

ILLINOIS POLLUTION CONTROL BOARD
November 7, 1996

WHITE CAP, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 96-191
)	(Variance - Air)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

TRACEY L. MIHELIC, GARDNER, CARTON & DOUGLAS, APPEARED ON BEHALF OF PETITIONER;

CHRISTINA L. ARCHER APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Theodore Meyer):

This matter comes before the Board on a petition for extension of variance filed March 6, 1996 by White Cap, Inc. (White Cap). The petition requests an extension of variance from certain testing requirements of the Board's air emissions regulations. (35 Ill. Adm. Code 218.105(b), 218.205(c)(2), 218.207, 218.211 (1994).) The Board previously granted White Cap a variance from the capture efficiency test methods in Continental White Cap, Inc. v. IEPA (April 22, 1993), PCB 92-155, and granted a variance extension in White Cap, Inc. v. IEPA (August 11, 1994), PCB 94-93, that expired April 22, 1996. On April 4, 1996 the Board granted White Cap's motion to incorporate the record from White Cap, Inc. v. IEPA (August 11, 1994), PCB 94-93. White Cap now seeks an extension of the variance until November 10, 1998 to allow time for Illinois to revise its State Implementation Plan (SIP), thereby allowing White Cap to conduct alternative capture efficiency testing on its coating lines. White Cap also requests the Board to retroactively apply any grant of variance to April 22, 1996.

The Illinois Environmental Protection Agency (Agency) filed its recommendation on June 3, 1996. The Agency asserts that an arbitrary or unreasonable hardship would continue to result if the requested relief is denied and therefore recommends grant of variance. (Rec. at 1.)¹ However, the Agency recommends that the variance expire on August 15, 1997 or until White Cap receives a federally enforceable permit, whichever occurs first. (Id.)

In its petition White Cap requested a hearing in this matter. Hearing was held July 17, 1996 in Chicago, Illinois before Chief Hearing Officer Michael L. Wallace. No members of

¹ The petition for variance will be cited as (Pet. at ___); the Agency Recommendation will be cited as (Rec. at ___.) and the hearing transcript will be cited as (Tr. at ___).

the public attended. The Agency entered an oral motion to amend its recommendation to reflect that White Cap had 127 tons per year of volatile organic material (VOM) emissions in 1995, not the reported 236 VOM per year. Hearing Officer Wallace granted the motion. (Tr. at 5.) As stated at hearing, the only remaining issue between the parties is the term of the variance extension. (Tr. at 6.) White Cap filed its post hearing brief on September 4, 1996; the Agency filed its post-hearing response on September 23, 1996; and White Cap filed its post-hearing reply on September 27, 1996.²

For the reasons set forth below, the Board finds that to require immediate compliance with capture efficiency test method regulations would continue to impose an arbitrary or unreasonable hardship on White Cap. The Board further finds that White Cap has demonstrated satisfactory progress toward achieving compliance during the term of its prior variance. The Board finds that unusual circumstances in this matter justify a retroactive application of the variance. The Board therefore grants White Cap an extension of its prior variance, subject to certain conditions set forth in the attached order.

The Board's responsibility in this matter arises from the Illinois Environmental Protection Act (Act). (415 ILCS 5/1 *et seq.* (1994).) The Board is charged therein with the responsibility of granting variance from Board regulations whenever it is found that immediate compliance with the regulations would impose an arbitrary or unreasonable hardship upon the petitioner. (415 ILCS 5/35(a).) A request for extension of variance may be extended from year to year upon a showing of satisfactory progress during the prior variance. (415 ILCS 5/36(b).) The Agency is required to appear at hearings on variance petitions (415 ILCS 5/4(f)), and is charged, among other things, with the responsibility of investigating each variance petition and making a recommendation to the Board as to the disposition of the petition. (415 ILCS 5/37(a).)

