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.	RECEIVED CLERK'S OFFICE **No. PCB 03-235** FEB 18 2004 (Permit Appeal - Land) STATE OF ILLINOIS Pollution Control Board

NOTICE OF FILING

To: Please see attached Service List

PLEASE TAKE NOTICE that on February 18, 2004, we filed with the Illinois Pollution Control Board, **1.) PETITIONERS UNITED DISPOSAL OF BRADLEY, INC. AND MUNICIPAL TRUST & SAVINGS BANK'S REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT; 2.) APPEARANCE OF JENNIFER MEDENWALD; and 3.) MOTION FOR ORAL ARGUMENT,** copies of which are attached hereto and served upon you.

Dated: February 18, 2004

Respectfully submitted,

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

Jennifer J. Sackett Pohlenz
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One of their attorneys

PROOF OF SERVICE

I, Ronnie Faith,* a non-attorney, certify that I served the following documents on the above referenced persons, by hand delivery or by depositing a copy in the U.S. mail at 175 W. Jackson, Chicago, Illinois with proper postage prepaid and addressed to the address shown above, at or prior to the hour of 5:00 p.m. on February 18, 2003.

Ronnie Faith

*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.

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65299-POH

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)

ADDITIONAL APPEARANCE

I hereby file my appearance in this proceeding on behalf of Petitioners, United Disposal of Bradley, Inc. and Municipal Trust & Savings Bank, Trustee Under Trust 0799.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED DISPOSAL OF BRADLEY, INC., And MUNICIPAL TRUST & SAVINGS BANK, As Trustee Under Trust 0799,	No. PCB 03-235
Petitioners,	(Permit Appeal - Land)
v.	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	
Respondent.	

PETITIONERS UNITED DISPOSAL OF BRADLEY, INC'S. AND MUNICIPAL TRUST & SAVINGS BANK'S REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

NOW COME the Petitioners, UNITED DISPOSAL OF BRADLEY, INC. and MUNICIPAL TRUST & SAVINGS BANK, as Trustee Under Trust 0799, by and through their attorneys, Jennifer J. Sackett Pohlenz, David E. Neumeister, and Jennifer L. Medenwald of QUERREY & HARROW, LTD., and submit the following reply in support of their Motion for Summary Judgment.

I. BY REFUSING PETITIONER'S REQUESTED PERMIT MODIFICATION, THE IEPA UNLAWFULLY APPLIED THE ILLINOIS ENVIRONMENTAL PROTECTION ACT AND WRONGFULLY PERPETUATED AN UNCONSTITUTIONAL RESTRICTION IN BLATANT DEROGATION OF THE *TENNSV* HOLDING

The focus of the Illinois Environmental Protection Agency's (hereinafter "IEPA" or "Agency") response to Petitioners' summary judgment motion is twofold. First, the "we asked for it" argument, contending that its denial of the Petitioners' requested permit modification was not in error, because the Petitioners sought a permit under the former "non-regional" provisions

of the Act. Second, IEPA argues waiver: that even if the subject permit condition is unconstitutional, the Petitioners did not contest it when it was initially imposed. These arguments are nothing more than red herrings, which detract from the core issue: the unconstitutionality of that portion of Special Condition No. 9 which purports to geographically restrict waste acceptance at the subject transfer station[1]. In making its arguments, IEPA challenges Petitioners' application of Tennsv, Inc. v. Gade, Nos. 92 503 WLB & 92 522 WLB, 1993 U.S. Dist. LEXIS 10403 (S.D. Ill. July 8, 1993), and, itself, incorrectly articulates its holding.

The provisions of the Act underlying the inclusion of those portions of Special Condition No. 9 at issue in this case were unambiguously declared unconstitutional by the District Court in Tennsv. The Illinois State Legislature then amended the Act (effective notably *after* Petitioners' original development and operating permits were issued) to delete those provisions in the Act that impermissibly distinguished between "regional" and "non-regional" facilities in the context of the shipment, conveyance, unloading or loading of municipal solid waste. Special Condition No. 9, as the progeny of those stricken provisions, now – in contrast to when it was first added to Petitioners' operating permit back in 1995 – lacks adequate statutory support under the Act. IEPA's attempt to justify its unconstitutional restriction on an article of commerce, *i.e.,* waste, by

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[1] The only portion of Special Condition No. 9 at issue in this appeal provides:

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

When "Special Condition No. 9" is referenced herein, whether or not with the words "the relevant portion of", it is only intended to reference the above cited portion of that special condition.

arguing that Petitioners' followed the law that was in effect when initially seeking a permit and, thus, "self-imposed" the restriction must fail. This appeal has nothing to do with the Petitioners' ability to restrict their own business geographically, if they so desire, it has to do with whether the government, in this case IEPA, has the ability to impose such a restriction. Such restrictions on commerce by government have been found repetitively to be clearly unconstitutional. 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 Envtl. 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).

