

ILLINOIS POLLUTION CONTROL BOARD
March 2, 2000

KRKH, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 00-25
)	(Water Well Setback Exception)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY, STUDIO 21)	
LIMITED, JOE and THERESA SCLAFINI,)	
and MIDWEST BANK AND TRUST as)	
trustee U/T # 74-11-1383,)	
)	
Respondents.)	

RICHARD A. WOLFE, OF WOLFE AND POLOVIN, APPEARED ON BEHALF OF PETITIONER; and

RONALD L. SCHALLAWITZ AND STEPHEN C. EWART, APPEARED ON BEHALF OF RESPONDENT, THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by R.C. Flegal):

This matter comes before the Board upon a petition filed by KRKH, Inc. (KRKH). KRKH requests that it be granted an exception from the water well setback requirements found at Section 14.2 of the Environmental Protection Act (Act) (415 ILCS 5/14.2 (1998)). KRKH has placed three underground petroleum storage tanks (USTs) within the minimum setback zone of a private potable water supply well. Construction of this type is prohibited under Section 14.2 unless an exception has been granted by this Board.

The Act gives the Board authority to grant exception from the setback requirements where the Board finds that the petitioner has made several necessary showings. 415 ILCS 5/14.2(c) (1998). The Environmental Protection Agency (Agency) has the responsibility, among other things, of investigating each petition for exception and filing a response with the Board as to the disposition of the petition. 35 Ill. Adm. Code 106.603.

As presented below, the Board finds that KRKH has made the necessary showings for the grant of exception. Accordingly, the Board grants the water well setback exception, subject to one condition.

FACILITY HISTORY

In March 1999, KRKH bought property located at 17 West 532 Lake Street, Addison, Illinois. Pet. at 1.¹ At the time of purchase, a gasoline service station was located on the property. Pet. at 1. Shilu Amin, an officer of KRKH, knew at the time of purchase that a leak had occurred from one of the USTs at the site in 1995. Tr. at 19.² Amin was told by the owner of the property that clean up work had been done and monitoring was ongoing. Tr. at 19. After discussing future clean up and renovation of the site with Environmental Protection Industries (EPI), a consulting firm, Amin purchased the site. Tr. at 20-21.

Amin intended to clean up the site and replace the USTs. Tr. at 21. He also intended to renovate the store at the site. Tr. at 22. Amin hired EPI to do the site classification and remove the existing USTs. Tr. at 23. DRW Services, Inc. (DRW), was hired to install the new USTs, and necessary pumps and piping. Tr. at 22.

After receiving appropriate permits from the Office of the State Fire Marshal (OSFM), KRKH replaced the four existing USTs with three new USTs at a different location at the site. Pet. at 1, 3, Tr. at 24. Amin estimated the new USTs are 20 feet east of the old USTs. Tr. at 23. The new USTs were placed in a different location than the old USTs, because, among other reasons, KRKH wanted to install a canopy, and did not want to build it over the old tanks and then have to take the canopy down if they needed to fix any problems with old tanks. Tr. at 23. Also, the Illinois Department of Transportation did not want gas delivery trucks to back out onto Lake Street, and by locating the new USTs in their current location, the trucks can use other exits. Tr. at 23.

When the new USTs were installed, KRKH knew that a water well existed on the property (on-site well). Pet. at 3. However, after the OSFM and the Agency issued permits to remove the existing USTs, the DuPage County Board of Health detected a second well in the area. Specifically, the Board of Health determined that a private potable water supply well was located approximately 140 feet from the USTs, on a property adjacent to the site. Pet. at 2. The well at issue in this case is the well on the adjacent property.³

When KRKH learned of the well on the adjacent property, they stopped work on the site. Tr. at 27. Today, the USTs are in the ground, product has been placed in the USTs, and pea gravel surrounds the tanks. Pet. at 2. However, the USTs are not connected to any pipe and the gas station is not operational. Pet. at 2-3, Tr. at 29-30.

¹ KRKH filed a petition (Pet.), a supplement to the petition (Sup.), and an amended petition (Am. Pet.).

