

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

CTI DEVELOPMENT, LLC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	PCB No. 21-110
	)	
ILLINOIS ENVIRONMENTAL	)	(Variance – Land)
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**NOTICE OF FILING**

To: Mr. Don Brown	Carol Webb
Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
James R. Thompson Center	1021 N. Grand Avenue East
100 W. Randolph Suite 11-500	Post Office Box 19276
Chicago, Illinois 60601	Springfield, Illinois 62794-9276
(VIA ELECTRONIC MAIL)	(VIA ELECTRONIC MAIL)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board **RESPONSE TO MOTION TO DISMISS SECOND AMENDED PETITION FOR VARIANCE**, a copy of which is herewith served upon you.

Respectfully submitted,

CTI DEVELOPMENT, LLC  
Petitioner,

DATE: December 2, 2021

By: /s/ Jennifer M. Martin  
One of Its Attorneys

Jennifer M. Martin  
HEPLERBROOM, LLC  
4340 Acer Grove Drive  
Springfield, IL 62711  
[Jennifer.Martin@heplerbroom.com](mailto:Jennifer.Martin@heplerbroom.com)  
(217) 528-3674

William J. Curtis  
POLSINELLI PC  
100 S. Fourth Street  
St. Louis, MO 63102  
[wcurtis@polsinelli.com](mailto:wcurtis@polsinelli.com)  
(314) 622-6172

**CERTIFICATE OF SERVICE**

I, Jennifer M. Martin, the undersigned, hereby certifies that the **RESPONSE TO MOTION TO DISMISS SECOND AMENDED PETITION FOR VARIANCE** was served via electronic mail upon the following:

Mr. Don Brown  
Clerk of the Board  
Illinois Pollution Control Board  
James R. Thompson Center  
100 W. Randolph Suite 11-500  
Chicago, Illinois 60601

Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 N. Grand Avenue East  
Post Office Box 19276  
Springfield, Illinois 62794-9276

Clayton Ankney, #6320224  
Stefanie Diers, #6271177  
Christine Zeivel, #6298033  
Division of Legal Counsel  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
Post Office Box 19276  
Springfield, Illinois 62794-9276  
(217) 782-5544  
[Clayton.Ankney@Illinois.gov](mailto:Clayton.Ankney@Illinois.gov)  
[Christine.Zeivel@Illinois.gov](mailto:Christine.Zeivel@Illinois.gov)  
[Stefanie.Diers@Illinois.gov](mailto:Stefanie.Diers@Illinois.gov)

That my email address is [Jennifer.Martin@heplerbroom.com](mailto:Jennifer.Martin@heplerbroom.com).

That the number of pages in the email transmission is 7 total pages.

That the email transmission took place before 5:00 p.m. on the date of December 2, 2021.

/s/ Jennifer M. Martin

Date: December 2, 2021

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

CTI DEVELOPMENT, LLC,)	)	
Petitioner,	)	
	)	
vs.	)	PCB No. 21-110
	)	
ILLINOIS ENVIRONMENTAL	)	(Variance – Land)
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**RESPONSE TO MOTION TO DISMISS  
SECOND AMENDED PETITION FOR VARIANCE**

NOW COMES Petitioner, CTI DEVELOPMENT, LLC (“CTI”), by and through its undersigned counsel, pursuant to 35 Ill. Adm. Code § 101.500, and hereby files its Response to the Illinois Environmental Protection Agency’s (“Illinois EPA’s”) Motion to Dismiss Second Amended Petition for Variance.

On October 6, 2021, CTI filed a Motion for Leave to File Second Amended Petition for Variance (“Second Amended Petition”). The Board granted the Motion for Leave on November 4, 2021 and the Second Amended Petition was filed *instanter*. In the Second Amended Petition, CTI requests a three-year variance from the requirements in 35 Ill. Adm. Code §§ 845.200(a)(4), 845.720(b)(2), and 845.200(e) to obtain a construction permit for closure of the West Ash Complex.

On November 19, 2021, Illinois EPA filed a Motion to Dismiss the Second Amended Petition (“Motion to Dismiss”). In its Motion to Dismiss, Illinois EPA argued that the relief requested by CTI was permanent, not temporary relief, and thus was an improper variance request. *See, generally*, Motion to Dismiss. As explained below, CTI disagrees with Illinois

EPA's contention that the Board cannot grant the relief requested in CTI's Second Amended Petition.

In its Second Amended Petition, CTI seeks relief from the regulatory requirements in 35 Ill. Adm. Code §§ 845.200(a)(4), 845.200(e), and 845.720(b)(2) to obtain a construction permit for closure of the West Ash Complex. As explained in the Second Amended Petition, CTI's request for a variance is based on the exception established by Section 22.59(e) of the Act (415 ILCS 5/22.59(e)) and 35 Ill. Adm. Code § 845.220(e) that parties who complete closure pursuant to an Agency-approved closure plan prior to July 30, 2021 will not be required to obtain a construction permit for closure. *Second Amended Petition*, at 4.

A Closure Plan for the Wood River West Ash Complex was submitted to the Agency and approved prior to May 1, 2019. *Id.* However, CTI was unable to commence implementation of the Closure Plan until April 15, 2020, due to a nearly four-year delay in the Agency's issuance of a NPDES permit. The issuance of the NPDES permit would allow CTI to proceed with pond dewatering, one of the first steps in the closure process. *Id.* at 4-5. The NPDES permit was not received until April 15, 2020, which left CTI with 15 months to complete closure activities that were projected to require 3-5 years for completion in the approved Closure Plan. *Id.* at 6. The requested variance relief, if granted, would extend the time for CTI to complete closure under the Agency-approved Closure Plan.

