2017 IL App (3d) 150637-U

Order filed September 12, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

COUNTY OF WILL and WILL COUNTY LAND USE DEPARTMENT,	)	Petition for Review of Order of the Illinois Pollution Control Board dated August 6, 2015.
Petitioners-Appellants,	)	
v.	)	Appeal Nos. 3-15-0637 3-16-0058
ILLINOIS POLLUTION CONTROL BOARD,	)	IPCB No. 2012-009(B)
Respondent-Appellee.	)	Appeal from a Decision of the Illinois Pollution Control Board.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Holdridge concurred in the judgment.
Justice Wright dissented.

ORDER

¶ 1 *Held*: The Illinois Pollution Control Board's determination that groundwater monitoring regulations were unnecessary to protect groundwater from clean construction and demolition debris and uncontaminated soil fill operations was not arbitrary, capricious, or unreasonable.

¶ 2 In 2011, the Illinois Environmental Protection Agency (IEPA) proposed regulations to eliminate groundwater contamination purportedly caused by clean construction and demolition debris (CCDD) and uncontaminated soil fill (USF) operations. See Ill. Admin. Code § 1100. The proposed regulations included "front-end" material certification and testing mandates, as

well as "back-end" groundwater monitoring requirements. The Illinois Pollution Control Board (Board) amended and approved the IEPA's proposed front-end regulations; these regulations set maximum allowable concentrations (MACs) of certain substances in acceptable fill materials.

¶ 3 However, the Board rejected "Subpart G," the IEPA's back-end groundwater monitoring proposal. On August 6, 2015, after two docket proceedings, four hearings, and dozens of pre- and post-hearing public comments, the Board issued its final order rejecting Subpart G. Based upon the record, the Board concluded that back-end groundwater monitoring regulations were unnecessary; the newly-promulgated front-end screening regulations would adequately protect groundwater by regulating materials that fill operations could accept and deposit. The People of the State of Illinois, Will County, and Will County's Land Use Department object to the Board's decision; they seek review pursuant to Illinois Supreme Court Rule 335 (eff. Feb. 1, 1994) and the Illinois Environmental Protection Act (Act) (415 ILCS 5/29(a), 5/41(a) (West 2014)). For the reasons set forth below, we confirm the Board's determination.

¶ 4 BACKGROUND

¶ 5 CCDD and USF are the remnants of construction projects. Road, building, and landscaping construction projects, both public and private, generate soil, asphalt, bricks, concrete, and other construction materials that are eventually discarded. Fill operations are businesses that take these materials and deposit them in large quarries; the materials decompose over time. Fill operations do not add chemicals or otherwise alter the CCDD and USF materials received—they exist in the quarries just as they existed elsewhere in buildings, roads, or soil. Operators fill water into the quarries. If the deposited CCDD and USF materials contain certain contaminants or certain amounts of contaminants, these contaminants may "leach" into the water pumped through the quarries.

¶ 6 The General Assembly first recognized CCDD in 1997; it amended the Act to distinguish "general" and "clean" construction and demolition debris materials (Public Act 90-475 (eff. Aug. 17, 1997)). The amendment defined clean materials (CCDD) as "uncontaminated broken concrete without protruding metal bars, bricks, rock, stone, reclaimed asphalt pavement, or soil generated from construction or demolition activities." 415 ILCS 5/3.78a (West 2000); see also 415 ILCS 5/3.160(b) (West 2014). Public Act 90-475 also declared that CCDD was not considered "waste" if used as fill material and deposited below grade either under a road or structure or in a manner that supported vegetation. *Id.*

¶ 7 Months later, Public Act 90-344 (eff. Jan. 1, 1998) amended the Act to require CCDD fill site operators, haulers, and generators to maintain dated records describing the volumes and sources of the materials received, hauled, or generated. See 415 ILCS 5/21(w) (West 2000). Public Act 90-344 meant to deter fill site operators from accepting waste materials instead of clean fill.

¶ 8 In 2005, Public Act 94-272 (eff. July 19, 2005)) amended the Act by requiring CCDD and USF site operators to obtain permits from the IEPA; the amendment also instructed the IEPA to propose, and the Board to promulgate, regulations concerning acceptable standards and uses for CCDD and USF at fill sites. See 415 ILCS 5/22.51(c) (West 2006). In 2006, the Board promulgated formal CCDD disposal regulations at Part 1100 of the Administrative Code (35 Ill. Admin. Code § 1100). Under these regulations, fill site operators were required, for the first time, to visually inspect and test CCDD materials with photo ionization detectors (PIDs) or similar devices to ensure accepted materials were "clean" or "uncontaminated."

¶ 9 In 2010, the General Assembly passed Public Act 96-1416 (eff. July 30, 2010), which defined "uncontaminated soil fill" as soil from construction projects that does not contain

contaminants harmful to human health or the environment. 415 ILCS 5/3.160(c) (West 2014). The Board subsequently set MACs for certain substances commonly found in USF. 35 Ill. Admin. Code § 1100.605. Public Act 96-1416 also directed the IEPA to propose, and the Board to promulgate, regulations that protect groundwater from CCDD and USF fill operations. 415 ILCS 5/22.51(f)(1), 22.51a(d)(1) (West 2010).

¶ 10 I. Proposed Regulations

¶ 11 In 2011, the IEPA initiated the rulemaking proceedings at issue in accordance with Public Act 96-1416. The Act authorizes the IEPA to propose regulations (415 ILCS 5/4 (West 2014)) but delegates final rulemaking authority to the Board (415 ILCS 5/5(c), 5/28 (West 2014)). The Board operates as a "science court." Each of the Board's five members is appointed by the governor, with the advice and consent of the senate, and must be qualified with verifiable experience in pollution control. 415 ILCS 5/5(a) (West 2014).

¶ 12 The IEPA's proposals included front-end regulations that increased CCDD and USF fill site operators' certification and screening requirements to ensure accepted fill materials were "clean" or "uncontaminated." The IEPA also proposed "Subpart G," a back-end groundwater monitoring requirement. Subpart G required site operators to build monitoring wells and annually monitor groundwater for contamination. Additionally, Subpart G required site operators to either show that discovered contamination was not related to fill operations or remediate any contamination exceeding the Board's MACs for potable resource groundwater (35 Ill. Admin. Code § 620.410).

¶ 13 As proposed, Subpart G was self-implementing; private site operators were not required to obtain an additional permit to monitor or report monitoring plans to the IEPA. Subpart G also proposed lifetime application, which included fill sites' operation, closure, post-closure

maintenance, and corrective action. However, sites that closed or entered post-closure maintenance within one year of Subpart G's effective date were excused from compliance. Sites engaged in dewatering were also excused from Subpart G's monitoring requirements until dewatering ended. However, dewatering is a temporary process—without water pumping into the quarries, the deposited materials will fill the quarries more quickly due to slower decomposition. Therefore, sites could not maintain dewatering permanently to avoid complying with Subpart G.

