

* * * * * PCB 2006-053 * * * * *

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

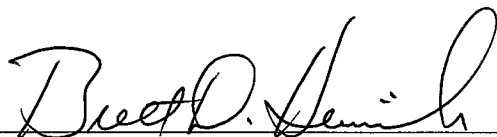
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|-------------------------------|---|---------------------|
| C&F PACKING COMPANY, INC., an |) | |
| Illinois corporation, |) | |
| |) | |
| Petitioner, |) | |
| |) | PCB 05-_____ |
| v. |) | (Variance Petition) |
| |) | |
| ILLINOIS ENVIRONMENTAL |) | |
| PROTECTION AGENCY and LAKE |) | |
| COUNTY, |) | |
| |) | |
| Respondents. |) | |

NOTICE OF FILING

To: Division of Legal Counsel
 Illinois Environmental Protection Agency
 1021 North Grand Avenue East
 Springfield, Illinois 62794-9276

Lake County Department of Public Works
 Lake County
 650 West Winchester Road
 Libertyville, Illinois 60048

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Petition for Variance of C&F Packing Company, Inc., a copy of which is herewith served upon you.



Brett D. Heinrich

October 28, 2005

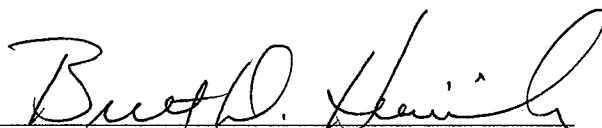
Brett D. Heinrich
 Meckler Bulger & Tilson LLP
 123 North Wacker Drive, Suite 1800
 Chicago, Illinois 60606
 Phone: (312) 474 - 7900
 Fax: (312) 474 - 7898
 Brett.heinrich@mbtlaw.com

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served a copy of C&F Packing Company, Inc.'s Petition for Variance with exhibits, via Federal Express, Saturday delivery, and certified mail on or before 5:00pm on October 28, 2005, upon the following:

Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Lake County Department of Public Works
Lake County
650 West Winchester Road
Libertyville, Illinois 60048

A handwritten signature in black ink, appearing to read "Brett D. Heinrich", written over a horizontal line.

Brett D. Heinrich

October 28, 2005

Brett D. Heinrich
Meckler Bulger & Tilson LLP
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Chicago, Illinois 60606
Phone: (312) 474 - 7900
Fax: (312) 474 - 7898
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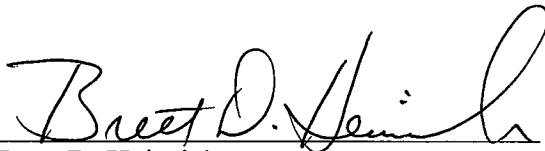
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| |) | |
| Respondents. |) | |

APPEARANCE

I hereby file my appearance in this proceeding, on behalf of C&F Packing Company, Inc.


Brett D. Heinrich

October 28, 2005

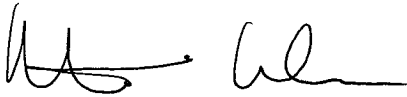
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| COUNTY, |) | |
| |) | |
| Respondents. |) | |

APPEARANCE

I hereby file my appearance in this proceeding, on behalf of C&F Packing Company, Inc.



Matthew E. Cohn

October 28, 2005

Matthew E. Cohn
Meckler Bulger & Tilson LLP
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Chicago, Illinois 60606
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matthew.cohn@mbtlaw.com

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| |) | |
| Respondents. |) | |

PETITION FOR VARIANCE

Petitioner C&F Packing Company, Inc., ("C&F Packing") by its attorneys Meckler Bulger & Tilson LLP, petitions the Illinois Pollution Control Board (the "Board") for a variance from a provision of ILL. ADMIN. CODE tit. 35, § 309.222(b) (2004). C&F Packing seeks to be relieved from the requirement that the Lake County Public Works Department ("Lake County" or the "Department"), as owner of an intermediate receiving sewer, be required to certify on a permit application that adequate capacity is available to transport the discharge proposed by C&F Packing. Regulation ILL. ADMIN. CODE tit. 35, § 309.222(b) (2004) became effective on March 7, 1972, and is therefore applicable to the permit application which is the subject of this petition.

C&F Packing is requesting relief from this requirement from the Board because the Department is inappropriately withholding its certification of a permit application which C&F Packing wishes to submit to the Illinois EPA. The Department is refusing to certify C&F Packing's permit application because of a dispute it has with the Village of Lake Villa (the "Village" or "Lake Villa"), the municipality in which the C&F Packing

facility is located, over the payment of sewer connection fees that the Department believes it is due under a 1991 agreement between Lake County and Lake Villa, a copy of which is attached hereto as Exhibit A. It is because of Lake County's improper linking of the certification of C&F Packing's permit application to its sewer connection fee dispute with Lake Villa that C&F Packing seeks this variance. This Petition for Variance ("Petition") is brought pursuant to Section 35 of the Illinois Environmental Protection Act (the "Act"), 415 ILL. COMP. STAT. 5/35 (2004), and Part 104 of Chapter 35 of the Illinois Administrative Code, ILL. ADMIN. CODE tit. 35, § 104 (2004).

I. REGULATORY REQUIREMENTS FOR SIGNATURE BY THE LAKE COUNTY PUBLIC WORKS DEPARTMENT

ILL. ADMIN. CODE tit. 35, § 104.204(a) (2004) requires that the Petition contain a statement describing the regulation from which a variance is sought. C&F Packing has requested that the Lake County Public Works Department certify its Supplemental Permit Application to modify Permit 2002-EN-0089-1 (the "Supplemental Permit Application"), a copy of which is attached hereto as Exhibit B. Pursuant to ILL. ADMIN. CODE tit. 35, § 309.222(b) (2004), permit applications require multiple certifications from governmental units to verify the adequacy of sewage treatment and storage capacity. ILL. ADMIN. CODE tit. 35, § 309.222(b) (2004) provides that

Permit applications for sewer construction or modification shall be accompanied by signed statements from the owners of all intermediate receiving sewers and the receiving treatment works certifying that their facilities have adequate capacity to transport and/or treat the wastewater that will be added through the proposed sewer without violating any provisions of the Act and this Chapter.

