

ILLINOIS POLLUTION CONTROL BOARD

September 3, 2015

CITY OF OAK FOREST,	)	
OAK FOREST, ILLINOIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 16-33
	)	(Variance - Water)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

On July 22, 2015, the City of Oak Forest (Oak Forest) filed a petition for a variance from the Board's chloride standards recently adopted in Water Quality Standards And Effluent Limitations For The Chicago Area Waterway System And Lower Des Plaines River Proposed Amendments To 35 Ill. Adm. Code 301, 302, 303, and 304, R08-9(D) (June 18, 2015) ("CAWS"). Specifically, Oak Forest seeks a variance from the standards in Sections 302.407(g)(2) and 302.407(g)(3) of the Board's water pollution regulations. 35 Ill. Adm. Code 302.407(g)(2), (g)(3).

On August 19, 2015, the Illinois Environmental Protection Agency (Illinois EPA) filed a Motion to Stay, asking that the Board stay the filing date for its recommendation in this case until the Board clarified the effective date of the chloride water quality standards adopted in R08-9D. After providing background on variances and briefly outlining Oak Forest's petition, today's order accepts the petition, explains the deadlines of the Illinois EPA's recommendation and the Board's decision, finds that Oak Forest's petition does not statutorily stay the chloride water quality standards, and finds the Illinois EPA's August 18, 2015 motion for stay moot.

PETITION

Under the Environmental Protection Act (Act) (415 ILCS 5/35-38 (2014)), the Board is responsible for granting variances when a petitioner demonstrates "that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship" on petitioner. 415 ILCS 5/35(a) (2014); *see also* 415 ILCS 5/37(a) (2014) (burden of proof is on petitioner). 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). The Board may issue a variance, with or without conditions, for up to five years, but may extend a variance if petitioner shows that it has made satisfactory progress toward compliance. *See* 415 ILCS 5/36(a), (b) (2014). The Act requires the Agency to "make a recommendation to the Board as to the disposition of the petition." 415 ILCS 5/37(a) (2014).

Oak Forest is located in Cook County. The petition concerns Oak Forest's chloride discharges into the Chicago Area Waterway System (CAWS), more specifically discharges from its storm sewers and outfalls into CAWS. Oak Forest states that the chloride standards adopted by the Board in CAWS "are not currently met on a consistent basis and cannot be met on a consistent basis during the term of the variance [5 years] that is being requested here." Pet. at 5. Oak Forest argues that there are "only two ways that chloride levels in Oak Forest's discharges can be reduced: applying end-of-pipe controls, or reducing chloride inputs into the sewer system." Pet. at 12. Oak Forest states that reverse osmosis is the best option to reduce chloride at the end-of-pipe, but it is cost prohibitive and would take well beyond the 3 years currently provided to implement. Pet. at 12-13. Oak Forest argues that "the Board should consider issuing a variance and stay of the chloride standards that applies to all discharges into the CAWS, to ensure that the dischargers are not unfairly penalized," in the case that a solution to the chloride issue is not available by July 1, 2018. Pet. at 4.

Oak Forest has waived its right to a hearing in this matter. Pet. at 21. The Board accepts Oak Forest's petition for variance but makes no determination on the informational sufficiency or merits of the petition. See 35 Ill. Adm. Code 104.204, 104.208, 104.210. Though Oak Forest waived hearing, there are circumstances under which the Board will nevertheless order a hearing on the petition. See 35 Ill. Adm. Code 104.234.

To ensure proper case management, the Board will assign a hearing officer to this proceeding. The assigned hearing officer is responsible for guiding the parties toward prompt resolution of this matter through whatever status calls and hearing officer orders he determines are necessary and appropriate. The Board, through orders of its own or its hearing officer, may direct Oak Forest to provide additional information concerning the petition. If the Board fails to take final action by the decision deadline, currently November 19, 2015, Oak Forest may deem the requested variance granted for a period not to exceed one year. See 415 ILCS 5/38(a) (2014). The Board has a regularly scheduled meeting on its calendar for November 19, 2015. Only Oak Forest may extend the decision deadline by waiver.

Section 37(a) of the Act requires petitioner to provide notice of the petition to:

any person in the county in which the installation or property for which variance is sought is located who has filed with the Board a written request for notice of variance petitions, the State's attorney of such county, the Chairman of the County Board of such county, and to each member of the General Assembly from the legislative district in which that installation or property is located, and shall publish a single notice of such petition in a newspaper of general circulation in such county. 415 ILCS 5/37(a) (2014).

The Board has not received proof that notice was provided pursuant to the Act and directs Oak Forest to do so pursuant to Section 37(a) of the Act. 415 ILCS 5/37(a) (2014).

STAY OF NEW REGULATION

Section 38(b) of the Act provides that "[i]f any person files a petition for a variance from a rule or regulation within 20 days after the effective date of such rule or regulation, the

operation of such rule or regulation shall be stayed as to such person pending the disposition of the petition . . .” 415 ILCS 5/38(b) (2014). Section 101.302(c) of the Board’s procedural rules (35 Ill. Adm. Code 101.302(c)) provides that “[d]ocuments may be filed by U.S. Mail or other mail delivery service, by electronic means . . . in person, or by messenger.” However, Section 101.300 of the Board’s rules instructs on the timing of a Board filing. Specifically, Section 101.300(b)(1) provides that “[i]f delivered in person, by messenger service, or by mail delivery service other than U.S. Mail, documents are considered filed when they are received in the Office of the Clerk.” 35 Ill. Adm. Code 101.300(b)(1).

Twenty days after the effective date of July 1, 2015 was July 21, 2015. The Board received Oak Forest’s petition on July 22, 2015 via FedEx. The mailbox rule of Section 101.300(b)(2) of the Board’s procedural rules does not apply unless the filing was made using U.S. Mail (*see* 35 Ill. Adm. Code 101.300(b)(2)), therefore, the Board finds that Oak Forest’s petition does not qualify for the statutory stay found in Section 38(b) of the Act. 415 ILCS 5/38(b) (2014).

AGENCY RECOMMENDATION

Unless otherwise ordered by the hearing officer or the Board, the Agency is required to file its recommendation on the variance with the Board within 45 days after the filing of the petition, or at least 30 days prior to a scheduled hearing, whichever is earlier. *See* 35 Ill. Adm. Code 104.216(b). The Agency recommendation is currently due September 8, 2015, the first business day following the 45th day after the petition was filed. Within 14 days after service of the Agency’s recommendation, Oak Forest may file a response to the Agency recommendation or an amended petition. *See* 35 Ill. Adm. Code 104.220.

AGENCY MOTION TO STAY

As stated above, on August 18, 2015, the Illinois Environmental Protection Agency (Illinois EPA) filed a Motion to Stay, asking that the Board stay the filing date for its recommendation in this case until the Board clarified the effective date of the chloride water quality standards adopted in R08-9D.

In an August 20, 2015 order, the Board clarified the effective date of the chloride water quality standards adopted by the Board on June 18, 2015. Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System (CAWS) and the Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304, R08-9(D) (Aug. 20, 2015). The Board found that the effective date of the water quality standards in question was July 1, 2015. *See id.* Therefore, the Board finds that the clarification sought by the Illinois EPA in its August 18, 2015 motion has been provided by the Board and the motion to stay is moot.

IT IS SO ORDERED.

I, Don A. Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 3, 2015, by a vote of 5 to 0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive style, with the first letter of each word being capitalized and prominent.

Don A. Brown, Assistant Clerk
Illinois Pollution Control Board