

ILLINOIS POLLUTION CONTROL BOARD
November 19, 1998

WHITE CAP, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 99-41
)	(Variance - Air)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

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

This matter comes before the Board on a petition for extension of variance filed September 2, 1998, by White Cap, Inc. (White Cap).¹ In the petition, White Cap requests an extension of its prior variance from capture efficiency (CE) testing requirements of the Board's air emissions regulations for volatile organic material (VOM).² See 35 Ill. Adm. Code 218.105(b), 218.205(c)(2), and 218.211.

In summary, White Cap requests time to complete plant modernization which may allow it to avoid the need for CE testing. If CE testing is necessary, White Cap requests time to do it using an alternative test method. In furtherance of its plan, White Cap makes three requests in its petition. First, White Cap requests that the Board extend its variance until December 31, 1999. Second, White Cap requests that the Board grant it retroactive relief from September 7, 1998, the date on which its prior variance granted by the Board in White Cap, Inc. v. IEPA, PCB 98-24 expired. Finally, White Cap asks that the Board not include the requirement that White Cap demonstrate compliance with 35 Ill. Adm. Code 218.207(b)(2) contained within condition 5 of the variance granted in White Cap, Inc. v. IEPA, PCB 98-24.

On October 1, 1998, the Illinois Environmental Protection Agency (Agency) filed its recommendation that variance be granted until either White Cap obtains a federally enforceable Clean Air Act Permit Program (CAAPP) permit or 90 days after Illinois revises its State

¹ The petition for variance will be cited as Pet. at __; the recommendation of the Illinois Environmental Protection Agency will be cited as Rec. at __; White Cap's response will be cited as Resp. at __; and the hearing transcript from White Cap, Inc. v. IEPA (November 7, 1996), PCB 96-191 will be cited as Tr.96-191 at __.

² On December 4, 1997, the Board extended White Cap's variance until White Cap obtained a federally enforceable state operating permit pursuant to the CAAPP or on September 7, 1998, whichever is sooner (see White Cap v. IEPA (December 4, 1997), PCB 98-24)). White Cap's variance history is outlined in this opinion in the section entitled "Prior History." See *infra* at 4-5.

Implementation Plan (SIP) to incorporate alternative CE testing, but in no case later than December 31, 1999. On October 16, 1998, White Cap filed a response.

In its petition, White Cap waived hearing. Pet. at 14. White Cap also requested that the Board incorporate into its petition the record in White Cap, Inc. v. IEPA, PCB 98-24. Pet at 1. On October 1, 1998, the Board granted White Cap's motion to waive hearing and to incorporate the record in White Cap, Inc. v. IEPA, PCB 98-24 into this instant petition. See White Cap, Inc. v. IEPA (October 1, 1998), PCB 99-41.

For the reasons below, the Board finds that to require White Cap to immediately comply with CE test method requirements would continue to impose an arbitrary or unreasonable hardship. The Board further finds White Cap has demonstrated satisfactory progress toward achieving compliance during the term of its prior variance. The Board therefore grants White Cap's variance, subject to conditions, until December 31, 1999. The Board grants White Cap's request for retroactive relief from September 7, 1998. By August, 3, 1999, White Cap must notify the Agency whether it will replace the temporary enclosed lines (non-PTE) with new permanently enclosed lines (PTE) or whether it will conduct CE testing on the remaining non-PTE lines. The Board also grants White Cap's request to delete the requirement that it demonstrate compliance with 35 Ill. Adm. Code 218.207(b)(2) contained within condition 5 of the variance granted in White Cap, Inc. v. IEPA, PCB 98-24. Finally, this variance extension terminates January 19, 1999, if by that date, White Cap fails to negotiate an extension of its existing consent agreement with the United States Environmental Protection Agency (USEPA) and if White Cap fails to notify the Agency of such extension.

The Board's responsibility in this matter arises from the Environmental Protection Act (Act). 415 ILCS 5/1 *et seq.* (1996). 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) (1996). A variance may be extended from year to year upon a showing of satisfactory progress during the prior variance. 415 ILCS 5/36(b) (1996). The Agency is required to investigate each variance petition and make a recommendation to the Board as to the disposition of the petition. 415 ILCS 5/37(a) (1996).