The certification required on the Supplemental Permit Application (Section 7.4.1 of Exhibit B) is as follows:

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The sewers to which this project will be a tributary have adequate reserve capacity to transport the wastewater that will be added by the project without causing a violation of the Illinois Environmental Protection Act or Subtitle C, Chapter I...

...

Signature _____ Date _____ Title _____

This is the identical certification and form presented to Lake County that is contained in C&F Packing's initial 2001 Permit Application and C&F Packing's 2002 Supplemental Permit Application. Lake County certified the adequacy of the capacity on both of those previous permit applications. Copies of the 2001 and 2002 permit application forms (without appendices) which were certified by Lake County are attached hereto as Exhibits C and D, respectively.

In its consideration of certification of the Supplemental Permit Application, the regulations require Lake County to answer one question, and one question only: Is there an adequate capacity in the Lake County sewer interceptor pipe to receive the flow from the C&F Packing facility? As explained herein, the answer to this question is yes, and Lake County is therefore required to certify the application.

Just as was the case in Hawthorn Realty Group, Inc. v. Illinois Environmental Protection Agency and Village of Lincolnshire, PCB 85-85, 1985 WL 21548, *2 (Oct. 10, 1985), the factual question presented to the Lake County Public Works Department deals solely with capacity. If the answer to the above question is affirmative, then the regulation requires that the Department certify the Supplemental Permit Application. It is improper for the Department to withhold its signature for reasons other than a finding of inadequate capacity, and as explained herein, the Department has done just that.

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II. BACKGROUND

ILL. ADMIN. CODE tit. 35, § 104.204(b) (2004) requires a complete and concise description of the nature of C&F Packing's activity that is the subject of the proposed variance. C&F Packing is an Illinois corporation producing custom private label sausage products, pizza toppings and other cooked meat items for the food industry. C&F Packing's manufacturing facility is located at 515 Park Avenue in Lake Villa. C&F Packing is the main occupant of the business park along State Route 83 that serves as the gateway to Lake Villa. This location, where C&F Packing employs approximately 150 people, is its only facility. C&F Packing began its operations in Chicago in the 1940s, moved its operations to Elk Grove Village in 1986, and again moved its operations to Lake Villa in 2000.

A. ENFORCEMENT BY THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

Recent enforcement activity by the Illinois Environmental Protection Agency (the "Illinois EPA") has given rise to this Petition. On November 1, 2004, the Illinois EPA issued a Notice of Violation ("NOV"), attached hereto as Exhibit E, to C&F Packing for three alleged violations. One of the alleged violations was that C&F Packing's wastewater treatment facility had slight variations from what was permitted under Illinois EPA Permit 2002-EN-0089-1.¹ The other alleged violations, which have been fully addressed by C&F Packing, concerned a sewer overflow event and system reliability.

¹ Specifically, four discrepancies were identified:

1. The current permit states that there is a 1,900 gallon sump/surge tank at the beginning of the wastewater treatment system to which all the incoming wastewater is directed. The wastewater was then pumped from the sump tank to the 18,000 gallon equalization/gravity separator tank. Currently, all the incoming wastewater is fed directly to the 18,000 gallon equalization/gravity separator tank via gravity. The 1,900 gallon tank has been eliminated.

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To address the alleged violation concerning the variations between C&F Packing's permit and the treatment system at C&F Packing's facility, C&F Packing's consultant Jeffrey Zak of Scientific Control Laboratories, Inc. prepared a Supplemental Permit Application (Exhibit B). The Supplemental Permit Application requires three certifications from governmental units: the Northwest Regional Water Reclamation Facility (operated by the Village of Fox Lake, and referred to hereafter as the "NWR WRF" or "Fox Lake"), Lake Villa, and Lake County. On January 5, 2005, the Supplemental Permit Application was certified by Lake Villa. On January 6, 2005, the Supplemental Permit Application was certified by Fox Lake. On January 7, 2005, the Supplemental Permit Application was delivered to Lake County for its certification. To date, it has remained unsigned.

On January 11, 2005, in response to the NOV, C&F Packing submitted its proposed Compliance Commitment Agreement ("CCA"), a copy of which attached hereto as Exhibit F, to the Illinois EPA. In that proposed CCA, C&F Packing attached a copy of its Supplemental Permit Application. C&F Packing was hopeful that it would be able to report to the Illinois EPA at the time of the submission of its proposed CCA that the Supplemental Permit Application was complete and had been submitted to the Illinois EPA's permitting staff. However, at that time, C&F Packing was informed by Lake County that it required additional time to review the application. (See affidavit of Martin

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2. The current permit states that there are three (3) 5,000 gallon sludge holding tanks. There are actually four (4) 8,000 gallon sludge holding tanks.
 3. The flow schematic submitted with the application for Permit Number 2002-EN-0089-1 depicted the 18,000 gallon equalization/gravity separator tank as being circular. The tank is actually rectangular.
 4. The flow schematic submitted with the application for Permit Number 2002-EN-0089-1 incorrectly stated that the Krofta Dissolved Air Floatation Clarifier had a volume of 18,000 gallons.

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Glab, Exhibit K, *infra*.) Consequently, C&F Packing was only able to present the Illinois EPA with an unsigned copy of the application. In a letter, a copy of which is attached hereto as Exhibit G, C&F Packing advised the Illinois EPA that it had obtained signatures from Fox Lake and Lake Villa, and that it was attempting to obtain a signature from Lake County.

On February 3, 2005, the Illinois EPA rejected C&F Packing's proposed CCA, and on March 17, 2005, the Illinois EPA issued a Notice of Intent to Pursue Legal Action ("NIPLA") letter to the C&F Packing, indicating that the NOV issues would be referred to the Office of the Illinois Attorney General ("OIAG") for formal enforcement. Copies of the February 3, 2005 and March 17, 2005 letters are attached hereto as Exhibits H and I, respectively. On April 18, 2005, C&F Packing met with the Illinois EPA to discuss the NIPLA letter. At the time of that meeting, the Lake County Public Works Department still would not sign the Supplemental Permit Application.

