

ILLINOIS POLLUTION CONTROL BOARD  
April 19, 2001

GILBERTS CITGO L.L.C, an Illinois corporation,	)	
	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 01-50
	)	(Water Well Setback Exception)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, WHEELING TRUST & SAVINGS BANK a/k/a COLE TAYLOR BANK, successor trustee, as trustee under Trust No. 73-314 and JOHN CAPORASO, as beneficiary of Trust No. 73-314,	)	
	)	
	)	
Respondents.	)	

TIMOTHY P. DWYER, OF THE LAW OFFICES OF TIMOTHY P. DWYER, APPEARED ON BEHALF OF PETITIONER; and

STEPHEN C. EWART, APPEARED ON BEHALF OF RESPONDENT, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by C.A. Manning):

On September 8, 2000, Gilberts Citgo L.L.C. (Citgo), filed a petition for a water well setback exception (WWSE) relating to installation of underground storage tanks (USTs) at a site located at the southeast corner of Route 72 and Center Road in the Village of Gilberts (Village of Gilberts), Kane County, Illinois. Citgo requested a WWSE pursuant to Section 14.2(a) of the Environmental Protection Act (Act) (415 ILCS 5/14.2(a) (1998)) and 35 Ill. Adm. Code 106, Subpart F. Citgo seeks to develop and operate a gas station and convenience store at the site.

Citgo purchased the site, which was previously undeveloped, in April of 2000. Tr. at 19.<sup>1</sup> The site plan contains a convenience store, as well as pumps, lines, and tanks for the sale of regular and premium gasoline and diesel fuel. The development plans of Citgo would place the USTs approximately 112 feet from an off-site well owned by John Caporaso. Citgo was aware of the existence of this well prior to purchasing the site. Tr. at 19. Since the placement

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<sup>1</sup> The petition and amended petition assert Citgo purchased the property in August of 1999. The transcript from the November 22, 2000 hearing in this matter will be referred to as "Tr. at \_\_\_\_."

of the UST would be within the applicable statutory setback zone set forth in the Act, such placement is only authorized if Caporaso waives the setback or the Board grants a WWSE pursuant to Section 14.2(c) of the Act. For the reasons expressed below, the Board grants Citgo's request for a WWSE, subject to conditions.

### STATUTORY AND REGULATORY FRAMEWORK

Section 14.2 of the Act establishes provisions designed to protect community and potable water supply wells from possible contamination. Among these provisions is the establishment of a setback zone around a potable water supply well. 415 ILCS 5/14.2(a) (1998). Within the setback zone, no "new potential source" nor "new potential route of groundwater contamination" may be sited, unless this Board has granted an exception. 415 ILCS 5/14.2(c) (1998). USTs are potential sources of groundwater contamination. 415 ILCS 5/3.60 (1998).

The Act also requires that an owner seeking an exception to a potable water supply well other than a community water supply well file a petition with the Board and the Agency, and describe the circumstances under which the owner sought a written request for a waiver from the water well's owner and the Agency. 415 ILCS 5/14.2(c) (1998).

Proceedings in this matter were conducted pursuant to the Board's former water well setback exception procedures codified at 35 Ill. Adm. Code 106.601 *et seq.* These have been superseded as of January 1, 2001, by rules codified at 35 Ill. Adm. Code 106.300 *et. seq.*

The Board must grant a requested exception when the Board finds that adequate proof has been presented "that compliance with the setback requirements . . . 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 . . . will not constitute a significant hazard to the potable water supply well." 415 ILCS 5/14.2(c)(1998) and 35 Ill. Adm. Code 106.310 (effective January 1, 2001).

### PROCEDURAL HISTORY

Once Citgo determined that a well was located within 200 feet of the proposed USTs, Citgo attempted to obtain the well owner's consent and a waiver to locate the well within the setback zone. These attempts failed and, on September 8, 2000, Citgo filed its WWSE request with Board. In its original petition, Citgo did not name the well owner as a respondent, but identified the well owner to be Marcia Caporaso. On September 21, 2000, the Board issued an order mandating that she be named a respondent to the action. See 35 Ill. Adm. Code 106.300(b) (effective January 1, 2001). On September 29, 2000, Citgo filed an amended petition naming Marcia Caporaso.

