

FEB - 4 2004

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD  
STATE OF ILLINOIS  
Pollution Control Board

UNITED DISPOSAL OF BRADLEY, INC.,  
and MUNICIPAL TRUST & SAVINGS  
BANK, as Trustee Under Trust 0799,  
Petitioners,

v.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,  
Respondent.

No. PCB 03-235

(Permit Appeal - Land)

NOTICE OF FILING

To: Please see attached Service List

PLEASE TAKE NOTICE that on February 4, 2004, we filed with the Illinois Pollution Control Board, (1) PETITIONERS UNITED DISPOSAL OF BRADLEY, INC. AND MUNICIPAL TRUST & SAVINGS BANK'S MOTION FOR LEAVE TO FILE RESPONSE and (2) PETITIONERS UNITED DISPOSAL OF BRADLEY, INC. AND MUNICIPAL TRUST & SAVINGS BANK'S RESPONSE TO RESPONDENT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S MOTION FOR SUMMARY JUDGMENT, copies of which are attached hereto and served upon you.

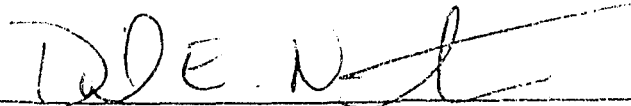
Dated: February 4, 2004

Respectfully submitted,

UNITED DISPOSAL OF BRADLEY, INC., and  
MUNICIPAL TRUST & SAVINGS BANK, as  
Trustee Under Trust 0799

Jennifer J. Sackett Pohlenz  
David E. Neumeister  
QUERREY & HARROW, LTD.  
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By:

  
One of their attorneys

PROOF OF SERVICE

I, Ronnie Faith,\* a non-attorney, certify that I served the following documents on the above referenced persons, by hand delivery or by depositing a copy in the U.S. mail at 175 W. Jackson, Chicago, Illinois (with proper postage prepaid and addressed to the address shown above), at or prior to the hour of 5:00 p.m. on February 4, 2003, as referenced above.



\*Under penalties as provided by law pursuant to Ill. Rev. Stat. Chap.110-§1-109  
I certify that the statements set forth herein are true and correct.

**SERVICE LIST**

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FEB - 4 2004

STATE OF ILLINOIS  
Pollution Control Board

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

UNITED DISPOSAL OF BRADLEY, INC.,  
and MUNICIPAL TRUST & SAVINGS BANK,  
as Trustee Under Trust 0799

Petitioners,

v.

ILLINOIS ENVIRONMENTAL PROTECTION  
AGENCY,

Respondent.

No. PCB 03-235

(Permit Appeal - Land)

**PETITIONERS UNITED DISPOSAL OF BRADLEY, INC.'S.  
AND MUNICIPAL TRUST & SAVINGS BANK'S  
MOTION FOR LEAVE TO FILE RESPONSE TO RESPONDENT  
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S  
MOTION FOR SUMMARY JUDGMENT**

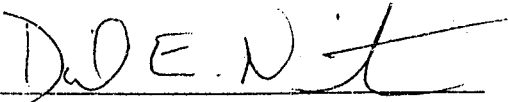
Petitioners UNITED DISPOSAL OF BRADLEY, INC. and MUNICIPAL TRUST & SAVINGS BANK, as Trustee Under Trust 0799, by and through their attorneys, Jennifer J. Sackett Pohlenz and David E. Neumeister of QUERREY & HARROW, Ltd., moves the Illinois Pollution Control Board and the Hearing Officer for leave to file Petitioners' Response in opposition to Respondent Illinois Environmental Protection Agency's (IEPA) Motion for Summary Judgment on February 4, 2004, rather than February 3, 2004. No prejudice will result from this one-day extension and Petitioners have no objection to extending the date by which the parties are to file their reply briefs one day to accommodate this filing. Petitioners' counsel who drafted the Response is at home on maternity leave and, despite her best efforts, was unable to get the Response to her office electronically on February 3<sup>rd</sup> in time to get to the Board for filing before it closed. This Motion and the Response were faxed to Respondent's counsel with the Illinois Environmental Protection Agency prior to noon on the February 4<sup>th</sup>.

WHEREFORE, Petitioner, United Disposal of Bradley, Inc. and Municipal Trust & Savings Bank as Trustee Under Trust 0799, respectfully request the Board and/or Hearing Officer enter an order allowing them leave to file their Response on February 4, 2004, and amending the briefing schedule to add one day to the time for reply briefs.

Dated: February 4, 2004

Respectfully submitted,

UNITED DISPOSAL OF BRADLEY, INC. and  
MUNICIPAL TRUST & SAVINGS BANK, AS  
TRUSTEE UNDER TRUST 0799

By:   
One of their attorneys

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STATE OF ILLINOIS  
Pollution Control Board

UNITED DISPOSAL OF BRADLEY, INC.,  
and MUNICIPAL TRUST & SAVINGS BANK,  
as Trustee Under Trust 0799

No. PCB 03-235

Petitioners,

(Permit Appeal - Land)

v.

ILLINOIS ENVIRONMENTAL PROTECTION  
AGENCY,

Respondent.

**PETITIONERS UNITED DISPOSAL OF BRADLEY, INC.'S.  
AND MUNICIPAL TRUST & SAVINGS BANK'S  
RESPONSE TO RESPONDENT  
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S  
MOTION FOR SUMMARY JUDGMENT**

Petitioners UNITED DISPOSAL OF BRADLEY, INC. and MUNICIPAL TRUST & SAVINGS BANK, as Trustee Under Trust 0799, by and through their attorneys, Jennifer J. Sackett Pohlenz and David E. Neumeister of QUERREY & HARROW, Ltd., submit the following Response in opposition to Respondent Illinois Environmental Protection Agency's (IEPA) Motion for Summary Judgment.

**INTRODUCTION**

This Petition concerns the IEPA's error failing to allow the Petitioners to modify their permit by removing an unlawful condition. Specifically, IEPA is wrong in finding Petitioners' application to modify an existing operating permit for a transfer station which has operated over the past nine years to be incomplete. Both the Petitioners and Respondent IEPA have moved for summary judgment, based on seemingly separate theories. Thus, this case can be decided as a

matter of law, based on their respective arguments. However, the crux of both of the motions<sup>1</sup> is the undisputed fact that the law on which the permit condition at issue is based is no longer valid, having been declared unconstitutional. The offending portions of the Illinois Environmental Protection Act (Act) were removed by the Illinois State Legislature in an amendment that took effect after Petitioners' transfer station development and operating permits were issued.

This Response opposes Respondent IEPA's motion for summary judgment, in which IEPA argues that its notice of incompleteness was correct because: Petitioners' requested operating permit modification was actually a development permit application that seeks a "new pollution control facility" that was not "grandfathered" out of Section 39.2 of the Illinois Environmental Protection Act (Act); and, in the alternative, the Petitioners' proposed modification to their operating permit "may be" interpreted to be an "expansion" under Section 3.330(b)(2) of the Act. The IEPA is wrong in both cases.

First, the IEPA's arguments ignore the importance of the statute on which the condition was based having been found unconstitutional and stricken by the Illinois State Legislature. Since there is no longer an existing law which supports the imposition of a geographical restriction on the Petitioners' business, there is no legal basis for IEPA to uphold and ostensibly require continued performance of that condition. The continued presence of this void condition constitutes an unlawful application of the Act. Certainly, its removal will not constitute a violation of the Act. Thus, the request to remove the condition must be granted.

Second, IEPA's contention that what was clearly on its face a request for modification of an operating permit, can somehow be transformed in IEPA's discretion to a request for

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<sup>1</sup> In addition to the constitutional argument, the Petitioners' Motion for Summary Judgment submits that procedurally Petitioners' permit application was incorrectly determined to be "incomplete" by IEPA, as IEPA

modification of a development permit is unsupported by any law or policy. Further, IEPA's attempt to shoehorn the subject permit application into an already strained legal argument that Petitioners' application to modify their transfer station operating requires siting, after the fact, of a facility which has been permitted and operating for over nine years, is simply inappropriate. There is simply no precedent, analogy or legal basis for arguing that the Petitioners' application to remove an unconstitutional geographical restriction on its business from its permit somehow results in Petitioners seeking an "initial" permit.

Third, IEPA's contention that Petitioners' permit modification "may" be an expansion of the transfer station, triggering Section 3.330(b)(2) of the Act, is an argument not only unsupported by the case law on this issue, but also a contention that directly conflicts and is inconsistent with past Agency action.

Thus, for the reasons outlined above and presented in more detail below, the IEPA's Motion for Summary Judgment should be denied, as IEPA should have approved the Petitioners' application for modification of its operating permit.

#### FACTS

The single fact most important to the Illinois Pollution Control Board's (Board) determination is that the Petitioners simply seek to remove an unconstitutional condition from their operating permit. The Petitioners obtained from IEPA their development and operational permits for a "non-regional" waste transfer station, prior to the effective date of the Illinois General Assembly's amendment to delete, on the basis they were unconstitutional, the terms "non-regional" and "regional" from the Act. By amending the Act to remove the terms "regional" and "non-regional," the General Assembly did away with the prior distinction

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missed the regulatory time frame for making such declaration and, thus, pursuant to the 35 IAC 807.205,

between "regional" and "non-regional" facilities. The question becomes whether removing language in a permit that geographically restricts the movement of waste (which is an article of commerce) and, thus, is an unconstitutional restriction on commerce, can be denied by IEPA without any basis in existing law and without any demonstration by IEPA that a violation of the Act would occur should the permit application be granted.

