

VEOLIA ES ZION )  
LANDFILL, INC., )  
 )  
Petitioner, )  
 )  
v. )  
 )  
CITY COUNCIL OF THE )  
CITY OF ZION, ILLINOIS, )  
 )  
 )  
Respondent. )

PCB 11-10  
(Pollution Control Facility Siting Appeal)

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Pollution Control Board

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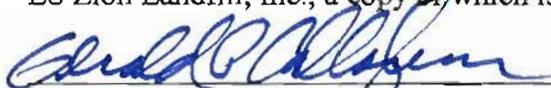
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PLEASE TAKE NOTICE that on February 4, 2011, I have filed with the Office of the Clerk of the Pollution Control Board the original and nine copies of the Brief of Petitioner Veolia ES Zion Landfill, Inc., a copy of which is herewith served upon you.

  
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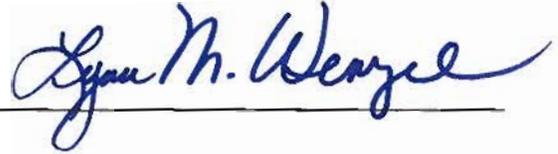
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CERTIFICATE OF SERVICE

I, the undersigned, certify that on February 4, 2011, I have served the attached Brief of Petitioner Veolia ES Zion Landfill, Inc., on the persons to whom the foregoing Notice of Filing is addressed by U.S. Mail, postage prepaid.



SUBSCRIBED AND SWORN TO BEFORE ME  
this 4<sup>th</sup> day of February, 2011.

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Notary Public



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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**BRIEF OF PETITIONER VEOLIA ES ZION LANDFILL, INC.**

Petitioner Veolia ES Zion Landfill, Inc. ("Veolia") submits this brief in support of its appeal of Special Condition 2.2 that was imposed by the Respondent City Council of the City of Zion ("City") in the ordinance approving siting of the expansion of Veolia's Zion Landfill ("Expansion"). For the reasons stated in this brief, Special Condition 2.2 should be stricken.

**I. INTRODUCTION**

On February 8, 2010, Veolia filed with the City a request for siting approval for the Expansion ("Application"). (C1-2) The Application was filed pursuant to Section 39.2 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/39.2. The Application addressed the siting criteria that are set forth in subsection (a) of Section 39.2. (C1-2 to C1-5398)

The City Council conducted hearings on the Application on May 12, 13, 17 and 25, 2010. At the hearings, Veolia presented the following witnesses to address the nine siting criteria in Section 39.2(a): Devin Moose testified regarding Criteria 2, 4, 5, 7 and 9 (C3-156 to C3-190);

Daniel Drommerhausen testified regarding Criterion 2 (C3-150 to C3-156); Phil Kowalski testified regarding Criteria 1 and 8 (C3-8 to C3-17); Chris Lannert testified regarding the first part of Criterion 3 (C3-32 to C3-46); Gary DeClark testified regarding the second part of Criterion 3 (C3-73 to C3-91); and Michael Werthmann testified regarding Criterion 6 (C3-18 to C3-32). In addition, Jim Lewis, General Manager of the Veolia Zion Landfill, testified concerning landfill operations and the landfill's compliance history. (C3-91 to C3-113)

On June 8, 2010, Veolia's counsel submitted Proposed Findings of Fact and Conclusions of Law, (C5-1 to C5-19) and counsel for the City's review team submitted a memorandum, which included proposed findings and 26 proposed siting conditions. (C5-20 to C5-27) On June 10, 2010, Veolia filed a response to the review team's memorandum in which it agreed to be bound by the 26 conditions. (C5-28). On July 19, 2010, the Hearing Officer submitted Proposed Findings of Fact, Conclusions of Law and Recommendations ("Hearing Officer's Report"), which included identical versions of 23 of the 26 conditions proposed by the City's review team. (C5-30 to C5-45) However, the Hearing Officer recommended modifications of conditions 2.2, 2.3 and 2.10. (C5-36 to C5-40)

On August 3, 2010, the City Council adopted "An Ordinance Approving The Application of Veolia ES Zion Landfill, Inc. Subject To Certain Special Conditions For Siting Approval Of A Pollution Control Facility On Property Located Within The City Of Zion, Illinois" ("Siting Approval Ordinance"). (C9-11 to C9-15) The Siting Approval Ordinance adopted the special conditions set forth in the Hearing Officer's Report with the exception of Special Conditions 2.2 and 2.3. Special Condition 2.2 in the Siting Approval Ordinance is a modification of the special condition proposed in the Hearing Officer's Report but is not the same as condition 2.2 in the review team's memorandum. In addition, the Siting Approval Ordinance adopted the

conclusions of law and findings of fact in the Hearing Officer's Report, including all citations, references and incorporations made by the Hearing Officer.