Since that time, counsel for C&F Packing has had numerous discussions with attorney Paula Wheeler of the OIAG. C&F Packing and its counsel met with Ms. Wheeler and members of the Illinois EPA on July 22, 2005. While C&F Packing has proposed actions to resolve the alleged violations, including agreeing to submit the Supplement Permit Application to get Permit 2002-EN-0089-1 amended, C&F Packing lacks the ability to resolve this enforcement matter with the OIAG due to Lake County's refusal to sign the Supplemental Permit Application. On October 18, 2005, OIAG filed its complaint against C&F Packing, a copy of which is attached hereto as Exhibit J. As long as Lake County continues to refuse to sign the Supplemental Permit Application, C&F Packing will be left unable to defend or settle the OIAG's lawsuit.

**B. C&F PACKING'S ATTEMPTS TO OBTAIN CERTIFICATION
FROM THE LAKE COUNTY PUBLIC WORKS DEPARTMENT**

C&F Packing has made numerous attempts on its own to persuade the Lake County Public Works Department to certify the permit application. C&F Packing has also reached out to local representatives for support and intervention. Finally, C&F Packing delivered a final demand letter to Lake County explaining that unless the Department certifies the Supplemental Permit Application, C&F Packing would seek relief in the form of a variance before the Illinois Pollution Control Board.

1. Communications with the Lake County Public Works Department

On January 7, 2005, C&F Packing made its initial effort to obtain a certification from the Lake County Public Works Department. (See the affidavits of Martin Glab and Karly Messick, attached hereto as part of Exhibit K.) The Supplemental Permit Application submitted to Lake County contained the previous certifications of adequacy executed by both Fox Lake and Lake Villa.

On February 16, 2005, C&F Packing met with the Lake County Public Works Department to discuss the Department's refusal to certify the Supplemental Permit Application. The meeting was attended by C&F Packing secretary/treasurer, Dennis Olson and plant engineer, Martin Glab, C&F Packing's engineering consultant, Jeffrey Zak, and Lake County Public Works director, Peter Kolb, Lake County engineer Charles Degrave, and Lake County engineer Dennis Price. At that meeting, Mr. Kolb admitted that the certification was being withheld because the Lake County Public Works Department believes it is due unpaid sewer connection fees from Lake Villa. Affidavits of Mr. Olson, Mr. Glab and Mr. Zak are attached hereto as Exhibit K, and state that Mr.

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Kolb advised C&F Packing that the certification was being withheld due to the dispute concerning connection fees and not due to a finding of inadequate capacity.

At that February 16, 2005 meeting, C&F Packing was provided with a copy of a memorandum prepared by the Lake County Public Works Department, attached hereto as Exhibit L. This memorandum outlines the Department's concerns over connection fees. This memorandum was prepared in the weeks following C&F Packing's request for a certification of the Supplemental Permit Application. Instead of preparing a memorandum evaluating the adequacy of capacity, and recommending approval or disapproval of the Supplemental Permit Application based on that analysis, the Department prepared a memorandum on the status of Lake Villa's payment of sewer connection fees. This memo provides direct evidence of Lake County's finding that the transport capacity was adequate, where it is reported that the agreed limit for the Village's Southern Interceptor is 11,700 PE, and that the permitted loading inclusive of the discharge amount in C&F Packing's supplemental permit application is 10,848 PE.²

A subsequent meeting on July 15, 2005 between Dennis Olson and Peter Kolb likewise failed to result in a change in Lake County's position.

In sum, C&F Packing's direct communications with the Department have failed to yield any willingness by the Department to sign the Supplemental Permit Application. In fact, communication subsequent to submitting the Supplement Permit Application demonstrated a consistent, obstinate, and improper linking of the certification of the adequacy of capacity with the dispute between Lake County and Lake Villa over the payment of sewer connection fees.

² A PE is a Population Equivalent, equal to 100 gallons per day.

2. Communications with Local Representatives

Following the April 18, 2005 meeting with the Illinois EPA, and the subsequent referral of the NOV issues to the OIAG for formal enforcement, C&F Packing initiated contact with several local representatives for assistance. On May 18, 2005, C&F Packing secretary/treasurer Dennis Olson sent emails to Lake County Board Chairperson Suzi Schmidt and Lake County Board Member Bonnie Thomson Carter, copies of which are attached hereto as Exhibits M and N, respectively. On May 19, 2005, Mr. Olson sent a letter to Gideon Bluestein, a staff member for Congresswoman Melissa Bean, a copy of which is attached hereto as Exhibit O. As explained below, none of these contacts have yielded any movement by the Lake County Public Works Department from its position.

The email response from Suzi Schmidt on May 19, 2005, included in Exhibit M, documents a conversation she had with Peter Kolb. In that email, Ms. Schmidt indicates that she spoke with Mr. Kolb, and that Mr. Kolb was concerned that C&F Packing believed that the Lake County sewer connection fees could be waived by Lake Villa. She states "I'm sure that once everyone is around the table, something will be worked out." While C&F Packing would certainly welcome an opportunity to gather around the table with all interested parties, this email response from Suzi Schmidt shows that Lake County is still impermissibly linking the certification of Supplemental Permit Application with the dispute over connection fees.

With respect to communications with Congresswoman Melissa Bean's staff, C&F Packing had a meeting with Gideon Bluestein on August 16, 2005. C&F Packing also provided Mr. Bluestein with a status update on September 8, 2005, a copy of which is attached hereto as Exhibit P.

These requests for intervention and assistance from representatives of the Lake County Board and Congresswoman Melissa Bean have failed to bring about any movement by the Lake County Public Works Department from its entrenched position on certification. While the responses from the representatives have been genuine and have shown concern, they do not enable C&F Packing to get any immediate relief from Lake County's position, and as a consequence, C&F Packing is still left unable to resolve the enforcement issues with the OIAG.

