**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**REPLY TO ILLINOIS EPA'S RESPONSE TO PETITIONER'S SUMMARY JUDGMENT MOTION**

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(e), 35 Ill. Adm. Code 101.516(a), and the Hearing Officer Order of May 21, 2026, replies to Respondent Illinois Environmental Protection Agency's Response to Petitioner's Cross-Motion for Summary Judgment ("Illinois EPA's Response") as follows:

## I. INTRODUCTION

The undisputed material facts show that Illinois EPA imposed a new, rolling 30-year post-closure care and financial assurance requirement despite no change in applicable law, no change in site-specific risk, and no adjusted standard authorizing such an extension. The Agency's own witnesses testified that the risks at BFI Davis Junction Phase I remained unchanged from those existing when Illinois EPA issued the prior permit in 2018, yet the Agency abandoned its pro-rated financial assurance methodology and substituted a rolling obligation unsupported by state or federal statutory or regulatory law. Because Illinois EPA exceeded its authority, failed to comply with the procedures established by the Board's

rules, and now seeks to justify its decision through rationales absent from its September 25, 2023, denial letter, the Board should deny the Agency's summary judgment motion. The Board should grant Petitioner's summary judgment motion because, absent the challenged conditions, Petitioner's requested permit modifications would not violate the Act or Board regulations.

## II. ARGUMENT

### A. ILLINOIS EPA'S RESPONSE IMPROPERLY RELIES UPON POST HOC RATIONALIZATION TO JUSTIFY ITS SEPTEMBER 25, 2023, DECISION.

Section 39(a) of the Environmental Protection Act provides in pertinent part that, when Illinois EPA denies a permit, that the Agency must provide the applicant with "specific, detailed statements as to the reasons the permit application was denied." 415 ILCS 5/39(a). These statements must include the sections of the Act and provisions of the Board's regulations that may be violated if the permit were granted as well as "a statement of specific reasons why the Act and the regulations might not be met if the permit were granted." *Id.* The need for administrative agencies such as Illinois EPA to provide a statement of reasons for its decisions is a fundamental principle of administrative law. *E.g.*, *Van Dyke v. White*, 2016 IL App (4th) 141109, ¶ 28. The purpose of Section 39(a) of the Act is to require Illinois EPA to timely issue its decision with information sufficient for the applicant to determine the bases for the Agency's determination. *West Suburban Recycling and Energy Center, L.P. v. Illinois EPA*, PCB Nos. 95-119 and 95-125 (Oct. 17, 1996).

Accordingly, when an applicant appeals Illinois EPA's denial of a permit, the Agency's denial letter frames the issues in the appeal to the Pollution Control Board. *See, e.g.*, *ESG Watts, Inc. v. Pollution Control Bd.*, 286 Ill. App. 3d 325, 335 (3d Dist. 1997).

If Illinois EPA intends to raise an issue before this Board supporting its denial of a permit, the Agency's denial letter must specify that reason or the Agency is "precluded from raising that issue." *Environmental Protection Agency v. Pollution Control Board*, 86 Ill. 2d 390, 405–06 (Ill. 1981). "The Agency may not raise new denial reasons before the Board that were not a part of the letter." *Brickyard Disposal & Recycling, Inc. v. Illinois EPA*, PCB No. 2016-66 at 4 (Jan. 19, 2017). Arguments raised for the first time on appeal may not support an administrative agency's actions because tribunals may not accept post hoc rationalizations for agency action. *E.g.*, *Van Dyke v. White*, 2016 IL App (4th) 141109, ¶ 26.

In its Response, Illinois EPA argues that Petitioner's summary judgment motion should be denied because BFI Davis Junction Phase I continues to generate leachate to be collected and treated, because of an alleged dioxane groundwater exceedance, and because the landfill's liner allegedly shows signs of failure so as to threaten groundwater. (*E.g.*, Resp. at 2–3, 6–7, 10–12). However, Illinois EPA's September 25, 2023, denial letter saying nothing about any of the Agency's newly claimed bases to partially deny Petitioner's five requested permit modifications. (R 00131—R000136).

