

ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE
FEB 28 2011
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:

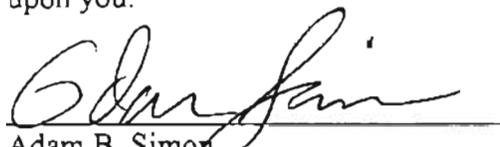
John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
Suite 11-500
100 West Randolph
Chicago, Illinois 60601-3218

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

Larry Clark
700 N. Lake Street
Suite 200
Mundelein, IL 60060

Bradley P. Halloran
Hearing Officer, IPCB
James R. Thompson Center, Suite 11-500
100 West Randolph
Chicago, Illinois 60601-3218

PLEASE TAKE NOTICE that on February 28, 2011, I have filed with the Office of the Clerk of the Pollution Control Board the original and nine copies of the RESPONSE BRIEF OF RESPONDENT CITY COUNCIL OF THE CITY OF ZION, a copy of which is herewith served upon you.


Adam B. Simon
Attorney for Respondent

Dated: February 28, 2011

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

ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

FEB 28 2011

STATE OF ILLINOIS
Pollution Control Board

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

PCB 11-10
(Pollution Control Facility
Siting Appeal)

RESPONSE BRIEF OF RESPONDENT CITY COUNCIL OF THE CITY OF ZION

Respondent, City Council of the City of Zion ("City") submits this brief in opposition to the Petitioner's appeal of Special Condition 2.2 that the City imposed in the ordinance granting local siting approval of the expansion of Petitioner's landfill (the "Expansion"). For the reasons stated in this brief, Special Condition 2.2 should be sustained, or alternatively, modified to maintain at least the degree of review consented to by the Petitioner.

I. Legal Standards for Board Review

In reviewing the local siting authority's imposition of a special condition, the Board must determine whether the special condition to a site approval is reasonable and necessary to accomplish the purposes of Section 39.2 of the Act and not inconsistent with Board regulations. Peoria Disposal Co. v. Peoria County Board, PCB 06-184, slip op. at 6 (Dec. 7, 2006), *citing* 415 ILCS 5/39.2(e) (2008). "When the issue is whether a condition is necessary to accomplish the purpose of a Section 39.2(a) citing criterion, the Board must determine whether the local government's decision to impose the condition is against the manifest weight of the evidence." Waste Mgmt. of Ill., Inc. v. Will County Board, PCB 99-141, slip op. at 3 (Sept. 9, 1999) (citation omitted), *aff'd sub nom. Will County Board v. PCB*, 319 Ill.App.3d 545, 747 N.E.2d 5 (3rd Dist. 2001); *see also* Town & Country Utilities, Inc. v. PCB, 225 Ill.2d 103, 119, 866

N.E.2d 227, 236 (2007) (a reviewing court must determine whether Board's decision in a landfill siting appeal was against the manifest weight of the evidence).

A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or indisputable from a review of the evidence. Land and Lakes Co. v. PCB, 319 App.3d 41, 48, 743 N.E.2d 188, 194 (3rd Dist. 2000); Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 550, 555 N.E.2d 1178, 1184 (3rd Dist. 1990). The Board is not in a position to reweigh the evidence, but it must determine whether the decision of the local authority is against the manifest weight of the evidence. *Id.* (citations omitted). The applicant has the burden of proving that the conditions are not necessary to accomplish the purposes of the Act and therefore were imposed unreasonably. Rochelle Waste Disposal, LLC v. the City of Rochelle, and the Rochelle City Council, PCB 07-113, slip op. at 21 (Jan. 24, 2008), *citing* IEPA v. PCB, 118 Ill. App. 3d 772, 780, 455 N.E.2d 188, 194 (1st Dist. 1983); 415 ILCS 5/40.1(a) (2006); 35 Ill. Adm. Code 107.506. The Board has authority to modify conditions imposed by the local siting authority to the extent that they are not supported by the record or would be inconsistent with the purposes of the Act. *See* Browning Ferris Industries of Illinois v. Lake County Board of Supervisors and IEPA, PCB 82-101, slip op. at 14-15 (Dec. 2, 1982).

II. Waiver of Claims on Appeal

On September 2, 2010, Petitioner filed the instant appeal challenging Special Condition 2.2 on the grounds that it 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.” *Petition for Hearing to Contest Siting Condition*, ¶5. For the reasons set forth below, Petitioner has in whole or in part waived several

of the foregoing grounds upon which it bases this appeal and for that reason this appeal should be denied.

