**BEFORE THE POLLUTION CONTROL BOARD**
**OF THE STATE OF ILLINOIS**



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|---|---|---|
| UNITED DISPOSAL OF BRADLEY, INC.,) And MUNICIPAL TRUST & SAVINGS BANK as trustee under Trust 0799, Petitioner, | ) | |
| v. | ) | PCB No. 03-235 |
| ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent. | ) | (Permit Appeal) |

**NOTICE**

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Carol Sudman, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue, East
P.O. Box 19274
Springfield, IL 62794-9274

Jennifer J. Sackett Pohlenz
Querrey & Harrow, Ltd.
175 West Jackson Street
Suite 1600
Chicago, IL 60604

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a MOTION FOR SUMMARY JUDGMENT and SUPPLEMENT TO THE ADMINISTRATIVE RECORD, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: December 3, 2003

**BEFORE THE POLLUTION CONTROL BOARD**
**OF THE STATE OF ILLINOIS**

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| UNITED DISPOSAL OF BRADLEY, INC.,) And MUNICIPAL TRUST & SAVINGS ) BANK as trustee under Trust 0799, ) Petitioner, ) | | |
| v. | ) | PCB No. 03-235 |
| ILLINOIS ENVIRONMENTAL ) PROTECTION AGENCY, ) Respondent. ) | | (Permit Appeal) |

**MOTION FOR LEAVE TO FILE INSTANTER A MOTION FOR SUMMARY JUDGMENT AND SUPPLEMENT TO THE ADMINISTRATIVE RECORD**

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, hereby requests that the Illinois Pollution Control Board ("Board") grant the Illinois EPA leave to file instanter a Motion For Summary Judgment. In support of this motion, the Illinois EPA states as follows:

1. On November 18, 2003, the Hearing Officer assigned to this matter issued an order requiring that the Petitioners and Respondent file motions for summary judgment on or before November 24, 2003.

2. Due to constraints imposed upon the undersigned attorney by several other matters pending before the Board that were short-term or emergency in nature, the Illinois EPA was not able to prepare its motion by November 24, 2003. Counsel for the Illinois EPA contacted opposing counsel, and an agreement was reached whereby the motions would not be due until December 1, 2003.

3. Unfortunately, the undersigned attorney was unable to conclude the drafting of the Illinois EPA's motion until December 3, 2003. It should be noted that this delay is solely on

the part of the Respondent, as the Petitioners have been cooperative and patient thus far and filed their motion for summary judgment in a timely fashion. In the interest of fairness the undersigned attorney will not read the Petitioners' motion until after filing of its own motion for summary judgment.

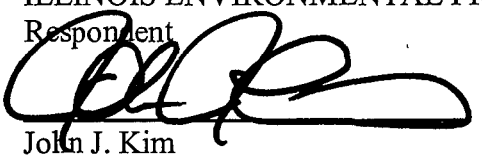
4. The Illinois EPA is also submitting a Supplement to the Administrative Record, which consists of several pages that were missing from the Administrative Record (one page was miscopied, and several others were erroneously excluded).

5. The undersigned attorney regrets this delay and believes that no prejudice will result since the parties will still have until December 30, 2003, to file their respective responses. This will allow for almost four full weeks between the filing of the motion and the response, compared to the two weeks otherwise provided for in the Board's regulations.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board grant the Illinois EPA leave to file instanter a motion for summary judgment and Supplement to the Administrative Record.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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## MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, 101.508 and 101.516, hereby respectfully moves the Illinois Pollution Control Board ("Board") to enter summary judgment in favor of the Illinois EPA and against the Petitioners, United Disposal of Bradley, Inc. and Municipal Trust & Savings Bank, as Trustee Under Trust 0799 ("United Disposal," collectively), in that there exist herein no genuine issues of material fact, and that the Illinois EPA is entitled to judgment as a matter of law with respect to the following grounds. In support of said motion, the Illinois EPA states as follows:

## I. STANDARD FOR ISSUANCE AND REVIEW

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 483, 693 N.E.2d 358, 370 (1998).

After the Illinois EPA's final decision on a permit is made, the permit applicant may appeal that decision to the Board pursuant to Section 40(a)(1) of the Illinois Environmental

Protection Act ("Act") (415 ILCS 5/40(a)(1)). The question before the Board in permit appeal proceedings is whether the applicant proves that the application, as submitted to the Illinois EPA, demonstrated that no violation of the Act would have occurred if the requested permit had been issued. Panhandle Eastern Pipe Line Company v. Illinois EPA, PCB 98-102 (January 21, 1999); Joliet Sand & Gravel Co. v. Illinois Pollution Control Board, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987), citing Illinois EPA v. Illinois Pollution Control Board, 118 Ill. App. 3d 772, 455 N.E. 2d 189 (1st Dist. 1983). Furthermore, the Illinois EPA's denial letter frames the issues on appeal. ESG Watts, Inc. v. Illinois Pollution Control Board, 286 Ill. App. 3d 325, 676 N.E.2d 299 (3rd Dist. 1997).

