BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE

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

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

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Dated: February 20, 2004

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

UNITED DISPOSAL OF BRADLEY, INC.,) And MUNICIPAL TRUST & SAVINGS) BANK as trustee under Trust 0799,) Petitioner,)		
v.	)	PCB No. 03-235 (Permit Appeal)
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REPLY TO PETITIONERS' RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500(e), hereby respectfully replies to the Response to the Illinois EPA's Motion for Summary Judgment ("Petitioners' response") filed by the Petitioners, United Disposal of Bradley, Inc. and Municipal Trust & Savings Bank, as Trustee Under Trust 0799 ("United Disposal," collectively). In reply to the Petitioners' response, the Illinois EPA states as follows:

I. INTRODUCTION

The Petitioners' response identifies certain arguments and positions that are raised in the Illinois EPA's motion for summary judgment ("Illinois EPA's motion") that are supposedly infirm. Specifically, the Petitioners argue that the Illinois EPA ignores the importance of the relevant provisions of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/1, et seq.) that were found to have been unconstitutional. Also, the Petitioners argue that the Illinois EPA's position that the application submitted by the Petitioners also in effect sought a modification of the development permit was unsupported by any law or policy. Finally, the Petitioners argue that the Illinois EPA's contention that the requested permit modification may be an expansion as addressed in Section 3.330(b)(2) of the Act (415 ILCS 5/3.330(b)(2)) is not supported by any

case law, and also directly conflicts with past Illinois EPA actions. Petitioners' response, pp. 2-3.

However, the Illinois EPA strongly argues that the Board should keep its focus on what the real issues and underlying facts are in this matter. The Petitioners, by virtue of the permit application they prepared and submitted, took advantage of the then-existing law that allowed them to receive a development permit for a transfer station without having to undergo local siting approval. The restriction that allowed for such issuance was that the service area of the transfer station had to be limited, and that was exactly what the Petitioners proposed in their application.

Later, in January 1995, after the law regarding the "loophole" for local siting approval was amended (in December 1994), the Petitioners received an operating permit but with the same restricted service area special condition. That permit, and specifically that condition, was not appealed. Then, in March 2003, over eight years after the operating permit was issued, the Petitioners asked the Illinois EPA to strike the permit condition in question. The Petitioners have made it abundantly clear that they do not feel they are required to undergo local siting approval to facilitate this change in their permit status. As such, the Petitioners would like to be the beneficiaries of the following scenario: To receive a development permit that would normally require local siting approval but in this case did not require local siting approval, and later to amend the operating permit (based on the development permit) without again having to undergo local siting approval. In short, the Petitioners seek to maintain their status as being a permitted facility without ever having to undergo local siting approval, despite their request to strike the very condition in their permit that allowed them to escape the local siting approval in the first place.

For the reasons that will be explained below, the Illinois EPA's decision comported with the law and facts as presented, and the Board should affirm the Illinois EPA's decision.

II. THE LANGUAGE IN SPECIAL CONDITION NO. 9 IS NOT UNCONSTITUTIONAL

In the Facts section of the Petitioners' response, a theme found throughout the Petitioners arguments is continued. Namely, the Petitioners claim that they seek only to remove what they

characterize as an "unconstitutional condition" from their operating permit. Petitioners' response, p. 3. This portrayal of special condition no. 9[1] as being unconstitutional is erroneous and misleading. There is no support in any case law or legal precedent that provides a geographical restriction on the service area of a transfer station that was requested by the transfer station itself is unconstitutional. The case of Tennsv, Inc. v. Gade, Nos. 92-503, 93-522 (S.D. Ill. 1993), 24 ELR 20019, stood for the proposition that a statutory permitting system whereby some facilities could avoid local siting approval and others could not was unconstitutional.[2]

There is nothing unconstitutional about special condition no. 9; rather, what was declared unconstitutional by the Tennsv court was the ability of an applicant to use that type of condition to avoid having to undergo the local siting approval process. In this case, that is exactly what the Petitioners did—by virtue of voluntarily asking that such a restriction be included in their development permit, the Petitioners avoided having to seek and obtain local siting approval. But if an applicant submitted a development permit application today to develop a new landfill or transfer station, and asked that the service area of that facility be restricted, there is no reason why the Illinois EPA could or would deny that request on the basis that it would violate the Act or underlying regulations. Despite the best efforts by the Petitioners, the fact remains that the Illinois EPA is all too familiar with the holding and impact of the Tennsv decision, and the final decision now under appeal before the Board comports with the Act and the Tennsv case.

