

ILLINOIS POLLUTION CONTROL BOARD

Blake Leasing Company, LLC – Real Estate Series,	)	
as owner of Kirkland Quick Stop,	)	
	)	
Petitioner,	)	PCB No. 16-100
	)	(Water Well Setback Exception)
v.	)	
	)	
Illinois Environmental Protection Agency and	)	
Village of Kirkland,	)	
	)	
Respondents.	)	

NOTICE OF FILING

To: See Attached Certificate of Service

PLEASE TAKE NOTICE that on June 29, 2017, the Petitioner, Blake Leasing Company, LLC – Real Estate Series, as owner of Kirkland Quick Stop, filed the attached Post-Hearing Brief in the above-captioned matter, a copy of which is attached hereto and served upon you.

Dated: June 29, 2017

Respectfully submitted,

On behalf of Blake Leasing Company, LLC –
Real Estate Series

/s/Charles F. Helsten

Charles F. Helsten
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Charles F. Helsten, an attorney, certify that I have served the attached Post-Hearing Brief on the named parties below via email and by certified mail, return receipt requested, by 5:00 p.m. on June 29, 2017, by depositing the attached in the U.S. Mail at Rockford, Illinois, with proper postage or delivery charge prepaid.

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POST-HEARING BRIEF

Petitioner, Blake Leasing Company, LLC – Real Estate Series, as owner of Kirkland Quick Stop (“Blake Leasing”), by and through its attorneys, Hinshaw & Culbertson, LLP, states as follows for its Post-Hearing Brief:

I. ALL INTERESTED PARTIES HAVE BEEN AFFORDED ADEQUATE NOTICE OF BLAKE LEASING’S PROPOSAL AND, IN TURN, ITS PETITION FOR WATER WELL SETBACK EXCEPTION

Discussion

1. As briefly discussed during the course of the May 23, 2017 Hearing on this Petition, Section 14.2 of the Act does not include a specified notice period. Likewise, corresponding regulations relating to Petitions such as the one in question do not prescribe a specified notice period. Moreover, Petitioner’s review of case law in this regard did not reveal any decision which set forth any minimum notice period which must be met in connection with a Petition filed pursuant to Section 14.2 of the Act.

While the Canadian Pacific Railroad was not given formal written notice of the May 23, 2017 Hearing on the Petition until May 18, 2017, the Railroad has had actual knowledge of Blake Leasing’s intent for some time. As indicated by the attached Affidavit of John Blake, (which is marked Exhibit “A” and incorporated herein by this reference), consistent with his ongoing discussions with the Village of Kirkland concerning the possibility of the Village

ceasing to designate Well #1 as a potential community water supply well, Mr. Blake reached out to the Canadian Pacific Railroad to discuss possible closure of Well #1 in September of 2016. As noted in the attached Affidavit, those discussions (had in material part with a corporate department director and in-house legal counsel for the Railroad) included not only Blake Leasing's ongoing remedial efforts, but the fact that IEPA had advised Blake Leasing that the Agency felt that petitions for setback exceptions were necessary for both the ongoing remedial effort and the current UST system as well.

As such, the Railroad has had actual knowledge of Blake Leasing's situation (and, in turn, Blake Leasing's intentions) for many months. Of further significant note is the fact that the Railroad has never objected to Blake Leasing's remedial proposal, presumably because if it is successful, Blake Leasing's remedial plan only serves to enhance groundwater quality in and around Well #1.

For all of the above reasons, the Board should find that the notice requirements of Section 14.2 have been met.

II. DENIAL OF BLAKE LEASING'S PETITION WOULD IMPOSE AN ARBITRARY AND UNREASONABLE HARDSHIP

Section 14.2 of the Act, in pertinent part, provides that the Board shall grant an exception to the potable water supply well setback requirements set forth in that Section where a petitioner has demonstrated that compliance with the setback requirements of the Section would pose an "... arbitrary and unreasonable hardship upon the petitioner ...". The Petitioner submits that in the present case, it has clearly made this demonstration.

Section 14.2 of the Act does not provide definitive guidance as to what is considered to be an "... arbitrary and unreasonable hardship ...". However, case law construing this portion of Section 14.2 of the Act provides guidance, and also clearly demonstrates that Blake Leasing has met this requirement.

