

JUN 07 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)

NOTICE OF FILING

To: Please see attached Service List

PLEASE TAKE NOTICE that on June 7, 2004, we filed with the Illinois Pollution Control Board the following documents: (1) **PETITIONERS UNITED DISPOSAL OF BRADLEY, INC.'S AND MUNICIPAL TRUST & SAVINGS BANK'S MOTION TO STRIKE THE "PUBLIC COMMENT" SUBMITTED BY JOHN J. BEVIS**, copies of which are attached hereto and served upon you.

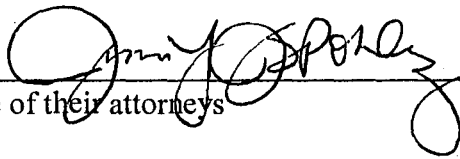
Dated: June 7, 2004

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.
175 W. Jackson Blvd., Suite 1600
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By:

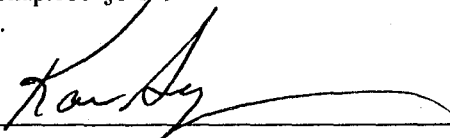

One of their attorneys

PROOF OF SERVICE

I, Karen Gryczan,* a non-attorney, certify that I served the following documents on the above referenced persons, by hand delivery and/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 on the attached Service List, and/or at the facsimile number show on the attached Service List, as applicable), at or prior to the hour of 4:30 p.m. on June 7, 2004, as referenced in the attached Service List.

*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.



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)

SERVICE LIST

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

Via Hand Delivery

9 COPIES and 1 ORIGINAL

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Joel J. Sternstein
Assistant Attorney General
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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**

No. 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
MOTION TO STRIKE THE "PUBLIC COMMENT"
SUBMITTED BY JOHN J. BEVIS**

NOW COME the Petitioners, United Disposal of Bradley, Inc. and Municipal Trust & Savings Bank as Trustee Under Trust 0799, and pursuant to 35 IAC 101.628(c)(2), move the Illinois Pollution Control Board (Board) to strike the "Public Comment" of John J. Bevis (PC #16)(attached as Exhibit A hereto). The IPCB should this strike Mr. Bevis' public comment, which is marked on the attached Exhibit A, in its entirety because it contains evidence not present in the record, consists of argument by an unidentified entity, and the Board is limited in its review to the record on appeal. In further support, Petitioner states as follows:

1. Mr. Bevis' comment presents essentially makes two references. The first is a legal argument which ignores the fact that the subject facility is currently permitted. The second is Mr. Bevis' "awareness" of alleged "apparent violations." Neither of these references is appropriate for public comment. In fact, in this very matter and from another County employee, Mrs. Wheeler, the Board struck alleged "public comment" referencing the County

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Health Department's allegations concerning a notice of violation. Therefore, this Motion should be granted and Mr. Bevis' comment stricken.

2. As respects the first issue, Mr. Bevis apparently intends to submit his written comment on behalf of the Illinois Environmental Protection Agency (IEPA). He references his "authority" with IEPA and he signs his name as a representative of IEPA. As such, the comment is completely inappropriate and should be stricken. IEPA is a party (Respondent) in this proceeding and cannot be represented by an individual and, further, cannot submit a written comment, thus, Mr. Bevis' comment should thus be stricken, as it violates Board Rules Section 101.400 and 101.628(c), at least to the extent it references the IEPA or his "authority" with the Agency.

3. However, regardless of the vagaries surrounding Mr. Bevis' submittal and authority or lack thereof for it, it is an inappropriate comment and should be stricken as there is *no* evidence in the record regarding the distinction between a facility that accepts its own waste versus one that accepts wastes generated off-site and there is *no* evidence in the record concerning and it is irrelevant to this proceeding what is the "future plan for solid waste disposal in Kankakee County". (Bevis Comment p. 2). The Illinois Environmental Protection Act requires that the decision of the IPCB "shall be based exclusively on the *record compiled in the Agency proceeding.*" (415 ILCS 5/40(c))(emphasis added). All public comments that are submitted after a hearing must present arguments or comments based on evidence contained in the record. *Am. Bottom Conservancy, et al. v. Village of Fairmont City, et al.*, PCB No. 01-159, p. 5 (October 18, 2001) (*quoting* 415 ILCS 5/40.1(b) (2000) (*citing* 35 Ill. Adm. Code 101.628(c)(2)).

