ILLINOIS POLLUTION CONTROL BOARD
October 3, 1972

ENVIRONMENTAL PROTECTION AGENCY	)	
	)	
	)	
v.	)	# 72-50
	)	
	)	
GAF CORPORATION	)	

Opinion of the Board (by Mr. Currie):

The Agency's complaint charged GAF with delays in the implementation of its Air Contaminant Emission Reduction Program, which required the installation of fume incineration systems on asphalt saturators and oxidizing stills at the company's Joliet roofing plant by May 1972. The result, it was alleged, was emissions in excess of regulation limits (Rules and Regulations Governing the Control of Air Pollution, Rule 3-3.111) and interference with the neighbors' enjoyment of their property, constituting air pollution under § 9(a) of the Environmental Protection Act.

On September 25, 1972, we received a stipulation and proposed settlement from the parties. The stipulation recited the Agency's contentions that allowable particulate emissions from the oxidizing stills were 20.66 pounds per hour and actual emissions 43.5, and both saturators and stills had "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." GAF denied that it committed any violation.

It is further recited that GAF is actively working to install the necessary fume incineration systems, which "are the most efficient asphalt fume abatement equipment presently available," and which are "contemplated by GAF to abate the nuisance . . . and to bring the particulate emissions from the oxidizing stills into compliance with all presently enacted state air pollution regulations"--presumably including the newly tightened particulate regulations we adopted in April of this year for future compliance (PCB Regs., Ch. 2). The stipulation states that the "program is now well under way and proceeding according to [the new] schedule." The company estimates the cost of control equipment at $1,555,802.

The proposed settlement is that GAF will complete the control installation and comply with all applicable laws and regulations by January 31, 1973; will post a bond in the amount of the cost of the program; will file monthly progress reports; will be permitted to operate under present conditions until the new deadline; and will pay a penalty of $15,000 for its alleged delays.

This agreement is contingent upon the Board's approval of a second settlement relating to GAF's petition for judicial review of our penalty order in #71-11, a water-pollution case involving the same plant; the water settlement was approved by the Board on September 26, 1972, for reasons stated in a separate opinion adopted today. GAF Corp. v. EPA, #71-11, 5 PCB ___, ___ (Sept. 26 and Oct. 3, 1972).

Board procedure in evaluating proposed settlements is detailed in our procedural Rule 333 (PCB Regs, Ch. 1, Rule 333), and in EPA v. City of Marion, #71-25, 1 PCB 591 (May 12, 1971), in which we have made clear that, because of the Board's role as an affirmative instrument for effectuating the policy of the Act, Board approval of the merits is requisite for any settlement of a pending case. See also the discussion in GAF Corp. v. EPA, #71-11, 5 PCB ___, decided today. As we said in the Marion case, the statutory policy of public participation in pollution cases requires that we make every reasonable effort to ascertain the views of the public upon settlements proposed by the Agency and the respondent. For the Agency is but the guardian of the public interest; it is the public itself that must put up with the results of our decisions. Consequently, as we said in Iowa-Illinois Gas & Electric Co., #72-216, 5 PCB ___ (August 22, 1972),

> It has been our preferred procedure, even where a stipulation is reached on all factual issues, and indeed even when the parties agree on a proposed disposition, to require that the stipulation and proposal be presented publicly so that affected citizens have a meaningful opportunity to know the terms and to express their views.

But we have not felt ourselves bound to hold a hearing on a proposed settlement when strong countervailing considerations indicate we should not. In EPA v. Russell, Burdsall & Ward Bolt & Nut Co., #71-369, 4 PCB 701 (June 27, 1972), the Board noted the desirability of a settlement hearing but decided the case without a hearing transcript, evidently believing that the completeness of the stipulation and the large amount of the agreed penalty (over $50,000) gave considerable assurance that the public interest would be protected, in light of the further delays that would have been encountered had the Board at that date

scheduled a settlement hearing. In Howe v. Commonwealth Edison Co., #71-333, 5 PCB ___ (Sept. 6, 1972), the record reveals that the parties' initial agreement to settle was retracted upon notification that a hearing on the proposal would be necessary; the Board after examining the facts and the proposed remedy (a $2500 penalty for an accidental spillage of 150 gallons of oil into the Mississippi River) concluded that "no useful purpose would be served by insisting upon a hearing on the facts of this particular proceeding." Our policy, therefore, is to hold settlement hearings unless extraordinary circumstances indicate otherwise.