This Honorable Board granted a water well setback exception in the case of ***Village of Morton v. EPA***, PCB No. 1083, 2010 Ill. Env. Lexis 445, where it found that denying the exception would be arbitrary, and would constitute an unreasonable hardship on the Village of Morton (hereafter referred to as “Morton”). In that case, Morton sought a community water supply well setback exception to accommodate construction of a new deicing agent storage facility. ***Id.*** at 4. The proposed facility was considered a “potential secondary source” under Section 14 of the Act, and, in turn, the proposed location of the source was within the 200 foot minimum setback zones established for certain of Morton’s community water supply wells. ***Id.*** In advancing its Petition, Morton argued that under certain conditions, the existing Village deicing storage facility did not have sufficient storage capacity to address Morton’s deicing needs during an ongoing storm event. As such, Morton had been relying upon semi-tractor deliveries of additional salt in these situations to adequately address snow removal needs and ensure safe road conditions. Morton pointed out that the Village was paying a “premium” for these deliveries of salt on a “as needed” basis, resulting in a nearly forty percent (40%) increase in annual cost for road salt (approximately \$43,000.00 per year). ***Id.*** Morton provided evidence that it could save \$20,000.00 - \$30,000.00 per year by purchasing deicing road salt in the off season, but this would require development of additional room to store this deicing agent through expansion of the existing storage facility, since no feasible alternative location was available.

In response to Morton’s economic analysis (as well as the hardship associated with finding a suitable alternative location) the PCB found that Morton had met its burden of demonstrating that compliance with the setback provision set forth in Section 14.2 would pose an arbitrary and unreasonable hardship. ***Id.*** at 21.

The Petitioner in the present case has made this same demonstration. During the course of his testimony at the May 23, 2017 Hearing on the Petition, Mr. Ron St. John pointed out that if the Petitioner were not allowed to conduct remediation activities within the respective setback

zones of Village Wells #1 and #2, the contamination in question could most likely not be effectively addressed. (*See* 5/23/17 Hearing Transcript, p. 70, ll. 9-24 and p. 71, ll. 1-8). Mr. St. John went on to note that other, less desirable remedial proposals would most likely not be effective, and would involve significant expenditures. *Id.* In other words, Blake Leasing would devote significant dollars to remedial efforts to no good and/or effective end, which would constitute unnecessary economic waste in the extreme (much the same as was the case in the *Village of Morton*).

In addition to demonstrating an arbitrary and unreasonable “economic” hardship, Blake Leasing has demonstrated a practical physical hardship as well, which has also been recognized by this Honorable Board in past decisions.

In *Sangamon Valley Farm Supply v. IEPA* and *The Village of Saybrook, Illinois*, PCB No. 06-43, 2006 Ill. Env. Lexis 612, the Board found that the Sangamon Valley Farm Supply (“SVFS”) would suffer an arbitrary and unreasonable hardship if not granted an exception from the water well setback requirements, because the contamination in question could not be effectively addressed without granting of such an exception.

SVFS had operated a service station and associated underground storage tanks (USTs) for the storage of fuel and heating oil. *Id.* at 4. Upon removal of the five (5) USTs in question in 1998, SVFS discovered that one of the tanks had leaked. *Id.* During the course of the cleanup process, SVFS learned that part of that contamination in the upper most water-bearing unit had migrated to within 95 feet of the existing community water supply well for Saybrook, Illinois. Notwithstanding that fact, SVFS argued that strict adherence to the setback requirement set forth in Section 14.2 would be arbitrary and unreasonable. *Id.* at 11. SVFS had proposed to employ enhanced natural remediation (much the same as Blake Leasing has in the present case), the purpose of using enhanced natural attenuation being to improve water quality without exposing a community water supply source to undue risk of contamination. However, SVFS noted that

forms of enhanced natural attenuation of this sort are only effective if they can be administered in close proximity to the area of contamination.

The Board found that SVFS would indeed suffer an arbitrary and unreasonable hardship if it were not granted an exception from the water well setback requirements of Section 14.2, *Id.* at 26, as SVFS could not effectively remediate the contamination without coming within the statutory setback zone, and, in turn, could not obtain a No Further Remediation Letter (“NFR Letter”) until this remediation was completed. Of additional significant note was the fact that the Board found that not only would SVFS suffer an unusual hardship if it was not granted an exception, but, in addition, the Village of Saybrook would also benefit from remediation of the contamination in question.

