

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
) PCB 2021-110
CTI Development, LLC v. Illinois)
Environmental Protection Agency) (Variance – Land)

To: See attached service list.

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Illinois Environmental Protection Agency's Motion to Dismiss CTI Development, LLC's Second Amended Petition for Variance, a copy of which is herewith served upon you.

Respectfully submitted,

Dated: November 19, 2021

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

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BY: /s/Clayton J. Ankney
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THIS FILING IS SUBMITTED ELECTRONICALLY

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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) PCB 2021-110
CTI Development, LLC v. Illinois)
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)

MOTION TO DISMISS SECOND AMENDED PETITION FOR VARIANCE

The Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”), by one of its attorneys, and pursuant to 35 Ill. Admin. Code 101.506 and 35 Ill. Admin. Code 104.230, hereby moves to dismiss CTI Development, LLC’s Second Amended Petition for Variance, stating as follows:

INTRODUCTION

On November 4, 2021, the Board entered an order accepting CTI Development LLC’s Second Amended Petition for Variance (“Second Amended Petition”). In its Second Amended Petition, CTI Development LLC (“CTI” or “Petitioner”) seeks “a three-year variance from the requirement set forth in 35 Ill. Admin. 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.” Second Amended Petition, p. 1. CTI asserts that the Illinois Pollution Control Board (“Board”) has the authority to grant the relief requested through a variance because it is temporary. The Agency does not contest the Board’s authority to grant temporary variance relief from its own rules and regulations.

However, while CTI’s request for relief implies it is seeking only temporary relief from the Board’s regulations, it is actually seeking to be permanently relieved of its clear obligation under both Part 845—§§ 845.200(a)(4), 845.720(b)(2), and 845.200(e)—and the Illinois Environmental Protection Act (“Act”)—Section 22.59(b)(2)—to obtain a construction permit for closure of the West Ash Complex.

CTI's Second Amended Petition should be dismissed because: (1) the Board does not have the authority to grant permanent relief from substantive requirements of its rules or regulations through the variance procedure; and (2) the Board does not have the authority to grant permanent relief from a substantive requirement of the Act through either the variance or adjusted standard procedures.

LEGAL STANDARD

The Board, as well as most courts of original jurisdiction, have consistently ruled that a motion to dismiss a pleading should be granted where the well-pleaded allegations, considered in the light most favorable to the non-movant, indicate that no set of facts could be proven upon which the petitioner would be entitled to the relief requested. *See Uptown Fed. Sav. & Loan Ass'n. v. Kotsiopoulos*, 105 Ill. App. 3d 444 (1982); *People v. Stein Steel Mills Services, Inc.*, PCB 02-1 at 1-2 (Ill. Pol. Control Bd. Nov. 15, 2001) (collecting precedent).

The Board has further reasoned that “[a] motion to dismiss, like a motion for summary judgment, can succeed where the facts, taken in a light most favorable to the party opposing the motion, prove that the movant is entitled to dismissal as a matter of law.” *BTL Specialty Resins v. Illinois Environmental Protection Agency*, PCB 95-98 at 1 (April 20, 1995). A petition is subject to dismissal if the “petition requests relief that the Board is not empowered to grant.” 35 Ill. Admin. Code 104.230.

ARGUMENT

The parties agree that “[a] variance is a **temporary exemption** from any specified rule, regulation, requirement or order of the Board[.]” 35 Ill. Admin. Code 104.200(a)(1) (emphasis added); *W.R. Grace & Co. – Conn. v. Illinois Environmental Protection Agency*, PCB No. 96-193 (Ill. Pol. Control Bd. Feb. 6, 1997) (“A variance, by its very nature, is a temporary reprieve from

compliance with the Board's regulations, and compliance is to be pursued regardless of the hardship which eventual compliance presents an individual petitioner."); Second Amended Petition, p. 17 (stating a variance is "a temporary exemption").

