

IN THE APPELLATE COURT OF ILLINOIS
FOR THE FIFTH DISTRICT

CTI DEVELOPMENT, LLC,

Petitioner-Appellant,

v.

ILLINOIS POLLUTION CONTROL
BOARD, and ILLINOIS
ENVIRONMENTAL PROTECTION
AGENCY,

Respondent-Appellee.

Petition for Review of Order of the
Illinois Pollution Control Board in its
Docket No. PCB 2021-110

No. _____

NOTICE OF FILING OF PETITION FOR REVIEW

TO: PERSONS LISTED ON CERTIFICATE OF SERVICE

Please take notice that on June 15, 2022, CTI Development, LLC, electronically filed in the Appellate Court of Illinois, Fifth District, its Petition for Review pursuant to Illinois Supreme Court Rule 335 of the Illinois Pollution Control Board's final OPINION AND ORDER entered on May 12, 2022 in PCB 2021-110, a copy of which is hereby served upon you.

By: /s/ Melissa S. Brown
One of Its Attorneys

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on June 15, 2022 the foregoing Notice of Filing and Petition for Review were filed with the Clerk of the Court for the Illinois Appellate Court, Fifth Judicial District, by using the Odyssey EFile IL System.

The undersigned also certifies that on June 15, 2022, true and correct copies of the Notice of Filing and Petition for Review were served via email on Respondent at the email addresses listed below:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matter therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

/s/ *Melissa S. Brown*

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No. _____

PETITION FOR REVIEW

Petitioner, CTI Development, LLC, hereby petitions the court for review of the order of the Illinois Pollution Control Board, entered on May 12, 2022, dismissing CTI Development, LLC's Second Amended Petition for Variance. Although the Petitioner's project was well underway before statutory and regulatory changes occurred materially affecting the project, the Illinois Pollution Control Board found that it lacked authority to grant a variance to alter the new requirements. A copy of the Illinois Pollution Control Board's May 12, 2022 Order is attached hereto.

DATE: June 15, 2022

By: /s/ Melissa S. Brown
One of Its Attorneys

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ILLINOIS POLLUTION CONTROL BOARD

May 12, 2022

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

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

CTI Development, LLC (CTI) seeks relief from the Board's regulations for coal combustion residual (CCR) surface impoundments at the Wood River Power Station (Station) at 1 Chessen Lane in Alton, Madison County. For the West Ash Pond System at the Station, CTI requests additional time to complete closure activities under a plan approved by the Illinois Environmental Protection Agency (IEPA). After the Board accepted CTI's second amended petition, IEPA filed a motion to dismiss it.

Based on the factors and reasons below, the Board grants IEPA's motion to dismiss CTI's second amended petition for a variance.

Below, the Board first provides a procedural history and background on the Station. The Board then summarizes CTI's petition, with emphasis on the requirements from which it requests a variance and its plan to comply with those requirements. Next, the discussion addresses background on variances, the standard of review, the Board's authority, and statutory and regulatory authorities before turning to the motion to dismiss. The Board then concludes to grant the motion and issues its order.

PROCEDURAL HISTORY

On May 11, 2021, CTI filed its original petition. On June 3, 2021, CTI filed a certificate of publication of notice of filing the petition in *The Telegraph* of Madison County on May 25, 2021. 415 ILCS 5/37(a) (2020); 35 Ill. Adm. Code 104.214(d). On June 17, 2012, the Board found that CTI had timely published notice and accepted CTI's original petition for hearing.

On July 29, 2021, CTI filed a motion for leave to file an amended petition, to which it attached the amended petition. On August 26, 2021, the Board granted the motion for leave to file and accepted the amended petition.

On September 22, 2021, IEPA filed a motion to dismiss CTI's amended petition. On October 6, 2021, CTI filed its response to IEPA's motion to dismiss. CTI also filed a motion for

leave to file a second amended petition, to which it attached its second amended petition (Pet.). Attached to CTI's second amended petition were eight attachments:

- Pet. Att. 1: Closure and Post-Closure Care Plan for the Wood River West Ash Complex (Oct. 2016);
- Pet. Att. 2: Letter from IEPA to Dynegy (May 25, 2017);
- Pet. Att. 3: Letter from CTI to IEPA (Nov. 11, 2019);
- Pet. Att. 4: Letter from IEPA to CTI (Dec. 4, 2019);
- Pet. Att. 5: Modified NPDES Permit No. IL0000701 (modified Apr. 15, 2020);
- Pet. Att. 6: Renewed NPDES Permit No. IL0000701 (issued May 5, 2021);
- Pet. Att. 7: IEPA National Pollutant Discharge Elimination System (NPDES) Permit Responsiveness Summary (Apr. 15, 2020); and
- Pet. Att. 8: Affidavit of Jesse Froh, Vice-President for CTI (July 29, 2021).

