Nos. 122798 & 122813 (cons.)

IN THE
SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant, v. ILLINOIS POLLUTION CONTROL BOARD Respondent-Appellee	On Appeal from the Appellate Court of Illinois, Third Judicial District, Nos. 3-15-0637 & 3-16-0058 (cons.)
COUNTY OF WILL and WILL COUNTY LAND USE DEPARTMENT, Petitioners-Appellants, v. ILLINOIS POLLUTION CONTROL BOARD, Respondent-Appellee	There Heard on Direct Administrative Review from an Order of the Illinois Pollution Control Board, No. R12-9 (subdocket B)

BRIEF OF RESPONDENT-APPELLEE
ILLINOIS POLLUTION CONTROL BOARD

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12/3/2018 2:59 PM
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Page(s)

NATURE OF THE CASE

The Illinois Environmental Protection Agency ("IEPA") filed a rulemaking proposal with respondent, the Illinois Pollution Control Board ("Board"), to amend the Board's regulations concerning two types of facilities: permitted facilities accepting clean construction and demolition debris ("CCDD") as fill; and registered facilities accepting "uncontaminated soil" fill ("USF"). The proposed rules included provisions requiring operators of both types of facilities to monitor groundwater and remediate any detected contamination. IEPA's filing with the Board opened rulemaking docket R12-9 ("base docket"). After holding public hearings and receiving public comments, the Board issued a first-notice proposal striking the groundwater monitoring provisions from the proposed rules, but strengthening requirements for testing fill material before it could be deposited in CCDD and USF facilities. The Board later proposed similar rules—*i.e.*, with no groundwater monitoring requirement—for second-notice review by the Joint Committee on Administrative Rules ("JCAR"). JCAR issued a certificate of no objection to the Board's proposed rules but recommended that the Board consider further whether groundwater monitoring should be required for CCDD and USF facilities. In turn, the Board adopted the final rules in the base docket without groundwater monitoring provisions and, accepting JCAR's recommendation, opened subdocket B (R12-9(B)) and invited additional public comment on whether to require groundwater monitoring.

After holding a public hearing on groundwater monitoring and receiving numerous public comments, the Board issued a final opinion and order in subdocket B, declining to adopt IEPA's proposed rule requiring groundwater monitoring at CCDD and USF operations. The People of the State of Illinois ("People"), as well as Will County

and the Will County Land Use Department (collectively, "Will County") petitioned for direct administrative review.

The Appellate Court, with one justice dissenting, affirmed the Board's orders. This Court granted the People's and Will County's petitions for leave to appeal.

ISSUE PRESENTED FOR REVIEW

Whether the Board's decision not to require groundwater monitoring at permitted CCDD and registered USF facilities was arbitrary and capricious, where the Board found that screening, testing, and certification requirements will protect groundwater; where the record lacks evidence of groundwater contamination at regulated facilities; where the only groundwater monitoring proposal before the Board excluded several types of facilities and presented sharply contested elements; and where exempt fill sites protect groundwater through "front-end" procedures alone.

STATEMENT OF FACTS

IEPA proposed rules in the base docket to satisfy the rulemaking mandates of 415 ILCS 5/22.51 and 22.51a of the Environmental Protection Act (Act), as amended by P.A. 96-1416 (eff. July 30, 2010). Relevant here, IEPA's proposed rules contained maximum allowable concentrations ("MACs") of soil contaminants and, in Subpart G, groundwater monitoring requirements. R. 553.

On August 14, 2011, the Board asked the Illinois Department of Commerce and Economic Opportunity ("DCEO") to perform a study on the proposed rules' economic impact, as is required of the Board by 415 ILCS 5/27(b) (2014). R. 644-45. DCEO later declined the request. R. 765. The Board held two public hearings on the proposed rules before proceeding to first notice, one on September 26, 2011, 9/26/11 Tr. at 1-150, and

the other on October 25 and 26, 2011, 10/25/11 Tr. at 1-270; 10/26/11 Tr. at 1-116. The first hearing elicited IEPA witness testimony, 9/26/11 Tr. at 18-130, while the second admitted testimony from IEPA and others, 10/25/11 Tr. at 12-222; 10/26/11 Tr. at 6-93. Also at the second hearing, the hearing officer invited comment on DCEO's decision not to perform an economic impact study; those offering comment generally expressed disappointment at the decision. 10/26/11 Tr. at 76-88.

Subpart G of IEPA's proposed rules required groundwater monitoring at permitted CCDD and registered USF operations, as "an additional protection against groundwater contamination." R. 584. IEPA considered monitoring "important" because fill operations consolidate a "large volume of offsite materials", often "directly into the groundwater flow", but are not required to have a protective liner. R. 584.

IEPA's proposed groundwater monitoring program would be self-implementing, *i.e.*, not a permitting matter and, absent groundwater contamination, would not require reporting to IEPA. R. 584. Annual monitoring would be required for all contaminants that have a Class I groundwater quality standard, and corrective action would be required if contaminant concentrations exceeded the higher of Class I standards or background groundwater quality.[1] R. 584-85. Fill operations would be required to conduct monitoring for the life of the operation, including closure, post-closure maintenance, and any corrective action; but monitoring would not have to occur at facilities that closed or entered post-closure maintenance within a year after Subpart G's effective date. In

[1] The Board's groundwater quality standards (35 Ill. Adm. Code 620) designate four classes of groundwater, including, as relevant here, Class I: Potable Resource Groundwater. *Id.* at 620.201. The regulations set maximum allowable concentrations in groundwater of specified contaminants (*e.g.,* nickel, benzo(a)pyrene) for each groundwater class; the Class I standards are contained in 35 Ill. Adm. Code 620.410.

addition, fill operations engaged in dewatering could delay monitoring until dewatering stopped. R. 636-41.

On February 2, 2012, the Board adopted—for first-notice publication in the *Illinois Register*—much of IEPA's proposal, except for Subpart G. R. 1011-1126. Regarding groundwater monitoring, the Board made findings on each major area of concern raised by rulemaking participants, including (1) the lack of evidence that groundwater monitoring at CCDD and USF operations was necessary; (2) the failure to consider the costs of monitoring; (3) the adequacy of "front-end" testing and certification to protect groundwater; and (4) the need to make monitoring required of fill sites at least as stringent as monitoring at nonhazardous waste landfills. R. 1063-67.

The Board's "first concern" was that CCDD and uncontaminated soil deposited in excavations be "clean" and uncontaminated as defined by the Act. R. 1064. The Board explained that 415 ILCS 5/22.51(f)(1) (2014) requires the rules to include standards and procedures necessary to protect groundwater; it does not, however, mandate groundwater monitoring. The Act instead lists groundwater monitoring as one measure that the rules could impose upon CCDD facilities to protect groundwater; other listed measures included testing and certification of soil used as fill material, surface water runoff control, recordkeeping, reporting, and closure and post-closure care. *Id.* The Board added that its first-notice proposal "strengthened" front-end protections to ensure that only CCDD and uncontaminated soils are deposited at fill sites. *Id.* The Board declined to impose "costly" groundwater monitoring to address a problem "the record does not support." *Id.*

In addition, the Board was "disturbed" by IEPA's assertions that groundwater monitoring costs were unknown but would not be fiscally detrimental, calling on IEPA to

consider the costs of developing groundwater monitoring plans, installing monitoring wells, and testing for all Class I groundwater standards. R. 1065. The Board pointed to the testimony of business and municipal representatives concerned about the "high costs" of monitoring, and the prospect that fill operations would close rather than implement monitoring, adding to disposal at landfills and shortening their lifespans. R. 1065, citing Exhs. 10, 12, and 13. Mandatory monitoring could also lead to the deposition of soils at unregulated sites. R. 1065. And higher costs would "adversely affect private businesses, municipalities, and ultimately taxpayers—a relevant consideration since the Board must consider economic reasonableness in adopting substantive regulations." R. 1065; *see also* Exh. 13 at 11, 14. The Board concluded that groundwater monitoring was not economically reasonable. R. 1065-66.

Next, the Board explained that its first-notice proposal bolstered front-end procedures by requiring soil testing and certification by a licensed professional engineer or geologist whenever the source site is a "potentially impacted property" ("PIP")—*i.e.*, soil more likely to be contaminated based on the source site's current or prior use and in need of professional evaluation and certification before use at a fill site. R. 1067; *see also* R. 1071-73. The first-notice proposal imposed the additional screening requirement that the mandatory certification of soil from a PIP include analytical testing data to show compliance with the MACs. R. 1072-73. Finally, the Board declined to impose groundwater monitoring as required of landfills, finding that the Act defines CCDD and uncontaminated soil as other than "waste." R. 1067.

During the first-notice period, the Board held a public additional hearing, on March 13 and 14, 2012. 3/13/12 Tr. at 1-134; 3/14/12 Tr. at 1-82. Several witnesses

testified on behalf of IEPA and other participants. 3/13/12 Tr. at 15-133; 3/14/12 Tr. at 6-64. The hearing officer again invited comment on the lack of an economic impact study by DCEO; no one offered testimony or comment, however. 3/13/12 Tr. at 132; 3/14/12 Tr. at 64.

On June 7, 2012, the Board issued a second-notice opinion and order. R. 1678-1807. Relevant here, the Board found groundwater monitoring is "not required" to protect groundwater at fill sites. R. 1766. And the Board "remain[ed] convinced" that the requirement under Section 22.51 of the Act for the Board to adopt rules to protect groundwater did not mandate groundwater monitoring. R. 1761. Rather, monitoring is specified by Section 22.51 (CCDD sites) as one of several potential ways to protect groundwater—and it is not even mentioned in Section 22.51a (USF sites). R. 1761. The rules proposed at second notice incorporated other measures for protecting groundwater, including testing and certification of soil to be deposited in fill sites; surface water control; recordkeeping; reporting; and closure and post-closure care. *Id.* The proposed rules also defined "uncontaminated soil" to exclude soil exceeding specified MACs, *id.*, and required pH testing of soils from all source sites. R. 1757

Citing the Act's definition of CCDD and "uncontaminated soil", the Board further found that CCDD and uncontaminated soil used as fill in an excavation are not "waste." R. 1763. Soil exceeding MACs is not "uncontaminated" and cannot be used as fill in a fill operation, the Board explained. R. 1764. Although "mistakes can be made" and laws deliberately ignored, the Board continued, front-end checks at the fill sites would address the potential for mistakes by source site owners and operators. Also, licensed professional engineers and geologists would have to certify that soil from PIPs meets the

MACs, and errors would have professional ramifications for those providing certifications. *Id.*

Further, the Board found no evidence showing that any facilities operating within the law had contaminated drinking water wells or were likely to do so. R. 1764. Rather, certain participants had merely "suggested" fill sites could contaminate groundwater. R. 1765. The Board found the possibility of groundwater contamination at sites not following the rules insufficient to justify requiring monitoring, and emphasized that groundwater can be protected without monitoring. *Id.*

Finally, addressing cost, the Board noted that IEPA and other participants had provided "cost break downs for groundwater monitoring." R. 1765. The Board stated that while it "appreciate[d]" this information, it did not change the Board's determination that monitoring is unnecessary to protect groundwater. R. 1766.