¶ 14 II. Base Docket and Initial Proceedings

¶ 15 On August 14, 2011, the Board, as it must under the Act (415 ILCS 5/27(b)(1) (West 2014)), asked the Department of Commerce and Economic Opportunity (DCEO) to study the proposed regulations' economic impact. The DCEO declined the Board's request. Nonetheless, pursuant to the Administrative Procedure Act (5 ILCS 100/5 *et seq.* (West 2014)), the Board held two hearings on the IEPA's proposed regulations prior to first notice; the first on September 26, 2011, the second on October 25 and 26, 2011.

¶ 16 In addition to hearing participants' testimony during these initial hearings, the Board invited comment on the DCEO's decision not to perform an economic impact study—generally, all parties expressed disappointment with the DCEO's decision. Despite the lack of an economic impact study, Subpart G's proponents asserted that groundwater monitoring was economically reasonable.

¶ 17 Will County and its Land Use Department advocated for Subpart G. By 2011, the IEPA had issued permits to 60 CCDD fill operations statewide. Although these sites were spread among 18 counties, 9 of the 60 CCDD sites operated within Will County and sat near major waterways such as the Des Plaines and Du Page Rivers. According to Will County, 71% of its

residents obtain their potable water supply "exclusively" from groundwater running through shallow bedrock aquifers, which are susceptible to contamination from CCDD and USF fill operations.

¶ 18 Both Will County and the IEPA argued that fill site operators have historically ignored regulations. Although the IEPA admitted at the September 26 hearing that operators' compliance with the proposed front-end regulations would negate the need for groundwater monitoring, both the IEPA and Will County assumed that operators—either by mistake or intent—would not regularly comply with the front-end regulations. Therefore, Subpart G offered a necessary check on operators by providing a means of exposing their failures to comply with the front-end regulations.

¶ 19 Advocates for Subpart G also suggested that materials deposited in fill sites' quarries before 2011 present "a clear and present danger" to groundwater. CCDD and USF fill site operators were effectively unregulated prior to 2005 and, according to the IEPA and Will County, insufficiently regulated until these rulemaking proceedings. According to the IEPA and Will County, unknown contaminants from these older, unregulated materials may migrate into the aquifers. Front-end regulations do nothing to address the threat posed by these older materials.

¶ 20 Will County and the IEPA also noted that reclaimed asphalt (a material within CCDD's definition under the Act) contains constituent polynuclear aromatic hydrocarbons (PNAs). PNAs are carcinogens that could, if leached from the asphalt, contaminate the potable groundwater supply. Participants in these rulemaking proceedings disagreed as to whether PNAs can, in fact, be leached from the asphalt. Subpart G's opponents advocated that asphalt is nonleachable and inert; therefore, water passing through asphalt fill would not acquire its constituent PNAs.

¶ 21 All participants agreed that CCDD and USF fill operations provide a significant public benefit. Site operations are subject to state regulations and agency oversight. Alternative methods to dispose of CCDD and USF are neither environmentally safe nor cost-effective. Without fill site operations, CCDD and USF materials would be dumped haphazardly at unregulated sites or placed in landfills at a drastically higher cost to taxpayers and private entities.

¶ 22 On February 2, 2012, the Board published its first notice opinion in the *Illinois Register*. The Board adopted most of the IEPA's proposed regulations; in fact, the Board published more stringent front-end screening, testing, and certification measures than the IEPA proposed. However, the Board rejected Subpart G. According to the Board, the front-end regulations ensured that deposited materials would not contaminate groundwater; Subpart G proposed a costly measure that offered little or no environmental benefit. To this end, the Board opined that Subpart G's proponents did not provide sufficient evidence to show CCDD and USF materials that comply with the front-end regulations threaten groundwater.

¶ 23 The Board held another two-day hearing on March 13 and 14, 2012. The IEPA urged the Board to reconsider Subpart G. The Board "remained unconvinced" that groundwater monitoring was necessary to prevent contamination. According to the Board, the record indicated that front-end certification and screening regulations were sufficient to protect groundwater.

¶ 24 On June 7, 2012, the Board issued its second notice opinion and order, which again rejected Subpart G. The Board found that its authority included adopting rules based on policy objectives, including the nature of the pollution issue, the risk implicated, and the "technical feasibility and economic reasonableness of measuring or reducing the particular type of

pollution." 415 ILCS 5/27(a) (West 2014). Moreover, the Board found that the Act's mandate to protect groundwater at CCDD and USF fill sites (415 ILCS 5/22.51(f)(1), 22.51a(d)(1) (West 2014)) did not require groundwater monitoring regulations. Finally, the Board found that the front-end certification and screening regulations adequately protected groundwater, as required by the Act (415 ILCS 5/22.51, 22.51a (West 2014)).

¶ 25 The Board declined to impose "costly" monitoring and remediation regulations upon site operators to address purported contamination problems that "the record [did] not support." The record did not show that compliant CCDD and USF materials pose a threat to groundwater. Nor was Subpart G, in the Board's estimation, economically reasonable; operators would bear large costs or be forced out of business in exchange for an unknown environmental benefit.

¶ 26 On August 14, 2012, the Joint Committee on Administrative Rules (JCAR) issued a certificate of no objection to the Board's proposed regulations. However, JCAR also recommended that the Board "give further consideration to whether groundwater monitoring should be required." On August 23, 2012, the Board adopted the rule as proposed to JCAR. However, the Board followed JCAR's recommendation and opened "subdocket B" to further consider Subpart G in separate proceedings.

¶ 27 III. Subdocket B Proceedings

¶ 28 Within subdocket B, the Board included "all the comments, testimony, and filings" from the base docket. Then, on September 21, 2012, subdocket B's hearing officer opened a pre-hearing public comment period to more thoroughly address issues debated in the base docket regarding Subpart G. The Board fielded over a dozen comments during this initial comment period.

¶ 29 A. Prehearing Public Comments

¶ 30 Will County officials, in favor of Subpart G, asserted that no groundwater contamination evidence existed because no data had been collected; Will County believed that a study would show groundwater contamination attributable to fill site operations. Without Subpart G, Will County believed that operators would perpetuate this suspected groundwater contamination by ignoring the front-end regulations and accepting noncompliant materials. Will County also argued that Subpart G's costs to operators would be "incidental" compared to remediation costs and costs associated with citizens' exposure to contaminated groundwater.

¶ 31 Will County hired Michael Crutcher, a licensed engineer and hydrogeologist, to analyze Subpart G's potential costs. Crutcher determined that groundwater monitoring costs would total $58,048 over a site's 3-year lifespan, and $1,036,389 over a 33-year lifespan; this total cost amounted to $.06 to $.16 per cubic yard of accepted material—sites charge "tipping fees" between $4.50 and $5 per cubic yard. In addition to the annual monitoring costs, Crutcher estimated that site operators would spend $156,399 to install four monitoring wells. Based on Crutcher's findings, Will County concluded that these costs could easily be recaptured by slight increases in operators' tipping fees.

