

ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
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SEP 29 2010
STATE OF ILLINOIS
Pollution Control Board

VEOLIA ES LANDFILL, INC.)	
)	
Petitioner,)	
v.)	PCB 11-10
)	
CITY COUNCIL OF THE CITY OF ZION)	(Pollution Control Facility
)	Siting Appeal)
Respondent.)	

NOTICE OF FILING

To:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601-3218

Gerald P. Callaghan
Freeborn & Peters, LLP
Attorneys for Petitioner
311 S. Wacker Drive, Suite 3000
Chicago, Illinois 60606-6677

PLEASE TAKE NOTICE that on September 29, 2010, I have filed with the Office of the Clerk of the Pollution Control Board the original and nine copies of the City of Zion's SECTION 101.506 MOTION TO DISMISS APPEAL, copies of which are herewith served upon you.



Adam B. Simon
Attorney for Respondent

Dated: September 29, 2010

Adam B. Simon
Derke J. Price
ANCEL, GLINK, DIAMOND, BUSH, DiCIANNI & KRAFTHEFER, P.C.
Attorneys for Respondent
140 South Dearborn Street, Sixth Floor
Chicago, Illinois 60603
(312) 782-7606

CERTIFICATE OF SERVICE

I, the undersigned, certify that on September 29, 2010, I have served the SECTION 101.506 MOTION TO DISMISS APPEAL, on the following persons at the following addresses by U.S. Mail, postage prepaid.

Gerald P. Callaghan
Freeborn & Peters, LLP
Attorneys for Petitioner
311 S. Wacker Drive, Suite 3000
Chicago, Illinois 60606-6677

Paul Donovan

SUBSCRIBED AND SWORN TO BEFORE ME
this 29th Day of September, 2010.

Darlene L. Hincks
Notary Public



(SEAL)

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CITY COUNCIL OF THE CITY OF ZION)	(Pollution Control Facility
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SECTION 101.506 MOTION TO DISMISS APPEAL

NOW COMES the CITY OF ZION, Respondent ("City"), by and through its attorneys, Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C., and for its motion to dismiss the appeal of Veolia ES Landfill, Inc., filed pursuant to 35 ILAC §101.506, states as follow:

1. Veolia ES Landfill, Inc. (Veolia) is the owner and operator of a pollution control facility for which the City granted siting approval, subject to certain conditions, for an expansion of such pollution control facility.

2. Veolia has filed an appeal of the City's local siting approval with respect to Condition of Approval 2.2, on the basis that said condition is unsupported by the record; against the manifest weight of the evidence; standardless; vague; not within the authority of the City to impose; not reasonable and necessary to accomplish the purposes of Section 39.2 of the Act; potentially in conflict with permit conditions imposed by the Illinois Environmental Protection Agency; and inconsistent with the regulations promulgated by the Board.

3. On June 10, 2010, during the 30-day public comment period following the adjournment of the public hearing, Veolia filed "Veolia's Consent to Conditions Proposed By the City Staff and Special Consultants," a true and accurate copy of which is attached hereto as Exhibit A (the "Veolia Consent").

4. Among the conditions of approval to which Veolia expressly granted its consent to be bound was an earlier form of Condition of Approval 2.2, which formerly stated:

2.2 Prior to submitting the development permit application to the IEPA for the proposed Facility, the Owner/Operator shall submit draft plans and designs relating to the landfill gas collection and control system to the City of Zion for review and approval. The City shall have up to 60 days from submittal to render its approval or denial of the proposed design. The Owner/Operator shall be responsible for reimbursing the City for any costs related to the review of the proposed design.

5. By comparison, the final Condition of Approval 2.2 which was enacted with the City's grant of local siting approval is set forth below:

2.2 Prior to submitting the development permit application to the IEPA for the landfill gas collection and control system for the proposed Facility, the Owner/Operator shall submit draft plans, designs, and an operations and maintenance plan relating thereto to the City of Zion for review and approval. Thereafter, prior to submitting any and all pertinent permit applications to the IEPA for modification to the landfill gas collection and control system for the proposed Facility, the Owner shall submit notice thereof to the City of Zion, which may exercise the option to review and approve said plans by giving notice of such election within 10 business days of receipt. In both cases, the City shall have up to 60 days from submittal of such plans to render its approval or conditional approval of the proposed design. The Owner/Operator shall be responsible for reimbursing the City for any costs related to the review of proposed designs.