The IEPA – in light of the Illinois legislature's noted amendments to the Act and the district court's holding in the Tennsv – can no longer lawfully uphold, apply or enforce that portion of Special Condition No. 9 purporting to restrict the geographical area of waste acceptance for the transfer station against the Petitioners' business activities. The IEPA was wrong to suggest otherwise when it refused to allow the Petitioners' to modify their existing operating permit to remove that portion of Special Condition No. 9 at issue, by finding the Petitioners' permit application to be "incomplete." That determination should now be reversed, the Petitioners' motion for summary judgment granted, and the Petitioners' requested permit modification approved.

A. The *Tennsv* case supports a finding that IEPA erroneously refused to allow the Petitioners' requested permit modification and the Petitioners' lawful application for their initial permits under the law that was later amended as unconstitutional has no bearing on the unconstitutionality of Special Condition No. 9

The Agency's attempt at justifying an unconstitutional restriction on commerce by arguing that the Petitioners' applied for their permits under portions of a law later amended by the Illinois General Assembly as they were unconstitutional, and thus "asked for it" is as misconstrued as IEPA's interpretation of the Tennsv holding on which it relies in making its argument. Oddly, the IEPA accuses the Petitioners of having distorted the "exact wording and holding" of the Tennsv case. Specifically, the Agency claims that the Petitioners have interpreted that case well beyond its plain and clear meaning and that the Tennsv does not apply to restrictions on the movement of waste between subdivisions of the State. (Resp. Br., pp. 2-3, 9). IEPA is wrong. It is IEPA – and *not* the Petitioners – who misconstrues and refuses to acknowledge the clear import of the Tennsv holding.

In Tennsv, the Court struck down a statutory scheme that distinguished between facilities that accepted waste generated outside the boundaries of any local general purpose unit of government and facilities that serviced only the local general purpose unit of government in which they were situated as being violative of the Commerce Clause of the U.S. Constitution. See Tennsv, 1993 U.S. Dist. LEXIS 10403, at *3-5. Specifically, the Court declared portions of Sections 39.2, 3.32 and 22.14 of the Act, which imposed additional burdens with respect to the location of and the permit approval process for facilities that accepted waste originating from beyond its local general purpose unit of government, unconstitutional as they applied to a

plaintiffs' business activities. *Id.* at *6. In doing so, the Court in Tennsv relied on and cited to Fort Gratiot Landfill v. Michigan Dept. of Natural Resources, 504 U.S. 353, 112 S. Ct. 2019 (1992). Specifically, as respects subdivisions of the State, the court held that a state or one of its political subdivisions may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the state itself. Tennsv, 1993 U.S. Dist. LEXIS 10403, at *5 (citing Fort Gratiot Landfill v. Michigan Dept. of Natural Resources, 504 U.S. at 361, 112 S. Ct. at 2024).

By limiting the Petitioners' facility to accepting waste solely "generated" within the "municipal boundaries" of the Village of Bradley, Special Condition No. 9 clearly precludes the movement of waste through a particular political subdivision of the State of Illinois as well as interstate[2]. According to the clear import of the Tennsv holding (which the IEPA wrongfully ignores), such a restriction is improper and unconstitutional. Since IEPA does not dispute *any* of the facts in support of Petitioners' motion for summary judgment, if the Illinois Pollution Control Board (Board) follows the holding in Tennsv, the Board should find that waste is an article of commerce and a geographic restriction on the movement of that commerce, be it through subdivisions of a state or interstate (as the *instant* condition restricts both), is unconstitutional and either void (by virtue of the amendments of the State Legislature) or should be stricken.

