BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

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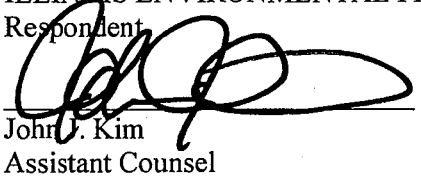
PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent,



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Dated: December 23, 2003

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

RESPONSE TO PETITIONERS' 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, 101.504 and 101.516, hereby respectfully responds to the Motion for Summary Judgment ("Petitioners' motion") filed by the Petitioners, United Disposal of Bradley, Inc. and Municipal Trust & Savings Bank, as Trustee Under Trust 0799 ("United Disposal," collectively). In response to the Petitioners' motion, the Illinois EPA states as follows:

I. INTRODUCTION

In the Petitioners' motion, there is a consistent argument that the Illinois EPA erroneously based its final decision under appeal on the outdated distinction between a "non-regional pollution control facility" and a "regional pollution control facility," such that the Illinois EPA failed to take into account the finding of a district court that certain provisions of the Illinois Environmental Protection Act ("Act") were unconstitutional. Petitioners' motion, p. 2. This argument is wrong, both in its legal analysis and its purported characterization of the Illinois EPA's decision.

The Petitioners also take issue with what they perceive to be a flawed procedure employed when the subject permit application was reviewed. United Disposal argues that the

application sought only a change to the facility's operating permit, and as such did not require any proof of local siting approval. Further, United Disposal argues that the Illinois EPA failed to conclude its completeness review of the permit application within the time allowed. The Petitioners' arguments are without merit, as they do not take into consideration the nature of the permit application, the underlying permits already issued to the facility, and the relevant time periods set forth in the Board's regulations.

As will be addressed more fully below, the Petitioners have not advanced any meritorious arguments that would meet their burden of proof. Accordingly, the Illinois EPA requests that the Board issue an order affirming the Illinois EPA's final decision.

II. THE ILLINOIS EPA CORRECTLY APPLIED THE LAW AND WAS CONSISTENT WITH THE TENNSV CASE

The Petitioners argue that the only permit condition sought for modification was special condition 9 of the operating permit. They also argue that the legal authority by which that condition was originally imposed was later found to be unconstitutional by the court in Tennsv, Inc. v. Gade, Nos. 92-503, 93-522 (S.D. Ill. 1993), 24 ELR 20019, and therefore any permit condition purporting to continue the effect of those statutes should likewise be found to be void. The Petitioners then claim that even if the condition is considered on its fact, it is both an unconstitutional restriction of commerce and is vague. Finally, the Petitioners argue that by denying the subject application on incompleteness grounds, the Illinois EPA was in effect applying a permit condition for which the Illinois EPA no longer has statutory authority. Petitioners' motion, p. 8.

The flaw in these arguments is that the Illinois EPA's issuance of the final decision under appeal was consistent not only with the Act as it now reads, but also with the Tennsv holding. What must first be reviewed is the exact wording and holding of the Tennsv case. The Petitioners have interpreted and portrayed that case well beyond the plain and clear language of

the court. In Tennsv, the court considered a challenge brought by the plaintiffs that certain provisions of the Act were unconstitutional in that they discriminated against operations handling out-of-state municipal solid waste versus operations handling locally generated municipal solid waste in contravention of the Commerce Clause. On July 8, 1993, the court issued its opinion that portions of Sections 39.2, 3.32 and 22.14(a) of the Act (415 ILCS 5/39.2, 3.32, 22.14(a)) were unconstitutional as applied to interstate municipal solid waste. The Petitioners go to great pains to break down the Tennsv opinion in their motion. Again, the Illinois EPA is not ignoring or refusing to comply with the Tennsv decision, so it is unnecessary to revisit that opinion other than to clarify the scope of the decision as done here.

The Petitioners have sought to have this straightforward and focused finding by the Tennsv court to instead stand for a much broader proposition; namely, that the statutory provisions in question prevented United Disposal from accepting waste generated outside the municipal boundaries of the Village of Bradley. The Petitioners claim that this prohibition against the acceptance of waste from beyond those municipal boundaries violates the Commerce Clause of the United States Constitution. Petitioners' motion, p. 9.

This argument is erroneous and not supported by the record. It is true that special condition 9 in the operating permit does restrict the type of waste that may be accepted at the transfer station based upon the point of generation. Administrative Record, p. 69.[1] However, that condition is a restatement of the same special condition found in the development permit. AR, p. 3. The reason the special condition was included in the development permit was because the applicant, United Disposal, asked that it be included. AR, pp. 10-11, 26. Thus the Illinois EPA did not restrict the type of waste that the transfer station could accept. Rather, the permit

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

applicants asked that the transfer station be restricted in the type of waste that it could accept, and the Illinois EPA agreed to include that request in the development permit. When the operating permit was issued in 1995, there was no appeal taken by United Disposal asking that the special condition restricting waste acceptance be withdrawn. The operating permit was issued in 1995, or two years after the Tennsv opinion was issued.