Among the evidence on groundwater monitoring costs, the Board recited the Illinois Association of Aggregate Producers' (IAAP) information on costs that the Bluff City Materials CCDD facility incurred to develop a groundwater monitoring model and wells for its CCDD site. R. 1715. For six wells, the cost of engineering, surveying, well development, and analysis totaled $528,000. Deducting flow rate modeling costs that would not necessarily be required under IEPA's groundwater monitoring proposal, IAAP estimated that total costs under IEPA's proposal would be approximately $350,000. *Id.*, citing PC 34 at 2-3. Beyond these upfront costs, Bluff City Materials estimated that annual groundwater monitoring costs for the six wells would be $20,000 to $25,000. *Id.*, citing PC 34 at 3.

Also at second notice, the Board altered other aspects of the proposed rules that are not relevant here, and found the rules, as modified, technically feasible and economically reasonable. R. 1736, 1752, 1757, 1768.

On August 14, 2012, JCAR issued a certificate of no objection to the Board's rules and issued a recommendation that the Board "give further consideration to whether groundwater monitoring should be required" at fill operations. R. 1813.

On August 23, 2012, the Board adopted the final rules, making only nonsubstantive changes JCAR suggested. R. 1816-59. Further, accepting JCAR's recommendation, the Board opened subdocket B and incorporated into it "all the comments, testimony, and filings" in the base docket. R. 1820, 1860-61. On September 21, 2012, the hearing officer in subdocket B opened a public comment period to address groundwater monitoring including specific issues such as cost and the lack of evidence of groundwater impacts at "properly run facilities." R. 47.

The Board received 17 public comments, PC 48-64, which the People's brief fairly summarizes, Brief of the People of the State of Illinois ("People's Br.") at 6-10, as it does hearing testimony and post-hearing comments in subdocket B (PC 67-78), *id.* at 10-17. Accordingly, the Board limits its summaries to an overview. Five State legislators and Will County State's Attorney James Glasgow urged the Board to require groundwater monitoring. PC 50-54, 61. Citing 11 enforcement cases against CCDD fill site operators for violating the rules, Mr. Glasgow claimed it is "dangerously naïve" to expect operators to detect contamination at their own sites. PC at 5. Other State and local officials and a local organization, Citizens Against Ruining the Environment ("CARE"), supported requiring groundwater monitoring, PC 49, 55, 57, 60. CARE

pointed the Board to three enforcement cases against CCDD fill site operators that the Board had decided either immediately before or while the rulemaking was pending: *People v. Western Sand & Gravel Co., LLC*, PCB 10-22 (Mar. 18, 2010); *People v. Reliable Materials LLC*, PCB 12-52 (Aug. 21, 2014); and *People v. 87th & Greenwood*, PCB 10-71 (June 9, 2011). PC 60 at 3-6.

Among commenters opposed to requiring groundwater monitoring were the City of Springfield's public utility and other organizations. PC 48, 58, 59. Pat Metz, representing the public utility, contended there was no evidence that groundwater monitoring is needed or that the benefits of groundwater monitoring would outweigh the costs of maintaining a monitoring system at each permitted fill operation. PC 48 at 1. Mr. Metz reasoned that requiring groundwater monitoring could force fill operations to cease operating or increase costs to generators, who, in turn, might have to take non-contaminated materials to a landfill. *Id.* Mandating monitoring could also aggravate illegal dumping, undermining the purpose of the CCDD and USF regulations. *Id*.

Another organization, the Land Reclamation and Recycling Association ("LRRA"), provided monitoring information for Reliable Lyons, a 275-feet deep quarry and one of the largest permitted CCDD facilities in Illinois, which had installed a groundwater collection and pump system that discharges to a local river under a National Pollutant Discharge Elimination System ("NPDES") permit. PC 58 at 1, 3-4. According to LRRA, Reliable Lyons's annual groundwater testing from 2007 to 2010 showed no exceedances of the Class I groundwater standards; in fact, most levels were well below the standards. PC 58 at 3-4. Another commenter cited as the "largest concern" to the

industry the prospect that a fill site could incur substantial costs to deal with historical rather than current sources of groundwater contamination. PC 59 at 2.

IEPA characterized groundwater monitoring as "the single most important measure for achieving groundwater protection", and part of a "multi-barrier approach" for fill operations accepting soil as fill. PC 62 at 2, 5. According to IEPA, factors supporting monitoring include the lack of infallible available material certification procedures and tools, the large quantities of soil accepted at many facilities, the frequent placement of soil into the saturation zone, the lack of design controls such as liners at fill sites, and the infeasibility of installing design controls in former quarries. PC 62 at 8. Further, IEPA estimated the combined cost of a monitoring well system design and well installation would be less than $0.12 per cubic yard over a 10-year period for 96% of facilities, and less than $0.52 per cubic yard over 10 years for 99% of fill operations. PC 62 at 22. IEPA asserted that monitoring should be both retrospective and prospective, to detect contamination from previously-deposited materials as well as materials yet to be accepted. PC 62 at 36.

In their comments, the People asserted that they had consistently advocated a more comprehensive approach to groundwater protection, including required monitoring and corrective action as warranted. PC 63 at 2. The People also disagreed with IEPA's proposal to the extent it would make groundwater monitoring self-implementing, advocating instead for required reporting to IEPA. PC 63 at 6. Regarding monitoring costs, the People asserted IEPA's estimates showed they would not be so "exorbitant" as to rule out monitoring—particularly given the proximity of public and private wells to CCDD sites. PC 63 at 4. The People noted that under IEPA's proposal, facilities with an

NPDES permit for dewatering could defer installing a groundwater monitoring system, meaning many would not incur any monitoring costs for "potentially several years." PC 63 at 5-6.

The People also asserted that the record shows fill operations do pose a threat to groundwater and have caused groundwater contamination. PC 63 at 9. The People contested the Board's finding that CCDD is by definition "clean," arguing that CCDD may include cancer-causing polynuclear aromatics ("PNAs") from reclaimed or other asphalt pavement; the threat of contamination will, therefore, always exist. PC 63 at 10. Further, the People pointed to enforcement actions filed since Part 1100 (35 Ill. Adm. Code 1100) was first adopted and two brought after the Board adopted the R12-9 amendments as indicating that soil certifications and load checking procedures are inadequate to protect groundwater. PC 63 at 10-11. Aggravating the threat, the People added, is that from 1997 to 2005, CCDD could be deposited at fill sites without a permit, and between 2005 and 2010, screening requirements were inadequate. Fill material deposited during these timeframes could contaminate groundwater, the People concluded. PC 63 at 12-13.

Based on these public comments, the Board ordered an additional public hearing concerning groundwater monitoring. R. 50-51. A hearing officer order dated April 18, 2013, scheduling the hearing, posed questions to be addressed at the hearing. R. 70-71.

Several witnesses testified at the subdocket B hearing. 5/20/13 Tr. at 1-227. State and Will County officials and others testified in support of groundwater monitoring. 5/20/13 Tr. at 9, 12, 16; Exh. 55 (Will County witness Stuart Cravens). Witnesses for LRRA and other industry organizations testified against monitoring, including Gregory

Wilcox. Exhs. 57, 58; 5/20/13 Tr. at 61-104, 172-91. He stated that approximately 43% of the water pumped at Reliable Lyons in dewatering the site has been in direct contact with CCDD at the facility. Exh. 57 at 2. Citing sampling results, Mr. Wilcox asserted there is no evidence that deposition of CCDD at Reliable Lyons has contaminated groundwater. Exh. 57 at 2. James Huff testified that because the fill industry was for years not heavily regulated, monitoring would detect not only new impacts but historical ones as well. Exh. 58 at 4. Mr. Huff suggested that a "baseline" approach that would "grandfather" in historical impacts might address "the concerns of the current operators of these facilities." *Id.* He also opined that IEPA's proposed list of contaminants for monitoring parameters was excessive and would cause unnecessary testing and follow-up work. *Id.* at 6. IAAP representative John Henriksen testified that while the CCDD industry can and will accept upfront controls to protect groundwater, adding groundwater monitoring would be "unacceptable" and might drive operators out of business. 5/20/13 Tr. at 188. And as CCDD sites close rather than monitor, he continued, the material will be disposed elsewhere: a solid waste facility, at higher cost, or in unregulated farm fields, forest preserve districts, and "borrow pits" used in road construction.[2] 5/20/13 Tr. at 189-91. And a representative from an asphalt industry association testified that asphalt cement, which holds rock and sand together to form asphalt pavement for roads, is non-leachable and inert, and contains neither polyaromatic hydrocarbons nor PNAs. 5/20/13 Tr. at 99-100; Exhs. 60, 61.

[2] "Borrow pits" are excavations other than former quarries or mines that are developed as part of State, county, or municipal road construction projects that may, subject to Illinois Department of Transportation specifications, use CCDD or USF as fill material. R. 539.

On behalf of the People, Assistant Attorney General Stephen Sylvester testified that "inert waste", which is subject by regulation to semi-annual leachate testing, is like CCDD because inert waste also includes materials such as bricks, masonry, and concrete. Exh. 59 at 2. But, continued Mr. Sylvester, since CCDD, unlike inert waste, may contain PNAs from asphalt, facilities receiving it should be subject to quarterly groundwater monitoring rather than the annual monitoring proposed by IEPA. *Id.* Mr. Sylvester worried that without monitoring, contamination would be discovered only once it impacts drinking water. Exh. 59 at 3-4. Mr. Sylvester also reiterated his concern that between 1997 and 2005, no regulations existed for CCDD sites and no permits were issued, and that even after 2005, screening procedures were inadequate. Exh. 59 at 6-7.

