No. 122798

IN THE SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant, v. ILLINOIS POLLUTION CONTROL, BOARD, Respondent-Appellee. (No. 3-16-0058). COUNTY OF WILL and WILL COUNTY LAND USE DEPT., Petitioners-Appellants, v. ILLINOIS POLLUTION CONTROL, BOARD, Respondent-Appellee. (No. 3-15-0637).	Appeal from the Appellate Court of Illinois, Third Judicial District Nos. 3-15-0637 & 3-16-0058 There Heard on Direct Administrative Review from an Order of the Illinois Pollution Control Board, No. R2012-009(B)

AMICUS CURIAE BRIEF OF THE ILLINOIS CCDD COALITION IN SUPPORT OF APPELLEE POLLUTION CONTROL BOARD

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POINTS AND AUTHORITIES

I. INTEREST OF THE AMICI CURIAE

The members of the Illinois CCDD Coalition ("Coalition"), a group of associations and entities interested in appropriate regulation of Clean Construction or Demolition Debris ("CCDD") and Uncontaminated Soil Fill ("USF"), join in this pleading in support of the Illinois Pollution Control Board's ("Board's") decision to not promulgate a proposal of the Illinois Environmental Protection Agency ("Agency"), specifically Subpart G of the July 29, 2011 proposed amendments to Title 35, Part 1100 of the Illinois Administrative Code ("Subpart G"). Adoption of that proposal would have required groundwater monitoring at permitted CCDD and USF operations (collectively herein known as "CCDD Operations"). As the Board found, implementation of Subpart G was not supported by the substantial administrative record compiled in the underlying regulatory proceeding.

Members of the Coalition are a part of the industry, or represent members that are affected by the industry, that deals with material from public and private construction projects by removing it, transporting it or accepting it as fill in permitted facilities. The Coalition members represent the various economic sectors that support the Board's decision to not adopt Subpart G. Many members or representatives of the Coalition appeared at the Board's regulatory hearings, offering testimony and public comment. The members of the Coalition include the Illinois Association of Aggregate Producers ("IAAP"); the Illinois Asphalt Pavement Association ("IAPA"); Illinois Mechanical & Specialty Contractors Association ("IMSCA"); the Illinois Municipal League ("IML"); the Illinois Road and Transportation Builders Association ("IRTBA"); the Federation of Women Contractors ("FWC"); the Associated General Contractors of Illinois ("AGCI"); the Illinois Construction Industry Committee ("ICIC"); the Great Lakes Construction Association ("GLCA"); the Contractor's Association of Will and Grundy Counties

("CAWGC"); the Underground Contractor's Association ("UCA"); and ATM Aggregate Logistics ("ATM"). The Coalition's Motion to Appear as *Amicus Curiae* and to File Brief In Support of Appellee Pollution Control Board, filed simultaneously herewith, describes each of the members of the Coalition and identifies each entity's specific membership and interest in this appeal.

The Coalition members share a common concern that promulgation of a groundwater monitoring requirement for CCDD operations would threaten the viability of the CCDD industry. Implementation of Subpart G would increase the cost of CCDD Operations, threaten industry jobs and increase costs to customers and taxpayers for the disposal of CCDD and USF, with no corresponding environmental benefit. Additional costs for disposal of CCDD and USF would increase the cost of public and private demolition and construction, leading to a decline in construction development that provides jobs and economic support to many other industries. Increased costs to public demolition and construction projects will reduce the number and scope of public projects, putting an even greater strain on state and local government budgets and Illinois taxpayers.

II. ARGUMENT

A. The Board's Decision Properly Considers the Entire Record, Including the Interests of the Coalition, in Appropriate and Responsible Regulation of CCDD and USF

The Coalition supports the decision of the Board, affirmed by the Appellate Court of Illinois, Third Judicial District ("Third District"), to decline adoption of Subpart G. As the Third District found, the Board's decision was supported by a record consisting of "substantial evidence and testimony during multiple dockets, hearings and public comment periods" and was not arbitrary, capricious or unreasonable. *County of Will v. Illinois Pollution Control Bd.*, 2017 IL App (3d) 150637-U, ¶ 77, *appeal allowed sub nom. County*

of Will v. People, 95 N.E.3d 472 (Ill. 2018), and *appeal allowed*, 95 N.E.3d 485 (Ill. 2018). In this brief, the Coalition hopes to enlighten the Court on the important public and legal issues before it and provide further rationale and support for the considered, thoughtful decision of the Board that is the subject of this appeal.

