

ILLINOIS POLLUTION CONTROL BOARD
April 3, 1997

SHELL OIL COMPANY,)
)
 Petitioner,)
)
 v.) PCB 97-99
) (Water Well Setback Exception)
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

ORDER OF THE BOARD (by J. Yi):

On December 5, 1996, Shell Oil Company (Shell) filed a petition for water well setback exception. Shell's request is for its facility located at 9560 West 159th Street, Orland Park, Cook County, Illinois. The Board accepted this matter for hearing on December 5, 1996.

On December 27, 1996 the Illinois Environmental Protection Agency (Agency) filed a motion to dismiss Shell's petition. On January 6, 1997 the Agency filed a motion for reconsideration of the Board's December 19, 1996 order accepting the petition for hearing. On January 14, 1997 Shell filed a response to both of the Agency's motions.¹

BACKGROUND

Shell operated a facility at 9560 West 159th street, Orland Park, Illinois from 1977 until 1989 when it closed the facility and removed the underground storage tanks (USTs). (Pet. at 1-2.) In 1984, Cooper Oil Company (Cooper), a neighbor to the facility, relocated a water well approximately 180 feet from Shell's tank bed at the facility. (Pet. at 2.) Due to releases from its USTs, Shell conducted remediation at the facility after it was closed. (Pet. at 1.) The facility has been classified as a "High Priority" site due to Cooper's water well being located within 200 feet from the facility. Shell maintains that there remains only residual hydrocarbon readings in the soil and in one of six monitoring wells located around the site. (Pet. at 2-3.) The Agency's rejection of Shell's closure request is the subject of an appeal currently pending before this Board in PCB 96-48. (Pet. at 2.)

REGULATORY FRAMEWORK

¹ Shell's petition will be referenced to as "Pet. at "; the Agency's motion to dismiss will be referred to as "Mot. at "; the Agency's motion for reconsideration will be referenced as "Reconsideration at "; and Shell's response will be referred to as "Resp. at ."

Section 14.2 of the Act.

A minimum setback zone is established for the location of each new potential source or new potential route as follows:

(a) Except as provided in subsections (b), (c) and (h) of this Section, no new potential route or potential primary source or potential secondary source may be placed within 200 feet of any existing or permitted community water supply well or other potable water supply well.

(b) The owner of a new potential primary source or a potential secondary source or a potential route may secure a waiver from the requirement of subsection (a) of this Section for a potable water supply well other than a community water supply well. A written request for a waiver shall be made to the owner of the water well and the Agency. Such request shall identify the new or proposed potential source or potential route, shall generally describe the possible effect of such potential source or potential route upon the water well and any applicable technology-based controls which will be utilized to minimize the potential for contamination, and shall state whether, and under what conditions, the requestor will provide an alternative potable water supply. Waiver may be granted by the owner of the water well no less than 90 days after receipt of the request unless prior to such time the Agency notifies the well owner that it does not concur with the request.

The Agency shall not concur with any such request which fails to accurately describe reasonably foreseeable effects of the potential source or potential route upon the water well or any applicable technology-based controls. Such notification by the Agency shall be in writing, and shall include a statement of reasons for the nonconurrence. Waiver of the minimum setback zone established under subsection (a) of this Section shall extinguish the water well owner's rights under Section 6b of the Illinois Water Well Construction Code but shall not preclude enforcement of any law regarding water pollution. If the owner of the water well has not granted a waiver within 120 days after receipt of the request or the Agency has notified the owner that it does not concur with the request, the owner of a potential source or potential route may file a petition for an exception with the Board and the Agency pursuant to subsection (c) of this Section.

No waiver under this Section is required where the potable water supply well is part of a private water system as defined in the Illinois Groundwater Protection Act, and the owner of such well will also be the owner of a new potential secondary source or a potential route. In such instances, a prohibition of 75 feet shall apply and the owner shall notify the Agency of the intended action so that the Agency may provide information regarding the potential hazards associated with location of a potential secondary source or potential route in close proximity to a potable water supply well.

(c) The Board may grant an exception from the setback requirements of this Section and subsection (e) of 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 5-35 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.

* * *

(g) Nothing in this Section shall preclude any arrangement under which the owner or operator of a new source or route does the following:

- (1) purchases an existing water supply well and attendant property with the intent of eventually abandoning or totally removing the well;
- (2) replaces an existing water supply well with a new water supply of substantially equivalent quality and quantity as a precondition to locating or constructing such source or route; or

(3) implements any other arrangement which is mutually agreeable with the owner of a water supply well.
(415 ILCS 5/14.2)

(4) modifies the on-site storage capacity at an agrichemical facility...