3. Demand Letter to Lake County Public Works Department

On September 23, 2005, in a letter from C&F Packing's counsel to Lake County Public Works Department director Peter Kolb, a copy of which is attached hereto as Exhibit Q, the Department was advised that if after three days, it continued to refuse to certify the Supplemental Permit Application, C&F Packing would request that the Board relieve it from the certification requirements of ILL. ADMIN. CODE tit. 35, § 309.222(b) (2004). On September 29, 2005, counsel spoke with Mr. Kolb, requesting that he execute the Supplemental Permit Application on behalf of Lake County.

On September 29, 2005, attorney Daniel Jasica of the State's Attorney of Lake County's office responded to the September 23, 2005 demand letter. In that letter, a copy of which is attached hereto as Exhibit R, Mr. Jasica further acknowledges the linking of the connection fee dispute with the certification of the Supplemental Permit Application. Mr. Jasica states, "[t]he County categorically denies that it has any obligation to sign the IEPA [permit] and thereby agree to accept *additional* flows from C&F Packing's facility when Lake Villa remains so far in arrears on its connection fees under the agreement." The agreement referred to is a 1991 agreement between Lake Villa and Lake County.

C&F Packing is obviously not a party to that agreement, and until recently was never aware of that agreement. (See Exhibit A.)

The Lake County State's Attorney response underscores the difficulty of C&F Packing's situation, and provides the greatest justification for the Board to grant the relief requested. Mr. Jasica has indicated that Lake Villa is responsible to collect the sewer connection fees and provide those fees to Lake County. Mr. Jasica then explained that Lake County in turn keeps a portion of that fee and provides another portion of that fee to Fox Lake. Based on this letter, it is readily apparent that Lake County believes that Lake Villa owes it a connection fee and in turn Lake County is refusing to certify the Supplemental Permit Application. Thus, Lake County is using its certification authority as leverage to resolve a dispute it has with Lake Villa. As a result, C&F Packing cannot settle the NOV enforcement issues and related litigation with the State of Illinois because it cannot get its Supplemental Permit Application approved by the Illinois EPA and thus be in compliance without Lake County's certification. Relief from the certification requirement of ILL. ADMIN. CODE tit. 35, § 309.222(b) (2004) is thus sought to prevent the intergovernmental dispute from disrupting C&F Packing's efforts to resolve its enforcement matter with the State of Illinois and come into compliance with the Act.

III. DATA CONCERNING C&F PACKING'S FAILURE TO MEET ILL. ADMIN. CODE tit. 35, § 309.222(b) (2004)

ILL. ADMIN. CODE tit. 35, § 104.202(c) (2004) requires that the Petition contain data describing the nature and extent of the present or anticipated failure to meet the regulation. The regulation for which relief is sought is not a numerical standard, and thus no data supporting a C&F Packing argument that compliance with the regulation cannot be achieved is being provided. C&F Packing's ability to comply with ILL. ADMIN. CODE

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tit. 35, § 309.222(b) (2004) rests with the discretion of the Lake County's Public Works Department since it currently possesses the Supplemental Permit Application with the executed certifications from Fox Lake and Lake Villa. The Department has taken the position that it can continue to refuse to certify the Supplemental Permit Application even though it has determined that the sewer has an adequate capacity to accept C&F Packing's discharges. Consequently, C&F Packing is unable to submit a Supplemental Permit Application to the Illinois EPA that is compliant with the requirement that its application contain a certification from Lake County. Accordingly, C&F Packing is requesting a variance from the Illinois Pollution Control Board relieving C&F Packing of the necessity of obtaining Lake County's signature on its Supplemental Permit Application.

IV. DESCRIPTION OF EFFORTS NECESSARY FOR C&F TO ACHIEVE IMMEDIATE COMPLIANCE

ILL. ADMIN. CODE tit. 35, § 104.202(d) (2004) requires that the Petition contain a description of the efforts required to come into immediate compliance. Without the granting of a variance, the only way for C&F Packing to obtain *immediate* compliance is for Lake County to certify the Supplemental Permit Application, and for the Illinois EPA to subsequently approve the Application. Without Lake County's willingness to sign the Supplemental Permit Application, C&F Packing cannot come into compliance with ILL. ADMIN. CODE tit. 35, § 309.222(b) (2004).

In order for C&F Packing to avoid the regulation, C&F Packing would have to instantaneously construct an alternative self-contained wastewater treatment operation. Such a system would have to treat and process wastewater and provide for the discharge of treated water back to the environment bypassing treatment by the NWR WRF. If C&F

Packing could treat and discharge its own treated wastewater, then C&F Packing would have no need to utilize the Lake County's sewer connection between Lake Villa and the NWR WRF. Such an alternative is technically impracticable if not impossible to treat all of C&F Packing's wastewater. Moreover, this alternative would require additional permitting from the Illinois EPA. This alternative is also likely to be cost prohibitive to C&F Packing, and certainly could not be achieved according to an immediate schedule which would enable C&F Packing to resolve its pending enforcement action with the OIAG. The only other option available to C&F Packing is for the Board to grant it a variance making Lake County's signature on C&F Packing's Supplemental Permit Application unnecessary.

V. **IMMEDIATE COMPLIANCE WOULD IMPOSE AN ARBITRARY AND UNREASONABLE HARDSHIP**

ILL. ADMIN. CODE tit. 35, § 104.202(e) (2004) requires that the Petitioner set forth reasons why immediate compliance with the regulation would impose an arbitrary and unreasonable hardship. C&F Packing cannot force Mr. Kolb to put his signature on the Supplemental Permit Application. Without the granting of a variance, the only way C&F Packing can obtain *immediate* compliance is for Lake County to certify the Supplemental Permit Application. Without the certification, C&F Packing is in continuous noncompliance. The Illinois EPA cannot begin to review the Supplemental Permit Application and ultimately approve it until it has been certified by Lake County.

The OIAG is requiring that in response to the Illinois EPA's November 1, 2004 NOV, C&F Packing immediately return to compliance. On October 18, 2005, the OIAG filed its complaint against C&F Packing in the Lake County Circuit Court, a copy of which is attached hereto as Exhibit J. In order to address the Count II allegations, C&F

Packing must update its Permit 2002-EN-0089-1 so that the permit accurately reflects the wastewater treatment equipment at the C&F Packing facility. Without a certification from Lake County or a variance removing the requirement that Lake County certify the permit, C&F Packing will be unable to update its permit and come into compliance.