Of course, that the permit applicants asked that the transfer station be limited in its service area begs the question of why an applicant would seek such a restriction. The answer is that at the time of the permit application, asking for and receiving such a restriction allowed an applicant to avoid having to undergo the local siting approval process and complying with setback requirements. In short, the portrayal by the Petitioners that the Illinois EPA is prohibiting acceptance of waste is totally misleading, in that the Petitioners asked for the restriction and did so knowing full well that they would not be required to comply with other burdensome requirements of the Act.

There is also no doubt that the Tennsv court did rule that certain provisions of the Act were unconstitutional, and that the Illinois EPA must in turn comply with the dictates of the court's order. To a large extent that compliance has been met by the Illinois EPA's application of existing statutory language in the Act, language which reflects the Illinois General Assembly's modification of the Act to conform to the Tennsv court order. However, it seems that the Petitioners are arguing that the special condition has a sort of self-actuating voidance mechanism, whereby the special condition would instantly vanish (both legally and figuratively). That is not the case though, as the provision (or provisions of that type) was not declared unconstitutional by the Tennsv court. What was declared improper was the Act's provisions allowing certain types of facilities from being able to avoid local siting approval while others had

to go through the process. Special condition no. 9 is not unconstitutional, and no language in the Tennsv opinion would support such a contention.

Rather, the court took issue with the Act's scheme of allowing certain types of facilities to avoid having to undergo local siting approval. Since the United Disposal facility never underwent that procedure, it arguably received the very benefit and preferential treatment that the court found inappropriate. The Petitioners may respond that the penalty for receiving that benefit was a limited service area; however, if that were the case, then the Petitioners could have sought to have the condition removed in 1993 immediately upon the Tennsv decision. They did not. At the very least, the Petitioners could have asked that the condition be removed in 1995 when the operating permit was issued for the facility. They did not. At no time other than in 2003, or ten years after the Tennsv decision was issued, did the Petitioners ask that the condition be removed. Further, in the application filed in 2003, the Petitioners did not argue or claim that the condition ought be removed since it was unconstitutional. The request was simply made to remove the condition. AR, p. 129.

The Board has held that a condition imposed in a permit that is not appealed to the Board may not be appealed in a subsequent permit. Mick's Garage v. Illinois EPA, PCB 03-126 (December 18, 2003), pp. 6-7; Panhandle Eastern Pipe Line Co. v. Illinois EPA, PCB 98-102 (January 21, 1999), p. 30. The grounds that the Petitioners are relying upon in this appeal are the very grounds that could have been asserted in 1995 when the Illinois EPA issued the operating permit that contained special condition no. 9. The failure of the Petitioners to appeal the condition then prevents them from appealing the condition now.

The Petitioners description of the 2003 permit application, and the impact of special condition no. 9, is also flawed in its reference to the Tennsv case. The Petitioners argue that

special condition no. 9 prevented the movement of waste between subdivisions of the State of Illinois, and that such a prohibition was declared unconstitutional in Tennsv. Petitioners' motion, p. 10. This argument is incorrect, in that the condition's restriction was not the prohibition that was declared unconstitutional. What was declared unconstitutional was the Act's provisions that allowed a facility to avoid local siting approval through a limited service area, while imposing the local siting approval requirement upon facilities with broader service areas. Thus the prevention of the movement of waste was not unconstitutional, but the different treatment of facilities that accepted waste from inside or outside a unit of local government's boundaries was unconstitutional.

The Illinois EPA did not perpetuate the "unconstitutional prohibition" contained in special condition no. 9 when it denied the permit application. Petitioners' motion, p. 10. Instead, the Illinois EPA applied the law as it currently exists to the permit application at hand. As described in the Respondent's motion for summary judgment, the permit application sought approval of a modification to the development permit, which amounted to a request for approval of a new pollution control facility since the facility was not grandfathered out of the requirement of having to obtain local siting approval.

Even more support for the imposition of local siting approval is found in the Petitioners' own arguments. The Petitioners claim that an unconstitutional state enactment causes the state authorization for such action to be a nullity. Petitioners' motion, p. 10. If that is taken as applicable in the manner espoused by the Petitioners, then the effect of the Tennsv case is that the Illinois EPA had no authority to issue development or operating permits to United Disposal. United Disposal, then, would be treated as having no valid permits issued by the Illinois EPA. There can be little argument that if such is the case, any permit sought now by United Disposal

must be treated as an initial permit for development (since no operating permit can be issued without first obtaining a development permit) after July 1, 1981. Such a permit requires that the applicant provide proof of local siting approval.