## II. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. Here, United Disposal must demonstrate to the Board that approval of the permit application would not cause a violation of the Act or underlying regulations. On appeal, the sole question before the Board is whether the applicant proves that the application, as submitted to the Illinois EPA, demonstrated that no violation of the Act would occur if the permit was granted. Saline County Landfill, Inc. v. Illinois EPA, PCB 02-108 (May 16, 2002), p. 8.

## III. FACTS

The facts in this case are straightforward and not in dispute. In June 1994, United Disposal applied for a development permit to develop a transfer station to accept general municipal refuse, demolition debris (including putrescible material), and landscape and yard waste. Administrative Record, pp. 16-55.[1] The application included United Disposal's statement that the proposed facility would serve only customers within the Village of Bradley,

[1] References to the Administrative Record will henceforth be made as "AR, p. ___."

and therefore the proposed facility qualified as a non-regional pollution control facility. Also, the application stated that Sections 22.14 and 39.2 of the Act (415 ILCS 5/22.14, 39.2) would not apply since the facility would be a non-regional pollution control facility. AR, p. 26.

The Illinois EPA reviewed the permit application and noted in the permit reviewer's notes that the facility was not a regional pollution control facility and therefore that local siting approval was not a prerequisite to issuing the requested permit. AR, pp. 10-11.

On September 21, 1994, the Illinois EPA issued a development permit to United Disposal (Permit No. 1994-306-DE). The permit stated that the subject transfer station was not a regional pollution control facility, and that as a condition of development the transfer station would not be able to accept waste generated outside the municipal boundaries of the Village of Bradley ("Village"). AR, pp. 1, 3.

On or about December 5, 1994, United Disposal submitted a permit application seeking an operating permit for the transfer station. AR, pp. 88-93. The application referenced that the transfer station was a non-regional pollution control facility, and that it was submitted in conjunction with approved Permit No. 1994-306-DE. AR, p. 89. There was no request within the application to remove or delete the special condition imposed in the development permit that limited the service area of the transfer station.

On January 19, 1995, the Illinois EPA issued an operating permit to United Disposal (Permit No. 1994-306-OP). AR, pp. 67-73. The permit included special condition no. 9 consistent to one found in the development permit; namely, that no waste generated outside the municipal boundary of the Village may be accepted at the facility. AR, p. 69.

On March 27, 2003, United Disposal submitted another application, seeking ostensibly to strike special condition no. 9 from the operating permit. AR, pp. 129-137. On May 15, 2003,

the Illinois EPA issued a decision in response to the permit application. The Illinois EPA deemed the application to not have been filed because it failed to set forth certain information, documents or authorizations required pursuant to Section 807.205 of the Board's regulations (35 Ill. Adm. Code 807.205). Specifically, the decision stated that application failed to provide proof of local siting approval as required pursuant to Section 39(c) of the Act (415 ILCS 5/39(c)). The decision further stated that though the application sought only to remove special condition no. 9 from the operating permit, there must also be a corresponding change to the development permit. Supplemental Administrative Record, pp. 143-144.[2]

## IV. CHANGE IN STATUTORY LANGUAGE

From the time of United Disposal's development permit application and submission of an operating permit application, references in the Act to pollution control facilities were distinguished by such facilities being defined as either a "regional pollution control facility" or a "non-regional pollution control facility." The use of the terms "regional" and "non-regional" stemmed from a statutory exemption to the definition of a regional pollution control facility.

Section 3.32(a) of the Act (415 ILCS 5/3.32(a) (1994)) provided in part:

> "Regional pollution control facility" is any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility or waste incinerator that accepts waste from or that serves an area that exceeds or extends over the boundaries of any local general purpose unit of government.

Section 3.32(a)(1) of the Act (415 ILCS 5/3.32(a)(1) (1994)) provided that:

> The following are not regional pollution control facilities:
>
> (1) sites or facilities located within the boundary of a local general purpose unit of government and intended to serve only that entity.

[2] Through an oversight, the Illinois EPA's Administrative Record in this proceeding does not include a copy of the final decision under appeal (though that document is included as an exhibit to United Disposal's petition). The final decision, along with certain other documents erroneously left out of the record (and one page that was mis-copied), are submitted contemporaneously with this motion for summary judgment in a separate document as a supplement to the record. References to the Supplemental Administrative Record will hereinafter be made as, "SAR, p. ___."

The language of Section 3.32(b) of the Act (415 ILCS 5/3.32(b) (1994)), which defined a "new regional pollution control facility," also utilized the term "regional" in conjunction with the three defined subsets of new regional pollution control facilities. ion 1039.2 of the Act read:

> "(a) The county board of the county or the governing body of the municipality, as determined by paragraph (c) of Section 39 of this Act, shall approve the site location suitability for such new regional pollution control facility only in accordance with the following criteria ... ." (See: Ill. Rev. Stat., 1983, ch. 111 ½, par. 1039)

In July 1993, a federal district court in Illinois ruled that the use of the term "regional" to differentiate between facilities that have limited or unlimited service areas was unconstitutional. In recognition of that court ruling, effective on December 22, 1994, the Illinois General Assembly amended affected sections in the Act. The "regional" terms that preceded the phrase "pollution control facility" were stricken from the Act, as was the exemption found in Section 3.32(a)(1) of the Act. This is the way that we do it.