* * *

Section 57.7(a)(3) of the Act states:

Sites shall be classified as High Priority if any of the following are met:

- (B) The underground storage tank is within the minimum or maximum setback zone of a potable water supply well or regulated recharge area of a potable water supply well.

35 Ill. Adm. Code 732.304(b) states:

The underground storage tank is within the minimum or maximum setback zone of a potable water supply well or regulated recharge area of a potable water supply well.

STANDARD OF REVIEW

The courts have stated that a motion to dismiss a pleading should be granted where the well-pleaded allegations, considered in the light most favorable to the non-movant, indicate that no set of facts could be proven upon which the petitioner would be entitled to the relief requested. (See Uptown Federal Savings & Loan Assoc. v. Kotsiopoulos (1982), 105 Ill. App. 3d 444, 434 N.E.2d 476.) The Board has stated "[a] motion to dismiss, like a motion for summary judgment, can succeed where the facts, taken in a light most favorable to the party opposing the motion, prove that the movant is entitled to dismissal as a matter of law." (BTL Specialty Resins v. Illinois Environmental Protection Agency, (April 20, 1995), PCB 95-98.)

In ruling upon a motion for reconsideration the Board is to consider factors including, but not limited to, error in the previous decision and facts in the record which are overlooked. (35 Ill. Adm. Code 101.246(d).) In Citizens Against Regional Landfill v. The County Board of Whiteside County, (March 11, 1993), PCB 93-156, the Board stated that "[t]he intended purpose of a motion for reconsideration is to bring to the court's attention newly-discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the court's previous application of the existing law." (Korogluyan v. Chicago Title & Trust Co., (1st Dist. 1992), 213 Ill. App.3d 622, 572 N.E.2d 1154.)

AGENCY'S ARGUMENTS

Arguments in Support of Its Motion to Dismiss

The Agency offers four arguments in support of dismissal: (1) the requested relief is outside the scope of Section 14.2 of the Act, (2) the petition is premature, (3) the Agency has not made a final determination denying the water well setback waiver, and (4) the petition does not contain minimum elements of fact to support the Board's acceptance of the petition for hearing. These arguments are discussed sequentially in the following sections of the opinion.

The requested relief is outside the scope of a Section 14.2 of the Act. The Agency states that "Shell is actually asking the Board to do is to declare that the Cooper Oil well is not a potable well." (Mot. at 12.) The Agency further states that "[i]f the Board could declare and decide in this action that the Cooper Oil well is not a potable water supply well, then the underground storage tanks that were at the site would not have been within 200 feet of a potable water supply well, and consequently, the site would not be a high priority site for remediation purposes under Section 57.7(b)(3)(B) of the Act." (Mot. at 12.)

The Agency argues that a Board declaration that a water well is not potable is not within the scope of Board actions authorized by Section 14.2 of the Act. In support of its argument the Agency cites to Section 14.2(c) of the Act which states, "[t]he Board may grant an exception from the setback requirements of this Section and subsection (e) of 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". (Mot. at 12.)

The Petition is Premature. The Agency states that the purpose of a setback waiver and a setback exception is to allow a new potential route or source to move within the setback zone of a potable well as described in Section 14.2 of the Act. (Mot. at 14.) The Agency asserts that Shell is in fact not seeking to place a new potential source within the setback zone of Cooper's well but rather Shell seeks relief from its determination that Shell's site is a high priority site under Section 57.7(b)(3)(B) of the Act. (Mot. at 13-14.) The Agency claims that "Shell is attempting to obtain relief from the 200-foot radial area around the Cooper Oil well being designated as a setback zone so that Section 57.7(b)(3)(B) of the Act is not applicable." (Mot. at 14.) The Agency argues that this is an inappropriate use of the relief authorized by Section 14.2 of the Act. (Mot. at 14.)

The Agency, citing to Section 14.2 of the Act, asserts that the owner of a site applies for the exception for a new potential route, a new potential primary source, or a new potential secondary source. (Mot. at 13.) The Agency claims that "Shell should apply for the Exception, if it is the owner of the site and if it intends to place a new potential route, a new potential primary source, or a new potential secondary source within the setback zone of a potable well." (Mot. at 13.) The Agency argues that Shell does not intend to place a new route or a source within 200 feet of Cooper's well. (Mot. at 13.)

The Agency also maintains that a new owner of the site should apply for the exception if the new owner requires relief from the setback requirements. (Mot. at 14.) The Agency states that Shell does not know if a new potential route or a new potential primary source or a new potential secondary source will be placed within the setback zone. (Mot. at 14.) The Agency

argues that Shell should not be requesting the exception from the Board and that the new owner should make the request, if one is required. (Mot. at 14.)

