ILLINOIS POLLUTION CONTROL BOARD April 3, 2003

THE ENSIGN-BICKFORD COMPANY,)	
Petitioner,)	
V.)	PCB 02-159
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)	(Variance - Air)
Respondent.)	
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ORDER OF THE BOARD (by W.A. Marovitz):

This matter is before the Board on the Ensign-Bickford Company's (EBCo) motion to transfer variance (motion) filed on March 19, 2003. The motion represents that the Environmental Protection Agency (Agency) agrees with the request. Mot. at 2. For the reasons explained below, the Board denies the motion.

BACKGROUND

On June 20, 2002, the Board granted EBCo a variance pursuant to 35 Ill. Adm. Code 237.103, to open burn explosive waste and explosive-contaminated waste at its 456-acre facility near Wolf Lake in Union County. The Ensign-Bickford Company v. IEPA, PCB 02-159 (June 20, 2002). The variance lasts until June 20, 2003, or six month after the Board rules on EBCo's adjusted standard in AS 00-5. On March 20, 2003, the Board granted EBCo an adjusted standard for a term of ten years. *In re* Petition of the Ensign-Bickford Company for an Adjusted Standard from 35 Ill. Adm. Code 237.102, AS 00-5 (Mar. 20, 2003). The adjusted standard takes effect when the variance expires on June 20, 2003.

MOTION

In the motion, EBCo asks the Board to transfer the variance granted in June 20, 2002 to Dyno Nobel Inc.. The motion asserts Dyno Nobel will be the new operator of the Wolf Lake facility, if the May 3, 2003 closing occurs. Mot. 1-2. EBCo asks that the transfer of the variance be effective on May 3, 2003. Mot. at 1.

EBCo explains that the pending transaction is a "purchase of certain assets by Dyno Nobel Inc.." Mot. at 1. Pursuant to the terms of the acquisition, the ownership of the facility will transfer to Tech Real Estate Holdings L.L.C., and the operational assets of the facility will transfer to Dyno Nobel Inc. Mot. at 2.

EBCo states that EBCo has conferred with the Agency and both parties agree that transfer of the variance can be accomplished by Board order. Mot. at 2.

ANALYSIS

The filing requirements for a variance are set forth at 35 Ill. Adm. Code 104.202. Among those requirements is Section 104.202(a), which states:

Any person seeking a variance from any rule or regulation, requirement or order of the Board that would otherwise be applicable to that person may file a variance petition. 35 Ill. Adm. Code 202.

Neither the Environmental Protection Act (Act) 415 ILCS 5 *et seq.* nor the Board's procedural rules address the specific type of relief EBCo seeks.

The Board has previously granted a joint motion to substitute a petitioner and holder for a previously granted adjusted standard, *see e.g. In re* Petition of Commonwealth Edison Company for an Adjusted Standard from 35 Ill. Adm. Code 302.211(d) and (e), AS 96-10 (Mar. 16, 2000). In Commonwealth Edison the Board granted a joint motion filed by Commonwealth Edison (ComEd) and Midwest Generation, LLC (Midwest). The Board had previously granted ComEd an adjusted standard from the thermal standards for discharges of cooling water from some of ComEd's generating stations. *Id.* Title to the generating stations was transferred from ComEd to Midwest on December 15, 1999. *Id.* The parties filed the joint motion on February 25, 2000, stating that the operations of the generating stations would not change as a result of the transfer, and the transfer of the facility did not affect the relevant factors that justified the grant of the adjusted standard. *Id.* Additionally, Midwest retained almost the entire workforce previously employed by ComEd. *Id.*

Although EBCo asks that the variance be transferred to Dyno Nobel Inc., Dyno Nobel is not a party to the motion. The Board's procedural rules do not provide for a third party to seek a variance or have a variance transferred on Dyno Nobel's behalf. If in fact the May 3, 2003 closing occurs, consistent with Section 104.202(a), Dyno Nobel may file a variance petition or other appropriate filing concerning this facility. For these reasons, the motion to transfer the variance is denied.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on April 3, 2003, by a vote of 7-0.

Dorothy M. Gunn, Clerk Illinois Pollution Control Board

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