Further, Mr. Sylvester commented that at the Lynwood fill site, which was the subject of an enforcement action in circuit court, Class I groundwater quality standards were exceeded. Exh. 59 at 8. This monitoring data and data from two other sites —an "admittedly small sample size"—suggests, he added, that "one third of the CCDD facilities show groundwater contamination." Exh. 59 at 10.

Mr. Sylvester acknowledged that the Lynwood site closed before the Board adopted Part 1100, in contrast with the other two facilities he referenced, which began operating after its adoption and showed no groundwater contamination. 5/20/13 Tr. at 92, 94. He also agreed that none of the 13 CCDD enforcement actions he cited (*see* Exh. 59 at 4) alleged violations of groundwater quality standards. 5/20/13 Tr. at 91.

IEPA reported that soil sampling conducted after Part 1100 was amended in R12-9 found exceedances of MACs at 10 of 12 sites. Exh. 63 at 9. Groundwater monitoring, IEPA asserted, is the "single most effective tool for identifying contamination of

groundwater at early stages," and noncompliant CCDD and soil fill poses a "significant threat" to groundwater. Exh. 63 at 12-13. IEPA identified exceedances of groundwater standards at the Lynwood site for several contaminants found through groundwater monitoring in November 2012, but acknowledged having concluded that the site accepted materials other than CCDD. Exh. 63 at 14, 24; 5/20/13 Tr. at 152. As for Reliable Lyons, IEPA believed dewatering data was no substitute for data from a dedicated groundwater monitoring system. Exh. 63 at 15. An IEPA witness also clarified that CCDD and uncontaminated soil may lawfully be disposed in a farm field with a naturally occurring depression, if the material is not deposited "above the surrounding topography." 5/20/13 Tr. at 132-33. And he confirmed that under IEPA's proposal, "borrow pits" used in road construction would not be subject to groundwater monitoring. 5/20/13 Tr. at 131.

By hearing officer order of June 12, 2013, the Board posed an additional round of questions for post-hearing public comments. R. 472-75. The Board would accept comments through August 1, 2013. R. 472.

Both proponents and opponents of requiring groundwater monitoring filed comments. PC 67-78. VCNA Prairie, Inc. ("Prairie") commented that the increased cost of groundwater monitoring would ultimately be borne by Illinois taxpayers. PC 67 at 1. Extrapolating from testimony in the base docket regarding the cost disparity for a municipal entity to dispose of CCDD at a permitted fill site versus a landfill, Prairie suggested "well over" $100 million could be spent annually to dispose of CCDD and uncontaminated soil at a municipal landfill. PC 67 at 1. Sexton Properties R.P., LLC ("Sexton") commented that that data submitted to the Board showing groundwater

contamination at CCDD sites was collected before the Board amended Part 1100 to require front-end testing and certification. PC 68 at 2. Sexton added that CCDD and USF materials are not "waste", and Part 1100 imposes standards to ensure that these materials are clean. PC 68 at 2. IAAP similarly remarked it would be costly and unreasonable to require groundwater monitoring at permitted CCDD and registered USF sites given the "proliferation" of unregulated "clean fill" dumps throughout Illinois, including borrow pits, which are subject only to Illinois Department of Transportation ("IDOT") specifications, and farm fields, ravines, and low-lying areas. PC 69 at 4-6. IAAP also asserted that the only groundwater monitoring results in the record from operations under Part 1100 as amended in R12-9 "show no pollution has occurred." PC 69 at 7. Noting IEPA had provided at the hearing a cost estimate for four groundwater monitoring wells, Mr. Huff stated that the norm would be closer to eight wells. PC 71 at 1-2. Additionally, he maintained that the real problem with groundwater monitoring was not sampling costs but the overly broad list of contaminants that must be tested for, as well as what he described as "pre-existing conditions." PC 71 at 3. Mr. Huff further opined that if CCDD and USF facilities are required to conduct groundwater monitoring as a condition of accepting uncontaminated soil, declining to accept uncontaminated soil and not installing monitoring wells is "clearly the option the industry" will take. PC 71 at 4.

Will County believed four monitoring wells would be sufficient if the CCDD site had a "clearly apparent groundwater flow direction" and if the site had "one primary water-bearing unit" and if the site had "a more compact disposal footprint as opposed to a long linear footprint." PC 72 at 1. CARE claimed that groundwater monitoring should

be required because: (1) Part 1100 as amended cannot ensure proper disposal of CCDD; (2) there have been approximately 175 enforcement actions since 2002 for violation of "then-existing regulatory standards"; (3) there have been 11 enforcement actions against CCDD operators since Part 1100's adoption in 2006; and (4) absent groundwater monitoring, the "first indication" of groundwater contamination will be in drinking water from public and private wells. PC 73 at 1-2, 5, 6. CARE further argued that self-implemented monitoring, as proposed by IEPA, would effectively be like having "no groundwater monitoring at all." PC 73 at 9-10.

In its post-hearing comments, IEPA disputed the adequacy of screening, citing results of soil sampling in 2012 showing "exceedances of the MACs and/or the pH limits" at 10 of 12 CCDD facilities. PC 74 at 5, citing Exh. 63 at 9. Additionally, IEPA stated that Mr. Hock, on behalf of IAAP, reported seven detections of PNAs exceeding MACs among the soil samples drawn from 44 borings. PC 74 at 5, citing Exh. 12 at 3-5. And, IEPA added, of 417 load rejection sheets from fill operations in the timeframe of September 2012 through June 2013, 269 loads were rejected based on photo ionization detector readings of 0.1 to 185 parts per million. PC 74 at 6.

IEPA shared the People's concern about materials deposited at fill sites before 2006 as well as from 2006 to 2010. PC 74 at 8. Regarding groundwater monitoring costs, IEPA asserted they are reasonable and can be reallocated to source site owners through tipping fees. PC 74 at 9.

IDOT provided comments to clarify statements by other participants regarding the so-called "IDOT exemption" for "borrow pits" at 415 ILCS 22.51(b)(4)(B). PC 75 at 1-2. IDOT explained that 415 ILCS 22.51(b)(4)(B) makes Section 22.51(b) inapplicable to

the use of CCDD as fill in an excavation other than a current or former quarry or mine if the use meets IDOT specifications. PC 75 at 2-3. According to IDOT, the exemption is reasonable because IDOT ensures beforehand that CCDD and soil placed in these borrow pits are "protective of human health and the environment and will not cause or contribute to groundwater contamination." PC 75 at 3-4.

The People argued that certification requirements are inadequate to protect groundwater given evidence in the record of (1) disposal of fill without any regulatory safeguards from 1997 to 2005; (2) screening only for volatile organic compounds from 2005 to 2010; (3) fill operators' failure to comply with Part 1100; and (4) soil at fill operations exceeding the MACs. PC 77 at 5.

The People maintained that various sources demonstrate asphalt is not necessarily inert and does pose a threat to groundwater. PC 77 at 8-12. The People also expressed concerns with other contaminants that could be present in reclaimed asphalt pavement, such as "various substances from vehicles on the roadway" and from sealcoating. PC 77 at 11-14. Given the similarities between inert waste and CCDD as defined in the Act, the People continued, asphalt should be subject to regulation at least as stringent as inert waste landfills. PC 77 at 14.

The Board, on August 6, 2015, issued its decision closing subdocket B. R. 476-542. The Board stated that, "[a]fter reviewing the entire record", including the base docket, and "considering the additional comments and testimony" in subdocket B, the Board "remains unconvinced that groundwater monitoring" of fill sites is "required for the protection of groundwater." R. 538. The Board added that "additional evidence" supported its decision. R. 538.

The Board first reiterated that CCDD and USF meeting the requirements of the Act and Part 1100 do not constitute "waste" under the Act, and should not be regulated like inert waste. R. 538-39. Further, the Board observed that "numerous" borrow pits are developed every year in Illinois, and IDOT provided guidance on how it determines that CCDD or uncontaminated soil is "clean." R. 539. To protect groundwater, the Board added, borrow pits assess potential fill using only front-end detection methods similar to but less stringent than those required of regulated fill sites; and groundwater monitoring would not have been required for borrow pits even if it had been required of CCDD and USF operations. R. 539. To the Board, these factors supported the Board's finding that monitoring is not needed to protect groundwater. R. 539.

The Board also reiterated that soil certification and testing would keep contaminated material out of fill sites and protect groundwater. R. 540. And while the record identified enforcement actions and problems at sites not subject to Part 1100, there was no indication of groundwater contamination at Part 1100 sites. The Lynwood site "showed contamination," the Board noted, but Reliable Lyons "does not show contamination in its dewatering." R. 540.

The Board was "puzzled" that IEPA's proposal would allow dewatering fill sites with NPDES permits to defer groundwater monitoring—"for years" at some sites— until dewatering stopped. R. 540. This approach was "especially puzzling" to the Board because IEPA refused to "equate" dewatering data with groundwater monitoring data. R. 540-41. This further supported finding that Part 1100 sufficiently protects groundwater. R. 541.

The People and Will County sought direct administrative review of the Board's orders in the Appellate Court. Finding the Board's decision to reject groundwater monitoring of fill sites not arbitrary, capricious, or unreasonable, the Appellate Court affirmed. *County of Will v. Illinois Pollution Control Bd.*, 2017 IL App (3d) 150637-U, ¶¶ 52-80. First, the Appellate Court held that the Board properly considered whether CCDD and USF constitute "waste" under the Act in meeting its statutory duty to develop prospective regulations that protect groundwater at fill operations. *Id.* at ¶¶ 60-63. The Court next rejected the People and Will County's positions that the Board failed to consider the threat to groundwater from fill material deposited at CCDD and USF facilities before these regulations were adopted. *Id.* at ¶ 66. The Board considered the evidence and comments on operators' past practices, but simply chose not to give it as much weight as the People and Will County would have liked. *Id.* Additionally, the Board found that Subpart G's potential benefits, if any, did not justify the "known and unknown costs" to site operators of groundwater monitoring. *Id.* Also regarding cost, the Court rejected Will County's contention that the Board failed to consider the issue. *Id.* at ¶ 68. More generally, the Court held, the Board did not fail to consider any important aspect of protecting groundwater from fill operations. *Id.* at ¶ 69. Finally, the Appellate Court stated that the Board found that Subpart G's proponents established no threat to groundwater from compliant CCDD and USF that would justify requiring groundwater monitoring. Emphasizing that the Board, not the Appellate Court, "utilizes its expertise and delegated authority to weigh" the rulemaking evidence, the Court concluded that, even without considering Subpart G's economic reasonableness, "the thorough record sufficiently supported" the Board's determination. *Id.* at ¶¶ 76-77.