Petitioner appealed the conditions and modifications set in forth Paragraphs 1, 2, and 3 the Agency's denial letter. (Pet. at ¶ 27; R. 000132). Those conditions and modifications are as follows:

> 1. BFI's annual costs and one-time cost for post-closure care in the updated cost estimate can be approved by the Illinois EPA. However, the total postclosure care cost estimate cannot be approved by the Illinois EPA at this time. The Illinois EPA has reevaluated the requirements for post-closure care cost estimates and financial assurance under 35 Ill. Adm. Code Part 724 and has determined the total post-closure care estimate must reflect thirty (30) years of post-closure care as required by 35 Ill. Adm. Code 724.217.

2. Within sixty (60) days of the receipt of this letter, BFI must submit a revised post-closure cost estimate (in 2023 dollars) and financial assurance to reflect thirty (30) years of post-closure care in accordance with 35 III. Adm. Code 724.217. This revised cost estimate must include items required in Condition 3 and 4 below.

3. The Permittee must include costs associated with re-surveying the wells every five (5) years in accordance with Condition III.J.5 of the Permittee's RCRA Permit. In addition, copies of the latest well survey information must be provided to the Illinois EPA.

4. The table provided with the itemized cost estimates for post-closure care must be revised to provide a legible copy with a font size of no less than 12 pt.

(R 000132). Neither these four (4) paragraphs nor the rest of Illinois EPA's September 25, 2023, letter, including Attachment A ("Changes to the RCRA Post-Closure Permit") says a word about the need to impose these conditions or modifications because of the generation and need to collect and treat leachate, because of an alleged dioxane groundwater exceedance, or because the landfill's liner showed signs of failure so as to threaten groundwater. (R 000131–R 000136). In fact, the RCRA Hazardous Waste Permit the Agency issued in conjunction with its September 25, 2023, decision speaks of the Landfill's leachate collection system, its in-situ liner, and dioxane sampling, but the decision nonetheless says nothing about them in its "specific, detailed statements as to the reasons the permit application was denied," as required by Section 39(a) of the Act. Further, Illinois EPA's decision did not predicate its new, rolling 30-year financial assurance obligation upon any change in the Landfill's handling of leachate, of the alleged dioxane exceedance, or in the in-situ liner, and thus the Agency cannot now argue that the conditions and modifications it imposed in that decision were required to remedy these alleged issues.

Petitioner never has asked Illinois EPA to allow BFI Davis Junction Phase I out of post-closure care or to not require Petitioner to uphold its post-closure care obligations, such as collecting and treating leachate. What Petitioner has contended is that, with its September 25, 2023, decision, Illinois EPA overstepped its authority by circumventing this Board and unilaterally imposing a new, rolling 30-year post-closure care and financial assurance obligation in place of the established pro-rated methodology.

If Petitioner were to ask Illinois EPA to be allowed out of post-closure care, including the financial assurance obligation, the Agency could then deny the request based upon existing problems at the site, such as issues with the liner, exceedances, or leachate generation. But the Agency failed to raise any of these issues in its September 25, 2023, denial letter, and consequently it cannot rely upon them to justify its decision after the fact.

As Illinois EPA's denial letter frames the issues on appeal and as the Agency's September 25, 2023, denial letter fails to set forth any site-specific conditions in a specific, detailed statement of the reasons for the conditions and modifications imposed upon Petitioner's permit modifications, Illinois EPA is precluded from raising them now in support of its decision, and this Board should find that it cannot accept these post hoc rationalizations for the Agency's actions.

## B. THE AGENCY OFFICIAL WHO SIGNED THE DECISION AT ISSUE TESTIFIED THERE WERE NO CHANGES TO THE RISKS AT THE LANDFILL PROMPTING ILLINOIS EPA'S REEVALUATION OF THIS BOARD'S REGULATIONS.

Illinois EPA's Response contends it is "patently incorrect" to state there was no change in risk at the Landfill from when the Agency issued the 2018 permit and when it issued the September 25, 2023, decision. (*See* Illinois EPA Resp. at 10). That contention is squarely contradicted by repeated sworn testimony of the very person who signed that decision: Jacqueline M. Cooperider.

Cooperider was the Permit Section Manager within Illinois EPA's Bureau of Land who signed the September 25, 2023, decision at issue in this appeal. (R 000134). At the time of her deposition in this matter, though, Cooperider had been promoted to Deputy Bureau Chief for the Division of Land Pollution Control within the Bureau of Land. (BFI Motion for Summ. J. Ex. 2 (Cooperider dep.) at 8:14–21).