A. Failure to Present Evidence or Citation to Record

A quick review of Petitioner's brief reveals a complete failure to present arguments related to each of the following grounds for appeal: unsupported by the record; against the manifest weight of the evidence; standardless; and vague. In fact, Petitioner's brief, except for presenting the history of the siting hearing, completely ignores the Record on which the City relied in adopting Special Condition 2.2. Illinois law is replete with cases which hold that points raised by an appellant but not supported by arguments or citations to authority are deemed waived. Vancura v. Katris, 238 Ill.2d 352, 939 N.E.2d 328 (2010); Bennett v. Chicago Title and Trust Co., 404 Ill.App.3d 1088, 936 N.E.2d 1068 (Ill.App. 1 Dist. 2010); Fleissner v. Fitzgerald, 403 Ill.App.3d 355, 937 N.E.2d 1152 (Ill.App. 2 Dist. 2010).

Furthermore, the petitioner bears the burden of proof in a proceeding reviewing a local siting decision and the special conditions imposed therein. 35 Ill. Adm. Code §107.506; 415 ILCS 5/40.1(a). By failing to cite to the Record or any case law in support of its arguments that Special Condition 2.2 is against the manifest weight of the evidence or unsupported by the record, Petitioner has failed to meet its burden.

For each of the foregoing reasons, Petitioner's appeal should be partially denied with respect to any arguments that Special Condition 2.2 is unsupported by the record, against the manifest weight of the evidence, standardless and vague.

B. Petitioner Consented to Part of Special Condition 2.2

In reviewing the Record (C5-28) and Petitioner's Brief, it is clear that Petitioner found an earlier version of Special Condition 2.2 reasonable. An excerpt from Petitioner's Brief, and the earlier version of Special Condition 2.2 referred to therein, helps highlight this point:

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 20, 2010, Veolia filed a response to the review team’s memorandum in which it agreed to be bound by the 26 conditions. (C5-28). (Petitioner’s Brief, Page 2)

* * *

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. (C5-22)

Based on the foregoing consent, it becomes clear that the evaluation of Special Condition 2.2, and Petitioner’s appeal, must be broken into two parts: (i) the review of Petitioner’s initial gas collection and control system (“GCCS”) plan, and (ii) the review of Petitioner’s subsequent GCCS modifications. Based on the foregoing consent, Petitioner must be found to have waived its contest to the City’s review of Petitioner’s initial GCCS plan.

For the foregoing reasons, Petitioner’s appeal should be denied in part with respect to that portion of Special Condition 2.2 which addresses the City’s review of Petitioner’s initial GCCS plans and the Board should at the very most modify Special Condition 2.2 to match the form to which Petition consented.

III. Special Condition 2.2 is Supported by Manifest Weight of the Evidence

A. Review of Petitioner’s Initial GCCS Plan

In case the Petitioner’s consent is not sufficient to support at least the first part of Special Condition 2.2, it is also supported by the manifest weight of the evidence. In addition to the citations to the Record presented by the Solid Waste Agency of Lake County (“SWALCO”) in

its Public Comment, filed February 7, 2011, the most direct evidence that the City's review and approval of the Petitioner's initial GCCS plan is reasonable and necessary is presented by the testimony of Petitioner's witness, Devin Moose, P.E., in the exchange set forth below:

MR. PRICE: And the best way to control landfill gas and odor migration is through the installation and proper operation of a gas collection control system. Would you agree?

MR. MOOSE: Yes.

MR. PRICE: And we have talked about the fact that you said in your opening comments that this -- at this stage, this is a fairly preliminary design of the landfill. It goes through many more [iterations] even after this with more specificity and more detail, correct?

MR. MOOSE: Correct.

MR. PRICE: Given the primacy of the odor issue, the city would like to have the opportunity to review and comment on the final design before it goes down to the EPA for permitting. Would that requirement be reasonable in your opinion, that the city have the opportunity to review and comment on the design before it is finally submitted to the EPA?

MR. MOOSE: It is more than reasonable. I think it is welcomed.

(C3-179)

Based on the manifest weight of the evidence, especially the foregoing testimony, the Petitioner's appeal should be denied and Special Condition 2.2 should be affirmed, at least with respect to the City's opportunity to review and approve the Petitioner's initial GCCS plans.

B. Review of Petitioner's Subsequent GCCS Modifications

Next, the Board should observe the great deal of attention the City, SWALCO and the public participants focused on the landfill's odor problems during testimony, examination and public comment, as well as the history of odor-related violations described in Table V-2 in Appendix V. *See generally* C3-81 to C3-82; C-85; C3-93; C3-100 to C3-101; C3-109 to C3-113; C3-139 to C3-140; C3-174; and C1-5350 to C1-5355.