The dissenting justice stated that the Board's decision was "counter to the evidence" and so implausible "that the Board's reasoning cannot be ascribed to a difference of viewpoints or the product of the Board's superior expertise." *County of Will*, 2017 IL App (3d) 150637-U, ¶ 82 (Wright, J., dissenting). The dissent stated that the "manifest weight" of the evidence revealed "serious gaps at every stage of the front-end screening process." *Id.* at ¶ 88. Opining that most of the material delivered to CCDD and USF operations would never be professionally tested, that even professionally analyzed fill could be contaminated, and that on-site load checking was deficient, the dissent deemed "simply unsupported" the Board's finding that front-end screening procedures adequately protect groundwater. *Id.* at ¶¶ 90-98, 102. Nor, in the dissent's view, was the existence in IEPA's Subpart G of exemptions from groundwater monitoring for borrow pits and other specified facilities a basis for rejecting groundwater monitoring for all other CCDD and USF sites. *Id.* at ¶¶ 105-08. To the dissent, "the weakest, most irrational, and arbitrarily flawed reasoning" was the Board's reliance in rejecting mandatory groundwater monitoring on the lack of evidence that compliant fill operations contaminate groundwater. *Id.* at ¶ 110. The dissent believed this evidence attributable to a failure to conduct groundwater monitoring, and further cited IEPA's 2012 soil sampling results and groundwater contamination at the Lynwood site. *Id.* at ¶¶ 114-16. Additionally, the dissent took issue with the Board's conclusion at first notice that the record did not support requiring groundwater monitoring given the potentially sizeable costs for operators. *Id.* at ¶¶ 118-19. According to the dissent, the increase in costs could be passed on to fill generators and would be "inconsequential" in any event, particularly compared to the cost of delayed detection of contaminated groundwater and

drinking water. *Id.* at ¶¶ 119-24. The dissent concluded that the Board's decision shifts, from the fill industry to taxpayers, the responsibility for detecting and remediating groundwater contamination, and reflected "a desire to protect the industry from the burden of correcting prospective and inevitable contamination, no matter how slight, that can be traced to CCDD and USF sites." *Id.* at ¶ 126. The dissent would have reversed and remanded the matter to the Board to incorporate "some form of groundwater monitoring and corrective action, if necessary, in the Part 1100 regulations." *Id.* at ¶ 127.

The People and Will County timely filed petitions for leave to appeal, which this Court granted on March 21, 2018.

ARGUMENT

I. Introduction

The Board's finding that requiring load-checking including front-end screening, testing, and certification of soils and materials used as fill material at CCDD and USF operations protects groundwater from contamination at those regulated sites, making groundwater monitoring unnecessary, was not "arbitrary, unreasonable or capricious." *Granite City Div. of Nat. Steel Co. v. Pollution Control Bd.*, 155 Ill.2d 149, 161 (1993). Because the Board's front-end rules, more stringent than those proposed by IEPA, adequately protect groundwater, this Court should affirm the Board's decision not to require groundwater monitoring at CCDD and USF facilities.

Of import in reviewing the Board's decision, the statutory directive to the Board in Sections 22.51(f)(1) and 22.51a(d)(1) states "the Board shall adopt, rules for the *use of* clean construction or demolition debris and uncontaminated soil as fill material at clean construction or demolition debris fill operations." 415 ILCS 5/22.51(f)(1), and

22.51a(d)(1) (2016) (emphasis added). Sections 22.51(f)(1) and 22.51a(d)(1) continue with a directive that "the rules must include standards and procedures necessary to protect groundwater." *Id.* The rulemaking proceeding before the Board, and now before this Court, was proposed under P.A. 96-1416, which amended Sections 22.51 and 22.51a of the Act. R. 553. The plain language of Sections 22.51 and 22.51a of the Act leave no doubt that the Board rulemaking was to address the *use of* CCDD and USF at regulated facilities, and in so doing, to protect groundwater. The People, Will County, and Amici Curiae Environmental Law & Policy Center and CARE (collectively, "Amici") focus on the second sentence in those subsections and seem to ignore the first.

As the Board "is a creature of statute, any power or authority claimed by it must find its source within the provisions of the statute by which it is created." *Granite City*, 155 Ill.2d at 171. In this proceeding, the IEPA proposed a rule under Sections 22.51 and 22.51a to establish procedures for the use of CCDD and USF at sites in Illinois. The Board adopted a rule that included enhanced front-end screening, testing, and certification of soils and materials used as fill material at CCDD and USF operations. The Board did not have before it a proposal from IEPA, the People, or even Will County, to protect groundwater from historical contamination in the State of Illinois under the Groundwater Protection Act. Rather, the People, Will County, and Amici attempt to shoehorn a comprehensive rule to protect groundwater from historical contamination into a rulemaking proposed to protect groundwater from potential contamination by the use of CCDD and USF. If the People, Will County, and Amici believe that a comprehensive groundwater monitoring program for the State is necessary, they may of course propose under Title VII of the Act, an amendment to the groundwater rules the Board has already

adopted in 35 Ill. Adm. Code 620. The Part 620 rules establish comprehensive groundwater quality standards that include provisions prohibiting groundwater use impairment, as well as provisions requiring preventive notification and response activities. If presented with such a rulemaking proposal, the Board would certainly consider how to address historical groundwater contamination throughout the State. Here, however, the General Assembly directed the Board to adopt rules that protect groundwater from the use of CCDD and USF as fill material at fill operations. The Board's decision complied with those mandates and was not arbitrary or capricious.

II. Standard of Review

The Board generally agrees with the People's and Will County's respective statements of the applicable standard of review, that the Board's decision will not be set aside unless shown to be arbitrary, capricious, or unreasonable. *See* People's Brief ("People Br.") at 21-22; Will County's Brief ("Will County Br.") at 18-19 *see also*, *e.g.*, *Granite City*, 155 Ill. 2d at 162. For the sake of completeness, however, the Board supplements their statements. When an administrative agency such as the Board exercises its rulemaking powers, it is performing a quasi-legislative function and has no burden to support its conclusions with a given quantum of evidence. *See Granite City*, 155 Ill. 2d at 180; *Illinois State Chamber of Commerce v. Pollution Control Bd.*, 177 Ill. App. 3d 923, 928 (2nd Dist. 1988). Rather, the burden is on petitioners to establish the invalidity of the regulations, *see*, *e.g.*, *Granite City*, 155 Ill. 2d at 180, and that burden is "very high," *Illinois State Chamber*, 177 Ill. App. 3d at 928. It is not the court's role to "determine whether the Board's action was wise, or even if it was the most reasonable

based on the record." *Central Ill. Pub. Serv. Co. v. Pollution Control Bd.*, 116 Ill. 2d 397, 412 (1987).

III. The Board's Decision Not to Proceed With Groundwater Monitoring for CCDD and USF Operations, as Proposed by IEPA, Was Based on the Evidence Compiled During a Lengthy and Thorough Rulemaking.

The Board's decision not to require groundwater monitoring should be upheld as the Board based its decision on the extensive record developed throughout this rulemaking, including the base docket as well as subdocket B. And after reviewing the "entire record" in the base docket and in the subdocket, the Board determined that the rules requiring front-end screening, testing, and certification protect groundwater from the use of CCDD and USF; therefore, groundwater monitoring for CCDD and USF operations is not necessary. R. 62.

In this rulemaking, the Board had before it a single proposal, from IEPA, that included ways to protect groundwater from the use of CCDD and USF at fill operations. IEPA's proposal included many of the same measures as those suggested and required by the legislature in Sections 22.51(f)(1) and 22.51a(d)(1) (415 ILCS 5/22.51(f)(1), 22.51a(d)(1) (2016)). R. 1013. IEPA's proposal also required groundwater monitoring for CCDD and USF operations; however, groundwater monitoring would only be required at sites that did not close within one year of the rules being adopted, or after CCDD and USF operations stopped dewatering. R. 635, 641-42. The Board held public hearings on that proposal before proceeding to first notice under the Illinois Administrative Procedure Act (5 ILCS 100/5 *et. seq.*). During those hearings and in public comment, the evidence revealed numerous concerns from participants with the IEPA's proposal for groundwater monitoring, including lack of evidence of

contamination from CCDD and USF operations, failure to consider the costs for monitoring, and how the monitoring would be accomplished. *See*, *e.g.*, R. 1032-33 22-23; Exh.12. This included Will County and CARE expressing concerns over self-implementation of the groundwater monitoring provisions included in IEPA's proposal. R1011. The Board summarized the evidence in its first-notice opinion in base docket R12-9, and stated:

> The Board's first concern is that the CCDD and uncontaminated soils to be deposited into quarries, mines, and other excavations be clean and uncontaminated as those terms are defined by the rules and the statute. If the regulations provide assurances that the materials being deposited are indeed clean and uncontaminated and are adhered to, protection will be provided to public health and the environment, including groundwater. R. 1064.

The Board declined to impose what the evidence showed were costly groundwater monitoring programs to protect against "a perceived problem" that the record did not support as even being a problem. *Id*. Rather, to protect groundwater as required by Sections 22.51 and 22.51a of the Act, the Board, after carefully reviewing the evidence, proposed at first notice more stringent front-end screening, testing, and certification of material used as fill, and struck groundwater monitoring from the proposed rules. R. 067.

During the first-notice period, the Board again held public hearings taking in additional testimony and comments on groundwater monitoring for CCDD and USF operations; however, after thoroughly reviewing those, the Board remained unconvinced that groundwater monitoring was necessary to protect groundwater from being contaminated by the use of CCDD and USF at those operations. In coming to this conclusion, the Board noted that the rules' soil certification requirements and front-end screening provided checks to protect against mistakes and those who choose to ignore the

law. R. 1764. In some instances where soil originates from a site with a potential presence of contamination, certification by licensed professional engineers or geologists would be required, and the Board emphasized that errors in certifications by a licensed professional engineer or geologist have professional ramifications, thus providing additional protection. *Id*. Thus, the Board found that keeping potential contaminants out of CCDD and USF operations by employing more stringent front-end screening requirements would be a better way to protect groundwater rather than requiring groundwater monitoring to detect contamination after the fact.