The Petitioners received a permit (No. 1994-306-DE) to develop the subject facility, a waste transfer station, in the Village of Bradley, Kankakee County, Illinois on September 21, 1994. (AR<sup>2</sup> 1-7). That permit specifically approved development of a municipal solid waste transfer station pursuant to Sections 21(d) and 39(a) of the Act and 35 Illinois Administrative Code, Subtitle G 807.201 and 807.207. *Id.* The IEPA received the application for an operational permit for the facility on December 5, 1994, and IEPA granted an operational permit (No. 1994-306-OP) on January 19, 1995. (Exhibit 1; AR 67-73). The operational permit approved the operation of a municipal solid waste transfer station pursuant to Sections 21(d) and 39(a) of the Act and 35 Illinois Administrative Code, Subtitle G 807.201, 807.202 and 807.207. *Id.*

Since the transfer station received its operational permit, it has operated successfully and with the support of the Village of Bradley. (AR 133-135). Further, the subject permit modification also is supported by the neighboring communities, namely the City of Kankakee and the Village of Bourbonnais (SAR<sup>3</sup> 140-142).

Respondent IEPA makes certain assertions in its Response which are not accurate statements of fact. For example, IEPA asserts that Petitioners seek to "strike special condition

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Respondents' permit application should be deemed by the Illinois Pollution Control Board (Board) to be complete.

<sup>2</sup> "AR" means the Administrative Record, which was filed by the Respondent on or about August 13, 2003, and which Petitioners' understand will be supplemented by Respondent shortly after this filing to include documentation referenced in Paragraph 12, below.

<sup>3</sup> "SAR" references the Supplemental Administrative Record filed by the Respondent IEPA on or about December 3, 2003.



no. 9" from the permit; however, that is not entirely accurate, as Petitioners only seek to strike *the portion* of the language of that condition that provides:

"9. No waste generated outside the municipal boundaries of the Village of Bradley may be accepted at this facility..." (See Exhibit 1; AR 69).

The remaining portion of special condition no. 9, concerning special waste, the Petitioners do not seek to change, which fact is clear from the face of the subject operating permit application (AR 129-139).

Additionally, IEPA references that Petitioners did not appeal the imposition of the permit condition, which they now seek to have removed, at the time it was imposed. However, this is not relevant, as constitutional issues cannot be waived.

Further, the IEPA contends that the Petitioners' March 27, 2003, application to modify its operating permit is, instead, an application for a development permit modification, despite the clear, concise and consistent identification on the application itself as an application to modify the facility's operating permit. There is no basis in the record for this assertion by the IEPA, whether asserted in fact or law. Not only does the permit application itself state that it is an application to modify an operating permit, but IEPA's response to the permit application and its log file identify the application as one to modify an *operating* permit. (See, IEPA response to permit application AR 98-99 and SAR 143-144, and example of log file, AR 100). Therefore this is not a "fact" asserted by IEPA that is supported in the record on appeal.

Finally, IEPA downplays the issue concerning the unconstitutionality of the law which distinguished between regional and non-regional. As such, IEPA omits mention of the following facts which are essential to this appeal and determination on both the Petitioners' and the Respondent's separate motions for summary judgment. Waste is an article of commerce subject

to the strict scrutiny of the Commerce Clause of the U.S. Constitution. Additionally, that portion of Special Condition No. 9 stating that "No waste generated outside the municipal boundaries of the Village of Bradley may be accepted at this facility" is a geographical prohibition on waste acceptance or a restriction on waste acceptance based on origin of waste.

### ARGUMENT

IEPA's arguments in support of its finding Petitioners' permit application incomplete, ignore the constitutional infirmity present in this case, and presents statutory construction arguments which are contrary to precedent and, if accepted, would constitute an inappropriate retroactive application of the law. Further, IEPA's statutory construction arguments, *i.e.*, that the Petitioners' permit application to modify their operating permit requires site location approval through application of Sections 3.330(b)(1) and (2), must fail, as they are not supported by precedent, the facts of this case, or the actual language of the Sections of the Act relied on by the Agency.

**I. IEPA'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENEIED, AS IT FAILS TO ADDRESS THE CONSTITUTION INFIRMITY IN THIS CASE AND ITS DUTY TO HAVE GRANTED PETITIONERS' PERMIT APPLICATION AND REMOVED AN UNCONSTITUTIONAL RESTRICTION FROM THE PERMIT.**

The statutes, under which IEPA imposed Special Condition No. 9, purporting to restrict the geographic boundary in which the Petitioners' facility can conduct business, were found to be unconstitutional in Tennsv, Inc. v. Gade. The Illinois State Legislature, then amended the Act by deleting the unconstitutional language and removing the concept of "regional" and "non-regional" facilities. This amendment was effective after the date of the issuance of the Petitioners' permits. IEPA misstates or misunderstands the relevance of the decision in Tennsv, Inc. v. Gade, when it states: "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." (IEPA Motion p. 17). This statement by the IEPA is simply not correct.

The holding of unconstitutionality in Tennsv, Inc. v. Gade is based on the Commerce Clause, and the prohibition on regional or jurisdictional restrictions on the purchase and sale of commodities, of which municipal solid waste is one. In Tennsv, Inc. v. Gade, the court found that the IEPA "offered no proof that municipal solid waste generated outside the boundaries of any local general purpose unit of government poses any different health risks to the public than municipal solid waste generated locally" and, absent such proof, that there existed no valid factor to justify the discriminatory effect of the statutory scheme at issue. Tennsv, Inc. v. Gade, 1993 U.S. Dist. LEXIS 10403 (U.S. Dist. , 1993); see also, Fort Gratiot Landfill v. Michigan Dept. of Natural Resources, 504 U.S. 353, 112 S.Ct. 2019 (1992).

Similarly, other courts have found geographical restrictions discriminating based on origin of waste or like material to violate the Commerce Clause. *See, e.g., Northeast Sanitary Landfill, Inc., et al. v. South Carolina Department of Health and Environmental Control, et al., 843 F. Supp. 100 (D. SC 1992)(geographical restrictions discriminating based on the origin of waste violates the U.S. Commerce Clause) and Ecological Systems, Inc. v. The City of Dayton, 2002 Ohio 388, 2002 Ohio App. LEXIS 354 (OH 2<sup>nd</sup> Dist. 1992), app. denied, 2002 Ohio 2852, 769 N.E.2d 873 (2002)(geographical restriction on wastewater violates U.S. Commerce Clause).*

Given both the unconstitutionality of the law on which the subject permit condition was based, and the discriminatory effect of such condition on origin of waste (a commodity), the permit condition should either have been removed by IEPA as a ministerial matter, as it is legally

null and void<sup>4</sup>, or, alternatively, the permit application should have been granted as the condition at issue is unconstitutional and unlawful, thus, its removal does not result in a violation of the Act. Rather, its continued existence unlawfully perpetuates an unconstitutional restriction. Instead, the IEPA apparently takes the position that after having been permitted and operating in excess of nine years, site location approval is now suddenly necessary for Petitioners to accept waste generated outside the “municipal boundaries” of the Village of Bradley. IEPA’s position is incorrect, as the permit condition at issue is null and void as based on an unconstitutional statute and is itself unconstitutional and should be stricken. Therefore, IEPA’s Motion for Summary Judgment should be denied, and Petitioners’ Motion for Summary Judgment should be granted.

**II. IEPA’S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED, AS PETITIONERS’ APPLICATION WAS CLEARLY A REQUEST TO MODIFY AN OPERATING PERMIT AND, EVEN IF, *IN ARGUENDO*, IT WAS AN APPLICATION TO MODIFY ITS DEVELOPMENT PERMIT (WHICH PETITIONERS’ DENY) NO SITE LOCATION APPROVAL IS REQUIRED**

IEPA makes two arguments to support its incorrect finding that Petitioners’ application to modify their operating permit was incomplete and requires site location approval: that the application triggers site location approval under Section 3.330(b)(1) as it is a “pollution control facility initially permitted for development or construction after July 1, 1981”; and, alternatively, that it triggers Section 3.330(b)(2) as it is an “expansion beyond the boundary of a currently permitted pollution control facility.” Even without consideration of the unconstitutionality of the subject permit condition, these arguments must fail for three reasons. (A) The permit application

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<sup>4</sup> An unconstitutional state enactment is void, and any action taken by a state official that is authorized by that enactment cannot be taken in an official capacity, since the state authorization for such action is a nullity. Papasan v. Allain, 478 U.S. 265, 276, 92 L.Ed.2d 209, 106 S.Ct. 2932, 2939 (1986) (citing Ex parte Young, 209 U.S. 123 (1908)).

at issue was for modification of an operating permit and, even if, *in arguendo*, for modification of a development permit, Section 3.330(b)(1) does not apply, as the facility is already “initially” permitted. (B) The permit does not seek an “expansion beyond the boundary” of the currently permitted facility, consistent with the well-established precedent applying that section and the Agency’s own previous applications of that section. Thus, Section 3.330(b)(2) does not apply. Finally, (C), IEPA’s attempt to force this facility through site location approval, if determined by the Board to be supported by the existing law, results in an improper retroactive application of the law.