BACKGROUND

White Cap employs approximately 600 people at its manufacturing facility located at 1819 North Major Avenue in Chicago, Cook County, Illinois. Tr.96-191 at 49. White Cap is the largest United States manufacturer of metal closures or caps for baby foods, pickles, preserves, juices, and iced teas. Tr.96-191 at 7, 46. In the manufacturing process, multiple layers of coatings are applied to sheet metal. Tr.96-191 at 47. The process results in VOM emissions which subject White Cap to the Board's VOM emissions regulations set forth at 35 Ill. Adm. Code 218. Tr.96-191 at 47. Strips of metal are then fed into a dye and shells are punched out, creating the closures and caps. Tr.96-191 at 48-49.

Originally, White Cap operated twelve process lines that consisted of four printing lines and eight coating lines. Tr.96-191 at 26. Seven catalytic oxidizers controlled VOM emissions from these lines. Tr.96-191 at 26. White Cap has modernized its facility by replacing six of its old non-PTE lines with three new, state-of-the-art, PTE lines at a cost of \$9 million. Pet. at 2. White Cap has also rebuilt three of its catalytic oxidizers to increase their destruction efficiency at a cost of \$600,000. Pet. at 2. White Cap has also replaced the other four catalytic oxidizers with a regenerative thermal oxidizer at a cost of \$1 million. Pet. at 2.

White Cap had planned to complete the replacement of the remaining six older non-PTE lines with new PTE lines by December 1998. Pet. at 2. Due to unforeseen delays and performance problems with the new PTE lines, White Cap states it must postpone replacing the remaining older non-PTE lines until it can solve the performance problems with its new PTE lines and ensure that the new PTE lines will provide the necessary productivity gains to justify their cost. Pet. at 2.

White Cap states that it remains committed to its modernization program but that it needs additional time to focus on correcting the performance problems. Pet. at 2. White Cap requests an extension of its variance until December 31, 1999. Pet. at 2. By that time, White Cap believes it will have solved the performance problem and removed its remaining old non-PTE lines and replaced them with new PTE lines. Pet. at 2. In the event that it is unable to resolve the performance problems, White Cap requests the extension until December 31, 1999, so that it can properly perform the requisite CE testing and submit the final test reports to the Agency and the USEPA. Pet. at 2.

REGULATORY FRAMEWORK

In determining whether any variance is to be granted, Section 35(a) of 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) (1996). 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 a 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. See 415 ILCS 36(b) (1996).

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 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. City of St. Charles v. IEPA (July 21, 1991), PCB 91-58.

The instant variance concerns VOM emission test methods set forth in Section 218.105 and relating to Section 218.108(b) of the Board's regulations. These sections read in 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 is approved by the Agency and approved by the USEPA [United States Environmental Protection Agency] as a SIP revision. 35 Ill. Adm. Code 218.105(c)(2).

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

Notwithstanding the provision of any 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 108(b).

PRIOR HISTORY

On April 22, 1993, the Board granted White Cap a variance from the requirements of the Board's air pollution control regulations for miscellaneous metal coating operations found at 35 Ill. Adm. Code 218.105, 218.205, 218.207, and 218.211. The Board determined that compliance with the CE testing regulations would cause an arbitrary or unreasonable hardship on White Cap because it was technically and/or economically infeasible to conduct the CE tests pursuant to the approved test methods. See Continental White Cap, Inc. v. IEPA (April 22, 1993), PCB 92-55, slip op. at 4. The variance granted in Continental White Cap, Inc. v. IEPA, PCB 92-55 permitted White Cap to operate its original 12 lines without conducting CE tests as required by Section 218.207(b)(2) until July 1, 1993, or until USEPA made a final determination on White Cap's pending federal implementation plan (FIP) revision request, whichever was later. *Id.*

The USEPA did not take final action on White Cap's FIP revision nor did it complete its review of the CE testing methods on or before July 1, 1993. On July 22, 1993, the Board

issued an order in Continental White Cap, Inc. v. IEPA, PCB 92-55, extending the variance date until the USEPA took final action on White Cap's FIP request or April 22, 1994, whichever was earlier. See Continental White Cap v. IEPA (July 22, 1993), PCB 92-55, slip op. at 3.

On August 11, 1994, the Board granted an extension of the variance until the USEPA took final action on White Cap's FIP revision request or April 22, 1996, whichever was earlier. White Cap v. IEPA (August 11, 1994), PCB 94-93, slip op. at 1.

