ILLINOIS POLLUTION CONTROL BOARD
October 3, 1972

GAF CORPORATION	)	
	)	
	)	
v.	)	# 71-11
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	)	
ENVIRONMENTAL PROTECTION AGENCY	)	

Opinion of the Board on Proposal for Settlement (by Mr. Currie):

This case began early in 1971 when GAF petitioned for a variance to allow more time for construction of wastewater treatment facilities at its roofing mill on the Des Plaines River near Joliet. No complaint seeking money penalties for past delays was ever filed. Following hearings, we concluded that GAF had unjustifiably delayed for about five months the construction of facilities for treating wastes equivalent to the raw sewage of 90,000 persons. Recognizing that immediate shutdown of the plant for this violation would impose severe hardships upon 700 employees and, because of other pollution sources, would not render the Des Plaines immediately free from pollution, we granted a two-months' variance during which GAF was required to demonstrate diligence in completing its program, subject to extension in the event satisfactory progress was shown. On the other hand, fearing that "to let the company off scot free" for what we termed its "callous disregard for its obligations," the Board required GAF to pay a penalty of $149,000 as a condition of the variance, relying upon our statutory authority to impose such conditions as may be required to effectuate the policy of the Environmental Protection Act. GAF Corp. v. Environmental Protection Agency, #71-11, 1 PCB 481 (April 19, 1971).

As anticipated by our first order, GAF submitted a petition for extension of the variance to permit completion of construction, alleging significant progress and asking interim extension pending resolution of the merits of the new petition. After a hearing we concluded that the company had "shown sufficient good faith commitment to curing its pollution problem to entitle it to continue operating while we pass upon the merits of its program," and extended the variance pending final decision. GAF Corp. v. EPA, #71-11, 2 PCB 57 (June 28, 1971). After full hearings we concluded that GAF, since our first order, had "elected to proceed post haste to abate the pollutional nature of its aqueous discharges," and that the "history in this case

of delay . . . is now happily past." We approved the program, providing for continued operation until completion of the required secondary treatment facilities April 30, 1972. GAF Corp. v. EPA, #71-115, 2 PCB 393, 401 (Sept. 13 and 16, 1972). The original penalty provision was not impaired by these later orders.

While pursuing its abatement program with what we found in the above opinions constituted due diligence, GAF sought judicial review of our order, especially as it related to money penalties, in the Appellate Court. The company's brief raises far-reaching constitutional and statutory questions, as yet unsettled by the courts, respecting the powers of this Board, and challenges certain aspects of the particular proceeding as well. Oral argument on the petition for judicial review was scheduled, we were informed by the Attorney General's office, for October 3, 1972.

On September 25, 1972, we received a proposed settlement agreement endorsed by both GAF and the Environmental Protection Agency, the two parties to the proceedings before this Board. Reciting that GAF has now completed its program and is in compliance with the regulations from which it originally sought variances, the agreement provides for the payment of $50,000 by GAF; for dismissal of the judicial review proceeding with prejudice; and for extinguishment of any remaining liabilities under prior Board orders. A condition of the agreement is Board approval of a second settlement in #72-50, Environmental Protection Agency v. GAF Corp., an air pollution case concerning the same plant; such approval was given September 26, 5 PCB , for reasons stated in a separate opinion adopted today (5 PCB). Because the impending oral argument of the appeal from our original order would impose substantial work burdens on the parties and might eliminate the opportunity for settlement, we passed upon the proposal September 26 and approved it by a 4-1 vote, Mr. Dumelle dissenting (5 PCB), for reasons that we detail in today's opinion.

I. Jurisdiction.

Whether the Board's approval is required for settlement of appeals from its decisions was a threshold question, never before resolved, that had to be decided before reaching the merits of the proposal. Were we a conventional trial court, the disposition of our decisions on appeal would be a matter exclusively for the parties, subject to the approval of the appellate tribunal; for the trial court is an impartial arbiter between adversary litigants and not an interested party on appeal. In many ways our function in individual pollution cases resembles that of a trial court, especially

in enforcement cases. The Board takes no part in the investigation or presentation of cases but sits to decide on the basis of a record made by adversary parties. The Administrative Review Act, however, explicitly makes the Board a party to every proceeding seeking judicial review of its decisions. Ill. Rev. Stat., ch. 110, § 271. From the language of that statute alone it would be open to us to view our position, like that of the judge whose decision is sought to be reviewed by a writ such as mandamus, as a purely formal one and to leave the fate of our orders on appeal to the parties who appeared before us. Consideration of our position under the Environmental Protection Act and comparison with our accepted role in the settlement of cases still pending before us, however, convinces us that we cannot view our position on appeal as that of a disinterested trial court.