BACKGROUND

White Cap employs approximately 500 people at its manufacturing facility located at 1819 North Major Avenue in Chicago, Cook County, Illinois. (Tr. at 49.) White Cap is the largest U.S. manufacturer of metal closures or caps for baby food, pickles, preserves, juices and iced teas. (Tr. at 7, 46.) Multiple layers of coatings are applied to sheet metal that results in VOM emissions and thereby subjects White Cap to the Board's VOM emissions regulations set forth at 35 Ill. Adm. Code Part 218. (Tr. at 47, Rec. at 2.) Strips of sheet metal are then fed into a dye and shells are punched out, creating the caps. (Tr. at 48-49.)

Originally, White Cap operated 12 process lines that consisted of four printing lines and eight coating lines. Seven catalytic oxidizers controlled VOM emissions from these lines. (Tr. at 26.) In November 1995, White Cap began a modernization program on its lithographic operations at its Chicago facility by which all existing lines will be replaced with permanently totally enclosed lines. (Tr. at 26-27.) In 1995 and 1996, White Cap removed four coating lines and one print line from operation and replaced them with one double print line and one

² These filings shall be cited as (PH Br. at ___); (PH Resp. at ___); and, (PH Reply at ___) respectively.

coating line equipped with permanent total enclosures, each capable of 100% capture efficiency. (Tr. at 27-28.) White Cap also removed four oxidizers and installed an ABB regenerative thermal oxidizer that will control emissions from the two new lines as well as two existing lines. (Pet. at 3-4). White Cap is currently in the process of completing construction of the two new lines and new thermal oxidizer, and expects to replace the rest of its lines by mid-1998. (Tr. at 28.)

REGULATORY FRAMEWORK

In determining whether any variance is to be granted, the Act requires the Board to ascertain whether a petitioner has presented adequate proof that immediate compliance with the Board regulations at issue would impose an arbitrary or unreasonable hardship. (415 ILCS 5/35(a).) Furthermore, the burden is upon petitioner to show that its claimed hardship outweighs the public interest in attaining compliance with regulations designed to protect the public. (Willowbrook Motel v. PCB, 135 Ill. App. 3d 343, 481 N.E.2d 1032 (1st Dist. 1977).) Only upon such showing can the claimed hardship rise to the level of arbitrary or unreasonable hardship. In addition, the Board may grant a request for extension of variance on a year to year basis, but only upon a showing of substantial progress toward achieving compliance. (415 ILCS 36(b).)

A variance, by its very nature, is a temporary reprieve from compliance with the Board's regulations, and compliance is to be pursued regardless of the hardship which eventual compliance presents an individual petitioner. (Monsanto Co. v. PCB, 67 Ill.2d 276, 367 N.E.2d 684 (1977).) Accordingly, as a condition to the granting of variance, a variance petitioner is required to commit to a plan which is reasonably designed to achieve compliance within the term of the variance, unless certain special circumstances exist.

The instant variance request concerns VOM emissions test methods set forth in Section 218.105 and as the test methods relate to Section 218.108(b) of the Board's regulations. These sections read in pertinent part:

Section 218.105 Test Methods and Procedures

(c) Capture System Efficiency Test Protocols

(2) Specific Requirements

The capture efficiency of an emission unit shall be measured using one of the four protocols given below. Any error margin associated with a test protocol may not be incorporated into the results of a capture efficiency test. If these techniques are not suitable for a particular process, then an alternative capture efficiency protocol may be used, provided that the alternative protocol is approved by the Agency and approved by the USEPA [United States Environmental Protection Agency] as a SIP [State Implementation Plan] revision.

Section 218.108 Exemptions, Variations, and Alternative Means of Control or Compliance Determination

Notwithstanding the provisions of any other Sections of this Part:

(b) Any equivalent alternative control plans, equivalent device, or other equivalent alternative practice authorized by the Agency where this Part provides for such alternative or equivalent practice or equivalent variations or alterations to test methods approved by the Agency shall be effective only when included in a federally enforceable permit or approved as a SIP revision.

(35 Ill. Adm. Code 218.105(c)(2), 218.108(b).)