- A. **IEPA is incorrect that Section 3.330(b)(1) requires site location approval prior to the removal of that portion of Special Condition No. 9 purporting to geographically restrict the origin of waste that may be accepted at the facility**

Section 3.330(b)(1) provides that a “new pollution control facility is a pollution control facility initially permitted for development or construction after July 1, 1981.” This Section is relevant to IEPA’s rather convoluted argument, as IEPA found the subject operating permit application incomplete, based on the requirement in Section 39(c) of the Act which requires that “no permit for the *development or construction* of a *new pollution control facility* may be granted by the Agency unless the applicant submits proof to the Agency that the location of the facility has been approved. . . in accordance with Section 39.2 of this Act.” (415 ILCS 39(c)) (emphasis added). Section 39.2 sets forth the criteria (and other procedure) that an applicant must meet to obtain site location approval from the local government in which its proposed new pollution control facility is located.

Although IEPA goes to some length in its Motion to state that it is not arguing that every permit modification after July 1, 1981 is an “initial permit,” in the end, it wishes to convince the Board that the operating permit application seeks an “initial” development permit, for the

Petitioners' transfer station even though it has been fully permitted and operating for over nine years. The argument must fail as the Agency has no authority to now revise Petitioners' permit application to be a development permit application, when it is clearly an application to modify an operating permit; and, even if, *in arguendo*, it were an application to modify its development permit, it is not an "initial" permit and Section 3.330(b)(1) does not apply.

The IEPA, as an administrative agency, "possesses only that authority conferred upon [it]. . . by statute." Pulitzer Community Newspapers, Inc. v. Illinois EPA, PCB 90-142 at 15 (12/20/90), *citing*, Village of Lombard v. PCB, 363 N.E.2d 814 (1977). Although there are many legal and logical hurdles the Agency's argument must clear to make sense, the first is that the Agency has to be able to transform the Petitioners' application to modify its *operating permit* to one that seeks modification of a development permit. Without being able to transform the Petitioners' permit application from operating to development, IEPA's argument fails as Section 39(c) of the Act requires site location approval, as relevant to the Agency's argument, only in circumstances in circumstances where there is an application for "development or construction of a new pollution control facility". (415 ILCS 39(c)).

However, to accomplish this "transformation" in permits, IEPA has to show that it has the authority to essentially relabel an application to best suit its reasons for denying an application. There is no law or regulation which provides that IEPA can deem an operating permit application to be a development permit application. The application, on its face, is perfectly clear and consistent that it is an operating permit application. (AR 129-139). IEPA's response, in fact, states in its very first sentence that it "responds to the application for permit to modify the operating permit. . ." (AR 98). Finally, even the IEPA permit log appears to be one that is designed for operating permit applications, as it specifies that if a determination of

incompleteness is made that the denial letter should be sent by the 30<sup>th</sup> day (as required if the application is for an operating permit pursuant to 35 IAC 807.205), whereas, development permit applications are allowed a 45-day review by the IEPA (AR 101). Although IEPA actually sent its response, having missed the 30-day deadline, on the 45<sup>th</sup> day, this failure of the Agency is not evidence of its claimed ability to “deem” a permit application transformed from operational to development. Rather, that timing failure is another, procedural reason, why the Board should find that the Petitioners’ application was complete and should have been granted by IEPA.<sup>5</sup> Thus, IEPA’s argument must fail on this ground alone, as it has no power to transform an operating permit application into a development permit application.

Additionally, IEPA’s argument must fail, as, even, *in arguendo*, if the Petitioners’ application was for modification of a development permit and removal of the subject condition, no site location approval is required. Section 39(a) of the Act requires proof of local site location approval only where the development permit application is for a “new pollution control facility.” The definitions of a “new pollution control facility” and a “pollution control facility” are found in Section 3.330 of the Act. Pursuant to Section 3.330(a), a “pollution control facility” is, among other things, a waste transfer station. Pursuant to Section 3.330(a)(1), a waste transfer station is a “new pollution control facility” if it was “initially” permitted for development after July 1, 1981. The Agency admits that “initially” means, permitted for the first time. (IEPA Motion pp. 10-11). The Agency also admits that the Petitioners’ waste transfer station already had a development (and operating) permit when it submitted the subject operating permit modification. (AR 1-7, 67-73). Specifically, the Petitioners development permit, Permit No. 1994-306-DE states that it “approves the development of a municipal solid waste transfer station

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<sup>5</sup> This timing argument is based on 35 IAC807.205 and the argument is set forth in Petitioners’ Motion for Summary

pursuant to Sections 21(d) and 39(a) of the Illinois Environmental Protection Act. . ." (AR 1). Thus, even if the subject permit application were for modification of a development permit, since it is not an "initial permit," proof of site location approval under Section 39.2 of the Act is not required by Sections 39(a) and 3.330(b)(1) of the Act.

Further, the Agency incorrectly contends that the permit application submitted by the Petitioners is analogous in its alleged triggering of Section 3.330(b)(1), to a facility which seeks to accept hazardous waste for the first time. This is clearly not an accurate analogy, as Section 3.330(b)(3) specifically provides that an already permitted pollution control facility that seeks to accept hazardous waste, is a "new pollution control facility." Additionally, this is not an appropriate comparison, as the subject permit application does not seek to change the type of waste managed by the transfer station. Thus, the Agency's correlation of the requested permit modification to a change in type of waste facility is wholly misplaced.

Finally, IEPA attempts to bootstrap its denial on a rather unclear exchange between two Senators, Welch and Karpel. This portion of IEPA's argument is irrelevant to the actual language of Sections 39(c) and 3.330(b)(1) and an incorrect reliance of the Agency on those Sections, as described above. Additionally, this is not a circumstance where a facility is seeking to be "grandfathered" into a statute. Black's Law Dictionary defines a grandfather clause as "an exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new restriction." (Black's Law Dictionary 699 (6th ed. 1990). There is nothing about the amendments to the Act, deleting the distinction between "regional" and "non-regional" pollution control facilities that can be interpreted as a "new restriction" or that can be interpreted as "stopping" the Petitioners' transfer station from operating. Lastly, to



the extent any of the exchange between Senators Karpel and Welch is clear, it relates to a different paragraph in Section 39(c) than is relevant here, as obvious by Senator Welch's reference to the change in the applicable date in that section from 1993 to January 1, 1994.

Specifically, the paragraph being referenced provides:

After January 1, 1994, if a solid waste disposal facility, any portion of which an operating permit has been issued by the Agency, has not accepted waste disposal for 5 or more consecutive calendar years, before that facility may accept any new or additional waste for disposal, the owner and operator must obtain a new operating permit under this Act. . . The Agency may not issue a new operating permit under this Act for the facility unless the applicant has submitted proof to the Agency that the location of the facility has been approved or re-approved by the appropriate county board or municipal governing body under Section 39.2 of this Act after the facility ceased accepting waste.

Thus, IEPA's argument concerning grandfathering is not applicable and not relevant to the subject permit modification request, as the Petitioners' transfer station is not a "solid waste disposal facility" and it did not cease waste acceptance as described in the above section.

Therefore, IEPA's Motion for Summary Judgment should be denied, as the Agency erred when it found the Petitioners' operating permit modification request to be incomplete, and the Petitioners' Motion for Summary Judgment should be granted.

**B. IEPA is incorrect that Section 3.330(b)(2) requires site location approval prior to the removal of that portion of Special Condition No. 9 purporting to geographically restrict the origin of waste that may be accepted at the facility**

IEPA argues that Section 3.330(b)(2), "may" apply to the Petitioners' application to modify its operational permit. Initially, the same leap in IEPA's argument giving it the authority to "deem" the Petitioners' application for modification of its operational permit to be an application to modify its development permit is necessary to present this argument. Like Section 3.330(b)(1), Section 3.330(b)(2) is triggered by Section 39(c) which requires an applicant to

present proof to IEPA of Section 39.2 site location approval, when submitting an application for a development permit for a new pollution control facility. (415 ILCS 5/39(c)). In the first instance, since the subject application was for modification of an operating permit, Sections 39(c) and 3.330(b)(2) are not applicable. Further, the Agency has no authority to "deem" the Petitioners' permit application to be something other than what it is: an application to modify an existing operating permit to remove an unconstitutional condition.

Finally, not only is there no legal precedent for IEPA's argument that Section 3.330(b)(2) applies, the argument IEPA makes opposes its own prior actions. Section 3.330(b)(2) provides that a "new pollution control facility" is "the area of expansion beyond the boundary of a currently permitted pollution control facility." There are a number of cases in which the Board and Courts have considered and ruled on the meaning of "the area of expansion beyond the boundary." As a backdrop to those cases, however, the courts have interpreted Sections 39.2 and 39(c) requiring site location approval, as provisions that "protects the public interest in having *significant changes in land use* subject to scrutiny by its elected representatives." Browning-Ferris Industries, Inc. v. Illinois Pollution Control Board, et al., 127 Ill.App.3d 509, 468 N.E.2d 1016, 1018-1019 (3<sup>rd</sup> Dist. 1984)(emphasis added).