In setting up the Pollution Control Board as part of a "unified, state-wide program . . . to restore, protect and enhance the quality of the environment" (Environmental Protection Act, §§ 2(b)), the General Assembly did not create simply another court with limited jurisdiction. Board members were required to be "technically qualified" in matters relating to pollution control, § 5(a), and the Board was directed to "determine, define and implement the environmental control standards applicable in the State of Illinois," § 5 (b). As Governor Ogilvie stated in recommending adoption of the Act (Special Message on the Environment, April 23, 1970, p. 5), "the principal job of defining what may or may not be done to the environment would be left, under the proposed act, to the new Pollution Control Board." Thus the Board was designed to be the final interpreter, subject to judicial review, of what is required to effectuate the policies of the Environmental Protection Act; not merely a disinterested arbiter, the Board is entrusted with affirmative responsibility to see to it, through appropriate orders in matters brought before it, that the policies of the Act are carried out. The Board is to exercise this responsibility in rule-making matters, by adopting regulations defining, for example, prohibited levels of discharge as required "to promote the purposes" of the Act (e.g., § 13). It is to do so in enforcement cases, by considering "all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits" and by entering "such final order" or making "such final determination, as it shall deem appropriate under the circumstances" (§§ 33(c), 33(a)). It is to do so in variance cases, such as this one, by determining whether or not compliance "would impose an arbitrary or unreasonable hardship" and by imposing "such conditions as the policies of this Act may require"

(§§ 35, 36(a)). In all its functions the Board operates as an affirmative instrument of the statutory policies of the Environmental Protection Act, responsible for entering orders on the basis of its own best judgment, form the record, as to what "may or may not be done to the environment" consistent with those policies. As a body thus charged with carrying out statutory policy, the Board has a continuing interest in the resolution of matters brought before it that we cannot in good conscience delegate to others.

The special interest of the Board in cases brought before it was expressed very early in our history in the adoption, in October 1970, of our procedural rule 333, which provides a special procedure to be followed if the parties desire to settle cases pending before us. In light of our affirmative responsibility under the Act for determining what would constitute an appropriate order consistent with statutory policy, that rule provides that "no case pending before the Board shall be disposed of or modified without an order of the Board." Written statements as to the reasons for settlement are required, and the Board may require the parties to appear to supply further information to guide the Board in making the ultimate decision whether or not the proposed settlement is consistent with statutory policy. PCB Regs., Ch. 1, Rule 333. We spelled out these requirements in EPA v. City of Marion, #71-25, 1 PCB 591 (May 12, 1971):

> Rule 333 requires the parties to submit to the Board adequate information on which we can base an intelligent evaluation of whether any proposed settlement is in the public interest. After all it is the Board and not the Agency or its attorneys that is given statutory responsibility to determine whether a violation exists and what is the appropriate remedy. . . . Such information must contain a full stipulation of the relevant facts pertaining to the nature, extent, and causes of the violations, the nature of the respondent's operations and control equipment, any explanations of past failures to comply, and details as to future plans for compliance, including descriptions of additional control measures and the dates for implementing them, as well as a statement of reasons why no hearing should be conducted. Opportunity will also be provided by the Board for individual citizens to express their views as is contemplated by the statute.

In exercising this responsibility we have not hesitated to reject proposed settlements that we believed were not consistent with statutory policy. E.g., EPA v. Packaging Corp of America, #72-10 (consolidated with #71-352), 5 PCB____, ___ (August 8 and 15, 1972).

Thus even in enforcement cases, in which there are by definition two adversary parties, our consistent rule has been that our special statutory position requires our affirmative approval of the merits of any settlement proposal. In variance cases the matter is even more clear; for although the statute makes every effort to assure the active participation of the Environmental Protection Agency in variance cases to avoid the undesirability of our having to decide upon records made entirely by one party (§ 37; see Kelberger v. EPA, #72-177, 5 PCB (September 26, 1972)), the Agency is not a true adversary in every case, for it may properly recommend that the variance be granted. We are directed even in such cases to examine the record for ourselves, and moreover public participation in variance proceedings is encouraged, in order that the decision will be based upon the Board's best judgment and not simply upon the Agency's agreement with the petitioner. In short the statute is quite explicit that variances are to be granted only by the Board, and not by the Agency; complete deference to Agency recommendations in variance cases would effectively transfer that power to the Agency.

Thus our position is clear that cases pending before us may not be settled without our approval on the merits. To hold that we have no concern with the terms on which our orders are settled after they are entered would thoroughly undermine that position; any time we rejected a settlement while the case was before us the parties could circumvent our policy by compromising our order on the basis of their original insufficient proposal. We do not mean to suggest that we anticipate any such action on the part of responsible public officials, but only that our authority to review proposed settlements after our orders have been entered and appealed is an essential safeguard if our authority over settlements of pending cases is to have any meaning. Indeed the case for our evaluation of settlements may be even stronger after we have entered an order than before, since agreement to any modification would appear to constitute a variance from our order, wihich only this Board is authorized to grant.