More specifically, the Coalition is concerned with the proper regulation of construction materials that are defined and managed as *clean* construction or demolition debris and *uncontaminated* soil fill pursuant to Section 22.51 and 22.51 of the Illinois Environmental Protection Act ("Act"). 415 ILCS 5/22.51 and 22.51a. As such, CCDD and USF are not considered waste that must be disposed of in landfills and are acceptable for use below grade as fill at quarries and other large excavations that are permitted by the Agency as CCDD Operations. For example, the Act defines "uncontaminated soil" as "soil that does not contain contaminants in concentrations that pose a threat to human health and safety and the environment." 415 ILCS 5/3.160.

IAAP represents companies who are permitted CCDD operations. IAAP and its members provided the Board with a significant amount of record information in the underlying rulemaking proceedings. IAAP member companies mine and produce crushed stone, sand, gravel, silica sand and agriculture lime (i.e., aggregates). PC # 69 at 1. In addition, most IAAP members intend to reclaim land disturbed by mining into appropriate post-mining uses: commercial, industrial, recreational or residential. *Id.*

Appropriately then, many members have applied for and become permitted CCDD Operations. As IAAP explained, for decades it worked with the Agency to ensure its members properly accepted materials that would not adversely impact the environment, yet in 2012 the Agency, at the urging of the Office of Attorney General and other interests, and in apparent response to individual bad actors, nonetheless proposed amendments that

would require *all* permitted CCDD Operations to conduct groundwater monitoring to prevent any ***potential*** for pollution:

> The Agency emphasizes it is not suggesting that any specific facilities are currently, or will become, sources of groundwater contamination. The Agency's larger point is that CCDD and uncontaminated soil fill operations must be considered to have the potential to cause groundwater contamination. Because of the State's policy of preventing groundwater contamination and protecting groundwater resources for current and future beneficial uses, this potential is reason enough to justify groundwater monitoring at fill operations. *Id*., at 4, quoting PC # 62 at 9.

Subpart G was only one facet of the regulatory proposal the Agency filed with the Board in 2011 pursuant to Public Act 96-1416 (eff. July 30, 2010). The legislation directed the Agency to propose rules to the Board, and the Board to adopt rules, for the use of CCDD and USF material at CCDD Operations. The legislature further directed that:

> The rules must 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 (emphasis added).

The Board opened docket R2012-009 and held hearings on September 26, 2011, October 25 and 26, 2011 and March 14, 2012. After considering the record evidence, the Board moved forward with much of the Agency's proposed rules, with some changes, but declined to adopt the groundwater monitoring provisions proposed by the Agency in Subpart G. The Board determined that the regulatory structure it adopted, which included extensive front end procedures for the characterization and screening of CCDD and USF, including laboratory soil testing, adequately protected groundwater without the need for expensive groundwater monitoring that was not warranted by the record. R. 1680-1681.

The Joint Committee on Administrative Rules ("JCAR"), a bipartisan committee of the Illinois General Assembly comprised of Senators and Representatives (5 ILCS 100/5-90), whose function is to ensure proposed regulations comport with the enabling statutory framework, issued a certificate of no objection, but requested that the Board give further consideration to whether groundwater monitoring should be required for these facilities. It did so in order that the Board have "the opportunity to receive further comment from parties who may not have submitted their supportive views when groundwater monitoring was an element of this proposal and who may have opinions and information to offer in light of the Board's decision to remove that requirement before going to 1st Notice on this rulemaking." 36 Ill. Reg. 13732; R. 1813. The Board agreed and opened a second docket, R2012-009(B) to receive additional public comment and testimony. R. 1860-1861. Another hearing was held on May 20, 2013, and substantial public comments were received. Thereafter, the Board issued its decision that is the subject of this appeal. R. 476-542.