During her deposition Cooperider was questioned about the September 25, 2023, decision. (*E.g.*, BFI Motion for Summ. J. Ex. 2 (Cooperider dep.) at 14:22–15:1, 15:20–16:1). She spoke of a document setting forth changes in the September 25, 2023, decision to the permit issued by Illinois EPA in 2018. (*Id.* at 31:8–16). Cooperider said it was correct that the document showed a change of the total post-closure care cost estimate for a six-year period to a 30-year period. (*Id.* at 31:12–16). She then was asked if that change was a result of the reevaluation of administrative regulations, to which Cooperider answered as follows:

> A. It was a reevaluation of the risk at the site.
>
> Q. What about the risk at the site changed since the 2018 permit was issued?

A. **This risk, I believe, remained the same.**

Q. If the risk remained the same from 2018 until this decision, why would the – why would the regulations be reevaluated?

A. Because this is -- we considered that the six years was inadequate given the risk at that facility and that the interpretation shouldn't be 30 years.

Q. So is it your testimony that you did not re-construe the regulations concerning post-closure care and financial assurance obligations in reaching this decision of September 25, 2023, but instead evaluated the site differently, the site specific conditions differently?

MR. GRANT: Can I ask – can you repeat it or ask her to read it back? Can you read it back?

(Record read back by the reporter.)

Q. (By Mr. Sievers) Do you understand the question?

A. Yes. The two were taken. And I would say we considered both of those things in tandem when making this decision.

Q. You considered both the regulations as well as the risk specific to the site?

A. Correct.

Q. But I believe you testified earlier that the risk had not changed at the site at all since 2018, correct?

A. The facility – no. **The risk – the risk remains the same.**

(BFI Motion for Summ. J. Ex. 2 (Cooperider dep.) at 31:17–33:5) (emphasis added). After taking a couple of breaks during her deposition, Cooperider was asked the following:

Q. I believe you testified that as to this site, BFI Davis Junction Phase I, **nothing about the risks at the site changed** since the pre-existing permit in 2018 and the decision of September 25, 2023, correct?

A. **Correct.**

(*Id.* at 42:13–16, 50:7–9, 53:5–10) (emphasis added). Finally, Cooperider was asked

> [w]ere you aware of any changes at the site at BFI Davis Junction Phase I since the 2018 permit was issued that factored into the agency's September 25, 2023, decision?"
>
> A. **No.**

(*Id.* at 70:24–71:71:5) (emphasis added). Thus, when the very person who signed the September 25, 2023, decision was asked about changes to risks at BFI Davis Junction Phase I since the Agency issued its 2018 permit, Deputy Bureau Chief Cooperider herself repeatedly testified that there were no changes to the risks at the site that factored into Illinois EPA's decision. Consequently, the Agency's Response is "patently incorrect" to state otherwise.

### C. IEPA CANNOT BASE EITHER ITS SUMMARY JUDGMENT MOTION OR RESPONSE TO PETITIONER'S MOTION ON UNADJUDICATED CLAIMS AND SPECULATION.

In an apparent attempt to shore up its claim that BFI Davis Junction Phase I posed a threat to human health and the environment justifying the imposition of the conditions and modifications challenged in this matter, Illinois EPA repeatedly inflates its purported evidence despite not citing any of it as a basis in its September 25, 2023, decision letter.

Throughout this appeal, Illinois EPA has complained of the manner by which the Landfill was closed and of the nature of its in-situ clayey liner. This is despite the fact that the Agency approved the landfill's closure and has presented no evidence that constructing the landfill with its in-situ clayey liner violated any laws. Nonetheless, Illinois EPA argues these factors should weigh against Petitioner and support denial of its summary judgment motion.