¶ 32 Several environmental agencies and associations also favored Subpart G. The Illinois Nature Preserve Commission (INPC) stated that fill site operations could compromise several nature preserves' water supply. Similarly, the Will County Forest Preserve District stated that site operations could jeopardize sensitive habitats within local nature preserves. Moreover, the District stated that most Will County communities rely upon groundwater as their potable water source; therefore, Subpart G's costs to operators were relatively small compared to ensuring clean water for Will County citizens. Finally, Citizens Against Ruining the Environment (CARE) contended that, because the sites quarries are unlined, contaminants would inevitably

accumulate and migrate into the water supply unless site operators perfectly complied with the front-end regulations—CARE believed perfect compliance to be unrealistic.

¶ 33 The IEPA and the People characterized Subpart G as "the single most important measure for achieving groundwater protection." The IEPA stated that front-end regulations would achieve "limited effectiveness" without back-end monitoring; site operators would have no incentive to comply with front-end regulations without Subpart G exposing operators' noncompliance through monitoring. Further, the People contended that front-end regulations without Subpart G do nothing to address current contamination or contaminated materials deposited before these rulemaking proceedings.

¶ 34 The IEPA and the People also argued that Subpart G's costs were reasonable. The People characterized Subpart G's costs as "insignificant." The IEPA deemed monitoring costs small compared to potential remediation costs, which are "inherently expensive." The IEPA calculated that the cost of a monitoring design and well installation would amount to less than $.12 per cubic yard over 10 years for 96% percent of sites, and less than $.52 per cubic yard over the same period for 99% of sites. Although these estimations seem insignificant, they amount to a 2.5% to 11.5% tipping fee increase for 10 years, not counting costs increases unrelated to Subpart G.

¶ 35 Springfield's City Water, Light, and Power stated that Subpart G was unnecessary and could force site operators out of business, force price increases, and needlessly direct non-contaminated materials to more expensive landfills. Springfield also expressed extreme disappointment with the DCEO's decision not to perform an economic impact study; interested parties had no way to determine Subpart G's costs to operators, effect on the industry, or eventual costs to taxpayers if operators shut down rather than complying with Subpart G.

¶ 36 The Land Reclamation and Recycling Association (LRRA), a fill site association, also disfavored Subpart G. The LRRA contended that Subpart G would require eight monitoring wells, rather than four, at each fill site. Based upon a member fill site's recent monitoring well installation, the LRRA estimated that developing a groundwater flow model and installing eight wells would cost sites over $470,000—three times Will County and the IEPA's estimations. The IEPA rebutted that groundwater flow models are, in most cases, unnecessary; the IEPA also maintained that sites would need only four wells to adequately monitor groundwater.

¶ 37 The LRRA also cited water sampling data from a member fill site, Reliable Lyons. Reliable Lyons stored CCDD fill in a 275-foot quarry; the operator installed a groundwater collection system at the bottom of this quarry. Over several years prior to the study, Reliable Lyons accepted over six million cubic yards of CCDD. Water pumped from Reliable Lyons' site into the Des Plaines River contained no contamination exceeding the Board's potable water supply MACs. Although advocates for Subpart G contended that Reliable Lyons' water samples were diluted, and therefore inaccurate, the LRRA estimated that approximately 43% of the sampled groundwater came in direct contact with CCDD materials.

¶ 38 Finally, the Illinois Transportation Coalition (ITC) stated that groundwater was adequately protected by "regulating the quality of CCDD" with front-end certification and screening. The ITC noted two types of costs associated with Subpart G; known capital and operating costs and unknown costs. Site operators were concerned with the unknown, but undoubtedly substantial, unknown costs that Subpart G could impose, such as remediation costs. Further, the ITC pointed out that groundwater monitoring could uncover contamination from pre-regulation practices. Therefore, Subpart G could place operators on the hook for millions of

dollars in remediation costs without evidence that the operators violated a single regulation, past or present.

¶ 39 B. Subdocket B Hearing

¶ 40 On May 30, 2013, the Board held its subdocket B hearing. Many of the same participants who provided prehearing comments testified at the hearing. Will County's expert geologist, Stuart Cravens, testified that CCDD and USF contaminants could migrate more than 10 feet per day through an aquifer. He also opined that PIDs and other tools used to certify, screen, or inspect materials before deposit were unreliable in detecting PNAs and semi-volatile organic contaminants found in asphalt and other forms of CCDD.

¶ 41 Assistant Attorney General Stephen Sylvester, on the People's behalf, equated CCDD to "inert waste," which includes materials such as bricks, masonry, and concrete. The Board requires inert waste landfills to monitor leachates (liquid that has percolated through a solid and extracted, or "leached," some of its constituents) every six months and report these results to the IEPA. 35 Ill. Admin. Code § 811.206. Therefore, the People claimed that Subpart G was, in fact, too lax. As proposed, Subpart G was self-implementing and required annual, rather than semiannual, monitoring.

¶ 42 The People also cited data from a CCDD fill site near Lynwood, Illinois. The Lynwood site was not licensed by the IEPA, accepted noncompliant CCDD materials, and piled materials above grade. Test samples taken from the Lynwood site showed numerous MAC exceedances and prevalent groundwater contamination. The Lynwood site is now closed. Further, because the Lynwood site stored CCDD above grade, the materials constituted "waste" under the Act.

¶ 43 Subpart G's opponents argued that CCDD and USF materials are not "waste" or inert waste. By definition, CCDD and USF must be "clean" and "uncontaminated," respectively.

Moreover, licensed sites do not deposit or store materials above grade, as did the Lynwood site prior to closure. Thus, the material stored at these fill operations do not constitute "waste" under the Act.

¶ 44 Perhaps the most disputed issue surrounding Subpart G was its intended retroactive effect. The People testified that fill site operators' preregulation actions have contaminated or will contaminate groundwater near the sites. Subpart G required operators to finance remediation for any contamination related to fill operations, regardless of when the contamination occurred. James Huff, a professional geologist for the ITC, testified that Subpart G's intended retroactive effect was unfair to site owners and would likely devastate the industry. He advocated for monitoring baselines that would account for preexisting groundwater conditions; operators would be responsible for contamination exceeding the baseline levels rather than all prior contamination that may or may not be attributable to site operations or the current operators.

¶ 45 C. Posthearing Comments

¶ 46 By a hearing officer order on June 12, 2013, the Board invited posthearing comments before making its final determination. Site operators stated that they would be forced to reassess or close operations if the Board imposed Subpart G. One operator, VCNA Prairie, Inc., pointed out that taxpayers would ultimately bear the costs of fill sites closing. According to the Chicago Public Building Commission, CCDD and USF from a large construction project could be deposited in a fill site quarry for approximately $5.7 million; the same materials from the same project would cost approximately $20.6 million to deposit into a landfill. These price increases, if site operators shut down, would discourage public construction projects by increasing their costs to taxpayers.

