ILLINOIS POLLUTION CONTROL BOARD
December 17, 1987

CARGILL, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 87-89
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

DISSENTING OPINION (by J. Theodore Meyer):

I dissent from the majority opinion adopted in this matter. The majority holds that a permit condition imposed by the Illinois Environmental Protection Agency (Agency), requiring a 100-foot stack height for a liquid waste incinerator, preempts a local ordinance which restricts stack height to 35 feet. I cannot agree.

The majority bases its decision on County of Kendall v. Avery Gravel Co., 101 Ill. 2d 428, 463 N.E.2d 723 (1984), where the Supreme Court of Illinois held that a county ordinance prohibiting the crushing, washing, and screening of limestone at the particular location of a strip mine was preempted by an Agency permit issued to the strip mine. The Board majority thus finds that the ordinance of the Village of Carpentersville, to the extent that it imposes a 35-foot stack height restriction, is preempted by the Agency's permit. (Majority opinion at 5.) Nowhere, however, does the majority ever mention Section 39(c) of the Environmental Protection Act (Act), which provides, in part:

> Except for those facilities owned or operated by sanitary districts . . ., and except for new regional pollution control facilities as governed by Section 39.2, and except for fossil fuel mining facilities, the granting of a permit under the Act shall not relieve the applicant from meeting and securing all necessary zoning approvals from the unit of government having zoning jurisdiction over the proposed facility. Ill. Rev. Stat. 1985, ch. 111½, par. 1039(c).

This section clearly states that with three exceptions, the grant of an Agency permit does not exempt an applicant from meeting and securing all necessary zoning approvals. Petitioner Cargill,

Inc. does not fall under any of these exceptions: the facility is not owned or operated by a sanitary district, nor is it a new regional pollution control facility, nor is it a fossil fuel mining facility. Cargill's facility is a liquid waste incinerator which will dispose of wastes from Cargill's own manufacturing process. Since the facility is not covered by any of the exceptions, the majority's decision that the Agency permit preempts Carpentersville's ordinance is contrary to the clear statutory language of the Act.

I note that in County of Kendall, the court rejected the county's argument that the addition of Section 39(j) to the Act indicated that the legislature did not intend to supersede local zoning control over the operation of strip mines. Section 39(j) states:

> The issuance under the Act of a permit to engage in the surface mining of any resources other than fossil fuels shall not relieve the permittee from its duty to comply with any applicable local law regulating the commencement, location, or operation of surface mining facilities. Ill. Rev. Stat. 1985, ch. 111½, par. 1039(j).

However, the court's rejection of the county's claim was based solely on the fact that the legislation could not be given retroactive application because of its substantive nature. The court found that it must base its decision on the law as it existed at the time the suit was filed, but specifically stated that the legislature can enact such laws. 463 N.E.2d 723, 727. In the instant case, there is no such problem with the application of Section 39(c). The relevant portion of subsection(c) was effective in 1982, while the permit which is the subject of this appeal was issued on May 20, 1987. Thus, it is clear that Section 39(c) applies to this case.

Additionally, I must point out that in County of Kendall, the court relied heavily on three of its prior decisions: O'Connor v. City of Rockford, 52 Ill. 2d 360, 288 N.E.2d 432 (1972); Carlson v. Village of Worth, 62 Ill. 2d 406, 343 N.E.2d (1976); and County of Cook v. John Sexton Contractors Co., 75 Ill. 2d 494, 389 N.E.2d 553 (1979). O'Connor, Carlson, and County of Cook all involved the attempted application of local requirements upon sanitary landfills which had obtained Agency permits. In all three cases, the court held that local regulation was preempted by the Act. Sanitary landfills are now included in the category of "regional pollution control facilities" under Section 3.32 of the Act. Ill. Rev. Stat. 1985. ch. 111½, par. 1003.32. As noted above, regional pollution control facilities are excepted from Section 39(c). I believe that the specific exception in that section for such regional

pollution control facilities evidences the legislature's agreement with the courts that such facilities are to be regulated exclusively by the state, except as specifically provided. See Ill. Rev. Stat. 1985, ch. 111½, par. 1039.2. In other words, regulation of regional pollution control facilities is separate and distinct from most other environmental regulation for purposes of interaction with local zoning ordinances.

Finally, I question the Board's authority to declare a local ordinance preempted. Section 40 of the Act, Ill. Rev. Stat. 1985, ch. 111½, par. 1040, provides for appeal to the Board of a permit denial or grant of permit with conditions, but does not set forth the scope of review. It is clear that the Board may decide the validity of a permit condition, but doubtful, in my mind, that the Board is empowered to rule upon the interaction of a permit condition with a local ordinance. I believe the better cause would be to decide the validity of the 100-foot stack height condition and leave the issue of preemption to the courts.

For these reasons, I dissent.

J. Theodore Meyer
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 22nd day of December, 1987.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board