The Agency's Response refers back to its summary judgment motion and, in turn, the affidavit of Illinois EPA employee Takako Halteman, one of the Illinois EPA officials who signed off on the September 25, 2023, decision. (Resp. at 2–3, 7; BFI Mot. for Summ. J. Ex. 4 (Halteman dep.) at 20:16–21:10). As the Agency does so, however, it continues to overstate Halteman's statements. In her affidavit, Halteman stated in pertinent part that "[i]nformation and reports reviewed by the RCRA Unit indicate that the bottom of the in-situ liner at the Landfill is **possibly** already in contact with groundwater at the Landfill. Specifically, groundwater poteniometric maps provided by the Landfill in 2022 and 2023 indicate that groundwater was in contact with or very close to groundwater underneath the Landfill." (Illinois EPA Mot. for Summ. J. Halteman aff. ¶ 7) (emphasis added). Halteman's affidavit does not assert that she has personal knowledge of these statements, just that the RCRA Unit reviewed information and reports. Nonetheless, Illinois EPA apparently asks this Board to trust her on these assertions, despite the fact that Halteman's affidavit does not have the referenced maps attached to it nor even refer to them by their location within the Record on Appeal. (*Id.*). Accordingly, Halteman's affidavit fails to lay foundation for her assertions about information and reports reviewed by the RCRA Unit and unspecified maps, and thus those assertions constitute inadmissible hearsay that may not be considered on summary judgment.

Despite this weakness, Illinois EPA's summary judgment motion puffs up Halteman's assertions to claim that, "[a]s noted by Ms. Halteman, groundwater reports submitted in 2022 and 2023 indicate that hazardous waste leachate was 'in contact with or very close to groundwater' beneath the in-situ liner. *Exhibit 2*, par. 7." (Illinois EPA Mot. for Summ. J. at 12). Significantly, Halteman's affidavit does not state that hazardous waste

leachate was in contact with or very close to groundwater beneath the in-situ liner, thus explaining the Agency's creative quoting of its contents. (Illinois EPA Mot. for Summ. J. Halteman aff. ¶¶ 1–7). Illinois EPA then goes further still in its Response, asserting that "according to 2002 and 2003 groundwater reports, the Landfill liner shows signs of failure, which immediately threatens the migration of leachate into groundwater. *Respondent's Motion*, p. 12 ." (Resp. at 3). As with Halteman's affidavit, the Response does not attach those purported groundwater reports or refer to them by citation to pages in the Record on Appeal, instead only relying upon reference to Page 12 of the Agency's own summary judgment motion. That page, however, makes no reference to 2002 or 2003 groundwater reports, only to "groundwater reports submitted in 2022 and 2023" but not specifically to the 2022 and 2023 groundwater poteniometric maps to which Halteman's affidavit refers. Consequently, it is unclear to what Illinois EPA refers, but what is clear is that Halteman's affidavit does not state that "the Landfill liner shows signs of failure." Accordingly, Illinois EPA's claims of a "confirmed threat to human health and the environment" by the Landfill that "at least threatens, and may have already caused, the pollution of groundwater beneath the Landfill" (Resp. at 2, 5) rest upon speculation and conjecture and not upon evidence in the Record on Appeal.

Motions for summary judgment and responses in opposition to summary judgment motions cannot rest upon speculation or conjecture, *see*, *e.g.*, *Berke v. Manilow*, 2016 IL App (1st) 150397), and denial of a permit based upon unadjudicated allegations violates Fourteenth Amendment due process rights. *See Martell v. Mauzy*, 511 F. Supp. 729, 740–43. "If allege violations of existing permits or regulations are serious enough so that if proved a pending application should be denied, a hearing on such alleged violations is

required[.]" *City of East Moline v. Pollution Control Bd*., 136 Ill. App. 3d 687, 689 (3d Dist. 1985). Consequently, the Board should reject Illinois EPA's efforts to justify its September 25, 2023, decision after the fact—and outside the four corners of its decision—through speculation and unadjudicated allegations.

### D. DESPITE ITS ARGUMENTS TO THE CONTRARY, ILLINOIS EPA'S ROLLING, 30-YEAR POST-CLOSURE CARE AND FINANCIAL ASSURANCE PROTOCOL IS NOT INCREMENTAL, AND THE AGENCY GIVES EVERY INDICATION IT INTENDS TO IMPOSE IT PERPETUALLY.

In its Response, Illinois EPA disputes that its September 25, 2023, decision imposes a "perpetual" obligation for post-closure care, including financial assurance. (Resp. at 2–5). Instead, the Agency contends its decision only "extend[s] the post-closure period, in 30-year increments, until post-closure care is completed and the Agency can determine that there is no unacceptable risk to human health or the environment at the Landfill." (Resp. at 3). The testimony of key Illinois EPA officials behind the decision undermines this contention.

