

ILLINOIS POLLUTION CONTROL BOARD

October 3, 1972

GAF CORPORATION)	
)	
v.)	PCB 71-11
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ENVIRONMENTAL PROTECTION AGENCY)	
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ENVIRONMENTAL PROTECTION AGENCY)	
)	
v.)	PCB 72-50
)	
GAF CORPORATION)	
)	

DISSENTING OPINION (by Mr. Dumelle)

In filing this opinion some two months after the decision I have had the benefit of hindsight. The Citizens Utilities v. EPA case (PCB 71-125, October 14, 1971) has been decided by the Appellate Court which has said that this Board has no power to levy penalties in variance cases. That is what the instant settlement was all about. In order to avoid an appellate test on PCB 71-11 the majority agreed to a \$50,000 settlement in lieu of the \$149,000 originally thought just. And the other GAF case, PCB 72-50, was also settled for \$15,000.

Let me briefly state my reasons for dissenting in this case:

- 1) When the Board on April 19, 1971 voted 4-0 to levy a penalty of \$149,000 upon GAF it felt then that it had the legal power to do so and that the flagrant disregard of Des Plaines River cleanup merited the use of the statutory maximum penalty possible. The Board should have had the courage of its legal convictions and should have squarely faced the appellate test. It is my belief that the appellate court, had they received this case, would have understood the significance of a discharge to the Des Plaines River equal to the raw sewage strength of 90,000 people. The court could have weighed Joliet's and Marseilles' and

other cities rights to clean water against the delay manifest in this case. And in that setting the court might have concluded that we had and needed the power to assess penalties in variance cases. But now the precedent has been set against the Board in an insignificant case. Would it not have been better to have bit the bullet on the main case?

- 2) The extreme haste and the unauthorized settlement negotiations in these cases were disturbing to me. The settlement proposal was filed with the Board at noon on September 25 and acted upon the next day with just four business hours to reflect upon this matter (and also upon a 50-item agenda). The Attorney-General was never specifically authorized by the Board to negotiate a settlement at the appellate level. I do agree fully with the majority opinion on the Board's now enunciated role in approving settlements of appeals from its decisions. The Board is not a court--it is an agency that many times fashions its own remedies out of its experience. It should therefore itself decide whether the conditions of its orders ought to be changed at some later date when at the appellate review stage.
- 3) The companion case, PCB 72-50, involves air pollution. The stipulation in this case is quoted in the majority opinion and bears repeating. GAF is stated by the Agency to have "created a nuisance for the community... by emitting asphalt odors which citizens have found objectionable and by emitting copious amounts of particulate matter which interfere with normal lives of the local citizens". How "objectionable" were the odors? Did they cause people to become nauseated as in another roofing company case (Hemmerich v. Lloyd A. Fry Roofing Co., PCB 71-33, 2PCB 581, October 14, 1971) in which we levied a penalty of \$50,000? Did the "copious amounts of particulate" interfere with people's lives to the extent we saw in a case (EPA v. Incinerator, Inc. PCB 71-69, 2PCB 505, September 30, 1971) in which we levied a \$25,000 penalty? We will never know because the instant case, PCB 72-50, never went to public hearing.

The Environmental Protection Act is designed for public participation and citizen involvement. It makes a mockery of the Act to deny citizen participation by settling a case on four hours consideration without knowing the dimensions of interference with people's right to enjoy clean air.

- 4) In summary, the majority, by accepting this settlement has reduced the penalty to a major water polluter by \$99,000. No new facts have been alleged. GAF Corporation with annual sales in excess of \$699 million is now 180th largest in the United States as against its 193rd position in 1970 (FORTUNE, May 1972, p. 196) and so poverty can hardly be claimed as a reason for mitigation.

The air pollution case, with its admitted 8-month delay by GAF would have left the company liable for a penalty of up to \$250,000 (240 days delay at \$1,000 per day plus \$10,000 for violating the Act) had the majority allowed it to go to hearing. Delay in installing air pollution control equipment saves a firm money. Virginia Brodine in "Running in Place" (Environment, Jan.-Feb. 1972, p.10) states

... efforts to abate pollution at every governmental level have been stalled by delaying tactics and court action. There are good dollars-and-cents reasons. Benjamin Linsky, San Francisco's first air pollution control officer, and now a professor of air pollution control engineering has told Congress that each year a public utility defers the installation of one million dollars worth of air pollution control equipment, the utility is ahead by about \$200,000 to \$300,000.

Let's compute GAF's "savings-by delay". Using Linsky's median 25% savings figure and multiplying by the GAF capital cost for its control program (\$1,555,802) and adjusting this for 8 months instead of a year we find that \$259,300 was saved! The \$15,000 settlement was a good business bargain.

The GAF water case, PCB 71-11, has been marked by fits and starts on the part of the Board. On April 19, 1971 the penalty and certain conditions were set. On June 28, 1971 the Board retreated from some of these conditions (see Dissenting Opinion, 2PCB 59). Now a further retreat has been made and a penalty meant to penalize has been discounted 66%. How do all of these actions appear to the public and the would-be polluters? The Bible tells us

If a trumpet, for that matter, gives
out an uncertain note, who will arm
himself for battle? (I Corinthians 14:8, The Holy
Bible, Knox Translation, 1950.)



Jacob D. Dumelle
Board Member

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Dissenting Opinion was submitted on the 7th day of December, 1972.



Christan L. Moffett, Clerk
Illinois Pollution Control Board