## IV. ISSUE

This action involves a transfer station that Petitioners requested to have permitted for development and operation in 1994 and 1995. The issue before the Board is whether the application submitted by United Disposal to the Illinois EPA would result in a violation if approved. As a corollary, there is a question as to whether the Petitioners must comply with Section 39.2 of the Act (415 ILCS 5/39.2) and submit proof of local siting approval as a condition precedent to the Illinois EPA issuing a permit allowing the facility to expand its service area beyond that area identified in Petitioner's permit.

## V. ARGUMENT

The permit application submitted by United Disposal, if approved by the Illinois EPA, would result in a violation of Section 39(c) of the Act. The Act is clear in mandating that no permit for the development or construction of a new pollution control facility may be granted by

the Illinois EPA unless a permit applicant submits proof to the Illinois EPA that the location of said facility has been approved by the governing body of the municipality in which the facility is to be located in accordance with Section 39.2 of the Act. Though United Disposal captioned its application as one seeking to modify its operating permit, in fact it must be considered as an application requesting a modification of its development permit. The application seeks a change that would result in a new pollution control facility, and therefore proof of local siting approval is needed before a permit may be issued.

**A. United Disposal's Transfer Station Is A Pollution Control Facility**

There is no doubt that United Disposal's transfer station meets the definition of a pollution control facility as that term is defined in Section 3.330(a) of the Act (415 ILCS 5/3.330(a)). By the terms of its development and operating permit applications, the facility is one that transfers materials defined and acknowledged as waste. AR, pp. 17, 88. The permits issued by the Illinois EPA to develop and operate the facility as a transfer station also identify the facility as a transfer station that accepts waste. AR, pp. 1-7, 67-73.

Accordingly, any potential modification or change in the facility's development or expansion of the facility may result in the pollution control facility rightfully being considered as a new pollution control facility.

When the transfer station was first proposed, United Disposal's application stated it wished the transfer station to be considered as a non-regional pollution control facility. The application noted that it would be limiting its service area to the municipal boundaries of the Village, and therefore would not be subject to local siting approval or any statutory setback requirements imposed by the Act. AR, p. 26.

As requested in the development permit application, on September 21, 1994, the Illinois EPA approved United Disposal's application such that the facility would have a limited service area. Special condition no. 9 in the development permit imposed the limitation on the service area for the transfer station. AR, p. 3. Later, in early December 1994, United Disposal submitted its application for an operating permit for what it continued to characterize as a non-regional pollution control facility. AR, p. 89.

On January 19, 1995, after the effective date of the deletion of the term "regional" from the phrase "regional pollution control facility" as found in the Act, the Illinois EPA issued an operating permit consistent with the application submitted by United Disposal. The operating permit did not refer to the facility as a non-regional pollution control facility, but maintained the special condition limiting service area since that condition was an element of the development permit. United Disposal did not appeal any conditions imposed in either its development or operating permit.

**B. United Disposal's Permit Application Was For A New Pollution Control Facility**

In the documents submitted by United Disposal as part of its permit application that led to the final decision now under appeal, United Disposal stated that it seeks a modification to its operating permit. AR, p. 129. The application stated that the applicant seeks only the deletion of special condition no. 9 from the operating permit (which imposes the limited service area); the application purported to seek no modification to the physical structure or property boundaries of the currently permitted facility. Id.

Those statements notwithstanding, the permit application dated March 27, 2003, is in fact and law not a request to modify United Disposal's operating permit. It is the position of the Illinois EPA that given that the special condition described in the permit application is a

condition that was imposed in and carried over from the development permit for the transfer station, the special condition must be stricken from both the development and operating permit.

By analogy, consider a facility developed as a waste treatment facility that would not accept any hazardous waste. Such a limitation in the facility's operations would first be noted as a special condition in its development permit and later carried over into the operating permit for the facility. If the permitted owner/operator of the facility later sought to accept hazardous waste for the first time, it could not do so by simply by asking to have the special condition in the operating permit removed without any similar modification to the development permit. To do so would clearly bypass the scope and intent of Sections 3.330(b) and 39(c) of the Act (415 ILCS 5/3.330(b), 39(c)), which provide that certain changes to a facility render it a facility that must undergo the local siting approval process.

Since Section 39(c) of the Act only requires local siting approval prior to issuance of development permits (and not operating permits), it would be nonsensical to nonetheless allow a facility to sidestep local siting requirements by asking to simply change a term or condition in its operating permit and to ignore the continued existence of such a term or condition in its development permit.

Section 3.330(b) of the Act provides as follows:

A new pollution control facility is:

(1) a pollution control facility initially permitted for development or construction after July 1, 1981; or

(2) the area of expansion beyond the boundary of a currently permitted pollution control facility; or

(3) a permitted pollution control facility requesting approval to store, dispose of, transfer or incinerate, for the first time, any special or hazardous waste.