On October 20, 2021, IEPA filed its response to CTI's motion for leave to file a second amended complaint. Also on October 20, 2021, IEPA filed a reply in support of its motion to dismiss. On October 26, 2021, CTI filed a motion for leave to reply in support of its motion for leave to file, to which it attached its reply.

On November 4, 2021, the Board denied CTI's motion for leave to file a reply. The Board also granted CTI's motion for leave to file and accepted the second amended complaint. Having accepted the second amended complaint, the Board stated that it need not decide IEPA's motion to dismiss the first amended complaint. On November 5, 2021, CTI filed an open waiver of its statutory decision deadline. 415 ILCS 5/38 (2020); 35 Ill. Adm. Code 101.308(c)(1).

On November 19, 2021, IEPA filed a motion to dismiss CTI's second amended complaint (IEPA Mot.). On December 2, 2021, CTI responded to the motion (CTI Resp.).

BACKGROUND ON WOOD RIVER STATION

Location

The Wood River Power Station is located at 1 Chessen Lane in Alton, Madison County. Pet. at 8; Pet. Att. 8 (¶2). Immediately south and southwest of the Station across Berm Highway is the Mississippi River. Pet. at 9; Pet. Att. 8 (¶12). Immediately east of the Station is the Wood River. *Id.* A privately-owned parking lot is north of the Station, and a former smelting facility is northwest of it. *Id.*; see 35 Ill. Adm. Code 104.204(b)(1).

History

Station operations began in 1954 and ended on June 1, 2016. Pet. at 8, 9; Pet., Att. 8 (¶3). Dynegy Midwest Generation, LLC (Dynegy), the former owner of the Station, transferred ownership to CTI on August 30, 2019. Pet. at 7. Demolition of the Station was completed in July 2021. *Id.* at 9; Pet. Att. 8 (¶6). The Station does not employ any persons. Pet., Att. 8 (¶10); see 35 Ill. Adm. Code 104.204(b)(5).

The Station includes a West Ash Complex commissioned in 1997. Pet. at 9; Pet. Att. 8 (¶5). The West Ash Complex is comprised of West Ash Ponds 1, 2W, and 2E, “which are inactive CCR surface impoundments” separated by splitter dikes. Pet. at 2, 8; Pet. Att. 8 (¶¶4, 8). “West Ash Pond 2E contains a geomembrane liner system and West Ash Ponds 1 and 2W are unlined.” Pet. at 10; Pet., Att. 8 (¶8). “The amount of CCR being left in place in the West Ash Complex is approximately 950,000 cubic yards.” Pet. at 10; Pet., Att. 8 (¶8).

Because the Station has been demolished, CTI reports that there are no ongoing processes using materials there. Pet. at 9; Pet. Att. 8 (¶7); *see* 35 Ill. Adm. Code 104.204(b)(6). The Station’s modified and renewed NPDES Permit No. IL 0000701, which allows for dewatering the West Ash Complex, identifies points of discharge and receiving waterways. Pet. at 8-9, citing Pet. Atts. 5, 6; *see* 35 Ill. Adm. Code 104.204(b)(2).

Closure Plan

On June 9, 2016, Dynegy requested a modification of its NPDES permit. The Station had ceased operations and sought “to accommodate the dewatering of the West Ash Complex that would be required for closure.” Pet. at 6. In October 2016, Dynegy submitted a closure plan for the West Ash Complex to IEPA. It also submitted an addendum to the closure plan dated April 28, 2017, and a revision of the addendum dated May 18, 2017. *Id.*, citing Pet. Att. 1. On May 25, 2017, IEPA approved the closure plan. Pet. at 6, citing Pet. Att. 2.

Under the closure plan, activities include “first dewatering the ponds and then constructing an alternative geomembrane cover system which will include a geomembrane, geocomposite drainage layer, protective soil cover, and an erosion layer.” Pet. at 6. The plan also includes constructing a stormwater management system. *Id.* The plan estimated that closure activities would be complete in 3-5 years by November 18, 2020. *Id.* Post-closure activities, including groundwater monitoring and maintaining the final cover system, will continue for 30 years. *Id.* at 6, 10.

CTI asserts that Dynegy could not begin implementing the closure plan until IEPA approved its 2016 request to modify the NPDES permit. Pet. at 6. IEPA submitted a draft permit modification to public notice in September 2018. IEPA held a public hearing on the proposed modification in April 2019. *Id.* at 6-7.