¶ 47 John Henriksen from the IAAP also pointed out that the Act permits the Illinois Department of Transportation (IDOT) to deposit CCDD and USF from road projects into "clean fill dumps" or "borrow pits." See 415 ILCS 5/22.51(b)(4)(B) (West 2014). Subpart G, if promulgated, would not apply to borrow pits. In defense of the borrow pit rules, IDOT stated that it inspects the CCDD or USF before deposit to ensure the materials are "protective of human health and the environment and will not cause or contribute to groundwater contamination." Site operators took issue with Subpart G's implicit approval of IDOT's front-end inspection measures while Subpart G's advocates argued that back-end groundwater monitoring was indispensable to regulating private operators. The People and Will County claimed that Subpart G must apply to private operators because they are motivated by profit and, therefore, less likely than IDOT to comply with front-end regulations. The People also claimed that borrow pits are much smaller and have shorter lifespans than fill site quarries; "[i]t is, in large part, the size, depth and longevity of these [quarries] that pose risks to groundwater."

¶ 48 In their final comments, Subpart G advocates reiterated that site operators would continue to contaminate groundwater without back-end groundwater monitoring and remediation regulations. The IEPA cited groundwater sampling from 2012 in which it found pH level or MAC exceedances in 10 of 12 samples from various fill sites. The IEPA also cited an IAAP study showing PNA exceedances in 7 of 44 samples taken from three fill sites. Based on these studies, the IEPA argued that Subpart G's costs were reasonable compared to landfill costs, costs associated with groundwater contamination, and "present and future costs of the loss of groundwater resources." Will County's Land Use Department added that fill site operators could afford Subpart G's costs; Director Dean Olson cited a newspaper article reporting on a Will County CCDD fill site that sold for $17.7 million.

¶ 49 D. Subdocket B Opinion and Order

¶ 50 On August 6, 2015, the Board issued its subdocket B opinion and order, which rejected Subpart G. In coming to its decision, the Board considered the base docket, as well as subdocket B's hearing testimony, public comments, and posthearing comments. The Board remained "unconvinced that groundwater monitoring" was "required for the protection of groundwater." The Board also found that CCDD and USF do not constitute "waste" under the Act and should not be regulated like inert waste, as the People argued. Additionally, the Board pointed out that its new front-end regulations imposed "more stringent requirements" than those IDOT employs before depositing CCDD and USF materials into borrow pits. In sum, the Board believed in the front-end regulations' utility and found Subpart G's advocates failed to clearly demonstrate that licensed CCDD or USF fill sites, acting within the law, need to monitor groundwater. This appeal followed.

¶ 51 ANALYSIS

¶ 52 Rules adopted by the Board pursuant to its statutory authority (415 ILCS 5/27 (West 2014)) will stand unless shown to be arbitrary, capricious, or unreasonable. *Granite City Division of National Steel Co. v. Pollution Control Board*, 155 Ill. 2d 149, 162 (1993); *Celotex Corp. v. Pollution Control Board*, 94 Ill. 2d 107, 125 (1983). Because administrative agencies, like the Board, employ specific expertise in promulgating regulations, courts should hesitate to find agencies' regulations unreasonable. *Shell Oil Co. v. Pollution Control Board*, 37 Ill. App. 3d 264, 270-71 (1976).

¶ 53 In exercising its rulemaking authority, the Board performs a quasi-legislative function; therefore, the Board is not required to support its conclusions or opinions with any given quantum of evidence. *Granite City*, 155 Ill. 2d at 180. On review, courts do not "determine

whether the Board's action was wise, or even if it was the most reasonable based on the record." *Central Illinois Public Service Co. v. Pollution Control Board*, 116 Ill. 2d 397, 412 (1987).

¶ 54 Instead, the objecting party must prove that the Board's regulations are invalid, which is a high burden. See *Granite City*, 155 Ill. 2d at 180; *Illinois State Chamber of Commerce v. Pollution Control Board*, 177 Ill. App. 3d 923, 928 (1988). Relevant factors for determining whether an agency's rule is arbitrary, capricious, or unreasonable include whether the agency's decision relies upon factors that the legislature did not intend the agency to consider, entirely fails to consider an important aspect of the problem addressed, or offers an explanation that runs counter to the evidence presented—or one that is so implausible that it could not be ascribed to a difference in view or be the product of the Board's expertise. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 505-06 (1988); *Waste Management of Illinois, Inc. v. Pollution Control Board*, 231 Ill. App. 3d 278, 285 (1992). The People and Will County argue that all three considerations indicate the Board's decision to reject Subpart G was arbitrary, capricious, or unreasonable. We address each argument in turn.

¶ 55 I. Factors the Legislature Did Not Intend the Board to Consider

¶ 56 The People and Will County first argue that the Board "injected into the proceeding an unnecessary and inappropriate factor" by considering whether CCDD and USF constitute "waste" under the Act. Sections 22.51 and 22.51a (415 ILCS 5/22.51, 22.51a (West 2014)) direct the Board to promulgate regulations that apply to CCDD and USF operations; the regulations must protect groundwater. The objecting parties argue that whether CCDD and USF constitute "waste" is irrelevant to whether fill site operations have caused groundwater contamination or otherwise pose a threat to groundwater.

¶ 57 Will County argues that whether CCDD and USF materials are "waste" under the Act "has no bearing on whether the groundwater near [the fill sites] is contaminated." In fact, Will County suggests that the source of groundwater contamination is altogether irrelevant: "it makes no difference to the citizens of Will County if a contaminant came from CCDD or USF or some other source. Nor should it make a difference to the Board." According to Will County, the Illinois Constitution imposes a duty upon citizens to maintain a healthful environment for the benefit of this generation and future generations (Ill. Const. 1970, art. XI, § 1); thus, the Act requires the Board to approve Subpart G regardless of whether CCDD and USF constitute "waste."

¶ 58 Similarly, the People contend that the Board cannot promulgate rules to protect groundwater without addressing contamination that has occurred or may occur due to operators' past practices. The People claim that materials deposited before these proceedings threaten groundwater; these materials have purportedly caused groundwater contamination at fill sites and are likely to further contaminate groundwater over time.

¶ 59 The Board contends that Public Act 96-1416 (eff. July 30, 2010) ordered the Board to promulgate *prospective* regulations for CCDD and USF fill site operations, not to "detect and remediate historical contamination." Accordingly, whether CCDD and USF constitute "waste" under the Act is relevant to determining how the materials should be regulated moving forward.

¶ 60 Public Act 96-1416 amended the Act to require groundwater protection regulations specifically applicable to licensed CCDD and USF fill operations. 415 ILCS 5/22.51, 22.51a (West 2014). Section 22.51 requires the Board's CCDD groundwater protection regulations to include standards and procedures that "may include, but shall not be limited to" soil fill certification and testing, surface water runoff, liners or protective barriers, "monitoring

(including, but not limited to, groundwater monitoring)," corrective action, recordkeeping, reporting, closure and postclosure controls, location standards, and modifying existing permits. 415 ILCS 5/22.51(f)(1) (West 2014). Additionally, section 22.51a states that the Board's USF regulations "shall include *** testing and certification of soil used as fill material and requirements for recordkeeping." 415 ILCS 5/22.51a(d)(1) (West 2014).

