

No. 122798

IN THE
SUPREME COURT OF ILLINOIS

<p>THE PEOPLE OF THE STATE OF ILLINOIS,</p> <p style="padding-left: 40px;">Petitioner-Appellant,</p> <p style="padding-left: 40px;">v.</p> <p>ILLINOIS POLLUTION CONTROL BOARD,</p> <p style="padding-left: 40px;">Respondent-Appellee.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>On Appeal from the Appellate Court of Illinois, Third Judicial District, Nos. 3-15-0637 & 3-16-0058 (cons.)</p> <p>There Heard on Direct Administrative Review from an Order of the Illinois Pollution Control Board, No. R2012-009(B).</p>
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**REPLY BRIEF OF PETITIONER-APPELLANT
THE PEOPLE OF THE STATE OF ILLINOIS**

KWAME RAOUL
Attorney General
State of Illinois

DAVID L. FRANKLIN
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Petitioner-Appellant
the People of the State of Illinois

CARL J. ELITZ
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2109
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
celitz@atg.state.il.us

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ARGUMENT

The issue here is whether the Illinois Pollution Control Board's (Board) decision to not include groundwater monitoring requirements for operators that accept clean construction or demolition debris (CCDD) or uncontaminated soil fill (USF) at Illinois CCDD fill operations and USF operations was arbitrary, capricious, or unreasonable in light of the Board's statutory mandate to adopt final rules that "protect groundwater" at these facilities, 415 ILCS 5/22.51(f)(1), 22.51a(d)(1) (2016), and the record developed during the rulemaking proceedings. The Board reasons that monitoring is not warranted because there are now "front-end" requirements in the rules (recordkeeping, certifications by originators, and load screenings by operators) that will keep potential contaminants out of these facilities. AE Br. 24-47. Regardless, it argues, the Illinois General Assembly did not task it with crafting rules that protect groundwater from fill contamination from "historic" deposits. *Id.* at 35. This Court should reject these contentions.

The Board's decision to not include groundwater monitoring embraced logic contrary to the evidence that it received during the rulemaking proceedings regarding the ineffectiveness of front-end requirements, misconstrued its role in implementing the Act's groundwater protection mandate, and failed to appreciate important aspects of the groundwater protection problem. The decision should be reversed and remanded to the Board for further proceedings consistent with this Court's decision.

I. Recordkeeping, Certificates, and Operator Screenings Are Insufficient to Protect Groundwater Because Even Compliant CCDD and USF Contains Contaminants.

The Board insists that the “front-end” certifications and screening of materials before they are placed into the ground at CCDD and USF operations will protect groundwater. AE Br. 21. The migratory nature of contaminants potentially released by CCDD and USF when brought into contact with water, however, means that certification and screening of these material before they are deposited cannot meet the goal of protecting groundwater alone. The Board argues that its decision was based on a “lengthy and thorough” rulemaking, *id.* at 24, and that it “reviewed the entire record,” having “fully explored the issues,” *id.* at 29. But the evidence presented during the rulemaking proceedings on this point was unchallenged. Stuart Cravens, a licensed professional hydrogeologist, warned that contaminants contained in CCDD can potentially migrate “tens of feet per day” through aquifers toward waterways or areas of groundwater withdrawal once fill is immersed in water. Exh. 55, pp. 1-2.

To that, the Board counters that its final rules “screen out contaminants from entering CCDD and USF operations” as fill material and potentially contaminating groundwater. AE Br. 30. The final rules adopted by the Board themselves establish this is only partially true. Under even the Board’s final rules designed to strengthen the front-end standards, CCDD and

USF may lawfully contain chemical constituents recognized to be dangerous to human health, and so even materials that comply with the regulations pose a potential threat. R. C1757 (citing 35 Ill. Admin. Code 742, App. B, Tbl. C); *see also* Summary of Maximum Allowable Concentrations (MACs) of Chemical Constituents in Uncontaminated Soil Used as Fill Material At Regulated Fill Operations (<https://tinyurl.com/y9vvlpgs> (last visited Jan. 14, 2019)). The MACs include allowances for contaminants such as cyanide, lead, mercury, and DDT, all of which may be components of so-called “uncontaminated” soil. *Id.*