At second notice, the Board also reviewed legal arguments regarding the Board's authority under Section 27 of the Act (415 ILCS 5/27 (2016)) and found that adoption of a rule based on mere policy objectives was within the Board's authority as a general matter, but that groundwater protection could be achieved without monitoring. Noting that some participants had "suggested" that groundwater contamination remained a possibility, the Board concluded that something more than just assertions by participants was necessary to justify monitoring. R. 1765. Further, the Board found that a "statutory directive to protect groundwater" did not equate to a groundwater monitoring requirement, and that the rules proposed by the Board protect groundwater, given the strengthened front-end screening, soil certification and testing, and recordkeeping requirements imposed by the Board. *Id*.

The Board's consideration of groundwater monitoring was not yet complete even after two rounds of careful review at first and second notice in the base docket. At the request of JCAR, the Board opened a subdocket for the sole purpose of continuing to examine the issue of groundwater monitoring at CCDD and USF operations. R. 5, 1820.

The Board specifically incorporated all comments, testimony, and filings from the rulemaking's base docket into the subdocket. *Id*. The Board held yet another public hearing, received additional public comment, and even posed additional questions to participants *after* the hearing. "After reviewing the entire record", the Board came to the same conclusion that it did in the base docket that, given the stringent front-end screening, soil certification and testing, and recordkeeping requirements, groundwater monitoring was not required to protect against contamination from the use of CCDD and USF at fill operations. R. 538. As further support for its findings, the Board noted that the proposed rule and the Act include exemptions from Board regulation and the Act for sites referred to as "borrow pits." R. 539. The exemption is available only if the use of CCDD or USF in the "borrow pit" complies with IDOT specifications, which do not require groundwater monitoring. *See generally* PC 75. Accordingly, even if the Board's rules had included groundwater monitoring requirements for the use of CCDD and USF at fill operations governed by Sections 22.51 and 22.51a (415 ILCS 5/22.51 and 22.51a (2016)), "borrow pits" would not have to monitor groundwater, even though they receive the very same type of fill that CCDD and USF operations receive. The Board found that the existence of "borrow pits", which are not subject to groundwater monitoring but are subject to IDOT specifications similar to Part 1100's screening requirements for permitted fill facilities, further supported the Board's conclusion that groundwater monitoring was unnecessary to protect groundwater at CCDD and USF operations. *Id*.

It is clear that the Board considered all the evidence provided and used the Board's technical expertise to determine that groundwater is protected by the rule adopted by the Board. The Board properly found that the statutory requirement to protect

groundwater was met through front-end screening, testing, and certifications of material to be used as fill, as well as recordkeeping. These requirements assure that at properly run CCDD and USF operations, the possibility of groundwater contamination is adequately managed in an economically reasonable manner. Furthermore, while the record contains numerous references to "possible" contamination or "mistakes" that might occur, the evidence fails to include facts establishing that CCDD and USF operations, abiding by the law, have contaminated groundwater. Groundwater monitoring is a costly solution for a problem that the record does not even establish exists.

The Board's decision does not represent "a result-driven theory that favors the industry without a sound evidentiary basis." *County of Will v. Illinois Pollution Control Bd.*, 2017 IL App (3d) 150637-U, ¶82. As indicated above, IEPA's proposed Subpart G was flawed and was questioned not only by industry but also by CARE and Will County. R. 1011. Thus, contrary to the dissenting opinion, proposed Subpart G did not have reasonable parameters, but was fraught with problems, none of which any participant proposed specific alternative rule language to address.

The People and Will County argue that the Board failed to address important aspects of this rulemaking when adopting the final order in subdocket B. *See generally* People Br. at 39; Will County Br. at 24. This includes claims that the Board did not address the issue of cost of groundwater monitoring, or even address the concerns that contaminated CCDD and USF might still make the way into CCDD and USF facilities. This is incorrect.

The People and Will County would have this Court ignore the Board's extensive record, which the Board relied upon, and instead ask the Court to rely on snippets of information, some taken out of context, to overturn the Board's decision. The People argue that "important concerns raised by the People went unaddressed in the Board's discussion." People Br. at 36. The Board's final opinion and order clearly stated that the Board reviewed the entire record (R. at 476), which includes two substantial opinions and orders in the base docket discussing groundwater monitoring at length. The Board was presented with a proposal that included groundwater monitoring as well as front-end screening, testing, and certification for materials that might enter a CCDD or USF operation. The Board found that with front-end screening, testing, and certification, more stringent than proposed by IEPA, groundwater would be protected from contamination by CCDD and USF operations. The Board fully explored the issues in three substantive opinions—two in the base docket and one in the subdocket dedicated entirely to groundwater monitoring—and, consistent with the evidence of record, found monitoring unnecessary to protect groundwater from the use of CCDD and USF.

Contrary to Will County's claim that the Board took a "do nothing" approach (Will County Br. at 20), the Board did act; Will County simply quibbles with the result of that action. Based on the evidence amassed in the base docket and subdocket, the Board determined that "if the regulations provide assurances that the materials being deposited are indeed clean and uncontaminated and are adhered to, protection will be provided to public health and the environment, including groundwater." R. 1064. The Board clearly acted on the proposal submitted to the Board, adopting a rule with more stringent requirements to protect against noncompliant fill being used at CCDD and USF

operations. The rules screen out contaminants from entering CCDD and USF operations as fill material and potentially contaminating groundwater. Thus, the Board adopted rules that focus on preventing groundwater contamination rather than requiring monitoring to detect contamination.

The dissenting opinion also expressed concern regarding the adequacy of front-end screening, and risk of "inadvertent" noncompliance. *County of Will v. Illinois Pollution Control Bd.*, 2017 IL App (3d) 150637-U, ¶93. However, the dissent itself notes that loads are rejected at the facility, thus establishing that the checks and balances of the rules are successful. *Id*. at ¶96.

As to the possibility for mistakes or ignoring the law, the Board took the issue into account even though it need not have done so. Title VIII of the Act provides for enforcement actions against violations of the Act and Board regulations that may be brought by the People or anyone else, including environmental groups or individual citizens. 415 ILCS 5/30-34, 42-45 (2016). Under those provisions, the Board and courts have broad authority to act on complaints alleging violations of the Act or Board regulations, as demonstrated by the enforcement actions against CCDD or USF facilities cited in the People's, Will County's briefs, and Amici's briefs. *See* People Br. at 22; Will County Br. at 21; Brief of Amici Curiae Environmental Law & Policy Center and CARE ("Amici Br.") at 9. Even so, the Board did address the risk of noncompliance with its rigorous requirements, but properly found that the existence of enforcement actions did not establish that groundwater contamination is occurring at sites permitted or registered under Part 1100. R. 640. And without evidence of contamination at permitted or registered facilities, the Board properly declined to impose costly monitoring and

remediation requirements on sites regulated under Part 1100 and the Act. Furthermore, the Board stated that:

> The Board understands that mistakes can be made and that there are persons who may choose to ignore the law. However, the rules do provide checks at the fill sites to alleviate the potential for source site owners/operators to make mistakes. Furthermore, LPE/LPGs will be certifying that soils meet MACs from PIPs and errors by LPE/LPGs have ramifications for them professionally. Thus, the Board is convinced that the rules provide checks and balances against errors and persons who may choose to ignore the law. R. at 1764.

Thus, the Board specifically addressed in the rule the potential for both mistakes and bad actors, by building redundancies into the rules. The site owners (generators) are the first check on materials, but facilities also check loads as they enter. Here, the Board adopted rules that provide detailed guidance to source site owners to identify whether soil is likely to be contaminated and need professional evaluation and certification, as well as requirements for owners or operators of CCDD and USF operations to screen incoming materials.

The Board continues to be somewhat perplexed by the insistence of the People and Will County that the Board assume that the law will be broken, and to protect against the law being broken, require those who abide by the law to take remedial steps. This argument ignores the fact that even if groundwater monitoring were required, bad actors still exist, and enforcement is the proper recourse. Indeed, while not Amici's "preferred" option, Amici correctly recognize that citizens may bring enforcement actions "upon the discovery of contaminated groundwater", whether from the use of fill at CCDD and USF operations or another source. Amici Br. at 22; *see also* 415 ILCS 5/31(d)(1) (2016).

The People, Will County, and Amici also argue that the Board's rules do not provide protection against CCDD and USF sites that may have been previously

contaminated from the period from 1997-2003. People Br. at 32; Will County Br. at 21, 22; Amici Br. at 11. This contention ignores completely that the only rulemaking proposed to the Board in this docket was IEPA's, which was proposed under Section 22.51 and 22.51a (415 ILCS 5/22.51 and 22.51a (2016)). The IEPA proposed and the Board considered and ultimately adopted a rule for the use of CCDD and USF as fill at fill operations that would protect groundwater. Further the IEPA's proposal for groundwater monitoring before the Board presented its own problems. IEPA's proposal was far from uncontroversial. For one, the proposal would not have required groundwater monitoring for any facility that closed within one year of the adoption of the rule. R. 625, 635. The proposal also allowed for self-implementation of monitoring, which the People and others found unacceptable. *See*, *e.g.*, Exh. 59 at 5; PC 63 at 6; PC 73 at 9. Thus, under the rules as proposed by IEPA many of the facilities that may potentially have historical contamination, including from fill material placed before even load checking was required, could completely avoid groundwater monitoring by closing. And the participants disagreed about other specifics of monitoring, including the list of parameters that should be tested and the number of monitoring wells that would have to be installed. *See*, *e.g.*, Exh. 58 at 6; PC 71 at 1-3. These issues made IEPA's proposal to the Board regarding groundwater monitoring problematic as well as unnecessary.