The continued presence of Special Condition No. 9 in the Petitioners' operating permit completely contradicts the Tennsv Court's unambiguous mandate that there can be no curtailment on the movement of articles of commerce absent a valid justification that is wholly

unrelated to economic protectionism. See Tennsv, 1993 U.S. Dist. LEXIS 10403, at *6. Special Condition No. 9, in as much as it represents such a curtailment without valid justification, cannot stand. Further, in so far as the inclusion of Special Condition No. 9 in the Petitioners' operating permit was undisputedly predicated upon the exact portions of Sections of the Act that removed by the Illinois General Assembly due to the Tennsv decision, it strains credulity to suggest, as the IEPA does in its response brief, that Special Condition No. 9 maintains some modicum of constitutionality. If the statutory provisions underlying the restriction embodied in Special Condition No. 9 are unconstitutional, then so too is the actual restriction itself. Likewise, the Agency's argument that, should this premise be true, then Petitioners' entire permit should be void lacks legal authority and is an entirely ineffective threat in response to Petitioners' motion[3], given First of Am. Trust Co. v. Armstead, 171 Ill.2d 282, 664 N.E.2d 36 (Ill. 1966) and its legacy of decisions in Illinois. Thus, the Petitioners' requested permit modification to remove Special Condition No. 9 should have been granted and IEPA's finding of "incompleteness" and, therefore, denial of Petitioners' operating permit application should be reversed.

B. There is no "waiver" of an unconstitutional restriction

Attempting to circumvent the clear import of the Commerce Clause and constitutional argument presented in Petitioners' motion, IEPA claims that Special Condition No. 9 should nonetheless remain a part of the Petitioners' operating permit because the Petitioners failed to

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[2] United Disposal of Bradley, Inc. has at least one customer and has business opportunities outside the State of Illinois, however, the current geographic restriction of Special Condition No. 9 purports to restrict any waste from those customers from being accepted at the Petitioners' transfer station.

[3] Likewise, IEPA's baseless contention that Petitioners sought permitting under a non-regional status to "avoid" siting is not relevant and Petitioners' motivation in its initial permits is not a "fact" before the Board. This is nothing more than a back door to an argument that contradicts the Armstead line of cases, essentially arguing that a party

challenge the inclusion of that condition at the time their operating permit was initially issued. (Resp. Br., pp. 4-5). Specifically, the IEPA claims that the Petitioners have effectively waived the right to challenge the constitutionality of Special Condition No. 9 by not appealing it at any time prior to when they sought to have their operating permit modified via their March 27, 2003 application. Again, the IEPA is wrong. First and foremost, the IEPA's suggestion that its inclusion of Special Condition No. 9 was ripe for appeal as of the 1995 issuance date of the Petitioners' operating permit is disingenuous. While the Tennsv case had indeed already been decided at the time the Petitioners' operating permit was issued, notably, the Illinois State Legislature had not yet amended the Act to delete those provisions that the Tennsv Court found to be unconstitutional. Accordingly, the Petitioners committed no wrong in not immediately challenging Special Condition No. 9 upon the subject operating permit's issuance. The IEPA is mistaken to suggest otherwise.

Further, the timeliness of the Petitioners' challenge to the imposition of the subject permit condition is really completely irrelevant, as constitutional challenges, as a matter of law, cannot be waived and may be raised at any time. See, e.g., People v. Christy, 139 Ill. 2d 172, 176, 564 N.E.2d 770, 772 (Ill. 1990) ("As a general rule, a constitutional challenge to a statute can be raised at any time.").

Finally, in support of its argument to the contrary, the Illinois EPA cites to Mick's Garage v. Ill. EPA, PCB No. 03-126, 2003 Ill. ENV LEXIS 751, at *15 (Dec. 18, 2003), and Panhandle E. Pipe Line Co. v. Ill. EPA, PCB No. 98-102, 1999 Ill. ENV LEXIS 52, at *30 (Jan.

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who follows the law in place at the time of permitting should later be penalized and a vested right removed, when the General Assembly changes the law.

21, 1999). (Resp. Br., p. 5). Both of these cases stand for the proposition that the Board will not review in a subsequent permit a condition that was imposed without challenge in a predecessor permit. Notably, however, *neither* of these cases involved a situation where the imposed permit condition implicated constitutional concerns. Those cases are, therefore, factually distinguishable from the instant matter and are not controlling here. Accordingly, the Petitioners did not, as the Agency contends, waive the issue regarding the constitutionality of Special Condition No. 9 by not raising it in an appeal of their initial operating permit.