Representatives of various Coalition members attended or appeared at each of the above-referenced hearings, and were among the many individuals, associations and businesses that presented testimony and public comment to the Board. These members represent industries and public entities that are devoted to the proper characterization, transport or acceptance of CCDD and USF. After CCDD and USF is unearthed, the contractor and property owner, often a public body (in the case of road construction, municipal buildings, schools, libraries, etc.), has to determine where to take the material. There are only three options: (a) a landfill that accepts waste and is regulated pursuant to federal laws that have been incorporated into the Act by the Illinois legislature; (b) a CCDD Operation; or (c) an unregulated area (e.g., farm field, subdivision construction, etc.).

As the Board's Part 1100 regulations require, prior to removal and transport, responsible contractors and property owners will properly characterize the material to determine whether it is consistent with the definition of CCDD or USF. Pursuant to the process codified in the Board's regulations at 35 Ill. Adm. Code 1100, a licensed professional engineer or geologist must certify the material and, if the material came from an area considered by the regulations to be a "potentially impacted property," laboratory soil testing is required prior to certification. The standards set by the Board to be utilized for soil testing are more stringent than those required for remediation of properties for reuse as residential or school properties and are known as the "maximum allowable contaminants" or "MAC" standards. See Summary of Maximum Allowable Concentrations of Chemical Constituents in Uncontaminated Soil Used as Fill Material at Regulated Fill Operations (MAC Table) in 35 Ill. Adm. Code 1000, Subpart F.

Indeed, the MAC standards adopted by the Board were so stringent that the City of Chicago commented in the Board's base docket proceedings that it was "concerned that the proposed MACs will exclude a great deal of soil that can, in fact, be safely deposited into Fill Operations. Given the extraordinary environmental and monetary costs of landfilling clean soil, the City urges the Board to reconsider [the MAC standards] in light of the data and expert testimony in the record." PC # 35.

Upon transport to a permitted CCDD facility, the facility operator is required to review the certification, including any analytical testing of soil, and perform a screening of the material upon acceptance with a device known as a photoionization detector ("PID"). The facility operator is also required to keep detailed contemporaneous records and is subject to inspection by the Agency. As explained at the Board's hearing on May 20, 2013 by Bret Hall, a representative of Hanson Material Services who has managed CCDD sites

for many years, including some in Will County: "We do pretty extensive due diligence on each of the sites … in addition to site inspections ensuring that we have analytical data, and that analytical data does, in fact, meet or fall below the maximum level of concentrations for chemical constituents and uncontaminated soil." Tr.5/20/13, p. 176.

While these procedures are expensive, they represent a fraction of the cost of landfilling. As pointed out on behalf of the Public Building Commission ("PBC") of the City of Chicago in the original Board docket in R2012-009, the cost to the PBC for landfilling materials that met the Board's CCDD and USF criteria from its twenty then planned projects (Chicago public schools and libraries) would be approximately $20.6 million, while the costs to PBC for the testing and transport required for use as fill at a permitted CCDD Operation was approximately $5.7 million. Tr.3/14/12, p. 8.

Similarly, in the Board's follow-up docket that focused solely on the proposed groundwater monitoring requirement, a representative from Springfield's City Water Light and Power, whose responsibilities included assuring compliance with state and federal regulations pertaining to excavated materials, expressed his agreement with the Board's determination in the first docket that groundwater monitoring was not required:

> I concur with the five reasons the Board has indicated that groundwater monitoring is not needed. While it cannot be argued that requiring groundwater monitoring wells can provide advance warning of potential contamination of the aquifer, there is an obligation to demonstrate first the need for groundwater monitoring and second that the advantage of this information outweighs the cost of such a system at each of the permitted fill sites. Neither has been shown. If operators either decide to go out of business because of the cost or agree to put in a system but need to substantially increase the cost for their customers to place material at their site, generators such as City Water, Light and Power who choose to comply with state regulations will have no choice but to take their non-contaminated excavated material to a landfill. Besides being economically unreasonable, it is environmentally sinful. It is my belief that as the regulations become more restrictive, more generators of CCDD material will dispose of the material illegally, thus negating the purpose of these rules. PC # 48.

