

ILLINOIS POLLUTION CONTROL BOARD
November 4, 2021

CTI DEVELOPMENT, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 21-110
)	(Variance - Land)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by C.M. Santos):

CTI Development, LLC (CTI) seeks relief from the Board’s recently-adopted regulations for coal combustion residual (CCR) surface impoundments (35 Ill. Adm. Code 845) at the Wood River Power Station in Alton, Madison County. After the Board accepted CTI’s first amended petition, the Illinois Environmental Protection Agency (IEPA) filed a motion to dismiss it. While that motion was pending, CTI moved for leave to file a second amended petition.

For the reasons below, the Board denies CTI’s motion for leave to reply, grants CTI’s motion for leave to file its second complaint, and accepts it for hearing. Having done so, the Board need not decide IEPA’s motion to dismiss the first amended complaint.

Below, the Board first provides an abbreviated procedural history. It then briefly summarizes CTI’s second amended petition before addressing CTI’s motion for leave to reply, CTI’s motion for leave to file the amended petition, and IEPA’s motion to dismiss it. The Board then briefly reviews procedural requirements before issuing its order.

PROCEDURAL HISTORY

On May 11, 2021, CTI filed its original petition (Orig. Pet.). On June 3, 2021, CTI filed a certificate of publication of notice of filing its petition in *The Telegraph* of Madison County on May 25, 2021. See 415 ILCS 5/37(a) (2020); 35 Ill. Adm. Code 104.214(d).

On June 7, 2021, the parties filed an agreed motion to extend the deadline for IEPA to file a motion to dismiss and recommendation. The motion requested an extension to 30 days after the Board or hearing officer rules on a motion for leave to file an amended petition. The hearing officer granted the agreed motion on June 15, 2021. On the same date, CTI waived its statutory 120-day decision deadline to March 7, 2022. See 415 ILCS 5/38(a) (2020); 35 Ill. Adm. Code 104.232(a).

On June 17, 2012, the Board found that CTI had provided timely publication of notice and accepted CTI’s original petition. See 35 Ill. Adm. Code 104.214(d).

On July 29, 2021, CTI filed a motion for leave to file an amended petition, to which it attached the amended petition (First Am. Pet.). On August 26, 2021, the Board granted the unopposed motion, accepted the first amended petition, and set a deadline of September 27, 2021, for IEPA to file a motion to dismiss and its recommendation.

On September 22, 2021, IEPA filed a motion to dismiss CTI's first amended petition. On September 24, 2021, IEPA filed a motion requesting that the Board extend its deadline to file a recommendation to 45 days after the Board decides the motion to dismiss. On September 27, 2021, the hearing officer granted the motion to extend IEPA's deadline.

On October 6, 2021, CTI responded to IEPA's motion to dismiss. Also on October 6, 2021, CTI filed a motion for leave to file (CTI Mot. Leave) a second amended petition, to which it attached its second amended petition (Second Am. Pet.). On October 13, 2021, the hearing officer granted IEPA's motion for leave to file a reply by October 20, 2021.

On October 20, 2021, IEPA responded to CTI's motion for leave (Resp. Leave) to file a second amended complaint and filed a reply in support of its motion to dismiss (Reply). On October 26, 2021, CTI filed a motion for leave to reply in support of its motion for leave to file a second amended petition (CTI Mot. Reply), accompanied by its reply.

CTI'S SECOND AMENDED PETITION

Original Petition

CTI's original petition requests a variance extending by one year the requirement at 35 Ill. Adm. Code 845.200(a)(4) to obtain a construction permit to close the West Ash Complex. Orig. Pet at 1, 3, 5.

Section 845.200(a)(4) of the Board's regulations for CCR surface impoundments provides in its entirety that, "[e]xcept as provided in Section 22.59(e) of the Act, no person may close a CCR surface impoundment without obtaining a construction permit for closure issued by the Agency under this Part." 35 Ill. Adm. Code 845.200(a)(4) (Permit Requirements).

First Amended Petition

CTI's first amended petition requests a variance extending by three years the requirements at 35 Ill. Adm. Code 845.200(a)(4) and 845.720(b)(2) to obtain a construction permit to close the West Ash Complex. First Am. Pet. at 1, 2-3, 4, 17, 21, 22.

Section 845.720(b)(2) of the Board's regulations for CCR surface impoundments provides in its entirety that, "[e]xcept as otherwise provided in Section 22.59 of the Act, the owner or operator of a CCR surface impoundment must not close a CCR surface impoundment without a construction permit issued under this Part." 35 Ill. Adm. Code 845.720(b)(2) (Final Closure Plan).

Second Amended Petition

CTI's second amended petition requests a variance extending by three years the requirements at 35 Ill. Adm. Code 845.200(a)(4), 845.220(e), and 845.720(b)(2) to obtain a construction permit to close the West Ash Complex. Second Am. Pet. at 2-3, 4-5, 21, 23.

Section 845.220(e) of the Board's regulations for CCR surface impoundments provides in its entirety that

[o]wners or operators of CCR surface impoundments who submitted a closure plan to the Agency before May 1, 2019, and who complete closure before July 30, 2021, shall not be required to obtain a construction permit for closure under subsection (d). [415 ILCS 5/22.59(e)]. 35 Ill. Adm. Code 845.220(e).