² Citations to the Board hearing transcript will be referred to as "Tr. at ___."

³ The location of both wells is depicted in Exhibit 1 (Exh. 1) attached to the petition.

PROCEDURAL HISTORY

KRKH filed the original petition in this matter on August 16, 1999. KRKH filed a supplement to the petition on September 2, 1999. The Agency filed its response (Resp.) on September 7, 1999. The response addressed the petition, but not the supplemental filing. KRKH filed an amended petition on November 17, 1999.⁴ The Agency did not file an amended response.

Hearing was held on January 19, 2000, in Chicago, Illinois, before Board Hearing Officer Amy Muran Felton. KRKH presented the testimony of Amin, Doug Harmon, general sales manager of DRW, and Robert Mankowski, vice president of EPI. The Agency presented the testimony of Lynn Dunaway, a geologist for the Agency. No members of the public were present.

Both parties waived filing posthearing briefs. No public comments were filed.

STATUTORY AND REGULATORY FRAMEWORK

Section 14.2 of the Act establishes provisions designed to protect groundwater 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).

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).

⁴ Although petitioner captioned the filing “Amended Petition for Water Well Setback Exception,” the filing merely names as parties the owners/lessees of the site where the affected well is located. Those parties are: Studio 21 Limited, Joe and Theresa Scaloppini, and Midwest Bank and Trust as Trustee U/T #74-11-1383. The Board interprets the amended petition to supplement, not replace, the original petition.

WAIVER ATTEMPTS

On July 19, 1999, KRKH sought a written waiver from the owners of the adjacent property, respondents Joe and Theresa Sclafini, to locate the USTs within 200 feet of the well on the Sclafini property. Pet. at 7, Exh. 7, Tr. at 28. The Sclafinis did not respond. Tr. at 27. A subsequent attempt was made on July 26, 1999. Pet. at 7, Exh. 8. Again, the Sclafinis did not respond. The Agency sent a letter to the Sclafinis on August 4, 1999, to which the Sclafinis did not respond. Pet. at 7. Amin testified that he spoke to the Sclafinis “on a handful of occasions,” but that the Sclafinis never responded to his written correspondence. Tr. at 27. The Sclafinis did not attend the Board hearing, nor did they file any documents with the Board that indicated their opinion on this matter. Since the Sclafinis refused to sign a consent for KRKH to locate the USTs within 200 feet of the Sclafini’s well, the case is before the Board today.

MERITS OF EXCEPTION REQUEST

Of the four items that the Board must consider in review of a water well setback request, the Agency in its response originally raised questions regarding three. See Resp. at 5-6. By the time of the hearing, the Agency’s reservations on these three items had been assuaged.

Maximum Feasible Alternative Setback

KRKH contends, and the Agency does not disagree, that the site design incorporates the maximum feasible alternative setback. Pet. at 8, Resp. at 6.

In addition to arguing that its site design incorporates the maximum feasible alternative setbacks for the USTs and the piping system, KRKH notes that there is a concrete building on the site and a well is located southwest of the building.⁵ Pet. at 9, Exh. 1, Tr. at 42. The USTs are located southeast of the building. Exh. 1. The pump dispenser will be located in front of the building. Pet. at 9. KRKH asserts that good design practices suggest that the USTs be close to the pump dispensers to minimize the length of the piping system. Pet. at 9. KRKH argues that no other configuration would allow proper site access and a good and safe traffic pattern. Pet. at 9.

The Agency responds that KRKH has made an adequate argument for locating the tanks southeast of the building. Resp. at 6.

The Board has reviewed the evidence regarding the maximum feasible alternative setback. We find that KRKH has met its burden on this item, and we accordingly will not discuss it further.

Below, the Board analyzes the remaining three factors, whether “the location of such potential source . . . will not constitute a significant hazard to the potable water supply well,” whether “compliance with the setback requirements . . . would pose an arbitrary and unreasonable hardship

⁵ This is the on-site well and not the well on the adjacent property at issue in this case.

upon the petitioner,” and whether “the petitioner will utilize the best available technology controls economically achievable to minimize the likelihood of contamination of the potable water supply well.” 415 ILCS 5/14.2(c) (1998).