Jacqueline Cooperider, the Permit Section Manager at the time of the Agency's September 25, 2023, decision, testified that the rule it imposed required 30 years of financial assurance to be provided by the applicant for a permit to issue. (BFI Mot. for Summ. J. Ex. 2 (Cooperider dep.) at 45:24–46:4). She then was asked the following:

> Q. And when that 30 years is over, they, you know, they file for another application. Does another 30 years kick in as well of financial assurance?
>
> A. Yes.
>
> Q. So the 30 years is rolling and perpetual?
>
> A. Uh-huh.

Q. Is that yes?

A. Yes.

(BFI Mot. for Summ. J. Ex. 2 (Cooperider dep.) at 46:5–13). Later Cooperider was asked the following:

Q. And as a result of the September 25, 2023, decision, the determination had been made that a 30-year post-closure care period and financial obligation were required?

A. Yes.

Q. And that is rolling and perpetual, that 30-year period?

A. Yes.

(BFI Mot. for Summ. J. Ex. 2 (Cooperider dep.) at 67:7–14). Thus, the Permit Section Manager who signed the September 25, 2023, decision at issue in this permit appeal understood that decision to impose a rolling and perpetual post-closure care and financial assurance obligation.

Further, the Agency's argument in its Response that this obligation is incremental is misleading. Jacob Nutt, the engineer who reviewed Petitioner's permit modification submittals, testified to this topic in his deposition:

Q. So is it your understanding that the financial assurance obligation that is set forth in the September 25, 2023, decision is that at any time during the course of the existing post-closure care permit there needs to be 30 years of financial assurance in place?

A. Yes.

(BFI Mot. for Summ. J. Ex. 3 (Nutt dep.) at 28:15–21). Nutt testified that Petitioner's current permit expires in 2028 and explained who financial assurance would apply to a renewed permit:

Q. And so in 2028, BFI Davis Junction would need to submit a request to renew the permit at that point?

A. Yes.

Q. And then that renewal would be a 10-year renewal?

A. Yes.

Q. During the course of that 10-year renewal, at any point in that 10-year renewal they would need to maintain 30 years' worth of financial assurance?

A. Yes.

(BFI Mot. for Summ. J. Ex. 3 (Nutt dep.) at 31:4–21). Thus, Illinois EPA's September 25, 2023, decision would not extend financial assurance in 30-year increments but instead would require Petitioner to continually maintain 30 years of financial assurance—a drastic departure from the pro-rated financial assurance protocol the Agency had been employing.

In is Response, Illinois EPA argues that its new financial assurance protocol does not impose a perpetual obligation upon Petitioner, essentially suggesting that this obligation could end once alleged leachate or other issues at the site are satisfied. (Resp. at 3). However, in that Response, Illinois EPA continues to express its disdain for the decision to close the Phase I hazardous waste landfill with hazardous waste in place. (Resp. at 5). The Agency does not and cannot argue that doing so violated any law—after all, Illinois EPA itself certified closure on December 5, 1984. (R 000141). But the testimony of Agency witnesses instrumental in the September 25, 2023, decision at issue makes clear that Illinois EPA could use the fact that a closed hazardous waste landfill contains hazardous waste as a basis to invoke its new rolling, 30-year protocol to perpetually impose post-closure care and financial assurance obligations. Takako Halteman, Nutt's supervisor, testified as follows:

> Q. So as long as hazardous waste is in place at a RCRA facility there's a risk that's posed?
>
> A. Yes, I believe so.

(BFI Mot. for Summ. J. Ex. 4 (Halteman dep.) at 66:5–8; 20:16–21:10). In his deposition, Nutt testified as follows:

> Q. So as long as there are hazardous constituents present, even if post-closure care had been completed, the financial assurance obligation of 30 years at any one time would continue on?
>
> A. As long as there are hazardous constituents present, I am not certain that they would be able to end post-closure care.

(BFI Mot. for Summ. J. Ex. 3 (Nutt dep.) at 32:4–10).