¶ 61 Neither the People nor Will County argues that prospective regulations were not within the amendment's scope. Nor do the objecting parties challenge the Board's rulemaking authority or raise a question of statutory interpretation. Whether CCDD and USF constitute "waste" or "inert waste" is relevant to determining what prospective regulations are necessary to protect groundwater, as some of the Board's other regulations demonstrate (see, *e.g.*, 35 Ill. Admin. Code § 811.206).

¶ 62 We also note the People's disagreement with the Board's decision not to treat CCDD "as waste, even inert waste." During subdocket B proceedings, the People compared CCDD to inert waste in an effort to prove Subpart G's necessity. In fact, the People argued that Subpart G was too lax compared to the semiannual leachate monitoring requirements for inert waste landfills (35 Ill. Admin. Code § 811.206). The People equated, in purpose and effect, Subpart G to inert waste landfill regulations; thus, the Board had to consider whether CCDD and USF materials should be treated as "waste" or "inert waste."

¶ 63 We hold that whether CCDD and USF constitute "waste" was relevant to the Board's rulemaking determination, as indicated by the record. The Board's consideration of this factor, therefore, does not suggest its final determination was arbitrary, capricious, or unreasonable.

¶ 64 II. Failing to Consider Important Aspects of the Problem

¶ 65 The People and Will County next argue that the Board's decision was arbitrary, capricious, and unreasonable because it failed to consider site operators' prior actions that may pose a continuing threat to groundwater. The objecting parties suspect that materials deposited before these proceedings "present a clear and present danger to groundwater." They argue that the risk of pollution from preregulation materials was "obviously an 'important aspect' of the groundwater monitoring problem," which the Board ignored. They also argue that the Board failed to consider fill operators' history of "scoff-law" behavior that Subpart G aimed to rectify. We disagree.

¶ 66 The Board considered operators' past practices; it simply did not attribute as much weight to this issue as the People and Will County would have liked. During these proceedings, Subpart G's advocates provided lengthy testimony and comment regarding site operators' past practices and lack of adequate regulation. However, the Board "remained unconvinced" that compliant CCDD and USF pose contamination threats; the Board also found that "the record still does not provide indications of groundwater contamination at [licensed fill sites]." Further, the Board steadfastly maintained throughout both rulemaking dockets that Subpart G's potential effect, if any, did not justify its known and unknown costs to site operators.

¶ 67 Next, the People and Will County disagree as to whether cost was an important aspect of these proceedings that the Board failed to consider. The People argue that, because the Board did not address Subpart G's costs in its final order, the Board retreated from cost as a justification for rejecting Subpart G. Will County, on the other hand, admits that "cost [was] a compelling issue, and the pivotal issue for private industry." Thus, Will County claims that the Board's failure to address costs in its subdocket B order indicates it failed to consider an important aspect of the problem addressed in these proceedings.

¶ 68 The record indicates that the Board thoroughly investigated site operators' costs to comply with Subpart G. In fact, most of Subpart G's pushback addressed its costs to site operators and the corresponding industry effects. Moreover, the DCEO denied the Board's request for an economic impact study. The Board relied on participants' economic analyses. We do not find that the Board failed to consider costs altogether, as Will County suggests.

¶ 69 We also need not rely upon cost analysis to affirm the Board's determination. Participants in these proceedings provided more than enough information for the Board to make its decision. The record indicates that the Board considered all significant issues presented by the evidence. 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. We hold that the Board did not fail to consider any important aspect of protecting groundwater from CCDD and USF fill site operations.

¶ 70 III. Evidentiary Support for the Board's Determination

¶ 71 We reiterate that the Board exercised its quasi-legislative authority to promulgate pollution regulations during these proceedings. Accordingly, the Board's determinations were not required to be supported by any given quantum of evidence. *Granite City Division of National Steel Co.*, 155 Ill. 2d at 180. Despite this deferential standard, the Board's determination can be arbitrary, capricious, or unreasonable, if it runs completely counter to the evidence presented or is so implausible that reasonable minds could not disagree. See *Greer*, 122 Ill. 2d at 505-06; *Waste Management of Illinois, Inc.*, 231 Ill. App. 3d at 285.

¶ 72 The People and Will County argue that the Board's determination "runs counter to nearly all of the evidence presented." First, the objecting parties point to the IEPA and IAAP's sampling data, which purportedly showed contamination at several fill sites. They also highlight

data obtained from the now-closed Lynwood site. They argue that this evidence clearly demonstrates that CCDD and USF contaminates groundwater; therefore, the Board's decision to reject Subpart G was arbitrary, capricious, or unreasonable.

¶ 73 However, the Board points out that Reliable Lyons' data showed no contamination; Reliable Lyons is one of the largest fill site operations in Illinois. According to the Board, data from the Lynwood site, which operated in violation of the Act, and the IEPA's sampling data failed to demonstrate that CCDD and USF materials that complied with the new front-end regulations caused groundwater contamination. For the Board, the front-end regulations sufficiently protected groundwater; site operators' compliance with regulations were enforcement concerns outside the scope of these proceedings.

¶ 74 In further support of its opinion that front-end regulations adequately protected groundwater, the Board cited IDOT's borrow pit rules. The Board noted that borrow pits are not, and would not under Subpart G, be subject to groundwater monitoring requirements. The Board interpreted this omission to imply that front-end regulations, at least in some cases, were sufficient to protect groundwater.

¶ 75 The People and Will County claim that borrow pit rules do not support the Board's determination. Fill site quarries are larger, deeper, and have longer lifespans than borrow pits; the objecting parties argue that these distinguishing characteristics are why fill site operations threaten groundwater. Further, the objecting parties argue that Subpart G's back-end monitoring requirements check private operators' profit motivation; the IDOT does not utilize borrow pits for profit.

¶ 76 Regardless of the differences between borrow pits and fill site quarries, they hold the same materials—CCDD and USF. Thus, borrow pit rules are relevant, though perhaps not

dispositive, to how CCDD and USF can be safely discarded. The Board, not this court, utilizes its expertise and delegated authority to weigh the evidence presented during rulemaking proceedings. The Board's reference to borrow pit rules in its final order and opinion does not render its determination implausible or completely counter to the evidence presented.

¶ 77 We find that the Board's decision was adequately supported by the record of proceedings. Participants presented substantial evidence and testimony during multiple dockets, hearings, and public comment periods. According to the Board, Subpart G's proponents did not show that compliant CCDD and USF materials pose a threat to groundwater that justifies implementing Subpart G. Even without considering Subpart G's economic reasonableness, the thorough record sufficiently supported the Board's determination. Therefore, we cannot find the Board's determination to be arbitrary, capricious, or unreasonable. We confirm the Board's August 6, 2015, order.