Subsection (b)(1) of Section 3.330 of the Act was drafted in conjunction with subsections (b)(2) and (b)(3). Therefore, subsection (b)(1) does not stand alone. Any interpretation or construction of subsection (b)(1) must consider the provisions of Section 3.330(b) as a whole.

The primary goal of statutory construction is to ascertain and give effect to the intent of the legislature and the most reliable indication of the legislature's intent is the plain language of the statute itself. A court must examine the language as a whole and consider each part or section in connection with every other part or section. Where the legislature uses certain words in one instance and different words in another, the legislature intends different results. A statute must be construed so that no word or phrase is rendered meaningless. Northwest Diversified, Inc. v. Mauer, 341 Ill. App. 3d 27, 35-36, 791 N.E.2d 1162, 1168-1169 (1st Dist. 2003).

What is noteworthy about subsection (b)(1) is the fact that the phrase "pollution control facility" within the subsection is not preceeded by the phrase "currently permitted" nor "permitted" which are included within the other subsections. This indicates that when drafted, the General Assembly was distinguishing between "initially permitted" facilities after July 1, 1981, and "currently permitted" facilities (i.e., facilities permitted as of the present time). The question becomes, is it important that a "currently permitted" facility could have been permitted prior to or after the date of July 1, 1981?

This question centers on why the General Assembly chose to distinguish between "permitted" and "initially permitted" facilities. Had the General Assembly intended for a pollution control facility permitted after July 1, 1981, to always be a "new" pollution control facility, the drafters could have provided within subsections (b)(2) and (b)(3) that local siting approval is required for a pollution control facility permitted prior to July 1, 1981, since by application, a facility permitted following that date was already a "new" pollution control facility.

Also, the legislature could have provided that a pollution control facility requesting to expand its boundary required local siting approval instead of limiting that subsection's application to "currently permitted" facilities. Thus, facilities initially permitted after July 1,

1981, could, and do, fall into subsection (b)(2) for review. As drafted, therefore, one would infer that the provision of subsection (b)(2) applies to "currently permitted" facilities whether permitted prior to or after July 1, 1981.

Put simply, a "currently permitted" facility need only provide proof of local siting if it were to request an expansion or request the right to accept special or hazardous waste for the first time. If subsection (b)(1) was to be read that a facility "initially" permitted after July 1, 1981, was *always* a "new pollution control facility," then subsections (b)(2) and (b)(3) would be unnecessary as applied to those facilities. Therefore, subsection (b)(1) applies when an applicant files an initial application for permitting a pollution control facility after July 1, 1981.

This conclusion is further bolstered by the Board's holding in Waste Management of Illinois, Inc. v. Illinois EPA, PCB 94-153 (July 21, 1994). In Waste Management, the Board reviewed an Illinois EPA denial of a permit application for modification of a landfill site. The facility received its original local siting approval in 1986 and received approval again in 1989 when the original owner filed for an expansion of the site. The proposed final design caused the contours to be lower in some areas and higher in others as compared to the original permitted designs approved by the Illinois EPA in 1990. However, the proposed modification would not increase the site's capacity and, in fact, the actual capacity would be decreased. The issue under review was whether the change in landfill contour and design proposed fell within the definition of "new regional pollution control facility."

The Waste Management decision ultimately hinged on a finding that the proposed redesign did not constitute an "expansion beyond the boundary of a currently permitted pollution control facility" within the meaning of Section 3.330(b) of the Act. If a pollution control facility that was "initially permitted" for development or construction after July 1, 1981, was always a "new pollution control facility" this review would not have taken place.

Therefore, Section 3.330(b)(1) should not be construed to provide that all pollution control facilities permitted after July 1, 1981, need to provide siting approval for every

modification. Section 3.330(b)(1) provides that the applicant seeks a "new pollution control facility" if it is filing an "initial" permit application after July 1, 1981.

The Illinois General Assembly created a regulatory scheme for determining when a permit applicant subject to Section 39 of the Act must also comply with Section 39.2 of the Act. Any "new pollution control facility" requesting a development permit must comply with Section 39.2 pursuant to the mandates of Section 39(c) of the Act. A facility is a "new" facility if it falls within the intended scope of Section 3.330(b)(1), (b)(2) or (b)(3) of the Act.

First, a facility is "new" if it is initially permitted for development after July 1, 1981. Moreover, at the time of enactment of Section 3.330(b), the General Assembly recognized that some facilities were "currently permitted." As a result, the General Assembly drafted subsection (b)(2) and (b)(3) to control siting approval for these "grandfathered" facilities. Grandfathered facilities permitted before July 1, 1981 are required to provide proof of local siting approval if the facility: (1) expanded its boundaries; or (2) requested to accept special of hazardous waste for the first time. Later, as "initially permitted" sites attempted to expand their boundaries, Section 3.330(b) created a separate category of a "new" facility in situations in which a facility was initially permitted for development after July 1, 1981 and the facility requested the ability to modify its development permit to: (1) expand its boundaries; or (2) request the right to transfer or manage special or hazardous waste for the first time.