On October 19, 2000, the parties participated in a status conference with Hearing Officer Brad Halloran. Subsequent to that conference call, on October 23, 2000, Citgo filed its second amended petition. This petition was filed for the sole purpose of clarifying the ownership of the property upon which the wells are located. Accordingly, the second amended petition changed the name of respondent from Maria Caporaso to Wheeling Trust and Savings Bank a/k/a Cole Taylor Bank, successor trustee under Trust No. 73-314 and John Caporaso as beneficiary of Trust No. 73-314, as now reflected in the caption of this opinion and order.

On October 17, 2000, the Illinois Environmental Protection Agency (Agency) filed its response to Citgo's WWSE request, see Resp. at 5-7,<sup>3</sup> and on November 22, 2000, a public hearing was held in this matter. Attorney Timothy Dwyer appeared on behalf of Citgo. Attorney Diana Larson, design builder Michael Maude, Jr., and part-owner of the site Edward Newby testified on behalf of Citgo. Attorney Stephen Ewart appeared on behalf of the Agency. Lynn Dunaway testified on behalf of the Agency. There were no representatives present on behalf of respondent Wheeling Trust & Savings Bank or respondent John Caporaso. No members of the public attended the hearing.

On January 18, 2001, the Board issued an order in which the Board found that Citgo had not yet proven the necessary elements for the granting of a water well setback exception. The order granted Citgo 60 days to provide more specific information and to demonstrate that an exception would not cause a significant hazard to the affected well and that Citgo would suffer an arbitrary or unreasonable hardship if the setback exception were denied. On March 15, 2001, Citgo filed a supplemental petition for WWSE. On April 2, 2001, the Agency filed a response to the supplemental petition for WWSE recommending grant of the WWSE.

### Motion to Substitute Counsel

On March 19, 2001, Citgo filed a motion to substitute counsel pursuant to 35 ILCS 101.400(d). The Board grants the motion.

### MERITS OF EXCEPTION REQUEST

Each of the four issues that the Board must consider in its review of a water well setback request is discussed below.

### Maximum Feasible Alternative Setback

Citgo provided site layouts, including the tanker truck access plan. Site design and UST placement is based on IDOT criteria for safety during fuel delivery by large tanker trucks. Citgo contends, and the Agency does not disagree, that the site design incorporates the

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<sup>3</sup> The Agency's October 17, 2000 response in support of Citgo's petition will be referred to as "Resp. at \_\_\_\_."

maximum feasible alternative setback. Tr. at 58. The Board has reviewed the evidence regarding the maximum feasible alternative setback. As stated in the January 18, 2001 order, the Board finds that Citgo has met its burden on the issue.

#### Significant Hazard to the Well on the Adjacent Property

Prior to the Board's January 18, 2001 request for additional information, Citgo asserted that it had taken all the steps within its control to minimize the potential of any type of leak from the tanks or lines as potential sources of contamination. Am. Pet. at 8.<sup>4</sup> Further, Citgo stated that the well logs it received from the Illinois State Water Survey indicated that most of the wells in the area of Citgo's property are deep wells which are located in soil formation of clay to a depth of at least 20 feet. *Id.* However, the well logs submitted by Citgo did not include a log for the Caporosas' well, and the petitioner's attempts to obtain any information from the well owner or conduct a well inspection were not successful. Pet. Br. at 8.<sup>5</sup>

Dunaway testified about the geologic logs from the area near the proposed site. Tr. at 58. Based on the review of the available logs, Dunaway determined that the geologic conditions at the site consisted of bedrock surface overlain by unconsolidated glacial materials ranging from 150 to 200 feet in thickness. Tr. 59-61. Dunaway stated that clay is the most common glacial material noted in the logs, and because clay has a low permeability contaminants that may enter the ground tend not to move very far nor do they move rapidly. *Id.* Dunaway further testified that there is glacial material in this area with sand and gravel layers of adequate thickness which contains Class I groundwater. Tr. at 60. These sands and gravel layers are fairly common and are occasionally used as a source of water in the area. However, Dunaway testified the layers did not appear to be laterally extensive.