Consequently, despite its arguments to the contrary, the rolling, 30-year post-closure care and financial assurance obligation Illinois EPA imposed in its September 25, 2023, decision is not incremental, and the Agency has given every indication that it would impose that obligation perpetually.

### E. ILLINOIS EPA EXCEEDED ITS AUTHORITY BY UNILATERALLY EXTENDING POST-CLOSURE CARE WITHOUT SEEKING AN ADJUSTED STANDARD.

The Board's rule sets a 30-year period and provides a single path to extend it: an adjusted standard issued by the Board upon findings that an extension is necessary to protect human health and the environment. 35 Ill. Adm. Code 724.217(a)(1) fixes a 30-year period; subsection (a)(2)(B) authorizes the Board—via adjusted standard—to extend it. Illinois EPA neither petitioned for nor obtained an adjusted standard for Phase I, and its decision letter and Attachment A do not invoke or apply any Board adjusted standard findings. The Agency's reliance on federal delegation and guidance cannot displace Illinois' allocation of authority to the Board for any extension. The Agency's response

confirms it is using "default" 30-year increments "until" it decides risk is gone, which is precisely the sort of unilateral extension the rule assigns to the Board, not the Agency. Illinois EPA's own September 25, 2023, decision cites Section 724.217 to demand 30 years of financial assurance, yet it bypasses subsection (a)(2)(B)'s adjusted standard requirement.

### F. ILLINOIS EPA UNLAWFULLY USED A CLASS 1* PATH FOR WHAT THIS BOARD'S RULES CLASSIFY AS A CLASS 2 MODIFICATION.

The Board's modification matrix expressly lists "[e]xtension of the post-closure care period" as a Class 2 modification, which carries heightened process including public notice, meeting, and comment. Illinois EPA processed Petitioner's permit modification submissions as Class 1* and then imposed an extension requirement upon them. The rules do not allow the Agency to do indirectly, via Class 1*, what the Board classifies as a Class 2 extension.

### G. NO CHANGE IN LAW OR SITE RISK JUSTIFIED ABANDONING THE AGENCY'S PRO-RATED FINANCIAL ASSURANCE PROTOCOL.

Agency witnesses conceded there were no changes to the Act or Board regulations after 2018 affecting post-closure/financial assurance, and that site risk had "remained the same"; nonetheless, the Agency multiplied required financial assurance more than five-fold by repudiating the historic pro-rated methodology previously applied to this very site. Under Illinois administrative law, where a regulation's meaning is debatable and circumstances have not changed, an agency is bound by its long-standing interpretation and may not abruptly reverse course without proper authority and process. Petitioner's record demonstrates the Agency "reevaluated" policy internally and via external

guidance/peer discussion, not through rulemaking, adjusted standard, or evidence of changed risk at the Landfill. The internal notes identify USEPA guidance and an ASTSWMO paper that expressly lacks binding effect and, in ASTSWMO's case, urges EPA to revise regulations or issue supplemental guidance, thereby confirming the need for rulemaking rather than ad hoc permit conditions.

Throughout this proceeding, Illinois EPA has attempted to contort its case to fit the contours of *Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board*, 179 Ill. App. 3d 598 (2d Dist. 1989). That decision recognized the prior holding of the Appellate Court of Illinois in *Central Illinois Public Service Company (CIPS) v. Pollution Control Board*, 165 Ill. App. 3d 354 (4th Dist. 1988). In *CIPS*, the Appellate Court held that, if "the meaning of a regulation is debatable, and circumstances have not changed, an administrative agency is bound by a long-standing interpretation of the regulation." *Id.* at 363. However, in the *Browning-Ferris* case, the Appellate Court found numerous circumstances had changed justifying a change in Illinois EPA's prior policy: the Illinois General Assembly had addressed hazardous waste, new regulations were promulgated, and the dangers of hazardous wastes were more fully recognized. *Id.* at 604–05. By contrast, in the instant case there has been no change in law from the issuance of the 2018 permit to the September 25, 2023, decision, and Agency witnesses have testified that the risks at the landfill have not changed. *See supra*. Illinois EPA continues to point to leachate at the site in support of its decision, but the landfill generated comparable leachate volumes prior to the 2018 permit as it did afterwards (*see* Illinois EPA Mot. for Summ. J. at 9), and thus the generation of leachate does not constitute a change in circumstances justifying the Agency's change of its 30-year post-closure care and financial assurance protocol. Not

surprisingly then, no change in site-specific risk was cited by Illinois EPA in its September 25, 2023, decision (R 000130–R 000136), and thus this Board should reject the Agency's attempts to newly identify risks so that it can invoke *Browning-Ferris.*