United Disposal's transfer station was not permitted prior to July 1, 1981. Thus, the facility is not grandfathered into Section 3.330(b) of the Act. The Petitioners' March 2003 permit application demonstrates one thing on its face, that is, United Disposal wishes to engage in the business of waste transfer, after the date of July 1, 1981, without receiving local siting approval. To date, the Petitioners have not received local siting approval. Legislative intent derived from the express language of Section 3.330(b) of the Act mandates that all pollution control facilities initially developed after the date of July 1, 1981, submit proof of local siting approval pursuant to Section 39.2 of the Act.

The statutory scheme (later deemed unconstitutional) in place at the time of United Disposal's receipt of its development permit allowed the facility to be permitted as a facility exempt from the definition of a regional pollution control facility. Therefore, local siting approval was not a consideration. The transfer station has never received a development permit as either a regional pollution control facility or a pollution control facility. Given that modification of the development permit to strike the condition imposing a limited service area would require a request for a development permit to that end, and such a development permit would be related to a pollution control facility (as the facility now meets no exemptions), in effect the March 2003 permit application sought an initial development permit for a pollution control facility after July 1, 1981.

### C. United Disposal's Transfer Station Is Not Grandfathered Out Of Local Siting Approval Requirements

As noted above, the District Court for the Southern District of Illinois ruled in the case of Tennsv, Inc. v. Gade, 24 ELR 20019 (S.D. Ill.) (July 8, 1993), that the framework of a permitting system involving regional and non-regional facilities was unconstitutional. Following the court's decision, the General Assembly amended the Act to strike the offending terms and procedures. Looking to those amendments to the Act, it is are clear that the General Assembly did not intend to "grandfather" facilities that were currently permitted out of the potential requirement of having to obtain local siting approval.

The definition of "Regional Pollution Control Facility" appeared in the Act in 1994 at the time of issuance of the development permit to United Disposal as Section 3.32(a) of the Act.

Upon review in the context of "trash train" litigation, the Tennsv court found Sections 3.32, 22.14(a) and 39.2 of the Act unconstitutional. In Tennsv, the plaintiff argued that Section 22.14(a) restricted the location of a "regional" pollution control facility, but did not restrict the location of a facility that did not fall within the definition of a regional pollution control facility. The plaintiff's argument highlighted the fact that the Act established a statutory scheme that distinguished between facilities located outside the geographical boundaries of a general purpose

unit of government and those which were not so located. This scheme was alleged to be in violation of the "dormant" Commerce Clause of the United States Constitution that prohibits States from advancing their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state. In ruling, the Tennsv court reasoned that the State failed to advance any argument that municipal solid waste generated outside the boundaries of any local general purpose unit of government posed any different health risk to the public than municipal solid waste generated locally.

Although the holding in Tennsv is limited to a finding that Sections 3.32, 22.14(a) and 39.2 of the Act were unconstitutional as applied to interstate municipal solid waste, it was likely that if presented with the appropriate fact situation, a court would find these provisions unconstitutional on their face. More importantly, with regard to transfer stations, the Tennsv ruling mandated only that the General Assembly could not distinguish between wastes generated from differing sources. The court did not intimate that the State was precluded, on constitutional grounds, from delegating to units of local government the authority to render, based on set criteria, decisions on location of pollution control facilities.

Following Tennsv, the General Assembly amended the Act to exclude the term "regional." In amending the Act in conformance with the District Court's opinion, members of the 88th General Assembly debated the issue of whether or not facilities would be "grand fathered" with regard to the provisions within Section 39.2 of the Act.

On December 1, 1994, in floor debate, Senator Welch stated:

> "... Senator [Karpiel], according to my analysis, this bill is going to grandfather in facilities permitted for development or construction before January 1, 1994, meaning that they won't have to follow any of the nine siting requirements under the siting requirements of Senate Bill 172."

Senator Karpiel (Sponsor of House Bill 1594) responded in the negative stating:

> "I'm sorry, Senator Welch, according to my staff and according to what I know about the bill, there's no grand fathering in."

Senator Welch replied:

"Yes...."

Following a break, Senator Karpiel clarified and continued:

> "... let me just go through this again [this legislation] just simply changes the siting legislation in Illinois for landfills, transfer stations, other pollution control facilities, to take out the word "regional." ... A city or a county or any local government can still have a local facility that takes in only their waste, but under the new language now, it will have to go through the siting process, just as a multi-unit government facility has to.

Senator Welch responded:

> "... there is a amendment to the prior bill that changed the wording, "After the effective date of this amendatory Act or 1983(sic 1993)." That was changed to, "After January 1, 1994." That language allows a facility to avoid the requirements for local siting. How, is it your assertion here that the legislative intent in that change of the date is not to allow any other facilities to escape siting, that was merely done to comply with a — with a court decision?"

Senator Karpiel again clarified stating:

> "... it was a technical change. The intent is to not allow any siting before that date, and as a matter of fact, it wouldn't — there is not time for that to happen anyway."