The parties further agree that, if CTI were seeking temporary relief, precedent establishes the Board would have the authority to grant temporary variance relief from a statutory provision. Amended Petition, pp.18-19 (collecting cases supporting the proposition that "in matters involving variance relief from regulations that are substantively identical to statutory provisions, the Board has generally held that variance relief from the overlying statutory provision is unnecessary").

1. The Board does not have the authority to grant CTI's request for permanent relief from the §§ 845.200(a)(4) and 845.720(b)(2) construction permit requirement or to obviate the construction permit by extending the § 845.220(e) exemption deadline.

In its Second Amended Petition, CTI asserts it is seeking a temporary variance from the requirements of 35 Ill. Admin. Code §§ 845.200(a)(4), 845.720(b)(2), and 845.200(e). Second Amended Petition, p. 1 ("[CTI] hereby petitions. . . for a three-year variance from the requirement set forth in 35 Ill. Admin. 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."); Second Amended Petition, X. Term of Variance, p. 21 ("CTI proposes a three-year variance, or from July 30, 2021 through July 30, 2024[.]").

Sections 845.200(a)(4) and 845.720(b)(2) require CTI to obtain a construction permit to close its West Ash Complex. A three-year variance from these provisions would extend the deadline for CTI to obtain a construction permit under Part 845 from the applicable deadlines in Section 845.700(h), to July 30, 2024.

Further, CTI seeks an extension of the deadline in 845.220(e), which states that owners and operators who "submitted a closure plan to the Agency before May 1, 2019, and who **completed**

closure before July 30, 2021 shall not be required to obtain a construction permit for closure under subsection (d).” 845.220(e) (emphasis added). CTI did not complete closure of the West Ash Complex prior to July 30, 2021. *See* Second Amended Petition, p. 2 (“The West Ash Complex is in the process of being closed.”). Therefore, the 845.220(e) exemption does not apply to the West Ash Complex and CTI must obtain a construction permit prior to closing the West Ash Complex under 35 Ill. Admin. Code. §§ 845.200(a)(4) and 845.720(b)(2) (and 22.59(b)(2) of the Act). If the Board grants CTI an extension of the exemption deadline and CTI completes closure prior to the extended deadline, CTI would be exempt from the requirement that it obtain a construction permit prior to closure.

While phrased in a way that makes the relief sought appear to be temporary—a mere extension of a deadline—throughout the Second Amended Petition, CTI makes it clear it has no intention of obtaining a construction permit and intends to use the extended deadline to complete closure without obtaining the construction permit required under 35 Ill. Admin. Code. §§ 845.200(a)(4) and 845.720(b)(2) (and 22.59(b)(2) of the Act):

“However, CTI was unable to complete closure of the CCR surface impoundments by July 30, 2021 as set forth in 415 ILCS 5/22.59(e) and 35 Ill. Adm. Code § 845.220(e). Therefore, **CTI is requesting a variance from the requirements in the Board’s rules to obtain a construction permit for closure.**” Second Amended Petition, p. 2 (emphasis added);

“CTI seeks a variance from the regulatory requirement in Part 845 to obtain a construction permit for closure of the West Ash Complex.” Second Amended Petition, p. 2;

“If CTI is unable to obtain a variance from the requirement in 35 Ill. Admin. Code §§ 845.200(e), 845.200(a)(4) and 845.720(b)(2), CTI would be required to obtain a construction permit to complete the closure activities that are already in process at the West Ash Complex. Requiring CTI to go through the construction permit process under Part 845 would halt the current closure work underway and cause significant delays to the closure

of the West Ash Complex.” Second Amended Petition, p. 13 (emphasis added); and

“It is an arbitrary and unreasonable hardship to require CTI to comply with the requirement in 35 Ill. Admin. Code §§ 845.220(e), 845.200(a)(4) and 845.720(B)(2) to obtain a construction permit to close the West Ash Complex. A three-year variance from Sections 845.220(e), 845.200(a)(4) and 845.720(b)(2) will allow CTI to complete closure of the West Ash Complex in accordance with its NPDES permit and Illinois-approved Closure Plan.” Second Amended Petition, p. 23 (emphases added).