The People and Will County attempt to relitigate issues fully vetted by the Board, cherry-picking facts to assert that the Board somehow failed in its duties. However, the Board, using its technical expertise, fully assessed the record in the base docket and subdocket B, and found that groundwater will be protected from potential contamination at CCDD and USF operations by requiring strengthened front-end screening, testing, and

certification. R. 1761. The Board's rules emphasize ways to ensure that materials being used for fill are in fact "clean" as defined by the Act, and as a result possess no threat to groundwater. "It is not this court's role to determine whether the Board's action was wise, or even if it was the most reasonable based on the record." *Illinois State Chamber of Commerce*, 177 Ill. App. 3d at 933, quoting *Central Illinois Public Service Co.*, 116 Ill. 2d at 412. Furthermore, "the Board, unlike this court, is well equipped to determine the degree of danger which a pollutant will cause, and then to balance the public threat against an alleged individual hardship." *Id*., quoting *Central Illinois Public Service Co.*, 116 Ill. 2d at 412, quoting *Monsanto Co. v. Pollution Control Board*, 67 Ill. 2d 276, 290 (1977). The Board carefully weighed substantial hearing testimony, comments from interested persons, and the proposed rule itself to properly determine that groundwater would be protected by rules requiring stringent front-end screening, testing, and certification. As a result, the Board properly found that groundwater monitoring for CCDD and USF operations subject to the rule was not necessary.

IV. The Board's Decision Not to Adopt IEPA's Proposed Groundwater Monitoring Rules for the Use of CCDD and USF Operations Was Not Clearly Arbitrary, Unreasonable, or Capricious.

The Supreme Court has found that an agency acts in an arbitrary or capricious manner when it does any one of three things. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 505-06 (1988). If the agency relies on factors that the legislature did not intend for the agency to consider, or if the agency "entirely fails to consider an important aspect of the problem," the court can find that the agency acted in an arbitrary or capricious manner. *E.P.A. v. Pollution Control Bd.*, 308 Ill. App. 3d 741, 751 (2nd Dist. 1999), citing *Greer*, 122 Ill. 2d at 505-06. Finally, an agency acts in an

arbitrary or capricious manner when it "offers an explanation for its decision that runs counter to the evidence or that is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise." *Id*. Based on the record this Court cannot find that the Board acted in an arbitrary or capricious manner under these standards.

A. The Board did not rely on factors that the legislature did not intend for the Board to consider.

The Board reviewed IEPA's proposal to require groundwater monitoring based on factors that the legislature clearly intended the Board to consider. The universe of relevant provisions in the Act is limited but detailed. The legislature defined "clean construction or demolition and debris" and "uncontaminated soil fill." 415 ILCS 5/3.160. Sections 22.51 and 22.51a set forth directives on CCDD operations and USF operations. 415 ILCS 5/22.51, 22.51a. Section 22.51(b)(4) exempts CCDD used as fill at sites where the fill is generated and CCDD used as fill material in an excavation other than a former quarry or mine if the use complies with IDOT specifications. 415 ILCS 5/22.51(b)(4) (2016). Section 22.51(d) states that the section applies only to CCDD that is not considered "waste" as provided by Section 3.160 of the Act. 415 ILCS 5/22.51(d) (2016). CCDD fill operation is also defined by the legislature to mean a current or former quarry, mine or other excavation where CCDD is used as fill material. 415 ILCS 5/22.51(e)(3) (2016). And the legislature required the Board to adopt rules for the use of clean construction and demolition debris and uncontaminated soil as fill material at CCDD operations. 415 ILCS 5/22.51(f)(1) (2016). The legislature required the Board's rules to include standards and procedures necessary to protect groundwater:

> which may include, but shall not be limited to, the following: requirements regarding testing and certification of soil used as fill material, surface water runoff, liners or other protective barriers, monitoring (including, but

> not limited to, groundwater monitoring), corrective action, recordkeeping, reporting, closure and post-closure care, financial assurance, post-closure land use controls, location standards, and the modification of existing permits to conform to the requirements of this Act and Board rules. 415 ILCS 5/22.51(f)(1).

Section 22.51a defines USF operations as a current or former quarry, mine or other excavation where USF is used as fill, but that is not a CCDD operation. 415 ILCS 5/22.51a(a)(2). The legislature also required the Board to adopt rules for use of uncontaminated soil as fill material at USF operations that include standards and procedures necessary to protect groundwater, "which shall include, but shall not be limited to, testing and certification of soil used as fill material and requirements for recordkeeping." 415 ILCS 5/22.51a(d)(1) (2016).

As the above summaries make clear, Sections 22.51 and 22.51a charged the Board with adopting rules to protect groundwater from the *use of* CCDD and USF as fill material at CCDD *operations* and USF *operations*. 415 ILCS 5/22.51(f)(1), 22.51a(d)(1) (2016). Consistent with the legislative mandate for this rulemaking, the Board's rules were *not* required to be a comprehensive program for detecting and remediating groundwater contamination across the State or Will County, whether caused by noncompliant clean construction or demolition debris, noncompliant uncontaminated soil, or any other source of contamination—historical or otherwise. Indeed, neither Section 22.51(f)(1) nor Section 22.51a(d)(1) refers to "contamination." Rather, the legislature provided the Board with a specific context for CCDD operations and USF operations that included a requirement to protect groundwater on a prospective, not retrospective, basis, with certain requirements and suggestions on how the Board might do so. The Board adopted rules to protect groundwater that include front-end screening, testing,

certification and recordkeeping —measures identified in Sections 22.51(f)(1) and 22.51a(d)(1)—to ensure that the materials taken to CCDD and USF operations meet the requirements of the Act to be "clean" as that term is used in the relevant provisions of the Act. The Board in reviewing the need for groundwater monitoring at CCDD and USF operations—again, just one statutory option for groundwater protection for CCDD facilities—properly limited its consideration to monitoring in that specific, statutorily-defined context.

The People argue that the Board "misapprehended its role in regulating groundwater 'contamination'." People Br. at 28. The People maintain that the Board "focused" on the CCDD and USF not being defined as "waste" under the Act, and this led to the Board concluding that CCDD and USF should not be regulated like waste by requiring groundwater monitoring. *Id.* The Board is dismayed that the People continue to take issue with the Board's discussion in the record on the fact that CCDD and USF regulated under Sections 22.51 and 22.51a of the Act (415 ILCS 5/22.51 and 22.51a) are not waste. It was the People who raised the issue that the Board should treat regulated CCDD and USF as waste prior to first notice (PC 15) and it was the People who continued to raise the issue throughout the Board proceeding (Exh. 35, 59). The Board made clear that CCDD and USF, meeting the definitions in Sections 22.51 and 22.51a of the Act (415 ILCS 5/22.51 and 22.51a), are not waste and, therefore, will not be subject to the same groundwater monitoring requirements as landfills. In fact, the Board stated in the first notice opinion and order that:

> The Board's first concern is that the CCDD and uncontaminated soils to be deposited into quarries, mines, and other excavations be clean and uncontaminated as those terms are defined by the rules and the statute. If the regulations provide assurances that the materials being deposited are

> indeed clean and uncontaminated and are adhered to, protection will be provided to public health and the environment, including groundwater. R. at 1064.

Thus, the "focus" of the Board was to ensure that CCDD and USF deposited in quarries met the definitions in Sections 22.51 and 22.51a of the Act (415 ILCS 5/22.51 and 22.51a (2016)). Furthermore, as the Appellate Court held, "whether CCDD and USF constitute 'waste' or 'inert waste' is relevant to determining what prospective regulations are necessary to protect groundwater. . .." *County of Will v. Illinois Pollution Control Bd.*, 2017 IL App (3d) 150637-U, ¶61.

The Board's finding that CCDD and USF used as fill are by definition not "waste" was not only relevant but properly kept this rulemaking within the explicit bounds defined by the legislature. As noted above, the Appellate Court agreed that whether CCDD and USF constitute "waste" is relevant to the Board's determination. 2017 IL App (3d) 150637-U, ¶63. To review, the Act specifically states that CCDD "shall not be considered 'waste' if it is" used as fill material in a current or former quarry, mine or other excavation and used in accordance with Section 22.51 of the Act and the rules adopted under that provision. 415 ILCS 5/3.160(b) (2016). Section 22.51 requires the Board to adopt regulations "for the use of clean construction or demolition debris as fill material." 415 ILCS 5/22.51(c)(1) and (f)(1) (2016). Section 22.51 does not give the Board the authority to define clean construction or demolition debris; the Act defines that term. Under Section 22.51, the Board is to adopt rules on use of CCDD, but not to change the definition of CCDD. The Act already defines CCDD used in accordance with Section 22.51 as not waste.

The People further argue the Board has an obligation to protect groundwater from all pollution, not just waste. People Br. at 28. In support, the People, as well as the Amici, cite to the Act and the Groundwater Protection Act (415 ILCS 55/2(b)). *Id*. at 29; Amici Br. at 6-7. The Board agrees with the People and Amici that the Board has a responsibility to protect groundwater against all pollution. However, this rulemaking was not proposed as general rule for groundwater protection, but rather, under Sections 22.51 and 22.51a, as a proposal to protect groundwater from the use of CCDD and USF as fill at fill operations. As discussed above, the proposal, made to satisfy the directive from the legislature, aimed to protect groundwater from CCDD and USF operations, not to detect and remediate historical contamination.

If the People, Will County, or even Amici believe that a comprehensive rulemaking for the protection of groundwater from historical contamination is necessary, they may file one. The Board would consider all the information provided, and determine, based on that record, when, where, and even who should perform monitoring for the protection of groundwater. The Board cannot, however, consider a proposal not before the Board, nor adopt a rule that is not supported by the record.

B. The Board did not fail to consider an important aspect of the problem.

The Board reviewed the extensive record in this proceeding and found that front-end screening along with testing and certification was sufficient to protect groundwater from potential contamination by the use of CCDD and USF at fill operations. Each of the Board's opinions and orders built upon the information supplied by participants, many of whom raised the same arguments about the potential for contamination at each stage of the rulemaking and subdocket. *See* R. 540; R. 1765; PC 60 at 6. Yet no participant

provided evidence that a CCDD or USF operation, operating within the law, has caused contamination of groundwater. R. 540; R. 1764.

Among other relevant aspects of the issue, the Board also considered information about the sites and facilities that would be exempt from any groundwater protections, including groundwater monitoring. Under the IEPA proposal—the only one before the Board in this rulemaking—a facility that closed within one year of the effective date of the rules would not be required to perform groundwater monitoring. R. 625, 635. The proposed rule allowed for facilities that were already closed or that closed within one year to escape groundwater monitoring, and yet many of the concerns raised to the Board centered around historical uses of fill material and historical contamination that might already exist. *See*, *e.g.,* 5/20/13 Tr. at 16; PC 63 at 12-13; PC 74 at 8. Thus, the only rule proposal before the Board in this proceeding *did not* require groundwater monitoring at facilities that had accepted fill material not subject to the front-end screening and certification of fill material at CCDD and USF operations. Such a rule—*i.e.*, one that would in some form have gone into effect had the Board imposed groundwater monitoring—would not protect groundwater from historical contamination, a fact that the People and Will County fail to consider despite their professed concerns about such contamination. *See* People Br. at 32; Will County Br. at 21.

