ill. Adm. Code 724.217(a)(2). That section provides in pertinent part as follows:

> **a) Post-Closure Care Period**
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> 1) Post-closure care for each hazardous waste management unit subject to the requirements of Sections 724.217 through 724.220 must begin after completion of closure of the unit and continue for 30 years after that date and must consist of at least the following:
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> A) Monitoring and reporting in accordance with the requirements of Subparts F, K, L, M, N, and X; and
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> B) Maintenance and monitoring of waste containment systems in accordance with the requirements of Subparts F, K, L, M, N, and X.
>
> 2) Any time preceding partial closure of a hazardous waste management unit subject to post-closure care requirements or final closure, or any time during the post-closure care period for a particular unit, **the Board** may, in accordance with the permit modification procedures of 35 Ill. Adm. Code 702, 703, and 705**, do either of the following**:
>
> A) **Shorten the post-closure care period** applicable to the hazardous waste management unit or facility if all disposal units have been closed and the Board has found by an adjusted standard issue pursuant to Section 28.1 of the Act and 35 Ill. Adm. Code 101 and 104 that the reduced period is sufficient to adequately protect human health and the environment (e.g., leachate or groundwater monitoring results, characteristics of the waste, application of advanced technology or alternative disposal, treatment, or re-use techniques indicate that the hazardous waste management unit or facility is secure); or
>
> B) **Extend the post-closure care period** applicable to the hazardous waste management unit or facility if the Board has found by an adjusted standard issue pursuant to Section 28.1 of the Act and 35 Ill. Adm. Code 101 and 104 that the extended period is necessary to adequately protect human health and the environment (e.g., leachate or groundwater monitoring results indicate a potential for migration of hazardous wastes at levels that may be harmful to human health and the environment).

35 Ill. Adm. Code 724.217(a) (West 2026) (emphasis added).

Illinois EPA contends that "**Section 724.217 cannot apply** to Illinois EPA's extension of the post-closure care period." (IEPA Mot. for Summ. J. at 16) (emphasis added). The Agency makes this grand assertion despite the fact that it cites this very provision in its September 25, 2023, decision in support of its modification of the post-closure care estimate. (R. 000132 at ¶¶ 1–2). Regardless, the Agency argues that the provision concerning extension of the post-closure care period, Section 724.217(a)(2)(B), "requires an adjusted standard, in other words a deviation from a rule of general

applicability, **typically sought by the regulated community, not the agency.**" (IEPA Mot. for Summ. J. at 16) (emphasis added).

While one can readily envision why a regulated entity might wish to seek an adjusted standard to "[s]horten the post-closure care period" under Section 724.217(a)(2)(A), it is more difficult to imagine why a regulated entity might want to seek an adjusted standard to "[e]xtend the post-closure care period" under its corollary, Section 724.217(a)(2)(B). However, it is easy to imagine why Illinois EPA might wish to do so. Nonetheless, the Agency argues that, "[**c]learly**, the provision for an adjusted standard in Section 724.217 of the Board['s] Hazardous Waste Regulations, 35 Ill. Adm. Code 724.217, **applies solely to permit applicants**, and **not to the Agency**, the permitting authority." (emphasis added).

This Board thought differently in 1983. As Illinois EPA notes in its motion, this Board's rulemaking in R82-19 promulgated hazardous waste regulations. (IEPA Mot. for Summ. J. at 18). The Board had opened the R82-19 docket to promulgate RCRA regulations in response to U.S. EPA's promulgation of rules allowing permit applications for hazardous waste management facilities. *In the Matter of: Phase II RCRA Rules Adopted Rule. Final Order*, PCB No. R82-19 at 1 (March 18, 1983). In doing so, the Board solicited public comment on various issues, specifically including "[c]an the **Agency** reduce or extend the 30-year post-closure care period [§ 724.217(a)(2)]?" *In the Matter of: Phase II RCRA Rules Adopted Rule. Final Order*, PCB No. R82-19 at 18 (March 18, 1983) (emphasis added).

The Board has held that the Act makes a "sharp distinction in responsibilities delegated to the Board and the Agency[.]" *In the Matter of: Site-specific Rulemaking For*

the Sanitary District of Decatur, Illinois at 11 (PCB No. R85-15) (Jan. 22, 1987). While Illinois EPA's functions "are primarily administrative in character," (*id.*), Section 5(b) of the Act provides that "[t]he Board shall determine, define and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of this Act." 415 ILCS 5/5(b) (West 2026). For example, the Board has held that specification of analytical methods is equivalent to setting environmental control standards, a power reserved to the Board by Section 5 of the Act. *In the Matter of: Safe Drinking Water Act Regulations* at 79 (PCB No. R88-26) (Aug. 9, 1990).