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[1] The Illinois EPA agrees with the statement made by the Petitioners that only a portion of special condition no. 9 is the subject of the request for a permit modification. The portion in question provides, "No waste generated outside the municipal boundaries of the Village of Bradley may be accepted at this facility." The remainder of the special condition would stay intact.

[2] The Petitioners claim that the Illinois EPA is misstating the holding of the court in Tennsv. To the contrary, the Illinois EPA notes that the court stated, "[t]he sections in question [Sections 39.2, 2.32 and 22.14(a) of the Act] violate the Commerce Clause because they place more stringent requirements on facilities which accept waste from areas outside the boundaries of a local general purpose unit of government (which includes waste from outside the State of Illinois) than on those facilities which do not accept such waste, and this discrimination has not been shown to be demonstrably justified by a valid factor unrelated to economic protectionism." Tennsv, Inc. v. Gade, Nos. 92-503 WLB, 92-522 WLB (S.D. Ill. 1993), 1993 WL 523386. This statement by the court is exactly what the Illinois EPA has represented. The Petitioners only raise half the finding of the Tennsv court when they claim that the court found that geographical distinctions are unconstitutional; the Illinois EPA's statements regarding the court's holding are complete and consistent with the court's opinions.

There is simply nothing illegal or noncompliant about a facility that chooses to define its service area in a narrow fashion. Of course, the applicant could no longer use such a restriction as a means to avoid having to obtain local siting approval. Here, despite the fact that the condition in question is not unconstitutional, the Petitioners continue to make that claim so that they may frame a constitutional argument around their appeal. That argument must fail, as it is without any support in fact or law.

The Petitioners argue that the language in the permit that restricts the movement of waste is an unconstitutional restriction on commerce. They claim that the Illinois EPA's denial to allow the removal of the condition's language without any consequences is without basis in existing law. Petitioners' response, p. 4. To the contrary, the Petitioners' argument is without basis in law, and is contrary to the language of the Act. In section 39.2(a)(i) of the Act (415 ILCS 5/39.2(a)(i)), one of the required criteria necessary for approval of local siting is set forth. That criteria states that the facility must be necessary to accommodate the waste needs of the area it is intended to serve. That language clearly provides that as part of local siting approval, a siting applicant must propose, inter alia, the service area for the facility. Thus, a siting applicant must define, by whatever bounds it chooses, the service area for the facility.

The fact that Section 39.2(a)(i) of the Act contemplates that a facility has a defined service area is consistent with the Illinois EPA's position that it is not contrary to the Act that a transfer station may have a defined service area. In fact, Section 39.2(a)(i) of the Act effectively requires that a siting applicant set forth exactly what service area is proposed for the subject facility. Therefore, the Petitioners' claim that the service area restriction found in special condition no. 9 is itself unconstitutional is contrary to the Act. Service area restriction or definition is a component of the Act and is not unconstitutional; relying on service area restriction to avoid having to undergo local siting approval is unconstitutional.

The question presented here is not whether the language in special condition no. 9 is unconstitutional; clearly, it is not. The question raised here is whether removal of that language causes the Petitioners' facility to be placed into a position of having to comply with local siting

approval requirements. As the Illinois EPA has argued, changing the language in the operating permit cannot be done without changing the language in the development permit. Issuing an amended development permit would, in this situation, require the facility to undergo local siting approval since it would be issuing a development permit after 1981 to a pollution control facility.