¶ 78 CONCLUSION

¶ 79 For the foregoing reasons, the decision of the Illinois Pollution Control Board is confirmed.

¶ 80 Confirmed.

¶ 81 JUSTICE WRIGHT, dissenting.

¶ 82 Unlike my respected colleagues, I conclude the Board's decision to reject Subpart G, runs counter to the evidence and is so implausible that the Board's reasoning cannot be ascribed to a difference of viewpoints or the product of the Board's superior expertise. See *Greer v. Illinois Housing Development Authority,* 122 Ill. 2d 462, 506 (1988). The Board's conclusion, that front-end regulations are sufficient to provide prospective protection for groundwater, represents a result-driven theory that favors the industry without a sound evidentiary basis. I conclude the

Board's decision to reject Subpart G was not only arbitrary, capricious, and unreasonable but also contrary to the legislative directive of Public Act 96-1416.

¶ 83 I begin with a brief review of the reasonable parameters of Subpart G. Subpart G was proposed by the IEPA on July 29, 2011, in accordance with sections 22.51 and 22.51a of the Environmental Protection Act (415 ILCS 5/22.51, 22.51a (West 2010)). The IEPA's proposal for the amendment of the Board's rules is predicated on an assumption that there is a real risk for future contamination of groundwater located below quarries, mines and other excavations where disposal of CCDD and USF occurs. This real risk resulted in a legislative directive and is not subject to debate.

¶ 84 The proposed Subpart G allowed owners and operators of CCDD and USF fill operations to develop their own conservative and flexible approach to groundwater monitoring at each site. For example, the proposed Subpart G allowed owners and operators to determine the number of wells necessary to monitor groundwater at each site. Subpart G appears to contemplate a minimal amount of groundwater monitoring by merely requiring a "sufficient" number of wells at each site. The wells would be required to be installed at appropriate locations and depths to yield "[s]amples that represent the background groundwater quality;" and "[s]amples that represent the quality of groundwater that is downgradient from the fill operation or unit with respect to groundwater flow, including both horizontal and vertical directions, and that may be affected by constituents from the fill operation or unit."

¶ 85 In addition, Subpart G contains a rational requirement that a professional engineer should supervise the design and preparation of all groundwater monitoring systems, programs, and reports necessary to comply with the regulations. Importantly, Subpart G did not dictate the frequency of groundwater testing beyond the required annual sampling. I observe Subpart G took

into account the often expressed concerns of the industry by allowing owners and operators to chose the minimum number of wells necessary for each particular site based on the advice of a professional engineer selected by the owners and operators.

¶ 86 In addition, Subpart G allows a CCDD fill operation or a USF operation to completely avoid groundwater monitoring by using a dewatering process. Specifically, where dewatering is present and part of the operation, Subpart G permits the facility to delay compliance with these provisions until one year after the dewatering ceases. If dewatering continues, groundwater testing is obviated by that particular process onsite.

¶ 87 Further, the provisions of Subpart G are very generous to the industry because the provisions are self-implementing, meaning that owners and operators are not required to submit information to the IEPA unless the site's records reveal an exceedance exists in a groundwater sample collected by the site operator. Subpart G also contains procedures that allow an owner or operator to demonstrate that a detected exceedance resulted from natural phenomena, sampling or analysis errors, or an offsite source of contamination.

¶ 88 With these reasonable parameters of Subpart G in mind, the manifest weight of the evidence discussed below clearly reveals that there are serious gaps at every stage of the front-end screening process. I cannot uphold the Board's decision finding the front-end provisions are sufficient to protect groundwater because there is no reason to believe contamination now exists at these sites or will occur in the future. I hope the fallacy of the Board's rationale will become evident based upon the analysis of each front-end provision discussed separately below.

¶ 89 I. Certification Before Arrival at Fill Site

¶ 90 The front-end provisions require certification before the materials arrive at the fill site. According to the Illinois Association of Aggregate Producers, between August 2010 and

April 28, 2012, approximately 63% of the certifications for the disposal of materials at fill sites were self-certified by the source site originator. The weakness in the front-end requirements arises because the source site owner or operator is assigned the task of certifying that the soil destined for a fill site did not originate from a potentially impacted property. Once certified by the source site originator, presumably a layman employed by the source site, the regulations do not require this initial self-certification to be double-checked by a licensed professional engineer/licensed professional geologist (LPE/LPG) before the material arrives at the fill site. 35 Ill. Adm. Code 1100.205(a)(1)(A) (West 2014).

¶ 91 In other words, more than half of the materials actually delivered to a fill site are screened once by someone other than the site originator, and the second inspection occurs at the gates of the fill site operation that profits from accepting such loads. The certified soil does not undergo any analytical soil testing by a professional LPE/LPG for compliance with the MACs as required by section 1100.205(a)(1)(B). 35 Ill. Adm. Code 1100.205(a)(1)(B) (West 2014).

¶ 92 I agree with the IEPA's assumption that most original source site owners and operators will make a good faith effort to comply with the new rules. Yet, as the IEPA points out, accurately assessing whether a property has been potentially impacted is not a simple task and is subject to a strong likelihood of human error. Respectfully, I submit that source site originators may find it difficult, if not impossible, to hire, train, and retain reliable employees that are motivated to develop and exercise the necessary familiarity with complex legal, environmental and technical concepts necessary to become proficient at identifying potentially impacted properties.

¶ 93 I observe that only 37% of the loads that are not source site certified (as originating from a non-impacted property) will be inspected by a LPE/LPG. Hence, 37% of the material placed in

a fill site will be professionally inspected and certified as having a soil pH within the range of 6.25 to 9.0 and free of chemical constituents at levels above the MACs established under subpart F of Part 1100. 35 Ill. Adm. Code 1100.205(a)(1)(B) (West 2014). In my view, unless *all* loads are subject to certification by a LPE/LPG, 63% of the loads that are self-certified have a great risk for inadvertent noncompliance that will impact groundwater prospectively by inadvertent contamination – but contamination nonetheless.

¶ 94 Turning to the certifications provided by an LPE/LPG of soil from a potentially impacted property, these evaluations are inherently complex and necessarily involve the professional judgment of one person. Therefore, variations in the results of different professionals should be expected and materials one expert would reject may be overlooked by another professional with a less exacting approach. Hence, even the tighter front-end procedures for 37% of loads inspected by LPE/LPG professionals may potentially include some materials that are contaminated above the MACs. Again, inadvertent contamination is contamination nonetheless.

¶ 95 While the professional certification from potentially contaminated sites reduces the risks, it is not a perfect process. The Board's conclusion that front-end certification procedures actually provide adequate protection for groundwater is simply unsupported.