The Agency Has Not Made a Final Determination. The Agency states that Shell stated that “[t]he Agency objected to the waiver claiming that the site was an existing source, not a potential new source, and as such, the provisions of 735 ILCS 5/14.2 (sic) did not allow a waiver.” (Mot. at 15.) The Agency maintains that its response letter, dated May 16, 1996, “expressed no objection to Shell’s waiver application.” (Mot. at 15.) Instead, the Agency asserts that “[t]he letter’s intent was to request additional information to assist in determining if the waiver was justified.” (Mot. at 15.) The Agency states that it requested information to establish the need for a waiver from Section 14.2 (a) of the Act, and to obtain necessary information to enable the Agency to decide if it could concur with the waiver request according to Section 14.2(b) of the Act. (Mot. at 15.)

Additionally, the Agency cites the second, third and fourth paragraphs of the Agency response letter. (Mot. at 15.) The opening sentences of those paragraphs begin as follows:

In order to determine if a waiver is necessary for your site, the Agency must determine if the gas station is a new potential secondary source.

* * *

In order to determine if your site would meet the definition of a new potential secondary source, please address the following:

* * *

In addition to addressing the three questions above, please provide the following information as a supplement to your letter of March 7th: (Mot. at 15.)

* * *

The Agency argues that it is evident from the wording of these paragraphs that it had not made any determination about granting or denying of Shell’s waiver. (Mot. at 15-16.)

The Petition Does Not Contain Minimum Elements of Fact to Support the Board’s Acceptance of the Petition for Hearing. The Agency states that Section 14.2 of the Act sets forth four criteria all of which Shell must meet for the Board to grant the exception. (Mot. at 16.) The Agency argues that Shell has not met them. The Agency claims that “it is evident that the Petitioner is either premature in requesting the Exception or the wrong party to be requesting the Exception.” (Mot. at 16.) The Agency bases its claim on the following four reasons:

1. Compliance with the setback requirements of this section would pose an arbitrary and unreasonable hardship upon the petitioner;

2. The petitioner will utilize the best available technology controls economically achievable to minimize the likelihood of contamination of the potable water supply well;
3. That the maximum feasible alternative setback will be utilized; and
4. The location of such potential source or potential route will not constitute a significant hazard to the potable water supply well. (Mot. at 16-18.)

In its motion to dismiss the Agency argues that Shell failed to submit the necessary information to carry the burden of proof as set forth in Section 14.2 of the Act. (Mot. at 18.)

Motion for Reconsideration

The Agency requests that the Board reconsider and rescind the December 19, 1996 order which accepted the Petition, so that the Board may consider the Agency's Motion to Dismiss filed with the Board on December 23, 1996. (Reconsideration at 2.) In support of this request the Agency states that Section 106.603, Response and Reply, provides that the Agency shall file a response within 21 days after the filing of Shell's petition. (Reconsideration at 2.) The Agency asserts that it filed its motion to dismiss as a response on December 23, which was within twenty-one days of the filing of Shell's petition. (Reconsideration at 2.) Furthermore, the Agency states that the Board issued its order accepting Shell's petition within the twenty-one day period provided for in Section 106.603. (Reconsideration at 2.)

In addition to reconsidering our order of December 19, 1996 the Agency requests that the Board also consider the following additional information in deciding the Agency's motion to dismiss. (Reconsideration at 4.) The Agency states that subparagraph (b) of Section 106.602, Contents of Petition, requires that Shell's petition contain: 1) a written statement, signed by the petitioner or authorized representative, outlining the scope of evaluation, the nature of, the reasons for and the basis of the exception, consistent with the level of contained in Section 14.2(c) of the Act; and 2) the nature of the petitioner's operations and equipment. (Reconsideration at 4.) The Agency argues that Shell failed to meet the terms of Section 106.602(b). The Agency asserts that Shell's petition failed to outline the scope of the evaluation and the nature of, the reasons for and the basis of the exception and did not contain information on the nature of the Shell's future operations at the site, including the description of the equipment that the Shell would be installing. (Reconsideration at 5.) The Agency requests the Board to reconsider its December 19, 1996 order and the Agency's motion to dismiss.

SHELL'S RESPONSE

In response Shell acknowledges that "this action is a somewhat unique one for the Board and requires this Board to determine whether this Board has the authority to grant relief to Petitioner in the somewhat unique facts of this case." (Resp. at 1.) Shell states that in an attempt

to remove that impediment² to closure of the site remediation, it requested the owner of the property agree to allow Shell's former UST bed to remain in its current state within 200 feet of the water well. (Resp. at 2.) Shell states that the Agency rejected this request because the Agency believes that an agreed upon exception to the water well setback restriction can only apply to new potential sources of contamination, not to existing sources, and therefore the process set forth in 415 ILCS 5/14.2(g) does not apply. (Resp. at 2.)