Precisely the same situation exists in the present case. As also noted by Mr. St. John in the course of his testimony, enhanced natural attenuation of the contamination requires Blake Leasing to gain close proximity to the remaining pockets of residual contamination. (Hearing Tr., p. 70, ll. 9-24). As noted by Mr. St. John, this can only be done if Blake Leasing is allowed to come within the statutory setback zones now established for the Village of Kirkland Wells #1 and #2. Moreover, as also pointed out by Mr. St. John during the course of his testimony, the purpose of the remedial proposal included Blake Leasing’s Petition is to improve water quality and enhance environmental conditions in the surrounding area. In addition, Blake Leasing would be unable to obtain an NFR Letter from the Agency without remediating the contamination. As such, Blake Leasing would not only suffer an unusual hardship if it was not granted an exception, but, much like the Village of Saybrook in the *Sangamon Valley Farm Supply* case, the Village of Kirkland would also benefit from Blake Leasing’s remedial effort.

For all of the above mentioned reasons, the Petitioner respectfully submits that it has met its burden in demonstrating that compliance with the existing setback requirements for Village of Kirkland municipal Wells #1 and #2 would pose an arbitrary and unreasonable hardship.

III. PETITIONER HAS DEMONSTRATED IT WILL UTILIZE THE BEST AVAILABLE TECHNOLOGY CONTROLS ECONOMICALLY ACHIEVABLE TO MINIMIZE THE LIKELIHOOD OF CONTAMINATION OF VILLAGE WELLS #1 AND #2

Both submissions made by St. John Mittelhauser in support of the Petition, as well as the testimony of Ron St. John clearly demonstrate that under the physical circumstances presented in this matter, the air sparging regimen proposed utilizes the best available technology controls economically achievable to minimize the likelihood of contamination of Village Wells #1 and #2. As noted by Mr. St. John in his testimony, the active ingredient involved in the sparging process is simply ambient air. In turn, since the remedial problem presented in this case is replenishing levels of dissolved oxygen in areas where dissolved oxygen has become severely depleted (thus depriving naturally-occurring microorganisms of the means to effectively metabolize the residual petroleum product contamination), the introduction of dissolved oxygen through air sparging constitutes the best (and most economically practicable) method of remediation. (*Id.* at p. 48, ll. 5-24, p. 49, ll. 1-3, p. 66, ll. 7-24, p. 67, ll. 1-2).

IV. THE PETITIONER WILL UTILIZE THE MAXIMUM FEASIBLE ALTERNATIVE SETBACKS FOR VILLAGE WELLS #1 AND #2

Discussion

As noted by Mr. St. John during the course of his May 23, 2017 testimony, and as also set forth in various submissions made by St. John Mittelhauser on behalf of the Petitioner through the course of this matter, enhanced natural attenuation of residual petroleum contaminants such as those involved here involves gaining close physical proximity to the areas of residual contamination. (*Id.* at p. 70, ll. 9-24, p. 71, ll. 1-3). Mr. St. John's testimony demonstrates that the Petitioner has done everything possible to maximize the alternative setbacks that can be maintained while, at the same time, being able to effectively remediate the various pockets of residual contamination, thus enhancing the quality of the environment in and around this area. (*Id.* at pp. 58 and 59 and Petitioner's Hearing Exhibit "F").

V. **THE PETITIONER HAS DEMONSTRATED THAT ITS REMEDIAL PROPOSAL WILL NOT CONSTITUTE A SIGNIFICANT HAZARD TO THE POTABLE WATER SUPPLY WELL**

Again, as noted by St. John Mittelhauser in its various submissions in this case, as well as the testimony of Ron St. John, the active ingredient involved in the sparging proposal was simply ambient air. (*Id.* at p. 48, ll. 1-3). Moreover, Mr. St. John made clear that the air sparging proposal will not in any way exacerbate the nature, extent or concentration of the plume of contamination in and around Wells #1 and #2, or in any way threaten Wells #1 or #2. *Id.* at p. 48, ll. 5-24, p. 67, ll. 18-24, p. 68, ll. 16-20, p. 69, ll. 1-14. In short, the remedial process being proposed in the present case simply involves supplying indigenous microbial populations with the dissolved oxygen necessary to metabolize those organisms “food source” (i.e., the residual petroleum product contamination). As noted by Mr. St. John in his testimony, this is “ ... about as natural as a remediation would get ...”. *Id.* at p. 69, ll. 13-14.

Conclusion

As noted above, the Petitioner has clearly presented adequate proof that as to each of the elements required to be proven under Section 14.2 of the Act.