As the Board’s final rules themselves also recognize, acidic and alkaline water tends to liberate these contaminants. R. C1678. The rules attempt to address this concern by requiring that soil deposited as fill at CCDD and USF operations be pH tested before being placed into the ground, and that loads be rejected when tests show pH readings outside the neutral range, below 6.2, or above 9.0. *Id.* The rules do nothing to address the risks raised by participants in the rulemaking hearing about the effect of soil already at these sites, and to exposure to the elements. *E.g.*, PC39, pp. 17-19 (citing studies showing “very acidic” rain in eastern and northeastern Illinois); PC49 (discussing “hydrologic vulnerability” and “hydraulic connectivity” of the State’s natural areas), PC74, pp. 8-9 (addressing contaminant migration caused by water). Only groundwater monitoring at these facilities would provide information, for example, about the pH values of the water in which the deposited materials

sits, or how its prolonged exposure to the elements may be dispersing — or concentrating — chemical contaminants.

Neither do the Board's arguments address the risks posed by fill accepted at CCDD and USF sites before even basic screening requirements were in place, and before the Board adopted the MACs. The Board refers to this material as "historical," AE Br. 22-23, 32, 35, 38-39, 50, and this fill represent a very large amount of what is being used at the approximately 60 commercial operations existing in Illinois accepting CCDD and USF. Some of these facilities have operated since 1997, when the General Assembly relaxed the requirements for placing CCDD in unlined excavations. *See* Pub. Act 90-475 (eff. Aug. 17, 1997); *see also* <https://tinyurl.com/y94z74z5> (Agency map, last visited Jan. 14, 2019). At that time, there were no permits required for CCDD operations. And though USF sites must now register with the Agency, they continue to operate without the need for Agency permit review. *See* Pub. Act 94-272 (eff. July 19, 2005).

True, the rules now provide for electronic screening for volatile organic compounds (VOCs), but such screening did not exist until the enactment of section 22.51 of the Act, which requirement was later codified as part 1100 by the Board in 2006. *See* 35 Ill. Admin. Code § 1100. Because much of the materials received are untested by originators, and because the screening done at the fill site is incapable of detecting the presence of semi-volatile organic

compounds, poly-nuclear aromatic hydrocarbons, metals, or other non-volatile contaminants, contaminated soils can still enter the fill area. PC74, p. 6. As for the protections provided by the MAC requirements, these were not promulgated by the Board until 2012. *See* Pub. Act 96-1416 (eff. July 30, 2010); 35 Ill. Admin. Code § 1100 Subpart F.

The Agency proposed groundwater monitoring because it recognized that “the screening procedures themselves do not provide the level of protection necessary to comply with the MACs and the legislature’s stated policy to ensure the prevention of groundwater contamination at fill operations.” PC74, p.3. It concluded that “only groundwater monitoring can provide the information necessary to fully understand and evaluate the threat from fill operations and to ensure the threat is addressed in a timely manner if it materializes.” *Id.*

Yet the Board insists that there must be more evidence than just a showing of soil contamination at these sites, countering that there has been no showing of groundwater contaminated by CCDD or USF. AE Br. 18. It characterizes the alarms raised during the rulemaking proceedings by the Agency, the People, local citizens, and others, as being just “a perceived problem,” and one that the record does not even support as “being a problem.” AE Br. 25; *see also id.* at 28 (calling groundwater contamination “a problem that the record does not even establish exists”). As the dissent in the appellate

court in this case pointed out, however, it is not the Board's prerogative to dismiss the need for rules protecting groundwater where the General Assembly has directed otherwise: "This real risk [of contamination] resulted in a legislative directive," and so it was not one that is "subject to debate." AT Br. at A90, ¶ 83.

Moreover, the Board's suggestion that there has never been contamination from an Illinois CCDD or USF operation, AE Br. 46, is wrong. In *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 1, the defendants were accused of accepting CCDD materials at their Lynwood facility, described by the appellate court as being a 40 acre site that initially included a sandpit 40 feet below grade, 2013 IL App (1st) 113498, ¶¶ 5, 11. The CCDD disposal violations began when operators accepted material for use above the grade. That resulted in a 90-foot pile containing approximately 750,000 cubic yards that was composed of "99.99% CCDD." 2015 IL 117193, ¶¶ 17-18. The complaint brought against the operators thus stemmed not from the nature of the materials received at the site (they were nearly all "clean" under the statutory definition of CCDD), but from the defendants' piling of the materials above the surrounding grade. Exh. 59, p. 8. Yet subsequent groundwater monitoring at Lynwood showed widespread exceedances of the applicable groundwater standards, including from a well that was drilled directly into the fill zone. Exh. 63, p. 24. Even though the fill was nearly all

CCDD, it showed exceedances of the applicable limits for arsenic, iron, lead, manganese, boron, and eight volatile organic compounds. *Id.*; Exh. 59, pp. 8-10. The Lynwood site is therefore a documented example of “clean” CCDD materials causing contamination to groundwater.