The above admonitions are even more expansively treated by key representatives of the CCDD industry, such as those from VCNA Prairie, Inc. PC # 67. The company, doing business as Prairie Materials, was founded in Bridgeview, Illinois in 1948 and currently operates four permitted CCDD fill operations in Illinois. *Id*. It estimated that its costs to implement a groundwater monitoring program at its facilities would exceed $1,884,000. *Id.* Moreover, the public comment provided by Prairie Materials highlights the valuable environmental role it provides:

> Currently, CCDD and uncontaminated soil associated with construction activities is loaded into commercial trucks at the job and hauled to quarries and gravel pits regulated by the IEPA. The material is placed for reclamation, and generally the same truck is loaded with aggregate at the facility and returns to the construction site, with the truck loaded for both legs of the trip. This cycle is then repeated until the construction project is complete. Having the commercial trucks loaded with material in both directions cuts down on the number of trucks on the road, and therefore reduces fuel consumption, wear and tear on already deteriorating roadways, and the overall carbon footprint of construction activities.
>
> Landfill space is finite. Originally one of the drivers for allowing CCDD and uncontaminated soil to be permanently placed in quarries was to reduce the volume of material being placed in landfills. Landfill space should be reserved for municipal waste. *Id*.

As Prairie Materials told the Board, the stricter the regulation of CCDD becomes, the more potent the risk to the environment:

> Since the interim rules have gone into effect, we have witnessed an increased number of unregulated CCDD disposal options being utilized throughout Northeast Illinois. Within the direct vicinity of each of our permitted sites, various farm fields, construction sites, valleys, and ditches are being filled with CCDD and various soils of unknown sources. These locations are not, nor are they required to be, registered or permitted with the State or local municipalities. The material that is accepted by these locations is not monitored, screened, or in any other way confirmed to be uncontaminated. The true risk to groundwater quality is this unregulated and unmonitored placement of CCDD occurring throughout the State. Imposing overly burdensome requirements on permitted and registered sites, such as the proposed groundwater monitoring scheme, will cause

> many sites currently regulated by the IEPA to cease operations, thereby increasing the volume of materials being disposed of in an unregulated manner. *Id*.

Similarly, in addressing a question from the Board concerning the relative risks associated with placement of CCDD as fill in large quarries permitted as CCDD Operations, as opposed to unregulated borrow pits and farm fields, Josh Quinn of Vulcan Materials explained that even though the borrow pits may be smaller than quarries, the upfront controls required in the Board's Part 1100 regulations provide more than adequate environmental protection. Tr.5/20/13, p. 183. As he stated, "my experience in the 12 years in the industry is that it takes a lot of time to manage the due diligence aspect of this, but it also takes a lot to fully train a staff to carry out all of these upfront controls and load checking procedures outlined in Part 1100." *Id*.

Additionally, as the Third District pointed out in its review of the Board's decision, the Illinois Transportation Coalition agreed that the front-end certification and screening provided adequate protection for area groundwater by "regulating the quality of CCDD." *County of Will,* 2017 IL App (3d) 150637-U, ¶ 38. It also pointed out that the Agency's proposed Subpart G, which required remediation in the event of any detected exceedances of groundwater, "could place operators on the hook for millions of dollars in remediation costs without evidence that operators violated a single regulation, past or present." *Id*. The order also highlighted testimony regarding the Reliable Lyons CCDD operation, where the operator had installed a groundwater collection system at the bottom of the quarry. *Id*. at ¶ 37. Even though the site accepted over six million cubic yards of CCDD in its 275-foot quarry, water pumped from the site contained no contamination exceeding the Board's groundwater standards. *Id.*

For the above reasons, the record fully supports the Board's decision not to move forward with the Agency's proposed Subpart G, which would impose burdensome and unnecessary groundwater monitoring requirements on an industry that is already heavily regulated considering the material they accept and manage is: (i) clean, (ii) not waste, and (iii) not required by federal regulations to be regulated by states, as distinct from municipal solid waste and hazardous waste. Indeed, the Illinois regulations are already among the strictest in the nation since most states do not define or regulate CCDD.

