ILLINOIS POLLUTION CONTROL BOARD
June 17, 2004

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.	)	

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

Today the Board addresses the parties' cross motions for summary judgment. This matter involves whether a waste transfer station permitted in 1994 must obtain local siting approval before it can have a geographic limitation on its service area removed from its operating permit.

The Illinois Environmental Protection Agency (Agency) issued United Disposal of Bradley, Inc. (United Disposal) and Municipal Trust & Savings Bank, as Trustee Under Trust 0799 (Municipal Trust & Savings) (collectively, petitioners) a development permit for a waste transfer station in 1994. The development permit included a special condition that prohibits acceptance of: (a) waste generated outside the corporate limits of the Village of Bradley, Kankakee County; and (b) special waste. In 1995, the Agency issued an operating permit that included the same condition. At the time of issuance, the language limiting the facility's service area exempted United Disposal from going through the local site location suitability approval process of Section 39.2 of the Environmental Protection Act (Act) necessary only for "regional pollution control facilities." Instead, the limited service area qualified United Disposal as a "non-regional pollution control facility." *See* 415 ILCS 5/39.2

The legislative distinction between "regional" and "non-regional" pollution control facilities has not existed since 1994. In 2003, United Disposal sought to have the language limiting its service area deleted from its operating permit by applying for a supplemental permit from the Agency. The Agency denied United Disposal's request as incomplete on the procedural grounds that United Disposal must request the same modification of its development permit. Additionally, the Agency stated that before it could make those modifications, United Disposal must provide proof of local siting approval from the Village of Bradley under Section 39.2 of the Act.

For the reasons set forth below, the Board grants the Agency's motion for summary judgment and denies the petitioners' motion. Accordingly, the Board affirms the Agency's denial of United Disposal's request to modify its operating permit for the waste transfer station located in the Village of Bradley, Kankakee County (facility). .

PROCEDURAL BACKGROUND

On July 10, 2003, the Board accepted this matter for hearing. The Agency filed the administrative record on August 14, 2003.[1] The petitioners moved the Board for summary judgment on December 2, 2003, and the Agency responded on December 26, 2003.[2] The Agency filed a motion *instanter* for summary judgment in its favor on December 5, 2003, accompanied by a motion to supplement the record.[3] United Disposal responded to the Agency's motion for summary judgment on February 4, 2004, and the Agency replied on February 23, 2003.[4] No hearing has been held in this matter. The decision deadline is currently August 19, 2004.

The Board grants both parties' motions to file *instanter* and accepts the parties' motions for summary judgment.

MOTION TO SUPPLEMENT

It is well-settled that the Agency record in a permit appeal consists only of the information which the Agency considered or should have considered in making its permitting decision. Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 516 N.E.2d 275 (5th Dist. 1987); Joliet Sand & Gravel v. PCB, 163 Ill. App. 3d 830, 516 N.E.2d 955 (3rd Dist. 1987). The Board has denied motions to supplement the Agency record with information that the Agency did not or should not have considered. CWM Chemical Services, Inc. v. IEPA, PCB 89-177 (July 11, 1991). Here, the Agency considered the documents it now seeks to add to the record when the permitting decision was made.

The four supplemental documents the Agency seeks to add are: (1) the second page of notes regarding the facility, page 126 of the administrative record, which was copied incorrectly in the record; (2) a letter from the Mayor of the Village of Bourbonnais to the Agency, dated April 3, 2003, supporting United Disposal's request to eliminate the restriction against accepting waste from outside the Village of Bradley (Bradley); (3) a letter from the Mayor of the City of Kankakee to the Agency, dated April 10, 2003, supporting United Disposal's request to eliminate

[1] The Board cites to the administrative record as "AR. at _."

[2] The Board cites to the petitioners' motion for summary judgment as "Pet. Mot. at _," and the Agency's response as "Agency Resp. at _."

[3] The Board cites to the Agency's motion for summary judgment as "Agency Mot. at _."

[4] The Board cites to the petitioners' response as "Pet. Resp. at _," and the Agency's reply brief as "Agency Reply at _."

the restriction against accepting waste from outside Bradley; and (4) a letter dated May 15, 2003, expressing the Agency's final decision to deny the petitioners' application for a permit to modify the operating permit.

The petitioners did not respond to the Agency's motion to supplement the record with the additional three documents. A party who fails to respond to a motion is deemed to have waived any objection to the Board granting the motion. 35 Ill. Adm. Code 101.500(d).

The Board notes that the fourth document the Agency seeks to supplement is already contained in the administrative record as pages 98 and 99. The first, second, and third documents are not found within the originally-filed record. The documents predate the Agency's final denial letter of May 15, 2003, and were available to the Agency when making its permit decision, the Board grants the Agency's motion to supplement the administrative record with the first three documents and incorporates those three documents into the record. The Board denies the Agency's motion to supplement the record with the fourth document as moot, finding it already exists in the record.

PRELIMINARY MATTER

On June 7, 2004, United Disposal filed a motion to strike a public comment submitted by John J. Bevis on May 24, 2004 (PC16). Although the 14-day response period has not yet run, the Board addresses United Disposal's motion today to avoid undue delay in this proceeding. *See* 35 Ill. Adm. Code 101.500(d).

United Disposal claims the Board should strike Mr. Bevis' public comment because it contains evidence not contained in the record. United Disposal argues that the Board's decision is limited to the record on appeal. Mot. to Strike at 2; citing 415 ILCS 5/40(c) (2002). In support of its argument, United Disposal references the Board's order of August 21, 2003, in which the Board accepts all of a public comment submitted by Ms. Wheeler, except a letter not contained in the record on appeal.

The Board finds PC16 properly filed under Section 101.628(c) of the Board's procedural rules. Mr. Bevis provides his opinion and recommendation in the comment and does not submit for Board review any documents not included in the public record. Accordingly, the Board denies United Disposal's motion to strike PC 16.