Public Act 88-681 (House Bill 1594 as signed by the Governor) amended Sections 3.32, 22.14 and 39.2 of the Act and became effective on December 22, 1994. This legislation deleted the term "regional" from Sections 3.32 and 39.2, as well as amended Section 22.14(b) to provide that the Section did not prohibit any such facility that was operating on January 1, 1988.

Had the General Assembly intended to "grandfather" facilities such as Petitioners' out of the requirement of seeking local siting approval and thus considered such facilities to be "currently permitted" facilities under Section 3.330(b)(2) or (b)(3), the General Assembly surely would have amended Section 22.14(b) (garbage transfer stations) to insure that old non-regional pollution control facilities which by operation of law became regional would not be required to meet setback requirements.

It is apparent from the debate above, as well as the chosen amendments to Sections 3.32, 22.14 and 39.2 of the Act, that the General Assembly did not intend for facilities to be "grandfathered" into local siting. Thus, the Board should not find that United Disposal's transfer station is "currently permitted" under Section 3.32(b)(2) or (b)(3).

**D. United Disposal's Facility May Be Subject To Section 3.330(b)(2) Of The Act**

In the alternative, if the Board does conclude that the transfer station is currently permitted, in the alternative Section 3.330(b)(2) of the Act also merits consideration and application to the present situation. That subsection provides that a new pollution control facility is an area of expansion beyond the boundary of a currently permitted pollution control facility. As stated above, that section only applies to facilities that are considered to be pollution control facilities with a permit. The United Disposal transfer station did not receive a development permit as a regional pollution control facility or as a pollution control facility.

However, given that the statutory amendments striking the term "regional" were effective in between the time that United Disposal submitted its application for an operating permit and the date that the Illinois EPA issued the operating permit, there is a question as to whether the facility received an operating permit as a pollution control facility. The factual and legal peculiarities of this case are likely one of first impression to the Board, and the possibility that a facility could receive a development permit as a facility exempt from the requirement of local siting approval and then receive an operating permit as a facility that would otherwise be subject to local siting approval is certainly unusual. But that may be the case here. If so, and if the Board decides that for some reason Section 3.330(b)(1) of the Act is not applicable, then the Illinois EPA believes that Section 3.330(b)(2) should be reviewed.

There is no doubt that United Disposal did not seek a physical change to its facility. But the Board has noted in several cases that physical expansion of boundaries are deserving of attention since such changes lead to the possibility of increased capacity. In Waste Management, the Board stated that to expand the boundaries of a landfill, whether vertical or laterally, in effect increases its capacity to accept and dispose of waste. Waste Management, p. 3. Acceptance and

disposal of waste is the business and purpose of a landfill; similarly, acceptance and transfer of waste is the purpose of a transfer station. In this situation, there is little doubt that removing the service area limitation on United Disposal's transfer station would in effect increase the facility's ability to accept and transfer waste since it would be open to a much larger service area.

In Saline County Landfill, the Board found that there was a reasonable likelihood that the design change being contemplated that led to the permit denial would substantially alter the nature and scope of the expansion that had been otherwise earlier approved by the County Board. The Board contrasted that with a holding in a different case that no additional siting would be needed when a facility is going to be substantially the same as originally proposed. Saline County Landfill, p. 13.

Here, United Disposal has never received local siting approval, and therefore has never had to undergo any type of scrutiny by the local unit of government and interested members of the public. The change being contemplated by United Disposal to dramatically expand its service area would no doubt result in a facility substantially different than what was originally proposed. The expansion would not be of a physical nature, but would go to the types of local siting criteria the Board has noted in past cases that trigger an "expansion" so as to require local siting approval. If United Disposal were not required to undergo local siting approval, it would be given a windfall of never having been subject to that process, never having been specifically grandfathered out of that requirement, and having gone from a small-scale operation to a much larger one without any attendant need to obtain local siting approval. From a policy and legal standpoint, that scenario is inconsistent with the language and purpose of Sections 3.330(b) and 39(c) of the Act.

## VI. CONCLUSION

The permit application submitted by United Disposal in March 2003 on its face sought only a modification to an operating permit, but given that the modification involved the removal of a key special condition that was first imposed in a development permit, it is impossible to remove the condition from the operating permit without also removing the condition from the

development permit. Due to the specific factual and legal background here, making such an amendment to the development permit in this situation results in United Disposal seeking a development permit for a new pollution control facility, thus invoking the requirement of local siting approval. This requirement is imposed either through the consequence of the transfer station, a new pollution control facility, being initially permitted for development after July 1, 1981. In the alternative, the proposed change in the facility's operations may rise to the level of an expansion such that Section 3.330(b)(2) of the Act is applicable.