Shell states that as a result of the Agency's decision it petitioned the Board for a variance from the water well setback requirement which is PCB 96-236. (Resp. at 2.) Shell states that the "Board determined that a variance was not the appropriate remedy and noted that "[i]f permanent relief from Section 14.2 is sought, a party must request an adjusted standard pursuant to the Water Well Setback Exception procedures as set forth in 35 Ill. Adm. Code 106.601, et seq." (Resp. at 3.) Shell maintains that after the Board's decision in PCB 96-236 it entered into negotiations with the Agency to determine whether the Cooper water well was, in fact, a potable water well, due to its acknowledged use by Cooper only for truck washing and toilet flushing, not for drinking purposes. (Resp. at 3.) Shell states that due to the negotiations being unproductive, it brought this action to seek a permanent exception from the setback requirements. (Resp. at 3.)

Shell claims that the Board has held "that it is not the form of the request before the Board, it is the substance of the relief sought." (Resp. at 3.) Shell contends that it has been directed by the Board to bring this petition. (Resp. at 3.) Shell argues that if the Board dismisses its petition it will have no remedy. (Resp. at 3.) Shell then states that the USTs at the site were located at the site before the effective date of the water well setback requirements; and that Cooper's water well was installed before the effective date of the water well setback requirements. (Resp. at 3.) Shell reiterates that the Agency has concluded that there is no remedy pursuant to the statute. (Resp. at 3.) Shell contends that the Agency is asking "the Board to apply the statutory water well restriction but says the Board cannot grant a statutory exemption." (Resp. at 3.) Additionally, Shell asserts that the Agency is requesting "the Board to condone the continued presence of a water well which is present in violation of law." (Resp. at 3.) Furthermore, Shell states that the Agency is taking the "position that whether a well is illegally present or not, if it is within a setback zone, adjacent sites must be classified as high priority." (Resp. at 3.)

Finally, Shell states that the "Board has determined that there must be some flexibility in water well setbacks when it promulgated the Groundwater Quality Standards, 35 Ill. Adm. Code 620, when it noted at Section 620.240(e) that some groundwater underlying potential primary or secondary sources in which contaminants may be present from a release would result in groundwater being classified as "Class IV: Other Groundwater" even if it would otherwise be classified as Class I." (Resp. at 4.) Shell requests the Board to deny the Agency's motions and set the matter to hearing. (Resp. at 4.)

DISCUSSION

² Shell is referring to water well that has been located within 180 feet of its facility as an impediment to closure because Section 732.304(b) requires that the facility be classified as a "High Priority" site needing further remediation.

The Board grants the Agency's motion for reconsideration of the December 19, 1996 order and grants the Agency's motion to dismiss Shell's petition. The Agency has presented new arguments which the Board did not consider at the time it made its decision to accept this matter for hearing. The Board finds that Shell is not requesting relief from the setback requirements of Section 14.2 of the Act for a new potential route, a new potential primary source, or a new potential secondary source. It appears that Shell is requesting relief from the water well setback requirements of Section 14.2 of the Act in order to gain relief from the requirements of 35 Ill. Adm. Code 732.304(b) and Section 57.7(b)(3)(B) of the Act, the application of which has resulted in Shell's site being classified as a "High Priority" site.

Shell mistakenly asserts that in dismissing its variance request in PCB 96-236, the Board determined that the appropriate mechanism for its requested relief was an adjusted standard pursuant to the water well setback exception procedures as set forth in 35 Ill. Adm. Code 106.601, *et seq.* Shell has misinterpreted the Board's order. The Board's order stated in pertinent part the following:

On May 19, 1996 Shell Oil Products Company (Shell) filed a document titled "Petition for Variance". The filing details the history of the denial by the Illinois Environmental Protection Agency (Agency) of Shell's request for a "No Further Action" determination for its facility at 9560 West 159th Street, Orland Park, Illinois. Shell appealed the Agency's denial which is currently before the Board in Shell Oil Company v. IEPA, PCB 96-48. However, the petition in this matter requests the Board "to grant a variance from the requirements of 35 Ill. Am. Code 732.408", and additionally cites Section 14.2 of the Illinois Environmental Protection Act (Act).