On August 30, 2019, Dynegy transferred ownership of the Station to CTI. CTI notified IEPA of the transfer in September 2019. Pet. at 7. On October 15, 2019, CTI met with IEPA to discuss the closure plan, transferring the Station’s NPDES permit, and the possible applicability of Section 22.59(e) of the Act. *Id.* In a letter to IEPA dated November 11, 2019, CTI documented transferring ownership of the Station. *Id.*, citing Pet. Att. 3.

In a response dated December 4, 2019, IEPA “acknowledged the change in ownership and transfer of closure responsibility to CTI.” Pet. at 7, citing Pet. Att. 4. IEPA notified CTI that “[a] construction permit, pursuant to 35 Ill. Adm. Code 309 is required prior to commencing closure of the West Ash Complex.” Pet. Att. 4. IEPA added that “[s]ubsection 22.59(e) is applicable to the Agency-approved closure of the West Ash Complex.” *Id.* IEPA concluded that

“CTI may close the West Ash Complex utilizing the approved closure plan, subject to the requirements and limitations of Section 22.59 of the Act.” *Id.*

CTI argues that it could not begin closing the West Ash Complex until IEPA issued a modified NPDES permit because “the facility was restricted by the requirements of the prior NPDES permit.” Pet. at 8. On April 15, 2020, nearly four years after Dynegey’s June 9, 2016 request for a permit modification, IEPA issued CTI modified NPDES Permit No. IL0000701. The modified permit allows dewatering ponds at the West Ash Complex. *Id.* at 7, citing Pet., Att. 5. CTI began dewatering once IEPA issued the modified permit. Pet. at 7.

At the time it filed its second amended petition, CTI reported that it had “begun pumping to remove surface water” and constructing drainage structures. Pet at 16. It also continued to dewater and had begun moving material to construct a subgrade. *Id.* at 8. “To date, CTI has moved approximately 260,000 cubic yards of material for subgrade, with approximately 125,000 cubic yards left to complete the subgrade.” After completing the subgrade, CTI would then install the synthetic liner and final soil cover. *Id.* CTI estimated that “the remaining work will take approximately three years to complete.” *Id.* at 16.

However, CTI was “unable to complete closure of the West Ash Complex by July 30, 2021 due to the unanticipated and significant delay in issuance of the modified NPDES Permit.” Pet. at 8, citing 415 ILCS 5/22.59(e) (2020); 35 Ill. Adm. Code 845.220(e). If it cannot complete closure by July 30, 2021, CTI must obtain a construction permit to complete activities under the approved closure plan. *Id.*

SUMMARY OF CTI’S PETITION

Compliance Alternatives

A variance petition must include

[a] description of the efforts that would be necessary for the petitioner to achieve immediate compliance with the regulation, requirement or Board order at issue. All possible compliance alternatives, with the corresponding cost for each alternative, must be set forth and discussed. The discussion of compliance alternatives must include the availability of alternate methods of compliance, the extent that the methods were studied, and the comparative factors leading to the selection of the control program proposed for compliance. The discussion of the costs of immediate compliance may include the overall capital costs and the annualized capital and operating costs. 35 Ill. Adm. Code 104.204(d).

CTI argues that “it is not possible with any amount of man-power or capital” to complete closure by July 30, 2021, as required by 35 Ill. Adm. Code 845.200(e). Pet. at 13. CTI concludes that immediate compliance with 35 Ill. Adm. Code 845.200(a)(4), 845.220(e), and 845.720(b)(2) “is not possible.” *Id.*

If it is not granted its requested variance, CTI argues that it would be required “to obtain a construction permit to complete the closure activities that are already in progress at the West Ash Complex.” Pet. at 13. CTI states that the permitting process would halt closure activities that are already underway “and cause significant delays to the closure of the West Ash Complex.” *Id.*

Regulations from Which CTI Requests Variances

35 Ill. Adm. Code 845.200(a)(4): Permit Requirements and Standards of Issuance

CTI requests a variance from Section 845.200(a)(4) of the Board’s regulations for CCR surface impoundments, which 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); Pet. at 3, 4; *see* 415 ILCS 5/22.59(b)(2) (2020).

35 Ill. Adm. Code 845.220(e): Construction Permits

CTI also requests a variance from Section 845.220(e) of the Board’s regulations for CCR surface impoundments, which 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); Pet. at 2-3, 4.