In 1995, the USEPA finally approved alternative CE test methods and recommended that states, such as Illinois, that had already adopted the previous test methods into their State Implementation Plans (SIPs), but wanted to allow the use of the new alternative CE test methods, should revise their SIPs. Exh. 1 at 4. Thereafter, the USEPA negotiated a consent decree with White Cap whereby White Cap agreed to conduct CE testing on any non-PTE lines by December 5, 1998. Exh. 1 at 4-5. Accordingly, on March 6, 1996, White Cap submitted a request for extension of variance. The Board extended the variance until the Agency should issue White Cap a federally enforceable CAAPP permit, or 90 days following a SIP revision incorporating the alternative CE testing methods, but no later than January 12, 1998. See White Cap, Inc. v. IEPA, PCB 96-191.

On December 4, 1997, the Board again extended White Cap's variance until White Cap obtained a federally enforceable CAAPP permit or on September 7, 1998, whichever was sooner. See White Cap, Inc. v. IEPA, PCB 98-24.

In this action before the Board, White Cap requests the Board extend the variance until December 31, 1999, so that it can either solve the performance problems on the new PTE lines and replace the remaining non-PTE lines with new PTE lines, or perform the requisite CE testing.

COMPLIANCE PLAN

White Cap has modernized its facility by replacing six of the twelve non-PTE lines with three new, state-of-the-art, PTE lines. Pet. at 2. Two of those old non-PTE were replaced with one new PTE line since the Board granted the most recent variance extension in White Cap, Inc. v. IEPA, PCB 98-24. Pet. at 11.

White Cap had planned to complete the replacement of the remaining six non-PTE lines with new PTE lines by December 1998. Pet. at 2. Unforeseen delays and performance problems with the three new PTE lines have meant that the new lines have not yet produced the expected production levels to justify their expense. Pet. at 9. The first and second lines White Cap purchased and installed resulted in mechanical and electrical problems that required reworking, such as parts failures and poor designs. Pet. at 8-9. White Cap has experienced installation problems with the third new PTE line and has been "debugging" it since March of 1998. Pet. at 9. While White Cap has a purchase order approved and an initial downpayment made for the next new PTE line, White Cap is holding off making further payments, accepting

delivery, and installing the next new line until it identifies and corrects the performance problems with the existing third line. Pet. at 9. White Cap states that it has been forced to outsource a portion of its production during the installation of the three new PTE lines. Pet. at 10. If White Cap must install new lines prior to solving its production problems, White Cap believes that it will be forced to outsource a significant portion of its production, thereby severely curtailing its ability to stay in business. Pet. at 10.

White Cap asserts that it is committed to completing its modernization program by 1999. In furtherance of this goal, White Cap plans to do one of the following: (1) if White Cap resolves its performance problems with the existing PTE lines by July 31, 1999, White Cap will replace the remaining six lines with PTE lines by December 31, 1999; or (2) if, by July 31, 1999, White Cap is unable to resolve its performance problems with the new lines, by December 31, 1999, White Cap will conduct CE testing. Pet. at 10-11. White Cap states it is negotiating with the USEPA to extend the time from December 5, 1998, to December 31, 1999, by which White Cap will either remove the old non-PTE lines to be replaced with new PTE lines or test the old non-PTE lines for CE. Pet. at 11.

White Cap points out that while it has requested variance relief since 1993, it was not until White Cap, Inc. v. IEPA, PCB 98-24, that White Cap asked for an extension of time in which to actually conduct the CE tests. White Cap states that the previous variance extensions were sought because either the USEPA had not developed the necessary test methods, or the Agency had not yet provided for the use of said test methods in a federally enforceable CAAPP permit or in Illinois' SIP.³ The CAAPP permit is necessary before White Cap can use alternative CE test methods, since no SIP revision has been made to allow use of the alternative CE tests.