Significant Hazard to the Well On the Adjacent Property

KRKH argues that not only are the new USTs closer to the on-site well than to the well on the adjacent property, but the Agency issued a waiver to KRKH from the minimum setback zone requirements found at Section 14.2 of the Act, on the basis that only the on-site well was affected. Pet. at 5, Exh. 4. KRKH also notes that EPI collected and analyzed soil and groundwater samples from the adjacent property. Pet. at 5, Exh. 4. KRKH adds that no chemicals were detected above the laboratory method detection limits in the soil sample and that there was no impact detectable in the groundwater sample. Pet. at 5, Exh. 4. KRKH deduces from these observations that the old, leaking USTs did not cause contamination on the adjacent property. Pet. at 5. KRKH contends further that the new tanks are less likely to cause contamination than the old USTs, because the new USTs have more control and monitoring devices designed to reduce the potential for a release or leak. Pet. at 5-6.

KRKH also notes that the EPI water well sampling results (report) reveal that the groundwater flow at the site is from east to west. Pet. at 6, Exh. 6. Since the well on the adjacent property is east of the USTs, KRKH reasoned that the flow of water would be in a direction away from the well on the adjacent property. Pet. at 6. Therefore, KRKH argues contamination of the well is unlikely. Pet. at 6.

In its response to KRKH’s petition, the Agency initially asserted that KRKH did not provide enough evidence that the USTs would not be a significant hazard to the well on the adjacent property. Resp. at 6. The Agency noted that only portions of EPI’s report were attached to the petition, and suggested that KRKH provide all available site data so the Agency could thoroughly assess the site. Resp. at 6.

In contrast to the Agency’s response, Dunaway testified at the hearing that KRKH’s supplemental petition included additional information such as reports submitted to the Agency’s leaking underground storage tank program, but it “still left some questions” in Dunaway’s mind about the potential hazard to the well. Tr. at 120-121. When asked what questions he still had, Dunaway testified that he would have liked to have seen more geologic information provided in the supplemental petition. Tr. at 121. To address his geologic concerns, Dunaway testified:

- A: I checked those files out from the Bureau of Land files, and I did review the 1995 – I believe it was the 45-day report and the 1999 site classification completion report.
- Q: Did you find the additional data there?
- A: Yes, I did. There was a fairly large number of well logs there.

Q: And did this information address your groundwater concerns?

A: Previously, there seemed to be some conflict in the direction of groundwater flow, but in looking at the data, it appears that the shallow aquifer that they discussed, which occurs somewhere between ten and twenty feet below ground surface, there appears to be a bit of a mound in that aquifer below the northern part of the site which may cause a slight variation in groundwater flow direction on site. However, on a more large scale area-wide assessment, it looks as though the groundwater flow is, in fact, more towards the west or southwest.

Also in reviewing that data, I was not able to find well logs that I could identify as either the on-site well or the affected well, the Studio 21 well. However, the other wells in the area all utilized a bed rock aquifer, and on top of that aquifer, there seemed to be a fairly -- I won't say uniform -- a continuous low permeability layer that varied from 30 to 70 feet thick between the upper aquifer and the lower aquifer that the wells in here actually used.

Q. What conclusions have you drawn from the geologic information that you've reviewed with regard to this site?

A. It appears to me that the continuous low permeability layer will provide significant protection to the lower aquifer from any contaminants that may exist in the upper aquifer.

Q. Are there any other factors you believe that should be considered at the site?

A. Yes. Considering that, you know, there's a contamination event -- well a cleanup ongoing on site, it appears that this would provide -- operation of this site would actually provide an economic base where the cleanup can be completed and would actually provide a positive environmental impact.

Q. Do you have any recommendations regarding this proceeding, things to do at the site?

A. Based on the information I had which was April 7 of 1999, it appeared like there were fairly high levels of contaminants still left on site. I think it would be a prudent move to monitor the on-site well and prepare the affected well on an annual basis to ensure a continued safe water supply for potable purposes.