35 Ill. Adm. Code 845.720(b)(2): Closure Plan

Finally, CTI requests a variance from Section 845.720(b)(2) of the Board’s regulations for CCR surface impoundments, which 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); Pet. at 3; *see* 415 ILCS 5/22.59(b)(2) (2020).

CTI’s Requested Relief

A variance petition must include a “detailed description of the compliance plan,” including the proposed method or equipment, estimated costs, and a schedule. 35 Ill. Adm. Code 104.204(f).

CTI requests a three-year variance from the requirement to obtain a construction permit for closure so that it can complete closure under the plan approved by IEPA. Pet. at 8.

To achieve compliance with 35 Ill. Adm. Code 845.200(a)(4), 845.220(e), and 845.720(b)(2), “CTI would complete all the measures outlined in the Illinois EPA-approved Closure Plan by July 30, 2024.” Pet. at 15. CTI argues that this timing is consistent with the

timing approved by IEPA. *Id.* If it does not complete the closure plan by that date, it will submit a construction permit application to IEPA as required by Part 845. *Id.*

DISCUSSION

Variations Generally

Under the Act, the Board “may grant individual variances beyond the limitations prescribed in this Act, whenever it is found, upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship.” 415 ILCS 5/35(a) (2020); 35 Ill. Adm. Code 104.200, 104.238. A “variance is a temporary exemption from any specified rule, regulation, requirement or order of the Board.” 35 Ill. Adm. Code 104.200(a)(1).

In a variance proceeding, the burden of proof is on the petitioner. 415 ILCS 5/37(a) (2020); 35 Ill. Adm. Code 104.238(a). The petitioner must prove that timely compliance with the Board rule or order would cause an arbitrary or unreasonable hardship that outweighs the public interest in timely compliance with the rule or order. *See Willowbrook Motel v. IPCB*, 135 Ill. App. 3d 343, 349-50 (1st Dist. 1985).

Standard of Review

In deciding a motion to dismiss, the Board considers all well-pled facts contained in the pleading as true and draws all inferences from the facts in favor of the non-movant. Timber Creek Homes v. Vill. of Round Lake Park, et al., PCB 14-99, slip op. at 10 (Mar. 20, 2014) (citations omitted). Dismissing the petition is proper only if no set of facts could be proven that would entitle the petitioner to the requested relief. People v. Stein Steel Mills Svcs., PCB 02-1, slip op. at 1 (Nov. 15, 2001).

Like a motion for summary judgment, a motion to dismiss can succeed where the facts, taken in light most favorable to the party opposing the motion, prove that the moving party is entitled to dismissal as a matter of law. Pekin Energy Co. v. IEPA, PCB 97-145 (Apr. 17, 1997) (denying motion to dismiss petition for variance for ash settling pond). A variance petition is subject to dismissal if the Board determines that “[t]he petition requests relief that the Board is not empowered to grant.” 35 Ill. Adm. Code 104.230(a).

Board Authority

The Board is a creature of statute and has only the authority granted to it by statute. McAfee v. IEPA, PCB 15-84, slip op at 6 (Dec. 4, 2014), citing Granite City Div. of Nat'l. Steel Co. v. IPCB, 155 Ill. 2d 149, 162, 613 N.E.2d 719, 724 (1993). “The best evidence of legislative intent is the statutory language itself, which must be given its plain and ordinary meaning.” Ultsch v. Ill. Mun. Retirement Fund, 226 Ill. 2d 169, 181 (Ill. 2007); Allstate Ins. Co. v. Menards, 202 Ill. 2d 586, 591, 270 (Ill. 2002).

Legislative, Statutory, and Regulatory Background

Public Act 101-171

On July 30, 2019, the Governor signed Senate Bill 9 into law as Public Act 101-171. Among its provisions, Public Act 101-171 added to the Act Section 22.59 entitled “CCR surface impoundments.” Public Act 101-171, eff. July 30, 2019.

415 ILCS 5/22.59(b)(2)

Section 22.59(b)(2) of the Act provides that no person shall “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.” 415 ILCS 5/22.59(b)(2) (2020); *see* Pet. at 3.

The Act provides an exception to requiring an IEPA permit to close a CCR surface impoundment. Pet. at 4. Section 22.59(e) provides in its entirety that

[o]wners or operators of CCR surface impoundments who have submitted a closure plan to the Agency before May 1, 2019, and who have completed closure prior to 24 months after July 30, 2019 (the effective date of Public Act 101-171) shall not be required to obtain a construction permit for the surface impoundment closure under this Section [22.59].¹ 415 ILCS 5/22.59(e) (2020); Pet. at 4.