As described above, the facility has done everything in its power to effectuate the necessary approvals of the three germane governmental units. Two governmental units, Fox Lake and Lake Villa, have completed their certifications, and one, Lake County, has continued to deny C&F Packing the certification of its permit application for reasons unrelated to the adequacy of sewer capacity. Lake County is therefore denying C&F Packing an opportunity to come into compliance.

It should be noted that C&F Packing did receive a certification from the proper Lake County official on both its original 2001 Permit Application (Exhibit C) and its 2002 Supplemental Permit Application (Exhibit D). In the context of the prior certifications, the denial of the present request for a certification is additional evidence that Lake County's actions are improper and frustrate the regulatory intent of ILL. ADMIN. CODE tit. 35, § 309.222(b) (2004).

C&F Packing has been placed in the hardship of continuous noncompliance by Lake County's unwillingness to sign the Supplemental Permit Application. The hardship C&F Packing is experiencing is real. As referenced above, C&F Packing has made numerous attempts to effectuate the signature of Mr. Peter Kolb without success. C&F Packing faces the very real potential of a civil penalty up to \$50,000 and an additional penalty of up to \$10,000 per day if the violation of noncompliance continues. 415 ILL. COMP. STAT. 5/42(a) (2004). Moreover, C&F Packing may be forced to surrender its

permit or ultimately be forced to shut down if it cannot obtain approval of its application. Permit 2002-EN-0089-1, condition 8(c); 415 ILL. COMP. STAT. 5/42(e) (2004). A copy of Permit 2002-EN-0089-1 is attached hereto as Exhibit S. The hardship is not self-imposed due to the fact that irrespective of its water connection fee dispute, C&F Packing could have reasonably expected its Supplemental Permit Application to have been executed by Lake County since the capacity is adequate and previous supplemental permit applications have been executed by Lake County officials.

VI. COMPLIANCE PLAN

ILL. ADMIN. CODE tit. 35, § 104.202(f) (2004) requires that the Petition provide a description of a compliance plan. The requirements in the Board's regulations for a description of a compliance plan are not applicable to this Petition. C&F Packing requires a variance from the Board's requirement that Lake County certify its Supplemental Permit Application, an action beyond C&F Packing's control.

VII. ENVIRONMENTAL IMPACT

ILL. ADMIN. CODE tit. 35, § 104.202(g) (2004) requires that the Petition describe the environmental impact of the activity. Because Lake County's refusal to sign a statement certifying the adequacy of capacity has nothing to do with water pollution, and because it is uncontroverted that the receiving sewer has adequate capacity to transport the proposed discharge, the variance requested will have no impact on human, plant or animal life.

VIII. CITATION TO LEGAL AUTHORITY

ILL. ADMIN. CODE tit. 35, § 104.202(h) (2004) requires that the Petition cite supporting documents and legal authority. With respect to documents, Exhibits A

through T are attached to this petition and are specifically referenced herein. With respect to legal authority, a discussion of the analogous Hawthorn Realty Group case and a discussion of the balancing of hardship against environmental impact follow. Furthermore, legal authority concerning C&F Packing's request that the variance be applied retroactively is provided in Section XI of this Petition for Variance.

A. THE HAWTHORN REALTY GROUP CASE

The situation that C&F Packing finds itself in is very much akin to that of Hawthorn Realty Group in Hawthorn Realty Group, Inc. v. Illinois Environmental Protection Agency and Village of Lincolnshire, PCB 85-85, 1985 WL 21548 (Oct. 10, 1985). In Hawthorn Realty Group, the Village of Lincolnshire refused to certify a permit application due to a dispute between Lincolnshire and Hawthorn Realty Group over annexation and property rights. The Board concluded:

The factual question to be addressed deals solely with capacity, not Village policy on annexation or Hawthorn's property rights which should be addressed in another forum. The record shows that the capacity is adequate for the proposed connection, but that the Village will not certify for reasons having to do with other matters. The Village's refusal to certify this simple factual question places Hawthorn in the position of not being able to file a complete permit application. Given this situation, complying with the regulations constitutes an arbitrary or unreasonable hardship Hawthorn could seek a mandamus order requiring certification, but this would consume both public and private resources without resolving the underlying issue. The Board rejects the argument that any hardship is self-imposed, because Hawthorn can reasonably expect the Village to certify line capacity without imposing extraneous conditions regardless of other issues which may be in dispute. Such conditions are improper and frustrate the regulatory intent.

Id. at *2. C&F Packing should reasonably expect Lake County to certify capacity without the imposition of conditions concerning Lake Villa's payment of sewer connection fees. The sole question is one of line capacity. Applying the Board's holding in the Hawthorn Realty Group case to the case at bar, it is clear that Lake County's

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refusal to execute the Supplemental Permit Application is improper and frustrates the regulatory intent of the certification requirement.

**B. BALANCING THE HARDSHIP OF CERTAIN ENFORCEMENT
AGAINST THE ENVIRONMENTAL IMPACT RESULTING FROM
THE VARIANCE**

In the consideration of a variance request, the Board is required to balance the impact the variance will have on the environment against the hardship that will be endured by the petitioner. *See* Marathon Oil Co. v Environmental Protection Agency, 242 Ill App.3d 200, 610 N.E.2d 789 (1993); Willowbrook Motel v. Pollution Control Board, 135 Ill. App.3d 343, 481 N.E.2d 1032 (1985); Monsanto Co. v. Pollution Control Board, 67 Ill.2d 276, 367 N.E.2d 684 (1977).

In Marathon Oil, Marathon sought a variance from a wastewater discharge standard for chloride. Marathon presented evidence that the concentration of chloride it needed to discharge would not damage the environment of the stream or endanger the species within the stream. 242 Ill App.3d at 205. According to Marathon, the environmental impact of the requested variance was zero. *Id.* The Court recognized that Marathon would suffer a hardship if the Board failed to grant its requested variance.

This certainty of a future violation places Marathon in the unenviable position of having to decide whether to (1) violate the Board's rule and suffer possible prosecution and substantial fines and penalties; (2) shut down; or (3) slow [it's manufacturing process.]