The statutory exception refers to subsection (d), Closure Construction. In addition to the general requirements for a construction permit application in Section 845.220(a), subsection (d) requires that construction permit applications for closure of a CCR surface impoundment must contain specified information and documents. 35 Ill. Adm. Code 845.220(d).

CTI's Motion for Leave to File Amended Petition

CTI states that the Board's procedural rules allow it to amend its variance petition before the hearing closes by filing a motion with the Board. CTI Mot. Leave at 5, citing 35 Ill. Adm. Code 104.226(a).

Based on discussions with IEPA, CTI states that it must request additional relief "to address a related regulatory provision." CTI Mot. Leave at 3. CTI seeks leave to amend by adding a request for relief from 35 Ill. Adm. Code 845.220(e).

CTI argues that this request is consistent with the relief requested in its first amended petition. CTI Mot. Leave at 4. CTI acknowledges that, if it receives the requested relief and closes the West Ash Complex by the extended three-year deadline, it "would not be required to obtain a construction permit for closure under Part 845 for the West Ash Complex." *Id.* at 4. CTI argues that "[a]ddressing this additional provision will make CTI's variance request more comprehensive." *Id.* at 3.

IEPA's Response

IEPA's response does not cite or address the Board's procedural rules providing that a petitioner may move to amend a variance petition. Resp. Leave; *see* 35 Ill. Adm. Code 104.226(a). Instead, IEPA argues that CTI's second amended petition requests relief that the Board does not have authority to grant, so the motion for leave to file it should be denied. *Id.* at 2, 3.

CTI's Motion for Leave to File Reply

Noting IEPA's response opposing its motion for leave to file a second amended petition, CTI requests leave to reply. It argues that "[a] Reply is needed to ensure that CTI's position as to filing a Second Amended Complaint is fully addressed for the Board's consideration." CTI Mot. Reply at 2.

Under the Board's procedural rules, CTI as the moving party "will not have the right to reply, except as the Board or hearing officer permits to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). CTI's motion does not refer to any material prejudice that it may suffer and does not persuade the Board that filing a reply would prevent it. The Board denies CTI's motion for leave to reply and does not consider its reply in deciding its motion for leave to file a second amended petition in the following subsection of the order.

Discussion

CTI may amend its petition before the close of hearing or, if a hearing is not held, before the Board's decision. 35 Ill. Adm. Code 104.226(a). A petitioner amends its petition by filing a motion with the Board under Subpart E of the Board's procedural rules. *Id.*; see 35 Ill. Adm. Code 101.Subpart E (Motions).

Based on discussions with IEPA, CTI seeks to amend its petition to address a provision related to relief it has requested. Mot. Leave at 3. CTI argues that the amendment makes its request "more comprehensive." *Id.* CTI filed a motion requesting leave to file its second amended petition, to which it attached its amended petition. See 35 Ill. Adm. Code 104.226(a).

Section 104.226 allows CTI to move to amend its complaint at this point in the proceeding. The Board has not yet scheduled a hearing or issued a decision on CTI's request. See Dynegy Midwest Generation v. IEPA, PCB 12-135, slip op. at 2 (May 7, 2015). While the Board notes IEPA's opposition, IEPA has not cited legal authority for denying the motion and has not persuasively provided a basis for the Board to deny CTI's motion for leave to file. Rather, IEPA argues the substantive merits of the second amended petition. Based on these factors, the Board grants CTI's motion for leave to file the second amended complaint and accepts the complaint for hearing. By accepting the second amended petition for hearing, the Board makes no findings and reaches no conclusions about its substantive merits.

Having accepted the second amended petition, the Board need not decide IEPA's motion to dismiss the first amended petition.

SUMMARY OF PROCEDURAL REQUIREMENTS

CTI requests that the Board hold a hearing on its second amended petition. Second Am. Pet. at 22. The Board's hearing officer is responsible, as appropriate, for guiding parties through status conferences and hearing officer orders to promptly resolve this matter. The hearing will be scheduled and completed in a timely manner consistent with the statutory decision deadline.

When a petitioner files an amended petition for a variance, the decision deadline recommences from the date of filing the amended petition. 35 Ill. Adm. Code 104.232(a)(2).

Based on its filing date of October 5, 2021, CTI's 120-day decision deadline would be Wednesday, February 2, 2022. However, as noted above under the procedural history, CTI on June 7, 2021, waived its decision deadline to March 7, 2022.

When a petitioner amends its petition, IEPA must file or amend its recommendation not later than 45 days after the filing of an amended petition. 35 Ill. Adm. Code 104.226(b). Based on its filing date of October 5, 2021, IEPA's deadline to file its recommendation is Friday, November 19, 2021. CTI may file a response to IEPA's recommendation within 14 days after being served with recommendation. 35 Ill. Adm. Code 104.220, 104.226.

ORDER

1. The Board denies CTI's motion for leave to file a reply in support of its motion for leave to file a second amended petition.
2. The Board grants CTI's motion for leave to file and accepts the second amended complaint.
3. IEPA must file its recommendation within 45 days after the filing of the amended petition, on or before Friday, November 19, 2021, and CTI may file its response to the recommendation within 14 days after being served with the recommendation.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 4, 2021, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board