White Cap asserts that the Agency will not finalize the CAAPP permit until mid 1999, or later, due to the Agency's review of numerous CAAPP permits for the ERMS sources. Resp. at 5. By agreeing that the variance extension is warranted and not offering another viable date to conduct the CE testing, White Cap asserts that the Agency agrees that December 31, 1999, is a reasonable date for the variance to expire. Resp. at 3-4. Thus, White Cap concludes that extending the variance until December 31, 1999 is not only reasonable to allow White Cap's modernization program to continue but is consistent with the

³ In White Cap v. IEPA, PCB 96-191, the Board extended White Cap's variance until the Agency issued White Cap a federally enforceable CAAPP permit allowing White Cap to conduct CE testing using the alternative test methods or until 90 days following a SIP revision incorporating the alternative CE test methods, but no later than January 12, 1998. The January 12, 1998 date was established because this was the statutory deadline by which the Agency was required to issue White Cap a CAAPP permit. In White Cap v. IEPA, PCB 98-24, the Board extended the variance until September 7, 1998, finding that it was impractical for the Agency to issue White Cap a federally enforceable CAAPP permit by January 12, 1998, as the Agency had not completed review of the Emissions Reduction Market System (ERMS) applications.

amount of time that may be needed by White Cap to obtain a final, effective, federally enforceable CAAPP permit. Resp. at 5.

The Agency states that the variance should be extended only until the Agency issues a final, effective, federally enforceable CAAPP permit or until 90 days after the revision of the Illinois SIP to incorporate the alternative CE test methods, whichever occurs first, but in no case later than December 31, 1999. Rec. at 5. The Agency disagrees that the variance should be extended outright until December 31, 1999. Rec. at 5.

In response to the Agency's recommendation, White Cap asserts that the CAAPP permit process is still in its early draft stages. Resp. at 5. White Cap maintains that, given the lengthy CAAPP permitting process, it is unlikely that the Agency will issue a final, effective, federally enforceable CAAPP permit until June 1999. Resp. at 5. If the USEPA becomes involved in the permitting process, White Cap alleges that the permitting process could extend beyond that projected date. Resp. at 5. Even if the Agency issues a CAAPP permit by June 1999, White Cap asks that the Board allot it time to decide which compliance plan it will implement, *i.e.*, replace non-PTE lines with PTE lines or conduct CE testing. White Cap states that it is committed to making a compliance decision by July 31, 1999, and committed to implementing that plan by December 31, 1999.

If the Board accepts the Agency's recommendation that the variance expire at the time the Agency issues a final, effective, federally enforceable permit, White Cap requests that the Board's order: (1) provide time for White Cap to determine whether additional lines will be removed; (2) require White Cap to conduct CE tests only on non-PTE lines which will not be removed before December 31, 1999, or provide reasonable amount of time to remove the lines; (3) provide for a reasonable amount of time to conduct CE testing, if necessary; (4) allow for the use of alternative CE tests set forth in the USEPA CE Guidance Memorandum dated February 7, 1995; and (5) provide time for White Cap to submit final tests to the Agency. Resp. at 5-6.

White Cap states that it cannot test the CE of its lines "on demand," but must have a reasonable amount of time to conduct such tests. Resp. at 6. Prior to conducting such tests, White Cap must provide a minimum of 30 days notice to the Agency and the USEPA, setting forth the test parameters. Resp. at 6. Moreover, the CE testing will require White Cap to run the same product through the lines for several days; thus White Cap, a facility that runs several products on each of its lines every day based on customer demand, could be required to produce the same product when it is not certain it has the customer base to support such product. Resp. at 6.

ALLEGED ARBITRARY OR UNREASONABLE HARDSHIP

White Cap states that in White Cap, Inc. v. IEPA, PCB 98-24 and the prior variances granted in this matter, the Board found that an arbitrary or unreasonable hardship would result if White Cap was not granted an extension of its variance until the Agency issued a final, effective, federally enforceable CAAPP permit or Illinois modified its SIP to include alternative CE testing. Pet. at 13. White Cap maintains that the situation has not changed. To date, White Cap has not been issued a final, effective, CAAPP permit. Moreover, Illinois has not modified its SIP. Pet. at 13.

In the short term, White Cap alleges that if the petition is not granted, White Cap would be left with no mechanism to demonstrate compliance with the Board's regulations because it does not have a final CAAPP permit which would allow alternative CE testing. Pet. at 13-14. In the long term, White Cap argues that if the petition is not granted, White Cap will have to immediately conduct costly CE testing when it could be focusing its efforts towards resolving the performance problems with its existing PTE lines, so that it can continue to replace its old lines with new PTE lines. Pet. at 14. Therefore, White Cap asserts that immediate compliance with the Board's regulations will result in an unreasonable or arbitrary hardship.