The Board points to another CCDD facility, Reliable Lyons, where tested water did not show drinking water exceedances. AE Br. 9. But that there is a CCDD facility in Illinois that is not contaminated does not diminish the need for groundwater monitoring to discover contamination where it does exist, as well as to provide incentives to operators to accept only clean fill. *See, e.g.*, Exh. 26, p. 4. Regardless, the testing done at Reliable Lyons is not a fair comparator for the type of groundwater monitoring proposed by the Agency. It was not just groundwater that was collected and tested at the Reliable Lyons quarry against the applicable standards, but stormwater too — as part of that facility’s substantial dewatering program. *See* Exh. 63, p.14. The Board notes that approximately 43% of water tested from Reliable Lyons had come into contact with fill at the site. AE Br. 12. This means, of course, that the majority of water tested there, or approximately 57%, had not come into contact with fill. That is in contrast to the testing done at the Lynwood site. Exh. 63, p. 24. There, as noted, “leachate” obtained directly from the CCDD fill material was shown to contain dangerous levels of several contaminants. *Id.*

Moreover, as its name implies, dewatering such as was done at the Reliable Lyons site is designed, in part, to keep fill from being subject to the

migration and contamination risks associated with flowing water. *See* PC58, p. 5. This was one of the purposes of installing the collection and pump system at the Reliable Lyons quarry. *Id.* The owner's desire to move water off the Reliable Lyons site illustrates the Agency's reason for proposing a final rule that exempts from monitoring sites that are actively dewatering. Testimony at the rulemaking hearing was that the risk of groundwater contamination is directly related to the migration of CCDD and USF contaminants when these materials are in contact with water. Exh. 55, pp. 1-2. As the People argued, the risk posed to groundwater is thus not from the mere existence of CCDD or USF used at these facilities, but their placement in very high volumes and for long periods in the flow of moving water, where constituent components, like many of the chemicals identified by the MACs, can be liberated, and then migrate. *See* PC74, p.8.

Even if there were no examples of groundwater contamination in Illinois from CCDD and USF operations, the Board's reliance on that point is not consistent with its prior decisions that recognize the need for proactive measures to identify contamination where protecting groundwater is the goal. Identifying contamination *before* it migrates is key. *In the Matter of: Groundwater Protection: Regulations for Existing and New Activities within Setback Zones and Regulated Recharge Areas*, PCB 1989-5 (Dec. 6, 1991) (<https://tinyurl.com/y949hllg> (last visited Jan. 14, 2019)), the Board specifically

rejected an argument that the lack of any established harm from pesticides or fertilizers at sites should preclude the Board from adopting a prophylactic groundwater monitoring rule. The Board in that case wrote that it

does not believe that eliminating all monitoring requirements for affected pesticide and fertilizer facilities is acceptable as a rule-of-general-applicability. Neither does the Board believe that it would be acceptable to require monitoring only after off-site occurrences of contamination have been recognized. Either circumstance is viewed as not compatible with the mandate of the [Illinois Groundwater Protection Act] to reduce the risk to the State's groundwaters. The Board agrees with the Agency that the monitoring component of the proposed regulations is "an essential element of the groundwater protection scheme, providing notice of contamination in its earlier stages", and allowing for initiation of non-degradation and preventative response measures to maintain or restore the integrity of potable supplies. This preventative aspect of the regulations would be lost should the Board only require groundwater monitoring after contamination is discovered at an off-site location.

Id. at 30 (citation omitted). The same logic should apply here.

Given the volumes of materials used at these facilities, their potential to release dangerous chemical components, and the practice of operators depositing them below grade into the water table, PC74, p.8, the Board's decision to strike from its final rules all groundwater monitoring was arbitrary, capricious, and unreasonable. The Board's rulemaking decision should not stand.

II. There Is No Statutory Basis for Distinguishing Between the Risk of Contamination Caused by "Current" Versus "Historic" Fill.

