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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PROPOSED AMENDMENTS TO CLEAN	)	
CONSTRUCTION OR DEMOLITION	)	R 2012-009
DEBRIS (CCDD) FILL OPERATIONS:	)	(Rulemaking - Land)
PROPOSED AMENDMENTS TO 35 Ill.	)	
Adm. Code 1100	)	

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that I have electronically filed today with the Illinois Pollution Control Board the Illinois Attorney General's Office's Pre-filed Testimony on the Illinois Pollution Control Board's First Notice Proposal, a copy of which is hereby served upon you.

Dated: March 5, 2011

Respectfully submitted,

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General of the State of Illinois

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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PROPOSED AMENDMENTS TO CLEAN	)	
CONSTRUCTION OR DEMOLITION	)	R 2012-009
DEBRIS (CCDD) FILL OPERATIONS:	)	(Rulemaking - Land)
PROPOSED AMENDMENTS TO 35 Ill.	)	
Adm. Code 1100	)	

PRE-FILED TESTIMONY OF THE ATTORNEY GENERAL'S OFFICE, ON THE POLLUTION CONTROL BOARD'S FIRST NOTICE PROPOSAL

The Illinois Attorney General's Office on behalf of the People of the State of Illinois ("People") hereby files its testimony directed to the Illinois Pollution Control Board ("Board") in this matter, as provided by the Hearing Officer Order issued on February 15, 2012.

I. INTRODUCTION AND SUMMARY OF TESTIMONY

A. The Attorney General Is The Chief Legal Officer Of The State Of Illinois And Its Agencies And Is Obligated To Represent The Interests Of The People In Ensuring Their Right To A Healthful Environment.

The Attorney General is the chief legal officer of the State of Illinois and the Attorney General has an obligation to represent the interests of the People so as to ensure a healthful environment for all the citizens of the State. Ill. Const. 1970, art. V, § 15; *People v. NL Industries*, 152 Ill.2d 82, 103 (1992); *see also Pioneer Processing, Inc. v. E.P.A.*, 102 Ill.2d 119, 137 (1984) (Attorney General is the chief legal officer of the State and its departments and agencies). The Attorney General's obligations include ensuring that waste and clean construction or demolition debris ("CCDD") are disposed of properly, *see* 415 ILCS 5/21 and 22.51 (2010), and that waters of the State of Illinois, including groundwater are not threatened by water pollution. 415 ILCS 5/12(a) and (d) (2010).

The People's pre-filed testimony is given in response to the Board's February 2, 2012 Opinion and Order and focuses primarily on the Board's decision to eliminate any groundwater

monitoring requirements for CCDD fill operations. In addition, the People reiterate the concerns raised in their December 2, 2012 Comments to the Board in this proceeding, which remain unaddressed, including the following:

> 1) the Proposed Part 1100 CCDD Regulations must actually promote the purposes of the Act, as expressed in Section 2(b): to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them. 415 ILCS 5/2(b) (2010); *Town & Country Utilities, Inc. v. Illinois Pollution Control Bd.*, 225 Ill.2d 103, 107 (2007);
>
> 2) various classes of materials that pose the same or similar risks to public health, safety and the environment must be regulated in a consistent manner; these Proposed Part 1100 CCDD Regulations should be at least as comprehensive and protective as the regulations previously adopted by the Board for the disposal of inert wastes; and
>
> 3) the Part 1100 CCDD Regulations, which the Board ultimately adopts, must be enforceable to ensure that those persons who choose not to abide or comply with them, will be, in fact, held accountable for their actions.

In addition as part of the People's pre-filed testimony, they concur with the pre-filed testimony provided by Richard P. Cobb, a licensed professional geologist, Deputy Manager of the Division of Public Water Supplies for the Illinois Environmental Protection Agency's ("Illinois EPA") Bureau of Water.