Dunaway testified if the Caporosas' well utilizes the bedrock and is properly constructed and maintained, the site would not pose a significant hazard to a well utilizing the bedrock formation. *Id.*

However, Dunaway noted the possibility that the Caporosas' well was utilizing one of the localized sands as its source of water, and that the same sands could exist on the site. Tr. at 61. If this were the case, the USTs could pose a significant hazard to the well. *Id.* Dunaway noted that Citgo had committed to sample and analyze the Caporosas' well water annually for petroleum contaminants to ensure that it does not become contaminated. *Id.* Dunaway testified that annual groundwater monitoring would provide sufficient protection to prevent a significant health risk to the water users and would keep the site from being a significant health risk. *Id.*

As noted in the last Board order, the Board agreed with the Agency that a significant hazard might be present if the Caporosas' well draws water from a localized sand layer and the same sand layer exists on the site. Gilbert's Citgo v. IEPA (January 18, 2001), PCB 01-50, slip

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<sup>4</sup> Citgo's September 29, 2000 amended petition will be referred to as "Am. Pet. at \_\_\_\_."

<sup>5</sup> Citgo's December 8, 2000 post-hearing brief will be referred to as "Pet. Br. at \_\_\_\_."

op. at 4-5. The Board noted that the petitioner did not provide a geologic log of the Caporosas' well to ascertain whether the well is drawing water from the protected bedrock aquifer or from any localized sand layer. *Id.* While the geologic logs submitted by Citgo indicated that a large number of wells in the vicinity of Citgo's site draw water from the bedrock aquifer, the logs did not provide assurance that the proposed placement of USTs would not pose threat of contamination to the Caporosas' well, especially considering that the occurrence of sand and gravel layers of adequate thickness to contain Class I groundwater are fairly common in the area.

While the petitioner's commitment to monitor the Caporosas' well provided a measure of safety for the well water users, the Board, in its last order, noted that such monitoring does not protect the well from contamination since any detection of indicator contaminants in the Caporosas' well would mean that the well is already contaminated. Gilbert's Citgo v. IEPA (January 18, 2001), PCB 01-50, slip op. at 4. Further, since the petitioner proposed to monitor the Caporosas' well on an annual basis, if contaminants reach the well within a short period time after a monitoring event, the water well users would be exposed to contaminated water for a significant period of time. In this regard, Citgo had not offered to perform any groundwater monitoring on its property to ensure that any potential contamination would be detected before it moves beyond the property line. Further, Citgo had not provided any site hydrogeologic information such as direction and rate of groundwater flow or site geologic characterization to support its claim that the proposed activity does not pose a significant threat to the Caporosas' well. In light of this, the Board found that the petitioner did not provide sufficient proof to demonstrate that the proposed site would not constitute a significant hazard to the Caporosas' well. Gilbert's Citgo PCB 01-50, slip op. at 4.

Rather, the Board concluded that a significant hazard might be present if the affected well draws water from the same sand layer where Citgo's proposed USTs would be located at its new service station. Gilbert's Citgo PCB 01-50, slip op. at 4.

Citgo supplied the following information in its March 15, 2001 supplemental petition. To demonstrate that the new USTs will not constitute a significant hazard to the offsite potable water supply, Citgo examined the affected well for depth, installed monitoring wells, committed to performing annual well testing, and upgraded leak prevention features on the proposed UST.

In its exploration of the affected well, Citgo determined the well's depth to be 210 feet, pumping from a level of 185 feet deep. Information from the Illinois State Water Survey indicates that most of the wells in the general vicinity are in limestone strata at 185-200 feet in depth. Water samples were also taken and analyzed. Supp. Pet. at 3; Exh. 1 at 2; Exh. A.; Exh. D.<sup>6</sup>

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<sup>6</sup> Citgo's March 15, 2001 supplemental petition will be referred to as "Supp. Pet. at \_\_\_\_." The engineer's report, prepared by Wight Consulting, will be referred to as "Exh. 1 at \_\_\_\_." The report prepared by A.C. Snelton, Inc., will be referred to as "Exh. A." The test results from Suburban Laboratories, Inc., will be referred to as "Exh. D."

Citgo installed two monitoring wells on its property between the proposed USTs and the affected well at a depth of 21 feet. In addition, Citgo plans to install two additional monitoring wells in the underground storage tank field at the time of the tank installation. A fifth well is also planned on Citgo's property to supply potable water to the service station and will be drilled to approximately the same depth as the affected well. Supp. Pet. at 5, Exh. 1 at 3.

Citgo proposed to conduct annual monitoring of the first two monitoring wells, Citgo's potable well, and the affected well. Supp. Pet. at 5.

Although the Board found that Citgo satisfied criteria for best available technology controls, Citgo is also planning to upgrade its proposed UST leak prevention features to include double-hulled tanks and interstitial monitoring. Supp. Pet. at 4; Exh. 1 at 3-4.

