

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE
JUL 12 2010
STATE OF ILLINOIS
Pollution Control Board

VEOLIA ES VALLEY VIEW)
LANDFILL, INC.,)
)
Petitioner,)
)
v.)
)
COUNTY BOARD OF)
MACON COUNTY, Illinois,)
)
Respondent.)

PCB 10-31
(Pollution Control Facility Siting Appeal)

NOTICE OF FILING

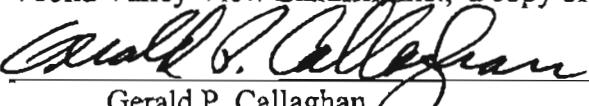
To:

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 N. Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

Randy Waks
Assistant State's Attorney
Macon County State's Attorney's Office
253 E. Wood Street
Decatur, Illinois 62523-1408

Larry Clark
Attorney For Macon County Board
700 N. Lake Street, Suite 200
Mundelein, Illinois 60060

PLEASE TAKE NOTICE that on July 12, 2010 I have filed with the Office of the Clerk of the Pollution Control Board one original and nine copies of the Reply Brief of Petitioner Veolia Valley View Landfill, Inc., a copy of which is herewith served upon you.



Gerald P. Callaghan
Attorney For Petitioner

Gerald P. Callaghan
Freeborn & Peters LLP
Attorneys for Petitioner
311 S. Wacker Drive, Suite 3000
Chicago, IL 60606-6677
Telephone: (312)360-6000

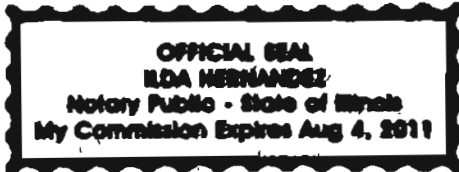
CERTIFICATE OF SERVICE

I, the undersigned, certify that on July 12, 2010, I have served the attached Reply Brief of Petitioner Veolia Valley View Landfill, Inc. on the persons to whom the foregoing Notice of Filing is addressed by U.S. Mail, postage prepaid.

Laura M. Wenzel

SUBSCRIBED AND SWORN TO BEFORE ME
this 12th day of July, 2010.

Ida Hernandez
Notary Public



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE
JUL 12 2010
STATE OF ILLINOIS
Pollution Control Board

VEOLIA ES VALLEY VIEW)
LANDFILL, INC.,)
)
Petitioner,)
)
v.)
)
COUNTY BOARD OF)
MACON COUNTY, Illinois,)
)
)
Respondent.)

PCB 10-31
(Pollution Control Facility Siting Appeal)

REPLY BRIEF OF PETITIONER VEOLIA ES VALLEY VIEW LANDFILL, INC.

Petitioner Veolia ES Valley View Landfill, Inc. ("Veolia") submits this brief in reply to the Brief of Respondent County Board of Macon County ("County"). For the reasons stated in this reply brief, the arguments contained in the County's brief should be rejected and the siting conditions contested by Veolia ES Valley View Landfill, Inc. ("Veolia") should be stricken by the Pollution Control Board ("Board").

I. INTRODUCTION

It is well established that siting conditions must supported by the record. *Browning Ferris Industries of Illinois, Inc. v. Lake County Board of Supervisors*, PCB 82-101 (Dec. 2, 1982). The County's brief underscores the obvious fact that there in no evidence in the record to support the five contested conditions. The County attempts to evade this obvious flaw by arguing that the conditions are supported by the record because the conditions were filed in the record as public comment. But the mere filing of recommended conditions in the record does not mean they are supported by evidence in the record. This is particularly true in this case where there was no testimony or other evidence in the record to support them. The conditions

may be part of the record, but they do not constitute credible evidence.

The contested conditions were filed on the 30th day of the 30-day post hearing comment period. They were filed as the recommendations of the review team, not as evidence. C3-21. For the County to call the recommendations public comment is somewhat disingenuous as they were filed in response to the hearing officer's invitation that findings and recommendations of the participants could be filed. C2-353. In fact, the County included the recommended conditions in Section C-3 of the appellate record, entitled "Briefs, Arguments, Statements of the Parties, Participants," not in Section C5, entitled "Public Comments." C10-1. It is clear that the conditions are nothing more than argument or advocacy; they are not evidence or supported by evidence.