The Illinois EPA has already addressed and struck down the notion that special condition no. 9 was "effectively eliminated" from the Petitioners' operating permit upon the Tennsv court decision. Thus special condition no. 9 must be considered on its face. The Petitioners argue that the condition still fails given the findings by the Tennsv court. Petitioners' motion, p. 11. But the arguments advanced by the Petitioners are not persuasive, since the condition simply limits the service area of the facility. There is nothing inherently objectionable about such a limitation, especially since it was basically a self-imposed condition. For example, it would not be unusual for a facility that has undergone local siting approval to define its service area within certain boundaries of its own choosing. The description of a limited service area is not unconstitutional, by the Tennsv court's decision or by any other analysis. The use of such a limited service area to allow a facility to escape having to undergo local siting approval is unconstitutional, and that was the clear and focused finding in Tennsv.

The Petitioners also argue that the language used in special condition no. 9 is unconstitutionally vague and uncertain as it is written. Petitioners' motion, pp. 12-14. In response, the Illinois EPA first notes that the Petitioners have received two permits prior to applying for the removal of special condition no. 9 (i.e., the development permit and operating permit), and both prior permits were issued with the language found in special condition no. 9. At no time prior to 2003 have the Petitioners argued that the language in the condition was unconstitutionally vague or uncertain. Since 1994, when the development permit was issued, there has apparently been no problem with United Disposal interpreting the language in special

condition no. 9, and it is unclear what lapse in understanding has happened in the nine years preceding this new argument that would have caused the Petitioners to not comprehend the meaning of the wording in special condition no. 9.

Further, the Illinois EPA argues that the language employed in special condition no. 9 is not at all uncertain or vague. The terminology is based either in statutory definitions found in the Act or Board regulations or is commonly understood in layman's terms. There is no substantive merit to the claim that the wording of special condition no. 9 is impermissibly vague, and any arguments to that end should be disregarded.

Lastly, the Petitioners argue that by denying the subject application, the Illinois EPA has effectively re-imposed that portion of special condition no. 9 purporting to prohibit the service area of the transfer station. The Petitioners posit that since the portions of the Act that unconstitutionally provided the authority for imposing geographical prohibitions on waste acceptance no longer exist, the Illinois EPA has no authority to act to keep the condition in the permit. Petitioners' motion, p. 14.

This argument also must be set aside. As has been said repeatedly herein, there is no language in the Tennsv decision that declared unconstitutional the "authority for imposing geographical prohibitions on waste acceptance." The Illinois EPA did not impose any prohibition on waste acceptance; rather, the Illinois EPA approved the defined service area proposed by United Disposal in its permit application for a development permit. There is nothing unconstitutional about a facility having a defined service area. The problem of unconstitutional permitting arose when the Illinois EPA used geographical definitions of service area to exempt certain facilities out of local siting approval. Contrast that scenario with the

present situation, in which the Illinois EPA sought to impose local siting approval as a condition precedent to approving the Petitioners' permit application.

The Petitioners have put forth numerous arguments, all with one goal in mind: To allow them to avoid ever having to obtain local siting approval for their facility. This is a situation which falls between two permitting frameworks, one involving statutory language that was found to be unconstitutional and one of the present state of the Act. United Disposal avoided local siting approval when it received its development permit by virtue of its claiming an exemption to local siting approval pursuant to the Act. That exemption was later found to be an unconstitutional tool, and the Illinois General Assembly in turn amended the language to remove the exemption. The Petitioners particular timeline of permitting overlaps both the permitting frameworks, and by virtue of that happenstance, they now seek a finding by the Board that they are free from ever having to obtain local siting approval. Basically, the Tennsv court held that facilities such as United Disposal's should not be able to avoid local siting approval while other facilities were required to undergo the process. Now, it is undisputed that facilities such as United Disposal's are subject to the requirements of local siting approval. The Board should not allow this facility to again sneak by the requirements of local siting approval through a purported statutory "back door."

III. THE ILLINOIS EPA CORRECTLY INTERPRETED THE PERMIT APPLICATION AS SEEKING TO MODIFY THE DEVELOPMENT PERMIT

The Petitioners argue that the Illinois EPA's denial of the subject permit application was wrong since the denial was based on lack of local siting approval, since there is no requirement for a facility seeking to modify its operating permit or to remove an unconstitutional restraint to obtain local siting approval. Petitioners' motion, p. 15.