On September 2, 2010, Veolia filed with the Pollution Control Board ("Board") its Petition For Hearing To Contest Siting Condition. By the Petition, Veolia appeals only Special Condition 2.2 in the Siting Approval Ordinance, which states as follows:

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.

Special Condition 2.2 was imposed under Criterion 2 of Section 39.2(a) of the Act, which states that: "the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected."

## II. ARGUMENT

Section 39.2(e) of the Act allows the City to impose conditions on a decision to grant site approval, subject to the following limitations: "In granting approval for a site the [City] ... may impose such conditions as may be reasonable and necessary to accomplish the purposes of this Section and as are not inconsistent with the regulations promulgated by the Board." It is Veolia's contention that the City, by imposing Special Condition 2.2, has exceeded the authority delegated under Section 39.2. Specifically, the City has exceeded its authority because Special Condition 2.2 requires Veolia to obtain the approval of the City before seeking any and all permits from the IEPA, including all permits after issuance of a development permit pursuant to

Section 39(c) of the Act. Moreover, Special Condition 2.2 allows the City to impose future conditions on Veolia.

The law is clear that such meddling in the future activities of sited facilities and permits within the jurisdiction of the IEPA is not authorized by the Act, not reasonable and necessary to accomplish the purposes of Section 39.2, and not consistent with the regulations promulgated by the Board. For the reasons described below, the Board should strike Special Condition 2.2.

**A. The City is not authorized to control future permits for the Expansion of the Veolia Zion Landfill.**

Special Condition 2.2 requires Veolia, prior to filing an application with the IEPA for a development permit, to submit to the City, for the City's review and approval, the draft plans and designs and an operations and maintenance plan for the landfill gas collection and control system.<sup>1</sup> In addition to the initial plans for the gas system, the condition requires Veolia to submit to the City, for the City's "approval or conditional approval," all future applications for permits to modify the gas collection and control system. Because Special Condition 2.2 requires the City's approval of permit applications before they are filed with the IEPA, the City would presumably have the authority to reject such applications, which could place Veolia in the untenable position of being unable to obtain permit modifications for necessary adjustments to the gas collection and control system.

Fortunately, this type of meddling by local siting authorities into the future activities and permitting of sited facilities has been soundly rejected by the Board. In *Christian County Landfill, Inc. v. Christian County Board*, PCB 89-92, (Oct. 8, 1989), the Board held that

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<sup>1</sup> Veolia consented to a version of Special Condition 2.2 that would have required Veolia to submit to the City, prior to filing its application with the IEPA for a development permit, plans and designs relating to the landfill gas collection and control system. In fact, Veolia has submitted those plans for the City's review. However Veolia did not agree to submit an operations and maintenance plan or to be subject to the City's review of future modification permits. Nor did Veolia agree that the City may impose future conditions on Veolia. (C5-22, 28)

conditions affecting future occurrences and authorizing the imposition of conditions in the future were not necessary to accomplish the purposes of Section 39.2 of the Act. In reversing a condition requiring any future owner of the Christian County Landfill to request approval from the county board to operate the facility, the Board concluded that the state legislature intended to limit local siting authority to only the initial siting application, stating:

Once the county determines that the criteria have been met and grants its site location approval, the county's authority under Section 39.2 is exhausted. The operational aspects of the new regional pollution control facility will be reviewed by the Agency during the permitting process to assure compliance with the Act and the Board regulations. To permit the county board or local unit of government to oversee the operations at this point in time with the implication that the county board or local unit of government possesses the authority to divest the new regional pollution control facility of its siting approval could create havoc in the state's system of waste disposal. Therefore, the Board believes that this condition is not reasonable and necessary to accomplish the purposes of Section 39.2 of the Act.

PCB 89-92, slip op. at 8.

In the present case, as in *Christian County*, the City's authority under Section 39.2 was exhausted as soon as it adopted the Siting Approval Ordinance on August 3, 2010. The City has no authority to participate in the permit process, which is within the exclusive jurisdiction of the IEPA. Indeed, almost 30 years ago, in *County of Lake v. Illinois Pollution Control Board*, 120 Ill.App.3d 89, 457 N.E.2d 1309, 1316 (2d Dist. 1983), the Appellate Court upheld this Board's decision to strike a local siting condition that interfered with the IEPA's permit authority, and in so doing stated as follows:

The language of section 39.2 does not vest the County Board with permitting authority. .... The imposition of Condition X is an attempt by the County Board to issue a permit. By requiring the Agency to adopt and enforce its conditions, the County Board has usurped the exclusive power of the Agency to grant or deny a permit. Sections 39(c) and 39.2 have not delegated the Agency's authority in this area to the County Board.