Id. at 207. While remanding the evidentiary question of the accuracy of Marathon's claim of no environmental harm back to the Board, the court explained the balancing as follows:

[I]f we assume *arguendo* that Marathon's evidence that the variance would not damage the environment is true, then the hardship to Marathon becomes more apparent. Marathon could be prosecuted and punished or forced to slow or shut

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down, costing Marathon, its employees and the economy a monetary loss, even though the proposed discharge would not or could not harm the environment.

Id.

Similar to Marathon Oil, the variance requested by C&F Packing would result in no environmental impact, as previously explained herein. However, the substantial burden C&F Packing continues to suffer is ongoing noncompliance and a corresponding enforcement action by the OIAG. Without relief, C&F Packing will be forced to shut down costing C&F Packing, its employees and the local economy. Thus, following the balancing analysis of Marathon Oil, the hardship to C&F Packing is substantial, arbitrary and unreasonable, while the granting of the variance would not adversely impact the environment. Therefore, the balancing test favors granting C&F Packing's requested variance.

In Willowbrook, the petitioner was unable to construct a hotel on a property in which it had an interest because the sewage treatment plant would not grant the landowner a permit. 135 Ill. App.3d at 344. The sewage treatment plant was on restricted status, meaning that the plant was operating at the limit of its design capacity. *Id.* The plant was also not able to comply with the standards of its NPDES permit. *Id.* The petitioner sought a variance from the Board so that it could discharge to the sewer system despite the treatment plant's restricted status. The Board was unsympathetic to the petitioner's situation, noting that the petitioner took the interest in the land at the time that the facility was under a court order on matters concerning its capacity, and thus gambled on its ability to obtain permits. *Id.* at 345. The Board found that the petitioner's economic condition was self-imposed. *Id.*

Unlike the petitioner in Willowbrook, C&F Packing has already developed and operated its facility for several years. The sewage treatment facility to which C&F Packing is connected is not on restricted status, and all of the pertinent governmental units have determined that there is adequate capacity to accept the proposed permitted discharges. C&F Packing did not engage in any risk-taking like the Willowbrook petitioner, and it is fully reasonable for C&F Packing to have an expectation that its discharge would be permitted. Thus C&F Packing's situation cannot be characterized in any way as self-imposed.

The Willowbrook case also addresses the argument that any increase in discharge can be considered an environmental impact, albeit marginal. The case acknowledges that "lines must be drawn somewhere even though each successive increase in the load in a sewer may have minimal effect." *Id.* at 349, *quoting* Springfield Marine Bank v. Pollution Control Board 27 Ill. App.3d 582, 587, 327 N.E.2d 486 (April 17, 1975). However, in the Willowbrook and Springfield Marine decisions, the variances being requested were for permission to discharge to an already overburdened sewage treatment facility, where even a marginal increase in discharge to an overburdened system can be considered to have some environmental impact. As evidenced by certifications by Lake Villa and Fox Lake on its pending Supplemental Permit Application, C&F Packing is discharging into a system with adequate capacity, and thus the discharges do not even have a minimal impact on the environment.

In Monsanto, the Illinois Supreme Court ultimately agreed with the Board's decision to deny a variance to Monsanto, who had requested relief from a mercury

discharge standard. 67 Ill.2d 294. Monsanto was technologically unable to comply with the required mercury standard. *Id.* at 293. The Supreme Court found that

it is not necessarily arbitrary and capricious conduct for the Board to set a standard which a petitioner cannot adhere to at the present time, or, if absolutely necessary to protect the public, set a standard with which there can be no foreseeable compliance by petitioner.

Id. The Supreme Court embraced the “technology forcing” standards of the mercury regulations that the Board adopted, and said that the Board did not have to create an exception for those that could not meet the standard because the protection of public health was too important. *Id.* Unlike the relief from the mercury standard sought by Monsanto, the relief that C&F Packing seeks does not impact the level of environmental protection. C&F Packing’s requested relief is only to allow the permitting of the discharge into a sewer system that has an adequate capacity. The relief will have an administrative effect only, allowing C&F Packing to be brought into compliance. In this context, the hardship of being forced into noncompliance outweighs the nonexistent environmental harm of granting the variance.

Finally, in the Board’s recent opinion in Citgo Petroleum Corporation and PDV Midwest Refining, L.L.C. v. Illinois Environmental Protection Agency, PCB 05-85 (April 21, 2005), Citgo was a party to a consent decree with the Agency, under which it was required to substantially reduce its air emissions from a refinery. PCB 85-85 at 4. However, in order to meet the air emission standards, Citgo required a variance from water discharge standards. *Id.* Pursuant to the consent decree, Citgo installed scrubbers that resulted in water discharges exceeding the Board’s standard for total dissolved solids (“TDS”). *Id.* The Board granted Citgo a variance, holding that requiring Citgo to complete a substantial water pollution control project for TDS discharges, in addition to

the actions already being undertaken by Citgo to address the air emissions, was an arbitrary or unreasonable hardship that outweighed any injury to the public or the environment. *Id.* at 14.

A similar situation to that faced by Citgo, warranting the issuance of a variance, arises in the case at bar. C&F Packing has made a commitment to the OIAG that it will submit a Supplemental Permit Application to the Illinois EPA. By doing so, C&F Packing would be able to settle its enforcement matters with the State of Illinois, much as Citgo settled its air emission violations in its consent decree. Just as Citgo needed a variance to be able to fulfill its commitments made to resolve an enforcement matter under its consent decree, C&F Packing needs a variance to fulfill its commitment to resolve its enforcement matter with the OIAG. Without a variance from the Board relieving C&F Packing of the requirement of a certification from Lake County, C&F Packing will remain out of compliance and will be left unable to fulfill a necessary requirement to settle an enforcement matter.

IX. PENDING PERMIT APPLICATION ENCLOSED

ILL. ADMIN. CODE tit. 35, § 104.204(i) (2004) requires that the pending permit application be attached to this Petition for Variance. As referenced above, the Supplemental Permit Application is attached hereto as Exhibit B. This Supplemental Permit Application is a copy, and does not bear the signatures of the representatives of Fox Lake and Lake Villa. (See Martin Glab's affidavit, Exhibit K, *supra*.) The partially signed permit application bearing the signatures of representatives of Fox Lake and Lake Villa is currently located at the office of the Lake County Department of Public Works.