COMPLIANCE PLAN

White Cap states that it complied with all terms of the prior variance order. Specifically, White Cap submitted data on the VOM contents of its coatings within 180 days of the order's date; maintained daily records of the coating amounts, VOM content and VOM weight per volume of coating used on each line; and prepared monthly reports of these records, submitting them to the Agency quarterly. (Pet. at 4-5.)

White Cap has taken other steps in addition to complying with the Board's previous order. White Cap is in the process of replacing its 12 coating lines with new lines which will be permanently closed and will achieve 100% capture efficiency. White Cap has replaced four lines in the last year, as well as installed an ABB Preheater Regenerative Thermal Oxidizer, which controls emissions from two new lines, as well as two existing lines. (Pet. at 3-4, Rec. at 6-7.) White Cap expects to complete its modernization program by mid-1998. (Tr. at 28.)

White Cap asserts that the requested variance is needed to allow the Agency sufficient time to submit a SIP revision to the USEPA. White Cap states that the SIP revision is necessary before it can use alternative test methods to achieve compliance with Board regulations. White Cap states it is requesting the variance to terminate on November 10, 1998 so that White Cap will not be required to spend money to test coating lines it intends to replace with lines expected to emit significantly less emissions. (PH Reply at 5.)

ARBITRARY AND UNREASONABLE HARDSHIP

White Cap states that the situation in which the Board previously found an arbitrary or unreasonable hardship to exist, thereby granting White Cap the prior variance, continues to exist. White Cap states that, during its prior variance, it was awaiting USEPA approval of its Federal Implementation Plan (FIP) revision petition before conducting the required tests. USEPA addressed the dilemma caused by the capture efficiency testing requirements of the FIP by entering into a consent agreement with White Cap. The consent agreement allows White Cap to conduct capture efficiency testing on existing lines not permanently enclosed using alternative test methods, including Data Quality Objective (DQO) and Lower Competency Level (LCL) methods, as set forth in its guidance memorandum. (PH Brief at 3-4, Pet. at Exhibit 2.) The consent agreement also provides Illinois time to modify its SIP to

incorporate these alternative capture efficiency test methods by requiring White Cap to achieve compliance by November 10, 1998. White Cap states that to require it to conduct testing before this date would require White Cap to test lines which will ultimately be replaced. (Tr. at 131.)

The Agency agrees that the Board previously found an arbitrary or unreasonable hardship existed in its grant of the original variance in PCB 92-155 and the extension in PCB 94-93. The Agency acknowledged that USEPA has extended the time for White Cap to conduct capture efficiency testing until November 10, 1998. Since White Cap does not have a federally enforceable permit allowing the use of alternative CE test methods, the Agency agrees that requiring immediate compliance with the CE testing requirements of the Board's regulations would continue to impose an arbitrary or unreasonable hardship. However, the Agency states that White Cap may use alternative test methods once it receives a federally enforceable state operating permit pursuant to the Clean Air Act Permit Program (CAAPP), and that revision of the Board's regulations is not required. Therefore, the Agency concludes, White Cap's belief that the regulations must be revised in a SIP revision before it can use alternative test methods is unfounded, and any hardship resulting from that mistaken belief is self-imposed. (Rec. at 8-9). The Agency recommends that the Board grant White Cap an extension of its prior variance until August 15, 1997, or until the Agency issues White Cap a CAAPP permit, whichever is earlier. (Tr. at 133-35.)

ENVIRONMENTAL IMPACT

White Cap states that it is in compliance with the emission standards set forth in the Board's regulations and therefore a grant of variance extension regarding the date by which emissions testing must be completed would not pose an environmental or human health threat. (Pet. at 4.)

The Agency maintains that the issuance of the requested variance may result in an environmental impact. The Agency states that White Cap has the potential to emit 1,308 tons per year (TPY) of VOM and averages 736 TPY before control measures are employed. (Rec. at 6.) The Agency estimates White Cap's current average controlled VOM emissions to be 140 TPY. (Tr. at 7.) Based on Section 302 of the Clean Air Act and Section 39.5 of the Act, the Agency asserts that White Cap is a major source of air pollution. Since VOM contributes to the formation of ozone, the Agency concludes that a grant of the requested extension of variance may have an adverse impact on the ozone air quality in the Chicago nonattainment area.

