ILLINOIS POLLUTION CONTROL BOARD
July 7, 1971

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

Dissenting Opinion (by Mr. Dumelle)

The 4-1 majority opinion of June 28, 1971 extending the variance of GAF for 90 days or less if a decision is reached, sets a dangerous precedent and makes a mockery of the original Board order of April 19, 1971 approved by a unanimous vote.

The conditions of the Board order of April 19, 1971 are quite clear. The order states that GAF "shall have completed plans, obtained all leases and permits and begun construction of the secondary facilities, by June 19, 1971."

GAF has not completed the plans for the secondary facilities by June 19, 1971. Its Supplemental Petition states that engineering design work will not be completed until September 1971 (p.9).

GAF has not obtained all leases by June 19, 1971. It admits that the sublease agreement between Phoenix Manufacturing Company and GAF has not been approved by the Metropolitan Sanitary District of Greater Chicago (Supplemental Petition, p.8).

GAF has not obtained all permits required by the June 19, 1971 date. It admits that the permit from the Illinois Division of Waterways and the permit from the U.S. Corps of Engineers have not been issued (Supplemental Petition, p.7).

The original Board order also requires that a "bond or other adequate security in the amount of $2,600,000" be posted with EPA before May 19, 1971. Counsel for GAF stated this has not been done because of the pendency of the appeal.

The Board order further requires that a penalty of $149,000 be paid by GAF to the State of Illinois by May 19, 1971. Again, counsel for GAF stated that the penalty had not been paid pending appeal.

Nothing in the Board's order provides that upon appeal or for any other reason the conditions are stayed. Quite the contrary, the last condition in the Board order predicates the entire April 19 - June 19, 1971 variance upon meeting all of the conditions of the order.

GAF's filing of its appeal does not suspend the operation of the Board's April 19 order; the filing of the appeal does not automatically act as a stay. The only proper way for GAF to prevent the execution of the Board's order would be to take those steps necessary to effect a supersedeas in the appellate court. Interim relief in the nature of a stay from the operation of the Board's order of April 19 could have been granted by the appellate court if GAF had filed a supersedeas bond.

We have in the grant of an additional 90 days to GAF in spite of the admitted non-compliance with the explicit conditions of the original order the spectacle of the Board issuing a strong order and then beating a hasty retreat from that order. The Board should say what it means in its orders and it should mean what it says. If it meant to condition GAF's variance on some indefinite measure of progress achieved and to overlook the payment of the penalty and filing of the bond by reason of an appeal being in progress it should have said so. By its further order of June 28 the Board has in effect said "Don't read our orders literally - they are all subject to negotiation."

GAF is the 193rd largest corporation in America as ranked by Fortune magazine in its May 1971 issue. It had sales of $598,706,000 in 1970; 19,773 employes and profits of $14,694,000. If the Board had not granted the 90 day variance extension on June 28, 1971 what would have been the consequences? The Board opinion of April 19, 1971 discusses the alternatives open to GAF (p.9). These are, simply stated, to shut down the plant, or to continue to operate and hope that enforcement proceedings might not be brought or that penalties would be light. And these alternatives are self-inflicted since they were caused by GAF's inexcusable delay in providing treatment.

This Board has no obligation to a corporation with the sophistication and resources which GAF has, to continue to shield it from prosecution when the company has not met the very conditions imposed upon it by this Board in a prior proceeding. Indeed if the Board had meant what it said on April 19, 1971 the original 60 day variance would now be cancelled.

The Board in its action of June 29 has shown that it is all thunder and no lightning.

Jacob D. Dumelle