6. The form of Condition of Approval 2.2 described in the Veolia Consent is materially and substantially identical to the form of Condition of Approval 2.2 which was finally enacted with the City's grant of local siting approval insofar as they both: require City review and approval of the design of the landfill gas collection and control system; grant the City limited time to perform such review; and require the Owner/Operator to reimburse the City for the costs to review such plans.

7. Veolia did not object before the City Council, either orally or in writing, to the final form of Condition of Approval 2.2.

8. Notwithstanding anything else contained in the record, Veolia's failure to object to Condition of Approval 2.2, and Veolia's filing of the Veolia Consent, waives any argument regarding Condition of Approval 2.2, as issues not raised before the City Council should be deemed forfeited on appeal. *See generally Board of Managers of Hidden Lake Townhome Owners Ass'n v. Green Trails Imp. Ass'n*, 2010 WL 3331368 (Ill.App.2.Dist.); *Atanus v. American Airlines, Inc.*, 2010 WL 2486746 (Ill.App.1.Dist.); *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 929 N.E.2d 641 (1st App. Dist. 2010); *Lazenby v. Mark's Const., Inc.*, 923 N.E.2d 735 (Ill. 2010).

9. The Veolia Consent represents an admission by Veolia as to the reasonableness of Condition of Approval 2.2, and as such cannot be contested on appeal. *See People v. Whitney*, 361 N.E.2d 131 (Ill.App.3.Dist. 1977); and *R.B. Hayward Co. v. Lundoff-Bicknell Co.*, 7 N.E.2d 289 (Ill. 1937).

10. By filing the Veolia Consent, Veolia should be estopped from appealing Condition of Approval 2.2, as the doctrine of judicial estoppel, which prevents a party from taking one position at trial and a different position on appeal, should apply with equal force to local siting approval proceedings. *See generally Sakellariadis v. Campbell*, 909 N.E.2d 353 (Ill.App.1.Dist. 2009); *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 770 N.E.2d 177 (Ill. 2002); *McMath v. Katholi*, 730 N.E.2d 1 (Ill. 2000).

11. Veolia should be estopped from cherry-picking from the local siting approval only the condition which it finds objectionable, as a litigant cannot avail himself of those parts of a judgment which are beneficial to him and afterward appeal seeking to reverse those parts of judgment unfavorable to him. *See Young v. Hummer*, 576 N.E.2d 1072 (Ill.App.1. Dist. 1991); and *Schroeder v. Meier-Templeton Associates, Inc.*, 474 N.E.2d 744 (Ill.App.5.Dist. 1984).

12. Based on the foregoing, Veolia's appeal of Condition of Approval 2.2 should be dismissed with prejudice.

WHEREFORE, the CITY OF ZION respectfully prays for the Board to enter an order dismissing Veolia's appeal with prejudice and granting any further and additional relief as justice requires.

RESPECTFULLY SUBMITTED,
CITY OF ZION



By: One of its attorneys

Adam B. Simon
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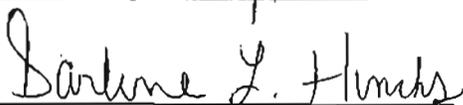
35 ILAC §101.504 VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the documents attached hereto are true and correct copies thereof in the same form as they shall appear in the official record of the proceedings to be filed by the City.



By: _____

Subscribed and sworn to before me this
29th Day of September, 2010.


Notary Public

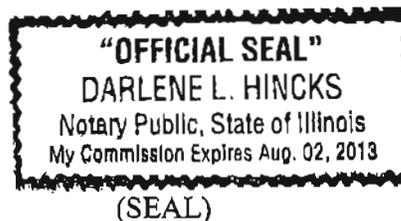


EXHIBIT A

Veolia's Consent to Conditions Proposed By the City Staff and Special Consultants

RECEIVED

JUN 10 2010

Judy Macken

**CITY OF ZION
LAKE COUNTY, ILLINOIS**

**CITY OF ZION
2828 SHERIDAN ROAD
ZION, ILLINOIS 60099**

**ON THE MATTER OF THE APPLICATION)
OF VEOLIA ES ZION LANDFILL, INC. FOR)
LOCAL SITING APPROVAL TO EXPAND THE)
CURRENTLY OPERATING VEOLIA ES ZION)
LANDFILL IN ACCORDANCE WITH SECTION)
39.2 OF THE ILLINOIS ENVIRONMENTAL)
PROTECTION ACT AND THE CITY OF ZION)
POLLUTION CONTROL FACILITY SITING)
ORDINANCE)**