CONSISTENCY WITH FEDERAL LAW

Pursuant to Section 35 of the Act, the Board may grant variances only if they are consistent with the provisions of the Clean Air Act. (42 U.S.C. 7401 *et seq.*) The parties state that USEPA has approved the coating rules set forth in Subpart F of Part 218, and a proposed final rule is expected, which must then go through the SIP process. (Pet. at 6, Rec. at 7-8.) The Agency notes that the consent agreement into which White Cap and USEPA entered does not affect White Cap's responsibility to comply with other local, state or federal

laws, but states that the requested variance can be issued consistent with federal law. (Rec. at 8.)

TERM OF VARIANCE

Termination Date

Both parties generally agree that an extension of variance is appropriate in this matter. The only area of disagreement is the term of variance. White Cap requests that the variance expire on November 10, 1998, the date given in the USEPA consent agreement. White Cap states that this time frame would allow it to complete its modernization program before testing its coating lines, as well as allow Illinois to include the DQO and LCL alternative capture efficiency test methods into its SIP. White Cap asserts that Section 218.105 requires the submission of a SIP revision before White Cap can use the alternative test methods in question. (PH Br. at 8.) White Cap argues that in the USEPA consent agreement, the USEPA did not include the option of using alternative test methods under a federally enforceable state operating permit (FESOP) as set forth in Section 218.108, therefore, it is not a viable compliance option. White Cap also contends that tying its variance term to the USEPA consent agreement would foster the Board's prior concern that only one body of law cover these matters. (PH Brief at 4, PCB 94-93 at 4.)

The Agency counters that compliance with testing requirements can be achieved much sooner than November 10, 1998, and that a SIP revision is not necessary before White Cap can utilize either the DQO or LCL alternative test methods. At hearing, Gary Beckstead, an environmental protection engineer for the Agency, explained that the DQO and LCL alternative test methods are not specifically found in Illinois regulations, but that Section 218.108(b) allows sources the flexibility to use these alternative methods, provided that the alternative test methods are part of either a SIP revision or a FESOP. (Tr. at 52-57.) The Agency contends that White Cap could obtain a FESOP much sooner than Illinois could obtain a SIP revision and therefore recommends that the variance terminate when the FESOP is obtained. (Tr. at 134.) Specifically, the Agency testified that White Cap applied for a CAAPP permit (which is a FESOP permit) on December 7, 1995. The Agency is required to issue or deny a permit within two years of the application, but the Agency stated that it expects to issue White Cap's CAAPP permit sooner than two years, and probably by August 15, 1997. (Tr. at 59.) Therefore the Agency recommends that the variance terminate on August 15, 1997 or when White Cap receives its CAAPP permit, whichever is earlier. The Agency asserts that this time frame would permit testing by late 1997 or early 1998, which is more desirable than waiting until November 1998 (Tr. at 134.)

Inception Date

White Cap also requested that this variance be applied retroactively to April 22, 1996, the date by which its last variance terminated. (Pet. at 6.) The Agency stated that it has no objection to a retroactive date for this variance request. (Rec. at 10.)

DISCUSSION

The Board finds the hardship that existed during the prior variance continues to exist for White Cap. Specifically, the Board finds that an arbitrary or unreasonable hardship would result if White Cap were required to conduct coating line testing pursuant to Section 218.105 before alternative test methods are available, either through a SIP revision or through a FESOP.

The Board further finds that White Cap has made substantial progress towards achieving compliance during the term of its prior variance. Namely, White Cap has applied for a CAAPP permit, receipt of which will allow it to conduct either the DQO or LCL alternative test method. In addition, White Cap is committed to reducing its total VOM emissions. It has implemented a modernization program to replace all of its coating lines with five permanently totally enclosed lines. (Tr. at 26-28.) In 1995, White Cap replaced four lines and four oxidizers with two permanently totally enclosed lines and an ABB preheater regenerative thermal oxidizer which controls emissions from the two new lines and two existing lines. (PH Br. at 9.) White Cap expects to replace four more lines with one permanently totally enclosed line in winter 1996 and complete its modernization program by mid-1998. (Tr. at 27-28.) White Cap's modernization efforts have resulted in 80% reduction in emissions since 1994. (Tr. at 29.) The Board therefore grants White Cap an extension of its prior variance.