In the course of adopting RCRA regulations via the R82-19 docket, the Board considered various proposed rules that, as written, would allow Illinois EPA to make determinations that commentors argued were akin to establishing an environmental control standard or regulation—"a quasi-legislative function delegated to the Board." (*Id.* at 41; *also id.* at 42, 44, 46, 48, 50–51). The Board agreed with the comments in some cases and not in others. (*Id.*). In answering the question whether Illinois EPA can reduce or extend the 30-year post-closure care period, the Board ultimately considered comments on Section 724.217 from Illinois Power, stating that,

> [a]s proposed §724.217(a)(2)(A) allowed the **Agency** to reduce the 30-year post-closure care period to a lesser period which it finds to be "sufficient to protect human health and the environment". Section 724.217(a)(2)(B) allowed extension beyond 30 years if necessary to so protect. Illinois Power contends that this is the equivalent to establishing an environmental control standard (IPC 23). **The Board agrees**, noting that the stated standard is not sufficiently specific to allow for Board review.
>
> The Board has modified this Section to **require site-specific rulemaking to alter the 30-year period in this manner.** Even a two-year delay in rulemaking would not be significant with respect to the 30-year period established by the rule.

In the Matter of: Phase II RCRA Rules Adopted Rule. Final Order, PCB No. R82-19 at 46 (July 26, 1983). Thus, out of concern that the Agency's exercise of Section 724.217(a)(2)(B) to extend the post-closure care period beyond 30 years would be equivalent to establishing an environmental control standard—a power delegated solely to the Board by Section 5(b) of the Act—the Board modified the section to require the site-specific rulemaking in the form of an adjusted standard. The Board therefore viewed Section 724.217(a)(2) in the context of Illinois EPA pursuing such action through this provision and not just the regulated community. Therefore, this Board clearly contemplated the procedures for shortening or extending the 30-year post-closure care period in 35 Ill. Adm. Code 724.217 to apply to Illinois EPA and not only to applicants.

III. CONCLUSION

When Illinois EPA imposed its new, rolling 30-year post-closure care and financial assurance obligation upon Petitioner's permit, it did so without authority from the Act or Board rules. It chose to bypass the legislative and rulemaking processes, and it used Petitioner's permit modification submission as a vehicle to do so. But Petitioner's five permit modification submissions did not violate the Act or Board rules so as to warrant the new, rolling 30-year post-closure care and financial assurance obligation. Petitioner did not seek to alter the non-rolling, post-close care and financial assurance obligation that Illinois EPA had approved when it issued Petitioner its 2018 permit. Further, the conditions the Agency imposed in its September 25, 2023, decision were not imposed in response to any change in law or site conditions since it issued the 2018 permit despite Illinois EPA's arguments to the contrary, including its erroneous claims concerning "hazardous waste leachate" that was delisted in 2008 without Agency objection. Absent the permit conditions

imposed by Illinois EPA's September 25, 2023, decision, Petitioner's permit modification submittals did not violate the Act or Board rules just as Petitioner's submittal resulting in the 2018 permit did not. Consequently, the Board's imposition of its new, rolling 30-year post-closure care and financial assurance obligation was arbitrary, unnecessary, and unreasonable. Accordingly, this Board should deny Illinois EPA's summary judgment motion and enter summary judgment for Petitioner.

WHEREFORE, Petitioner BFI Waste Systems of North America, LLC, prays that this honorable Board deny Respondent Illinois Environmental Protection Agency's Motion for Summary Judgment, grant Petitioner's Motion for Summary Judgment, and enter summary judgment in favor of Petitioner and against Respondent.

DATED: May 13, 2026

Respectfully submitted,

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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 May 13, 2026, from Springfield, Illinois, he electronically submitted for filing the foregoing **RESPONSE TO ILLINOIS EPA'S MOTION FOR SUMMARY JUDGMENT** with the Pollution Control Board by using the Clerk's Office On-Line (COOL) eFile system. Scott B. Sievers further certifies that on May 13, 2026, he served the other parties in this case with a copy of the foregoing document by transmitting the document by e-mail to the parties' representatives, who are identified below, at their designated e-mail addresses of record:

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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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BFI WASTE SYSTEMS
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