The emphasis on "significant changes in land use" becomes more apparent with the development of the cases applying Section 3.330(b)(2), in which the Board and Courts have consistently held that Section 39.2 siting is required and a facility is a "new pollution control facility" pursuant to Section 3.330(b)(2), when the "area of expansion beyond the boundary" is both an increase in waste capacity *and* an increase in permitted physical dimensions. Concerned Neighbors for a Better Environment, et al. v. County of Rock Island, et al., PCB 85-124 (January 9, 1986)(applicant sought siting approval of a "new" regional pollution control facility,

notwithstanding the fact that it already operated a facility on the same site. "This occurs because the Board has construed § 3(x) of the Illinois Environmental Protection Act ("Act"), which defines a new regional pollution control facility, as applying to increases the waste disposal capacity of a site in any direction beyond the dimensions contemplated by the current permit."); MIG Investments, Inc., et al. v. The Environmental Protection Agency, et al., 122 Ill. 2d 392, 523 N.E.2d 1 (S.Ct. 1988)(a vertical expansion of a landfill, increasing amount of waste in the site and the physical dimensions of the site, is an "area of expansion beyond the boundary of a currently permitted pollution control facility"); Bi-State Disposal v. The Environmental Protection Agency, et al., 203 Ill. App. 3d 1023; 561 N.E.2d 423 (5<sup>th</sup> Dist. 1990)(Court held siting required because application increased landfill footprint and capacity, as applicant sought to landfill a minecut which bisected a previously permitted landfill).

There are no facts presented in this case to support the Petitioners' application as seeking either an increase in capacity or an increase in the physical dimensions of the facility. In fact, the IEPA expressly admits that Petitioners sought absolutely no physical change to their facility. (IEPA Motion p. 15). Further, there is nothing that ties a facility's geographic service area to capacity - a facility can accept the same amount of waste despite increases or decreases its geographic span, because its business is dependent on customer base and waste generation which fluctuates for reasons other than and despite their location.

The Agency's reliance on Waste Management of Illinois, Inc. v. Illinois EPA, PCB 94-153 (July 21, 1994) and Saline County Landfill, LLC v. Illinois EPA, PCB 02-108 (May 16, 2002), to support its argument is misplaced. The Board found that siting was not required in Waste Management, as the change in contouring of the landfill for purposes of leachate production did not result in an increased capacity and there was no evidence that the proposal

substantially altered what was approved by the local government, particularly since the local government did not limit the waste footprint in its siting approval. Waste Management is, thus, not precedent for IEPA's proposed expanded interpretation of Section 3.330(b)(2), as there was evidence that capacity would not be increased and the local government placed on restriction on the physical dimensions of the facility. In the instant matter, there is no evidence in the record concerning capacity of the Petitioners' facility; capacity is not related to geographic boundaries of waste acceptance, rather, it relates to the size of the facility itself; and, no physical change in the permitted structure is proposed to occur.

Saline County is likewise distinguishable from the instant matter and the Agency's reliance on it is misplaced. In Saline County, the landfill owner operator changed its design, after having received siting approval of a landfill expansion with a specific footprint. This change in design, resulted in a landfill expansion that was different in size, design, and capacity, since waste was proposed to be placed during permitting in airspace designated during siting as a waste-free interior separation berm. None of those factors are present in this case. Additionally, nothing about this simple request to modify a permit and remove an unconstitutional condition call into question any of the factors a local government is called on to review during the Section 39.2 site location approval process. Further, siting "after the fact," as the Agency proposes in this case, without any proposed change to facility design or operation (the only change being to the geographic area, off-facility property, from which facility can accept waste), is simply inappropriate and unsupported by the Act.

Thus, the only precedent interpreting and applying Section 3.330(b)(2), requires both capacity increase and physical dimension change for a "expansion" to be a "new pollution control facility," neither of which exists in the circumstances of this permit application. Further,

IEPA's own previous action on applications to modify permits for transfer stations is inconsistent with the argument it makes in this matter. For example, on March 7, 2002, IEPA approved an application for a transfer station located in West Chicago, to modify a development and operating permit, to increase the capacity of a transfer station from 1,950 tons per day to 3,000 tons per day. (IEPA Supplement Permit No. 2001-432-SP). Copies of the IEPA's original operating permit and its supplemental permit which approved this described expanded capacity are attached hereto as Exhibit A. For the Agency who approved an increase in throughput capacity (where such capacity was specifically limited in the original permit) in the above referenced West Chicago transfer station's permit application, without requiring site location approval for this change and not asserting that the applicant's request amounted to an "expansion" under Section 3.330(b)(2), it is an illogical leap now to argue that site location approval is necessary to remove an unconstitutional geographic restriction on the area of waste acceptance for the Petitioners' facility. Therefore, IEPA's argument should fail and its Motion for Summary Judgment be denied, as the removal of the unconstitutional geographic restriction on commerce is not an "expansion beyond the boundary of a currently permitted pollution control facility."

**C. IEPA's position that to remove the unconstitutional geographic restriction on the area from which the facility can accept waste requires site location approval, amounts to an improper retroactive application of the law**

IEPA's attempt to squeeze the subject permit application into either Sections 3.330(b)(1) or 3.330(b)(2) of the Act runs afoul of the legal precedent protecting vested rights from a change in the law. The BOARD is well versed on this precedent, since much of the case law derives from BOARD decisions. See, First of America Trust Company v. Armstead, 171 Ill.2d 282, 664 N.E.2d 36 (S.Ct. 1966); Chemrex Inc. v. Pollution Control Board, 257 Ill.App.3d 274, 628

N.E.2d 963 (1994); United States of America v. Illinois Pollution Control Board, et al., 17 F.Supp. 2d 800 (N.D. IL 1998). This well established rule of law provides that "Illinois courts are to apply the law that applies by its terms at the time of appeal unless doing so interferes with a vested right." United States of America v. Illinois Pollution Control Board, et al., 17 F. Supp.2d at 807, *citing*, Armstead. IEPA formulates existing law in a manner which, first, ignores current law by misstating the legal basis of the removal of and the unconstitutionality of the permit condition at issue. Second, IEPA applies the current law retroactively in a manner which ignores Petitioners' vested right in its permits by arguing Petitioner has no pollution control facility permits or that an unconstitutional geographic restriction on its pollution control facility permit should be enforced to require it to go through siting as a "new" pollution control facility if Petitioners' seek to have such restriction removed. Both arguments are inappropriate constructions of the law and, as a result, the IEPA's Motion for Summary Judgment should be denied.

### CONCLUSION

Upon the determination that Sections 39.2, 3.32 and 22.14 were unconstitutional as applied to facilities – such as Petitioners' – that were prohibited from accepting waste beyond certain geographic limits, any existing restrictions imposed upon those facilities based on those statutes because null, void and unenforceable as a matter of law. Alternatively, that portion of Special Condition No. 9 at issue in this case should be deleted from the Petitioners' permit and found to be unconstitutional for the reasons stated above. Thus, the contested language of Special Condition No. 9 is either effectively eliminated from the Petitioners' operating permit as null and void, or is affirmatively deleted as being unconstitutional. The IEPA should not be allowed to enforce or apply the progeny of unconstitutional statutes upon which Special

Condition No. 9 and the IEPA's decision was ultimately based, through its tortured application of Sections 3.330(b)(1) and (b)(2), which, as described above, are not relevant to the subject permit application. Thus, IEPA's Motion for Summary Judgment should be denied and Petitioners' Motion for Summary Judgment should be granted.

WHEREFORE, Petitioner, United Disposal of Bradley, Inc. and Municipal Trust & Savings Bank as Trustee Under Trust 0799, respectfully request the Board enter an order denying the IEPA's Motion for Summary Judgment, granting the Petitioners' Motion for Summary Judgment, and providing such other and further relief as the Illinois Pollution Control Board deems appropriate.

Dated: February 4, 2004

Respectfully submitted,

UNITED DISPOSAL OF BRADLEY, INC. and  
MUNICIPAL TRUST & SAVINGS BANK, AS  
TRUSTEE UNDER TRUST 0799

By: 

One of their attorneys

Jennifer J. Sackett Pohlenz  
David E. Neumeister  
**Querrey & Harrow, LTD.**  
175 W. Jackson Blvd., Suite 1600  
Chicago, Illinois 60604  
Phone: (312) 540-7000  
Fax: (312) 540-0578

# Exhibit A





ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276

RENEE CIPRIANO, DIRECTOR

217/524-3300

March 7, 2002

Certified Mail  
7099 3400 0014 9525 7092

Groot Industries, Inc.  
Attn: Mr. Larry Groot  
1759 Elmhurst Road  
Elk Grove Village, Illinois 60007

Re: 0430905819 – DuPage County  
Dukane Transfer Facility  
Permit No. 1997-412-DE/OP  
Log No. 2001-432  
Supplemental Permit No. 2001-432-SP  
Permit File

Dear Mr. Groot:

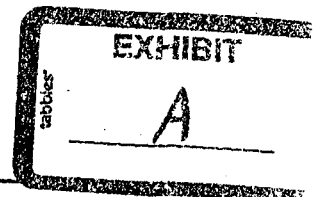
Supplemental Permit is hereby granted to Groot Industries, Inc. as owner and operator pursuant to 35 Illinois Administrative Code (hereinafter IAC) Subtitle G, Part 807. Specifically, this supplemental permit approves the request for an increase in the maximum throughput to 3,000 tons per day, increase the permitted hours of operation, modify the facility's cleaning requirements, modify the vehicle staging requirements, and modify the vehicle tarping requirements. Final plans, specifications, application and supporting documents as submitted and approved shall constitute part of this permit and are identified on the records of the Illinois Environmental Protection Agency, Bureau of Land by the permit number(s) and log number(s) designated in the heading above.