The Board should resist the Petitioners' "siren song" of invoking a constitutional element to this matter. There is no question about constitutionality that need be addressed, since the Illinois EPA has done nothing that would call such analysis into consideration. All parties are in agreement that the pre-Tennsv statutory permitting scheme was declared unconstitutional, and as such neither an applicant nor the Illinois EPA can avail themselves of the law as it then existed. The law as it now exists is what must be applied, and that is exactly the law that was applied by the Illinois EPA. Special condition no. 9 is not in and of itself unconstitutional, and requiring local siting approval prior to removing the relevant language of that special condition is not unconstitutional. Rather, the final decision issued by the Illinois EPA is a straightforward application of the Act in its current form to the facts presented by the Petitioners.

The Petitioners also argue that the Illinois EPA, through a "ministerial" matter, should have removed the permit condition. Petitioners' response, p. 7. Such a position is unfortunately without any basis in the Act, as the Illinois EPA has no authority to make such a unilateral decision. And, as has been argued, there has never been a need for the Illinois EPA to even contemplate such a move since there is nothing about the language in special condition no. 9 that is itself unconstitutional.

Equally without basis is the Petitioners' claim that the Illinois EPA is now "suddenly" finding that it is necessary for the Petitioners to obtain site location approval to accept waste generated outside the boundaries of the Village of Bradley. Petitioners' response, p. 8. As has been noted in previous recitations of the facts, this is the first time since the operating permit was issued in 1995 that the Petitioners have sought a change to the operating permit that would necessitate a change to the development permit. Thus, it is not that the Illinois EPA is now suddenly finding this requirement necessary, but rather that after over eight years from the date

of the issuance of the operating permit, only now are the Petitioners seeking to amend the condition in question. The timing here is the direct result of the Petitioners' actions, not those of the Illinois EPA.

III. THE ILLINOIS EPA CORRECTLY DENIED THE PERMIT APPLICATION

The Petitioners argue several times that the Illinois EPA improperly denied the operating permit application by "transforming" the application to that of one seeking to modify the development permit application. However, a plain reading of the final decision (AR, pp. 143-144) makes clear that such was not the case. The Illinois EPA's final decision acknowledged that the request as presented by the Petitioners was one to the operating permit. However, the Illinois EPA's review of that application had to take into account the relief being requested, and to do so required that the nature of the permits that would be affected must also be taken into account. The final decision stated that the requested modification to the operating permit was denied based on the fact that local siting approval was not provided. The final decision states that the application for a supplemental permit to revise the operating permit is not the appropriate method to remove the permit condition in question, since there must also be a corresponding change to the development permit. AR, pp. 143-144.

In short, the Illinois EPA could not approve the modification to the operating permit since to do so would also require the modification of the development permit, and that modification would in turn require proof of local siting approval. Since the application therefore was effectively and legally asking for both a change in the operating permit and the development permit, the Illinois EPA had to consider all aspects of the application in that light. To do so also meant that the time line applicable for review of development permit applications was properly utilized. The Illinois EPA did not improperly transform the permit application submitted by the

Petitioners. Rather, the Illinois EPA clearly informed the Petitioners that the change that was sought must be consistent with a change to the development permit, which was the basis for the language and special condition in question. In turn, that change must also require proof of local siting approval. Therefore, the Illinois EPA denied the application here since there was no corresponding change to the development permit, and no proof of local siting approval which would allow for such a change. Those reasons were proper and were made in the context of the review of the request to modify the operating permit. The Illinois EPA did not relabel the permit application submitted by the Petitioners, it explained why the permit application was not appropriate for the relief requested, and further stated what would be the proper course of action to take. In so doing, the Illinois EPA went above and beyond its statutory obligation to provide reasons as to why the subject application was denied. The decision was reached in a timely fashion, consistent with the appropriate and reasonable time allowed by the Board's regulations.

IV. THE PERMIT APPLICATION WAS SUBJECT TO SECTION 3.330(B)(1)

The Petitioners argue that the Illinois EPA's interpretation of Section 3.330(b)(1) of the Act (415 ILCS 5/3.330(b)(1)) was incorrect, in that their facility is not a new pollution control facility as defined. Petitioners' response, pp. 11-13. The Illinois EPA has already provided an explanation of its interpretation of that section as it applies to this case, but in summary, the Board should bear in mind the following.