35 Ill. Adm. Code 845

Public Act 101-171 added to the Act Section 22.59(g), which set deadlines for IEPA to propose and the Board to adopt specified standards and requirements for CCR surface impoundments. 415 ILCS 5/22.59(g) (2020). On April 15, 2021, the Board adopted these requirements as Part 845 of its waste disposal regulations. Standards for the Disposal of Coal Ash Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 (Apr. 15, 2021); Pet. at 2. The regulations became effective on April 21, 2021. 45 Ill. Reg. 5884 (May 7, 2021); Pet. at 2.

In 35 Ill. Adm. Code 845.220(e), the Board adopted the language of Section 22.59(e) of the Act:

¹ Since Public Act 101-171 became law, the General Assembly has amended subsection (e) to insert the July 30, 2019 effective date of Public Act 101-171. Public Act 102-16, effective June 17, 2021 (budget implementation); Public Act 102-137, effective July 23, 2021 (adding subsection (b)(4)); Public Act 102-309, effective August 6, 2021 (striking subsection (c)); Public Act 102-558, effective Aug. 20, 2021; (First 2021 General Revisory Act); Public Act 102-662, effective Sept. 15, 2021 (addressing Board rulemaking deadline).

Owners 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); Pet. at 2-3, 4.

Subsection (e) refers to subsection (d), which provides that, in addition to the general requirements for a construction permit, applications for a construction permit to close a CCR surface impoundment must contain specified information and documents. 35 Ill. Adm. Code 845.220(d), (e).

Motion to Dismiss

Section 22.59(e) of the Act establishes two deadlines that owners or operators of CCR surface impoundments must meet to be exempt from having to obtain a construction permit for closure. First, the owner or operator must submit a closure plan to IEPA before May 1, 2019. Second, the owner or operator must then complete closure by July 30, 2021. The Board adopted these requirements for the statutory exemption into its CCR surface impoundment rules at 35 Ill. Adm. Code 845.220(e).

CTI submitted a closure plan for the West Ash Complex in October 2016, and IEPA approved it in May 2017. Pet. at 20. However, CTI argues that it could not implement the approved closure plan “until a modified NPDES permit was issued by Illinois EPA in April 2020.” *Id.* CTI effectively argues that, because of an unanticipated delay attributable to IEPA, it could not complete closure by July 30, 2021, and could not meet the second deadline of the permitting exemption under Section 22.59(e) of the Act. To meet the second deadline and qualify for the statutory exemption, CTI requests a three-year variance extending the deadline under Section 22.59(e) to complete closure by July 30, 2024. Pet. at 8, 15.

CTI argues that the Act, rules, and precedent clearly establish the Board’s authority to grant a variance from Board rules. Pet. at 18, citing 415 ILCS 5/35(a) (2020); 35 Ill. Adm. Code 104.200(a)(1); Exelon Generation v. IEPA, PCB 16-106, slip op. at 1-2 (Sept. 8, 2016). IEPA acknowledges “the Board’s authority to grant temporary variance relief from its own rules and regulations.” IEPA Mot. at 1.

The Board looks to the language of the Act to determine whether the Board has authority to grant CTI’s requested relief. Under Section 35(a) of the Act, the Board may grant a variance “whenever it is found, upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship.” 415 ILCS 5/35(a) (2020). IEPA argues that CTI seeks relief from 35 Ill. Adm. Code 845.200(a)(4) and 845.720(b)(2), which “are substantively identical to Section 22.59(b)(2),” and from 35 Ill. Adm. Code 845.220(e), which “is substantively identical to [Section] 22.59(e) of the Act.” IEPA Mot. at 6. CTI acknowledges that it requests variances from rules based on these statutory provisions. Pet. at 18; CTI Resp. at 2.

The Board of course recognizes that Section 845.220(e) of its CCR surface impoundment rules provides an exemption from permitting for an owner or operator who met deadlines to submit a closure plan and complete closure. However, Section 845.220(e) adopts statutory language without substantive revision — and cites Section 22.59(e) of the Act as its source. The Board has included in its rules two deadlines adopted by the General Assembly in the Act. The Board agrees with IEPA that CTI's petition seeks relief from a statutory requirement. The General Assembly has required an owner or operator to complete closure by July 30, 2021, to be exempt from having to obtain a construction permit. 415 ILCS 5/22.59(e). While the Board's rules reflect that requirement, the Board can only conclude that it is a statutory requirement and not a "rule or regulation, requirement or order of the Board" from which the Board may grant a variance. The Board agrees with IEPA that CTI's petition should be dismissed because the Board does not have authority to grant relief from a statutory requirement through a variance. IEPA Mot. at 2. Even if the Board had authority to extend the deadline to complete closure at 35 Ill. Adm. Code 845.220(e), the Board could not grant a variance from rules based on Section 22.59(b)(2) that require obtaining a construction permit to close the West Ash Complex. *See* IEPA Mot. at 7. Accordingly, the Board concludes to grant IEPA's motion to dismiss CTI's second amended petition.