In addition to the risk posed to groundwater from materials currently being deposited at CCDD and USF facilities, testimony during the rulemaking

hearing demonstrated that there is a risk from materials placed at these sites dating back to 1997, before there was any Board rules for these facilities.

Industry participants acknowledged the potential of what one witness called the “historic impacts” of such deposits. Exh. 58, p. 4. The Board asserts that the load-checking and certification of materials later included in the part 1100 rules, 35 Ill. Admin. Code § 1100, adequately serve the General Assembly’s purpose of protecting groundwater, AE Br. 21, and that materials deposited at sites before adoption of the rules were not the General Assembly’s concern when it directed the Board to adopt rules that protect groundwater. *Id.* at 22. It is enough, the Board argues, to prevent prospective contamination at these sites. *Id.* at 35. In making this argument, the Board misreads the statute.

The Act required that the Board, after receiving proposals from the Agency, enact rules “necessary to protect groundwater” related to “the use of [CCDD] as fill material in current and former quarries, mines, and other excavations.” 415 ILCS 5/22.51(f)(1) (2016); *see also* 415 ILCS 5/22.51a(c)(1) (2016) (relating to USF). This is a broad statutory mandate, particularly when read together with section 3.545 of the Act that seeks to protect the State’s water resources from “pollution,” defined by the General Assembly to include the presence of nearly any type of “contaminant” in water. 415 ILCS 5/3.545 (2016).

But the Board interprets the Act as applying only to contamination caused by the placement of materials after the Act was amended to include

groundwater protection at CCDD and USF facilities, arguing that the law should apply only to “the *use of* CCDD and USF as fill material at CCDD *operations* and USF *operations*.” AE Br. 35 (emphasis in original). The Board’s stress on the words “use” and “operations” indicates that it believes that CCDD and USF stop being “used” at an “operation” once it is deposited into the ground. *See also id.* at 21-22. This belief, in turn, drives its conclusion that the legislature intended to protect groundwater only “on a prospective, not retrospective, basis,” by preventing contaminated materials from being taken to fill sites, and that there is no statutory requirement that the Board enact “comprehensive” rules to detect and remediate contamination retrospectively. *Id.* at 35-36. Because the premise of the Board’s argument regarding the General Assembly’s intent is incorrect, so too is its conclusion.

Section 22.51(f)(1) of the Act requires that the Board adopt rules for the “use of [CCDD] and [USF] at CCDD fill operations.” 415 ILCS 5/22.51(f)(1)(2016). Section 22.51a(d)(1) mimics this language, requiring the Board to adopt rules for the “use of” USF at USF operations. 415 ILCS 5/22.51(a)(d)(1) (2016). These provisions then state that the Board must adopt rules that “include standards and procedures necessary to protect groundwater.” *Id.* There can be no disagreement, therefore, that it is the “use” of CCDD and USF at these facilities that the Board is charged with regulating, and it is the “use” of materials at these sites from which the General Assembly intended groundwater to be protected.

The front-end protections implemented by the Board protect the facility from contamination only at the time of placement, even though the Act makes clear that the placement of materials is just the start of their “use” at these fill operations. With regard to CCDD, the Act provides that while it is being used CCDD shall not be considered waste:

[CCDD] shall not be considered “waste” if it is . . . used as fill material outside of a setback zone if the fill is *placed* no higher than the highest point of elevation existing prior to the filling immediately adjacent to the fill area

415 ILCS 5/3.160(b) (2016) (emphasis added). This provision continues, making clear that the “used as fill” is measured from the time that it is “placed” into the ground, through at least 30 days after a “final cover” is applied,

and if covered by sufficient uncontaminated soil to support vegetation within 30 days of the completion of filling or if covered by a road or structure, and, *if used* as fill material in a current or former quarry, mine, or other excavation, *is used* in accordance with the requirements of Section 22.51 of this Act and the rules adopted thereunder.

Id. (emphasis added). A similar provision exempts USF from being “a waste,” 35 ILCS 5/3.160(c)(2) (2016), with the Board’s regulations defining a regulated “USF operation” as one at which USF is “used as fill,” 35 Ill. Admin. Code § 1100.103. The CCDD and USF materials in the ground are not waste *because* they are being used at these sites as fill.