Still another fact supporting the Board's decision not to require monitoring is that under the proposed rule a CCDD or USF operation that is dewatering did not need to perform groundwater monitoring until dewatering ended. R. 641-42. Pursuant to testimony the Board learned that some facilities may not stop dewatering for several years. 5/20/13 Tr. at 186. Thus, groundwater monitoring would not even begin for an

indefinite period of time at these sites. PC 63 at 5-6. Therefore, the Board found this factor to be supportive of the Board's decision that the safeguards adopted in Part 1100 for groundwater protection were sufficient. R. 540-41.

A related supporting factor is that, by statute, so-called "borrow pits" are not subject to Part 1100, including any groundwater monitoring. 415 ILCS 5/22.51(b)(2); R. 539. The Board reviewed IDOT's procedures for determining that CCDD and uncontaminated soil to be deposited in borrow pits is clean. R. 633-34, 639; *see also* PC 75. The Board found IDOT's procedures similar to the requirements that the Board adopted in Part 1100 for testing and screening of materials. *Id*.; *see also* PC 75 at 3. Because the Act exempts borrow pits, and similar requirements for testing and screening of materials are required by IDOT as those under Part 1100, the Board found further support for its decision not to require groundwater monitoring for CCDD and USF operations.

The Appellate Court found that the participants provided more than enough information for the Board to make a decision. *County of Will v. Illinois Pollution Control Bd.*, 2017 IL App (3d) 150637-U, ¶69. The Court stated "the objecting parties' disagreement with the Board's final determination, and the weight it assigned to certain evidence, does not compel this Court to reweigh the evidence on review. *Id*.

The dissenting opinion argues that the Board's opinion ignored many important differences between facilities that would be exempt from groundwater monitoring and those that would be required to perform groundwater monitoring. *County of Will v. Illinois Pollution Control Bd.*, 2017 IL App (3d) 150637-U, ¶104. The dissent argues the fact that Reliable Lyons' testing showed no exceedances is evidence that IEPA's

proposed Subpart G properly exempted dewatering facilities from groundwater monitoring. The dissent also believes that there is "a tendency for contaminates to aggregate over long periods of time, due to the large volume of materials compacted in the fill site." *Id*. at ¶106. The dissent sees this as a difference between borrow pits and CCDD and USF facilities. In contrast, the Appellate Court held that "regardless of the differences between borrow pits and fill site quarries, they hold the same materials" and are thus relevant, though not dispositive, as to how CCDD and USF can be safely discarded. *Id*. at ¶76. And, as the Appellate Court recognized, just because a court would have viewed the evidence differently is not a basis to set aside the Board's decision not to require groundwater monitoring at CCDD and USF operations. *See id.* at ¶53, citing *Central Ill. Pub. Serv. Co.*, 116 Ill. 2d at 412.

The People and Will County's arguments that the Board's final decision in subdocket B failed to consider the cost of groundwater monitoring is baseless. People Br. at 30; Will County Br. at 26. To be sure, the Board's August 6, 2015 opinion and order did not reiterate every Board finding in the base docket. However, that opinion made clear that the Board had reviewed all the evidence in the record, *see* R. 538, 542, and the record includes first-notice and second-notice opinions that did discuss the cost of groundwater monitoring, R. 1065-66, 1765-66. The People seem to be of the opinion that the Board must reiterate every finding it makes in a proceeding in each subsequent opinion. There is no such requirement. The Board need not reiterate a finding once made, especially in the instance where the Board states that it "remains unconvinced" and the Board has reviewed the entire record. R. at 476.

The People argue that even industry representatives acknowledged that the costs of monitoring were manageable when considered on a cost-per-unit basis. People Br. at 31. The People claim that because of these comments and testimony, the Subdocket B opinion did not "point to monitoring costs" as a reason for rejecting the IEPA's proposal. *Id.* The People rely on comments from James Huff and testimony by Brett Hall to support their position. *Id*. However, the People fail to state that Mr. Huff acknowledged that capital costs are significant and expressed concern that many fill operations would exit the market and force these materials to be deposited in landfills "at a huge economic burden on the citizens of Illinois." PC 59, p. 2. Likewise, Mr. Hall's testimony was that liability for groundwater test results that might stem from pollution caused by off-site source was a much greater concern than the upfront costs of monitoring. Tr. 176 8/6 at 43. Clearly, the comments by Mr. Huff and the testimony by Mr. Hall support the Board's decision that the record showed groundwater monitoring was a costly undertaking that was not justified by the mere potential of contamination.

Will County argues that the Board's Subdocket B finding is not sufficient due to the "extensive evidence about cost" presented at hearing in Subdocket B. The Court need look no further than the testimony and comments of Mr. Huff and Mr. Hall cited by the People in its brief to find the Board's decision in Subdocket B was supported by the record. *See* People Br. at 31. The testimony and comments of Mr. Huff and Mr. Hall establish that the Board's record on the economics of groundwater monitoring, even after another hearing, included evidence that the cost of groundwater monitoring could force closures and require non-responsible parties to remediate. This evidence alone supports a finding that the Board's decision was not arbitrary or capricious. When an agency has

acted in its rulemaking capacity, a court will not substitute its judgment for that of the agency. *Granite City*, 155 Ill.2d at 162.

Will County maintains that the cost of groundwater monitoring is reasonable and should be required. Will County Br. at 25-26. However, Will County acknowledges that the costs estimated by industry, including actual installation of groundwater monitoring, is "significantly higher" than the number presented by IEPA and representatives of Will County. *Id*. Will County itself cites to evidence that the Board could rely on to find that groundwater monitoring was costly. This underscores that the Board's policy decision was reasonable and should stand.

The People next argue that the Board did not give proper consideration to the primary concerns raised by the People. People Br. at 32. Specifically, the People argue that the Board failed to consider the history of industry noncompliance and the fill material already in place at CCDD and USF operations. *Id*. In support of its argument the People note that several participants pointed the Board to enforcement actions against members of the industry that were either negligent or scoff-laws. *Id*. at 33. The People are incorrect.

First, the record contains conflicting evidence regarding contamination of groundwater by existing CCDD and USF sites. The record reveals that Reliable Lyons conducted testing in 2007, 2008, 2009, and 2010, and that the tests showed that the local groundwater was not contaminated by the fill. PC 58 at 2, 3-4. The Board noted that this facility did not "show contamination in its dewatering." R. 540. In contrast, the Lynwood site, which was found to be in violation of the Act, but that closed before Part 1100 was adopted (*see* 5/20/13 Tr. at 92), showed exceedances of groundwater quality

standards. Exh. 59 at 8-10. Lynwood is also a site that was never subject to regulation under Part 1100 and would not be required to perform groundwater monitoring under IEPA's proposal in this proceeding.

Along with this evidence, the Board considered the cited enforcement actions against fill operations. R. 540. The Board concluded:

> The Board is unconvinced by the additional arguments made in this subdocket that the safeguards adopted to protect groundwater will fail. While evidence of enforcement actions and evidence regarding sites not regulated under Part 1100 were offered, the record still does not provide indications of groundwater contamination at sites that are permitted under Part 1100. Also, while the Lynwood site showed contamination, Reliable Lyons does not show contamination in its dewatering. *Id*.

Thus, as the Appellate Court concluded, the Board did consider this "important" aspect, but "simply did not attribute as much weight to the issue as the People and Will County would have liked." 2017 IL App (3d) 150637-U ¶66. And simply because the People and Will County would have viewed the evidence differently is not a basis to set aside the Board's decision not to require groundwater monitoring at CCDD and USF operations. *Central Ill. Pub. Serv. Co.*, 116 Ill. 2d at 412.

Moreover, the People's and Will County's reliance on soil sampling and load checking data is entirely misplaced (People Br. 34, 35; Will County Br. at 22, 23) as is the dissenting opinion's and Amici's reliance on IEPA testing. *County of Will v. Illinois Pollution Control Bd.*, 2017 IL App (3d) 150637-U, ¶115; Amici Br. at 12. All cite the results of IEPA soil sampling—conducted after Part 1100 was amended in the base docket—finding exceedances of MACs at 10 of 12 regulated sites. *See* Exh. 63 at 9. Also referenced by the People are IAAP's report of seven detections of PNAs exceeding MACs in 44 random soil samples from three CCDD sites, and IEPA's review of 417 load

rejection sheets from fill operations in the timeframe of September 2012 through June 2013 showing that 269 loads were rejected based on high photo ionization detector readings. PC 74 at 5-6, citing Exh. 12 at 3-5. None of this soil-related data, however, shows groundwater has been contaminated at *any* regulated CCDD or USF fill operation. Indeed, the People's witness Mr. Sylvester admitted that other than at the unlawfully operated, pre-Part 1100 Lynwood site, the only groundwater monitoring results from regulated fill operations in the record showed no contamination. 5/20/13 Tr. at 94-95; *see also* R. 1764. And regarding IEPA's 2012 sampling in particular, an IEPA witness acknowledged that the data on metals exceedances was not a "good indicator" of actual groundwater contamination; IEPA would have had to, but did not, run a different test to develop a reliable indicator for that. *Id.* at 147-49. And of course, the load rejection information identified loads that regulated fill operations did *not accept*, *see* PC 74 at 5-6; 35 Ill. Adm. Code 1100.205(b)(4)—meaning the material never posed a "risk to groundwater" at a CCDD or USF facility, and that Part 1100 as amended in R12-9 successfully protected against noncompliant materials being placed in CCDD and USF facilities. People Br. at 34. Beyond these considerations, assuming any of the cited data did reveal such contamination, the proper result under the Act—including Sections 22.51 and 22.51a—is enforcement under Title VIII against the responsible parties, not a costly, one-size-fits-all requirement likely to lead to increased dumping at unregulated sites. *See* 5/20/13 Tr. at 189-91; PC 71 at 4.