We have thus concluded, as we have been urged by the Agency and Attorney General to conclude, that our approval is necessary to the settlement of a petition for judicial review of a Board decision.

II. The Merits of the Settlement.

The terms of the settlement are simple: GAF will drop its appeal and pay $50,000 if the Agency and the Board will accept that sum in full payment of the penalty we first assessed at $149,000. Both GAF and the Agency are willing to sacrifice a $149,000-or-nothing gamble for the

certainty of a $50,000 penalty.

When we set penalties, we do not do so with compromise in mind; we do not artificially inflate them in hopes of precipitating a favorable settlement. We set them in amounts that we think are appropriate to further statutory policy, after considering all relevant factors, such as the harm done, the length of the delay, the difficulties facing the company, the sums saved by violating the law, and so on. See the discussion in EPA v. CPC International, #71-338, 5 PCB , decided today. It must necessarily be the extraordinary case in which, after entering an order on the basis of all relevant facts before us, we consent to a modification of our decision. If it were otherwise there would be no finality to our orders, and pollution control would be impeded. When we enter a penalty order we mean the specified sum should be paid, not that the figure is a basis for further negotiations.

At the same time, we have recognized a limited power and duty to entertain petitions for rehearing in order to correct manifest errors or to consider the impact of changed circumstances. See, e.g., North Shore Sanitary District v. EPA, #71-343, 3 PCB 697 (March 2, 1972). Finality is thus not an absolute. And, in consideration of the Board's special interest in the effectuation of statutory policy, we think finality may be forced to yield in extraordinary situations in which, because the Board has been made respondent in a judicial proceeding challenging its orders, some modification of those orders appears necessary to afford maximum assurance that the underlying policy of the Board and of those orders themselves will not be frustrated. As an interested litigant, in other words, the Board must have some flexibility to protect the interests of the pollution control program.

This flexibility must be employed rarely and with great care, lest the mere filing of a petition for review be taken the occasion for negotiating downward any penalty imposed by the Board. We emphatically reject any such notion. We hold only that, in extraordinary cases in which reexamination of a prior order in light of the original record and of the risks of reversal strongly indicates that pollution control policy would be best served by modification of our order, it is appropriate for us to modify it.

The facts of the present case led us to conclude that this is such a situation. First of all, $50,000 is a very considerable penalty, especially for no more than five months' delay in constructing treatment facilities.

The Board was aware that additional time had elapsed since the deadline first set by the Sanitary Water Board, but as our opinion recognized that Board had granted extensions forgiving all but the last five months of delay. $50,000 is equal to the largest money penalty ever imposed by the Board in any other fully litigated case.[1] See Hemmerich v. Lloyd A. Fry Roofing Co., #71-33 (consolidated with #71-4), 2 PCB 581 (October 14, 1971), in which asphalt plant emissions estimated at seven times those permitted by the regulations since 1967 had "caused headache, nausea, burning to the eyes, nose and throat, coughing, upset stomach, and, in many instances, foreclosed outdoor activities." In Incinerator, Inc., #71-69, 2 PCB 505 (September 30, 1971), a penalty of $25,000 was imposed for unexcused failure since 1967 to control odors and particulate emissions at least three times those allowed from a large incinerator, which we found "with its frequent, almost daily, shower of particulate matter and the accompanying odors, constitutes nothing short of a nuisance to the neighborhood."

The penalty in the present case was computed at the statutory maximum rate of $10,000 for the initial offense and $1,000 a day thereafter. To have applied such a formula in the Fry or Incinerator cases would have resulted in penalties of over half a million dollars from the date the Act took effect.[2] Comparing the seriousness of GAF's

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1. In two instances we have approved settlements providing for the payment of larger sums under special circumstances: EPA v. Granite City Steel Co., #70-34, 4 PCB 347 (April 25, 1972), in which the company agreed to establish a $150,000 scholarship fund (presumably tax-deductible at least in part, unlike a straight penalty) as a result of a complaint alleging severe and long-standing air-pollution violations from multiple components of a large steel mill; and EPA v. Russell, Burdsall & Ward Bolt and Nut Co., #71-369, 4 PCB 701 (June 27, 1972), in which the company agreed to pay $40,000 in addition to the $13,449.96 estimated value of nearly 100,000 fish killed by a large cyanide discharge.

