

ILLINOIS POLLUTION CONTROL BOARD  
August 7, 1997

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

ORDER OF THE BOARD (by G.T. Girard):

This matter is before the Board on a motion to file instanter, a motion to modify a Board order and a motion for expedited decision, filed June 30, 1997, by the Illinois Environmental Protection Agency (Agency). On July 9, 1997, White Cap, Inc. (White Cap) filed a response to the Agency's motions. On July 16, 1997 the Agency filed a motion for leave to file a reply and reply to White Cap's response. On July 23, 1997, White Cap filed a motion for leave to file an attachment to its response.

The Board grants the Agency's motion to file instanter and its motion for leave to file a reply, as well as White Cap's motion to file an attachment. The Board will also grant the Agency's motion for expedited decision by adoption of this order.

In its motion to modify (Motion), the Agency requests that the Board modify its November 7, 1996 opinion and order to allow the Agency to issue a federally enforceable operating permit, rather than a Clean Air Act Permit Program (CAAPP) permit, as required by the order. The Agency explains that, as a participant in the Agency's Emissions Reduction Market System (ERMS) rulemaking, White Cap will have to determine baseline emissions and other issues prior to the issuance of a CAAPP permit. Since there is much uncertainty as to when these issues will be resolved, as well as when the rulemaking will be final, the Agency argues that it is impractical to issue a CAAPP permit by January 12, 1998, only to have to reopen the permit once the ERMS rulemaking is final. Motion at 2-3. Therefore, the Agency requests that the Board delete the phrase "pursuant to the Clean Air Act Permit Program" in Condition 1 of the Board order, and replace it with the following phrase:

Variance shall terminate on the date upon which the Illinois Environmental Protection Agency (Agency) issues White Cap a federally enforceable state operating permit, 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. White Cap shall apply for a federally enforceable state operating permit by August 12, 1997.

Motion at 3-4.

In its response (Resp.), White Cap requests that the Board deny the Agency's motion to modify. White Cap states that the Agency motion is improperly before the Board because it was not filed within 35 days of adoption of the order, as required by 35 Ill. Adm. Code 101.246. In addition, White Cap argues, the Agency failed to allege the existence of any conditions that would allow relief from final Board orders pursuant to 35 Ill. Adm. Code 101.301. White Cap further argues that the Agency failed to support its motion to modify with affidavits as required by 35 Ill. Adm. Code 101.301(c). Resp. at 1-2.

White Cap asserts that the Agency is requesting a significant modification to the Board's order, one for which there is no basis in the Illinois Environmental Protection Act (Act). In addition, White Cap argues that the Board's order does not require the Agency to take any action; rather, the order applies only to White Cap. In light of the Agency's inability to issue a permit by January 12, 1998, White Cap states that the appropriate relief is to extend the variance date until such time as the Agency can practically issue a CAAPP permit. White Cap states that it is in the process of drafting a petition for extension of variance, to be filed by the end of July 1997. Resp. at 2-3.

In its reply (Reply) the Agency argues that the relevant regulation, 35 Ill. Adm. Code 218.108(b), only requires a federally enforceable permit, which can be accomplished by either a CAAPP permit or a FESOP, a federally enforceable state operating permit. The Agency states that it can issue a limited FESOP within the timeframe of the Board's order in this matter, thereby allowing White Cap to achieve compliance by conducting the alternative capture efficiency testing from which it has had variance relief since 1993. Finally, the Agency argues that White Cap was bound by the Board's order prior to the ERMS rulemaking proceedings, and the ERMS proceedings do not impose an arbitrary or unreasonable hardship on White Cap; therefore, it would oppose a request for variance extension in this matter. Reply at 1-4.

### DISCUSSION

The issue in this matter is whether a party can seek modification of a final Board order after the 35-day period provided in the Board's procedural rules has expired. As White Cap stated, motions to modify Board orders "shall be filed within 35 days of the adoption of the order." 35 Ill. Adm. Code 101.246. Although the Board has made exceptions to this rule for parties seeking to extend an internal deadline, it has not granted untimely filed motions to modify a order that would extend the termination date of the variance granted. See The Nutrasweet Company and Consumers Illinois Water Company v. IEPA (December 20, 1990), PCB 88-84; Continental White Cap, Inc. v. IEPA (July 22, 1993), PCB 92-155; Allied-Signal, Inc. v. IEPA (September 27, 1990), PCB 88-172.

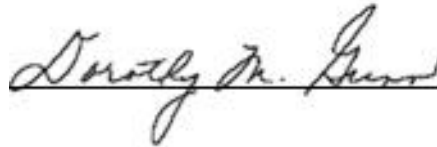
Throughout the instant variance proceeding the Agency indicated that, in the spirit of achieving compliance as soon as practicable, it expected to issue White Cap a CAAPP permit,

the permit for which White Cap had applied, no later than August 15, 1997. In its order, the Board determined that the variance would terminate no later than January 12, 1998, thereby giving the Agency additional time to issue the CAAPP permit. Subsequent events involving the ERMS rulemaking deem it impracticable to issue such a permit prior to adoption of a final rule in ERMS; therefore, not only is the Agency's August 15, 1997 deadline unrealistic, so is the termination date of this variance. The Board concludes that the Agency's motion to modify the Board order in this matter involves a modification of the termination date of the variance, not a modification of an internal deadline. Therefore, the Board denies the Agency's motion to modify the Board's November 7, 1996 opinion and order in this matter.

The Board notes that only White Cap, not the Agency, is bound by the terms set forth in the Board's November 7, 1996 order. Since the Agency states that it cannot issue a CAAPP permit before January 12, 1998, due to the uncertain timeframe for a final ERMS rulemaking, the Board finds that the appropriate remedy in this matter is a petition for extension of the prior variance. The Board further notes that White Cap filed such a petition on August 1, 1997.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 7th day of August 1997, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board