Termination Date

As stated by both parties at hearing, the only unresolved issue here is the term of the requested variance. Section 218.108 of the Board's regulations states that "[n]otwithstanding the provisions of any other Sections of this Part" any alternative test methods approved by the Agency "shall be effective only when included in a federally enforceable permit or approved as a SIP revision." (35 Ill. Adm. Code 218.108(b).) The Board construes this section to mean that, regardless of other language found in Part 218, alternative test methods are acceptable provided they are included in either a FESOP or approved as a SIP revision. By its terms, Section 218.108 supersedes Section 218.105 regarding alternative test methods. As such the logical termination date for the requested variance would be the earlier occurrence of the two options provided in Section 218.108(b). The Board's order must provide a date certain by which the variance will terminate and the Board believes this date should be tied to the option that will further the Act's underlying policy of achieving compliance as soon as possible.

White Cap applied for a CAAPP permit, which is a federally enforceable permit, on December 7, 1995. The Agency found the application complete on January 12, 1996. (Tr. at 21.) The Agency is required to issue the CAAPP permit within two years of application; therefore, the permit will issue on January 12, 1998 at the latest.³ In contrast, the SIP revision process is not driven by a deadline, and in this case the process is likely to take longer than January 1998 to complete. Specifically, USEPA has published its proposal of rulemaking for

³ The Agency indicated at hearing that it expects to issue a CAAPP permit to White Cap prior to January 12, 1998, and that it is committed to issuing the permit by August 15, 1997. (Tr. at 59, PH Reply at 9-10.)

the alternative test methods but has not published a final rulemaking. Illinois cannot revise its SIP until the USEPA finalizes its rulemaking. Although the Agency anticipates a final rulemaking in December 1996, both parties agree that there is considerable uncertainty as to when the USEPA will publish a final rulemaking.

The Board finds it more likely that White Cap can achieve compliance under a CAAPP permit sooner than under a SIP revision. Accordingly, the date certain by which this variance extension shall expire will be the last day the Agency can issue White Cap its CAAPP permit. In summary, this variance extension shall terminate when White Cap obtains its CAAPP permit or 90 days after Illinois revises its SIP to include alternative test methods pursuant to Section 218.105, whichever is sooner, but no later than January 12, 1998. This termination date allows White Cap to determine compliance with the Act before the 1998 ozone season as well as provide White Cap time to continue its modernization program of replacing its coating lines.

Inception Date

Regarding the inception date for the requested variance, the Board notes its well-established rule of beginning the term of a variance on the date the Board renders its decision, absent unusual or extraordinary circumstances. (DMI, Inc. v. IEPA (December 19, 1991), PCB 90-227, 128 PCB 245-249.) The reasoning behind this general rule is to discourage untimely filed petitions for variance. (Fedders-USA v. EPA, (April 6, 1989), PCB 86-47, 98 PCB 15, DMI, Inc. v. EPA, (February 23, 1987), PCB 88-1332, 96 PCB 185.) As stated in DMI, Inc., if a petitioner wishes a variance to commence on a certain date, its petition must be filed at least 120 days prior to the desired inception date. (Id.) However, where the petition was otherwise timely filed before the prior variance expired, the Board has moved the starting date to the latest date by which the Act would have required a Board decision, i.e., the 120-day decision deadline. (Monsanto Co. v. EPA, (April 27, 1989), PCB 88-206(B), 98 PCB 267.) This type of partially retroactive variance is entirely consistent with the Board's underlying principle of rarely granting retroactive variances.