4. Further, even if the Board were to consider Mr. Bevis' argument, it has to be rejected, as it is simply a diversion argument from the core issues in this proceeding: the permit condition at issue is an unconstitutional restriction of commerce and the time limitations for a finding of "incompleteness" were not met by the Agency. Mr. Bevis' argument that facilities accepting waste from off-site have to go through siting, ignores the fact that (a) this is a legally permitted facility; (b) after this facility obtained its permit, the provisions of the Illinois Environmental Protection Act underlying the inclusion of condition at issue in this case were unambiguously declared unconstitutional by the District Court in Tennsv.; (c) the government cannot, legally, impose the type of restriction on commerce as is found in the subject permit (*see, Fort Gratiot Landfill v. Michigan Dept. of Natural Resources*, 504 U.S. 353, 112 S. Ct. 2019 (1992); Tennsv. Inc. v. Gade, Nos. 92 503 WLB & 92 522 WLB, 1993 U.S. Dist. LEXIS 10403 (S.D. Ill. July 8, 1993); Northwest Sanitary Landfill, Inc v. South Carolina Dept. of Health and Env'tl. Control, et al., 843 F. Supp. 100 (D. S.C. 1992); Ecological Sys., Inc. v. City of Dayton, 2002 Ohio 388, 2002 Ohio App. LEXIS 354 (Ohio Ct. App. 1992), *app. denied*, 2002 Ohio 2852, 769 N.E.2d 873 (2002)); (d) nothing about the permit modification sought by Petitioners from Respondent triggered siting for this already permitted facility (*i.e.*, it isn't a "new" pollution control facility and it is not an "expansion" under the Illinois Environmental Protection Act); and, (e), it runs afoul of the legal precedent protecting vested rights from a change in the law (*see, First of America Trust Company v. Armstrong*, 171 Ill. 2d 282, 664 F.2d 30 (5th Cir. 1980), Chemrea Inc. v. Pollution Control Board, 277 Ill App.3d 374, 630 F.2d 963 (1994); United States of America v. Illinois Pollution Control Board, et al., 17 F.Supp. 2d 800 (N.D. IL 1998)).

5. As respects the **second** issue, Bevis' reference to his "awareness" of an alleged "apparent violation" for which "enforcement is being pursued," the Board previously considered this issue and granted that portion of Petitioners' Motion to Strike that related to the "apparent violations" that are vaguely referenced in Mr. Bevis' comment when it ruled, on August 21, 2003, that a specific notice letter that sent by the Kankakee County Health Department to United Disposal of Bradley, Inc. and was attached to a Ms. Wheeler's "public comment" was not in the record and, thus, was stricken from the record.¹ A copy of the Board's August 21, 2003, Order is attached hereto as **Exhibit B**.

WHEREFORE, Petitioners United Disposal of Bradley, Inc. and Municipal Trust & Savings Bank, as Trustee under Trust 0799 respectfully requests the Illinois Pollution Control Board to strike the "public comment" of Mr. Bevis submitted as "Public Comment" No. 16. In the alternative, Petitioners respectfully request the Illinois Pollution Control Board to strike the following sentences in the comment:

"In my capacity as Illinois EPA Delegated Authority in Kankakee County, I am very familiar with the rules and regulations governing pollution control facilities,"

and

¹ Interestingly, and without waiving their rights that such information should not be included in the record, the "apparent violations" that at least these two individual employees of the County attempt to prejudice the record with, are rooted in an allegation that United Disposal of Bradley, Inc. allowed a truck to unload at the transfer station which picked up waste from **two households** located within the jurisdictional limit of Bradley, but just barely outside its municipal corporate limits and a local university similarly geographically located. Additionally, the "apparent violations" relate to documentation sought by Bevis from United Disposal of Bradley, Inc., that Bevis would like to use to pursue and, presumably further investigate, his claim that United Disposal of Bradley, Inc. accepted waste from outside one but inside another "boundary" of the Village of Bradley, such as United Disposal of Bradley, Inc.'s confidential and privileged customer list, which is not required under any State Law to be "turned over" to the government. The "apparent violations" do **not** concern the manner or method in which United Disposal of Bradley, Inc. actually, physically operates the transfer station; only the origin of alleged incoming waste.