Citgo has demonstrated that the affected well is not located in the same sand layer as the proposed USTs and will not share the same groundwater. As an additional measure of protection, Citgo has proposed to monitor the water supply by sampling shallow monitoring wells, the affected well, and its own potable well. Initial water quality tests of the affected well conducted by Citgo during the investigation will provide a baseline for water quality if changes occur in the future. The Board finds that Citgo's efforts to investigate the affected well for depth and provide monitoring removes the significant hazard the USTs might pose to the affected well.

During the investigation of the affected well, Citgo observed a second well five feet to the west of the affected well measuring 45 feet deep. Supp. Pet. at 3. Citgo noted that the second well appeared to be abandoned with no cap or pumping equipment. *Id.* The discovery of this second well is within the scope of this WWSE since it is also located within the 200-foot setback.<sup>7</sup> The Board finds the measures taken by Citgo to remove any significant hazard posed by the USTs to the first identified well also apply to the second identified well on the Caparosos' property.

#### Arbitrary and Unreasonable Hardship

Given the insufficient proof on the significant hazard issue, the Board did not address the issue of arbitrary or unreasonable hardship in the last order.

A showing of arbitrary and unreasonable hardship is a necessary element to the Board's grant of water well exceptions. 415 ILCS 5/14(c) (1998). In the environmental context, both the Board and the Illinois Appellate Court have found that a hardship is arbitrary or unreasonable when it outweighs the injury to the public or environment. Marathon Oil Co. v. IEPA and PCB, 242 Ill. App. 3d 200, 610 N.E.2d 789, 793 (5th Dist. 1993). ("The petitioner must . . . show that the hardship it will encounter from the denial of the variance will outweigh

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<sup>7</sup> Citgo offered to cap this well, but the well owner rejected the offer. Supp. Pet. at 3-4.

any injury to the public or environment from the grant of the variance. Only if the hardship outweighs the injury does the evidence rise to the level of an arbitrary or unreasonable hardship.”) Therefore, to grant a water well setback exception, the Board must find that any hardship outweighs any injury to the public or environment.

During the hearing on November 22, 2000, Citgo’s witnesses, Larson and Newby, supported the claim that denial of the exception would constitute an arbitrary or unreasonable hardship. Tr. at 21; Tr. at 42-43. Citgo’s witnesses further stated that, as of the November 22, 2001 hearing, over \$237,000 has been spent to purchase the property plus an additional \$125,000 in engineering, legal, and permit fees. Tr. at 42, 47. Citgo’s witnesses stated at hearing that denial of the exception would devalue Citgo’s economic investment in the site, emphasizing that construction of a convenience store without the gasoline station is not a viable economic option. Tr. at 48. If the exception is denied, unrecoverable costs would include the \$125,000 in engineering, attorney, and permit fees in addition to devaluation of the property since it could not be developed as reflected in its “premium” purchase price. Tr. at 43-45. Citgo noted that no other piece of local real estate was available or better suited for Citgo’s proposed business venture from a marketing or access standpoint. Tr. at 20-21; Tr. at 43-45. Citgo concluded that the site, if developed, would be an important project to the Village of Gilberts because it would be the only gas station in, or within nine miles of, the Village of Gilberts.

The Board finds that the inability to develop the site would cause hardship to Citgo. If properly installed, maintained, and monitored, Citgo’s USTs should not constitute a significant hazard to the Caporaso’s potable water supply, and hence should pose no significant potential injury to the public or environment. The Board accordingly also finds that the hardship to Citgo caused by denying the water well exception rises to the level of arbitrary and unreasonable hardship.

#### Best Available Technology Controls

Citgo has demonstrated that it will use what the Agency agrees are the best available technology controls for its USTs. Pet. at 2-3.<sup>8</sup> Citgo’s UST systems will be equipped to use the best available technology controls as follows: double wall tanks with steel inner tanks and fiberglass reinforced plastic outer tanks; interstitial monitoring of the annular space; double wall direct burial product pumping, containment sumps; spill containment manholes to collect excess fuel in the hoses of the tanker at the time of filling; positive overfill prevention valves; line leak detection and automatic tank gauging system; non-discriminating liquid sensors in the submersible pump sumps for detecting any liquid that may accumulate in the containment sumps; a leak trigger alarm system; and two continuously monitored tank field monitoring wells. Exh. H; Exh. I; Am. Pet. at 3.<sup>9</sup> Accordingly, as stated in the January 18, 2001 order, the Board finds Citgo has met its burden on this issue.