Variance relief is allowed pursuant to Section 35 of the Act and 35 Ill. Adm. Code 104, and can be granted only for five (5) years, at which time the facility must be in compliance with the Act and Board regulations. If permanent relief from Section 14.2 is sought, a party must request an adjusted standard pursuant to the Water Well Setback Exception procedures as set forth in 35 Ill. Adm. Code 106.601 *et seq.* (Shell Oil Products Company v. Illinois Environmental protection Agency, (June 6, 1996), PCB 96-236.)

The Board did not determine that relief from Section 732.304(b) and Section 57.7(b)(3)(B) of the Act could be obtained by pursuing an exception as set forth in Section 14.2 of the Act and 35 Ill. Adm. Code 106.601 *et seq.* The Board was merely stating that if permanent relief from the water well setback requirements was desired by petitioner, petitioner needed to file a water well setback petition meeting the procedural requirements of 35 Ill. Adm. Code 106.601 *et seq.* and not a variance petition, because a variance petition only provides temporary relief from otherwise applicable regulations and compliance is ultimately required. It is now clear that Shell is requesting permanent relief from Section 732.304(b) and Section 57.7(a)(3)(B) of the Act so that its site is not classified as "High Priority" and can be given a "No Further

Remediation" letter pursuant to 35 Ill. Adm. Code 732.410. Shell is not requesting relief from the minimum setback requirements of Section 14.2 of the Act for a new potential route, a new potential primary source, or a new potential secondary source.

While Shell also asserts that the Board should not be concerned with the form of its request (*supra*, p. 8), the Board disagrees. The choice of the proper procedural mechanism for the situation is important. The informational requirements and statutorily prescribed burdens of proof are different from one action to another. Moreover, the Board can only grant relief pursuant to our authority as set forth in the Act. In this case Shell is requesting relief from a statutory requirement set forth in Section 57.7(a)(3)(B) of the Act that has been adopted by the Board as Section 732.304(b) through utilizing the Section 14.2(c) of the Act. Section 14.2(c) of the Act allows a petitioner who successfully demonstrates to the Board that its a new potential route, a new potential primary source, or a new potential secondary source deserves an exception from the prohibition set forth in Section 14.2(a) of the Act. An exception granted pursuant to Section 14.2(c) of the Act does not change the minimum set back zone for a potable water supply well but instead allows a new potential route, a new potential primary source, or a new potential secondary source to be located within the zone. Therefore, Shell's requested relief cannot be granted pursuant to a petition for a water well set back exception. Thus the Board grants the Agency's motion to dismiss. However, this does not leave Shell, as it asserts, without any mechanism for review of the Agency's decision or other relief.

Shell has appealed the Agency's determination concerning Shell's Corrective Action Completion Report in PCB 96-48. The record in that action indicates that the Agency denied issuance of the No Further Remediation letter because it determined that Shell has not demonstrated that the remediation objectives of 35 Ill. Adm. Code 732.408, the Risk Based Remediation Objectives, have been achieved for groundwater and soil. (Appendix A of Shell's petition in Shell Oil Company v. Illinois Environmental Protection Agency, PCB 96-48.) If Shell's assertions are correct that the Agency denied issuing a No Further Remediation letter solely because of Cooper's water well being a potable water well causing the facility to be within the minimum setback zone, the Agency's decision will be reviewed by the Board in that action. Additionally, Shell may seek adjusted standard pursuant to Section 28.1 of the Act and 35 Ill. Adm. Code 106.701 for any of the requirements of Section 732.408.

CONCLUSION

The Board finds that Shell is not requesting relief from the setback requirements of 14.2 of the Act for a new potential route, a new potential primary source, or a new potential secondary source. Instead, Shell is requesting relief from the water well set back requirements of Section 14.2 of the Act in order to gain relief from the requirements of 35 Ill. Adm. Code 732.304(b) and Section 57.7(b)(3)(B) of the Act that together require Shell's site to be classified as a "High Priority" site. The Board lacks the authority to waive the statutory criteria of Section 57.7(a)(3)(A) of the Act by granting an exception to Section 14.2(a) of the Act pursuant to Section 14.2(c) of the Act. The granting of an exception to the prohibition of placing a new potential route, a new potential primary source, or a new potential secondary

source pursuant to Section 14.2(c) of the Act allows a new potential route, a new potential primary source, or a new potential secondary source to locate within the minimum setback zone. A grant of an exception pursuant to Section 14.2(c) of the Act does not reduce the minimum setback zone and does not provide any relief from the requirements of Section 57 *et seq.* of the Act. The Board lacks the authority to grant Shell's requested relief by way of water well setback exception. Therefore the Board grants the Agency' motion to dismiss and the docket in this matter is closed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246 "Motions for Reconsideration.")

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the ____ day of _____, 1997, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board