“As the delegated inspector for Kankakee County, I and the Des Plaines Regional Office of the IEPA are aware of apparent violations at the site for which enforcement is being pursued,”

and

“While various appeals on the siting . . . receiving any permit to expand operations”,

and

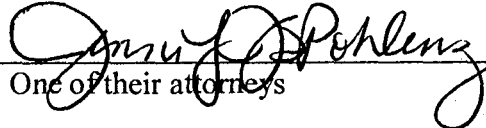
“IEPA Delegated Inspector” located under Mr. Bevis’ signature.

Dated: June 7, 2004

Respectfully Submitted,

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

By: _____


One of their attorneys

Jennifer J. Sackett Pohlenz
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Chicago, Illinois 60604
(312) 540-7000
Attorneys for Petitioners
Illinois Attorney Nos. 6225990 & 6207454



**KANKAKEE COUNTY
HEALTH
DEPARTMENT**

2390 West Station Street
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phone 815-937-3560
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MAY 24 2004

STATE OF ILLINOIS
Pollution Control Board

May 20, 2004

J. Philip Novak, Chairman
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, IL 60601

PC 16

Dear Chairman Novak:

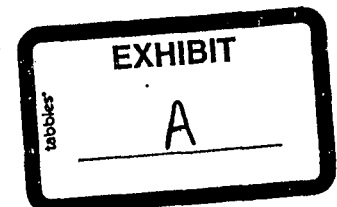
RE: PCB Case 03-235

I am writing this letter to voice my concern regarding United Disposal of Bradley, Inc.'s transfer station permit modification request.

In my capacity as Illinois EPA Delegated Authority in Kankakee County, I am very familiar with the rules and regulations governing pollution control facilities. It is clearly stated in the Illinois Environmental Protection Act that "any person conducting a waste storage, waste treatment, waste disposal, waste transfer or waste incineration operation for *wastes generated by such person's own activities*, when such wastes are stored, treated, disposed of, transferred or incinerated within the site or facility owned, controlled, or operated by such person or when such wastes are transported within or between sites or facilities owned, controlled or operated by such person" is not subject to local siting as a pollution control facility.

However, in this case, United Disposal would not be generating waste due to his own activity. United Disposal would be collecting and transferring waste from sites outside the Village of Bradley, owned by other people, with wastes generated by other people's activities. The facility would then become a pollution control facility by definition once it takes wastes outside of Bradley, Illinois. Such amendment to its service area without going through local siting is a clear violation of law, and granting this permit modification request would set an undesirable precedent for other pollution control facilities to follow.

As the delegated inspector for Kankakee County, I and the Des Plaines Regional Office of the IEPA are aware of apparent violations at the site for which enforcement is being pursued.



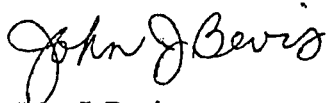
J. Phillip Novak
May 20, 2004
Page 2

While various appeals on the siting of two pollution control facilities (municipal solid waste landfills) within Kankakee County are pending and there is uncertainty as to the future plan for solid waste disposal within this County, this does not take away from the fact that United Disposal must go through local siting approval before receiving any permit to expand operations.

It is my recommendation to deny the consideration to deviate from the original conditions of the permit without going through the proper process of siting and hearings for the public's interest and concerns.

Thank you in advance for the Board's consideration of my comments.