The application approved by this permit consists of the following documents:

<u>DOCUMENTS</u>	<u>DATED</u>	<u>DATE RECEIVED</u>
Original Application Log No. 2001-432	November 2001	November 9, 2001

The special conditions listed below include a compilation of all conditions, which remain in effect from the previously issued permits for this facility. Unmodified non-standard conditions from previous permits are referenced by the first permit in which they appeared.

GEORGE H. RYAN, GOVERNOR



The permit is issued subject to the standard conditions attached hereto and incorporated herein by reference, and further subject to the following special conditions. In case of conflict between the application and plans submitted and these special conditions, the special conditions of this permit shall govern.

A. DEVELOPMENT AND OPERATION

1. This permit approves the operation of a pollution control facility to receive and transfer municipal solid waste, residential landscape waste, and segregated recyclables. (Permit No. 1997-412-OP)
2. This facility shall only accept municipal solid waste, residential landscape waste, and segregated recyclables all of which shall not exceed 3,000 tons per day. (Permit No. 2001-432-SP)
3. This permit is issued with the expressed understanding that no process discharge to Waters of the State or to a sanitary sewer will occur from these facilities, except as authorized by a permit from the Bureau of Water (BOW). (Permit No. 1997-412-DE)
4. Permittee shall notify the Illinois EPA of any changes from the information submitted to the Illinois EPA in its application for a Development and Operating permit for this site. Permittee shall notify the Illinois EPA of any changes in the names or addresses of both beneficial and legal titleholders to the herein-permitted site. Such notification shall be made in writing within fifteen (15) days of such change and shall include the name or names of any parties in interest and the address of their place of abode; or, if a corporation, the name and address of its registered agent. (Permit No. 1997-412-DE)
5. Site surface drainage, during development, during operation and after the site is closed, shall be such that no adverse effects are encountered by adjacent property owners. (Permit No. 2001-432-SP)
6. The leachate tank and appurtenances shall be constructed of materials that do not react with the leachate. The leachate tank shall be emptied every 6 months or when the liquid level reaches 90% of the tank capacity, whichever comes first. Leachate shall be managed in accordance with all applicable rules and regulations. (Permit No. 1997-412-DE)
7. The best available technology (mufflers, berms and other sound shielding devices) shall be employed to minimize equipment noise impacts on property adjacent to the site during both development, operation and during any applicable post-closure care period. (Permit No. 1997-412-DE)

Page 3

8. The facility may receive waste at the site from 4:00 a.m. on Monday through 12:00 p.m. (noon) on Saturday. Operating hours on Saturday may be extended to 12:00 a.m. (midnight) on Sunday during weeks containing the following holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day. (Permit No. 2001-432-SP)
9. Fire safety equipment as described in Application Log 1997-412 and fire extinguishers shall be maintained in accordance with recommended practice. (Permit No. 1997-412-DE)
10. The permittee shall remove all waste and mechanically clean the tipping floor at least once a day. Waste may be left at the site overnight; however, once waste is stored it must be in a covered container, covered transfer trailer, or waste collection vehicle. No waste shall remain at the facility when the site is not scheduled to be open the following day. (Permit No. 2001-432-SP)
11. A vector control specialist shall inspect the transfer station building at least quarterly. If necessary, vector control measures shall be taken. (Permit No. 1997-412-DE)
12. Management of Unauthorized Waste
  - a. Landscape waste shall be removed the same day and transported to a facility that is operating in accordance with the Illinois Environmental Protection Act (Act), Title V, Sections 21 and 39 [415 ILCS 5/21 and 39]. (Permit No. 1997-412-DE)
  - b. Lead-acid batteries mixed with municipal waste will be removed the same day and transported either to a drop-off center handling such waste, or to a lead-acid battery retailer. (Permit No. 1997-412-DE)
  - c. Special wastes including hazardous waste, non-hazardous special waste, and potentially infectious medical waste mixed with municipal waste shall be containerized separately and removed as soon as possible by a licensed special waste hauler. Special wastes shall be transported to a licensed special waste management facility that has obtained authorization to accept such waste. The operator shall maintain a contract with haulers so that the immediate removal is ensured. The operator shall develop an emergency response/action plan for such occurrences. (Permit No. 1997-412-DE)
  - d. Asbestos debris from construction-demolition shall be managed in accordance with the National Emission Standards for Hazardous Air Pollutants (NESHAPS) regulations. (Permit No. 1997-412-DE)

- e. Tires found to be mixed with municipal waste shall be removed and managed in accordance with 35 Ill. Adm. Code Part 748. (Permit No. 1997-412-DE)
  - f. White good components mixed with municipal waste shall be removed and managed in accordance with Section 22.28 of the Act [415 ILCS 5/22.28]. (Permit No. 1997-412-DE)
  - g. The operator shall not knowingly mix liquid used oil with any municipal waste that is intended for collection and disposal at a landfill. (Permit No. 1997-412-DE)
  - h. After the unauthorized waste has been removed from the transfer station, a thorough cleanup of the affected area will be made according to the type of unauthorized waste managed. Records shall be kept for three years and will be made available to the Illinois EPA-BOL upon request. (Permit No. 1997-412-DE)
13. The permittee may stage up to twenty (20) transfer trailers, up to ten (10), which may be loaded and tarped and up to ten (10) empty transfer trailers. The permittee may only stage the twenty (20) transfer trailers within the transfer building for shipment by 12:00 p.m. (noon) of the next operating day. (Permit No. 2001-432-SP)
14. The permittee shall allow incoming roll off waste collection vehicles that are not equipped with automatic tarping mechanisms to un-tarp within the designed area on drawing 9, of Groot's application dated November 2001 for Log No. 2001-432, prior to entering the transfer facility. The permittee shall only allow vehicles that are equipped with an automatic tarping mechanism to un-tarp after entering the transfer building. (Permit No. 2001-432-SP)
15. The permittee shall allow all outbound transfer trailers to tarp outside of the transfer building within the area designated on drawing 9 of Groot's application dated November 2001 for Log No. 2001-432. The permittee shall provide litter control in this designated area. (Permit No. 2001-432-SP)
16. Any modification to the facility shall be the subject of an application for supplemental permit for site modification submitted to the Illinois EPA. (Permit No. 1997-412-DE)

#### B. CLOSURE

- 1. The closure plan dated November 1997 which was received by the Illinois EPA on December 8, 1997 is approved in accordance with 35 Ill. Adm. Code, Subtitle G, Part 807. (Permit No. 1997-412-DE)

2. The operator shall notify the Illinois EPA within 30 days after receiving the final volume of waste. (Permit No. 1997-412-DE)
3. The operator shall initiate implementation of the closure plan within 30 days after the site receives its final volume of waste. (Permit No. 1997-412-DE)
4. The operator shall not file any application to modify the closure plan less than 180 days prior to receipt of the final volume of waste. (Permit No. 1997-412-DE)
5. Upon completion of closure activities, the operator will notify the Illinois EPA that the site has been closed in accordance with the approved closure plan utilizing the Illinois EPA's "Affidavit for Certification of Completion of Closure of Non-Hazardous Waste Facilities." (Permit No. 1997-412-DE)
6. In accordance with 35 Ill. Adm. Code, Subtitle G, Part 807, Subpart F, financial assurance is not required for this facility. (Permit No. 1997-412-OP)

The original and two (2) copies of all certifications, logs, reports and plan sheets which are required to be submitted to the Illinois EPA by the permittee should be mailed to the following address:

Illinois Environmental Protection Agency  
Permit Section  
Bureau of Land -- #33  
1021 North Grand Avenue East  
Post Office Box 19276  
Springfield, Illinois 62794-9276

Except as modified in the above documents, the site shall be operated in accordance with the terms and conditions of Permit Nos. 1997-412-DE and 1997-412-OP dated March 20, 1998 and March 5, 1999, respectively, and with other permits issued for this site.

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.

Work required by this permit, your application or the regulations may also be subject to other laws governing professional services, such as the Illinois Professional Land Surveyor Act of 1989, the Professional Engineering Practice Act of 1989, the Professional Geologist Licensing Act, and the Structural Engineering Licensing Act of 1989. This permit does not relieve anyone from



# ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276 Mary A. Gale, Director

217/524-3300

March 5, 1999

CERTIFIED MAIL

P 344 335 797

P 344 335 798

OWNER

Brazos Nationwide Properties, LP  
Attn: Mr. Gregory C. Greene  
2911 Turtle Creek Blvd., Suite 1240  
Dallas, Texas 75219

OPERATOR

BFI Waste Systems of North America, Inc.  
Attn: Mr. Charlie Murphy  
325 E. Fullerton Avenue  
Carol Stream, Illinois 60186

Re: 0430905819 -- DuPage County  
Dukane Transfer Facility  
Permit No. 1997-412-OP  
Log No. 1999-004  
Permit File

Gentlemen:

Permit is hereby granted to Brazos Nationwide Properties, LP as owner and BFI Waste Systems of North America, Inc. as operator to operate a solid waste management site to transfer municipal solid waste and landscape waste consisting of 6.3459 acres in the parcel of land described in DRAWING NO. D3 entitled "Site Plat of Survey" contained in Application Log 1997-412, all in accordance with the application and plans prepared, signed and sealed by Devin A. Moose, P.E., of Engineering Solutions dated January 7, 1999 and received by the Illinois EPA on January 8, 1999. Also, additional information submitted by Carol Schultz of Engineering Solutions dated February 19, 1999 and February 25, 1999 and received by the Illinois EPA on February 22, 1999 and March 1, 1999, respectively. Final plans, specifications, application and supporting documents as submitted and approved shall constitute part of this permit and are identified on the records of the Illinois Environmental Protection Agency, Bureau of Land by the permit number(s) and log number(s) designated in the heading above.