The Petitioners no doubt are taking the position that the Illinois EPA is somehow punishing the applicants by requiring local siting approval as a consequence of the facility first having been permitted under a now-invalid system. However, the Petitioners were the entity that sought the development and operating permit now in effect, and there is nothing unconstitutional about a permit that limits the service area of the facility. What was deemed unconstitutional was the State using the distinction of a service area to not require some types of facilities to undergo local siting approval. Here, if the Petitioners have their way, they will have received a development and operating permit (for a limited service area but done so at their own request) for a waste transfer station without having first received local siting approval. Then, the Petitioners would be able to receive an operating permit that removes the limited service area condition again without having to undergo local siting approval. In effect, United Disposal would have utilized a change in the statutory framework of permit issuance to allow them to completely avoid the local siting process that all other similarly situated facilities would be required to undergo.

Since the Petitioners' permit application did not prove that no violation of the Act would result if the application were granted, and since in fact approval of the application would result in a violation of Section 39(c) of the Act, the Illinois EPA respectfully requests that the Board issue an order affirming the Illinois EPA's final decision under appeal.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

John J. Kim
Assistant Counsel
Special Assistant Attorney General

Kyle N. Davis (Of counsel)
Assistant Counsel

Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: December 3, 2003

**BEFORE THE POLLUTION CONTROL BOARD**
**OF THE STATE OF ILLINOIS**



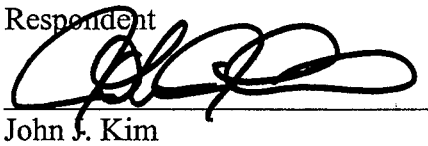
| | | |
|---|---|---|
| UNITED DISPOSAL OF BRADLEY, INC.,<br>And MUNICIPAL TRUST & SAVINGS<br>BANK as trustee under Trust 0799,<br>Petitioner,<br>v.<br>ILLINOIS ENVIRONMENTAL<br>PROTECTION AGENCY,<br>Respondent. | ) | PCB No. 03-235<br>(Permit Appeal) |

**SUPPLEMENT TO THE ADMINISTRATIVE RECORD**

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 105.212, hereby files this Supplement to the Administrative Record ("Record") of the Illinois EPA's decision in this matter. An original and requisite number of copies of this Record are herewith filed with the Board, the assigned Hearing Officer, and the Petitioner.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: December 3, 2003

generated within the Village of Bradley can be accepted at it.

2. The special conditions of the permit letter for Permit No. 1994-306-DE were adapted from Permit No. 1994-008-DE/OP for the transfer station at the D&L Landfill.

CJL\bradley.trf\94-306\revnotes

03-101

cc: Kankakee County
Des Plaines

~~SAS~~

# Village of Bourbonnais

700 Main Street N.W. • Bourbonnais, Illinois 60914
(815) 937-3570
Fax (815) 937-3467

Rec'd 5-2-3
SAS

April 3, 2003

Illinois Environmental Protection Agency
Bureau of Land, Permit Section (#33)
1021 N. Grand Avenue East
P.O. Box 19267
Springfield, Illinois 62794-9276

**Re: Application for Permit to Manage Waste (LPC-PA16)**
**United Disposal of Bradley, Inc.**
**Site number: 0910200013**

To Whom It May Concern:

The Village of Bourbonnais is in receipt of the Notice of Application for Permit to Manage Waste (LPC-PA16) regarding United Disposal of Bradley, Inc. The Village of Bourbonnais supports the request by United Disposal of Bradley to revise condition number 9 on permit 1994-30-OP to delete the sentence stating "[n]o waste generate outside the municipal boundaries of the Village of Bradley may be accepted at this facility."

Sincerely,

Robert Latham
Mayor, Village of Bourbonnais

cc: Rep. Phil Novak
Sen. Debbie Halvorson
Hon. Ed Smith
Hon. Karl Kruse
Hon. Bruce Clark
Hon. Don Green
Hon. Gerald Balthazor
Hon. Norm Grimsley

RECEIVED
APR 14 2003

City of Kankakee

Donald E. Green
Mayor
City Hall 385 East Oak Street
Kankakee, Illinois 60901
(815) 933-0500 – Fax (815) 936-3619
web site: www.ci.kankakee.il.us

April 10, 2003

Illinois Environmental Protection Agency
1021 N. Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

RE: Site Identification # 09102200013
United Disposal of Bradley, Inc.
1000 E. Liberty
Bradley, Illinois

Dear Sirs:

Please be advised that the City of Kankakee is in support of the United Disposal of Bradley, Inc. application to revise condition #9 on their permit 1994-30-OP. The City Council of Kankakee, Illinois, on April 7, 2003, passed a resolution in support of that action.

Sincerely,

Donald E. Green
Mayor

cc: United Disposal of Bradley, Inc.
Enclosure
DEG:ns

# RESOLUTION NO. 2003-09
# OF THE CITY OF KANKAKEE, ILLINOIS

WHEREAS, United Disposal of Bradley, Inc. has applied for a supplemental operating permit to the Environmental Protection Agency concerning its operation of the transfer station located on Liberty Street in the Village of Bradley, Illinois; and,

WHEREAS, the Village of Bradley has adopted a resolution whereby it supported the request of United Disposal of Bradley, Inc. to amend its operating permit and to repeal condition number nine of the operating permit of United Disposal of Bradley, Inc.; and,

WHEREAS, the City of Kankakee has been requested to support the efforts by United Disposal of Bradley, Inc. to obtain a supplemental operating permit; and,

WHEREAS, the City of Kankakee is in support of the unanimous resolution adopted by the Village of Bradley on March 24, 2003.