The Petitioners received a development permit in 1994 as a non-regional pollution control facility. The operating permit was issued following the change in law that struck such a designation, and accordingly does not make reference to the facility in that manner. The permit modification now sought by the Petitioners must legally and factually be taken to include a

change to both the operating permit and development permit.[3] However, there is no longer a "non-regional pollution control facility" that is recognized by the Act. The Petitioner has never received a development permit for a new pollution control facility as that term currently exists. Therefore, if the Illinois EPA were to approve the modification of the development permit here as would be necessary to modify special condition no. 9 in the operating permit, it would be issuing a development permit for a new pollution control facility for the Petitioners' facility for the first time. This issuance would take place after July 1981, and therefore Section 3.330(b)(1) of the Act would without question be applicable.

The Illinois EPA must apply the law in effect at the time of its decision. Skokie Federal Savings and Loan Association v. Illinois Savings and Loan Board, 61 Ill. App. 3d 977, 990, 378 N.E.2d 1090, 1100 (1st Dist. 1978). At the time of the Illinois EPA's decision here, the law in its current form did not recognize or contemplate non-regional pollution control facilities. Therefore, it would be impossible to modify a development permit for a non-regional pollution control facility, since no such creature was defined. To modify the Petitioners' development permit would require the issuance of an initial development permit for a new pollution control facility. There is no question that local siting approval must therefore be required.

V. THERE IS NO MERITORIOUS "VESTED RIGHT" ARGUMENT PRESENTED

The Petitioners argue that the Illinois EPA's decision here was a retroactive application of the law that would adversely affect a vested right of the Petitioners is wholly without merit. Petitioners' response, pp. 17-18. As stated above, the Illinois EPA's decision does not apply the

[3] In the Petitioners' response, the Petitioners argue that the analogy posed by the Illinois EPA involving a facility that seeks to accept hazardous waste for the first time is distinguishable since there is a specific statutory cite on that point. However, the analogy is still an apt one, since the point is that certain changes to an operating permit may directly involve changes to what was specifically provided for in the development permit. For example, if a facility was permitted to incinerate municipal solid waste, and instead sought to accept used tires for incineration. Such wastes are regulated separate from municipal waste, yet to allow acceptance without a corresponding change to the underlying development permit would be in error and inconsistent with the purposes of a development permit, i.e., to define and proscribe the type and method of development of a facility.

law as it existed when the development permit was issued; indeed, if the Illinois EPA (improperly) decide to apply that now rescinded law, there would likely be no permit denial since the issues regarding a new pollution control facility would not be evident. Instead, the Illinois EPA applied the law as it currently exists, and that law does not recognize that a non-regional pollution control facility as the Petitioners were so permitted. Also, there is no argument regarding vested rights, since nothing the Illinois EPA has done would affect the permits that have been issued to date to the Petitioners. The Petitioners at best have a vested right in the permits they now hold, and nothing about the Illinois EPA's decision would impact that. The Petitioners are seeking to obtain something they do not hold, and that does not involve any taking of any vested right.

VI. CONCLUSION

For the reasons stated herein, as well as those previously made by the Illinois EPA, the Illinois EPA respectfully requests that the Board affirm its final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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Dated: February 20, 2004

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on February 20, 2004, I served true and correct copies of a REPLY TO PETITIONERS' RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, by placing true and correct copies thereof in properly sealed and addressed envelopes and by sending said sealed envelopes via U.S. Mail First Class delivery, to the following named persons:

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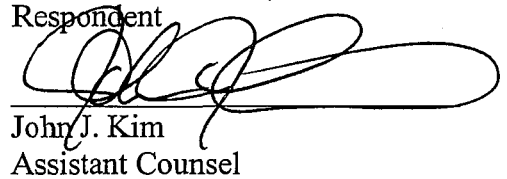
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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