The present case is one of such extraordinary circumstances. We received both this stipulation and that in the GAF water case on September 25, and each depended upon approval of the other. Oral argument in the water case before the Appellate Court was set for October 3, and we were informed that postponement of our decision would not only impose a considerable work burden upon attorneys in preparing for oral argument but would also entail a significant risk that our approval of the water settlement might come too late to forestall a court decision on the merits. In other words, if we did not approve both settlements before October 3 we might well lose the opportunity for settlement of the water case altogether.

The desirability of accepting the water settlement is spelled out in our opinion in that case, adopted today. To have insisted upon a public hearing on the air settlement, with the requisite 21-days' notice, would have put an end to the water settlement. Given this important adverse consequence of postponing the air decision, and given our evaluation of the air settlement itself, we concluded that we should proceed without a settlement hearing, and the air settlement was approved by a 4-1 vote, Mr. Dumelle dissenting, on September 26, for reasons that follow.

For purposes of passing upon the adequacy of the proposal, we assume that the Agency's allegations are true and that the Agency would prove them if a hearing on the merits were held. These allegations would establish that GAF has unjustifiably delayed by eight months the completion of necessary pollution control facilities. The Agency agrees that the equipment that is being installed is the best available, and it does not contend that, given present facts, the installation could be completed any faster than the company has agreed to complete it. Shutting down the plant, for reasons given in our first opinion in the water case (GAF Corp. v. EPA, #71-11, 1 PCB 481 (April 19, 1971)), does not appear a reasonable alternative. We are convinced the abatement program, seen from today's vantage point, is an exemplary one, and it is to be secured by an adequate bond.

The sole remaining question is the adequacy of the $15,000 penalty for the eight months' delay. As we said in the companion GAF water case, the setting of a money penalty is not an exact science. The penalty agreed upon here is in the same ball park as penalties for comparable delays in a number of other significant air-pollution cases. See, e.g., Marquette Cement Mfg. Co. v. EPA, #71-23, 1 PCB 145 (Jan. 6, 1971) ($10,000, which the opinion writer thought low, for over a year's delay in controlling a large cement plant); Molex, Inc. v. EPA, #71-200, 3 PCB 341 (January 6, 1972) ($10,000 for a two-to-three-year delay in controlling substantial and offensive emissions from a plastics factory); Agrico Chemicals Co. v. EPA, #71-211, 3 PCB 319 (Dec. 21, 1971) (10,000 for a year-and-a-half delay in controlling particulate emissions from a fertilizer plant). See also Spartan Printing Co. v. EPA, #71-19, 2 PCB 19 (June 23, 1971) ($10,000 for an 18-month delay in abating substantial water pollution violations from a large printing plant). Cases resulting in substantially higher penalties, by and large, have involved the failure to take any affirmative action to abate long-standing and serious nuisances down to the date of the complaint.[1] See Hemmerich v. Lloyd A. Fry Roofing Co., #71-33, 2 PCB 581 (Oct. 14, 1971)($50,000); EPA v. Incinerator, Inc., #71-69, 2 PCB 505 (September 30, 1971)($25,000). We conclude that, in view of the relatively brief delay in the present case, and the absence of Agency insistence that the emissions imposed an intolerable burden on the community, the agreed penalty of $15,000 is a substantial one that approximates what we would in all likelihood impose upon proof of all the violations alleged.

In the interest of avoiding unnecessary litigation, we accept reasonable settlements agreed to by both parties. See EPA v. Granite City Steel, #70-34, 4 PCB 457 (May 3, 1972).

On these grounds the settlement was approved September 26.

Mr. Dumelle dissents.

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1. The special circumstances surrounding the $149,000 penalty in the GAF water case, #71-11, and our acceptance of a $50,000 settlement, are described in today's opinion in that case.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion this 5th day of October, 1972, by a vote of 4.