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<sup>8</sup> Citgo’s September 8, 2001 petition will be referred to as “Pet. at \_\_\_\_.”

<sup>9</sup> The Permiantank brochure, will be referred to as “Exh. H” The Veeder-Root brochure will be referred to as “Exh. I”

### CONCLUSION

The Board concludes that Citgo has proven the necessary elements for the grant of a water well setback exception. The Board accordingly grants the exception, subject to the conditions stated in the order. These conditions are designed to insure that the USTs are properly maintained and monitored, so that any harm caused by an unintended release can be mitigated expeditiously.

Regardless of the grant of the exception, the Caporosas' water rights under 415 ILCS 30/6b of the Illinois Water Well Construction Code are preserved. If contamination occurs because of Citgo's USTs, Citgo must provide the Caporosas an alternate water supply 415 ILCS 30/6b. This section of the code provides assurance of a potable water supply:

Except as provided in Section 14.2 of the Environmental Protection Act, the owner of every potable water supply well which has been contaminated due to the actions of the owner or operator of a potential primary or potential secondary source or potential route shall be provided an alternative source of potable water of sufficient quality and quantity, or treatment of the waters from such well to achieve a sufficient level of quality and quantity appropriate to protection of the public health, or such other remedy as may be mutually agreed upon by the well owner and the owner or operator of the potential source or potential route.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

### ORDER

Citgo is granted a water well setback exception for the property located at the southeast corner of Route 72 and Center Road in the Village of Gilberts, Kane County, subject to the following conditions:

1. Citgo must sample and analyze groundwater for the appropriate indicator contaminants found at 35 Ill. Adm. Code 732. Appendix A as follows:
    - a. The Caporosas' well annually, and within 30 days of a detected release from the petroleum USTs or piping, contingent upon right of entry granted by the well owner for such purposes.
    - b. Citgo's onsite potable water well annually and within 30 days of a detected release from the petroleum USTs or piping.
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- c. The existing two monitor wells on a quarterly basis.<sup>9</sup>
- 2. Citgo must provide copies of laboratory test results from the Caporaso's well and Citgo's wells to the Caporaso and the Agency within seven days of receipt. Citgo must indicate on the results if any tested indicator contaminants exceed the Class I Potable Resource Groundwater criteria set forth in 35 Ill. Adm. Code 620. Citgo must send all monitoring results from the Caporaso's well and Citgo's wells within seven days of receipt to:

Division of Legal Counsel  
 Illinois Environmental Protection Agency  
 1021 North Grand Avenue East  
 P.O. Box 19276  
 Springfield, Illinois 62794-9276; and

Mr. and Mrs. John and Marcia Caporaso  
 c/o Abatron Incorporated  
 5501 95th Avenue  
 Kenosha, Wisconsin 53144.

IT IS SO ORDERED.

Board Member McFawn dissented.

If Citgo chooses to accept this exception, subject to the above conditions, within 45 days of the date of this order, Citgo must certify that it accepts the terms of the exception by executing a certificate of acceptance and agreement to be bound by all of the terms and conditions of the granted exception and forwarding such certificate to:

Stephen C. Ewart,  
 Division of Legal Counsel,  
 Illinois Environmental Protection Agency  
 1021 North Grand Avenue East  
 P.O. Box 19276, Springfield  
 Illinois 62794-9276

Such acceptance must be signed by an officer of Citgo duly authorized to bind Citgo to all of the terms and conditions of the final Board order in this matter. The 45-day period must be held in abeyance during any period that this matter is appealed. Failure to execute and forward the certificate within 45 days renders this exception void and of no force and effect as a shield against enforcement of rules from which the Board has granted relief. This form of the certificate is as follows:

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CERTIFICATION

I (We), \_\_\_\_\_, hereby accept  
and agree to be bound by all terms and conditions of the order of the  
Pollution Control Board in PCB 01-50 dated April 19, 2001.

\_\_\_\_\_  
Petitioner

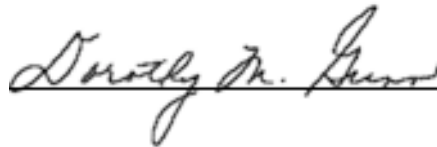
\_\_\_\_\_  
Authorized Agent

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1998)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.520, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 19th day of April 2001 by a vote of 5-1.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", is written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board