FACTS

On September 21, 1994, the Agency granted the petitioners a permit to develop a municipal solid waste transfer station (No. 1994-306-DE). AR. at 1-7. The facility consists of 4.7 acres and is located in the Village of Bradley in Kankakee County. AR. at 1. The development permit specifically stated the facility was a non-regional pollution control facility. The Agency issued the permit subject to certain special conditions. Special condition #9, relating to operation of the facility, stated:

> No waste generated outside the municipal boundaries of the Village of Bradley may be accepted at this facility. Furthermore, no waste, meeting the definition of "special waste" given in Section 3.45 of the Act (including "hazardous waste" as defined in Section 3.15 of the Act), may be accepted at this facility. AR. at 3.

The permit identified Mr. Merlin Karlock of Muncipal Trust and Savings Bank as the owner, and Mr. Michael Watson of United Disposal of Bradley, Inc. as the operator of the facility. *Id*. The permit approved development, not operation of the facility. AR. at 1.

On January 19, 1995, the Agency issued the petitioners an operating permit for the facility (No. 1994-30-OP). AR. at 67-73. The operating permit also contained the language of special condition #9. AR. at 69.

United Disposal applied to the Agency for a modification of its operating permit on March 27, 2003. AR. at 129. The application sought only to delete the geographical limitation of special condition #9 of the operating permit. United Disposal does not seek to modify the prohibition against accepting special waste at the facility. *Id*. On May 15, 2003, the Agency denied United Disposal's request for modification of its operating permit as incomplete pursuant to Section 807.205(f) of the Board's rules. AR. at 143. The Agency's denial letter reasoned that applying for a supplemental permit to revise the operating permit is not the proper way to remove special condition #9. The Agency's letter stated there must be a corresponding change made to the development permit. Further, the Agency's letter states the nature of the request requires local siting approval as provided by Section 39.2 of the Act. AR. at 144.

The Board has received sixteen public comments regarding this matter, all in support of United Disposal's position. The public comments include letters from the mayor of the City of Kankakee, Mr. Donald Green, the Village of Bradley President, Mr. Jerry Balthazor, the Kankakee County Economic Development Council, State Representative Lisa Dugan, and Mr. John Bevis of the Kankakee County Health Department. The public comments also include letters from neighbors, former residents, and small business owners located in the vicinity of United Disposal including: C.W. Hawley, Joseph Deno, Mr. & Mrs. Goldman, Linden White, Shawn Seabough, Denny Miller, Allen Green, Don Barber, Diane Neal, and Don Watson.

RELEVANT STATUTORY BACKGROUND

Section 3.330(b) of the Environmental Protection Act (Act) defines a new pollution control facility as:

> (1) a pollution control facility initially permitted for development or construction after July 1, 1981; or
>
> (2) the area of expansion beyond the boundary of a currently permitted pollution control facility[.] 415 ILCS 5/3.330(b)(1), (2) (2002).
>
> * * *

When United Disposal applied for and received its development permit, the Act excluded the following from the definition of a regional pollution control facility:

> [S]ites or facilities located within the boundary of a local general purpose unit of government and intended to serve only that entity[.] 415 ILCS 5/3.32(a) (1992).

Section 22.14(a) of the Act effective when the Agency issued United Disposal's development permit established setback requirements for waste transfer facilities located in the proximity of residentially zoned property and applicable only to regional facilities. 415 ILCS 5/22.14(a) (1992). Also at that time, Section 39.2 of the Act required the local siting authority to consider certain criteria when deciding whether to approve or disapprove siting for regional pollution control facilities. 415 ILCS 5/39.2 (1992).

Section 39(c) of the Act provides:

> [N]o 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 by the County Board of the county if in an unincorporated area, or the governing body of the municipality when in an incorporated area, in which the facility is to be located in accordance with Section 39.2 of this Act. 415 ILCS 5/39(c) (2002).

Section 807.205(f) of the Board's solid waste and special waste hauling rules states:

> An application for permit shall not be deemed filed until the Agency has received, at the designated address, all information, documents, and authorization in the form and with the contend required by these rules and related Agency procedures. However, if the Agency fails to notify the applicant within 45 days after the receipt of an application for development permit and 30 days after the receipt of an application for an operating permit, that the application is incomplete, and of the reasons, the application shall be deemed to have been filed on the date received by the Agency. An applicant may deem the Agency's notification that the application is incomplete as a denial of the permit for purposes of review pursuant to Section 40 of the Act. 35 Ill. Adm. Code 807.205(f).

Section 807.207 of the Board's rules governing solid waste and special waste hauling provides:

> The Agency shall not grant any permit, except an Experimental Permit under Section 807.203 unless the applicant submits adequate proof that the solid waste management site:
>
> a) will be developed, modified, or operated so as not to cause a violation of the Act or the Rules, or has been granted a variance pursuant to Title IX of the Act (Ill. Rev. Stat. 1981, ch. 111 ½, pars. 1035-1038); and
>
> ***

c) in the case of operating permits only, conforms to all conditions contained in the development permit.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id*. Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*, citing Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

Both the petitioners and the Agency have asked the Board to grant summary judgment in their favor. Upon reviewing the pleadings and the record in this matter, the Board agrees that there are no issues of material fact and that it may grant summary judgment as a matter of law. In determining whether to grant summary judgment, the Board must look to the burden of proof in a permit appeal and the arguments presented by the parties. The Agency's denial letter frames the issues on appeal. Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142, slip op. at 6 (Dec. 20, 1990).

BURDEN OF PROOF IN PERMIT APPEALS

Section 105.112(a) of the Board's procedural rules provides the petitioner has the burden of proof on appeal of permits under Section 40 of the Act. Here, the petitioners must demonstrate that approval of the permit application would not cause a violation of the Act or underlying regulations. "On appeal 'the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would occur of the permit was granted.'" Saline County Landfill, Inc. v. IEPA, PCB 02-108 (May 16, 2002); citing Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 10 (Jan. 21, 1999).

