

ILLINOIS POLLUTION CONTROL BOARD  
June 16, 1988

IN THE MATTER OF: )  
 )  
PROCEDURAL RULES FOR EXCEPTIONS ) R88-10  
TO WELL SETBACK REQUIREMENTS; )  
SECTION 14.2(c) OF THE ACT )

ADOPTED RULE.      FINAL ORDER.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This rulemaking implements a provision of the Groundwater Protection Act, P.A. 85-863 (SB 1482), effective September 24, 1987. The provision is found at new Section 14.2(c) of the Environmental Protection Act (Act). Subsection (c) reads as follows:

The Board may grant an exception from the setback requirements of this Section and Section 14.3 to the owner of a new potential route, a new potential primary source other than landfilling or land treating, or a new potential secondary source. The owner seeking an exception with respect to a community water supply well shall file a petition with the Board and the Agency. The owner seeking an exception with respect to a potable water supply well other than a community water supply well shall file a petition with the Board and the Agency, and set forth therein the circumstances under which a waiver has been sought but not obtained pursuant to subsection (b) of this Section. A petition shall be accompanied by proof that the owner of each potable water supply well for which setback requirements would be affected by the requested exception has been notified and been provided with a copy of the petition. A petition shall set forth such facts as may be required to support an exception, including a general description of the potential impacts of such potential source or potential route upon groundwaters and the affected water well, and an explanation of the applicable technology-based controls which will be utilized to minimize the potential for contamination of the potable water supply well.

The Board shall grant an exception, whenever it is found upon presentation of adequate proof, that compliance with the setback requirements of this

Section would pose an arbitrary and unreasonable hardship upon the petitioner, that the petitioner will utilize the best available technology controls economically achievable to minimize the likelihood of contamination of the potable water supply well, that the maximum feasible alternative setback will be utilized, and that the location of such potential source or potential route will not constitute a significant hazard to the potable water supply well.

Not later than January 1, 1988, the Board shall adopt procedural rules governing requests for exceptions under this subsection. The rulemaking provisions of Title VII of this Act and of Section 5 of the Illinois Administrative Procedure Act shall not apply to such rules. A decision made by the Board pursuant to this subsection shall constitute a final determination.

The granting of an exception by the Board shall not extinguish the water well owner's rights under Section 6b of the Illinois Water Well Construction Code in instances where the owner has elected not to provide a waiver pursuant to subsection (b) of this Section.

On March 24, 1988, the Board, in proposing the rule, ordered that it be published in the Illinois Register and established a 30 day public comment period. It was published on April 15, 1988. Only one public comment was received, from the Illinois Environmental Protection Agency (Agency). Format adjustments have been made in response to comments of the Administrative Code Unit of the Secretary of State's office.

The Agency objected to certain provisions, namely:

1) The requirement to file an Agency response to each setback petition, rather than leaving to the Agency the right to determine whether to comment or intervene.

2) The procedural format establishing the Agency as a voluntary co-petitioner; the Agency does not ever intend to be a co-petitioner. Thus the Agency requests deletion of all co-petitioner language (Sec. 106.502, 106.503 and 106.504(b)(1)). It does, however, want to retain the language in 106.502(b), which authorizes the Agency to require background information from the petitioner. On the other hand the Agency wants deleted the language providing that the petitioner may request assistance from the Agency.

3) The Agency also requests deletion of Section 106.505, which provides for Agency response to the petition (and petitioner reply) when the Agency has not joined as co-petitioner.

The Agency bases its assertion on the fact that the variance language in Section 37(a) of the Act requiring that the Agency investigate each petition and make a recommendation "is conspicuously absent from Section 14.2(c)" (Agency Comments, p. 2).

The Agency asserts that it was the principal architect of the Groundwater Protection Act and intended that such language not follow that aspect of the variance procedural process.

The Board notes the following:

1. Section 26 of the Act grants the Board general authority to adopt "such procedural rules as may be necessary to accomplish the purposes of this Act." A review of the Board's procedural rules show many instances where the Board has provided detailed procedural steps beyond those expressed in the statute.

2. The Board does not understand the Agency's focus on the variance process, to the exclusion of all others, in asserting the intent of the 14.2(c) exception procedure. Section 14.2(c) does not "track" the variance procedural process in Section 37(a). The Board notes that the "arbitrary or unreasonable hardship" language in both Section 37(a), variances, as well as in Section 31(c), enforcement, is different from the "arbitrary and unreasonable" language in Section 14.2(c).