The materials of concern to the General Assembly in passing section 22.51(f) and 22.51a(d) were, therefore, not just the materials at the time that

they are placed at these sites, but throughout the time that they are “used as fill” to reclaim “a current or former quarry, mine, or other excavation.” 415 ILCS 5/3.160(b)(i)((2016). That makes sense because fill may change over time, as explained, particularly when exposed to water.

The final rules adopted by the Board, however, do nothing to protect groundwater from the CCDD and USF used as fill once in the ground. This is not just a concern because the enhanced front-end regulations adopted by the Board are relatively new, but also because older facilities with “nonhazardous” and “clean” CCDD material can threaten groundwater by leaching contaminants into surrounding water, as happened at Lynwood. *See* Exh. 63, p. 24.

The groundwater monitoring proposed by the Agency was not designed to impose operator liability. Subpart G contemplated only “self-implementation” of the monitoring requirements, with data being reported to the Agency only in the event specific exceedances of the groundwater standards were discovered. Exh. 63, p. 12. The focus of the Agency’s proposal was thus intended only to require operators to recognize groundwater risk from their deposited fill so that they could be proactive in taking appropriate action in managing their facilities, whatever the particular realities of their operations were shown to be. PC62, pp. 2-4; Exh. 63, pp. 21-22.

Several industry witnesses testified that they would consider closing instead of monitoring. *See, e.g.*, PC59, p. 4; PC68, p. 1. That was one of the

options left open to industry members under the Agency's proposal. R. C635, 641-42. Another option would have allowed operators to delay the installation of groundwater monitoring until the completion of filling, by dewatering their sites so that "a cone of depression" in the water table under the facility was maintained, preventing the migration of any contamination. PC63, p. 5-6.

While these circumstances would not be ideal and are at best temporary, they are an improvement over allowing an operator with groundwater contamination to do nothing.

Because CCDD and USF are "used as fill," even after being placed into the ground, the Board had no statutory cause to draw a distinction between old and new fill by eliminating groundwater monitoring from the Board's proposal. Its decision to exempt "historic contamination" from the rules by removing all groundwater monitoring misconstrued its role as an agency charged with adopting regulations that protect the State's groundwater resources. Accordingly, the final rules adopted by the Board were arbitrary, capricious and unreasonable.

III. Seasonal "Borrow Pits" Are Not Analogous to Commercial Fill Operations at Quarries, Mines, and Other Large Excavations.

The Board continues to assert that its final rules are sufficient to meet the requirements of the Act because the front-end screenings it has put in place exceed the requirements that exist at Illinois Department of Transportation-supervised "borrow pits." AE Br. 27, 40-41, 47; *see* R. C539;

PC75, pp. 3-4. As explained in the People's opening brief, AT Br. 38-39, the comparison to borrow pits is not apt because a borrow pit is not just a smaller version of a quarry or mine. The former are relatively tiny operations, seasonal, and contain only materials related to road-building activities. *See* PC49-54; PC55, pp. 1-2; PC57; PC62, p. 22 & Exh. 63, p.9; Exh. 5, p.1. And unlike CCDD and USF operations, borrow pits are authorized to accept fill only from government-managed projects where, as the appellate court dissent pointed out, the profit motive to accept misdirected waste poses less of an environmental concern. *See* AE Br. A92.

Moreover, the record contains no evidence of soil contamination ever being found at a government-supervised borrow pit, let alone any groundwater contamination. The same is not true with regard to commercial CCDD operations where there are many examples of both soil contamination, Exh. 63, p. 9; PC74, p. 5; Exh. 12, pp. 3-5, and one example of fouled groundwater from CCDD material used as fill at the Lynwood site, Exh. 59, p. 8.

The Board argues that IDOT's experience with borrow pits are at least "relevant" to the proper analysis, and so support the Board's final decision. AE Br. 41. But given the major differences that exist between borrow pits and the quarries, mines, and other commercial excavations accepting CCDD, this Court should reject that argument. The Board should not have drawn an analogy between borrow pits and commercial CCDD and USF operations.

IV. Groundwater Monitoring Is Economically Reasonable When Apportioned Through Tipping Fees.

The Board argues that monitoring is not economically warranted due to its high cost. *E.g.*, AE Br. 25, 28, 30, 41-42, 45. At the time of its February 2, 2012 order, however, the Board had not made any conclusion that the costs associated with groundwater monitoring were too high to implement on a cost-per-unit basis. R. C1065. Without having received a report from the Illinois Department of Commerce and Economic Opportunity, the Board said that it was “impossible to estimate the economic impact of these regulations.”