C. The IEPA does nothing to meaningfully contradict any of the Petitioners' arguments that independent of the *Tennsv* holding, Special Condition No. 9 is nonetheless unconstitutional on its face as it is a geographic restriction that discriminates based upon the origin of the municipal solid waste and impermissibly vague

In their summary judgment motion, the Petitioners argued that even if Special Condition No. 9 could exist independent of the statutory provisions of the Act that were removed by the Illinois General Assembly as unconstitutional (based on the Tennsv case), that condition would still fail to pass constitutional muster because it is a geographic restriction that discriminates solely on the basis of the origin of waste. The Petitioners cited both Northwest Sanitary Landfill, Inc v. South Carolina Dept. of Health and Envtl. Control, 843 F. Supp. 100 (D. S.C. 1992), and Ecological Sys., Inc. v. City of Dayton, 2002 Ohio 388, 2002 Ohio App. LEXIS 354 (Ohio Ct. App. 1992), as examples where provisions similar in effect to Special Condition No. 9 were deemed to be unconstitutional for that reason. Notably, in its brief, IEPA fails to respond *at all* to: (a) the Petitioners' discussion of the aforementioned cases; or (b) the Petitioners' submission that Special Condition No. 9 is, notwithstanding the Tennsv holding, a geographical restriction that impermissibly discriminates on the basis of where the municipal solid waste is generated.

Accordingly, the Petitioners will rest upon the valid arguments already presented in their opening summary judgment brief. In light of those arguments, the requested permit modification should have been allowed and the IEPA's decision to the contrary should now be overruled.

It bears brief mention also that the IEPA fails to articulate any meaningful response to the Petitioners' contentions that Special Condition No. 9 is unconstitutionally vague and, therefore, void. In fact, the IEPA's only response to this argument is that the Petitioners' "void for vagueness" challenge to Special Condition No. 9 is untimely. (Resp. Br., pp. 7-8). Again, as has already been mentioned, constitutional challenges can, as a matter of law, generally be asserted at any time. Thus, the IEPA's criticism of the timing of the Petitioners' void for vagueness challenge alone is insufficient to defeat that argument. The Board should, in consideration of the vague and uncertain terms in which Special Condition No. 9 is written, find that that restriction is unconstitutionally vague and that IEPA erroneously denied Petitioners' request to modify their operating permit to delete the subject language.

II. THE IEPA INCORRECTLY INTERPRETED THE PERMIT APPLICATION AS A REQUEST TO MODIFY A DEVELOPMENT PERMIT THAT REQUIRED SECTION 39.2 SITING APPROVAL

The IEPA argues it correctly viewed the Petitioners' subject requested permit modification as one that required siting approval because the sought after modification would involve altering the Petitioners' operating *and* development permits, as Special Condition No. 9 appears in both of them. Additionally, the IEPA claims that the subject transfer station's mere acceptance of waste "generated" outside the "municipal boundaries" of the Village of Bradley would affect the physical design, construction and/or boundaries of the facility such that the

facility's operating permit modification request should be considered a request for "expansion" under Section 3.330(b)(2) of the Act.

First, given the constitutional infirmity of the subject permit condition, it is irrelevant whether the permit modification request was for deletion of the subject condition from the development or operating permits. This argument is fully addressed in both the Petitioners' Motion for Summary Judgment, its Response to IEPA's Motion for Summary Judgment, and this brief, and, thus, is referenced and incorporated, rather than repeated, herein.

Second, even if, *in arguendo*, Petitioners' sought a development permit modification, site location approval pursuant to Section 39.2 is not required under the clear language of Sections 39, 3.330(b)(1) and 3.330(b)(2). The definitions of a "new pollution control facility" and a "pollution control facility" are found in Section 3.330 of the Act. Pursuant to Section 3.330(b), a "pollution control facility" is, among other things, a waste transfer station. Pursuant to Section 3.330(b)(1), a waste transfer station is a "new pollution control facility" if it was "initially" permitted for development after July 1, 1981. The Agency admits in its own Motion for Summary Judgment that "initially" means, permitted for the first time. (IEPA Motion pp. 10-11). The Agency also admits that the Petitioners' waste transfer station already had a development (and operating) permit when it submitted the subject operating permit modification. (AR 1-7, 67-73). Specifically, the Petitioners' development permit, Permit No. 1994-306-DE, states that it "approves the development of a municipal solid waste transfer station pursuant to Sections 21(d) and 39(a) of the Illinois Environmental Protection Act. . ." (AR 1). Thus, even if the subject permit application were for modification of a development permit, since it is not an

"initial permit," proof of site location approval under Section 39.2 of the Act is not required by Sections 39(a) and 3.330(b)(1) of the Act.