Below, the Board considers adjusted standards under the Act, cases cited by CTI, and the parties' arguments but concludes that they do not persuasively support Board authority to grant a variance from a statutory requirement.

Adjusted Standards

Under Section 28.1 of the Act, "[a]fter adopting a regulation of general applicability, the Board may grant, in a subsequent adjudicatory determination, an adjusted standard for persons who can justify such an adjustment. . . ." 415 ILCS 5/28.1(a) (2020). The Board finds support for its conclusion to dismiss the CTI's petition in this authority and its adjusted standards cases.

In Maximum Investments, the petitioner requested an adjusted standard from 35 Ill. Adm. Code 740.210(a)(3), which required that a remediation applicant receive written permission from the landowner before cleaning up a site under the site remediation program. Petition of Maximum Investments for an Adjusted Standard from 35 Ill. Adm. Code 740.210(a)(3), AS 09-2, slip op. at 2 (June 18, 2009). The Board noted that Section 740.210(a)(3) adopted statutory language defining a remediation applicant. *Id.* at 6, citing 415 ILCS 5/58.2 (2006). Because the regulatory requirement was based on a statutory requirement, the Board found that it did not have authority to grant an adjusted standard to Section 740.210(a)(3). *Id.* at 7. The Board concluded that "it does not have authority to change statutory language" and dismissed the petition for an adjusted standard. *Id.*

Although a dissenting opinion questioned whether Section 740.210(a)(3) codified a statutory requirement, it agreed "that the Board lacks the authority to award adjusted standard relief from a *statutory* requirement. Petition of Maximum Investments for an Adjusted Standard from 35 Ill. Adm. Code 740.210(a)(3), AS 09-2, slip op. at 1 (June 18, 2009) (dissenting opinion) (emphasis in original).

In Apex Material Technologies, the Board first denied the petitioner's request for a finding of inapplicability of specified waste disposal regulations. Petition of Apex Material Technologies for an Adjusted Standard from Portions of 35 Ill. Adm. Code 807.104 and 810.103 or, in the Alternative, a Finding of Inapplicability, AS 15-2, slip op. at 52 (June 18, 2015) (Apex). Apex's petition also sought adjusted standards from specified definitions in the Board's solid waste rules. *Id.* at 53. Granting these adjusted standards "would make the remaining provisions of Part 807 and 811 through 817 inapplicable to Apex's facility." *Id.*

The Board observed that Apex requested "an adjusted standard from definitions drawn from statutory language." Apex at 53, citing 415 ILCS 5/3.470, 3.535 (2014). The Board concluded that, "[e]ven if receiving an adjusted standard from the regulatory definitions would relieve Apex of complying with applicable rules that use the term, the Board cannot grant an adjusted standard from a statutory requirement." Apex at 53.

The Board notes IEPA's position that the Board "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." IEPA Mot. at 5, n.1.

Cases Cited by CTI

The Board has reviewed cases cited by CTI but cannot agree that they persuasively support an argument that the Board has authority to grant a variance from a statutory requirement.

In Illini Beef Packers, the petitioner sought variances from Board Rules 102 and 103(b) and Sections 9(a) and 9(b) of the Act. Illini Beef Packers v. IEPA, PCB 76-117, slip op. at 1 (Sept. 29, 1977). Under an earlier Board order, Illini Beef had installed a scrubber at its beef packing plant to address odors. *Id.* at 2. When it applied to renew its operating permit, IEPA denied the application. IEPA investigated complaints from nearby residents and concluded that an open door to Illini Beef's rendering room caused intermittent odor violations. *Id.* Illini Beef proposed structural changes to address the risk of air pollution and sought a variance to install control equipment. *Id.* The Board granted variances from Rule 102 until November 1, 1977, subject to conditions. *Id.* Without discussing its authority to do so, the Board also granted a variance from Section 9(a) of the Act. The Board denied the request for variances from Rule 103(b) and Section 9(b) of the Act as "unnecessary." *Id.*