DISCUSSION

In the following pages, the Board will first discuss the petitioners' motion for summary judgment and then the Agency's response. Next, the Board will discuss the Agency's motion and the petitioners' response. Finally, the Board will analyze the parties' arguments and give reasons for its findings of fact and conclusions of law.

Petitioners' Motion for Summary Judgment

United Disposal and Municipal Trust & Savings argue they are entitled to summary judgment as a matter of law for various reasons. First, petitioners argue that the Act no longer distinguishes between regional and non-regional waste transfer facilities, as the distinction was found unconstitutional and the relevant statutes amended accordingly. Pet. Mot. at 2. The petitioners claim that likewise, the Agency should allow the petitioners' requested amendment to United Disposal's operating permit and delete the unconstitutional geographical limitation.

Second, petitioners maintain that United Disposal's application was not incomplete. According to the petitioners, Section 39.2 siting approval is not necessary for the modification of an operating permit. *Id*. The petitioners argue that nothing requires a simultaneous and identical change to the facility's development permit. Further, the petitioners contend that the requested modification does not amount to any change or expansion that would necessitate a simultaneous change to the development permit.

Finally, the petitioners claim that the Agency did not meet the 30-day deadline set forth in Section 807.205(f) for determining that the request for a permit modification was incomplete. Failure to meet the deadline, petitioners argue, means the application is deemed complete and granted as a matter of law. Pet. Mot. at 3.

Contested Language of Condition #9 Must be Struck as Vague and Unconstitutional

First the petitioners argue that the Agency's denial was incorrect because the application sought to strike an unconstitutional condition from its operating permit, for which the Agency no longer has statutory authority. Pet. Mot. at 8. The petitioners contend that the statutes in effect when the Agency included special condition #9 in the petitioners' operating permit were found unconstitutional in Tennsv, Inc. v. Gade, 1993 U.S. Dist. Lexis 10403 (S.D. Ill. 1993). *Id*. The court in Tennsv, Inc. held that a state statute that clearly discriminates against interstate commerce is unconstitutional unless it can be shown that the discrimination is justified by a valid factor not related to economic protectionism. *Id*. at 9; citing Gratiot Landfill v. Michigan Dept. of Nat. Res., 119 L.Ed. 2d 139, 112 S.Ct. 2019, 2023 (1992).

The petitioners continue that the statutes found to discriminate against interstate commerce, Sections 39.2, 3.32, and 22.14(a) of the Act, were then amended by the Illinois legislature to delete the unconstitutional language. The petitioners argue that, as a result, any permit condition that was imposed under the authority of those statutes should also be found null and void. Pet. Mot. at 8-9.

Alternatively, the petitioners contend that even assuming the Board does not deem the contested language of condition #9 invalid by reason of its unconstitutional authorizing statute, the condition nonetheless fails. The petitioners contend that the language of condition # 9 is a vague and unconstitutional restriction of commerce independent of the authorizing statutes. The petitioners opine that the terms "generated" and "municipal boundaries" are not defined in the permit and render condition #9 impermissibly vague. Pet. Mot. at 13; citing Smith v. Goguen, 415 U.S. 566, 575-76, 94 S.Ct. 1242 (1971).

Finally, petitioners argue that by denying United Disposal's request for modification of its operating permit, the Agency effectively re-imposed the geographic limitation in condition #9, when it no longer had the authority to do so. Pet. Mot. at 14.

No Pollution Control Facility Siting Approval is Necessary

Next the petitioners argue that the request for modification of the facility's operating permit does not require Section 39.2 siting approval. Pet. Mot. at 15. The petitioners argue the facility is not new and the permit modification does not seek a change in size or capacity, but only a change in the operational limits. The petitioners argue that this change does not trigger a need for Section 39.2 siting approval. Pet. Mot. at 15-16.

Modification of Petitioner's Development Permit is Not Necessary

Finally, the petitioners contend that the Agency's denial requiring the same modification to the facility's development permit was incorrect. Pet. Mot. at 16. The petitioners argue that the geographical limitation on the service area has no bearing on the physical design, construction or boundaries of the facility. Therefore, the petitioners reason, no change to the development permit is necessary.

Petitioners continue that in the alternative, if the Board determines that the contested language in condition #9 must also be removed from the development permit, petitioners can still apply for that modification. *Id*. at 17.

The Agency Did Not Meet the 30-Day Deadline

The petitioners argue that Section 807.205(f) of the Board's rules requires the Agency to notify an applicant that an application for an operating permit is incomplete within 30 days of receiving the application. Pet. Mot. at 18. The petitioners contend that if the Agency fails to notify the applicant that the operating permit application is incomplete, the application is deemed filed on the date it is received by the Agency. 35 Ill. Adm. Code 807.205(f). The petitioners contend the Agency's March 15, 2003 letter indicates that the denial was based on incompleteness, not the substance of the application itself. The petitioners continue that because the denial was not sent until 45 days after the Agency received the application for an operating permit, the application should have been deemed complete as a matter of law. *Id*.

Relief Requested

In summary, the petitioners request that the Board either: (1) reverse the Agency's denial of the petitioners' application to modify its operating permit finding that condition #9 is unconstitutional as a matter of law; (2) find that the petitioner's application does not mandate an identical change to the facility's development permit or require Section 39.2 siting approval; or (3) find the petitioner's application complete as a matter of law because the Agency did not issue the incompleteness determination until more than 30 days after it received the application. The petitioners also seek other and further relief as the Board deems appropriate. Pet. Mot. at 19.

Agency's Response

The Agency moves the Board to deny the petitioners' motion for summary judgment and affirm the Agency's March 15, 2003 final decision. The Agency argues that it did not, as the petitioners contend, base its final decision on the outdated distinction between non-regional and regional pollution control facilities. The Agency further argues that the petitioners' arguments that its application does not require proof of local siting approval and a similar modification to the facility's development permit are without merit. The Agency explains that the petitioners' arguments do not consider the nature of the permit application or the other permits already issued to the facility. Finally, the Agency contends that it acted within all of the applicable deadlines set forth by the Board regulations.