In making this argument, the Petitioners are overlooking several considerations. As a practical matter, and for the reasons set forth in the Illinois EPA's motion for summary judgment, it is nonsensical to allow a permittee to modify a condition in an operating permit that also exists in a development permit. If an operating permit has imposed a condition in conjunction with the imposition of the same condition in the development permit, it only follows that both the development and operating permits must be modified if the condition in question is modified.

Also, the development permit issued to United Disposal in 1994 included standard conditions applicable for development permits issued by the Illinois EPA. One of those standard conditions is that there shall be no deviation from the approved plans and specifications unless a written request for a modification of the project, along with plans and specifications as required, shall have been submitted to the Illinois EPA and a supplemental written permit issued. AR, p. 6. Therefore, it was clearly set forth in the 1994 development permit that any changes to the approved plans and specifications must be done through a supplemental written permit. The development permit application sought a defined service area for the transfer station. The Petitioners were put on notice from 1994 that any changes to the plans approved for the facility, including the definition of a service area, must be done through an appropriate modification. To modify the special condition in the operating permit that reiterated the special condition in the development permit, both the development and operating permits must be modified. Therefore, the Illinois EPA's handling of the permit application as one seeking to modify at least the development (and arguably also the operating) permit was correct.

The Petitioners instead take the position, again, that Tennsv did not require any modification to either the development or operating permit. Petitioners' motion, p. 16. This

issue has been discussed, with the only reasonable and legally correct conclusion being that the Tennsv decision did not act to unilaterally eliminate special condition no. 9 from either the development or operating permit.

The Petitioners also argue that the geographical restriction that the Petitioners sought to remove had absolutely no bearing on the physical design, construction or boundaries of the facility. Petitioners' motion, p. 16. That argument is weak and not supported by the Act or legal precedent. In Bi-State Disposal, Inc. v. Illinois EPA, PCB 89-49 (June 8, 1989), p. 5, the Board noted its position that the legislature deliberately drafted Section 3.32(b) of the Act (415 ILCS 5/3.32(b)) (now 415 ILCS 5/3.330(b)(2)) in a broad manner so that it would apply to all expansions of (regional) pollution control facilities. That sentiment was echoed by the appellate court that affirmed the Board's decision. The court stated that reinstating a mine cut for disposal purposes would increase the capacity of a landfill to accept and dispose of waste, and that increase—while not specifically defined in the Act—would impact the criteria local governmental authorities consider in assessing the propriety of establishing a new (regional) pollution control facility. Bi-State Disposal, Inc. v. Illinois Pollution Control Board, 203 Ill. App. 3d 1023, 1027, 561 N.E.2d 423, 426 (5th Dist. 1990). The Illinois Supreme Court previously took that position in M.I.G. Investments, Inc. v. Illinois EPA, 122 Ill.2d 392, 523 N.E.2d 1 (1988). In M.I.G., the supreme court stated that the concepts of "expansion" and "boundary" should be construed by taking into account changes of boundaries would have upon the criteria set forth in Section 39.2(a) of the Act (415 ILCS 5/39.2(a)).

The concepts of "expansion" and "boundary" should be liberally construed to meet the purposes of the Act. Here, the expansion of the boundaries of the service area of the transfer station could certainly have an impact on the criteria that units of local government take into

consideration when weighing requests for local siting approval. Since the nature of the request meets both the spirit and legal interpretation of the wording of Section 3.330(b) of the Act, the Illinois EPA's conclusion that local siting approval is required was correct.

IV. THE ILLINOIS EPA COMPLIED WITH THE TIME PERIODS FOR REVIEW

The Petitioners argue that the Illinois EPA failed to comply with the time period allowed for determining that a permit application for an operating permit (or modification to an operating permit), in that the Illinois EPA's decision was not issued within 30 days after receipt of the application. Petitioners' motion, pp. 17-19.

As has been argued herein, the Illinois EPA properly treated the permit application submitted by the Petitioners to be one seeking a modification of the development permit. Pursuant to Section 807.205(f) of the Board's regulations (35 Ill. Adm. Code 807.205(f)), the Illinois EPA has 45 days after receipt of an application for a development permit (or modification to a development permit) by which to issue its finding of completeness. Here, the Illinois EPA received the permit application on March 31, 2003. AR, p. 129. The final decision now under appeal was issued on May 15, 2003. AR, p. 143. Thus, the Illinois EPA issued its final decision on the 45th day following its receipt of the permit application, or within the time allowed by Section 807.205(f).

V. CONCLUSION

For the reasons stated herein, as well as the arguments raised in the Illinois EPA's motion for summary judgment, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA's decision dated May 15, 2003.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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Dated: December 23, 2003

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on December 23, 2003, I served true and correct copies of a RESPONSE TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT, 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
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Chicago, IL 60601

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