The GCCS Plan is also not expected to be a static system which will never change. The Petitioner admits to planning another \$1 million of improvements to the current, pre-Expansion GCCS system (C3-94) and states that as the landfill experiences growth and maturation the Petitioner will need to continue to “stay in front of that gas production curve.” (C3-107)

Furthermore, Special Condition 2.2 does not operate independently of the other conditions of approval imposed by the City. Special Condition 2.2 provides a means for the City to monitor and enforce the Petitioner’s compliance with other conditions of approval related to the City’s concern for Petitioner’s odor management, including: 2.4 (GCCS flare capacity not less than 9% greater than peak landfill gas production) (C5-22); 2.5 (GCCS must be constructed before leachate recirculation will occur and such recirculation system must be convertible for gas extraction) (C5-22); 2.12 (odor complaint root cause analysis and corrective action plan) (C5-23 to C5-24); and 2.13 (odor mitigation misting system) (C5-24). Hence, if the City is not given the opportunity to review the Petitioner’s future modifications to its GCCS plan it will frustrate its ability to enforce other conditions of approval, ensure that Petitioner is “staying ahead of the curve,” and modifying its GCCS in response to the relevant findings of any root cause analysis triggered by a series of odor complaints.

Based on the manifest weight of the evidence the Petitioner’s appeal should be denied and Special Condition 2.2 should be affirmed in its entirety.

IV. Special Condition 2.2 is Consistent with the Purposes of the Act

A. Statutory Construction Requires Approval of Special Condition 2.2

The Petitioner reads Special Condition 2.2 to “require” City Council approval of all future GCCS modifications and assumes that the City’s comments in such review will necessarily create conflicts with the IEPA air permitting regime. Frankly, Petitioner’s

interpretation overreaches and misinterprets Special Condition 2.2 in light of the evidentiary and statutory context in which it was imposed.

Special Condition 2.2 grants the City the opportunity to review the plans for future GCCS modifications, but does not require the City to perform such review. If the City does perform such review, it does not expressly state what standards will apply. To that extent, Special Condition 2.2 may be considered ambiguous. However, ambiguity itself does not render Special Condition 2.2 meaningless or invalid. Rather, the ambiguity simply, “widens the range of evidence that may be used to discover what the drafters intended.” County of Kankakee, et al. v. Illinois Pollution Control Board, et al., 396 Ill.App.3d 1000, 2009 WL 4723290 (Ill.App. 3 Dist. 2009) (citing Harvel v. City of Johnston City, 146 Ill.2d 277, 284, 586 N.E.2d 1217 (1992)). If the language of the condition is susceptible of two constructions, one of which will carry out its purpose and another which will defeat it, the condition should receive the former construction. *Id.* Furthermore, interpretation of an ambiguous statute or ordinance may be clarified by referring to legislative intent described in companion language describing the purpose of the law. *Id.*

In this context, Special Condition 2.2 was imposed in connection with the siting criteria described at Section 39.2(ii), to wit: “(ii) the facility is so designed, located and proposed to be operated that the public health, safety and welfare will be protected.” Consequently, the scope of the City’s review of the Petitioner’s GCCS plans, whether initially or in the future, must be guided by the purpose of this criteria, which clearly does not anticipate the City interjecting itself into the air permitting regime administered by the Illinois Environmental Protection Agency.¹ To interpret Special Condition 2.2 to mean that the City will necessarily create conditions which

¹ Although the City doesn’t concede that reference to statutory or regulatory performance standards is inappropriate for measuring whether the Expansion will be operated so that the public health, safety and welfare will be protected.

conflict with the applicable air pollution regulations and cause the Petitioner to be placed in an untenable position is to choose the connotation which renders it invalid. Clearly, this choice is disfavored and is unnecessary according to the plain language of the condition.

Further clarification of the City's intent for imposing Special Condition 2.2 is found in the preliminary language described in the City review team's June 8, 2010, memorandum describing the suggested conditions of approval, which was adopted by the City Council. (C5-21) There it states that the purpose of the special conditions is to address the pattern of operational challenges related to the collection and control of landfill gas, etc., and to exercise sufficient additional control to ensure that such challenges will be minimized so that the public health, safety and welfare will be protected. (C5-21) There is no direct or implied intent presented by this language that the City desires to interject itself into the air permitting process.

Finally, as described above, Special Condition 2.2 works in tandem with a number of the other special conditions imposed in relation to criteria 39.2(ii) – conditions which the Petitioner is not challenging and does not find unreasonable. Certainly, it is consistent with the purpose of the statute for the City to create a mechanism which assists it in monitoring and enforcing the conditions of siting approval. See Lake County v. Illinois Pollution Control Bd., 120 Ill.App.3d 89, 100, 457 N.E.2d 1309, 1316 (Ill.App. 2 Dist 1983) (The power to impose conditions under Section 39.2(e) implies a power to enforce them.) Nothing about this condition is inherently inconsistent with the regulatory scheme or necessarily interjects the City into the air permitting process.