The Agency Correctly Applied the Law

First, the Agency contends that the petitioners misapply the Tennsv, Inc. case to the facts at hand. The Agency explains that the court in Tennsv, Inc. held that certain provisions of the Act discriminated against operations handling out-of-state municipal solid waste, not locally generated municipal solid waste, in violation of the Commerce Clause of the Constitution of the United States. Agency Resp. at 3; Tennsv, Inc. v. Gade, 1993 U.S. Dist. Lexis 10403 (S.D. Ill. 1993) (July 8, 1993). The Agency states that the petitioners erroneously interpreted the Tennsv, Inc. case to prevent United Disposal from accepting waste generated outside the municipal boundaries of the Village of Bradley. The Agency contends that the contested language in condition #9 is not unconstitutional, and that Tennsv, Inc. does not support the petitioners' argument that it is. The Agency argues that Tennsv, Inc. held, rather, that legislation that treats facilities differently, by requiring proof of local siting approval from some and not others based on the facilities' service area is unconstitutional. Agency Resp. at 6.

Second, the Agency contends that during the original application process, the applicants specifically asked that specific language be included in the development permit to limit the facility's service area. The Agency argues that it was the permit applicants, not the Agency, that restricted the type of waste the transfer station could accept based on the point of generation. The Agency further argues that United Disposal did not appeal the operating permit, which included condition #9, when it was issued in 1995, two years after the Tennsv, Inc. decision. Agency Resp. at 4.

The Agency states that by requesting the restriction in condition #9, the petitioners benefited by avoiding the local siting approval process and not having to comply with setback requirements. Agency Resp. at 4. Further, the Agency states it is a general rule that a permit condition not appealed when imposed, may not be appealed in a subsequent permit. *Id*. at 5; citing Mick's Garage v. IEPA, PCB 03-126 (Dec. 8, 2003). Therefore, because the petitioners did not appeal the restriction on service area as unconstitutional when the Agency issued the permit in 1995, the petitioners cannot now appeal the condition. *Id*.

The Agency also argues that the contested language of condition #9 is not null and void because Sections 39.2, 3.32, and 22.14(a) of the Act were found unconstitutional and amended. Agency Resp. at 6. The Agency states that if, as the petitioners' argue, the Agency had no

authority to issue development or operating permits to United Disposal, then United Disposal would have no valid Agency-issued permits. It would follow, then, that the Agency should treat the permit United Disposal now seeks as an initial permit for development requiring proof of local siting approval. *Id*. at 7.

The Agency reiterates that there is nothing unconstitutional about limiting a facility's service area. It is only the facility's use of a limited service area to avoid obtaining local siting approval that was found unconstitutional in Tennsv, Inc. Agency Resp. at 7.

The Agency next argues that the contested language in condition #9 is vague. The Agency argues the permit was issued in 1994 and United Disposal had no problem with the language until it filed this action in 2003. Agency Resp. at 7-8. The Agency contends the language in condition #9 is based either on statutory definitions, or commonly understood in layman's terms.

Lastly, the Agency responds that it did not re-impose an unconstitutional provision, the contested language of condition # 9, by denying United Disposal's application. Agency Resp. at 8. The Agency restates that the contested language is not unconstitutional. Regardless, the Agency states that United Disposal itself proposed the service area limitation in its original application for a development permit. *Id*.

The Petitioner's Permit Application Sought to Modify the Development Permit

The Agency argues it would be "nonsensical" to allow a permittee to modify a condition in an operating permit, but not a development permit. Agency Resp. at 10. The Agency argues that if an operating permit has imposed a condition that also exists in the development permit, it follows that both the development and operating permits must reflect any permit condition modification. *Id*.

The Agency also contends that the geographical limit that the petitioners seek to remove does constitute an expansion under the definition of a new pollution control facility. Agency Resp. at 11. The Agency states that the Board has recognized that the legislature purposefully drafted Section 3.32(b) of the Act (415 ILCS 5/3.32(b)) (now, 415 ILCS 5/3.330(b) (2002)) broadly so that it would apply to all expansions of regional pollution control facilities. Agency Resp. at 11; citing Bi-Disposal Inc., v. IEPA, PCB 89-49, slip op. at 5 (June 8, 1989). The Agency continues that the appellate court affirmed the Board's decision, holding that an increase in the capacity of a landfill to accept and dispose of waste, while not specifically defined in the Act, would impact the criteria that local siting authorities consider in assessing the propriety of establishing a new regional pollution control facility. Agency Resp. at 11; citing Bi-State Disposal, Inc. v. PCB, 203 Ill. App. 3d 1023, 1027, 561 N.E.2d 423, 426 (5th Dist. 1990). The Agency concludes that because the nature of United Disposal's requested modification meets the definition of Section 3.330(b) of the Act, the Agency is correct in requiring that United Disposal undergo local siting approval. Agency Resp. at 12.

The Agency Complied with the Time Periods for Review

The Agency states it properly treated United Disposal's application as one seeking a modification of its development permit. The Agency argues that Section 807.205(f) of the Board's regulations, the Agency has 45 days after receipt of a development permit application to issue a decision. 35 Ill. Adm. Code 807.205(f). The Agency states it received the application on March 31, 2003 (AR. at 129), and issued a final decision on that application on May 15, 2003 (AR. at 143). The Agency argues that, accordingly, its final decision was timely. Agency Resp. at 12.