B. The Board's Decision Should be Affirmed as it is within the Board's Quasi-Legislative Rulemaking Authority, and is Not Arbitrary, Capricious, or Unreasonable

As the Third District majority[1] noted in its thoughtful and thorough review and affirmation of the Board's decision not to proceed with groundwater monitoring, the Board is regarded by the courts as a "science" court. *County of Will*, 2017 IL App (3d) 150637-U, ¶ 11. As created by the legislature, the Board is an independent state forum, with quasi-legislative and quasi-judicial functions. *E.P.A. v. Pollution Control Bd.*, 308 Ill. App. 3d 741, 747 (2d Dist. 1999). It is comprised of five members appointed by the governor, with the advice and consent of the Senate. Each of the five members are statutorily mandated to

[1] The dissenting justice appears to go beyond the arbitrary and capricious standard required for judicial review of Board rulemaking decisions, and instead offers findings of her own and findings not made by the Board (e.g., "I submit that the Board's decision to reject Subpart G and to shift this financial responsibility of detecting and remediating contamination to taxpayers is motivated by 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."). *County of Will*, 2017 IL App (3d) 150637-U, ¶ 92. Also, among other erroneous conclusions drawn from the record, the justice misreads the testimony of James Huff, P.E., who represented the Illinois Transportation Coalition. Clearly, he expressed opposition to the groundwater monitoring required by proposed Subpart G; he simply advocated for the Board to develop a base-line procedure should they proceed with that subpart – a procedure not contained in the Agency's proposed rule. He did not, as the justice suggests, present a "viable compromise" to the Agency's groundwater monitoring proposal which the Board ignored. See PC # 59.

perform their responsibilities full-time and must be qualified with verifiable experience in pollution control. 415 ILCS 5/5.

Indeed, this Court and the lower courts it supervises have a great deal of experience in reviewing decisions of the Board since its creation in 1973. As it relates to the Board's rulemaking authority, the courts have widely deferred to the decision of the Board, affirming such decisions unless they were shown to be arbitrary, capricious or unreasonable. *Granite City Div. of Nat. Steel Co. v. Pollution Control Bd.*, 221 Ill. App. 3d 68, 76 (5th Dist. 1991), *aff'd sub nom. Granite City Div. of Nat. Steel Co. v. Illinois Pollution Control Bd.*, 155 Ill. 2d 149 (1993); *Illinois Coal Operators Ass'n v. Pollution Control Bd.*, 59 Ill. 2d 310 (1974). As noted by the Third District, the burden of demonstrating the invalidity of a Board regulatory decision is upon the person or entity challenging it, and that burden is very high. *Shell Oil Co. v. Illinois Pollution Control Bd.*, 37 Ill. App. 3d 264, 272 (5th Dist. 1976) ("The courts should not … act as 'superagencies'"); See also *Illinois State Chamber of Commerce v. Pollution Control Bd.*, 49 Ill. App. 3d 954, 961 (1st Dist. 1977). It is not the reviewing court's function to reconsider the evidence presented to the Board or to make a new determination of facts. *E.P.A. v. Pollution Control Bd.*, 308 Ill. App. 3d 741, 749 (2d Dist. 1999). (Upon challenge from Agency, Board's interpretation of the phrase "economically reasonable" in granting regulatory relief to a manufacturer in the form of an adjusted standard was not arbitrary and capricious). Courts will look to the following factors in applying the arbitrary and capricious standard, as the Third District did: whether the agency entirely failed to consider an important aspect of the problem; whether it relied on factors the legislature did not intend it to consider; or whether it offers an explanation counter to the evidence and is so implausible that it could not be ascribed to a difference in viewpoint or the Board's

expertise. *County of Will*, 2017 IL App (3d) 150637-U, ¶ 54; *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 505-506 (1988); *Waste Mgmt. of Illinois, Inc. v. Pollution Control Bd*., 231 Ill. App. 3d 278, 285 (1st Dist. 1992). Here, the Appellants do not and cannot meet that standard given the substantial record the Board developed in this proceeding, as well as the careful review afforded the information presented.