The permit is issued subject to the standard conditions attached hereto and incorporated herein by reference, and further subject to the following special conditions. In case of conflict between the application and plans submitted and these special conditions, the special conditions of this permit shall govern.

A. DEVELOPMENT AND OPERATION

1. This permit approves the operation of a pollution control facility to receive and transfer municipal solid waste, residential landscape waste, and segregated recyclables.
2. This facility shall only accept municipal solid waste, residential landscape waste, and segregated recyclables all of which shall not exceed 1,950 tons per day.
3. This permit is issued with the expressed understanding that no process discharge to Waters of the State or to a sanitary sewer will occur from these facilities, except as authorized by a permit from the Bureau of Water (BOW).

5. Upon completion of closure activities, the operator will notify the Illinois EPA that the site has been closed in accordance with the approved closure plan utilizing the Illinois EPA's "Affidavit for Certification of Completion of Closure of Non-Hazardous Waste Facilities."
6. In accordance with 35 Ill. Adm. Code, Subtitle G, Part 807, Subpart F, financial assurance is not required for this facility.

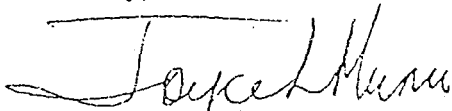
The original and two (2) copies of all certifications, logs, reports and plan sheets which are required to be submitted to the Illinois EPA by the permittee should be mailed to the following address:

Illinois Environmental Protection Agency  
Reporting and Financial Assurance Unit  
Division of Land Pollution Control -- #24  
1021 North Grand Avenue East  
Post Office Box 19276  
Springfield, Illinois 62794-9276

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.

Work required by this permit, your application or the regulations may also be subject to other laws governing professional services, such as the Illinois Professional Land Surveyor Act of 1989, the Professional Engineering Practice Act of 1989, the Professional Geologist Licensing Act, and the Structural Engineering Licensing Act of 1989. This permit does not relieve anyone from compliance with these laws and the regulations adopted pursuant to these laws. All work that falls within the scope and definitions of these laws must be performed in compliance with them. The Illinois EPA may refer any discovered violation of these laws to the appropriate regulating authority.

Sincerely,



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

JLM:CMR:bjh\983093S.WPD  
CTL

Attachment: Standard Conditions

cc: Devin A. Moose, P.E., Engineering Solutions  
Kevin Dixon, Director, DuPage County Department of Solid Waste  
Kenneth Dean, City of West Chicago

STANDARD CONDITIONS FOR CONSTRUCTION/DEVELOPMENT PERMITS  
ISSUED BY THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

July 1, 1979

The Illinois Environmental Protection Act (Illinois Revised Statutes, Chapter 111-1/2, Section 1039) grants the Environmental Protection Agency authority to impose conditions on permits which it issues.

These standard conditions shall apply to all permits which the Agency issues for construction or development projects which require permits under the Division of Water Pollution Control, Air Pollution Control, Public Water Supplies, and Land and Noise Pollution Control. Special conditions may also be imposed by the separate divisions in addition to these standard conditions.

1. Unless this permit has been extended or it has been voided by a newly issued permit, this permit will expire two years after date of issuance unless construction or development on this project has started on or prior to that date.
2. The construction or development of facilities covered by this permit shall be done in compliance with applicable provisions of Federal laws and regulations, the Illinois Environmental Protection Act, and Rules and Regulations adopted by the Illinois Pollution Control Board.
3. There shall be no deviations from the approved plans and specifications unless a written request for modification of the project, along with plans and specifications as required, shall have been submitted to the Agency and a supplemental written permit issued.
4. The permittee shall allow any agent duly authorized by the Agency upon the presentation of credentials:
  - a. to enter at reasonable times the permittee's premises where actual or potential effluent, emissions or noise sources are located or where any activity is to be conducted pursuant to this permit.
  - b. to have access to and copy at reasonable times any records required to be kept under the terms and conditions of this permit.
  - c. to inspect at reasonable times, including during any hours of operation of equipment constructed or operated under this permit, such equipment or monitoring methodology or equipment required to be kept, used, operated, calibrated and maintained under this permit.
  - d. to obtain and remove at reasonable times samples of any discharge or emission of pollutants.



- e. to enter at reasonable times and utilize any photographic, recording, testing, monitoring or other equipment for the purpose of preserving, testing, monitoring, or recording any activity, discharge, or emission authorized by this permit.
5. The issuance of this permit:
- a. shall not be considered as in any manner affecting the title of the premises upon which the permitted facilities are to be located;
  - b. does not release the permittee from any liability for damage to person or property caused by or resulting from the construction, maintenance, or operation of the proposed facilities;
  - c. does not release the permittee from compliance with other applicable statutes and regulations of the United States, of the State of Illinois, or with applicable local laws, ordinances and regulations;
  - d. does not take into consideration or attest to the structural stability of any units or parts of the project;
  - e. in no manner implies or suggests that the Agency (or its officers, agents or employees) assumes any liability, directly or indirectly, for any loss due to damage, installation, maintenance, or operation of the proposed equipment or facility.
6. Unless a joint construction/operation permit has been issued, a permit for operating shall be obtained from the Agency before the facility or equipment covered by this permit is placed into operation.
7. These standard conditions shall prevail unless modified by special conditions:
8. The Agency may file a complaint with the Board for modification, suspension or revocation of a permit:
- a. upon discovery that the permit application contained misrepresentations, misinformation or false statements or that all relevant facts were not disclosed; or
  - b. upon finding that any standard or special conditions have been violated; or
  - c. upon any violation of the Environmental Protection Act or any Rule or Regulation effective thereunder as a result of the construction or development authorized by this permit.



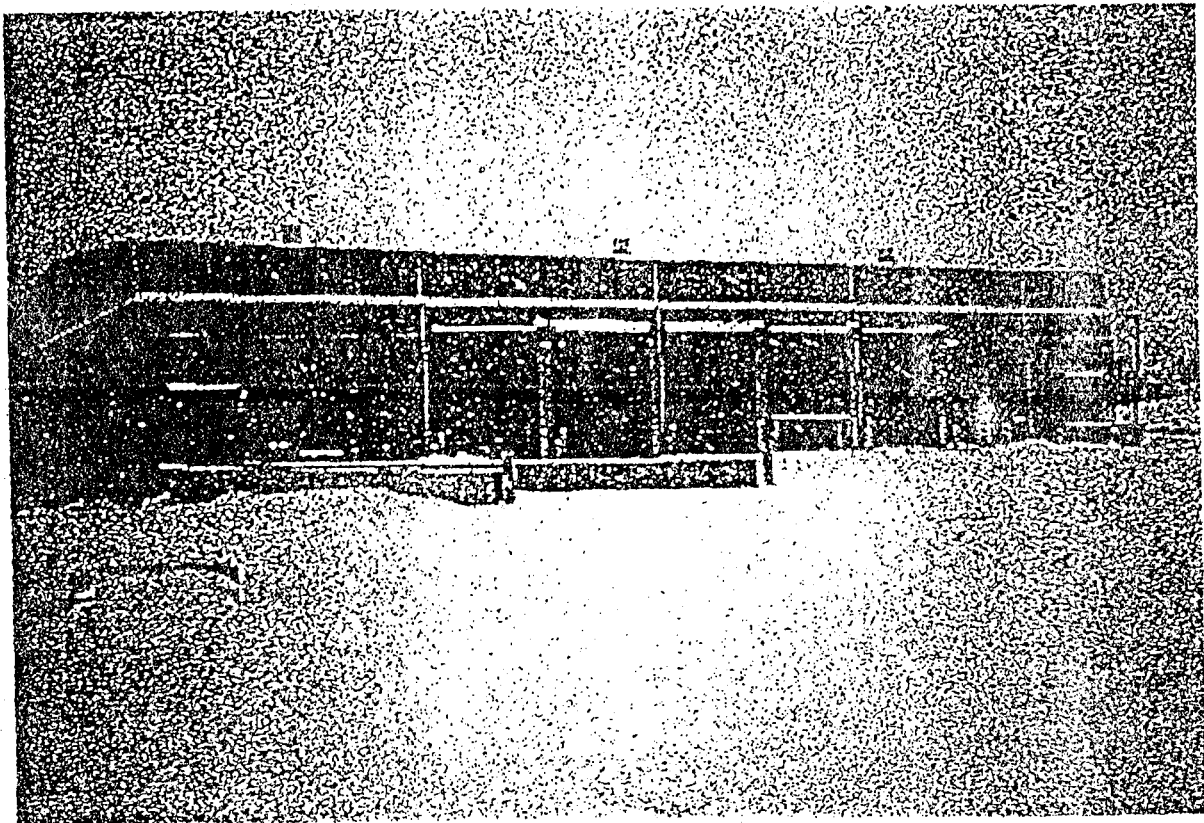
APPLICATION FOR AN  
OPERATING PERMIT FOR THE  
DUKANE TRANSFER FACILITY  
SOLID WASTE TRANSFER STATION

SUBMITTED TO THE ILLINOIS  
ENVIRONMENTAL PROTECTION AGENCY


JANUARY, 1999

Submitted by:

**BFI WASTE SYSTEMS OF  
NORTH AMERICA, INC.**



**Engineering Solutions**

A Division of Fluid Management and  ENVIROGEN, Inc.

