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Comment

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August 28, 2007

Hon. Jaclyn A. Brilling
Secretary
New York State Board on Electric
Generation Siting and the Environment
Three Empire State Place
Albany, New York 12223-135

RE: Case No.: 04-F-1178 Petition of AES New York for Clarification and/or To
Amend of its Certificate of Environmental Compatibility and Public Need in
Case No. 80002

Dear Secretary Brilling:

By this letter, the Town of Somerset (the "Town" or "Somerset") hereby submits comments regarding AES NY, L.L.C.'s July 17, 2007 Compliance Filing in this proceeding submitted "to satisfy the ordering clauses/certificate conditions" of the Order Granting Amendment of the Certificate of Environmental Compatibility and Public Need, dated June 29, 2007 ("Amendment Order"). The Town has reviewed the July 17, 2007 Compliance Filing and respectfully submits the following comments, specifically with respect to Item #5, wherein AES requests a modification to the specified moisture content for the compacted Low Permeability Soil Liner ("LPSL"), to increase the allowable moisture content range from that presently specified by the Certificate Holder (and agreed to by the parties in this case) (0% to 2% above optimum moisture content) to a proposed 0% to 6% above optimum moisture content.

Coming as it does immediately on the heels of the acceptance by the parties of the Amendment Order, this requested change is inconsistent with what can be reasonably assumed to represent a "compliance filing," and represents rather a "request for modification" of the agreed upon liner design. As such, those portions of the filing not consistent with the Amendment Order, to which AES is, and was, a signatory at the time this modification was put forth, should be rejected out of hand. This change would, if permitted, apply to the balance of those areas of Solid Waste Disposal Area ("SWDA") 2 not presently constructed or under construction – all areas except for SWDA 2 cells A & B, which have already been constructed,

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and were constructed consistent with the agreed upon liner design, and without this proposed modification. Thus:

1. It is the Town's opinion that the requested change, at least as presented in the July 17 compliance filing, is unsupported, in that:
 - a. AES is requesting a change in a critical liner design parameter less than one week after filing its acceptance of the design parameters that were testified to and made a part of the Joint Proposal and the Amendment Order and Amended Certificate in this proceeding. There is no justification presented in the compliance filing supporting this proposed modification. Indeed, there is no justification provided sufficient to support modifying this parameter when the specification calling for 0% - 2% maximum above optimum moisture content was used both in the construction of Cells A and B of SWDA 2, and furthermore served as the basis for the negotiations with regard to the development of the balance of the areas of SWDA 2. AES' letter of acceptance of the Amended Certificate was dated July 13, 2007 and filed with the Siting Board on July 16, 2007, one day before filing of the compliance filing.
 - b. The 0% to 2% maximum above optimal moisture content reflects a specified moisture - density - permeability relationship that demonstrates a critical element key to the performance of the LPSL, as specified by State and Federal regulation.
 - c. Specifically, 6 NYCRR Part 360-2.13 requires that:

The moisture content of the soil component of the liner system must be maintained, within the range identified [emphasis added] in the moisture-density- permeability relation developed in accordance with paragraph (3) [Certification Requirements] of this subdivision.
 - d. No supporting documentation (data, graphical representation of the proposed moisture-density-permeability relationship, etc.) outside of the cursory discussion found at page 9 of the referenced compliance filing has been presented, other than that of the obvious cost-savings that would support this requested change.
2. No discussion or documentation has been offered to ensure the Town that the requested change will neither: a.) compromise the performance of, nor b.) affect the long-term security of, the LPSL component of the Modified Liner Design

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agreed to in this case. Absent such information, it is not clear how the Town could responsibly agree to such a modification.

3. It is not clear to the Town what has changed subsequent to the agreement to the Amendment Order that would now render obsolete or restrictive the previously specified 0% to 2% maximum above optimal moisture content that other portions of the landfill in question have been constructed to, and further, no demonstration has been offered to support that the change requested will be at least as, if not more, protective of the environment and the health and safety of the residents of the Town of Somerset.

The Town of Somerset therefore respectfully requests that the Siting Board either reject, or barring that, hold in abeyance, that portion of the July 17, 2007 Compliance Filing related to the LPSL moisture content issues until such time as the Town and the Department of Environmental Conservation ("DEC") have been provided with the data upon which AES apparently relied to justify its proposed modification. The July 17, 2007 Compliance Filing does not contain at this time sufficient data nor analysis for a thorough and complete evaluation by the Town of this proposed modification. Until that analysis is provided, the Town believes this modification should be rejected until such information is provided and the Town and DEC have had an adequate period of time to review said information and comment to the Siting Board.

Thank you in advance for your consideration of these comments.

Very truly yours,

ANDREWS, PUSATERI, BRANDT,
SHOEMAKER & ROBERSON, P. C.

By Edwin J. Shoemaker
Edwin J. Shoemaker  

cc: Case No. 04-F-1178 Service List

James Austin, Public Service Commission

David Morrell, Public Service Commission

Stephen Hammond, Department of Environmental Conservation

Mark Hans, Department of Environmental Conservation Region 9