Without independent, credible evidence to support the conditions, the Board must conclude that the conditions are against the manifest weight of the evidence, which Veolia and the County agree is the applicable standard of review. *Rochelle Waste Disposal, LLC, v. City of Rochelle*, PCB 07-113, slip op. at 20-21 (Jan. 24, 2008).

II. ARGUMENT

A. Condition 8

Condition 8 to the County's siting approval states as follows:

8. Pumping. The gradient control system located inside of the slurry wall and well MS-13 (or its replacements) shall be pumped for a minimum of 100 years unless otherwise released from this obligation by the Macon County Board.

In the siting application, Veolia proposed that it would pump the gradient control system inside the slurry wall for 100 years, unless approved or directed otherwise by the IEPA. C1-45268. Condition 8 removes the IEPA from this process and inserts the County into the IEPA's authority to control pumping of the gradient control system. By doing this, the County has

usurped the IEPA's permitting authority. In *County of Lake v. Illinois Pollution Control Board*, 120 Ill.App.3d 89, 457 N.E.2d 1309, 1316 (2d Dist. 1983), the court held that "(t)he language of section 39.2 does not vest the County Board with permitting authority." In that case, the court reviewed sections 39(a) and 39.2(e) of the Act and concluded that: "When read together, the sections suggest that the Agency maintains its authority to issue permits. The scope of authority granted the County Board is restricted."

Condition 8 usurps the IEPA's permitting authority and could conflict with the IEPA's permit for the landfill expansion. *Browning Ferris Industries of Illinois, Inc. v. Lake County Board of Supervisors*, PCB 82-101, slip op. at 15 (Dec. 2, 1982) (siting conditions that "might conflict with permit conditions" should be stricken). Condition 8 should be stricken.

B. Condition 9

Condition 9 to the County's siting approval states as follows:

9. Financial Assurance. A perpetual care trust fund should be established to address the long term pumping required at this site, and the rate of \$0.20 per ton or an annual payment of \$50,000, whichever is greater, shall be placed into such fund during the 28 years of landfill operation. This fund is to be used for the required pumping from year 58 (at the end of the 30-year post-closure) until year 128 as predicted in the GIA (the GIA models 100 years following closure). More specifically, assuming a 2011 start date, the expected closure is in 2039 and the GIA pumping will run to 2139). Alternately, this requirement may be met by the inclusion of such costs, for the specified period of time (year 2139), in the applicant's Financial Assurance for Closure and Post-Closure Costs as identified in Subpart F: Financial Assurance for Closure and Post-Closure Care (35 Ill.Admin.Code 807.600 *et seq*). If the Illinois EPA proposes to release the applicant's Financial Assurance, then the applicant (or their successor) shall either maintain such financial assurance as identified above or shall petition the Macon County Board to release such financial assurance requirements.

As mentioned in Veolia's initial brief, the County does not have legal authority to impose a condition requiring the posting of financial responsibility. *Browning Ferris Industries of Illinois, Inc. v. Lake County Board of Supervisors*, PCB 82-101, slip op. at 4 (Dec. 2, 1982;

County of Lake v. Illinois Pollution Control Board, 120 Ill.App.3d 89, 457 N.E.2d 1309, 1317 (2d Dist. 1983). In its brief, the County does not assert that it has legal authority to impose this condition. Instead, the County essentially argues that it does not trust that the IEPA will carry out its regulatory duty to require adequate financial assurance. However, the County's mistrust of the IEPA does not create legal authority for the County to impose this condition.

In addition, as pointed out in Veolia's initial brief, there is no support in the record for this condition. The County asserts that its calculation of the amount of financial security is based on Veolia's estimate that is contained on page C1-1519 of the record. However, that page of the record does not even address pumping of the gradient control system.

There is no support in the record for this condition, and the County has no legal authority to impose it. Condition 9 should be stricken.