The Agency agrees that the Board previously found an arbitrary or unreasonable hardship existed in its grant of the prior variances in this matter. Rec. at 8. The Agency acknowledges that White Cap does not currently have a final, effective, federally enforceable CAAPP permit allowing it to use the alternative CE test methods. Rec. at 8. Consequently, the Agency agrees that requiring White Cap to conduct CE testing now using its current non-PTE lines would cause an arbitrary or unreasonable hardship since it would place White Cap in the position of having to comply with air regulations which require CE testing by methods that White Cap could not feasibly accomplish. Rec. at 8-9. However, the Agency disagrees that an arbitrary or unreasonable hardship will exist for White Cap once a federally enforceable CAAPP permit is issued or 90 days after alternative CE test methods are incorporated into the Illinois SIP. Rec. at 9-10.

ENVIRONMENTAL IMPACT

White Cap states that it is in compliance with emission standards set forth in Illinois' air pollution regulations, but cannot demonstrate compliance through the required test methods. Pet. at 11. Therefore, White Cap alleges that a grant of variance extension regarding the date by which emission testing must be completed would not pose an environmental or human health threat. Pet. at 11-12. White Cap further asserts that, because of its ongoing modernization program, it has had a positive impact on the air quality in the Chicago nonattainment area. Pet. at 12.

The Agency maintains that the issuance of the requested variance may result in an environmental impact. Rec. at 6. The Agency states that White Cap emitted 241 tons per year (TPY) of VOM in 1995, 209 TPY of VOM in 1996, and 206 TPY of VOM in 1997. Rec. at 6. As White Cap is a major source of air pollution (see 42 U.S.C. § 302 (1990); 415 ILCS 5/39.5 (1996)) and VOM contributes to the formation of ozone, the Agency concludes that the grant of variance extension may have an impact on ozone in the Chicago nonattainment area. Rec. at 6.

CONSISTENCY WITH FEDERAL LAW

Pursuant to Section 35 of the Act (415 ILCS 5/35 (1996)), the Board may grant variances only if they are consistent with applicable provisions of federal law, *i.e.*, the Clean Air Act (42 U.S.C. § 7401 *et seq.* (1990)). White Cap states that it is working with the USEPA to modify the consent agreement to extend the deadline for CE testing until December 31, 1999, so that the variance will be consistent with federal law. Pet. at 11.

The Agency states that the USEPA has approved the coating rules set forth in Subpart F of Part 218 of Illinois' RACT regulations as part of Illinois' SIP, as well as 35 Ill. Adm. Code 218.108(b). Rec. at 7. The Agency notes that the consent agreement into which White Cap and the USEPA entered granted White Cap an extension of time to conduct CE testing until December 5, 1998. Rec. at 8. The Agency states that, if the consent agreement is extended, the requested variance would be consistent with federal law. Rec. at 8.

VARIANCE CONDITIONS

Conditions 4 and 5

The Agency recommends that the Board continue to impose the requirements of condition 4 in White Cap, Inc. v. IEPA, PCB 98-24, which requires daily reporting requirements for VOM content and weight. Rec. at 10. The Agency also asks that the Board require White Cap to prepare a monthly report of the daily VOM content reporting requirements and submit a copy to the Agency on a quarterly basis as it was required in condition 5 of the Board's order in White Cap, Inc. v. IEPA, PCB 98-24. Rec. at 10-11.

White Cap agrees to the VOM content reporting requirements that were outlined in condition 4 of the Board's order in White Cap, Inc. v. IEPA, PCB 98-24. However, White Cap disagrees with the Agency's recommendation regarding quarterly submittals of monthly reports to the Agency. White Cap states that it will maintain daily records on the premises and when needed to demonstrate compliance, White Cap will prepare monthly reports for the Agency's review. Resp. at 9.

White Cap asks that the Board delete from any variance granted here condition 5 from the variance in White Cap, Inc. v. IEPA, PCB 98-24, requiring it to demonstrate compliance with 35 Ill. Adm. Code 218.207(b)(2). Specifically, condition 5 requires White Cap to ". . . demonstrate White Cap's compliance with 35 Ill. Adm. Code 218.207(b)(2)." See White

Cap, Inc. v. IEPA, PCB 98-24, slip op. at 9-10. White Cap asserts that it is unable to satisfy this requirement because an integral part of demonstrating compliance with this section is that White Cap perform CE. Pet. at 15. White Cap cannot demonstrate compliance with this section because it has variance relief from testing for CE. Pet. at 16.