¶ 96 For example, the IEPA reviewed 417 rejection sheets received from fill operations for September 2012 through June 2013. The IEPA selected this time period for review because the strengthened certifications were in place at this time, after the effective date of the Part 1100 amendments on August 27, 2012. The IEPA found that 269 of the 417 loads rejected, or approximately 64.5%, were rejected due to high PID readings. Hence, a large portion of loads certified as safe by the original source operation undisputedly contained volatiles that pose a risk to groundwater.

¶ 97 Moreover, since the Part 1100 regulations became effective, the Illinois Attorney General has filed more than 11 enforcement actions against CCDD disposal owners and operators for violations of the regulatory standards. The Board ignored this evidence provided by the IEPA and the Illinois Attorney General.

¶ 98 Despite these undisputed facts, the Board's final decision fails to recognize the limited effectiveness of the front-end certification process. This limited effectiveness is attributable to the relatively certain component of human error that could occur before any particular load arrives at the disposal site.

¶ 99 II. Load Inspections at Fill Sites

¶ 100 The front-end provisions also require load-checking procedures by the disposal site. These load-checking procedures are contained in section 1100.205(b) and seem to represent an attempt to double-check the accuracy of the initial certification process. 35 Ill. Adm. Code 1100.205(b) (West 2014).

¶ 101 These double-checking procedures begin with a visual inspection of each load followed by the use of a PID by a person at the fill site. 35 Ill. Adm. Code 1100.205(b)(1)(A) (West 2014). Visual observations will only permit detection of the most obvious contaminants that are visible to the person inspecting a large load. The use of a PID is also not failproof. Even assuming the employee carefully operated the PID, the PID may detect some, but not all, of the camouflaged contaminants. For example, PIDs are designed to detect concentrations of certain organic and inorganic vapors in the air. However, the PIDs cannot detect most semi-volatile organic compounds (SVOCs), polynuclear aromatics (PNAs), and metals that place groundwater at great risk. Further, PIDs are also susceptible to human calibration errors and may be influenced by weather conditions, electrical fields or signals, or other unrelated sources. The fact that PIDs are

not a reliable indicator for the presence of cancer-causing PNAs is particularly concerning given that PNAs are present in asphalt, which is frequently delivered to CCDD sites.

¶ 102 Due to both human error and the weaknesses in the PID screening device, SVOCs, PNAs, and various metals, such as arsenic, iron, lead, nickel, and mercury, may slip though front-end checkpoints at fill sites. For these reasons, the Board's conclusion that front-end regulations are sufficient turns a blind eye to reality.

¶ 103 III. Exceptions

¶ 104 Next, I address the Board's justification to reject Subpart G because dewatering operations, borrow pits, and operations subject to impending closure, are exempt from the groundwater testing requirements. The Board rationalizes that since the IEPA created exceptions from groundwater testing for some operations, then no operations should be required to conduct mandated groundwater testing. However, the Board ignored many important differences between facilities subject to the exceptions and CCDD and USF sites subject to the regulations.

¶ 105 In support of the Board's decision to strike Subpart G, the Board relies on the fact the Reliable Lyons site did not show contamination in the dewatering process. I agree that samples obtained from the dewatering process at Reliable Lyons showed no evidence of groundwater contamination as a result of the fill operation. This fact supports the reasonable and rational provisions of Subpart G that recognize a dewatering process justifies the long-term exception for dewatering activities in Subpart G.

¶ 106 Turning to borrow pits for a moment, borrow pits are much smaller in scale and are more temporary than sites subject to Part 1100 rules. As the People argue, it is the large size, vast depths, and longevity of CCDD and USF sites that cause these sites to pose the greatest risk of groundwater contamination. There is also a tendency for contaminants to aggregate over long

periods of time, due to the large volume of materials compacted in the fill site. Many facilities subject to Part 1100 rules are also located in areas that are geologically susceptible to groundwater contamination and are within 2500 feet or less of hundreds of existing community water supply wells, non-community water supply wells, and private water wells. While borrow pits may pose some risk to groundwater, the risk is diminished by the direct oversight of the State regarding when borrow pits are needed.

¶ 107 Further, Subpart G does not apply to fill operations that have closed or certify they will close within one year after the effective date of the amendments establishing Subpart G. This consideration supports my conclusion that the proposed rules were designed to protect groundwater from a reasonable and restrained approach to prevent *ongoing* contamination, rather than remediation for past abuses. If a site is closed, the ongoing risk to groundwater is greatly reduced, if not eliminated.

¶ 108 Case law recognizes the Board is not required to choose between promulgating rules against all evils of the same kind, or not implementing any reasonable rules at all. See *Tometz v. Board of Education, Waukegan City School District No. 61*, 39 Ill. 2d 593, 601 (1968). On this basis, I conclude the Board was not justified in rejecting all groundwater testing because dewatering operations, borrow bits, and facilities that would be closing within a short time frame were excluded from ongoing groundwater testing requirements.

¶ 109 IV. No Proof of Existing Contamination

¶ 110 The Board also justified the decision to strike Subpart G from Part 1100 based on the Board's conclusion that no evidence conclusively established that groundwater contamination existed at sites regulated under Part 1100. In my view, this is the weakest, most irrational, and

arbitrarily flawed reasoning the Board provided to support a result-oriented decision to strike Subpart G as desired by the industry.

¶ 111 First, the legislative directive required the IEPA and the Board to act in a timely fashion by adopting rules designed to afford protection to groundwater. The Board was not assigned the task to decide if prospective groundwater protection was necessary in the first place.

¶ 112 Further, the fact that the industry was strongly opposed to any baseline testing on-site suggests to me that the industry is well aware of the growing risks of future groundwater contamination at preexisting fill site locations with ongoing disposal activities. To defeat groundwater testing pursuant to Subpart G, the fill site operators regulated under Part 1100 could have easily collected samples and voluntarily tested groundwater on-site to demonstrate to the Board during public comment periods that the quality of groundwater at any given site remained pristine. The absence of proof concerning the current well-being of groundwater at current fill sites is telling.

¶ 113 More importantly, the Board's suggestion that evidence of groundwater contamination at sites regulated under Part 1100 must be proven before the Board will adopt the IEPA's proposed regulations for groundwater monitoring is an inappropriate standard. This standard is inconsistent with the State's long-standing policy of taking a preventative approach to protecting groundwater from contamination and thereby preserving the State's groundwater resources. See 415 ILCS 55/2(b) (West 2014) (stating "it is the policy of the State of Illinois to restore, protect, and enhance the groundwaters of the State, as a natural and public resource.").

¶ 114 As the IEPA argues, "the reason there is no evidence either way is that, insofar as the Agency knows, no one has been looking for it." Under these circumstances, where there have been little or no investigations performed at CCDD and USF operations regulated under Part

1100, the Board should not have drawn any definitive conclusions from the lack of information about groundwater contamination at these sites.