For all of the foregoing reasons, the Board should find Special Condition 2.2 is valid and deny the Petitioner's appeal.

B. Analogous to Macon County Condition 8 analysis

The instant case is analogous to the Board's analysis of Condition 8 in the appeal captioned Veolia ES Valley View Landfill, Inc. v. County Board of Macon County, PCB 10-31 (September 2, 2010). In Macon County an affiliate of the Petitioner argued that the subject condition "could conflict with the IEPA permit issued for the expansion...Veolia believes that this condition would put it in an irreconcilable position of being required by the IEPA to....[be] in violation of this condition." *Id.*, at 7. In response, Macon contended that:

Veolia has objected to this condition on the basis that it could conflict with the IEPA-issued permit...Macon argues that it is not trying to subvert the IEPA process, but merely be allowed to meaningfully participate in any proposed changes to the operation of the landfill in the future that would change the basis upon which the County granted approval.

Macon states that this landfill has accumulated a number of violations and that others owned by Veolia also appear to have operational issues. Macon considered this information when determining whether or not to grant local siting approval under the health, safety and welfare criterion and to impose appropriate conditions thereto. Macon opines that, based on the landfill's historically poor performance, it is reasonable for Macon to want to maintain some control over the operation of the landfill during the time proposed by Veolia. *Id.* At 8.

If there were a more comparable case it would be difficult to find. Under this set of facts the Board found that the subject condition addressing the future operation of the landfill expansion was reasonable and supported by the manifest weight of the evidence. *Id.* at 9.

In Macon County, Veolia similarly relied on the Christian County case for the premise that the County did not have "continuing powers" once the County Board granted siting approval. The Board rejected this argument and distinguished Macon County's Condition 8 by finding the County, "is not imposing on itself "continuing powers" in the same way as set forth under Christian County Landfill (i.e. to impose future conditions which may alter or affect the

Agency's permit), but is merely providing itself an assurance that an influential factor in its decision-making will continue so that Criterion 2 is met." *Id.*

As explained in the foregoing section, Special Condition 2.2 is not designed to impose on the City continuing powers which may alter or affect the Agency's permit. Instead, Special Condition 2.2 is intended to first ensure the original GCCS design will protect the public health, safety and welfare and, as it relates to future modifications, to ensure that influential factors in its decision-making process, as evidenced by the related special conditions, continue to be met.

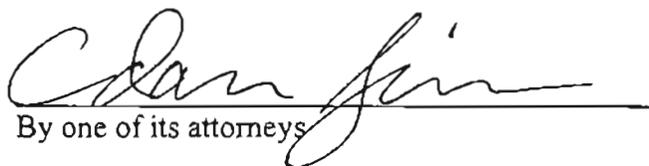
Just as in Macon County, the Board should find that Special Condition 2.2 is reasonable and necessary to ensure the public health, safety and welfare is protected as required under Criteria 39.2(a)(ii) of the Act. 415 ILCS 5/39.2(a)(ii).

V. Conclusion

For the reasons set forth in this brief, the Board should affirm Special Condition 2.2 and deny Petitioner's appeal.

Respectfully submitted,

CITY COUNCIL OF THE CITY OF ZION


By one of its attorneys

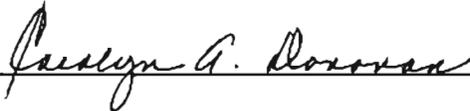
Adam B. Simon
Derke J. Price
Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.
Attorneys for Respondent
140 South Dearborn Street, Sixth Floor
Chicago, Illinois 60603
(312) 782-7606
(312) 782-0943 Fax

CERTIFICATE OF SERVICE

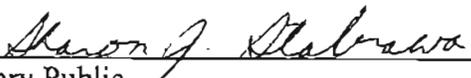
I, the undersigned, certify that on February 28, 2011, I have served the RESPONSE BRIEF OF RESPONDENT CITY COUNCIL OF THE CITY OF ZION, on the following persons at the following addresses by U.S. Mail, postage prepaid.

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

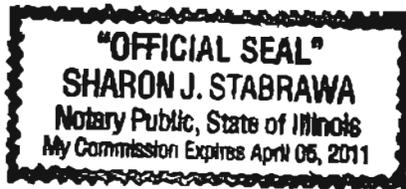
Larry Clark
700 N. Lake Street
Suite 200
Mundelein, IL 60060



SUBSCRIBED AND SWORN TO BEFORE ME
this 28th Day of February, 2011.



Notary Public



(SEAL)