The Agency agrees that the Board should grant relief from the requirement in condition 5 which requires that White Cap submit reports to the Agency demonstrating compliance with Section 218.207(b)(2). Rec. at 10.

Timing of CE Testing

In its recommendation, the Agency asks that the Board require White Cap to conduct CE testing 90 days after Illinois revises its SIP. Rec. at 5.

White Cap asks that the Board not include the 90-day post-SIP revision requirement for CE testing. Resp. at 7. White Cap believes this may not be a reasonable timeframe for White Cap to conduct such tests, depending upon White Cap's production demands. Resp. at 7. Further, if White Cap decides to replace the old lines with new PTE lines, but is unable to replace the lines until the 91st day after a SIP revision, White Cap would still be required to test on lines which would immediately be nonexistent following the tests. Resp. at 7. As the Agency has failed to present any support for the reasonableness of the 90-day period, White Cap requests that the Board not incorporate it into the termination date of this variance. Resp. at 7.

CAAPP Permit Application

The Agency recommends that White Cap amend its compliance schedule in its CAAPP permit application, within 30 days after the Board grants the variance, to include requirements that it test its applicable lines for CE pursuant to either the seven proposed test methods (Methods 204A through G) or the alternative test methods (*i.e.*, Data Quality Objective or Lower Confidence Limit) as specified in the USEPA's CE Guidance Memorandum dated February 5, 1995. Rec. at 10. This requirement was originally incorporated into condition 2 of the Board's order in the variance granted in White Cap, Inc. v. IEPA, PCB 98-24.

White Cap responds that the Board need not require it to amend its compliance schedule at this time. Resp. at 8. White Cap states that it has already amended its CAAPP permit application to be consistent with its variance petition by stating that it will either replace the non-PTE lines with PTE lines or it will conduct CE tests pursuant to the alternative test method set forth in the USEPA's CE Guidance Memorandum by December 31, 1999. Resp. at 9.

DISCUSSION

The Board finds that the hardship that existed during the prior variance term continues to exist for White Cap. Specifically, the Board finds that an arbitrary or unreasonable hardship would result if White Cap was not allowed to continue modernization but instead was required to conduct coating line testing pursuant to Section 218.105 before the alternative testing methods are permitted in a final, effective, federally enforceable CAAPP permit or until Illinois revises its SIP.

The Board further finds that White Cap has made substantial progress towards achieving compliance during the term of its prior variance. White Cap continues to negotiate with the Agency for a CAAPP permit, the receipt of which will allow it to use alternative CE test methods. In addition, since the Board granted a variance extension in White Cap, Inc. v. IEPA, PCB 98-24, White Cap has demonstrated its commitment to reducing its total VOM emissions by replacing two old non-PTE lines with one new state-of-the-art PTE line. Moreover, White Cap appears committed to resolving the performance problems in its existing PTE lines so that it can either replace the remaining old non-PTE lines with new PTE lines or conduct CE testing pursuant to a final, effective, federally enforceable CAAPP permit.

The Board therefore grants White Cap an extension of its prior variance.

Termination Date

The parties disagree over when the variance should terminate. White Cap requests that the Board extend the variance until December 31, 1999, so that it can do one of the following: (1) resolve performance problems and replace the old non-PTE lines with new PTE lines; or (2) conduct CE testing once the Agency issues a final, effective, federally enforceable CAAPP permit. Resp. at 10. The Agency, however, asks that the Board terminate the extended variance once White Cap receives a final, effective, federally enforceable permit or 90 days after Illinois revises its SIP, whichever comes sooner, but in no case later than December 31, 1999. Rec. at 10.

The Board grants variance until December 31, 1999, without the Agency's recommended interim condition. The Agency has not demonstrated a rationale or need for its suggestion. The Board notes that White Cap outlines two compliance plans in its petition for variance extension: White Cap will conduct CE testing once it receives a final, effective, federally enforceable CAAPP permit; or it will replace the non-PTE lines with PTE lines, thereby negating the need for CE testing.

The December 31, 1999 termination date is no large departure from the Agency's requested termination condition as the record indicates that a final, federally enforceable CAAPP permit will not be issued until mid to late 1999. The December 31, 1999 termination date gives White Cap time to resolve any performance problems with its new PTE lines and to

assess whether to replace the remaining six non-PTE lines with new PTE lines or, upon receipt of a CAAPP permit, to initiate CE testing. Further, when the CAAPP permit is issued and if White Cap elects to conduct CE testing rather than replace the non-PTE lines, White Cap has demonstrated that it will need additional time to properly demonstrate compliance with the Board's regulations regarding such testing.