Under *Christian County*, the City's authority ended as soon as it adopted the Siting Approval Ordinance on August 3. Notwithstanding this limitation, the City is attempting to place itself on equal footing with the IEPA. But the law is clear that the City and the IEPA are not on equal footing. In *County of Lake*, the Appellate Court described the difference between a local government's power and that of the IEPA as follows:

Also, the County Board is limited to imposing conditions which "accomplish the purposes of this Section, \*\*\*" referring to section 39.2 [citation omitted]. The Agency has broader authority to impose permit conditions which are "necessary to accomplish the purposes of this Act, \*\*\*" referring to the Environmental Protection Act. [citation omitted]. When read together, the sections suggest that the Agency maintains the authority to issue permits. The scope of authority granted the County Board is restricted.

457 N.E.2d at 1316. Special Condition 2.2 exceeds the authority delegated under Section 39.2, is not reasonable and necessary to accomplish the purposes of Section 39.2 and should be stricken.

**B. The City does not have the authority to impose conditions in the future.**

Because the City has no authority to participate in the permit process, it certainly has no authority to impose conditions on future permits; yet this is what Special Condition 2.2, which requires the City's "approval or conditional approval," would allow the City to do. In fact, the Hearing Officer's Report anticipated that future conditions would be imposed by the City, stating that: "In turn, permit conditions may need to be added over time in the future, which would necessitate additional, later 'rounds' of review by the City of Zion for changes proposed to the landfill collection and control system in order address future site Specific Conditions as the landfill is developed over time." (C5-38,39)

The Board in *Christian County* emphatically rejected a condition that would have allowed Christian County to impose additional conditions in the future:

In Condition H, the County states that it shall have power to impose those conditions which are reasonable and necessary to ensure that the operation of [the landfill] is in accordance with the criteria set forth in Section 39.2 of the Act. .... Section 39.2 affords the County or local unit of government the power to approve or disapprove the site location suitability based upon a review of the criteria set forth therein. Once the county or local unit of government renders its decision, the power of the county or local unit of government under Section 39.2 is exhausted. To allow the county or local unit of government to maintain power under Section 39.2 would threaten the finality of decisions rendered thereunder and could compromise the Agency's statutory permitting process. As a result, the Board does not believe that Section 39.2 grants "continuing powers" as the County alleges.

PCB 89-92, slip op. at 8 (Oct. 8, 1989). By reserving for itself the authority to approve permit applications and impose future conditions, the City has usurped the IEPA's permit authority and threatens the finality of the siting approval granted by the City. Special Condition 2.2 should be stricken.

**C. Special Condition 2.2 usurps the IEPA's authority to issue air permits.**

Special Condition 2.2 actually goes further than the conditions that were rejected in *County of Lake* and *Christian County* in that the City intends to impose itself in the air permitting process administered by the IEPA's Bureau of Air in addition to the development permit process administered by the Bureau of Land. The language of Special Condition 2.2, which applies to "any and all pertinent permit applications," is not limited to permits issued by the Bureau of Land. As mentioned in the Introduction of this Brief, the Siting Approval Ordinance adopted all conclusions of law and findings of fact in the Hearing Officer's Report, including all citations, references and incorporations. The Hearing Officer's Report clearly intended Special Condition 2.2 to cover all permits issued by the IEPA, including those issued by the Bureau of Air. Specifically, the Hearing Officer's Report states as follows:

In turn, over and above any permits which will need to be issued for development and construction of various areas of the proposed expansion from IEPA's Bureau

of Land (BOL), an air quality construction permit for the landfill gas and control system will need to be obtained from the IEPA Bureau of Air (BOA) consistent with the Illinois air quality regulations set forth at 35 IAC Part 220 and/or with the federal New Source Performance Standard (NSPS) 40 CFR Part 60, Subpart WWW for new and “modified” landfills. ... In short, and put a different way, review of the landfill gas collection and control system design information provided initially at the BOL development permit application stage may not adequately address the multiple system design and development alternatives later allowed (as well as possibly required) by NSPS Subpart WWW. (C5-37, 38)

The City derives its limited power from Section 39.2 of the Act. That section only grants the City the authority to review and approve the “site location suitability” of a new pollution control facility. The City’s limited power is tied to the IEPA’s permit authority by Section 39(c) of the Act, which states that “no permit for the development and 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 [City] ... in accordance with Section 39.2 of this Act.” Permits for the development and construction of new pollution control facilities are granted by the Bureau of Land, not the Bureau of Air. Indeed, the regulation implementing the process described in Section 39(c) is located in the section of the Environmental Protection Regulations administered by the Bureau of Land. *See* 35 Ill. Adm. Code 812.105.

Special Condition 2.2, as described by the Hearing Officer and adopted by the City, would require Veolia to obtain the City’s consent before filing an application for a permit with the Bureau of Air. The City’s attempt to meddle in the air permitting process is directly at odds with the Act and the regulations promulgated by this Board. Accordingly, the City has exceeded its authority and usurped the authority of the IEPA. Special Condition 2.2 should be stricken.

### III. CONCLUSION

For the reasons stated in this Brief, Special Condition 2.2 should be stricken.

Respectfully submitted,

VEOLIA ES ZION LANDFILL, INC.

By  \_\_\_\_\_  
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