C. Condition 11

Condition 11 to the County's siting approval provides as follows:

11. Leachate Elevations. The Applicants shall install and operate, at a minimum, the proposed number of leachate extraction wells and other leachate collection points to reduce the leachate elevation in Sections 1, 2 and 3 to a height no greater than the leachate elevations illustrated in the GIA model for future conditions (reference Hydrogeologic Characterization Report, Volume IV, Attachment 12b, Drawing Sheet 1, Predictive Model Landfill Potentiometric Contours) unless the Applicant can demonstrate that higher levels are acceptable by providing a revised GIA model to the County and Illinois EPA for review and approval. Leachate elevations shall be measured from at least 3 leachate piezometers, installed in each of Sections 1, 2 and 3 (located in the northern, central and southern portions), at points equidistant from leachate extraction points to minimize the influence of leachate extraction wells on the measured leachate elevation. Leachate elevation and leachate extraction well operation data shall be recorded at least quarterly and be readily available for County review.

This is another condition that is not supported by the record. The County tries to get around this problem by contending that the leachate levels at the existing landfill "are much

greater than allowed in today's landfills." This contention is erroneous for several reasons. First, John Bossert, Veolia's design engineer, testified that the leachate levels found at the existing landfill are common place and are present, and even greater, at other landfills in Illinois. C2-179-180. Second, although the review team was confused about this at the hearing (C2-195), the existing landfill is not required to meet the leachate level standard for new landfills. *See* 35 Ill. Admin. Code 814.302(a)(4). The only requirement regarding leachate levels is that the groundwater impact assessment must show that there will be no impact on groundwater. C2-61; 35 Ill. Admin. Code 811.317(b). Joseph Miller, Veolia's hydrogeologist, testified that the Valley View Landfill meets this regulatory requirement. C2-212. Mr. Miller's conclusion is supported by the Hydrogeologic Characterization Report in the siting application. C1-45287. Finally, the leachate levels used in the groundwater impact assessment are artificially high in that they were measured only after the leachate pumps had been shut off and the levels reached equilibrium, which in some cases took months. C1-47252-47261. In other words, the leachate levels used in the assessment are hyper-conservative, showing worst case conditions, because leachate will be pumped continuously and, contrary to statements made in the County's brief, leachate levels will be maintained at the bottoms of the extraction wells. C2-191, 256-258.

In addition to the fact that the record does not support the need for the condition, there is no evidence that piezometers can be installed and operated effectively in the waste mass of an active landfill. As mentioned in Veolia's initial brief, one of the members of the County's hearing committee did not even know what a piezometer is; yet he voted to impose this condition requiring piezometers in the waste mass. In its brief, the County desperately claims that the record supports the condition because Veolia's Hydrogeologic Characterization Report relies on measurements taken from piezometers. The County fails to mention, however, that the

piezometers referenced in the Hydrogeologic Characterization Report are groundwater piezometers, not leachate piezometers in an active waste mass.

Finally, this condition could conflict with conditions of a permit issued by the IEPA. A condition should be stricken for this reason. *Browning Ferris Industries of Illinois, Inc. v. Lake County Board of Supervisors*, PCB 82-101, slip op. at 15 (Dec. 2, 1982). This is another example of the County usurping the permitting authority of the IEPA. Condition 11 should be stricken.

D. Condition 19

Condition 19 to the County's siting approval states as follows:

19. Gradient Control System. The Gradient Control System to be used to de-water the horizontal expansion shall not be dismantled at the point in time when sufficient waste has been placed atop the base liner to discontinue its use, but shall be maintained such that a sample of the groundwater in the system can be extracted and tested once per year. The testing parameters shall be at least six (6) common leachate indicator parameters.

The County's brief accentuates the vagueness of this condition. The County argues that this condition should be upheld because Veolia gets to pick the parameters to test. Apparently, the County believes this transforms the unspecified leachate parameters mentioned in Condition 19 into specific parameters. The problem with the County's argument is that nowhere does the condition state who picks the parameters to be tested or how they are to be selected.

The County also argues that the term "leachate parameters" has a very specific meaning because such parameters are related to leachate and because they are site specific, although the condition does not require the parameters to be site specific. This is like saying that the term "food products" is specific because such products are related to food. Not very helpful. Indeed, the condition does not even state whether the leachate parameters must be one of the more than

200 listed in 35 Ill. Admin. Code 811.APPENDIX C. Apparently, the parameters to be tested do not have to be on this list if they are “related” to leachate; whatever that means.