As to the Board's rulemaking authority and expertise, a law review article written by one of the Act's drafters, and the Board's first Chairman, offers valuable insight. In 1975, David P. Currie, then a distinguished law professor at the University of Chicago, observed the following of the Board's rulemaking role as prescribed by the legislature:

> The basic plan of the statute is to leave the formulation of substantive standards to the Board, not to enshrine them in the statute itself. The reason for this choice was the expectation that specialized administrators working full time on pollution problems would be in a better position than legislators burdened by innumerable other concerns to make reasonable judgements based upon masses of relevant information. The heart of the statute, therefore, is a series of grants of authority to make whatever regulations may be necessary to accomplish the explicit purposes set forth by the General Assembly. David P. Currie, *Rulemaking under the Illinois Pollution Law*, 42 University of Chicago Law Review 457 (1975) at 458.

Relevant here is the grant of authority set forth in Public Act 96-1416 (eff. July 30, 2010), codified in Sections 22.51 and 22.51a of the Act. 415 ILCS 5/22.51 and 22.51a. Sponsored by Majority House Leader Barbara Flynn Currie and Senator Don Harmon, the legislature directed the Board to develop standards and procedures necessary to protect groundwater. In keeping with the decades long history of the legislative grant of authority to the Board, the legislature did not prescribe what specific standards and procedures those should be, but offered a list of items that the rules *may* include, such as 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 the Act and Board rules. *Id*.

In keeping with the regulatory framework of the Act, the legislature charged the Agency with proposing a set of rules related to CCDD, but maintained the Board's authority under Section 27 of the Act as the entity that actually promulgates the rules, pursuant to record evidence gained through hearing and other Board procedures. 415 ILCS 5/22.51(f)(1); 415 ILCS 5/27. Indeed, any substantive environmental regulations that are promulgated under the Act are Board regulations, not Agency regulations.

As Professor Currie explained, in crafting the original Act the drafters intentionally included what he considered "essential limiting constraints on Board pursuit of the statutory objective of a clean environment" by the explicit language of Section 27 of the Act (requiring that the Board "shall take into account…the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution"). Currie, at 459. As originally drafted, there was no express requirement that the feasibility or cost of abatement be considered in adopting regulations. Rather, the original bill would have forbidden, as the Appellants appear to urge here, the consideration of cost in prescribing standards relevant to Board regulations and standards. *Id.* at 459-460. Yet, as the Board knows, that is not the statutory framework relevant to Board rulemaking under the Act. Instead, as Professor Currie observed in 1975, the amendments that became the law we now know as the Act "wisely spared the Board from having to shut down a million-dollar plant if it found that the only way to avoid a single common cold." *Id.* at 460.

Here, the position espoused by the People and Will County disregards the important role assigned to the Board by the legislature to make technical and science decisions it is

not well equipped to make, which is a role independent from the Office of Attorney General and the Agency. In keeping with its authority under the Act, the Board wisely determined that groundwater monitoring was not warranted on the basis of the substantial record before it. The Board made that decision not once, but twice: first, in its February 2, 2012 decision not to proceed to First Notice pursuant to the Administrative Procedures Act, 5 ILCS 100/5 *et. seq.,* with Subpart G after three days of hearings in the original docket; and second, in its August 6, 2015 decision which is the immediate subject of this appeal.

None of the points made by the Appellants rise to the level of reversing and remanding to the Board for again further consideration of the Agency's groundwater monitoring proposal. If this honorable Court should find that the record here mandates implementation of the Agency's Subpart G proposal, such a determination would constitute a serious departure from decades of judicial precedent and legislative enactments which grant broad rulemaking authority to the Board.

First, the Appellants variously argue that the Board's decision fails to consider historical contamination that might exist in some form from activities that occurred prior to the enactment of the regulatory structure created pursuant to Public Act 96-1416. However, the record is devoid of any actual data which suggests such historical contamination has been or will be caused by the permitted CCDD Operations that are the subject of the instant legislative enactment and regulatory proposal of the Agency. The Agency itself stated it had no such data ("[T]he Agency emphasizes it is not suggesting that any specific facilities are currently, or will become, sources of groundwater contamination"). PC # 62 at 9. The data that *was* presented refutes that point.

Second, the Appellants present examples of rogue operators as justification for groundwater monitoring by permitted facilities who are committed to compliance with Part

1100 of the Board's regulations. The *Einoder* case is a prime example. *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193. Comparing this case to the regulated community involved in this proceeding is like comparing apples to oranges. Einoder made no attempt to follow any law, but accepted materials that were considered waste, and was determined to be operating an illegal landfill without a permit. Any exceedances of area groundwater alleged to be attributable to this site cannot reasonably be construed as justification for groundwater monitoring at the many permitted CCDD Operations facilities that are the subject of this rulemaking.