A concurring opinion agreed with granting a variance from Rule 102. Illini Beef Packers v. IEPA, PCB 76-117, slip op. at 1 (Sept. 29, 1977) (concurring opinion). However, it questioned granting a variance from Section 9(a) the Act, observing that Section 35 "appears to allow variances only from Board regulations and orders, not from the statute itself." *Id.* The concurring opinion cites the Board's first Chair, whose discussion of the legislative history of Section 35 stresses "the omission of authority to vary the requirements of the statute itself." *Id.*, citing Currie, David P., Illinois Pollution Law Enforcement, 70 Northwestern L. Rev. 408-09 (1975). That discussion noted that, while Section 35 refers to "variances beyond the limitations prescribed in this Act," it separately refers to proof that "compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship." Currie,

David P., Illinois Pollution Law Enforcement, 70 Northwestern L. Rev. 409, n.95 (1975). He suggested that these separate references might plausibly be reconciled to include “variances from the statutory requirement that the regulation be followed.” *Id.* The Board cannot conclude that the opinions in this case persuasively support for the position that the Board has authority to grant a variance from statutory requirements.

In City of Eldorado, Board Rule 962(a) provided that IEPA must not issue a permit unless the applicant submits adequate proof that its proposed facilities will be constructed or operated without violating the Act or regulations or it had been granted a variance. City of Eldorado v. IEPA, PCB 78-280, slip op. at 1 (Mar. 1, 1979). The City of Eldorado requested a variance from Rule 962 and Sections 12 and 39 of the Act to allow IEPA to issue permits for sewer extensions to serve existing residences relying on private sewage disposal. *Id.* at 3. IEPA recommended granting the variance with conditions. *Id.* at 1. The Board granted the variance from the rule, finding that it was necessary in this case “to alleviate an objectionable nuisance situation and a potentially serious threat to the public health.” *Id.* at 3. The Board dismissed the petition for a variance from Sections 12 and 39 of the Act because the variance from the Board rule “provides sufficient relief,” but it did not address whether it had authority to grant relief from those statutory provisions. *Id.*

In Reichhold, the petitioner sought variances from Rule 404 of the Board’s water pollution rules and Sections 12(a), 12(f), and 39 of the Act. Reichhold Chemicals v. IEPA, PCB 77-174, slip op. at 1 (May 11, 1978). Reichhold’s discharges of process wastewater to the Illinois River failed to meet the numerical standards of Rule 404, apparently as a result of “poor biological activity of the wastewater treatment system, especially in the winter.” *Id.* at 2. Reichhold proposed to improve its treatment basins by July 1979 to simulate warm weather conditions. *Id.* The Board granted a variance from Rule 404 but found that variances from the statutory provisions “are not necessary and will therefore be dismissed.” *Id.* at 3.

Having reviewed City of Eldorado and Reichhold, the Board cannot conclude that their facts or outcomes support the argument that the Board has authority to grant a variance from a statutory requirement.

In W.R. Grace, after the petitioner filed a petition to extend a variance, it filed a supplemental request including relief from 35 Ill. Adm. Code 218.Subparts QQ and UU and Section 9(b) of the Act. W.R. Grace & Co. v. IEPA, PCB 96-193, slip op. at 1 (Feb. 6, 1997). After an explosion and fire, Grace sought variances from these emission control and recordkeeping and reporting requirements. *Id.* at 11. IEPA recommended granting the request subject to conditions. *Id.* at 2.

The Board found that requiring Grace to comply before assessing its control options would impose an arbitrary and unreasonable hardship. *Id.* at 10-11. The Board granted variances from regulatory requirements. *Id.* Without discussing its authority to do so, the Board’s order included granting relief from Section 9(b) of the Act, which provided that “[n]o person shall [c]onstruct, install or operate any equipment, facility, vehicle, vessel, or aircraft capable of causing or contributing to air pollution or designed to prevent air pollution, or any

type designated by Board regulations, without a permit granted by the Agency, or in violation of any condition imposed by such permit.” *Id.* at 7.

In City of Rock Island, the Board found in 1978 that the City had violated Section 12(a), 12(d) and 21(e) of the Act and granted it a variance allowing continued operation of its solid waste management facility without an operating permit until October 15, 1978. City of Rock Island v. IEPA, PCB 78-143, slip op. at 1 ((Dec. 14, 1978). After the City filed an amended petition requesting a one-year extension, IEPA recommended granting the extension to allow the City to close its site and open a new one. *Id.* The Board stated that the City had continued to pursue a new site. *Id.* After finding that denying the request would constitute an arbitrary or unreasonable hardship, the Board granted a variance from eight of the Board’ solid waste regulations. Without discussing the authority to do so, it also granted variances from Sections 12(a), 12(d), 12(f), 21(e), and 21(f) of the Act. *Id.* at 2.