**VEOLIA'S CONSENT TO CONDITIONS PROPOSED
BY THE CITY STAFF AND SPECIAL CONSULTANTS**

The City Staff and the Special Consultants to the staff filed a memorandum, dated June 8, 2010, containing their proposed findings of fact and conclusions of law ("Memorandum"). The Memorandum was prepared by Derke Price and Adam Simon of Ancel Glink Diamond Bush DiCianni & Krafthefer. A copy of the Memorandum is attached hereto. The Memorandum recommends approval of local siting of the landfill expansion proposed by Veolia ES Zion Landfill, Inc. ("Veolia"), subject to twenty six (26) conditions ("Conditions").

Veolia hereby agrees to be bound by the Conditions proposed in the Memorandum. The Conditions are numbered as follows: 2.1, 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 2.10, 2.11, 2.12, 2.13, 2.14, 2.15, 2.16, 2.17, 2.18, 2.19, 2.20, 2.21, 2.22, 3.1, 3.2, 6.1 and 7.1. Veolia does not consent to the findings of fact and conclusions of law contained in the Memorandum; Veolia filed its own Proposed Findings of Fact and Conclusions on June 8, 2010.

Respectfully submitted,

VEOLIA ES ZION LANDFILL, INC.

By: 
Its Attorney

Gerald P. Callaghan
Freeborn & Peters LLP
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Suite 3000
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Derke J. Price
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MEMORANDUM

To: Mayor and Commissioners
City of Zion

CC: Hearing Officer Helsten

From: Adam B. Simon
Derke J. Price 

Subject: Veolia ES Zion Landfill, Inc. Application for Local Siting Approval
Proposed Findings of Fact and Conclusions of Law

Date: June 8, 2010

This Memorandum will set forth Staff's (and special consultants') review of the testimony and record on the statutory criteria and, where appropriate, set forth conditions of approval. This Memorandum will conclude our work and those of the specially retained expert consultants hired in this matter and we thank you for the opportunity to be of assistance.

The siting authority may, pursuant to 415 ILCS 5/39.2(e), impose such conditions of approval as may be reasonable and necessary to accomplish the purpose of Section 39.2 and as are not inconsistent with regulations promulgated by the Pollution Control Board. Accordingly, we believe the following conditions are reasonable and necessary to effectuate the purposes of the Act and with them, we can recommend approval. We cannot recommend approval of the application without conditions as we believe these are necessary for the application to meet the requirements of the Act.

General Condition of Approval:

All representations made by the Applicant in its application; in its design documents; and during the testimony offered in its case in chief and through its public comment submittals; as well as the terms of the Host Agreement; and all as modified by any other condition set adopted by the City of Zion, should all be made a condition of approval.

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Criterion 1. the facility is necessary to accommodate the waste needs of the area it is intended to serve;

The testimony of Phil Kowalski was credible concerning the need for disposal capacity in the intended area of service for the projected service life of the Facility.

Criterion 2. the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected;

In considering whether the facility is proposed to be operated so that the public health, safety and welfare will be protected, the City is permitted to consider as evidence the previous operating experience and past record of convictions or admissions of violations of the applicant (and any subsidiary or parent corporation) in the field of solid waste management. As a result, the testimony, ability and experience of Jim Lewis should be given special weight in your consideration of whether the applicant has met its burden with respect to this Criterion since he has and will continue to serve as the General Manager of the Facility.

The testimony of Dan Drommerhausen and Devin Moose was credible and established that the natural clays present and the design of the facility (with the conditions set forth below) will meet the requirement to protect the public health, safety and welfare.

The record establishes a pattern of operational challenges related to the collection and control of landfill gas, the migration of dust and litter, and vector control related to bird migration. Each of these issues have resulted in complaints by neighbors living in the surrounding area. Mr. Lewis and Mr. Moose each testified to the measures the applicant finds reasonable to address these matters. The evidence and testimony under your consideration present a unique opportunity for the City to exert further control over the operations and, with the conditions set forth below, we can conclude that the public health, safety and welfare will be protected.

