BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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PLEASE TAKE NOTICE that on March 7, 2011, I have filed with the Office of the Clerk of the Pollution Control Board the original and nine copies of the Reply Brief of Petitioner Veolia ES Zion Landfill, Inc., a copy of which is herewith served upon you.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on March 7, 2011, I have served the attached Reply Brief on the persons to whom the foregoing Notice of Filing is addressed by U.S. Mail, postage prepaid.

Lynn M. Wenzel

SUBSCRIBED AND SWORN TO BEFORE ME
this 7th day of March, 2011.

Cheryl L. Easton
Notary Public

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OFFICIAL SEAL
CHERYL L EASTON
Notary Public - State of Illinois
My Commission Expires Dec 9, 2013

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REPLY BRIEF OF PETITIONER VEOLIA ES ZION LANDFILL, INC.

Petitioner Veolia ES Zion Landfill, Inc. ("Veolia") submits this brief in reply to the Response Brief of Respondent City Council of the City of Zion ("City"). For the reasons stated below, Special Condition 2.2 should be stricken.

I. CONDITION 2.2 EXCEEDS THE CITY'S AUTHORITY UNDER SECTION 39.2

The City dedicates the first part of its Response Brief discussing the standard of review for appeals of siting conditions under Section 39.2(e) of the Illinois Environmental Protection Act and arguing that Condition 2.2 should be upheld under the standard of review. The City correctly recites the standard of review: "When the issue is whether a condition is necessary to accomplish the purpose of a Section 39.2(a) siting criterion, the Board must determine whether the local government's decision to impose the condition is against the manifest weight of the evidence." *Waste Management of Illinois, Inc. v. Will County Board,* PCB 99-141, slip op. at 3 (September 9, 1999)(emphasis added). However, the Response Brief misses, or conveniently ignores, the point of Veolia's argument, which is that, irrespective of the evidence in the record,

Condition 2.2 is not related to the purposes of Section 39.2 but instead invades the exclusive authority of the Environmental Protection Agency to issue permits under Section 39 of the Act.

Condition 2.2 would allow the City to review, approve or conditionally approve all plans and designs for the gas collection and control system before they are submitted to the Agency in the initial development permit application and in any and all modification permit applications in the future, including permit applications filed with the Bureau of Air. As mentioned in Veolia's opening brief, Condition 2.2 is not authorized by Section 39.2 and is nothing more than an effort by the City to involve itself in future permitting functions reserved exclusively to the Agency. Because Condition 2.2 is not related to or authorized by Section 39.2, it cannot be necessary to accomplish the purposes of that section. Therefore, Condition 2.2 cannot be sustained under the standard of review.

II. THE CITY'S RESPONSE BRIEF MISREPRESENTS THE LANGUAGE OF THE CONDITION TO WHICH VEOLIA CONSENTED

The City makes much of the fact that Veolia consented to an earlier and less onerous version of Condition 2.2, which is quoted on page 4 of the Response Brief.[1] Indeed, the City seems to concede that the version of Condition 2.2 imposed by the City in the Siting Approval Ordinance is not legally defensible. Veolia acknowledged in its opening brief (*see* footnote 1 on page 4) that it had consented to a different version of the condition. However, the City mischaracterizes the language of the condition that was approved by Veolia. Veolia did not consent to unlimited review by the City of the gas collection and control system plan prior to submittal of the application for a development permit. There were limitations in the language

[1] The version of Condition 2.2 that was approved by Veolia provides as follows: "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

that were not mentioned in the Response Brief. Specifically, the City was given only 60 days to approve or deny the proposed design. The City was allowed to review only the plans and designs for the system; Veolia did not agree to provide an operations and maintenance plan for the system, which is required by the version of Condition 2.2 that was imposed by the City in the Siting Approval Ordinance. Nor did Veolia agree that the City could impose future conditions. Finally, Veolia did not consent to the City's review, in any form or fashion, of permit applications after the initial application for a development permit.