X. SUGGESTED CONDITIONS

ILL. ADMIN. CODE tit. 35, § 104.202(j) (2004) requires that C&F Packing suggest any conditions for the variance. C&F Packing seeks no additional conditions. This variance request simply asks for relief for a certification requirement allowing C&F Packing to deliver the Supplemental Permit Application to the Illinois EPA with Lake Villa's and Fox Lake's signatures only, allowing the Illinois EPA to review and approve the application, and thereby allowing C&F Packing to return to compliance.

XI. PROPOSED BEGINNING AND END OF THE VARIANCE

ILL. ADMIN. CODE tit. 35, § 104.202(k) (2004) requires that C&F Packing propose a beginning and ending date for the variance. C&F Packing is requesting that the variance commence retroactively beginning on January 7, 2005, the date of the original request for certification of the Supplemental Permit Application by Lake County. C&F Packing is further requesting that the variance extend for a period up to one year from the time of the Board's decision or until the Illinois EPA has reviewed and approved the Supplemental Permit Application, whichever occurs first. C&F Packing recognizes that this request for a retroactive variance is contrary to the general rule that "in the absence of unusual or extraordinary circumstances, the Board renders variances as effective on the date of the Board order in which they issue." DMI, Inc. v. Illinois Environmental Protection Agency, PCB 90-227, 128 PCB 241, 245 (Dec. 19, 1991) (citations omitted).

In DMI, Inc., DMI sought a variance from volatile organic material ("VOM") emission limits for its farm implements manufacturing facility in Woodford County. 128 PCB at 241. In 1984, DMI began searching for a paint that would allow it to be both compliant with state regulations and acceptable to its customers. *Id.* at 242. To do so,

DMI was given a five year variance. *Id.* at 249. DMI found a paint that appeared acceptable and began using it in 1989. *Id.* DMI's customers were not satisfied with the new compliant paint. *Id.* In September 1990, DMI's paint supplier informed DMI that it was unable to develop a compliant paint. *Id.* at 243. DMI contacted other suppliers as well, but was unable to find an alternative. *Id.* DMI subsequently filed its petition for a variance with the Board to allow DMI to use the original paint while DMI explored other methods to achieve compliance, including continuing to investigate compliant paints and the installation of afterburner technology. *Id.* at 242-43.

Despite the Agency's objection, the Board granted a retroactive variance agreeing with DMI's argument that it had a "reasonable expectation that the compliant paint would be acceptable." *Id.* at 249. The Board found that "under certain circumstances, such as those in the instant case where DMI has diligently sought relief and...made a good faith effort to maintain compliance," a retroactive variance was appropriate. *Id.* at 250. The Board also noted that DMI "could not have anticipated earlier that [the] variance would be needed...." *Id.*

Like DMI, C&F Packing has demonstrated a good faith effort to obtain compliance. In C&F Packing's case, compliance can only be obtained through the approval of the Supplemental Permit Application by the Illinois EPA. C&F Packing has been unable to submit its Supplemental Permit Application for the Illinois EPA's review because of Lake County's refusal to certify the adequacy of the capacity. Commencing on January 7, 2005, C&F Packing has made a diligent, good faith effort to persuade Director Peter Kolb to certify the Supplemental Permit Application. As explained in more detail in Section II.B of this Petition for Variance, C&F Packing attended two

meetings at the Lake County Public Works Department, reached out to three local representatives, and finally issued a demand letter explaining the impropriety of Director Kolb's actions.

Retroactive variances are often granted for procedural delays that are of no fault to the petitioner. See Allied Signal, Inc. v. Illinois Environmental Protection Agency, PCB 88-172, 105 PCB 7, 12 (Nov. 2, 1989) and Union Oil Co. of California v. Illinois Environmental Protection Agency, PCB 84-66, 63 PCB 75, 79 (Feb. 20, 1985). Two Board decisions that are often cited where the variance commencement date preceded the date of filing are Deere & Company, John Deere Harvester Plant East Moline Works v. Illinois Environmental Protection Agency, PCB 88-22, 92 PCB 91 (Sept. 8, 1988) and Midwest Solvents Company of Illinois v. Illinois Environmental Protection Agency, PCB 84-5, 57 PCB 369 (April 5, 1984).

In Deere, the petitioner had a December 31, 1987 deadline to come into compliance with VOM emission standards for a paint coating operation. 92 PCB at 91. The petition had engaged in a ten-year, \$10 million effort to come into compliance. *Id.* After several months of operating the new system, it became apparent to Deere that a "debugging" of the system would be required, and the deadline would not be able to be met. *Id.* at 92. While the petition for variance was filed on January 21, 1988, the Board applied the variance retroactively on January 1, 1988. *Id.* at 91 and 95. In granting the request for a variance, the Board found that "the record demonstrates that Deere has diligently sought relief and has made good faith efforts to comply...." *Id.* at 94.

In Midwest Solvents, the petitioner sought an extension of a provisional variance from the Illinois EPA for BOD and TSS effluent limitations during a construction project,

because adverse weather conditions delayed the construction schedule. 57 PCB at 369. The Illinois EPA requested the petitioner file a standard variance request with the Board. *Id.* at 370. The variance request was filed on January 9, 1984, but was retroactive to December 31, 1983. *Id.* at 369-70. The Board found that “Midwest has been diligent in seeking relief on a timely basis....” *Id.* at 370.

In both of these retroactive variance cases, where the variance commencement date preceded the date of filing, the Board was persuaded to grant the variance in part due to the diligence of the petitioner’s efforts to comply. C&F Packing’s ability to come into compliance requires it to be able to submit its Supplemental Permit Application to the Illinois EPA for review, something C&F Packing cannot do without Lake County’s certification. Up to the time of the filing of this Petition, C&F Packing made every reasonable effort to obtain Lake County’s certification, and it has consistently refused. Therefore, the granting of a variance with a commencement date preceding the date of filing of this Petition for Variance is appropriate.