CTI seeks a three-year variance from the requirement to obtain a Part 845 construction permit so that it can complete closure pursuant to the approved Closure Plan and NPDES permit. *Id.* at 8. If it is able to complete closure within the extended period, it will not have to obtain a construction permit for closure, as contemplated by Section 22.59(e) of the Act (415 ILCS 5/22.59(e)) and 35 Ill. Adm. Code § 845.220(e). If it is unable to complete closure within the

extended period, CTI will be required to obtain a construction permit for closure, as set forth in 35 Ill. Adm. Code §§ 845.200(a)(4), 845.200(e), and 845.720(b)(2). *Id.*

When the Board adopted the Part 845 Rules for Coal Combustion Residuals Surface Impoundments, it clearly contemplated that variance relief would be available in cases such as this, as demonstrated by the following references in the Board's February 4, 2021 Opinion and Order in *Standards for the Disposal of Coal Ash Combustion Residuals in Surface*

*Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19* (February 4, 2021):

- “Regulatory relief mechanisms are available to owners and operators when they disagree with an IEPA determination concerning whether a unit is a CCR surface impoundment. In those instances, an owner or operator may seek an adjusted standard or a variance from the Board.” February 4, 2021 Opinion, at 14.
- “To address site-specific issues, an affected entity may avail itself of relief mechanisms, such as an adjusted standard or a variance” (in discussion addressing the definition of “inactive Closed CCR surface impoundment”). *Id.* at 17.
- “The Board therefore declines to extend the proposed submission deadline [for operating permit applications]. However, an owner or operator may seek a variance to extend the submission deadline based on site-specific circumstances.” *Id.* at 24-25.

The position taken by the Agency in its Motion to Dismiss – that the Board does not have authority to grant “permanent relief from a substantive requirement of the Act” – is not consistent with or supported by the language of the Board's February 4, 2021 Opinion and Order. In fact, according to the Board's February 4, 2021 Opinion, variance relief is available for issues involving the *applicability* of the Part 845 Rules to certain surface impoundments.

This would certainly appear to be the type of “permanent relief” described in the Agency’s Motion to Dismiss.

CTI is not challenging the applicability of the Part 845 Rules to the West Ash Complex. Second Amended Petition at 2 (“[T]he West Ash Complex is subject to the requirements of 35 Ill. Adm. Code Part 845.”). However, based on the site-specific circumstances outlined in the Second Amended Petition, including the unanticipated and significant delay in obtaining a NPDES permit from the Agency, CTI is seeking an extension of the Part 845 deadline to complete closure under the Agency-approved Closure Plan and apply for a construction permit.<sup>1</sup> The requested extension may or may not obviate the requirement for CTI to obtain a Part 845 construction permit. However, if granted, the extension will allow CTI to proceed with closure of the West Ash Complex under the Agency-approved Closure Plan and NPDES permit.

As stated in the Second Amended Petition, without variance relief, CTI will be forced to halt closure activities at the West Ash Complex and restart the entire closure process. *Id.* at 2. This would be costly, redundant and burdensome for a facility that already has an Agency-approved Closure Plan and NPDES permit, and would pose an arbitrary and unreasonable hardship. *Id.* CTI is still subject to the requirement to obtain an operating permit for the West Ash Complex and, once closure is complete, must follow the post-closure care requirements under Part 845. *See* 35 Ill. Adm. Code §§ 845.230 and 845.780.

Lastly, for the same reasons discussed above, any relief from Sections 22.59(b)(2) or 22.59(e) of the Act, 415 ILCS 5/22.59(b)(2) and (e), is also temporary and not permanent relief.

In its Motion to Dismiss, Illinois EPA acknowledged that the Board has authority to grant

---

<sup>1</sup> In *Midwest Generation, LLC (Powerton Station) v. Illinois Environmental Protection Agency*, PCB 21-109 (September 9, 2021 Opinion and Order), the Board granted a variance that extended the deadline for filing a construction permit application in 35 Ill. Adm. Code § 845.700(h)(1) under different factual circumstances.

temporary relief from statutory provisions through a variance proceeding. Motion to Dismiss at 5. Additionally, Illinois EPA acknowledged that, in proceedings involving variance relief from regulations that are substantively identical to statutory provisions, variance relief from the overlying statutory provision is not necessary. *Id.* at 7-8. As such, the requested relief in the Second Amended Petition is proper and Illinois EPA's Motion to Dismiss should be denied.

WHEREFORE, for the above reasons, Petitioner CTI DEVELOPMENT, LLC respectfully requests that the Illinois Pollution Control Board deny the Illinois Environmental Protection Agency's Motion to Dismiss Second Amended Petition for Variance.

Respectfully submitted.

CTI DEVELOPMENT, LLC  
Petitioner,

DATE: December 2, 2021

By: /s/ Jennifer M. Martin  
One of Its Attorneys

Jennifer M. Martin  
Melissa S. Brown  
HEPLERBROOM, LLC  
4340 Acer Grove Drive  
[Jennifer.Martin@heplerbroom.com](mailto:Jennifer.Martin@heplerbroom.com)  
[Melissa.Brown@heplerbroom.com](mailto:Melissa.Brown@heplerbroom.com)  
(217) 528-3674

William J. Curtis  
POLSINELLI PC  
100 S. Fourth Street  
St. Louis, MO 631102  
[wcurtis@polsinelli.com](mailto:wcurtis@polsinelli.com)  
(314) 622-6172