NOW, THEREFORE, BE IT RESOLVED by the Mayor and City Council of the City of Kankakee that it endorses the resolution of the Village of Bradley and supports the request of United Disposal of Bradley, Inc. to amend its operating permit to repeal condition number nine of the operating permit of United Disposal of Bradley, Inc.

AYES: 12
NAYS: 0
ABSTAIN: 0
ABSENT: 2

Donald E. Green, Mayor

ATTEST:

Anjanita Dumas, City Clerk

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601

ROD R. BLAGOJEVICH, GOVERNOR  RENEE CIPRIANO, DIRECTOR

217/524-3300

May 15, 2003

Certified Mail
7099 3400 0014 9526 2232
7099 3400 0014 9526 2249

Owner
Municipal Trust & Savings Bank
As Trustee under Trust 0799
Contact: Merlin Karlock
P.O. Box 146
Bourbonnais, Illinois 60914

Operator
United Disposal of Bradley, Inc.
Michael Watson, President
1000 E. Liberty
Bradley, Illinois 60915

Re: 0910200013 -- Kankakee County
United Disposal of Bradley, Inc.
Date Application Received: March 31, 2003
Log No. 2003-101
Permit File

Dear Mr. Karlock and Mr. Watson:

This letter responds to the application for permit to modify the operating permit you submitted on the date shown above.

The subject application for permit is deemed not to have been filed because it fails to set forth information, documents or authorizations as required pursuant to Title 35, Illinois Administrative Code (hereinafter 35 Ill. Adm. Code), Section 807.205. This action may be considered a denial for purposes of review pursuant to Section 40 of the Illinois Environmental Protection Act (Act) (415 ILCS 5/40).

Section 807.205(f) of 35 Ill. Adm. Code states that an application for permit shall not be deemed filed until the Illinois EPA has received all information, documents and authorizations in the form and with the contents required by the Part 807 rules.

The following deficiency is noted at this time:

1. You failed to provide proof of local siting approval as required pursuant to Section 39(c) of the Act (415 ILCS 5/39(c)). Section 807.207(a) provides in part that the Illinois EPA shall not grant any permit unless the applicant submits adequate proof that the solid waste management site will be developed, modified or operated so as not to cause a violation of the Act or Part 807 rules. Your application only addresses the revision of your operating permit. An application for supplemental permit to revise the operating permit is not the

appropriate method to remove the condition in question (i.e., Condition #9 of the operating permit), since there must also be a corresponding change to the development (DE) permit. The nature of the request made in the permit application requires that the applicant provide proof of local siting approval as described in Section 39.2 of the Act (415 ILCS 5/39.2). The resolution from the Village of Bradley included in your application does not conform to the procedures in Section 39.2 of the Act and therefore is not sufficient proof of siting approval as required by Section 39(c) of the Act.

Due to the deficiency noted above the Illinois EPA has not performed a technical review of the application. The technical review may reveal that the Illinois EPA needs additional information, or result in denial of permit.

Within 35 days after the date of mailing of the Illinois EPA's final decision, the applicant may petition for a hearing before the Illinois Pollution Control Board to contest the decision of the Illinois EPA, however, the 35-day period for petitioning for a hearing may be extended for a period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Illinois EPA within the 35-day initial appeal period.

If you wish to seek an extension of the time period for petitioning for a hearing, send a request for such an extension to John Kim, Assistant Counsel, Illinois EPA, 1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276.

Any resubmission of the permit application should be a complete application without referencing previous submissions. Any questions or requests for assistance may be directed to Sallie Springer at 217/524-3293 or the address above.

Sincerely,

Joyce L. Munie

Joyce L. Munie, P.E.
Manager, Permit Section
Bureau of Land

JLM:SAS:bjh\032304s.doc

cc: John Bevis, Kankakee County Health Department

**CERTIFICATE OF SERVICE**

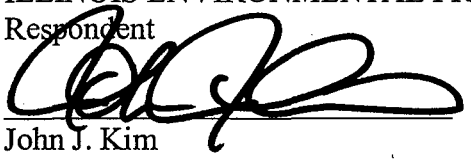
I, the undersigned attorney at law, hereby certify that on December 3, 2003, I served true and correct copies of a MOTION FOR SUMMARY JUDGMENT and SUPPLEMENT TO THE ADMINISTRATIVE RECORD, by placing true and correct copies thereof in properly sealed and addressed envelopes and by sending said sealed envelopes via U.S. Mail First Class delivery, to the following named persons:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Carol Sudman, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue, East
P.O. Box 19274
Springfield, IL 62794-9274

Jennifer J. Sackett Pohlenz
Querrey & Harrow, Ltd.
175 West Jackson Street
Suite 1600
Chicago, IL 60604

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
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