C. The Board's explanation for its decision is supported by the evidence in the record.

The Board's opinions each built on the information provided by the participants, and at each point, the Board found support for its decision that the ultimately-adopted

rules in Part 1100 in the base docket protect groundwater from potential contamination by the use of CCDD and USF at fill operations without requiring groundwater monitoring. The Board also explained in each of those opinions why the Board found the evidence did not support requiring groundwater monitoring, in addition to front-end screening, testing, and certification. *See* R. 538-42; R. 1063-67; R. 1759-66. Despite the Board's thorough review, the People and Will County insist the Board's decision does not square with the evidence. The People rely on the testing by IEPA in 2012 on random samples, as support for the Board's decision being counter to the evidence. People Br. at 36. The People also rely on the IAAP testing and point to the Lynwood site, claiming it shows that groundwater monitoring is necessary to protect groundwater. *Id.* at 37. The Board previously addressed the IEPA testing and IAAP testing and will not reiterate those arguments. *See supra* 24. As to Lynwood, the People maintain that the Board "improperly discounted" the People's evidence. *Id*. The Board did not. The Board reviewed the evidence that Lynwood had never been regulated under Sections 22.51 and 22.51a (415 ILCS 5/22.51 and 22.51a), and Lynwood accepted materials other than CCDD and USF. R. at 513. The Board instead relied on testing from Reliable Lyons, a facility operated under Sections 22.51 and 22.51a (415 ILCS 5/22.51 and 22.51a), which showed no contamination. *Id.* at 65. Further the People's reliance on Lynwood ignores that under IEPA's proposal, the Lynwood site and any other closed sites would never be required to perform groundwater monitoring under IEPA's proposal in this proceeding. The Board did not ignore the evidence from Lynwood; rather, for reasons explained in its decision in subdocket B, the Board simply found more persuasive the lack of evidence of groundwater contamination at permitted or registered facilities, *i.e.*, those that would

actually be subject to the proposed groundwater monitoring requirement, more persuasive. R. 540-41. This Court should reject the People's invitation to weigh the evidence differently than the Board did. *See Central Ill. Pub. Serv. Co.*, 116 Ill. 2d at 412.

The People also challenge the Board's reliance on the existence of "borrow pits", arguing that these sites are smaller than the sites IEPA's proposal would have subjected to groundwater monitoring. People Br. at 38. The size of the site is beside the point, because even though testing and screening of materials by IDOT is similar to the requirements of Part 1100, the procedures are not identical. For CCDD and USF sites regulated under Part 1100, IEPA will inspect the sites and check records. Part 1100 specifically states that materials that do not meet the requirements of Part 1100 must be rejected. R. 1105-06. Records are kept and IEPA inspects permitted fill sites, but "borrow pits" are not subject to the same rules. *See* PC 75 at 3. The Board adopted a rule that requires CCDD and USF operations to keep contaminated materials out of the fill; failure to abide by the rules subjects the operators to enforcement. Thus, as the Board explained, while permitted facilities and borrow pits use similar methods to determine what materials may be deposited, permitted facilities are already subject to more stringent standards yet would be subject to groundwater monitoring while borrow pits would not. R. 539. Differences in size cannot account for this disparate treatment. As the Appellate Court stated, "regardless of the differences between borrow pits and fill site quarries, they hold the same materials – CCDD and USF." *County of Will v. Illinois Pollution Control Bd.*, 2017 IL App (3d) 150637-U ¶76.

V. The Amici Repeat Arguments Already Addressed by the Board, Improperly Raise Arguments Not Presented to the Board, and Improperly Rely Upon Materials Outside the Board's Record.

The Board adopted a rule to protect groundwater from the use of CCDD and USF as fill at fill operations that requires load-checking, including front-end screening, testing, and certification of soils and materials used as fill material at CCDD and USF operations. These groundwater protection elements were part of the rule IEPA proposed to the Board and the rule the Board considered through numerous hearings, substantial public comment, and three substantive opinions. The Board's record did not include many of the documents relied upon by Amici to support its argument that the Board's decision is arbitrary, capricious, and unreasonable. *See generally* Amici Br. at 2-5; 16-18.

Amici argue that the Board failed to consider two important and necessary factors. Those factors, according to Amici, are: "1) the obvious insufficiency of relying on front-end certification and inspection procedures alone [*see supra* at 44]; and 2) exponentially higher remediation costs caused by delayed detection of contamination." Amici Br. at 7.

A. Amici's argument that the Board failed to consider the cost of groundwater remediation is misplaced and was not specifically raised to the Board.

The second prong of Amici's argument is that the Board failed to consider the exponentially higher remediation costs caused by delayed detection of contamination. Here, Amici argue that sampling in the Spring of 2017 showed quarries receiving CCDD materials that violated the MACs. Amici Br. at 16. Amici discuss the health effects of these materials and cites articles in support of its position. *Id*. at 16-19.

The Board agrees that it did not consider "exponentially higher remediation costs caused by delayed detection of contamination," as that issue was not specifically argued to the Board. The Board did hear evidence regarding the cost of remediation, as well as concerns regarding who would be responsible for remediation if groundwater monitoring was required, and contamination detected. However, to reiterate, IEPA's proposal, as modified by the Board before proceeding to adoption, aimed to protect groundwater from the use of CCDD and USF as fill material at fill operations. The Board did not consider issues of remediation, as the Board adopted a rule designed to ensure that CCDD and USF used at facilities would be "clean" as defined by Sections 22.51 and 22.51a of the Act (415 ILCS 5/22.51 and 22.51a (2016)). Therefore, the issue of remediation from the use of CCDD and USF as fill material at fill operations was not necessary, as the Board's rule protects groundwater.

Amici also make two arguments that further demonstrate a misunderstanding of the Board's rules. Amici claims that the Board's refusal to require groundwater monitoring raises remediation costs by allowing liable parties to escape liability, leaving citizens to bring enforcement actions under the Illinois Constitution. This is simply not correct. The Board found that the use of CCDD and USF at fill facilities that meet the requirements of these rules will not impact groundwater, and that groundwater is protected. If, for any reason, the rule requirements are not met, that is a violation of the Act, and remediation is only one potential form of relief available under the Act when enforcing the provisions of the Act. 415 ILCS 5/33 (2016). Fines are also a possibility. *Id*. The Board consistently stated throughout this proceeding that a violation should be prosecuted under the Act, and contamination of groundwater is a violation of the Act.

However, if Amici believe that there exists a need in Illinois to require by Board regulation comprehensive groundwater monitoring to address historical contamination and remediation, Amici should consider filing such a rulemaking with the Board. Amici could include in that rulemaking the arguments addressed above and the information not a part of the Board's record in this proceeding. The Board would certainly consider such a proposal. However, this rulemaking, was by statute designed to protect groundwater from the use of CCDD and USF at CCDD and USF facilities; and in that specific context, the Amici arguments are misplaced. Therefore, this Court should reject Amici's arguments.

B. Amici improperly rely upon multiple materials and authorities that were not a part of the Board's record.

In several places in Amici brief, the arguments are supported by materials that were not included in the Board record, including materials and authorities discussed above. Also, Amici's argument relies on purported national trends in C&D management, and in support cites to an article outside the Board's record. Amici Br. at 13. Some of the cited materials did not even exist at the time of the Board's decision. The Act requires the Board to make its rulemaking decisions based upon the evidence in the public hearing record (415 ILCS 5/27(b) (2016) *see also* 415 ILCS 5/28(a) (2016)). Amici's brief includes arguments not made to the Board and also based on source material never presented to the Board. The Court should not consider these new arguments and those based on these materials. *See e.g.* 735 ILCS 5/3-110 (2016); *Lyon v. Dept. of Children and Family Services*, 209 Ill. 2d 264, 271 (2004).

Under the Administrative Review Law (735 ILCS 5/3-101 *et. seq.*) (2016)), the courts review all questions of fact and law presented by the entire record; however, courts

cannot consider evidence outside the record of the administrative appeal. *Id*. at 209 Ill.2d 271. Here, Amici's brief includes citation to multiple authorities not cited to the Board, and as such not a part of the administrative record. Amici also cites to evidence that was developed after this case was on appeal, and therefore also not a part of the administrative record. This Court should disregard these citations and references.

However, even if this Court should decide to review these new arguments and materials, the problem remains that, under Sections 22.51 and 22.51a, the rulemaking before the Board was a rule proposal to protect groundwater from the use of CCDD and USF as fill material at fill operations, prospectively; the rule appropriately does not apply retroactively, to the materials that may have been legally placed in those facilities before IEPA filed its rulemaking proposal. The concerns about health effects from constituents are in fact addressed in the Board rule, which requires that loads from potentially impacted properties be tested against the MACs. *See* 35 Ill. Adm. Code 1100.205(a)(1)(B). And the MACs are themselves protective of human health. *See* R. 1080. Thus, the Board adopted a rule that will protect against contaminated materials being placed in CCDD or USF facilities.

Additionally, Amici's reliance on enforcement actions and testing done after this appeal was filed could be misleading. As the record before the Board indicated, IEPA did provide 44 random soil samples from three CCDD sites, and IEPA's review of 417 load rejection sheets from fill operations in the timeframe of September 2012 through June 2013. However, when questioned, the IEPA witness acknowledged that the data on metals exceedances was not a "good indicator" of actual groundwater contamination; IEPA would have had to, but did not, run a different test to develop a reliable indicator

for that. 5/20/13 Tr. at 147-49. This alone demonstrates why information not before the Board should not be considered by this Court. Such information has not been vetted by rulemaking participants, let alone the Board, exercising its technical expertise. Therefore, the Court should reject Amici's arguments.

CONCLUSION

For all the above reasons, respondent-appellee Illinois Pollution Control Board respectfully requests that this Court affirm the Board's orders promulgating rules governing CCDD and USF operations and declining to adopt rules requiring groundwater monitoring at these facilities.

Respectfully submitted,

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SUPREME COURT RULE 341 CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341 (h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14,999 words.

/s/ Marie E. Tipsord
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CERTIFICATE OF FILING AND SERVICE

I certify that on December 3, 2018, I electronically filed the foregoing **Brief of Respondent-Appellee Illinois Pollution Control Board** with the Clerk of the Court for the Illinois Appellate Court, Fourth District, by using the Odyssey eFileIL system.

Additionally, I further certify that the other participants in this appeal, named below, have been served by transmitting on December 3, 2018, a copy from my e-mail address to all primary and secondary e-mail addresses of record designated by those participants.

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

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