Sincerely,



John J. Bevis
IEPA Delegated Inspector
Kankakee County Health Department

JJB:scv

Cc: Ed Smith, State's Attorney Ofc.
Mike Van Mill, Kankakee Co. Planning & Zoning

ILLINOIS POLLUTION CONTROL BOARD

August 21, 2003

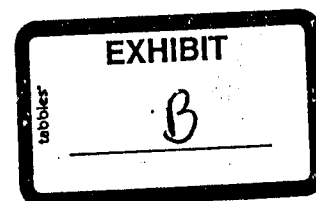
UNITED DISPOSAL OF BRADLEY, INC.,)
and MUNICIPAL TRUST & SAVINGS)
BANK as trustee under Trust 0799,)
)
Petitioners,) PCB 03-235
) (Permit Appeal - Land)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by N.J. Melas):

On June 19, 2003, United Disposal of Bradley, Inc., and Municipal Trust & Savings Bank, as Trustee under Trust 0799 (petitioners), timely filed a petition asking the Board to review a May 15, 2003 determination of the Illinois Environmental Protection Agency (Agency). See 415 ILCS 5/40(a)(1) (2002); 35 Ill. Adm. Code 105.206(a). On June 26, 2003, Ms. Barbara Wheeler filed a public comment in this matter. On July 10, 2003, petitioners filed a motion to strike Ms. Wheeler's comment. There has been no response to this motion, but the Agency filed the administrative record in this proceeding on August 14, 2003. For the reasons set forth below, the Board grants petitioners' motion to strike in part and denies the motion in part.

Ms. Wheeler attached several documents to her public comment including a notice of violation letter sent by the Kankakee County Health Department (KCHD) addressed to Mr. Mike Watson of United Disposal of Bradley, dated March 3, 2003. The remaining documents are identical to those attached to the petitioners' petition as Exhibit B. The remaining documents were part of the Agency's administrative record. Petitioners have not waived the hearing in this matter and the decision deadline is November 26, 2003.

Petitioners move to strike Ms. Wheeler's public comment, including all attachments, on the grounds that it contains evidence not present in the record and because the Board is limited to the record on appeal. Petitioners state that the Environmental Protection Act limits the Board's review to the "record compiled in the Agency proceeding." Mot. at 1; citing 415 ILCS 5/40(c). The petitioners state that Section 101.628(c)(2) of the Board procedural rules specifically limits the scope of public comments to arguments or comments "based on the evidence contained in the record." Mot. at 1; citing 35 Ill. Adm. Code 101.628(c)(2). Finally, petitioners cite to Board precedent for the principle that public comments submitted after hearing must present arguments or comments based on evidence contained in the record. Mot. at 1; citing American Bottom Conservancy, et al. v. Village of Fairmont City, et al., PCB 01-159 at 15 (Oct. 18, 2001).



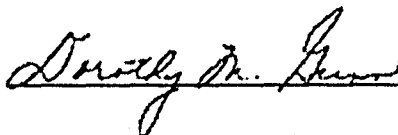
Although the petition in American Bottom is an appeal of a local siting approval, and the petition here is an appeal of a permit denial, the principle remains the same. As with reviews of local siting approvals, the Board must base hearings in permit appeals exclusively on the Agency record, and any public comments submitted in permit appeals must present arguments or comments based on evidence contained in the record. 35 Ill. Adm. Code 101.628(c)(2); 105.214(a).

The Board accepts all of Ms. Wheeler's public comment except the notice of violation letter sent to United Disposal of Bradley by the KCHD on March 3, 2003, and any references to that letter. Ms. Wheeler's letter contains her opinions and comments regarding the petitioners' facility in Bradley. The Board accepts Ms. Wheeler's letter excluding any references to the letter from KCHD to United Disposal of Bradley. Additionally, all of the documents except the March 3, 2003 letter from the KCHD were submitted both as Exhibit B of the petitioners' original petition as well as part of the Agency's administrative record. The Board accepts all of the attached documents except the March 3, 2003 letter from the KCHD.

The Board finds that the only new evidence not found in the record before the Board is the March 3, 2003 letter from the KCHD to United Disposal of Bradley. Accordingly, the Board grants the petitioners' motion to strike only as to the KCHD letter and any references to that document contained in Ms. Wheeler's letter. The Board denies the petitioners' motion to strike the rest of Ms. Wheeler's public comment.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on August 21, 2003, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board