Agency's Motion for Summary Judgment

The Agency states the issue is whether United Disposal's application for modification of its operational permit would violate the Act if approved. Agency Mot. at 5. The Agency contends that the permit application, if approved, would violate Section 39(c) of the Act. The Agency states that the Act requires proof that the local siting authority has approved the location of any new pollution control facility in accordance with Section 39.2 before the Agency can grant any permit for the development or construction of the facility. Agency Mot. at 6. The Agency maintains that because the application seeks a change that would result in a new pollution control facility, proof of local siting approval is necessary before the Agency can issue a permit.

Change in the Act

As a preliminary matter, the Agency outlines how the Act has changed in the wake of the Tennsv, Inc. decision. The Agency states that at the time United Disposal applied for a development permit, the Act distinguished between regional and non-regional pollution control facilities. Agency Mot. at 4. The distinction was significant because regional pollution control facilities required Section 39.2 siting approval, while non-regional facilities did not. The Agency continues that in July 1993, a federal district court in Illinois ruled that using the word "regional" to distinguish between facilities that have limited or unlimited service areas was unconstitutional. In response to the ruling, the Illinois General Assembly amended the relevant sections of the Act to remove the term "regional" and the exemption found in Section 3.32(a)(1) of the Act by legislation effective December 22, 1994. Agency Mot. at 5.

United Disposal's Facility is a Pollution Control Facility

The Agency argues that United Disposal's transfer station meets the definition of a pollution control facility as it is defined in Section 3.330(a) of the Act. Section 3.330(a) states: "'Pollution control facility' is any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator." 415 ILCS 5/3.330(a) (2002).

The Agency further contends that United Disposal's Agency-issued permits to develop and operate the facility as a transfer station also identify the facility as a transfer station that accepts waste. Agency Mot. at 6; citing AR. at 1-7, 67-73. It follows, the Agency argues, that any modification or change in the facility's development or expansion may cause the facility to be considered a new pollution control facility.

The Agency contends that it issued United Disposal an operating permit on January 19, 1995, after the Act was amended to delete the word "regional" from the term "regional pollution control facility." The Agency states the permit did not refer to the facility as non-regional, but included condition #9 limiting the service area because it was already part of United Disposal's development permit. The Agency notes that the petitioners did not appeal any conditions imposed in either the development or operating permit until this action was filed in 2003. Agency Mot. at 7.

United Disposal's Permit Application Was for a New Pollution Control Facility

The Agency states that Section 39(c) requires Section 39.2 local siting approval only before the Agency can issue development permits, not operating permits. Agency Mot. at 8; citing 415 ILCS 5/39(c) (2002). Therefore, the Agency argues, by requesting a modification of only its operating permit, United Disposal is attempting to expand its service area without having to undergo local siting approval.

The Agency states that Section 3.330(b)(1) of the Act defines a new pollution control facility as "a pollution control facility initially permitted for development or construction after July 1, 1981." Agency Mot. at 8; citing 415 ILCS 5/3.330(b)(1) (2002). The Agency contends that subsection (b)(1) applies when an applicant files an *initial* application for permitting a pollution control facility, as opposed to a request for modification of an already permitted site, after July 1, 1981. Agency Mot. at 10; citing Waste Management of Illinois, Inc. v. IEPA, PCB 94-153 (July 21, 1994). The Agency states that when Section 3.330 was enacted (then, Section 3.32(b)), subsections (b)(2) and (b)(3) defined when "grandfathered" facilities, or facilities permitted before July 1, 1981, had to provide proof of local siting approval as when the facility: (1) expanded its boundaries; or (2) requested to accept special or hazardous waste for the first time. Agency Mot. at 11; 415 ILCS 5/3.32 (199?). The Agency contends that United Disposal is a pollution control facility requesting an expansion, and therefore, a new facility. Accordingly, the Agency argues that Section 3.330(b) requires United Disposal must submit proof of Section 39.2 local siting approval. Agency Mot. at 12.

United Disposal's Transfer Station is Not Grandfathered Out of Local Siting Approval Requirements

The Agency contends that in the wake of the Tennsv, Inc. decision, the General Assembly amended Sections 3.32, 22.14(a), and 39.2 of the Act to striking all distinctions between regional and non-regional pollution control facilities. The Agency contends that the General Assembly did not intend to "grandfather" currently permitted facilities out of the requirement of having to obtain local siting approval. Agency Mot. at 12.

In support of this principal, the Agency cites to the 88th General Assembly's debate of the bill that amended Sections 3.32, 22.14, and 39.2 of the Act (House Bill 1594 that became public act 88-681). The Agency contends that the Senate sponsor of the bill stated that even though the proposed legislation removed the word "regional" from pollution control facility siting legislation, "A city or a county or any local government can still have a local facility that takes in only their waste, but under the new language now, it will have to go through the siting

process, just as a multi-unit government facility has to." Agency Mot. at 13-14; citing Senator Doris Karpiel, December 1, 1994 Senate floor debate.

The Agency contends that at the time the Agency issued United Disposal its development permit, the Act defined "regional pollution control facility" in Section 3.32(a) of the Act. The Agency further contends that the General Assembly did not intend for facilities to be "grandfathered" into local siting. Thus, the Agency argues the Board should not find that United Disposal's transfer station is a "currently permitted" facility under Section 3.32(b)(2) or (b)(3). Agency Mot. at 15.

United Disposal's Facility May Be Subject to Section 3.330(b)(2) of the Act

The Agency argues that even assuming the Board concludes that the facility does qualify as a newly developed facility under Section 3.330(b)(1), United Disposal must still show proof of local siting approval because the modification qualifies as an expansion under Section 3.330(b)(2) of the Act. 415 ILCS 5/3.330(b)(2) (2002). The Agency contends that expansion beyond the boundaries of a currently permitted facility triggers local siting approval under Section 3.330(b)(2) of the Act. Agency Mot. at 15.

The Agency argues that eliminating the service area limitation will result in increasing United Disposal's capacity to accept and transfer waste. The increased capacity results in a facility substantially different than what was originally proposed when the Agency permitted the facility. Agency Mot. at 16; citing Saline County Landfill, Inc. v. IEPA, PCB 02-108, slip op. at 13 (May 16, 2002). This, the Agency argues, constitutes an expansion requiring local siting approval under Section 3.330(b)(2) of the Act. *Id*.