R. C1065. In the Board’s July 7, 2012 order, after taking additional testimony, including from one waste-industry witness that characterized the costs as “insignificant,” and “a few pennies a ton,” the Board said that the new cost information it had received was appreciated, but had not altered the prior decision. R. C1766. The rationale offered by the Board at this time thus was not that costs were unreasonably high to implement a groundwater monitoring program, but that groundwater monitoring was not needed where the front-end requirements “sufficiently protect groundwater.” *Id.*

This is the background for the Board’s final decision, issued August 6, 2015, that is now subject to review. R. C476-542. The Board there noted it had received additional estimates from Will County that groundwater monitoring would add only between \$0.06 to \$0.16 per cubic yard of material deposited. R. C501-02. The Agency reported that its estimates were

“generally in line with” those modest fees. R. C502. In its discussion upholding the rule as modified in this order, R. C538-40, the Board said only that it “remained unconvinced” groundwater monitoring was necessary given the front-end requirements of the rule. R. C538.

Throughout the proceedings, no one suggested that the use of tipping fees to cover the cost of groundwater monitoring would be an unworkable solution. Witnesses instead complained about the costs that would be associated with finding contamination in groundwater at one of their facilities that could then force a closure, theorizing that their customers would then have to direct fill to waste operations that would charge much more, or perhaps turn to illegal dumping. *See* AE Br. 42; PC59, p.2 (Huff). Another witness worried that installing monitoring wells could indicate groundwater contamination that had actually originated “off-site,” but he also offered no basis for this concern. Tr. 5/20/13, p. 176-77 (Hall).

In the end, the Board’s rejection of Subpart G prevents early identification of groundwater contamination close to its source, allowing owners and operators the ability to avoid dealing with the problem until contamination is discovered at other sources of withdrawal. This runs counter to the intent of sections 22.51 and 22.51a of the Act and its overall purpose to “restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by

those who cause them.” 415 ILCS 5/2(b) (2016). The Board’s final rulemaking is arbitrary, capricious and unreasonable.

CONCLUSION

For the foregoing reasons, and those in the People's opening brief, this Court should reverse the appellate court's judgment and remand this matter to the Board for further action consistent with this Court's opinion.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

DAVID L. FRANKLIN
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Petitioner-Appellant
the People of the State of Illinois

CARL J. ELITZ
Assistant Attorney General
100 West Randolph St.
12th Floor
Chicago, Illinois 60601
(312) 814-2109
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
celitz@atg.state.il.us

January 14, 2019

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in 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 19 pages.

/s/ Carl J. Elitz

CARL J. ELITZ

Assistant Attorney General

100 West Randolph Street

12th Floor

Chicago, Illinois 60601

(312) 814-2109

Primary e-service:

CivilAppeals@atg.state.il.us

Secondary e-service:

celitz@atg.state.il.us

CERTIFICATE OF FILING AND SERVICE

I certify that on January 14, 2019, I electronically filed the foregoing **Reply Brief of the Petitioner-Appellant the People of the State of Illinois** with the Clerk of the Court for the Supreme Court of Illinois by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are not registered service contacts on the Odyssey eFileIL system, and thus were served by transmitting a copy from my e-mail address on January 14, 2019, to all primary and secondary e-mail addresses of record designated by those participants.

Marie Tipsord:
Jonathan M. Powell
IPCB

marie.tipsord@illinois.gov
mark.powell@illinois.gov

Marie Q. Czech:
Will County

mczech@willcountyillinois.com

Howard Learner/Andrene Dabaghi
Amici, ELPC & CARE

hlearner@elpc.org
adabaghi@elpc.org

Claire A. Manning
Daniel L. Hamilton
Amicus Illinois CCDD Coalition

cmanning@bhslwa.com
dhamilton@bhslaw.com

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.

/s/ Carl J. Elitz

CARL J. ELITZ

Assistant Attorney General
100 West Randolph Street
12th Floor

Chicago, Illinois 60601
(312) 814-2109

Primary e-service:

CivilAppeals@atg.state.il.us

Secondary e-service:

celitz@atg.state.il.us

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Carolyn Taft Grosboll
SUPREME COURT CLERK