The County also asserts that testing should be no big deal because the cost of testing would be nominal. But it is impossible to say whether the cost would be nominal because Condition 19 does not describe the type of testing that must be performed.

Another problem with Condition 19 is that testing water from a drain is not the same as testing groundwater from a monitoring well. As mentioned in Veolia’s initial brief, the regulations provide detailed guidance on how groundwater must be sampled and tested. 35 Ill. Admin. Code 811.318 and 319. There are no such safeguards in the nebulous program prescribed by Condition 19. False positives are not only possible, but expected.

The County’s final argument is that several people voiced concern over groundwater contamination. However, there is no evidence in the record that the groundwater supply of any nearby residents is in any way threatened. In fact, the evidence is to the contrary. Joseph Miller, Veolia’s hydrogeologist, testified that “groundwater moves from north to south, thus eliminating the potential that a water supply well would be affected by operation of this landfill.” C2-232-233. Furthermore, the gradient control system from which water samples would be tested is under the lateral expansion area, which will have a Sub-Title D liner and leachate collection system in accordance with 35 Ill. Admin. Code 811.302(e). In short, in addition to problems of vagueness, there is no need for this condition. It should be stricken.

E. Condition 27

Condition 27 to the County’s siting approval states as follows:

27. Visual Barriers. The development of the landfill shall be built in such a manner that perimeter and operational berms shall be placed to minimize view of the landfill operations and to assist in minimizing possible offsite impact. Perimeter berms shall be vegetated immediately after they are constructed. The east

perimeter berm shall be constructed prior to waste exhumation and other operations that expose waste within 500 feet of the east property boundary. The east perimeter berm shall be no less than 8 feet in height and shall extend, at a minimum, from point 5800 N to point 4800 N shown on Drawing A4, and shall be built wide enough to support vegetation as described on the application's landscape plan. Operational berms shall be used such that waste is not seen on the west, north or east. In areas where there is insufficient room to construct a separate berm, the elevated roadway may be horizontally extended and the plantings may be installed adjacent to the roadway surface or upon the sideslopes of such roadway/berm. The elevation of such a combination roadway/berm shall be 8 feet above the adjacent grade except where existing localized conditions are prohibitive and such determination is approved by the Macon County Solid Waste Department.

In its brief, the County does not cite to any place in the record where there was testimony about operational berms; yet this is the language used in Condition 27. The County's argument is based on screening berms, which are not even mentioned in the condition. Contrary to the County's assertion, John Bossert, the design engineer, did not testify that Veolia could build an operational berm or a screening berm. When asked if Veolia could build a screening berm, Mr. Bossert answered "I guess." C2-56. This is hardly affirmative testimony in favor of this condition. In fact, Mr. Bossert's testimony that followed that answer clarifies that he does not know what a screening berm is or how such an undefined berm would be constructed; nor has he ever seen one at a landfill. C2-56, 57.

The County suggests that a screening berm, not an undefined operational berm, is nothing more than an extension of a perimeter berm. But the difference between these types of berms is significant. A perimeter berm is constructed outside of the landfill footprint on level ground. In contrast, although Condition 27 does not provide any standards, it appears the County would expect a screening berm to be constructed on the side slope of the landfill over areas filled with waste. But there is no evidence in the record to suggest that such berms could be constructed, and Condition 27 does not include any construction standards, describing the size, location,

materials or design of such berms. There is no support in the record for this standardless and vague condition. It should be stricken.

III. CONCLUSION

For the reasons stated in Veolia's original brief and in this brief, Conditions 8, 9, 11, 19 and 27, which were imposed on the County's siting decision, should be stricken.

Respectfully submitted,

VEOLIA ES VALLEY VIEW LANDFILL, INC.

By 
One of its Attorneys

Gerald P. Callaghan
Freeborn & Peters LLP
Attorneys for Petitioner
311 S. Wacker Drive,
Suite 3000
Chicago, IL 60606-6677
Telephone: (312)360-6000

2101268v1