III. CONDITION 2.2 IS NOT NECESSARY TO ENABLE THE CITY TO ENFORCE OTHER CONDITIONS

In the Response Brief, the City contends that Condition 2.2 is necessary to enable the City "to monitor and enforce [Veolia's] compliance with other conditions of approval." A similar argument was made in *County of Lake v. Illinois Pollution Control Board,* 120 Ill.App.3d 89, 457 N.E.2d 1309, 1316 (2d Dist. 1983) but was soundly rejected by the Court. In that case, Lake County had argued that one of the siting conditions was necessary in order to provide a means for enforcing other conditions. The Court upheld the Board's striking of the condition, recognizing that the imposition of the condition was "an attempt by the County Board to issue a permit" and that the "County Board has usurped the exclusive power of the Agency to grant or deny a permit." 457 N.E.2d at 1316. Notwithstanding the invalidation of the condition, the Court stated that the County Board was "not ... without a remedy," noting that "[t]he County Board can enforce its conditions in an action before the PCB as provided in sections 31(b) and 33(a)." *Id.* at 1317.

Similarly, in the present case, Condition 2.2 is not necessary to provide a mechanism for the City to enforce the other siting conditions. The City can enforce the other conditions by

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design." (C5-22, 28).

bringing an action before the Board.

IV. THE BOARD AND THE COURTS HAVE REJECTED A SITING AUTHORITY'S FUTURE INVOLVEMENT IN THE OPERATIONS AND PERMITTING OF A SITED FACILITY

As discussed in Veolia's opening brief, the Board in *Christian County Landfill, Inc. v. Christian County Board,* PCB 89-92, slip op. at 8, 14 (Oct. 8, 1989), held that once a local government grants siting approval its authority is "exhausted." Therefore, on August 3, 2010, the day the City Council granted siting approval to Veolia, the City lost any authority to direct future activities at the site, review and approve IEPA permit applications, or impose further conditions on Veolia.

In *Browning Ferris Industries of Illinois, Inc. v. Lake County Board of Supervisors*, PCB 82-101, slip op. at 12 (Dec. 2, 1982), the Board stated that "[s]iting conditions are in the nature of conditions precedent to an Agency permit." Yet Condition 2.2 is not written as a condition precedent to an Agency permit but instead is a mechanism for the City to become intertwined in the Agency permitting process. This is so because Veolia cannot review Condition 2.2 and know what it has to do to meet the City's requirements, which would be the case if it were truly a condition precedent. Veolia will not know what it is required to do until the City has approved, or more likely, conditionally approved Veolia's plans. This process essentially allows the City to control the permitting process because Veolia can only apply for a permit after it has received the City's blessing.

As mentioned in Section III above, the Appellate Court in *County of Lake* clearly rejected a local government's attempt to impose itself in the permitting process, noting that the Agency has the exclusive power to grant or deny a permit. 457 N.E.2d at 1316. By requiring Veolia to submit an application to the Agency only after it has been approved by the City and to be

governed by the City's future conditions, the City has become the Agency's gate keeper, thus controlling what ultimately can be approved by the Agency. This usurpation of the Agency's authority is not permitted by the Act. *County of Lake v. Illinois Pollution Control Board,* 120 Ill.App.3d 89, 457 N.E.2d 1309, 1316 (2d Dist. 1983); *Christian County Landfill, Inc. v. Christian County Board,* PCB 89-92, slip op. at 8, 14 (Oct. 8, 1989).

V. CONDITION 2.2 RESERVES BROAD, UNAUTHORIZED POWERS FOR THE CITY

Desperately searching for a response to Veolia's argument that Condition 2.2 is so broad that it would require the City's approval for all permits, including those under the jurisdiction of the Agency's Bureau of Air, the City makes the unusual argument that Condition 2.2 "does not expressly state what standards will apply" and "may be considered ambiguous." (Response Brief at 7) The City then embarks on a tortured analogy to the rules of statutory construction, which have nothing to do with the interpretation of a condition. The City's argument is surprising because if the condition is standardless and ambiguous, it should be stricken. *Browning Ferris*, PCB 82-101, slip op. at 13-16 (conditions that are standardless, vague or unspecific should be stricken).

It is clear that the City has taken this position because it realizes the condition, as written, cannot withstand scrutiny in that it not only usurps the permitting function of the Bureau of Land, but also the Bureau of Air. The City's efforts to revise the condition must be rejected because Veolia would still be subject to the City's review of all modification permit applications filed with the Bureau of Land as well as the imposition of further conditions in connection with the original development permit and subsequent modification permits.