Here, White Cap requests that the term of its variance commence retroactively on April 22, 1996, the date its prior variance expired. (Pet. at 6.) In reading the record, the Board finds that unusual circumstances warrant a retroactive application of this variance request. To expect White Cap to have filed its petition for variance extension on or about December 22, 1995, 120 days before April 22, 1996, would have required White Cap to prepare its petition before knowing whether or not the Agency approved its CAAPP application. In addition, the Board acknowledges the uncertainty White Cap faced when two agencies issued two different interpretations of alternative test method requirements. Therefore, the Board will grant a retroactive inception date of April 22, 1996 in this matter.

CONCLUSION

The Board finds that an arbitrary or unreasonable hardship continues to exist for White Cap if White Cap were required to achieve immediate compliance with the Board's VOM emissions testing requirements. The Board further finds that White Cap has demonstrated

substantial progress towards achieving compliance during its prior variance. Therefore, the Board grants White Cap an extension of its prior variance. The effective inception date of this variance is April 22, 1996. The variance shall continue until White Cap obtains a federally enforceable state operating permit pursuant to the Clean Air Act Permit Program, or 90 days after Illinois revises its State Implementation Plan to include alternative test methods, whichever is sooner, but in any case, no later than January 12, 1998.

This finding constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

Petitioner, White Cap, Inc. (White Cap), is hereby granted variance from the testing requirements found in 35 Ill. Adm. Code 218.105(b), 218.205(c), 218.207 and 218.211 for its facility located at 1819 North Major Avenue in Chicago, Illinois. This grant of variance shall begin on April 22, 1996, and is subject to the following conditions:

1. Variance shall terminate on the date upon which the Illinois Environmental Protection Agency (Agency) issues White Cap a federally enforceable state operating permit pursuant to the Clean Air Act Permit Program, or 90 days following the date Illinois revises its State Implementation Plan to include alternative test methods pursuant to Section 218.105, whichever is sooner, but no later than January 12, 1998.
2. White Cap shall test its applicable lines for Capture Efficiency (CE) pursuant to either the seven proposed test methods (Methods 204A through G) or the alternative CE test methods (Data Quality Objective or Lower Competency Level), as specified in the United States Environmental Protection Agency CE Guidance Memorandum dated February 7, 1995.
3. White Cap shall keep daily records of the following items starting on the date of this order, including:
 - (a) the amount of each coating used in each coating line;
 - (b) the VOM content of each coating applied (lb VOM/gal of solids);
 - (c) the weight of VOM per volume of coating solids applied daily on each coating line (VOMs, pursuant to 35 Ill. Adm. Code 218.104(e)(2)).
3. White Cap shall prepare a monthly report for Agency inspection on the daily records required above. The report must also demonstrate White Cap's compliance with 35 Ill. Adm. Code 218.207(b)(2). White Cap shall submit one copy of the monthly compliance demonstrations on a quarterly basis to each of the following Agency officers:

Illinois Environmental Protection Agency
Bureau of Air
2200 Churchill Road, P.O. Box 19276
Springfield, Illinois 62794-9276

Attn: Compliance Section Manager

Illinois Environmental Protection Agency
Division of Air Pollution Control
Intercontinental Center
1701 First Avenue
Maywood, Illinois 60153
Attn: Mel Villalobos

IT IS SO ORDERED.

Board Member M. McFawn concurred.

If White Cap chooses to accept this variance subject to the above order, within forty-five days of the grant of the variance, White Cap must execute and forward the attached certificate of acceptance and agreement to:

Stephen C. Ewart
Division of Legal Counsel
Illinois Environmental Protection Agency
P.O. Box 19276
2200 Churchill Road
Springfield, Illinois 62794-9276

Once executed and received, that certificate of acceptance and agreement shall bind White Cap to all terms and conditions of the granted variance. The 45-day period shall be held in abeyance during any period that this matter is appealed. Failure to execute and forward the certificate within 45 days renders this variance void. The form of the certificate is as follows:

CERTIFICATION

I (We), _____, hereby accept and agree to be bound by all the terms of the Order of the Pollution Control Board in PCB 96-191, November 7, 1996.

Petitioner

Authorized Agent

Title

Date

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246 "Motions for Reconsideration.")

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the ____ day of _____, 1996, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board