In American National Can Company v. Illinois Environmental Protection Agency, PCB 88-203, 102 PCB 215 (Aug. 31, 1989), ANC sought a variance extension for emission limitations for its can coating manufacturing plants. The variance extension was being sought for the period of time needed for the Illinois EPA to review a permit for pollution control equipment designed to address the emissions. *Id.* at 216. In granting the retroactive variance, the Board noted:

The Board is inclined not to grant retroactive relief, absent a showing of unavoidable circumstances, because the failure to request relief in a timely manner is a self-imposed hardship. However, in this situation, there appears to be evidence of unavoidable circumstances. The petitioner was diligently working on compliance through the installation of control equipment and utilization of provisions of Section 215.207. It appears that the petitioner was on schedule to

come into compliance by the end of its variance and had no reason to anticipate the need for an extension. When ANC realized that Section 215.207 could not be utilized and that an [alternative control strategy] permit would be required, it was too late to make a timely request for variance extension. Based on these circumstances, the Board will grant the variance retroactively.

Id. at 218.

As was the case with ANC, C&F Packing could not have anticipated that a variance would be needed at an earlier time. C&F Packing's situation, where a public official has refused to do what he is required to do, that is certify the adequacy of capacity on the Supplemental Permit Application, by every measure qualifies as an unusual and extraordinary circumstance, and thus qualifies as an exception to the general rule that retroactive variances are disfavored. C&F Packing's circumstances were unavoidable and in no way self-imposed, and a retroactive variance is therefore appropriate.

In J.M. Sweeney Co. v. Illinois Environmental Protection Agency, Sweeney had previously obtained a variance to allow it extra time to install vapor recovery systems at a gas dispensing operation in Lake County. PCB 96-184, 1996 WL 756335, *1 (Dec. 19, 1996). That petition expired on March 31, 1996. *Id.* Sweeney requested an extension of that variance, with its petition filed with the Board on February 28, 1996. *Id.* Sweeney was unable to install the vapor recovery system before the March 31, 1996 variance expiration date because Sweeney needed the prior approval of a separate Corrective Action Plan ("CAP") report related to a release from an underground storage tank. *Id.* at *1-3. At the time of the filing of the petition, Sweeney was unable to obtain the approval from the Illinois EPA of its CAP, and as a consequence could not install its vapor recovery systems prior to March 31, 1996. *Id.* at *7. The Board granted the variance

retroactive to the time of the expiration of the original variance. *Id.* “Specifically, the Board [found] that Sweeney’s attempts to secure a CAP approval from the Agency required more time than anticipated.” *Id.*

In Sweeney, the Board was sympathetic to the petitioner facing an unexpected delay in government action. Similarly, C&F Packing has faced an unexpected delay in government action. Given that C&F Packing had every reasonable expectation that Lake County would certify its Supplemental Permit Application, and given that there has been a continual delay and ultimate denial of C&F Packing’s obtaining of that certification, a retroactive variance is appropriate.

Finally, as discussed earlier in this section, the Board explained in the Sweeney decision that the purpose of the rule disfavoring retroactive variances is to avoid untimely filed petitions. *Id.* at *6. Under the circumstances, C&F Packing’s Petition for Variance cannot be characterized as untimely. It was Lake County’s unexpected delay, and subsequent denial, of certification that created the need for the petition in the first place. C&F Packing could only be expected to file its Petition for Variance after exhausting its efforts to obtain that certification from Lake County. C&F Packing’s diligent efforts to obtain Lake County’s certification should be recognized, and consequently the Board should grant C&F Packing the requested variance, effective January 7, 2005.

XII. CONSISTENCY WITH FEDERAL AND STATE LAW

ILL. ADMIN. CODE tit. 35, § 104.202(l) (2004) requires that the petition discuss consistency with federal law. The NWR WRF treatment plant to which the sewage is transported is permitted under NPDES Permit IL00020958. C&F Packing is a permitted user of that facility by NWR WRF Permit No. 05-001. As explained herein, Lake

County, Fox Lake and Lake Villa have all affirmed that the capacity of the sewage treatment and transport system is adequate to accept the discharge from C&F Packing. Compliance with the Illinois Environmental Protection Act, 415 ILL. COMP. STAT 5/1 *et. seq.*, the Clean Water Act, 33 U.S.C. §§ 1251, *et. seq.*, and the underlying regulations may therefore be assumed as a matter of law.

XIII. AFFIDAVIT VERIFYING FACTS

ILL. ADMIN. CODE tit. 35, § 104.202(m) (2004) requires the Petition contain an affidavit verifying the facts submitted in this petition. The affidavit of C&F Packing secretary/treasurer Dennis Olson verifying both that the facts stated in this petition are true and the attached exhibits are true and accurate copies, is attached hereto as Exhibit T.

XIV. NO HEARING REQUESTED

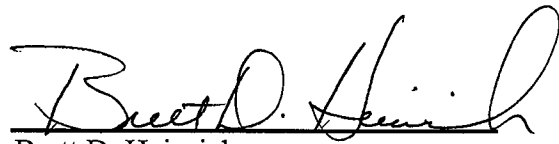
ILL. ADMIN. CODE tit. 35, § 104.202(n) (2004) requires a statement requesting or denying that a hearing should be held. C&F Packing does not request hearing on the Petition. The evidence provided herein adequately advises the Board of the pertinent facts and legal issue it is being asked to decide.

XV. CONCLUSION

C&F Packing therefore asks that this Board, pursuant to its authority under Section 35 of the Act, the Boards regulations under ILL. ADMIN. CODE tit. 35, § 104 (2004), and the established precedent found in the Hawthorn Realty Group case and other cases cited and discussed herein, to grant C&F Packing a variance from the provisions of ILL. ADMIN. CODE tit. 35, § 309.222(b) (2004) regarding the requirement that the Lake County Public Works Department, as owner of an intermediate receiving sewer, be

required to certify that adequate capacity is available to transport the discharge proposed by C&F Packing.

Respectfully submitted,


Brett D. Heinrich

Dated: October 28, 2005
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