Agency Conclusion

The Agency argues it is impossible to remove the contested language from United Disposal's operating permit without also removing the same language from its development permit. The Agency contends that amending the development permit makes United Disposal a new pollution control facility under Section 3.330(b)(1) of the Act. Agency Mot. at 17. New pollution control facilities require proof of Section 39.2 local siting approval. In the alternative, the Agency argues that even if the facility is not new, removing the geographic limitation on the facility's service area will cause a change in the facility's operations significant enough to constitute an expansion triggering local siting review under Section 3.330(b)(2) of the Act. *Id*.

Petitioners' Response

In response, the petitioners contend that removing the contested language from United Disposal's operating permit would not violate the Act. Next, the petitioners argue that United Disposal's request to modify its operating permit does not also require modification of its development permit. Finally, the petitioners claim that the Agency's argument that removing the geographical limitation constitutes an expansion of the transfer station fails because it is inconsistent with past Agency action. Pet. Resp. at 3.

The petitioners' argue that because Tennsv, Inc. found the law on which the geographical restriction in condition #9 was based unconstitutional, the condition itself is also unconstitutional. As a result, the petitioners argue that the Agency should have removed the condition as null and void, or alternatively, granted United Disposal's application and removed the condition. Pet. Resp. at 7-8.

The petitioners argue that Section 3.330(b)(1) does not apply. Pet. Resp. at 9. Contrary to the Agency's argument, the petitioners argue that United Disposal's application for a permit modification is not an *initial* permit, nor is it a *development* permit. Pet. Resp. at 10. According to the petitioners, under Section 3.330(a)(1), a waste transfer station is new if it was initially permitted for development after July 1, 1981. The petitioners argue that the facility does not fit that definition because when Section 3.330(a)(1) became effective, the facility already had an operating permit. Pet. Resp. at 12.

The petitioners argue that the permit application does not seek to change the type of waste the facility transfers and that United Disposal is not seeking to be "grandfathered" into any statute. The petitioners contend that the part of the Agency's argument relating to legislative intent is irrelevant to the language of Sections 39(c) and 3.330(b)(1) of the Act, because the debate to which the Agency refers actually concerns a different paragraph of Section 39(c). Pet. Resp. at 12-13. The petitioners contend the Agency's "grandfathering" argument concerns solid waste disposal facilities only, and United Disposal's facility does not dispose of solid waste. Pet. Resp. at 13.

The petitioners further argue that Section 3.330(b)(2) does not apply to require siting approval for two reasons. First, United Disposal is not requesting a modification of the operational permit, and second, the facility is not expanding beyond the boundaries of its currently permitted facility. Pet. Resp. at 14. The petitioners argue that the Board and courts have found that Section 3.330(b)(2) applies when the expansion is both an increase in waste capacity and an increase in permitted physical dimensions. Mot. at 14; citing Concerned Neighbors for a Better Environment, *et al*. v. County of Rock Island, *et al*., PCB 85-124 (Jan. 9, 1986). The petitioners contend the record contains no evidence that the application seeks an increase in capacity or physical dimensions of the facility. Pet. Resp. at 15. According to the petitioners, the requested modification will only affect the facility's operations.

The petitioner's argue that the Agency's reliance on Waste Management and Saline County is incorrect. Pet. Resp. at 15. The petitioners contends that distinguishable from Waste Management, there is no evidence in the record concerning capacity of United Disposal's facility and United Disposal does not propose to change any physical change in the permitted structure. The petitioners argue that unlike in Saline County, United Disposal does not seek any physical change to the facility. Pet. Resp. at 16.

The petitioners contend that the Agency's March 7, 2002 approval of a transfer station's application to modify permits proves their point. A transfer station located in West Chicago applied to the Agency to modify a development and operating permit to increase the facility's capacity from 1,950 tons per day to 3,000 tons per day. Pet. Resp. at 17; Pet. Resp. Exh. A. The petitioners contend the Agency approved the transfer station's application without finding the

modification was an expansion or requiring local siting approval under Section 3.330(b)(2). Pet. Resp. at 17.

Finally, the petitioners contend that applying either Section 3.330(b)(1) or 3.330(b)(2) is an improper retroactive application of the law. Pet. Resp. at 17. According to the petitioners, the Agency applies the law retroactively by arguing that United Disposal has no pollution control facility permits, or alternatively, that United Disposal must prove local siting approval if it wishes to remove a condition of its permit. Pet. Resp. at 18.

In summary, the petitioners argue that the portion of condition #9 at issue should be removed either because it is null, void, and unenforceable as a matter of law, or alternatively, because it is unconstitutional. For these reasons, the petitioners contend the Board should deny the Agency's motion for summary judgment and grant judgment in favor of United Disposal and Municipal Trust & Savings. Pet. Resp. at 18-19.

BOARD ANALYSIS

In light of the cross motions for summary judgment on the Agency's denial letter, the Board will address the two motions together. As previously explained, when considering motions for summary judgment, the Board must consider the facts of each motion in the light most favorable to the non-movant. Dowd, 693 N.E.2d at 370.

As set forth below, after analyzing the remaining issues set forth by the parties, the Board grants the Agency's motion for summary judgment and affirms the Agency's denial of United Disposal's application to modify its operating permit. The Board finds that United Disposal's application lacked necessary proof of local siting approval. The Board denies United Disposal's motion for summary judgment finding that before the Agency can grant the requested modification to the facility's operating permit, United Disposal must request a corresponding change to its development permit. Lastly, the Board finds that proof of local siting approval is a condition precedent to the Agency granting a modification to the facility's development permit.