Based on CTI’s admissions contained in its Second Amended Petition, it is clear CTI does not seek temporary relief, but, instead, seeks to be permanently relieved of its clear obligation under 35 Ill. Admin. Code. §§ 845.200(a)(4) and 845.720(b)(2) (and 22.59(b)(2) of the Act) to obtain a construction permit for closure of the West Ash Complex. CTI seeks to have the Board extend the deadline to obtain a construction permit, and the 845.220(e) construction permit exemption deadline, under Part 845, so that CTI can complete closure prior to the extended deadline without ever obtaining a construction permit under Part 845. Therefore, CTI is seeking a substantive change—to not have to obtain a construction permit—from generally applicable regulatory requirements—requiring CTI to obtain a construction permit—which the Board does not have the authority to grant through the variance procedure.

Substantive relief from generally applicable regulatory requirements is more appropriately sought through the adjusted standard procedure.¹ “The Environmental Protection Act (Act) and the Board’s procedural rules provide that a petitioner may request, and the Board may grant, an environmental standard that is different from the generally applicable standard that would otherwise apply to the petitioner. This is called an adjusted standard.” *In the Matter of Petition of*

¹ As discussed in Section 2 of this motion, the Board also does not have the authority to grant an adjusted standard from Board rules adopting statutory language because the Board does not have the authority to change statutory language.

Apex Material Technologies, LLC for an Adjusted Standard from Portions of the 35 Ill. Admin. Code 807.104 and 810.103, or, in the Alternate, a Finding of Inapplicability, AS 15-2 at 13 (Ill. Pol. Control Bd. June 18, 2015).

CTI cannot obtain the relief requested through the variance procedure, and, therefore, CTI's Amended Petition for Variance should be dismissed.

- 2. The Board does not have the authority to obviate the requirement that Petitioner obtain a construction permit for closure under Section 22.59(b)(2) of the Act or to obviate the construction permit requirement by extending the exemption deadline contained in Section 22.59(e) of the Act.**

CTI's request that the Board allow it to close the West Ash Complex without a construction permit runs afoul of Section 22.59(b)(2) of the Act, which requires CTI to obtain a construction permit. 415 ILCS 5/22.59(b)(2) ("No person shall (2) construct, install, modify, operate, or close any CCR surface impoundment without a permit granted by the Agency, or so as to violate any conditions imposed by such permit, any provision of this Section or any regulations or standards adopted by the Board under this Section[.]").

CTI asserts it does not need relief from Sections 22.59(b)(2) or 22.59(e) of the Act because "in matters involving variance relief from regulations that are substantively identical to statutory provisions, the Board has generally held that variance relief from the overlying statutory provision is unnecessary." Second Amended Petition, pp. 18-19 (citing *City of Eldorado v. EPA*, PCB No. 78-280 (Ill. Pol. Control Bd. Mar. 1, 1979)). Sections 845.200(a)(4) and 845.720(b)(2) are substantively identical to Section 22.59(b)(2) of the Act, and Section 845.220(e) is substantively identical to 22.59(e) of the Act; however, CTI is not seeking temporary relief from the identical regulatory requirements contained in Sections 845.200(a)(4), 845.720(b)(2), and 845.220(e)—it is seeking permanent relief. Since CTI cannot obtain permanent relief from the substantive requirement of Sections 845.200(a)(4) and 845.720(b)(2) (or Section 845.220(e)) through the

variance procedure, CTI requires relief from the generally applicable statutory requirement that it obtain a construction permit.

CTI provides no precedent showing the Board has the authority—under either the variance or adjusted standard procedures—to effectively obviate a statutory requirement. To the contrary, Board precedent establishes that the Board does not have the authority to permanently adjust statutory requirements. *Apex*, AS 15-2 at 53 (“[T]he [Board’s] definition of ‘solid waste’ mirrors the definition [in the] Act. Even if receiving an adjusted standard from the regulatory definition would relieve APEX of complying with applicable rules that use the terms, the Board cannot grant an adjusted standard from a statutory requirement.”); *see also Petition of Maximum Investments, LLC for an Adjusted Standard from 35 Ill. Administrative Code 740.210(a) for Stoney Creek Landfill, Palos Hills, Ill. v. IEPA*, AS 09-2 at 7 (Ill. Pol. Control Bd. June 18, 2009).