Q. Do you have an opinion as to whether the proposed installation of the underground storage tanks, the piping and other things at this site to become operational, whether or not this would propose a hazard?

- A. I don't believe the installation and new tank would pose a significant increase in hazard to either the affected well or the on-site well.

Based upon Dunaway's statements, the Board finds the location of the USTs will not constitute a significant hazard to the potable water supply well on the adjacent property.

Arbitrary and Unreasonable Hardship

A showing of arbitrary and unreasonable hardship is a necessary condition in 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 IPCB, 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 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, there must be a showing that the hardship outweighs any injury to the public or environment.

KRKH argues that it would be arbitrary and unreasonable to deny its request for a water well setback exception. Pet. at 5. To support its claim, KRKH contends that to deny the petition would not be more protective of human health and the environment than to allow the development and operation of the proposed gas station. Pet. at 5. Additionally, denial of the petition would "deplete the value" of the investment KRKH has made in the site. Pet. at 5.

The Agency argued in its response that KRKH failed to substantiate KRKH's assertions that denial of the exception would constitute an arbitrary or unreasonable hardship. Resp. at 5. The Agency also asserted that KRKH failed to support its statement that denying the exception would not be more protective of human health and the environment, would serve to frustrate KRKH's development plans, and would deplete the value of KRKH's economic investment in the site. Resp. at 5. Lastly, the Agency noted that KRKH did not provide information that would show KRKH would suffer a monetary loss if the exception was denied. Resp. at 5.

Subsequent to the comments in the Agency's response, Dunaway testified at the hearing that the demonstration of hardship "was certainly well laid out in the supplemental petition." Tr. at 120. In the supplement to the petition, Amin filed an affidavit that KRKH bought the site for \$210,000. Sup. at Exh. S1. Amin further declared that KRKH contracted with DRW to install the USTs, piping, gasoline dispensers, and canopy, and to do related work on the site for \$236,000. Sup. at Exh. S1.⁶ Additionally, KRKH contracted with EPI to remove the existing USTs, to prepare documents to submit to the Agency, and other remediation-related work for an estimated cost of \$165,000. Sup. at Exh. S1.⁷ Amin also represented that KRKH would incur additional expenses for the renovation and

⁶ At hearing, Amin testified that contract for DRW was approximately \$225,000. Tr. at 31.

⁷ At hearing, Amin testified that the contract with EPI was approximately \$175,000. Tr. at 31.

improvement of the building located on the site for an estimated cost of \$335,000. Sup. at Exh. S1.⁸ Furthermore, Amin noted that it would cost \$61,000 to remove the newly installed USTs from their current location to a site that was more than 200 feet from the affected well. Sup. at Exh. S1. Lastly, Amin argued that KRKH had lost income because the gasoline station and mini-mart that was contemplated to be opened at the site has not opened due to the conflict at issue in this case. Sup. at Exh. S1.⁹

Based upon Dunaway's and Amin's statements, the Board finds that the inability to develop the site would cause hardship. Having found that the USTs would not constitute a significant hazard to the potable water supply, and hence no significant potential injury to the public or environment, the Board accordingly also finds that the hardship to KRKH caused by denying the water well exception rises to the level of arbitrary and unreasonable hardship.

Best Available Control Technology

KRKH argues that because it knew about the well located on-site, it took precautions so that the equipment met or exceeded Agency guidelines. Pet. at 3. KRKH claims that the tank systems have double-walled protection with interstitial monitoring devices to identify and alarm the tank gauging console if a problem occurs. Pet. at 4. KRKH intends to install double-walled product piping for additional protection. Pet. at 4. KRKH further notes that mechanical leak detectors will identify pressure loss in the system and will stop dispensing. Pet. at 4. Additionally, tank gauging, overspill, and overflow prevention will be installed in the tanks to prevent delivery problems. Pet. at 8. KRKH concludes that releases to the environment will be minimized, because when leaks are detected, counteractive measures will be taken almost immediately. Pet. at 4.