ATTACHMENT B  
FACILITY OPERATING PLAN



- Regulated and Manifested Special Wastes
- Radioactive Wastes
- Lead-Acid (automotive) Batteries

No salvaging will be conducted at the facility, with the exception of cardboard, and the removal of tires, white goods and lead-acid batteries from the waste stream for proper recycling or disposal. The recycling of white goods will be conducted in accordance with the CFC regulations of 40 CFR part 82.

BFI will reject other materials and/or loads that are not compatible with the operations of the transfer facility. Any vehicle known or reasonably suspected to be carrying unauthorized waste, or any vehicle that appears likely to leak, spill or allow waste to be blown or scattered will be denied access to the facility. Any vehicle that is not in a safe, clean, and repaired condition will also be denied admittance to the facility.

#### Waste Quantity Accepted

The facility has been designed to transfer an average of 1,500 tons per day of waste, and will not accept more than 1,950 tons of waste during any single day.

#### Waste Transfer Operations

Incoming waste collection vehicles will enter the DuKane Transfer facility through the entrance along Powis Road and proceed to the inbound weigh station. In the event that a backup occurs at the scale, incoming vehicles will line up within the queuing area between the entrance and the scalehouse, as shown on Drawing No. D6. All waste collection vehicles will be weighed on the inbound scale before proceeding to the transfer building.

After weighing, the loaded collection vehicles will proceed to the transfer building. Vehicles will leave the scale and drive eastward until entering the paved area on the east side (behind) the transfer building. Once within the paved maneuvering area, the trucks will back into one of the five tipping bays, depending on which bays are currently unoccupied and how the incoming vehicles are directed by the traffic controllers. After tipping their load on the tipping floor, the waste collection vehicles will then drive out of the building and proceed around the southern limits of the transfer building towards the outbound scale. If the tare weight of the vehicle is on file within the computerized scale system, the waste collection vehicle may bypass the outbound scale before leaving the facility.

Once tipped on the tipping floor, waste will be temporarily stockpiled or directly loaded into waiting transfer trailers within the loading bays. Two wheel loaders will be used to stockpile waste against the pushwalls, and then to scoop the waste and load it into waiting transfer trailers. Note that the loaders will be required to lift the waste over the four (4) foot high parapet wall which surrounds the edge of the loading bay. The western half of the tipping floor



arrive at the facility. Note that this distribution is approximate, and may vary depending on seasonal fluctuations and the day of the week.

TABLE 2.4-1. COLLECTION VEHICLE PROCESSING TIMES

Activity	Minimum Time Required	Maximum Time Required
Enter Site (Approx. 370 feet at 10 miles per hour)	30 seconds	1 minute
Weigh-In at Inbound Scale	30 seconds	2 minutes
Proceed to tipping floor and maneuver position (Approx. 675 feet at 10 miles per hour)	1 minute	2 minutes
Detarp Load or Unfasten Locking Mechanisms	30 seconds	5 minutes
Discharge Waste	3 minutes	5 minutes
Lower Hopper or Hoist	1 minute	3 minutes
Proceed to exit, pausing at outbound scale (if necessary) (Approx. 1000 feet at 10 miles per hour)	1 minute	3 minutes
Total Time On-Site	7 minutes, 30 seconds	21 minutes

Knowing that up to 17 collection vehicles may arrive at the facility on an hourly basis (within the 1,500 tpd average), it is necessary to verify that the facility can process 17 vehicles within an hour. The first area which must be evaluated is the inbound scale, where all incoming vehicles must be weighed. Assuming that all 17 vehicles require the maximum projected time period to enter the site and cross the scale (3 minutes, as shown in Table 2.4-1), the scale will be utilized for:

$$(17 \text{ vehicles}) \times (3 \text{ minutes per vehicle}) = 51 \text{ minutes per hour}$$

Therefore, the scale can process all of the incoming collection vehicles even if all vehicles require the maximum processing time (assuming an even arrival rate during the hour). In the event that the trucks do not arrive at an even rate, stacking space has been provided at the inbound scale.

The next area which must be evaluated is the tipping floor. Drawing No. D7 demonstrates that tipping lanes will be provided for five (5) collection vehicles to discharge onto the tipping floor simultaneously. Assuming that all of the collection vehicles require the maximum length of time to discharge (conservatively estimated at 15 minutes, which includes indoor detarpping):

$$17 \text{ vehicles} \times 15 \text{ minutes per vehicle} = 255 \text{ minutes of use of the tipping floors}$$



may arrive at the facility than can be removed within the same hour, and this excess waste will be stockpiled on the tipping floor. The tipping floor has been designed to provide temporary storage space for waste during these peak periods, and the waste will be stockpiled against the pushwalls located along the western side of the tipping floor. As the incoming waste volumes decrease, the loaders can continue to load the transfer vehicles and reduce the stockpiled waste, removing all stockpiled waste from the tipping floor by the end of the day or earlier.

Appendix J provides a detailed analysis which demonstrates that during the 1,500 ton per day processing scenario, the tipping floor storage capacity will not be exceeded. The appendix documents that the tipping floor can temporarily stockpile up to 1,480 tons of waste without interfering with the transfer operation. During normal operation with a 1,500 ton per day scenario, a maximum of approximately 104 tons of waste will be stockpiled on the floor at any time, less than 10 percent of the 1,480 ton storage capacity. The calculation also shows that all waste will be removed from the floor at the end of each day, allowing the floor to be cleaned and swept. Therefore, BFI proposes that within two hours of the designated closing time, all waste will be removed from the facility or properly stored, the tipping floor cleaned, and the facility closed.

Note that for the analysis, the maximum loading rate for transfer vehicles was conservatively estimated to be approximately 66 tons per hour (3 trucks at 22 tons each) per loading bay. Two (2) transfer trailer loading bays are proposed, resulting in a facility loading rate of 132 tons per hour (6 trucks at 22 tons each). This rate allows a generous 20 minutes to perform the following tasks:

- Position an empty trailer in the loading bay;
- Load the trailer;
- Cover the trailer;
- Remove the trailer from the loading bay.

Stacking space will be provided to store empty trailers waiting to be loaded, and the stacking areas will be located to avoid interference with the flow of vehicles entering and exiting the transfer facility building. A stacking area for the south loading bay is provided to the east of the transfer facility building, as shown on Drawing No. D6. Stacking for the north loading bay is provided along the north side of the loading bay ramp, with additional stacking area provided to the east of the loading bay ramp. Together, these stacking areas provide space for 11 waiting transfer vehicles. In addition to this stacking area, additional storage space may be developed within the parking area on the west side of the transfer facility building, as shown on the drawing.



As a further conservative analysis, Appendix J also demonstrates that the entire 1,500 ton per day volume can be transferred through a single loading bay. The calculations within the appendix document that a single bay can be used to transfer all 1,500 tons from the facility, assuming the waste transfer vehicles can be loaded at a rate of four vehicles per hour. Although

TABLE 2.4-2. EQUIPMENT REQUIRED

Equipment	Number Required	Purpose
Wheel Loader	2	Loading waste from tipping floor to transfer vehicles.
Street Sweeper	1	Facility Cleaning

**Load Checking**

BFI will implement a random load checking program at this facility, similar to the landfill inspection requirements outlined within 35 Ill. Admin. Code, Section 811.323. An inspector designated by the facility will examine at least three random loads of solid waste delivered to the transfer facility on a random day each week. The drivers randomly selected will be directed to discharge their loads at a separate, designated location within the facility. The facility will conduct a detailed inspection of the discharged material for any regulated hazardous or other unacceptable wastes that may be present.

Furthermore, continuous inspection of all waste tipping operations shall be provided by spotters stationed on the tipping floor for the purpose of identifying potentially non-complying waste. At a minimum, the number of spotters will equal the number of transfer trailers being loaded at any one time. Any non-permitted waste will be promptly isolated from the waste stream, containerized and removed from the transfer facility as soon as practicable in the manner as required by all applicable laws and regulations. Such removal shall be performed by a licensed special waste or hazardous waste hauler and disposed of at a facility permitted to accept such waste.

In addition to the checking procedures employed at the transfer facility, all of the haulers which use this facility will be required to instruct their drivers not to accept unauthorized wastes from the curbside. BFI collection vehicle operators will be instructed to recognize unauthorized waste as part of their orientation and ongoing training programs, and third-party haulers will be notified of the waste acceptance procedures on or before their first visit to the facility. Third-party haulers who regularly use the facility will receive copies of the waste acceptance procedures and rules when they establish accounts with BFI. Smaller haulers, who may be using the facility once or on an infrequent basis, will be provided with a copy of the rules upon entry to the facility. These rules will encourage curbside screening of waste as it is collected. Through this checking program, an additional level of scrutiny will be provided at the curbside to prevent the acceptance of unauthorized wastes.