Third, the Appellants assert that the Board wrongly focused on the point that CCDD and USF are not considered waste under the Act, asserting that is a factor the legislature did not intend it to consider. Yet, the Board does not develop regulations in a vacuum. It instead is called upon to utilize its expertise to determine whether the proposed rule is justified. Here, it simply pointed out a legal truism: material defined as CCDD and USF is not waste; therefore, it is not regulated in the same manner as municipal solid waste and hazardous waste, which are subject to rigorous standards driven by federal regulations and federal oversight – such as groundwater monitoring and liner requirements. Indeed, CCDD is subject only to regulation as the Illinois General Assembly prescribes. Here, ample evidence in the record exists to demonstrate that CCDD regulations have become increasingly more stringent over the years, due in large part to rogue operators who motivated the legislature to action. That legislative action does not mandate groundwater monitoring, and this Court should not take up that mantle.

Fourth, the Appellants (and the environmental *amici*) raise issues related to Agency-issued violation notices concerning alleged MAC exceedances by permitted CCDD Operations that have not been the subject of formal enforcement with the Office of

Attorney General and therefore are of little or no import. The nature of environmental regulation is that inspections sometimes uncover minor violations, which are resolved by the Agency pursuant to the provisions of Section 31 of the Act, 415 ILCS 5/31, even when the alleged violator wholly disputes the alleged violation, as is the case with many of the allegations related to MAC exceedances. Such alleged MAC exceedances may also be skewed by improper testing methods, since any testing performed by the Agency can later be refuted with more accurate and expensive testing performed by the facility. If allegations rise to the level of demonstrated or even threatened contamination, those issues can be (and should be) dealt with through the mechanisms of the Act related to enforcement. See 415 ILCS 5/31 and 5/42.

Further, the MAC standards adopted by the Board were so stringent that participants in the Board's base docket expressed concerns that the proposed MACs would exclude a great deal of soil that can, in fact, be safely deposited into permitted CCDD Operations. R. 488-489. Indeed, the MAC table includes the element iron at levels that naturally occur in Illinois soil, and may be found at levels above the MAC in any one of our back yards. Thus, as the Board knows, individual allegations of exceedances of MAC standards at permitted facilities do not constitute evidence of contamination justifying groundwater monitoring, especially when the allegations were minor and resolved or withdrawn without enforcement or adjudication.

The Coalition believes that the Board properly exercised its discretion in the present matter by refraining from the adoption of the Subpart G groundwater monitoring requirements. As pointed out by the Coalition participants to the Board proceedings, the adoption of such a regulation would result in a variety of undesirable outcomes that neither the Coalition, the environmental *amici*, the Appellants, nor the Appellees desire. The

imposition of a groundwater monitoring requirement would have a devastating impact on an industry already highly regulated, given that it is only authorized to accept clean materials and uncontaminated soils. The outcome will not benefit the environment, as it will put good operators out of business, will require clean materials to be landfilled at costs far exceeding the cost for acceptance as fill, will delay the reclamation of quarries and large excavations in Illinois and will result in many contractors simply avoiding regulated entities entirely, instead dumping these materials (without any regard to testing) in the nearest available and willing farm field, borrow pit or subdivision development. The Board properly exercised the discretion provided it by the General Assembly in Public Act 96-1416, and in the Act, to avoid such outcomes.

III. CONCLUSION

The Coalition appreciates the opportunity to address this important subject. The Board's decision is within its authority, is not arbitrary, capricious or unreasonable and should be affirmed by this Court. Reversal and remand, as the Appellants urge, would contradict the authority vested in the Board as determined by this Court and lower courts. The Coalition urges this Court to affirm the decision of the Board, as did the Third District.

ILLINOIS CCDD COALITION,

By: /s/Claire A. Manning
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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 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 17 pages.

/s/Claire A. Manning

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2018, I electronically filed the foregoing with the Illinois Supreme Court using the eFileIL system, which will send notification of such filing to the following:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct.

/s/Claire A. Manning