Inception Date/Retroactivity

By its terms, the variance granted in White Cap, Inc. v. IEPA, PCB 98-24, expired on September 7, 1998. White Cap asks that the Board grant retroactive relief from September 7, 1998. The Agency did not object to White Cap's request for retroactive relief. Retroactive relief is appropriate, White Cap asserts, because the two factors causing delay in White Cap's ability to either perform CE testing or render such testing moot by installing new PTE lines are not self-imposed. Pet. at 5; see Minnesota Mining and Manufacturing, Co. v. IEPA (February 19, 1998), PCB 95-90. First, White Cap states that it cannot immediately perform CE testing because it has no legal mechanism to do so. Pet. at 5. Negotiations with the Agency to determine White Cap's ERMS baseline has delayed issuance of the CAAPP permit and thus the mechanism by which White Cap can perform CE testing. Second, White Cap argues that production problems with the new lines have caused it to reformulate its time-table for completion of the modernization plan.

Regarding the inception date of the requested variance, the Board notes its well-established practice of beginning the term of a variance on the date the Board renders its decision, absent unusual or extraordinary circumstances. See e.g., DMI, Inc. v. IEPA (December 19, 1991), PCB 90-227, 128 PCB 245-249. The Board's goal thereby is to discourage untimely filed petitions for variance. Fedders-USA v. EPA (April 6, 1989), PCB 86-47, 98 PCB 15; DMI, Inc. v. IEPA (February 23, 1987), PCB 88-1332, 96 PCB 185.

White Cap has no control over delays regarding issuance of the CAAPP permit. The Board disagrees with White Cap's assertions that the performance problems with its new PTE lines are not self-imposed. White Cap should have filed a petition for variance extension when it initially experienced performance problems with its new PTE lines.

Notwithstanding, the performance problems, the Board finds that the facts of this case and the Agency's support for retroactive relief demonstrate unusual or extraordinary circumstances which justify retroactive relief. The parties have made good faith efforts to timely complete the CAAPP permit process. Again here, as we have held previously, "to expect White Cap to have filed its petition 120 days prior to the expiration date would have required White Cap to prepare its petition before knowing whether or not the Agency approved its CAAPP application." White Cap, Inc. v. IEPA, PCB 96-191, slip op. at 8-9. Considering all the facts and circumstances in this case, then, the Board finds that the lack of a federally enforceable CAAPP permit was not self-imposed, and therefore grants White Cap retroactive relief from September 7, 1998.

Consistency with Federal Law

Finally, the Board finds that this variance expires January 19, 1999, if by that date, the consent agreement between White Cap and the USEPA is not extended until December 31, 1999. The initial agreement between White Cap and the USEPA provided that White Cap would test any non-PTE lines by December 5, 1998. The Board provides White Cap and the USEPA 45 days from the expiration of that consent agreement to negotiate an extension. The Board finds that White Cap must obtain an extension from the USEPA so that this variance is consistent with federal law.

Other Variance Conditions

Conditions 4 and 5

Condition 4, contained within the Board's order in White Cap, Inc. v. IEPA, PCB 98-24, will be included in today's order as the parties agree to continued need for the condition.

With regard to the Agency's request for quarterly submittals of VOM content reports, the Board includes a condition requiring such reporting. In White Cap, Inc. v. IEPA, PCB 98-24, condition 4 outlined daily reporting requirements regarding VOM content. In condition 5 of the order in White Cap, Inc. v. IEPA, PCB 98-24, the Board required White Cap to "prepare monthly reports for Agency inspection on the daily records required above . . . submit one copy of the monthly compliance demonstrations on a quarterly basis" to the Agency. White Cap, Inc. v. IEPA, PCB 98-24, slip. op. at 9-10. Condition 5 in that order required White Cap to prepare monthly reports of the daily VOM content records, as required by condition 4, and to submit those records (along with a 35 Ill. Adm. Code 218.207(b)(2) compliance demonstration) to the Agency on a quarterly basis.