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Leachate Collection

- 2.1 The Owner/Operator shall use uniformly-graded, rounded to sub-angular stone and/or pea gravel for the granular layer in the leachate collection system. The stone and/or pea gravel shall have a minimum hydraulic conductivity of 0.1 cm/sec and a uniformity coefficient of less than 4.

Landfill Gas Generation

- 2.2 Prior to submitting the development permit application to the IEPA for the proposed Facility, the Owner/Operator shall submit draft plans and designs relating to the landfill gas collection and control system to the City of Zion for review and approval. The City shall have up to 60 days from submittal to render its approval or denial of the proposed design. The Owner/Operator shall be responsible for reimbursing the City for any costs related to the review of the proposed design.
- 2.3 The gas collection and control system shall be operated principally for the purpose of environmental management. At no time shall the operator of the gas-powered electricity generation facility have the right or opportunity to direct the volume or characteristics of the landfill gas collected by the gas collection and control system
- 2.4 The gas collection and control system shall be maintained so that all flares provide collective, actual destructive capacity not less than 9% greater than peak landfill gas production, measured on a daily basis. The Owner/Operator shall maintain sufficient redundant blowers or gas moving equipment so that the collection system is capable of maintaining a vacuum at each wellhead.
- 2.5 Before commencing recirculation of leachate, a gas collection and control system must be constructed in each cell where recirculation shall occur. Owner/Operator shall design the leachate recirculation system so that the leachate distribution network can also be used for gas extraction as part of the gas control and collection system.

Stormwater Management

- 2.6 Owner/Operator must obtain a Watershed Development Permit from the Lake County Storm Water Management Commission prior to commencing construction of all or any part of the proposed Facility expansion and remain in compliance therewith during all periods of construction.

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Construction Quality Assurance Program

- 2.7 The Owner/Operator shall report to the City the name and qualifications of each Construction Quality Assurance Officer.
- 2.8 Owner/Operator shall report to the City anytime there is a change to the Best's rating assigned to the surety which has issued the performance bond required by the City's Siting Ordinance.

Operating Plan

- 2.9 Owner/Operator shall be permitted to accept waste during the following hours: Monday through Friday, 06:00 to 16:30, and 06:00 to 13:00 on Saturday; Closed Sundays and Federal holidays; and shall be permitted to conduct operations at the Facility until not later than 20:00 on a daily basis, except on Sundays and Federal holidays (New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day). Weekday hours shall be allowed on Saturdays following a week during which there is a Federal holiday and, with the consent of the City, in the event of emergencies.
- 2.10 Owner/Operator shall respond to any complainant within three (3) business days. Such response shall include, to the extent practicable, the identity of the complainant, the complainant's address and the nature of the complaint.
- 2.11 Owner/Operator shall, within 90 days following the City of Zion granting siting approval for the Facility, in consultation with the Lake County Health Department, Environmental Services Division, implement a comprehensive complaint monitoring system which shall include: (a) nature of the complaint, (b) location and identity of complainant, if possible, (c) weather conditions, and (d) a response of what was done. The reports produced by the complaint monitoring system shall be evaluated no less frequently than semi-annually for the purpose of identifying patterns in the nature of complaints and corrective actions designed to proactively prevent complaints of such nature, if any patterns exist. This system shall be incorporated into the facility's operating record and shall be made available upon request to the IEPA, the Lake County Health Department, Environmental Health Services Division, and the City of Zion.
- 2.12 Upon receipt of three (3) or more independent and confirmed odor complaints, measured during any seven (7) consecutive day period, Owner/Operator shall perform, in no greater than three (3) business days following the triggering of this condition, a root cause analysis to determine the origin of the odor, and shall begin, in no greater than six (6) working days following the triggering of

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this condition, to develop a corrective action plan corresponding to the findings of the root cause analysis, and thereafter diligently pursue performance thereof. A report describing the triggering of this condition, the root cause analysis and all corrective action plans corresponding thereto shall be filed with the City Clerk within twenty-one (21) days.

