ILLINOIS POLLUTION CONTROL BOARD
September 15, 1976

INTERNATIONAL HARVESTER, Petitioner,	)	
v.	)	PCB 75-271
ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

DISSENTING OPINION (by Mr. Dumelle):

My dissent in this case is on a matter of law and not on the merits of this particular case. I agree with the majority that Harvester's emissions do in fact contribute to the violation of national primary ambient air quality standards for particulate matter in the Chicago area. Today's date is long past July 31, 1975 which the Board agreed is the attainment date for these standards for Illinois (See King-Seeley Company v. EPA, 16 PCB 505, April 24, 1975).

I read Train v. NRDC, 421 U.S. 60 (1975) as prohibiting the instant variance. The ending portion of opinion by Justice Rehnquist states

> The Agency (U.S. Environmental Protection Agency) had properly concluded that the revision mechanism of Section 110(a)(3) (of the Clean Air Act) is available for the approval of those variances which do not compromise the basic statutory mandate that, with carefully circumscribed exceptions, the national primary ambient air standards be attained in not more than three years, and maintained thereafter. (7 ERC 1748) (Parenthetical phrases added)

This case does not fit into the exceptions. Thus I do not believe this Board can grant this variance as one which would be allowable under the Clean Air Act.

The majority opinion tries to term this variance as being one from the State laws only. Three points must be discussed in this regard.

First, the fact (if it is a fact) that no previous air variance to the Board's knowledge, has been "submitted to or ratified by U.S. EPA as a change in the Illinois State Implementation Plan" (opinion, p. 4). The Board's agent for contact with the United States Government is the Illinois Environmental Protection Agency. See Section 4(k) and 4(m) of the Environmental Protection Act. Its failure to submit Board variances for Federal approval does not make them of less force and effect.

Second, the enactment of a Board variance as a wholly exclusive State variance is poor policy and should not be done. It frustrates the intent of the Clean Air Act and may afford a degree of reliance for a petitioner to use as a defence from Federal action. Put another way, a two-tier system can lead to "whip-sawing".

Third, the Board may not be able to enact a wholly exclusive State variance by merely saying it has done so. A Board variance is a change in the State Implementation Plan if nothing else than in the physical fact that that source is allowed to continue to emit (and thus violate air standards) beyond a Federally-mandated attainment date. The question which is harder to answer from a legal standpoint is "Do Board actions have to conform to Federal law?" Federal program funds are received by the Illinois Environmental Protection Agency on the basis of the existence of a Federally approvable state program for air pollution control. This Board action and similar variances yet to come may jeopardize those funds.

In addition to the guidance afforded by Train the effect of Section 116 of the Clean Act is also important. This Section states

> ...if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such state or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section. (Emphasis added)

The instant variance is by definition an adoption of an emission standard or limitation less stringent than the Illinois implementation plan and is thus flatly prohibited.

Thus I believe that the majority distinction between a purely State law variance and one that also has Federal effect is wrong. The decision in this case breeches the intent of the Clean Air Act in fact and in law; it is poor policy; it certainly should not be done because of past failure to transmit documents by the Illinois Environmental Protection Agency and it may result in Federal funds being lost to Illinois.

I respectfully dissent.

Submitted by:

Jacob D. Dumelle

Jacob D. Dumelle

I, Christan L. Moffett, Clerk of the Illinois Pollution Control Board, hereby certify the above Dissenting Opinion was submitted on the 8th day of October, 1976.

Christan L. Moffett

Christan L. Moffett, Clerk
Illinois Pollution Control Board