While the Board finds that White Cap is no longer required to demonstrate compliance with 35 Ill. Adm. Code 218.207(b)(2), we do find that White Cap must fulfill, as it did in White Cap, Inc. v. IEPA, PCB 98-24, the reporting requirements, as outlined in condition 5 of the Board's order in White Cap, Inc. v. IEPA, PCB 98-24. Accordingly, White Cap must prepare a monthly report of the daily VOM content records and submit that monthly report to the Agency on a quarterly basis.

Finally, the Board agrees the requirements to demonstrate compliance with 35 Ill. Adm. Code 218.207(b)(2) are infeasible given that White Cap is unable to perform CE testing until it receives a federally enforceable CAAPP permit or Illinois revises its SIP. Therefore, the Board will not include a similar condition in today's order.

CAAPP Permit Application

With regard to the CAAPP permit application, the Board finds that White Cap does not need to supplement its CAAPP permit application to include its commitment to demonstrate compliance with the USEPA CE Guidance Memorandum. The Board finds credible White

Cap's response that it has already complied with this condition in the most recent submittal of its CAAPP application.

CONCLUSION

The Board finds that an arbitrary or unreasonable hardship continues to exist for White Cap if it is required to achieve immediate compliance with the Board's VOM emissions testing requirements. The Board further finds that White Cap continues to demonstrate substantial progress towards achieving compliance during the term of its prior variance. Therefore, the Board grants White Cap an extension of its prior variance subject to the conditions outlined in the order below. The inception date of this variance is September 7, 1998. The variance shall terminate December 31, 1999. However, this variance extension expires on January 19, 1999, if by that date, White Cap and the USEPA do not extend the consent agreement until December 31, 1999, and if White Cap does not notify the Agency of the extension of the consent agreement. In addition, by August, 3, 1999, White Cap must notify the Agency whether it will replace the non-PTE with PTE lines or whether it will conduct CE testing on the remaining non-PTE lines. Finally, in light of White Cap's lengthy variance history, the Board notes that it will view strictly any further petitions for variance extension.

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

ORDER

Petitioner, White Cap, Inc., 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 September 7, 1998, and is subject to the following conditions:

1. The variance terminates December 31, 1999. However, this variance expires on January 19, 1999, if by that date, the consent agreement between White Cap and the USEPA is not extended until December 31, 1999. By January 19, 1999, White Cap must notify the Agency that White Cap and the USEPA have agreed to extend the consent agreement until December 31, 1999. Such written notice must be sent to the following address:

Deborah J. Williams
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 N. Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

2. White Cap shall elect to either conduct capture efficiency (CE) testing on the remaining non-PTE lines, or to replace the non-PTE lines with PTE lines. By

August 3, 1999, White Cap shall provide the Illinois Environmental Protection Agency with written notice of its elected compliance plan. White Cap shall send written notice of its elected compliance plan to the address specified in condition 1 of this Order.

3. White Cap shall test its applicable lines for CE pursuant to either the seven proposed test methods (Methods 204A through G) or the alternative CE test methods (*i.e.*, Data Quality Objective or Lower Competency Level) as specified in the United States Environmental Protection Agency CE Guidance Memorandum dated February 7, 1995.
4. White Cap shall keep daily records of the following items starting on the date of this order, including:
 - a. the amount of coating used in each coating line;
 - b. the volatile organic material (VOM) content of each coating applied (lb VOM/gal of solids); and
 - c. the weight of VOM per volume of coating solids applied daily on each coating line (VOMs, pursuant to 35 Ill. Adm. Code 218.105(e)(2)).
5. White Cap shall prepare a monthly report for Agency inspection on the daily records required above. 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
Attention: Compliance Section Manager
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

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

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

Deborah J. Williams
 Division of Legal Counsel
 Illinois Environmental Protection Agency
 1021 N. Grand Avenue East
 P.O. Box 19276
 Springfield, IL 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:

CERTIFICATE

I (We), _____, hereby accept and agree to be bound all the terms of the Order of the Pollution Control Board in PCB 99-41, November 19, 1998.

 Petitioner

 Authorized Agent

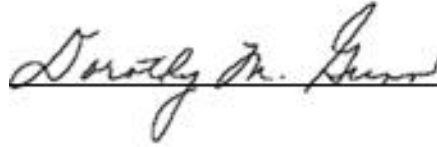
 Title

 Date

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 2d R. 335; 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 19th day of November 1998 by a vote of 7-0.

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

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board