Having reviewed these two cases, the Board cannot conclude that they persuasively support CTI’s argument that the Board has authority to grant a variance from a compliance deadline established by the General Assembly.

Finally, in IBS, the petitioner requested a provisional variance from Section 9(b) of the Act, which forbids operating an emission source in violation of any permit condition. IBS v. IEPA, PCB 87-143, slip op. at 1 (Oct. 1, 1987). IBS sought to participate in a study funded by IEPA and USEPA of the risks of burning PVC material. *Id.* While IBS’ permit included a special condition prohibiting it from burning PVC-coated wire in its incinerator, IEPA stated that IBS “cannot completely guarantee that it will be complying with the special permit condition.” *Id.* IEPA recommended granting the provisional variance for a trial burn of two to three days. *Id.* The Board concluded to grant the requested provisional variance. *Id.* at 3.

The Board finds little support in this case for the relief CTI requests. Under Section 35(b) of the Act, the Board no longer grants provisional variances, and CTI does not request “short-term” relief of two to three days.

The Board agrees with IEPA that CTI cites “no precedent showing that the Board has the authority – under either the variance or adjusted standard procedures – to effectively obviate a statutory requirement.” IEPA Mot. at 7.

Compliance with Other Requirements

CTI stresses that it is “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.” CTI Resp. at 4, citing 35 Ill. Adm. Code 845.230, 845.780. The Board agrees with IEPA that meeting these other requirements does not support CTI’s requested relief from the separate statutory deadline to complete closure. CTI Resp. at 8.

Possibility of Obtaining Construction Permit Insufficient

CTI argues that its requested variance “may or may not obviate the requirement for CTI to obtain a Part 845 construction permit.” CTI Resp. at 4. If it cannot complete closure within the extended period, CTI acknowledges that it will be required to obtain a construction permit. *Id.* at 2-3. The Board agrees with IEPA that the possibility of having to apply for a construction permit does not support CTI’s requested relief from the statutory deadline to complete closure.

Board Rulemaking and Regulatory Relief

CTI argues that, in the opinion proposing Part 845 for second-notice consideration, the Board “clearly contemplated that variance relief would be available in cases such as this.” CTI Resp. at 3, citing Standards for the Disposal of Coal Ash Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19, slip op. at 14, 17, 24-25 (Feb. 4, 2021) (second-notice opinion). CTI disputes IEPA’s position that the Board cannot grant permanent relief from a substantive requirement of the Act. It argues that IEPA’s position is not consistent with the Board’s second-notice opinion. CTI Resp. at 3.

CTI is correct that the Board addressed the possibility that owners and operators may request regulatory relief from requirements of its CCR surface impoundment rules. These requests must meet the requirements of the Act and Board rules. The Board’s opinion did not suggest the the Act expanded the Board’s authority to grant relief or revised requirements to receive it. The Board sees no conflict between its second-notice opinion in R 20-19 and its decision today in this case.

The Board stresses that it has granted two variances from the CCR rules. Midwest Generation LLC v. IEPA, PCB 21-108 (Sept. 9, 2021); Midwest Generation LLC v. IEPA, PCB 21-109 (Sept. 9, 2021). It has also granted relief to two petitioners who requested adjusted standards. Midwest Generation LLC’s Petition for an Adjusted Standard and Finding of Inapplicability, AS 21-2 (Feb. 17, 2022); Petition of Illinois Power Resources Generating, LLC for an Adjusted Standard or Finding of Inapplicability, AS 21-4 (Feb. 17, 2022).

The Board recognizes CTI’s position that, if the Board does not grant the requested relief, it “will be forced to halt closure activities at the West Ash Complex and restart the entire closure process.” CTI Resp. at 4, citing Pet. at 2. CTI argues that “[t]his would be costly, redundant and burdensome for a facility that already has an Agency-approved Closure Plan and NPDES permit. . . .” CTI Resp. at 4. While the Board does not overlook these points, the Act does not provide the Board with authority to extend a compliance deadline established by the General Assembly.

CONCLUSION

In deciding this motion to dismiss, the Board has considered all well-pled facts as true and draws all inferences from the facts in favor of CTI as the non-moving party. Based on the factors and reasons above, the Board concludes that CTI’s second amended petition for a variance requests relief that the Board does not have authority to grant. The Board grants IEPA’s motion to dismiss and dismisses CTI’s second amended petition.

ORDER

The Board grants IEPA's motion to dismiss and dismisses CTI's second amended petition.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 12, 2022, by a vote of 5-0.



Don A. Brown, Clerk
Illinois Pollution Control Board