3. Section 14.2(c) uses the term "exception procedure". The only place where this term has been heretofore utilized is in the combined sewer overflow Exception Procedure (35 Ill. Adm. Code Subpart D, 306.360 - 306.374). This latter procedure utilized the Board's Title VII powers, including Section 26, was supported by the Agency, and has been in force for some time.

The Board rejects the Agency's inference that the statutory language in Section 14.2, which includes no procedural prohibitions whatsoever, is nevertheless to be construed as superseding the Board's Section 26 authority (see also Sec. 1(b)) to establish such additional procedural rules as may be necessary to accomplish the purpose of the Act. The Board also points out that, in Section 14.2, the Agency has major involvement in the setback adjustment process (see esp. 14.2(b)).

The Board also questions how the Agency can argue on the one hand that the Board cannot require the Agency to provide responses to or assist the petitioner and yet, on the other hand assert that the Board can require the petitioner to provide

background information to the Agency, when the latter requirement is not discussed in the statute either.

In any event, the Board believes that the Agency's active participation is a necessary element in these proceedings. This is reflected in renumbered Section 106.503(a).

The fundamental benefit to the Agency of the co-petitioner format is that it gives an incentive to the petitioner to provide up-front information to the Agency. The benefit to all concerned is that the process allows for the gathering and exchange of information, the airing of issues in a timely and efficient manner, and the development of a record sufficient for the Board to make a reasoned decision. Specifically, the format was established to efficiently use the Agency's resources by eliciting information for the Agency early-on.

Nevertheless, since the Agency has stated that it will never exercise its discretion to be a co-petitioner, it makes little sense for the Board to provide for that format. Therefore, the earlier proposed Sections 106.502 and 106.503 are deleted in their entirety and the rest of the sections are renumbered and edited accordingly. The Board has also provided for a response by any owner required to be noticed under Section 14.2(c).

The Board notes that Section 14.2(c) specifies that the rulemaking provisions of Title VII of the Act and Section 5 of the Administrative Procedure Act shall not apply to such rules.

#### ORDER

The Board directs that the following procedural rule be filed with the Secretary of State and be published in the Illinois Register.

#### PART 106 GENERAL PROVISIONS

#### SUBPART E: WATER WELL SETBACK EXCEPTION PROCEDURES

##### Section 106.501 Scope and Applicability

This Subpart applies to the provision for exception contained in Section 14.2(c) of the Act.

##### Section 106.502 Contents of Petition

- a) The petitioner shall file ten copies of the petition for exception with the Clerk of the Pollution Control Board (Board), and shall serve one copy upon the Agency.

- b) The petition shall contain the following information:
  - 1) A written statement, signed by the petitioner or an authorized representative, outlining the scope of the evaluation, the nature of, the reasons for and the basis of the exception, consistent with the level of justification contained in Section 14.2(c) of the Act.
  - 2) The nature of the petitioner's operations and control equipment; and
  - 3) Any additional information which may be required in Section 14.2(c) of the Act.
- c) In accordance with 35 Ill. Adm. Code 103.123, the petition shall contain proof of service on owners required to be notified and provided with a copy of the petition as required by Section 14.2(c).

Section 106.503 Response and Reply

- a) Within 21 days after the filing of a petition, the Agency and any owner required to be notified under Section 14.2(c) shall file with the Board a response to the petition. The response shall include comments concerning potential Board action on the petition.
- b) The petitioner may file a reply within 14 days after the filing of any response.

Section 106.504 Notice and Conduct of Hearing

- a) The Board will hold at least one public hearing prior to granting an exception.
- b) The hearing officer will schedule the hearing. The Clerk will give notice of hearing in accordance with 35 Ill. Adm. Code 102.122.
- c) The proceedings will be in accordance with 35 Ill. Adm. Code 102.160 through 102.164.

Section 106.505 Opinions and Orders


- a) The Board will adopt an Order and Opinion stating the facts and reasons leading to the final Board determination, consistent with any considerations which may be specified in Section 14.2(c) of the Act.

- b) The Board will issue such other Orders as the Board deems appropriate, including, but not limited to, accepting or rejecting the petition, requiring the submission of further information or directing that further hearings be held.
- c) Such Board Orders and Opinions will be maintained for public inspection by the Clerk of the Board and a listing of all determinations made pursuant to this subpart will be published in the Illinois Register and the Environmental Register at the end of each fiscal year.
- d) A final Board determination made under this subpart may be appealed pursuant to Section 41 of the Act.

IT IS SO ORDERED.

B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 16<sup>th</sup> day of June, 1988, by a vote of 6-1.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board