

ILLINOIS POLLUTION CONTROL BOARD
March 24, 1988

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

PROPOSED RULE. PUBLIC COMMENT

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

This rulemaking proposes to implement 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.

The proposed regulations are the same in most all procedural respects to the RCRA (35 Ill. Adm. Code 700 through 750) adjusted standards procedural rules found at 35 Ill. Adm. Code 106.410 through 106.416 (effective August 4, 1987).*

There are two differences that the Board believes, nevertheless, are compatible to the process. First, these proposed procedural regulations apply to a statute, rather than a regulation, of general applicability. Second, the justification requirements are contained in 14.2(c) of the Act rather than being specified in a regulation of general applicability. The

* The Board also notes that a) the RCRA adjusted standards procedures have been proposed to be utilized in the Board's newly proposed landfill regulations (see the R88-7, First Notice proposal adopted by the Board on February 25, 1988) and b) that these RCRA procedures are an adaptation of the combined sewer overflows exception procedure (see 35 Ill. Adm. Code Subtitle C: Water Pollution, Subpart D, 306.350 through 306.374.

The Board has found over time, that these procedures work; they allow for the gathering of information and the airing and adjudication of issues in a timely, efficient manner.

Board may, in the future, seek to adopt regulations defining the information which must be included in a petition to demonstrate that the statutory requirements have been met. The Board solicits comments on whether this can be done under the provisions of 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. However, the Board believes that there must be an opportunity for public comment, even considering the January 1, 1988 deadline for Board action. The Groundwater Protection Act has only recently been enacted and its provisions are numerous and interrelated. Therefore, the Board on its own motion will provide for a public comment period for 30 days after publication in the Illinois Register. Following this comment period, the Board intends to expeditiously adopt a final rule.

ORDER

The Board directs that the following proposed rule be published in the Illinois Register, and provide for a 30 day comment period.

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 Joint or Single Petition

A person may initiate an exception proceeding either by filing a petition jointly with the Illinois Environmental Protection Agency (Agency), or by filing a petition singly.

Section 106.503 Request to Agency To Join As Co-Petitioner

- a) The Agency may, in its discretion, act as a co-petitioner in any exception proceeding.
- b) Any person may request Agency assistance in initiating a petition for exception. The Agency may require the person to submit to the Agency any background information in the person's possession relevant to the

exception which is sought. The Agency shall promptly notify the person in writing of its determination either to join as a co-petitioner, or to decline to join as a co-petitioner. If the Agency declines to join as a co-petitioner, the Agency shall state the basis for this decision.

- c) Discretionary decisions made by the Agency pursuant to this Section are not appealable to the Board.

Section 106.504 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 and the Agency, if the Agency is a co-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, regulation of general applicability;
 - 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.

Section 106.505 Response and Reply

- a) Within 21 days after the filing of a petition, the Agency shall file a response to any petition in which it has not joined as a co-petitioner. This response shall include the Agency's comments concerning the Board's action on the petition.
- b) The petitioner may file a reply within 14 days after the filing of any Agency response.

Section 106.506 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 102.124.
- c) The proceedings will be in accordance with 35 Ill. Adm. Code 102.160 through 102.164.

Section 106.507 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.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 27th day of March, 1988, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board