Constitutionality of the Contested Language in Permit Condition #9

In its motion for summary judgment, United Disposal argues that because the laws that authorized the distinction between regional and non-regional facilities were found unconstitutional and removed from the Act, the Agency should find the contested language in United Disposal's permit unconstitutional and delete that language accordingly. First, the Board discusses whether the Board can consider the constitutional issues that United Disposal raises.

It is a general principle that administrative agencies have the authority to determine constitutional applicability, but not the power to determine the constitutionality of legislation. People v. Santa Fe Park Enterprises, Inc., PCB 76-84, slip op. at 8-9 (Sept. 23, 1983). The Board has found that the Board is necessarily empowered to consider constitutional issues, and that, where appropriate, the Board should address such issues in the interest of efficient adjudication of the entire controversy at hand. *Id*. at 9. But, the appellate courts have not squarely addressed this issue in their review of Board cases making this finding. *See* People v. PCB, 83 Ill. App. 3d

802, 404 N.E.2d 352 (1st Dist. 1980); People v. PCB, 129 Ill. App. 3d 958; 473 N.E.2d 452 (1st Dist. 1984).

First, the petitioners contend that Tennsv, Inc. v. Gade, supports their argument that the contested language in condition #9 of the operating permit is unconstitutional. Agency Resp. at 2-3; citing Tennsv, Inc. v. Gade, 1993 U.S. Dist. Lexis 10403, slip op. at 4, 5. The Agency argues that United Disposal's claim of unconstitutionality is untimely because it did not appeal the condition when the Agency issued the permit in 1994. Agency Resp. at 4-5. The Board finds that review of an administrative act on constitutional grounds is not time-barred. Northwest Sanitary Landfill, Inc. v. South Carolina Dept. of Health and Envtl. Control, *et al.*, 843 F. Supp 100, 104 (D. S.C. 1992).

The Board is not persuaded by United Disposal's argument that the contested permit language itself is unconstitutional. Pet. Mot. at 2. The Commerce Clause prohibits States (or their political subdivisions) from advancing their own commercial interests by burdening the movement of commerce into or out of the state. Tennsv, Inc., 1993 U.S. Dist. Lexis 10403, slip op. at 4, 5; citing Fort Gratiot Landfill v. Michigan Dept. of Nat. Res., 119 L. Ed. 2d 139, 112 S. Ct. 2019, 2023 (1992). A state statute that clearly discriminates against interstate commerce is unconstitutional unless the discrimination can be justified by legitimate local concerns unrelated to economic protectionism. *Id*. at 2024.

The Board finds the contested language in condition #9 acts within the restraints of the Commerce Clause. Waste is an article of commerce,[5] and the Agency's approval of United Disposal's permit that affects interstate commerce, is an administrative act. However, the geographical limitation on the facility's service area is neutral; it applies only to United Disposal and allows the facility, at its own discretion, to accept waste only from within the municipal boundaries of the Village of Bradley. Thus, even though United Disposal admits that it accepts waste from one source in Indiana, the Board finds that United Disposal's permit has only incidental effects on interstate commerce. The slight burden the permit imposes on interstate commerce does not outweigh the benefits the permittees and the Village of Bradley enjoyed when the facility was established; avoiding the time and expense of the local siting process.

Although the Act no longer distinguishes between regional and non-regional facilities, various Sections of the Act require that the owner/operator of a pollution control facility such as a waste transfer station define the service area. For example, Section 39.2(a)(i) requires the applicant to show "the facility is necessary to accommodate the waste needs of the area it is intended to serve." 415 ILCS 5/39.2(a)(i) (2002). In fact, the appellate court has held that "it is the applicant who defines the intended service area, not the local decision making body." Metropolitan Waste Syst., Inc. v. PCB, 201 Ill. App. 3d 51, 558 N.E.2d 785, 787 (Aug. 7, 1990). Further, the Board has affirmed a local siting authority's approval even where agreeing that the applicant's service area was "loosely defined." St. Clair County v. Village of Sauget, *et al.*, PCB 93-51, slip op. at 13 (Jul. 1, 1993).

[5] Philadelphia v. New Jersey, 437 U.S. 617, 618, 98 S.Ct. 2531 (1978).

For the reasons discussed above, the Board also does not agree that the contested permit language is null and void because the permit was issued under the authority of a section of the Act that no longer exists. Pet. Mot. at 2. It was United Disposal's choice to limit the facility's service area to within municipal boundaries of the Village of Bradley. The limitation was not unconstitutional when the Agency issued United Disposal's development and operating permits, and it is not unconstitutional now. The Board finds that Tennsv, Inc. does not apply to render the contested language of condition #9 unconstitutional, null, or void.

Timeliness of the Agency's Denial Letter

The Board finds United Disposal's application for modification of its operating permit complete as a matter of law. Section 807.205(f) of the Board's rules provides that an application is not deemed filed until the Agency has received all the necessary information required under Part 807 of the Board's rules. The Agency must notify the applicant within 30 days after receipt of an application for an operating permit that the application is incomplete, or the application is considered filed on the date the Agency received the application.

Here, the Agency received the application on March 31, 2003, and issued a denial letter on May 15, 2003, 45 days after it received the application. The Agency argues that the May 15, 2003 denial letter was timely because it deemed United Disposal's request an application for a development, rather than operating, permit modification giving the Agency 45 days to notify the applicant of incompleteness under Section 807.205(f). However, both the application and denial letter clearly refer to United Disposal's request as an application to modify the facility's operating permit. The Board finds the Agency's denial letter untimely and deems United Disposal's application complete and filed as of March 31, 2003.

This does not, however, end the Board's inquiry, as the Board cannot direct Agency issuance of a permit that would violate the Act or Board regulations. The Agency's March 15, 2004 letter denied United Disposal's application as incomplete pursuant to Section 807.205(f). However, it is clear from the record and the parties' arguments that the primary reason for the Agency's denial is the lack of Section 39.2 siting approval. Even the Agency's denial letter states that "the nature of the request made in the permit application requires that the applicant provide proof of local siting approval as described in Section 39.2 of the Act and therefore is not sufficient proof of siting approval as required by Section 39(c) of the Act." For these reasons the Board finds that deeming United Disposal's application complete as a matter of law is not dispositive of the siting approval issue. Below the Board discusses whether United Disposal's permit could issue without local siting approval.