### H. U.S. EPA GUIDANCE DOES NOT PROVIDE ILLINOIS EPA WITH AUTHORITY TO IGNORE PCB PROCEDURES.

In its Response, Illinois EPA points to a 2016 U.S. EPA guidance memorandum and a Memorandum of Agreement[1] between the Agency and U.S. EPA, but neither document authorized Illinois EPA to disregard Illinois' own allocation of powers.

Illinois EPA contends that its Memorandum of Agreement with U.S. EPA required it to consider a December 16, 2016, U.S. EPA guidance memorandum. (Resp. at 18–20). Petitioner does not dispute that the agreement requires Illinois EPA to consider U.S. EPA guidance, but nothing in that agreement converts the December 16, 2016, guidance memorandum into law or otherwise authorizes the Agency to ignore this Board's rules.

Furthermore, Illinois EPA contends that its Memorandum of Agreement with U.S. EPA "significantly predates the 2023 Permit Decision." (Resp. at 19). Indeed, the Illinois EPA–U.S. EPA Memorandum of Agreement attached to the Agency's Response shows the agreement was executed in 2016, which not only predates Illinois EPA's 2023 decision but also the 2018 permit the Agency previously issued to Petitioner in which it employed the pro-rated financial assurance protocol. (R 000135–R 000136). Accordingly, when Illinois EPA issued Petitioner its 2018 permit, it had been required to consider U.S. EPA's December 16, 2016, guidance memorandum, and thus the Agency cannot now claim that

[1] Petitioner's Motion for Leave to File Objection to Respondent's Motion to Supplement Record was filed on June 10, 2026. A copy of Petitioner's Objection to Respondent's Motion to Supplement Record to include the State-EPA Memorandum of Agreement in the Record on Appeal was attached as Exhibit A, and Petitioner incorporates into this reply the arguments set forth in that objection.

this U.S. EPA guidance memorandum required it to change from the pro-rated 30-year financial assurance protocol employed with its 2018 permit to the rolling 30-year financial assurance protocol imposed in the 2023 permit, as the Agency was required to consider that guidance prior to both decisions.

## I. PETITIONER HAS MET ITS BURDEN, AND THIS BOARD SHOULD ENTER SUMMARY JUDGMENT IN ITS FAVOR.

On this record, Petitioner has shown that, absent the challenged conditions, the submitted permit modifications would not violate the Act or Board rules and that the Agency's modifications were unnecessary and imposed without lawful authority:

- The Agency imposed a new, rolling 30-year requirement without adjusted-standard findings and processed it as a Class 1* action despite the rules classifying extensions as Class 2
- No change in law or site risk supported abandoning the previously applied, approved pro-rated financial assurance methodology
- The Agency's decision and attachments did not rely on leachate or liner changes as the basis for the new condition, and its after-the-fact risk rationales cannot substitute for the procedures the Board's rules require. Petitioner is therefore entitled to judgment as a matter of law.

## III. CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, the Board should grant Petitioner's Motion for Summary Judgment; reverse the September 25, 2023, conditions and modifications requiring 30 years of financial assurance "at any time" and related cost-estimate revisions; and remand with direction that the five modifications be approved without the unlawful, rolling 30-year post-closure/financial assurance requirement. Alternatively, the Board should strike the challenged conditions and permit the Agency to proceed, if it wishes to seek an extension of post-closure, only through an adjusted standard and the Class 2 procedures specified by the Board's rules.

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: June 12, 2026

Respectfully submitted,

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Petitioner.

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***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 June 12, 2026, from Springfield, Illinois, he electronically submitted for filing the foregoing **REPLY TO ILLINOIS EPA'S RESPONSE TO PETITIONER'S SUMMARY JUDGMENT MOTION** with the Pollution Control Board by using the Clerk's Office On-Line (COOL) eFile system. Scott B. Sievers further certifies that on June 12, 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
OF NORTH AMERICA, LLC,

Petitioner

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