2. We do not say the use of that formula can never be justified, for it was put in the statute to be used when necessary.

violations with that of Fry's is no exact science, but we do not think it immediately apparent that the one case was three times more serious than the other. Roughly equal treatment of persons similarly situated is fundamental to our law, and the Fry case is an important part of the developing experience of this relatively new Board in determining the appropriate penalty to be assessed. Our experience in that regard, especially in serious cases, was severely limited at the time GAF was first decided; the largest penalty we had previously imposed was $10,000, and that in a case involving well over a year's unexcused delay in controlling particulate emissions from a giant cement plant (Marquette Cement Mfg. Co. v. EPA, #70-23, 1 PCB 145 (January 6, 1971).

We do not say that the penalty we initially imposed in this case was too high. It represented our best judgment at the time on the basis of the facts that were before us and on the basis of our experience. We adhere to the conviction that GAF's violation, like Fry's, was a very serious one, and that it is important to the credibility and success of the pollution control program that a substantial money penalty be paid. As we said in setting the penalty, for the company to go scot free would encourage future violations. The point we make today is simply that there is room for a significant degree of variation in the amount of penalty without materially affecting the purposes that the penalty serves. In a case like this one it is not so much the dollar amount of the penalty as the fact of a substantial penalty that serves as notice to GAF and to others that the State is serious about enforcing the pollution laws. The company's savings as a result of delay, offset perhaps to a degree we cannot ascertain by rising construction costs, are a matter of speculation, not of proof in this case. The effect on the public was to insult further a stream already badly polluted by others. Either $50,000 or $149,000, we believe, would substantially promote the statutory deterrent policy underlying our original decision, and the lesser figure appears to be in the range of subsequent Board decisions in other serious cases.

Second, while the filing of a petition for review by no means automatically justifies the reduction of a penalty once imposed, it poses the risk that the entire order may be overturned by an appellate court. The likelihood of

reversal, and the consequences of possible reversal, are of legitimate concern to the Board in assessing how best to effectuate statutory policy. Even though we are not convinced that an order was erroneous, it may be proper to accept a modification that will still carry out statutory purpose in order to avoid a significant risk of a court decision that would seriously frustrate the program.

GAF raises on appeal a number of constitutional objections to the essential features of the Environmental Protection Act. While we are firmly convinced that those contentions should be rejected, see EPA v. Granite City Steel Co., #70-34, 1 PCB 315 (March 17, 1971); EPA v. Modern Plating Corp., #70-38, 1 PCB 531 (May 3, 1971), and while we believe the courts will reject them, we see no reason to provoke unnecessary court challenges if a company agrees to pay a penalty substantial enough to serve the statutory purpose. Nor do we believe, for numerous reasons, that the present case is the ideal one in which such issues should be presented to the courts. The amount of the penalty is quite high in comparison to other Board decisions, and the company has raised questions concerning the adequacy of notice. We believe we correctly construed our authority and correctly interpreted the record in entering our initial order, but we recognize the risk of reversal, and the consequences of reversal would be quite severe. Possibly, GAF would get off without penalty for its serious violations, contrary to the policy underlying our original decision; at best a penalty might be imposed after still another hearing, long after the events in question took place, subject to further judicial review and exhausting the resources of the control agencies as well as of the company. Moreover, an adverse decision might have consequences far beyond this case, by affecting the authority of the Board to take vigorous action against others found in violation. We prefer to face that possibility in a case less complicated by extraneous arguments than this one, where the merit of our position can be made unconfusedly clear to the court and attention focused on the central issues. Finally, for reasons indicated above, we think that the significant dangers to pollution control policy both in the present case and in the long run posed by judicial review of our initial order can be avoided without substantially impairing the force of our decision by approving the payment of $50,000 in full satisfaction of the penalty in consideration of the dismissal of the petition for review.

Had the Board not conditioned the original variance on the payment of a penalty, GAF might indeed have gone "scot free," as we then observed, since no complaint was ever filed. By the same token, had the Board insisted upon collection of the entire $149,000 originally assessed, GAF might have ended up scot free and the Board might have been crippled in its future efforts as a victim of the maxim that hard cases have a tendency to make bad law.

Aesop summed it up some years ago:

> It happened that a Dog had got a piece of meat and was carrying it home in his mouth to eat it in peace. Now on his way home we had to cross a plank lying across a running brook. As he crossed, he looked down and saw his own shadow reflected in the water beneath. Thinking it was another dog with another piece of meat, he made up his mind to have that also. So he made a snap at the shadow in the water, but as he opened his mouth the piece of meat fell out, dropped into the water and was never seen more. Beware lest you lose the substance by grasping at the shadow.[3]

3. J. Jacobs, the Fables of Aesop (MacMillan, 1943), p. 7.

I, Christan Moffett, Clerk of the Pollution Control Board, certify that the Board adopted the above Opinion on Proposal for Settlement this_____day of October, 1972, by a vote of_____.

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