Need for Local Siting Approval

Next, the Board determines whether the Agency properly denied United Disposal's application for lack of local siting approval. The Agency argues it denied United Disposal's application to modify the facility's operating permit because the nature of the requested change requires United Disposal to also modify the facility's development permit. The Agency reasons that by increasing the facility's service area, the facility qualifies as a "new pollution control facility" under either Section 3.330(b)(1) or (2) of the Act. The Agency next argues that Section

39(c) of the Act requires any new pollution control facility seeking a development or construction permit to submit proof of local siting approval.

The Agency claims it considered United Disposal's application an application for a development permit, but provides no support for this reasoning. The Agency simply states that because the facility seeks to increase its service area, the facility qualifies as a new pollution control facility. Nonetheless, the Board agrees that Board regulations require that before the Agency may issue an operating permit for a solid waste management facility, the applicant must submit proof that the facility conforms to all conditions contained in the development permit. 35 Ill. Adm. Code 807.207(c). Therefore, here, before the Agency may grant United Disposal an operating permit without a limited service area, United Disposal must request the same modification to its development permit. Any requested modification to the development permit must show compliance with the Act and Board rules.

While not every request for modification of an operating permit requires siting or "re-siting," the Board finds that the nature of the change United Disposal seeks does require proof of local siting approval. The Board finds that by seeking to modify its development permit, United Disposal qualifies as a new pollution control facility because it seeks to engage in the transfer of waste, after July 1, 1981, without having received local siting approval.

The statute effective in 1994 when United Disposal applied for and received its development permit, exempted the facility from the definition of "regional pollution control facility," and thus, the requirement of local siting approval. United Disposal began operating the waste transfer station on December 5, 1994. The General Assembly amended the Act, removing the distinction between regional and non-regional pollution control facilities from Sections 39.2, 3.32, and 22.14, by Public Act 88-681, effective December 22, 1994.

The parties agree that the transfer station meets the definition of a pollution control facility, but the record is clear that the Agency has never permitted the facility as a pollution control facility as the Act currently defines that term. Even though the Agency issued United Disposal an operating permit after the public act eliminating the exemption became effective, the Agency takes the position that laws effective after the facility became operational do not apply. *See* AR. at 76 (Agency determined that the prohibition against locating waste transfer stations within 1,000 feet of any dwelling, effective December 22, 1994, was not applicable to United Disposal's facility). On its face, the operating permit, issued after the siting exemption was eliminated, indicates that siting certification was unnecessary because the Agency considered the facility non-regional. AR. at 89.

United Disposal now seeks to remove the language limiting the facility's service area from the operating permit; the language that initially exempted the facility from local siting review. The Board finds that by removing the contested language from both the facility's development and operating permits, the facility falls within the current definition of a pollution control facility. Read together, Sections 3.330(b)(1) and 39(c) of the Act require that all pollution control facilities initially developed after the date of July 1, 1981 submit proof of Section 39.2 local siting approval. 415 ILCS 5/3.330(b)(1). Accordingly, the Board affirms the

Agency's denial of United Disposal's requested permit modification for lack of proof of local siting approval.

In support of this conclusion, the Board notes that in the past, the Agency has required that a waste transfer facility wishing to "regionalize," or expand its service area, show proof of local siting approval. Continental Waste Industries of Illinois, Inc. v. City of Mount Vernon, PCB 94-138 (Oct. 27, 1994). In Continental Waste, the applicant appealed the local siting authority's denial of its request to expand the service area of its existing facility. The applicant did not seek to change the operation of the facility, but the expansion requested would have allowed the facility to receive and handle 20% more waste at the site.[6] At the time the applicant sought to regionalize, the Act still provided an exemption from local siting review for non-regional facilities. In affirming the siting authority's denial, the Board noted:

> The grant of permits by the Agency for a local pollution control facility is based on a review of similar factors as considered by the local governmental body in reviewing the siting application. However, the mere existence of a permit does not prohibit a finding by the local governmental body that the facility may threaten the public, health, safety and welfare. The Board finds that the findings of the Agency and the local governmental body are two independent decisions. Continental Waste Ind., PCB 94-138, slip op. at 13 (Oct. 27, 1994).

Like the permittee in Continental Waste, United Disposal seeks to expand the service area limits of its existing waste transfer facility. The Board notes that although United Disposal is currently permitted, the nature of the change that United Disposal seeks may impact the criteria a local siting authority considers in determining whether to site, or re-site, a pollution control facility. The Board has received many public comments in support of United Disposal's requested permit modification. Nonetheless, the Board will not deprive the local siting authority of its statutory right and obligation to review the service area expansion under the procedures of Section 39.2 of the Act.

Conclusion

The Board finds the Agency properly denied United Disposal's application. The nature of United Disposal's requested modification requires that the contested language be removed from both the facility's development and operating permits. By applying for a development permit, the waste transfer station falls under the Act's definition of a new pollution control facility. As a result, the Board finds the petitioners' requested modification requires proof of Section 39.2 local siting approval.

ORDER

The Board affirms the Agency's May 15, 2003 denial of a permit modification requested by United Disposal of Bradley, Inc. and Municipal Trust & Savings Bank, as Trustee Under

[6] City of Mount Vernon's brief at page 3.

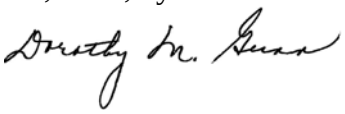
Trust 0799. The Board grants the Agency's motion for summary judgment, and denies petitioners' motion.

IT IS SO ORDERED.

Chairman J.P. Novak abstained.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 17, 2004, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board