The City's ambiguity argument actually raises an additional issue. Nothing could be more standardless, vague and unspecific than a condition that requires the City's approval of future

plans and that gives the City the authority to impose conditions in the future. There is simply no way for Veolia to know by reading Condition 2.2 what might be required in the future and whether it will be able to meet the potentially inconsistent demands of the City and the Agency. Since conditions should be stricken if they "might conflict with [Agency] permit conditions" (*Id.* at 15), Condition 2.2 should be stricken for this reason as well.

VI. THE MACON COUNTY CASE IS NOT ANALOGOUS

The City erroneously compares Condition 2.2 in the present case to a condition that was upheld in *Veolia ES Valley View Landfill, Inc. v. County Board of Macon County*, PCB 10-31 (September 2, 2010). Moreover, the City wrongly asserts that the petitioner's argument in *Macon County* was based on *Christian County Landfill, Inc. v. Christian County Board,* PCB 89-92, (Oct. 8, 1989). The City's assertions are wrong because *Christian County* was not even cited in the briefs filed by the petitioner in *Macon County,* and Condition 8, which was upheld in *Macon County*, is very different from Condition 2.2 in the present case.

Condition 8 in *Macon County* required the petitioner to pump the gradient control system for a minimum of 100 years unless released from the pumping obligation by the county. The petitioner had agreed to pump for 100 years but wanted the IEPA, rather than the county, to have the power to release the petitioner from the obligation, arguing that the condition could conflict with an IEPA permit if the Agency were to allow the petitioner to cease pumping sooner. The Board did not buy the petitioner's argument, noting that the petitioner had proposed pumping for 100 years and incorporated that assumption into its groundwater impact assessment, which formed the basis of the landfill design. Under these circumstances, the Board concluded that it was reasonable for the county to require the petitioner to do what it said it was going to do.

Contrary to the City's contention in the Response Brief, the petitioner in *Macon County* did not rely on *Christian County*. Rather, it was the Board that cited and discussed the *Christian County* case, pointing out that "[t]his current case is distinguishable from *Christian County Landfill, Inc. v. Christian County Board,* PCB 89-92, (Oct. 8, 1989)." The reason the petitioner in *Macon County,* unlike Veolia in the present case, did not rely on *Christian County* is that Condition 8 is not analogous to Condition 2.2. Condition 8 merely required the petitioner to do what it proposed. Moreover, Condition 8 was an objective condition that clearly informed the petitioner of what was required. In that sense, Condition 8 is analogous to Conditions 2.4, 2.5, 2.12 and 2.13, which are summarized on page 6 of the City's Response Brief. Each of those conditions requires Veolia to meet an objectively verifiable standard, a standard that was clear and understandable to Veolia on August 3 when the conditions were imposed.

In contrast, Condition 2.2 has no standards, as the City acknowledges on page 7 of its brief. It requires Veolia to submit future designs and plans to the City for approval or conditional approval before they are submitted to the Agency. Veolia has no idea what standards will be imposed by the City and does not know whether it will be able to satisfy the City's requirements. Nor does it know what, if any, conditions will be imposed or whether it will be able abide by such unknown and unwritten conditions. Indeed, Veolia does not even know whether it will be able to obtain the City's approval at all.

It is precisely because of these types of uncertainties that the Board has held that conditions that are imposed "to ensure that the operation of the [landfill] is in accordance with the criteria set forth in Section 39.2" are "not reasonable and necessary to accomplish the purposes of Section 39.2 of the Act." *Christian County Landfill.* slip op. at 12 and 14. Yet this is the rationale posited by SWALCO in its public comment and the City on page 6 of its brief as

justification for Condition 2.2. However, the Board has concisely summarized the problems created by conditions like Condition 2.2 as follows:

> To allow the county or local 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. *Id.*

By making itself the gate keeper for all permitting before the Agency, the City has usurped the Agency's exclusive authority under Section 39 of the Act. This the City cannot do. Condition 2.2 is very similar to the conditions that were stricken by the Board in *Christian County* on grounds that the county had invaded and usurped the authority of the Agency. The Illinois Appellate Court has recognized that when Sections 39 and 39.2 are read together it is clear that "the Agency maintains its authority to issue permits" and "the authority granted the [local siting authority] is restricted." *County of Lake v. Illinois Pollution Control Board,* 120 Ill.App.3d 89, 457 N.E.2d 1309, 1316 (2d Dist. 1983). The City has disregarded the limitations on its authority, and Condition 2.2 cannot be sustained.

VII. CONCLUSION

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

Respectfully submitted,

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