The Agency observed in its response that KRKH did not supply enough documentation to show the quality of the technology controls KRKH intended to use. Resp. at 5. However, at hearing, Dunaway testified that the supplemental petition provided documents regarding the technical controls KRKH intended to use with exact factory specifications. Tr. at 120. Dunaway explained that the documents were "more than adequate for anyone to review to see the quality of the equipment being used." Tr. at 120.¹⁰

Based upon the above findings, the Board concludes that KRKH has met the necessary conditions for the grant of a water well setback exception. The Board accordingly finds that exception must be granted.

⁸ At hearing, Amin testified that the expenses for remodeling the store were \$290,000. Tr. at 31.

⁹ At hearing, Amin estimated that the lost profits by not being able to operate a business on the site for ten months is \$80,000. Tr. at 31-32.

¹⁰ The documents include a schematic diagram of the USTs and the piping; a specification sheet for modern welding underground double-wall tanks; specifications for an advanced polymer technology underground piping system; specifications for a tank monitoring system; and specifications for an overspill containment system. See S2-S6 of Supplement to Petition.

As a final matter, the Board notes that the Agency recommends that the on-site well and the well on the adjacent property be monitored annually. Tr. at 123. The basis for the Agency recommendation is that the EPI report from 1999 showed that there were high levels of contaminants at the site. Tr. at 123. The Board agrees that grant of the exception should be conditioned upon annual monitoring of both wells, as assurance that the groundwater flow system is as portrayed herein. The Board will order that the monitoring be for the standard gasoline and diesel indicator contaminants that the Board has identified in its Petroleum Underground Storage Tank regulations at 35 Ill. Adm. Code 732 Appendix A. Additionally, the Board believes that if there are contaminants moving towards the wells, that they should be detectable within a period of ten years. The Board will accordingly order that the monitoring continue for a period of ten years.

If KRKH agrees to accept this conditional grant of the water well exception, it will need to so specify by filing a Certificate of Acceptance.

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

ORDER

KRKH, Inc., is hereby granted, pursuant to Section 14.2(c) of the Environmental Protection Act (415 ILCS 5/14.2(c) (1998)), an exception of the prohibition of siting a new potential source within the setback zone of a potable water supply well. The exception applies to the underground storage tanks and the well on the adjacent property described in the above opinion.

As a condition to grant of the exception, KRKH, Inc. shall monitor the on-site well and the well on the adjacent property (to the extent that such monitoring is authorized by the adjacent property owner), on an annual basis. The terms for monitoring are as follows:

1. Within a year of this order and continuing annually until March 2, 2010, KRKH, Inc. shall monitor the relevant wells for the following indicator contaminants as listed in 35 Ill. Adm. Code 732 Appendix A:

ethylbenzene
benzene
toluene
xylene
acenaphthene
anthracene
benzo(a)anthracene
benzo(a)pyrene
benzo(b)fluoranthene
benzo(k)fluoranthene

chrysene
dibenzo(a,h)anthracene
fluoranthene
fluorene
indeno(1,2,3-c,d)pyrene
naphthalene
pyrene
other non-care.PNAs(total)(6); and

2. KRKH, Inc. shall send all monitoring results within 7 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

Midwest Bank & Trust
as Trustee u/t # 74-11-1383
1606 N. Harlem
Elmwood Park, Illinois 60707
Attn: Land Trust Department.

If petitioner chooses to accept this exception, subject to the above conditions, within 45 days of the date of this order, KRKH 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 shall be signed by an officer of KRKH, Inc., duly authorized to bind KRKH, Inc., to all of the terms and conditions of the final Board order in this matter. The 45-day period shall 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. The form of the certificate is as follows:

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 00-25, dated March 2, 2000.

Petitioner

Authorized Agent

Title

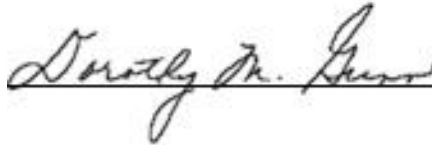
Date

IT IS SO ORDERED.

Board Member N.J. Melas abstained.

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 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 101.246, 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 2nd day of March 2000 by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board