Here, even if the Board could relieve CTI of the permitting requirements of 35 Ill. Admin. Code. §§ 845.200(a)(4) and 845.720(b)(2) (or obviate the construction permit requirement by extending the Section 845.220(e) exemption deadline) through the variance procedure—which it cannot—CTI would still be unable to obtain the permanent, substantive relief from Section 22.59(b)(2) and (e) of the Act it requires to close the West Ash Complex without first obtaining a construction permit.

3. Compliance with other parts of Part 845 or other regulatory or statutory requirements does not change the permanent nature of the relief requested.

Based on CTI’s response to the Agency’s September 22, 2021 Motion to Dismiss Amended Petition for Variance, it appears CTI will argue in response to this motion that the relief requested is not permanent relief from obtaining a permit for dewatering or approval of a closure plan, and the relief requested would not be permanent relief from all requirements of Part 845. *See* Response to Motion to Dismiss, p. 2.

However, Compliance with the aforementioned requirements does not convert the permanent relief CTI is requesting to temporary relief. Compliance with other regulations or permitting requirements is completely irrelevant to the question of whether CTI can obtain the relief requested in their petition. CTI may have to comply with other regulatory provisions, but, here, CTI is still requesting to be permanently exempt from the construction permit requirement.

4. The possibility that CTI could be required to obtain a construction permit if it does not complete closure prior to the extended deadline is irrelevant.

Another argument the Agency expects CTI to make is that the relief it seeks is temporary because it could potentially have to obtain a construction permit if it does not complete closure within the three years requested to complete closure without a construction permit. *See* Response to Motion to Dismiss, pp. 2-3.

That CTI might in the future be obligated to obtain a construction permit does not change the nature of the relief CTI is requesting in its petition. CTI's clear intent is to use the variance to never have to obtain a construction permit. Using CTI's logic, anyone could obtain a variance on the basis that some intervening event might one day terminate the permanence of the relief they are requesting. Such a result is not tenable. Ultimately, however, the tenuous potential for such intervening events does not change the fact that the relief actually requested by CTI is a permanent exemption from the construction permit requirement.

CONCLUSION

The Board does not have the authority—through either the variance or adjusted standard procedure—to relieve CTI of the requirement that it obtain a construction permit to close the West Ash Complex. Because CTI's Second Amended Petition requests relief that the Board is not empowered to grant, CTI's Second Amended Petition should be dismissed.

Wherefore, the Agency requests the Board dismiss CTI's Second Amended Petition for Variance.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

BY: /s/Clayton J. Ankney
Clayton J. Ankney

Dated: November 19, 2021

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THIS FILING IS SUBMITTED ELECTRONICALLY

CERTIFICATE OF SERVICE

I, the undersigned, on affirmation certify the following:

That I have served the attached **NOTICE OF FILING** and **MOTION TO DISMISS SECOND AMENDED PETITION FOR VARIANCE** by e-mail upon the following:

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Don Brown	Don.Brown@illinois.gov
Carol Webb	Carol.Webb@illinois.gov

That I have served the attached **NOTICE OF FILING** and **MOTION TO DISMISS SECOND AMENDED PETITION FOR VARIANCE** upon any other persons, if any, listed on the Service List, by placing a true copy in an envelope duly address bearing proper first-class postage in the United States mail at Springfield, Illinois on November 19, 2021.

That my e-mail address is Clayton.Ankney@Illinois.gov.

That the number of pages in the e-mail transmission is twelve (12).

That the e-mail transmission took place before 4:30 p.m. on the date of November 19, 2021.

/s/Clayton J. Ankney
Clayton J. Ankney