BFI has developed an internal training course, "Hazardous Waste ID and Response," to train its employees to recognize and properly handle unauthorized wastes. Unacceptable waste which does not represent a health hazard will be reloaded onto the collection vehicle which delivered it. If the unacceptable waste is suspected to be hazardous in nature, the waste will be isolated and the driver delivering the waste will be questioned as to its source. If the waste is subsequently determined to be hazardous, BFI or another appropriately licensed waste handler/hauler will containerize, remove, transport, and dispose of the waste in a permitted facility at the cost of the responsible party. If the unacceptable waste is determined to be special



Employees will be instructed that an open flame or smoking near any fuel is prohibited.

### Communication Systems

All equipment operators will be connected with the facility manager and scale house operator via phone or radio. Telephones will be located on-site in case of an emergency, and will be located at a minimum within the scalehouse, employee facility area of the transfer building, and the administration building. Continuous communication between facility management and employees will help to prevent accidents or other operating problems from developing and will facilitate an effective response to a problem should it occur.

### Recordkeeping

BFI will maintain accurate and up to date records on the operations of the transfer facility. At a minimum, the facility will maintain the following information for a two year period:

- All information submitted to the IEPA
- Daily, weekly, monthly, and annual waste receipts
- Load checking records
- Training procedures
- Employee records
- Closure and post-closure cost estimates

### Litter Control

BFI will control litter by discharging and loading all waste within an enclosed building. All waste vehicles utilizing the facility must be fully containerized, covered, or use other means to prevent litter from being blown from vehicles during travel. BFI will require that all trucks using the facility remain covered or closed until parked within the transfer building. Although this policy exceeds current standards of practice at many transfer stations and will add additional processing time, the applicant is committed to implementing the policy to further reduce the opportunity for blowing litter. Similarly, all transfer trailers will be tarped while still within the loading bays, before pulling out of the building. The only allowable deviation from this policy may occur within situations where driver safety may be compromised. The applicant recognizes that this policy will require additional processing time within the building, and has provided an ample number of tipping and loadout bays to accommodate the proposed processing volumes.

If litter does escape the building, several additional safeguards exist to prevent the litter from migrating off-site. The site will be surrounded by a chainlink fence, which will intercept any blowing litter before it leaves the site. One employee will patrol the site several times daily to collect any blowing litter, as required.



will also clean the site roadways regularly. Dust may also be created during the tipping and loading of waste within the transfer building, particularly during the transfer of dry materials like construction and demolition debris. In order to control this dust, BFI will install a misting system within the building. Note that the restriction of all transfer operations to the interior of the enclosed building further limits the amount of dust which could potentially travel off-site.

### **Odor Control**

Multiple design and operational features will be incorporated into the facility to control and eliminate the potential for odors. All vehicles utilizing the facility must be tarped until located within the transfer building, minimizing the potential for odors from traffic utilizing the facility. All exposed waste will be located within the transfer building on the tipping floor, which minimizes the potential for odors to be blown off-site. All incoming waste will be transferred or containerized on the same day as it is received, thereby minimizing odors by moving the waste before it has time to become particularly offensive. The facility will also be emptied and swept on a daily basis, eliminating the potential for any residual material which might generate odors.

As an added safeguard, BFI will use an odor neutralization system within the misting system. In the event that incoming waste is particularly offensive, an odor neutralizer can be mixed into the water providing the mist. As the mist contacts the waste, the neutralizer will counteract the odor emanating from the waste. The odor neutralizer will be non-toxic to protect the safety of employees and visitors.

### **Noise Control**

Since all waste tipping and transferring operations will be conducted in an enclosed building, no increase in the levels of ambient noise are anticipated within the vicinity of the site. The noise associated with this type of facility is generally traffic related noise, and the location of the transfer facility adjacent to North Avenue, an airport and within an industrial area renders the potential noises from the facility no more offensive than existing conditions. All equipment utilized for operations will be equipped with mufflers or other sound dissipating devices required for compliance with 35 Ill. Admin. Code 901.101 through 901.103 and 901.121.

### **Fire Control and Prevention**

Fire control and prevention at the DuKane Transfer facility will be provided by several features within the building design and operating plan. Two exterior fire hydrants exist along the north property line. Additional fire hydrants may also be developed as required. The transfer facility building will be equipped with a sprinkler system that is designed in accordance with the requirements of the National Fire Protection Association (NFPA), BOCA, and the DuPage County Building Ordinance. The sprinkler system will be connected to the local water supply.

The sprinkler system will be activated by heat sensors within the building. An alarm system will be installed to warn facility employees in the event of a fire. The telephone number for the fire department will be posted at all phones located in the building. The sprinkler system and

## Accident Prevention and Safety

Accident prevention and safety is a paramount concern, and BFI has taken several steps within the design of the facility and the proposed operation to provide a safe facility to all employees and neighbors. All transfer facility personnel will receive training in the performance of their work duties, in the operation of equipment, and in facility operations. The purpose of this training will be to facilitate the safe and efficient operation of the transfer facility and to prevent potential operational problems from developing. In addition, both the facility design and the plan of operations for the proposed DuKane Transfer facility will help to minimize accidents, as shown in Table 2.4-5.

TABLE 2.4-4. SAFETY-ENHANCING DESIGN AND OPERATING PROCEDURES

Design Features	Operating Procedures
<ul style="list-style-type: none"> <li>• Fire protection and alarm system</li> <li>• Site security system, including fencing around perimeter of facility</li> <li>• Safety signs and traffic signs</li> <li>• Dual scale system to facilitate traffic movement</li> <li>• Curbing and pavement markings throughout transfer facility yard</li> <li>• Dust suppression system</li> <li>• Oversized tipping floor</li> <li>• Parapet walls around loading bays</li> <li>• Active and passive building illumination</li> <li>• Floors sloped to floordrain system</li> <li>• Concrete-filled bollards to protect building corners from traffic</li> </ul>	<ul style="list-style-type: none"> <li>• Training in job performance, equipment operations, and facility operations</li> <li>• Operating procedures to limit the number of employees and/or visitors on the tipping floor</li> <li>• Employee safety training</li> <li>• Emergency operating procedures</li> <li>• Emergency first aid training</li> <li>• Training in identification of unauthorized materials</li> <li>• Regular inspection of fire protection system</li> <li>• Coordination with emergency management agencies</li> <li>• Equipment lockout/tagout procedures</li> <li>• Designated Emergency Coordinator</li> <li>• Employee radio communication system</li> <li>• Phones with emergency numbers posted</li> </ul>

### Lockout-Tagout Procedures

To ensure employee safety, all machinery or equipment capable of movement must be de-energized or disengaged and locked and tagged out during cleaning, servicing, adjusting or setting up operations. The program will physically lock or tag any defective equipment to prevent accidental use by an uninformed employee. Any defective equipment will be rendered inoperable (unplugged, disconnected, etc.) and tagged or locked. Only authorized personnel will be allowed to remove the locks and/or tags. In conjunction with the locking and tagging procedures, a training program will be implemented to ensure that all employees recognize when equipment has been removed from service.

### Personnel Training

Operating personnel will receive training to ensure that the equipment is operated in an environmentally sound manner in accordance with the provisions contained herein, the laws of the State of Illinois, DuPage County, and the specific requirements of the IEPA permit. This training is designed to supplement the accident and fire prevention training by creating informed



### *Equipment Failure*

As the transfer facility is not a highly automated system, the only possible equipment failures could be with the wheel loader, collection vehicles and transfer vehicles, or the scale. The facility will be operated with two wheel loaders, ensuring that one loader is available to complete the waste loading operations in the event of a loader failure. Additional loaders can be obtained from other BFI transfer facilities if necessary, or they can be rented from a local equipment supplier. Also, regular wear parts and replacement parts for the loader will be kept on-site, in the event that the breakdown is of a minor nature.

A single vehicle failure will not critically impact the facility's operation, since all facility roadways are at least two lanes wide, and redundant loading bays are provided at all points within the transfer operation. Under a worst case scenario, a local tow truck may be contacted to pull a stalled vehicle out of the way of operations until it can be repaired. Sufficient area is available at the site to park a stalled vehicle. If a vehicle is decommissioned for repairs, a sufficient number of additional vehicles service the facility to prevent any impact to the waste transfer operations.

The facility will be equipped with two 70 foot long scales at the weigh station and additional scales within the loading bays. Four scales provide more than enough system redundancy in the event of a scale failure.

In the unlikely event that an equipment failure slows the speed of operations, incoming waste vehicles can be diverted to other BFI facilities, including the transfer facility in Melrose Park, to reduce the amount of waste arriving at the facility.

### *Interruption of Utility Service*

Should electrical service, water service or telephone service be interrupted at the facility, provisions will be made to safely continue operation or else operations will be temporarily suspended until service is restored. If operations are to be discontinued, all incoming waste vehicles will be diverted to other facilities, and the amount of waste remaining within the building will be carefully loaded and transferred utilizing available light and resources. By safely emptying the building of the remaining waste, the potential for fire or other incident is eliminated. Alternate methods of emergency communication will be provided if telephone service is interrupted. Cellular phones or two-way radios to a dispatcher will be used to summon emergency assistance if the facility telephones are not operational.