¶ 115 In any event, with the benefit of hindsight, the sampling that has been performed by the IEPA since the new rules were enacted clearly demonstrates that the front-end provisions are inadequate. For example, the IEPA conducted sampling in late 2012 after the Board's adoption of the MACs. In this study, inspectors went to 12 sites and collected random samples of recently deposited surface soil from the active fill face at the sites. The soil was screened by using a PID or an x-ray fluoroscopy (XRF), or both, prior to selecting a location to collect a sample. The samples were sent to the IEPA's laboratory and analyzed for pH, metals, and semi-volatiles. The samples were not analyzed for volatiles because only surface samples were taken, and any volatiles at the surface were expected to have evaporated. The results showed that at 10 of the 12 sites sampled, exceedances of the MACs were found. In particular, exceedances of cadmium, iron, aluminum, chromium, lead, magnesium, manganese, and benzo(a)pyrene were all detected. Further, the pH level of a sample at one site was above the acceptable range. Based on these results, it is clear that even with the new front-end provisions in effect, soils with contaminant levels above the MACs will nonetheless be accepted at fill sites.

¶ 116 I disagree that the history of the Lynwood site supports the Board's decision to reject Subpart G. In November of 2012, the first round of groundwater samples were collected from nine monitoring wells installed around the Lynwood site. The 2012 results showed exceedances of the 35 Ill. Adm. Code 620 Class I groundwater quality standards for arsenic, iron, lead, and manganese. Furthermore, one of the nine monitoring wells was installed directly into the filled area of the site and, therefore, was in direct contact with the fill. This particular well showed exceedances of the section 620 groundwater standards for three metals (iron, lead, and

manganese) and eight semi-volatile organic chemicals (Benzo(a)anthracene, Benzo(a)pyrene, Benzo(b)fluoranthene, Chrysene, Benzo(k)fluoranthene, Indeno(1,2,3-cd)pyrene, Dibenzo(a,h)anthracene, and Bis(2-ethylhexyl)phthalate). The Board's August 6, 2015, opinion simply ignored the results of the 2012 testing at the Lynwood site that demonstrated the existing and obvious dangers CCDD sites can pose to groundwater.

¶ 117 V. Costs

¶ 118 Although the Board's final decision issued on August 6, 2015, did not expressly address the costs of installing and operating a groundwater monitoring system, the Board addressed this issue in an earlier opinion and order, dated February 2, 2012. In that decision, the Board stated, "considering the potentially sizeable costs for groundwater monitoring, the Board finds that this record does not support groundwater monitoring at this time."

¶ 119 The evidence in this extensive record clearly contradicts the Board's conclusion that excessive costs, associated with the installation of groundwater monitoring wells, justify the rejection of Subpart G. Here, the record shows that current tipping fees of approximately $5 per cubic yard could be increased by as much as 16 cents per cubic yard if the site owner passes on the cost to the originator. This represents approximately 3 cents on each dollar paid for disposal. The Chicago Public Building Commission stated the estimated cost to deposit materials in a fill site quarry for a large construction project would equal $5.7 million. Thus, the implementation of groundwater monitoring would increase the cost of disposal of materials from a large construction project by merely $171,000. Considering that it would cost $20.6 million to deposit the materials from a large construction site in Chicago in a land fill, I find the cost considerations to the industry to be inconsequential. Moreover, the evidence in the record demonstrates that the potential costs that could be passed on to the consumer are relatively low, particularly when

balanced against the cost to society that arises from the delayed detection of contaminated groundwater.

¶ 120 The record contains the *unsupported* claims or threats of industry members that the costs of installing and implementing a groundwater monitoring system will drive them out of business. Interestingly, the record reveals that a Will County CCDD site sold for $17.7 million in 2008. Even if a site owner elects to sell the business, such sites have great market value for others hoping to enter into the same business endeavor.

¶ 121 Respectfully, I submit it is the prohibitive costs of correcting any contamination detected after the implementation of Subpart G, rather than the costs of groundwater testing, that could cause fill sites to close their gates. If a handful of concerned industry members close their sites all together, the risk of prospective groundwater contamination from those sites are eliminated. Moreover, there are a large number of CCDD sites in Will County alone and the record suggests the remaining operational CCDD sites in Will County could accommodate the closure of multiple competing CCDD facilities.

¶ 122 The Board's front-end rules serve the purpose of superficially complying with a legislative mandate to protect groundwater while affording the greatest protection to business interests that do not wish to have the costs of remediation reduce profits. Without groundwater testing on-site, the site operators are at less risk of being traced as the source of contamination for purposes of sharing the costs of remediation.

¶ 123 Here, the front-end rules significantly delay the discovery of contaminants in the groundwater until the contaminants reach a water treatment facility or other location where groundwater is tested. Due to this delay attributable to the deletion of Subpart G, the risk of tracing the original source of contamination back to either site operators or material originators is

significantly reduced by other intervening environmental factors and the passage of time. As it stands, prospective groundwater contamination will only be discovered through the testing of drinking water by private and public entities. Once contamination is detected at local wells or water treatment facilities, it may be impossible to identify the source of the contamination. Thus, homeowners and other taxpayers may be left with the bill for expensive remediation costs.

¶ 124 For many years, the industry had minimal regulations that may have resulted in prior contamination with little assignable blame. The industry would like to continue this trend. For purposes of this dissent, I recognize that the industry has expressed a strong resistance to the adoption of groundwater monitoring regulations because there is a significant likelihood that historical contamination, attributable to prior unregulated activities, exists on numerous CCDD sites.

¶ 125 The Board has arbitrarily placed the industry's financial interests above public interests because a viable compromise was suggested during the testimony of James E. Huff, a professional geologist for the ITC. Huff established that historical contamination could be addressed with a "baseline approach" to the condition of groundwater that considers preexisting levels of contaminants from prior operations. Such an approach would "grandfather in" historical impacts and hold current site owners and operators accountable to correct or remediate only the damage to groundwater from new impacts. Under this approach, fill site owners and operators would be required to remediate only if there is a statistically significant change in groundwater quality at a site *after* implementation of Subpart G. However, the Board ignored this rational solution and provided reasons for the Board's conclusion to avoid groundwater testing that were arbitrary and contrary to the evidence submitted to the Board.

¶ 126 According to the record, it is undisputed that approximately 71% of Will County residents rely exclusively on groundwater sources for their potable water supply. Without groundwater monitoring, there will be no mechanism to make an early discovery of groundwater contamination before the groundwater is processed for human consumption at various sites in Will County. Once contaminated groundwater reaches points where it will be treated to become a potable resource for public consumption, the original source of contamination will be more difficult to locate. 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.

¶ 127 I conclude the People and Will County have met the onerous burden of demonstrating to this court that the Board's decision to reject the IEPA's proposal for groundwater monitoring, in some form, as a part of the Part 1100 rules, was arbitrary and capricious and against the manifest weight of the evidence presented to the Board. Accordingly, I would reverse the Board's rulemaking and remand this matter to the Board with directions to incorporate some form of groundwater monitoring procedures and corrective action, if necessary, in the Part 1100 regulations.

¶ 128 For these reasons, I respectfully dissent from the majority's decision to affirm the Board's August 6, 2015, opinion and order.