- 2.13 The Owner/Operator shall operate an odor mitigation misting system which Owner/Operator reasonably determines to be the most effective means to neutralize the odors resulting from the operation of the Facility, regardless of whether such odors result from deficiencies in the daily cover or the collection and control of landfill gas.
- 2.14 Owner/Operator shall remove, to the extent practicable, impermeable alternate daily cover before placement of new waste.
- 2.15 Owner/Operator shall not allow the use of any form of alternative daily cover which contains more than a de minimis amount of gypsum, and shall immediately implement operating protocols to implement this restriction upon the receipt of siting approval from the City of Zion.
- 2.16 Owner/Operator's operations and maintenance plan shall include a provision to ensure that all storm water and drainage layer outlets remain clear and permit the free flow of drainage at all times.
- 2.17 Owner/Operator shall review the species of birds most commonly found on and around the existing Facility and, based on the findings of such review, design reasonable bird mitigation measures corresponding to the unique characteristics of such species of bird.
- 2.18 The Owner/Operator shall employ effective measures to prevent litter from migrating off the Facility premises and shall mitigate any such litter that migrates off the Facility premises.
- 2.19 The City shall have the right to approve, which approval shall not be unreasonably withheld or delayed, any substitution of the General Manager to ensure any nominee for such position possesses such degree of skill, experience and familiarity with the Facility so that the Facility is operated in a manner to protect the health, safety and welfare of the public.
- 2.20 Owner/Operator shall implement and enforce a speed limit for all trucks operating within the Facility boundaries of not greater than twenty-five miles per hour (25 mph).

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- 2.21 Owner/Operator shall host an annual informational meeting open to the public during which it will present a summary of the operating experience for the previous year and its plans for the forthcoming year.

Groundwater Monitoring

- 2.22 The Owner/Operator shall respond as appropriate when ground water samples from monitoring wells owned in whole or in part by the Owner/Operator contain contaminants indicative of a release from any and all portions of the waste deposited within the Facility boundaries.

Criterion 3. the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;

The statute takes, as a given, that a pollution control facility is incompatible with the character of the surrounding area and that it will have a negative impact on the value of the surrounding property. The inquiry is whether the location is such as to minimize those deleterious effects. Accordingly, the part of Mr. DeClark's report and his corresponding testimony, as well as that of Mr. Lannert that there was no incompatibility and that there would be no negative effect on surrounding property values is not credible.

The application does, however, make the point (through the testimony of Mr. Lannert) that the landscape plan and design results in the applicant buffering itself by constructing screening on its own property and thereby taking steps to minimize incompatibility. Together with the operational measures described above, the "buffering and screening" approach of the applicant could be sufficient provided the applicant commits to maintain these features. Accordingly, we are recommending the following as conditions of approval under this Criterion:

- 3.1 Owner/Operator shall construct the storm water management facilities, landscape screening and the berm on the East side of the Facility at the earliest practicable and lawful time and, at a minimum, concurrent with the construction of the first new cell in the lateral expansion of the Facility.
- 3.2 The Owner/Operator shall replace, with the plant and/or tree species which are reasonably expected to have a likelihood of sustainability, all landscaping planted by the Owner/Operator for the purpose of screening the Facility that dies or shows a reasonable probability of dying.

Criterion 4. *(A) For a facility other than a sanitary landfill or waste disposal site, the facility is located outside the boundary of the 100-year flood plain or the site is flood-proofed; (B) for a facility that is a sanitary landfill or waste disposal site, the facility is located outside the boundary of the 100-year floodplain, or if the facility is a facility described in subsection (b)(3) of Section 22.19a, the site is flood-proofed.*

It was not controverted that the facility meets this criterion.

Criterion 5. *the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills or other operational accidents*

It was not controverted that the facility meets this criterion.

Criterion 6. *the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows;*

- 6.1 Owner/Operator shall cooperate with Illinois Department of Transportation, Lake County Department of Transportation, and City of Zion to design and implement an access contingency plan for the current entrance at any time when Green Bay Road, between Ninth Avenue and Russell Road, is under construction.

Criterion 7. *If the facility will be treating, storing or disposing of hazardous waste, an emergency response plan exists for the facility which includes notification, containment and evacuation procedures to be used in case of an accidental release;*

- 7.1 Owner/Operator shall not accept any waste which may be characterized as hazardous waste.

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Veolia ES Zion Landfill, Inc. Application for Local Siting Approval
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Criterion 8. *If the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility must be consistent with that plan;*

It was not controverted that the facility meets this criterion.

Criterion 9. *if the facility will be located within a regulated recharge area, any applicable requirements specified by the Board for such areas have been met.*

It was not controverted that the facility meets this criterion.

In conclusion, we recommend that the City of Zion take each Criterion in order, consider and adopt the proposed conditions for each, and then vote as to whether, with the conditions, the Criterion has been satisfied.