However, in its Response brief, unlike its Motion for Summary Judgment, the Agency relies primarily on its "expansion" argument, *i.e.*, that Section 3.330(b)(2) requires site location approval. The Petitioners' response to this argument is addressed in detail in its Response to IEPA's Motion for Summary Judgment at pages 13-17. Not only is the Agency's argument contrary to precedent, but it is also contrary to prior Agency actions (the example being shown in the Petitioners' Response brief in which the Agency specifically allowed nearly a doubling of capacity of a transfer station, where that capacity was *specifically limited by the facility's permits*, without requiring site location approval, *see*, Exhibit A to Petitioners' Response to IEPA's Motion for Summary Judgment). Further, the argument is contrary to the logic behind both Section 39.2 and facility permits, as the requested operating permit modification in this case has *nothing* to do with a change of the permitted facility's operation, shape, size or character, it *only* concerns from what off-site location waste can originate before being brought to the facility.

An "expansion" under Section 3.330(b)(2) has been found in cases wherein both the capacity and the physical boundary or "footprint" of a facility changes. The Agency admits in its own Motion for Summary Judgment that Petitioners sought absolutely no physical change to their facility. (IEPA Motion p. 15). Furthermore, capacity is not at issue in this case; is not a condition of the facility's permits; was not a condition of local zoning approval for the facility when it was initially developed; and there is no evidence that by merely changing the off-site geographical location from which waste can be accepted at the facility that there would be either an increase or decrease in capacity.

Further, the cases on which the Agency relies were previously distinguished by Petitioners and contrary Agency precedent noted (the permits attached as Exhibit A to the Petitioners' Response) in the Petitioners' Response to the IEPA's Motion for Summary Judgment (pages 13-17), which discussion is referenced and incorporated herein. The common ground in all cases concerning "expansion" under Section 3.330(b)(2) of the Act is an effect on "land use" and providing the local host government with the power to review and approve proposed facility expansions that will effect land use. Since the proposed deletion of that portion of Petitioners' operating permit Special Condition No. 9 purporting to geographically restrict the origin of waste is an off-site change that has no effect on land use of the facility, even from a logical perspective, Section 3.330(b)(2) is inapplicable.

Finally, IEPA's attempt to squeeze the subject permit modification application into either Sections 3.330(b)(1) or 3.330(b)(2) of the Act runs afoul of the legal precedent protecting vested rights from a change in the law. See First of Am. Trust Co. v. Armstead, 171 Ill.2d 282, 664 N.E.2d 36 (Ill. 1966); Chemrex Inc. v. Pollution Control Bd., 257 Ill. App. 3d 274, 628 N.E.2d 963 (Ill. App. Ct. 1994); United States of America v. Illinois Pollution Control Bd., et al., 17 F. Supp. 2d 800 (N.D. Ill. 1998). To say that the mere request to change the off-site location where waste accepted at the facility can be "generated" or originate, a request that is supported by the local host government as well as surrounding municipalities (AR 133-135; SAR 140-142), is either an "initial" permit or an "expansion" under Sections 3.330(b)(1) or (2), respectively, is nothing more than to attempt a retroactive application of the law that ignores Petitioners' vested right in its permits. Both arguments are inappropriate constructions of the law.

Accordingly, the Agency's arguments must fail and Petitioners' Motion for Summary Judgment should be granted.

III. THE ILLINOIS EPA CLEARLY FAILED TO ABIDE BY THE APPLICABLE TIME PERIODS FOR REVIEWING THE PETITIONERS' REQUESTED PERMIT MODIFICATION

IEPA's argument that it complied with the applicable time periods for reviewing the Petitioners' requested permit modification is contrary to all evidence in the record. Petitioners' requested permit modification clearly states that it is a request to modify its operating permit; IEPA's written response, likewise, clearly states that it is a notice of incompleteness for a request to modify an operating permit; and, even, IEPA's own permit log (AR 100) states that the timeframe for review is the 30-day timeframe required for an operating permit application. None of these facts are contested by the Agency. IEPA's failure to comply with the 30-day timing requirement of 35 IAC 807.205 is, notwithstanding the Agency's suggestions to the contrary, another, procedural reason, why the Board should find that the Petitioners' application was complete and should have been granted by IEPA. Thus, all facts in the record, none of which are contested, point to one conclusion: that the subject permit application was one to modify an operating permit; that IEPA treated it as such; and that IEPA mistakenly issued its notice of incompleteness late.