In addition, no public comments have been filed in this matter objecting to Blake Leasing’s Petition. Moreover, no interested parties have objected to Blake Leasing’s Petition. In fact, EPA has indicated its strong support for Blake Leasing’s remedial request. (*See* p. 2 of the Illinois EPA’s March 23, 2017 Response to Petitioner’s Responses to the Illinois Pollution Control Board’s Questions). Presumably, the support of the Agency, as well as the lack of objection by any other interested party or the public is due to the fact that it is clear that all interested parties realize that they (as well as the environment) will benefit if Blake Leasing’s Petition is granted.

As such, and for all of the foregoing reasons, the Petitioner, Blake Leasing Company, LLC – Real Estate Series, as owner of Kirkland Quick Stop, respectfully requests that the

Pollution Control Board grant its Amended Petition as set forth herein, as well as such other and further relief as this Honorable Board deems just and proper.

Dated:

Respectfully submitted,

On behalf of Blake Leasing Company, LLC –
Real Estate Series

/s/Charles F. Helsten

Charles F. Helsten
One of Its Attorneys

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AFFIDAVIT OF JOHN BLAKE

I, John Blake, being first duly sworn on oath, do depose and state as follows:

1. That I am a Member of Blake Leasing Company, LLC – Real Estate Series, as owner of Kirkland Quick Stop, and have personal knowledge of the matters set forth herein.

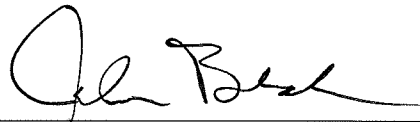
2. After engaging in ongoing discussions with the Village of Kirkland concerning the Village possibly ceasing its designation of Well #1 as a community water supply source, in connection with the Petition which is the subject of this matter, I contacted the Canadian Pacific Railroad. In that regard, I informed the Railroad of my desire to seek closure of Well #1 consistent with my ongoing discussions with the Village concerning my request that the Village cease its designation of Well #1 as a community water supply source. I first contacted the Canadian Pacific Railroad in September, 2016. My final contact was with David S. Drach, Director of Real Estate Sales & Acquisition, U.S., Attorney, 900 Canadian Pacific Plaza, 120 South Sixth Street, Minneapolis, Minnesota 55402. Mr. Drach's phone number is 612-904-6139. During the course of various telephone conversations, Mr. Drach was made aware of ongoing remedial activities at the Site, as well as the current Kirkland Quick Stop UST system located within the setback of Well #1. I recall informing Mr. Drach that IEPA had requested that Blake Leasing file Petitions for Setback Exception both for ongoing remedial activity as well as for the



current UST system. After reviewing this matter, Mr. Drach indicated that the Railroad believed that physical closure and abandonment of Well #1 was not in its best interests. This was conveyed to me in the form of an email on November 7, 2016. Based upon the same, Blake Leasing elected to go forward with the filing of an Amended Petition for Setback Exception in this matter.

Further the Affiant sayeth not.

Dated: June 27, 2017

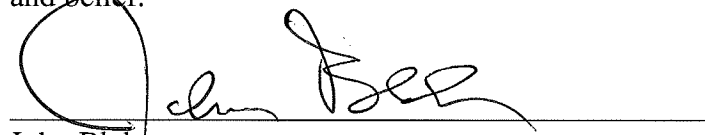


John Blake, Member of Blake Leasing, LLC –
Real Estate Series

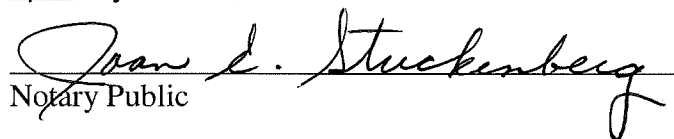
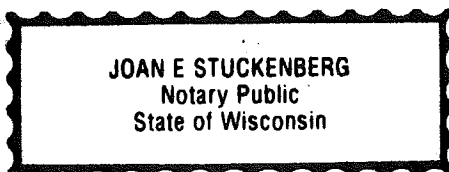
ATTESTATION

STATE OF ~~ILLINOIS~~ Wisconsin)
) SS.
COUNTY OF Oneida)

John Blake, being first duly sworn on oath, deposes and states that he has read the foregoing document, and the information herein are true, correct and complete to the best of his knowledge and belief.


John Blake

SUBSCRIBED and SWORN to before me this
27th day of June, 2017.


Notary Public

CERTIFICATE OF SERVICE

I, Charles F. Helsten, an attorney, certify that I have served the attached Post-Hearing Brief on the named parties below via email and by certified mail, return receipt requested, by 5:00 p.m. on _____, 2017, by depositing the attached in the U.S. Mail at Rockford, Illinois, with proper postage or delivery charge prepaid.

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