

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 Reply to CTI's Response to Motion to Dismiss, a copy of which is herewith served upon you.

Respectfully submitted,

Dated: October 20, 2021

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Clayton J. Ankney, #6320224
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(217) 782-5544
Clayton.Ankney@Illinois.Gov

Respondent,

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

THIS FILING IS SUBMITTED ELECTRONICALLY

SERVICE LIST

Jennifer M. Martin
Melissa S. Brown
HEPLERBROOM, LLC
4340 Acer Grove Drive
Springfield, IL 62711
Jennifer.Martin@heplerbroom.com
Melissa.brown@heplerbroom.com

William J. Curtis
POLSINELLI PC
100 S. Fourth Street
St. Louis, MO 63102
wcurtis@polsinelli.com

ILLINOIS POLLUTION CONTROL BOARD
Don Brown, Clerk
Carol Webb, Hearing Officer
James R. Thompson Center
100 W. Randolph, Suite 11-500
Chicago, IL 60601
Don.Brown@illinois.gov
Carol.Webb@illinois.gov

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**ILLINOIS ENVIRONMENTAL PROTECTION AGENCY’S REPLY TO CTI’S
RESPONSE TO MOTION TO DISMISS AMENDED PETITION FOR VARIANCE**

The Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”), by one of its attorneys, hereby submits its Reply to CTI’s Response to Motion to Dismiss Amended Petition for Variance, stating as follows:

INTRODUCTION

On September 22, 2021, the Illinois Environmental Protection Agency filed a motion to dismiss arguing CTI’s Amended Petition for Variance should be dismissed because the Board does not have the authority to grant CTI a variance permanently relieving it 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.

On October 6, 2021, CTI filed a response to the Agency’s motion to dismiss, arguing the relief sought was not permanent.¹ The Hearing Officer granted the Agency until October 20, 2021, to file a reply to CTI’s response to the motion to dismiss.

In its response, CTI argued the requested relief was not permanent because: (1) it is not permanent relief from obtaining a permit from dewatering or approval of the closure plan; (2) it is not permanent relief from all of Part 845—CTI would still have to obtain an operating permit and do post-closure care; and (3) CTI could potentially have to obtain a construction permit if it does

¹ CTI also filed a Motion for Leave to File Second Amended Petition for Variance, which the Agency will respond to separately.

not complete closure within the three years requested to complete closure without a construction permit. *See* Response to Motion to Dismiss, p. 2.

CTI's arguments are without merit, the relief sought by CTI is clearly permanent, and CTI's Amended Petition for Variance should be dismissed.

ARGUMENT

i. CTI is clearly requesting permanent relief.

CTI states in its response that it is seeking “relief from the regulatory requirements in 35 Ill. Admin. Code §§ 845.200(a)(4) and 845.720(b)(2) to obtain a construction permit for closure of the West Ash Complex.” Response to Motion to Dismiss, p. 2. CTI further admits that “[t]he requested relief, if granted, **would obviate the need for CTI to obtain a construction permit.**”² *Id.* (emphasis added).

Despite its statements to the contrary, CTI argues that the relief requested is temporary because it is seeking an extension of time to obtain a construction permit. However, CTI's plan is to get an extension of time to obtain a construction permit and use the additional time to close the West Ash Complex without first obtaining a construction permit—apparently hoping closing West Ash Complex prior to the extended deadline to obtain a construction permit will permanently alleviate them of their obligation to obtain a construction permit.

It is clear—and it appears CTI agrees—that the ultimate relief CTI seeks is to be permanently relieved of the Part 845 (and statutory) requirement that it obtain a construction

² The Agency agrees that CTI is seeking to have the Board obviate the construction permit requirement. However, the requirement would not actually be obviated if the Board granted the variance requested. Even if the Board granted the variance and CTI completed closure prior to the extended deadline to obtain a construction permit, CTI would not be in compliance with the Part 845 construction permit requirements, and the Agency would still require CTI to obtain a construction permit based on as-built plans for the closure. This may be why CTI has also filed their Motion for Leave to File Second Amended Petition for Variance to include the exemption provision at 35 Ill. Adm. Code 845.220(e), because without it, the construction permit requirement would remain even after construction is completed. Regardless, as discussed in the Agency's response to that motion, CTI's proposed Second Amended Petition fails for the same reasons as its Amended Petition.

permit for closure of the West Ash Complex.

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

In its response, CTI asserts 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.

CTI does not explain how compliance with these requirements converts the permanent relief they are requesting to temporary relief. Regardless, 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.

iii. 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.

CTI's final argument suggests 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 Amended Petition requests relief that the Board is not empowered to grant, CTI's Amended Petition should be dismissed.

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

Respectfully submitted,

Dated: October 20, 2021

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Clayton J. Ankney, #6320224
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(217) 782-5544
Clayton.Ankney@Illinois.Gov

Respondent,

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

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 **ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S REPLY TO CTP'S RESPONSE TO MOTION TO DISMISS AMENDED PETITION FOR VARIANCE** by e-mail upon the following:

Jennifer M. Martin Jennifer.Martin@heplerbroom.com
Melissa Brown Melissa.brown@heplerbroom.com
William J. Curtis wcurtis@polsinelli.com
Don Brown Don.Brown@illinois.gov
Carol Webb Carol.Webb@illinois.gov

That I have served the attached **NOTICE OF FILING** and **ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S REPLY TO CTP'S RESPONSE TO MOTION TO DISMISS 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 October 20, 2021.

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

That the number of pages in the e-mail transmission is ten (7).

That the e-mail transmission took place before 4:30 p.m. on the date of October 20, 2021.

/s/Clayton J. Ankney
Clayton J. Ankney