There is no other possible conclusion, as IEPA has no statutory, inherent or other power to transform Petitioners' application into something it is not, and the Agency's own record is clear that up until the time of these motions and the tardiness issue being raised, it treated the requested permit modification as one related solely to the Petitioners' operating permit. Accordingly, in light of the IEPA's clear failure to issue its denial of the Petitioners' subject

application within the said 30-day deadline, the Board should construe the Petitioners' application as complete pursuant to 35 IAC 807.205, reverse IEPA's decision, and grant the Petitioners' Motion for Summary Judgment.

WHEREFORE, the Petitioners, United Disposal of Bradley, Inc. and Municipal Trust & Savings Bank as Trustee Under Trust 0799, respectfully request the Board enter an order: **(a)** finding that the IEPA's denial of the application for permit modification was incorrect because the modification requested only the striking of otherwise unconstitutional language from Special Condition No. 9 and reversing that denial, and/or alternatively, striking the subject portion of Special Condition No. 9 as being an unconstitutional restriction in violation of the Commerce Clause and/or vague and uncertain such as to violate the Petitioners' due process rights; **(b)** alternatively, finding that the Petitioners' application did not require a development permit application or siting approval pursuant to Section 39.2 of the Act, due to the fact that no modification of its development permit was required; any denial of the application based on the lack of a development permit and site location approval is moot, as the subject condition is unconstitutional, or, alternatively, no change in the development permit was required; or, alternatively, remanding this matter to the IEPA for Petitioners to file a development permit; and no site location approval is necessary pursuant to Section 39(c); **(c)** alternatively, finding that the Petitioners' application is deemed to be complete as a matter of law based on IEPA's notice of incompleteness sent more than 30 days after receipt of the application, and that the application and subject permit is therefore deemed granted, or alternatively, the application is deemed filed and complete and should be remanded to IEPA for technical review, if any; and **(d)**, providing such other and further relief as the Illinois Pollution Control Board deems appropriate.

Dated: February 18, 2004

Respectfully submitted,

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

By: _____
One of their attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

UNITED DISPOSAL OF BRADLEY, INC., And MUNICIPAL TRUST & SAVINGS BANK, As Trustee Under Trust 0799,	**No. PCB 03-235**
Petitioners,	**(Permit Appeal - Land)**
v.	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	
Respondent.	

PETITIONERS UNITED DISPOSAL OF BRADLEY, INC'S. AND MUNICIPAL TRUST & SAVINGS BANK'S MOTION FOR ORAL ARGUMENT

NOW COME the Petitioners, UNITED DISPOSAL OF BRADLEY, INC. and MUNICIPAL TRUST & SAVINGS BANK, as Trustee Under Trust 0799, by and through their attorneys, Jennifer J. Sackett Pohlenz, David E. Neumeister and Jennifer L. Medenwald of QUERREY & HARROW, LTD., pursuant to Section 101.700 of the Illinois Pollution Control Board Rules, and move the Illinois Pollution Control Board ("the Board") to grant oral argument on Petitioners' Motion for Summary Judgment and Respondent's Motion for Summary Judgment in the above-captioned matter. In support of this motion, the Petitioners state:

1. Both Petitioners and the Respondent in the above-caption matter have filed Motions for Summary Judgment before the Board regarding the Respondent's denial of Petitioners' application for a permit to modify an existing operating permit.

2. The issues presented in both Petitioners' and Respondent's summary judgment motions are unique and implicate constitutional concerns. Oral argument will give the Board an opportunity to ask questions of counsel for the respective parties about these unique and/or constitutional issues.

WHEREFORE, the Petitioners, United Disposal of Bradley, Inc. and Municipal Trust & Savings Bank as Trustee Under Trust 0799, respectfully request, pursuant to Section 101.700 of the Illinois Pollution Control Board Rules, that the Illinois Pollution Control Board grant oral argument on Petitioners' Motion for Summary Judgment and Respondent's Motion for Summary Judgment in the above-captioned matter.

Dated: February 18, 2004

Respectfully submitted,

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

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