For the reasons discussed below, the regulatory approach proposed by the Board fails to effectively protect the People and the environment from the inadvertent, negligent, or intentional misuse of construction or demolition debris as fill material because the Board fails to employ the longstanding, traditional checks and balances normally associated with regulating disposal operations. Accordingly, the People respectfully request that the Board reconsider its stance on groundwater monitoring for CCDD fill operations, and, at a minimum, adopt the Illinois EPA's previously proposed "Subpart G: Groundwater Monitoring" for Second Notice.

II. SUMMARY OF PEOPLE'S TESTIMONY

The Need for Groundwater Monitoring Is Supported By The Legislative Directives Adopted By the General Assembly, Past Regulatory and Quasi-Judicial Actions Of the Board, and Necessary Enforcement Efforts Initiated by the Illinois EPA and Attorney General's Office.

In its February 2, 2012 Order, the Board set forth its rationale for eliminating groundwater monitoring.

> The Board notes that the record does not include evidence to demonstrate that CCDD or uncontaminated soil sites are a source of groundwater contamination. . . . . *CCDD and uncontaminated soils are not classified as wastes*, so do not require the stringent rules that exist for nonhazardous waste landfills. Therefore, the Board finds that this record does not support groundwater monitoring at this time.

February 2, 2012 Board Order at p. 57 (*Emphasis added*). For the following reasons, the findings and conclusions are erroneous.

First, the Board's decision not to require groundwater monitoring is inconsistent with the General Assembly's mandate and the State's long-standing policy based on the prevention of groundwater contamination and preservation of the State's groundwater resources for current and future beneficial uses.

Second, CCDD has always been and continues to be a waste, unless (to the extent permitted by federal law) it meets one of the use exceptions provided in Section 3.160(b) of the Act, 415 ILCS 5/3.160(b) (2101). Moreover, CCDD is at a minimum "inert waste" and may also be considered a "chemical waste," as defined in Section 810.103 of the Board Waste Disposal Regulations. 35 Ill. Adm. Code 810.103. Moreover, the General Assembly directed the Board to consider the same protections required of nonhazardous landfills, namely: requirements for "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, [and] financial assurance. . . ." *See* 415 ILCS 5/22.51(f)(1) (2010).

Third, as to the Board's finding regarding evidence of contamination, neither the General Assembly nor the Board directed the Illinois EPA or any other State agency to conduct a study on groundwater contamination from CCDD or uncontaminated fill sites and should not be surprised by the lack of data provided during the public hearings.[1] This is especially true since CCDD facilities have not previously been required to provide any such data and there is an obvious regulatory disincentive for the owners/operators to conduct such studies. Moreover, as discussed below, the record was not devoid of evidence of groundwater contamination from CCDD fill operations.

Fourth, the notion that regulations prevent unwanted materials from finding their ways into permitted disposal sites is easily dispelled by the examples provided below in which even highly regulated landfills ended up accepting materials for which they were not permitted.

Fifth, with regard to the regulation of CCDD, in the relatively short time that the Part 1100 regulations have been in effect, there have been a number of instances where enforcement action has been initiated for regulatory violations that call into question the ability to determine the nature of materials accepted by the facility.

If there was ever an instance where the adage "an ounce of prevention is worth a pound of cure," it is in the area of groundwater protection. All CCDD and clean soil fill operations have the potential to contaminate the State's groundwater. The Board's action to require analytical data to accompany soil certifications only for so-called potentially impacted properties (*see* February 2, 2012 Board Order at p. 63), along with the relaxed requirement of merely

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[1] Section 5(e) of the Act gives the Board the authority n connection with any proceeding pursuant to subsection (b) or (d) of this Section to subpoena and compel the attendance of witnesses and the production of evidence reasonably necessary to resolution of the matter under consideration. 415 ILCS 5/5(e) (2010).

checking only one incoming load of CCDD per day,[2] falls short of the General Assembly's mandate that the Board adopt rules to protect the State's groundwater. Accordingly, the Board should adopt a more comprehensive approach in protecting the State's groundwater and therefore require groundwater monitoring and, as appropriate, corrective action for these facilities.

1. The Illinois Constitution Mandates that the General Assembly Enact Laws to Provide and Maintain A Healthful Environment, Which Includes The Protection Of State Groundwater.

Article XI, Section 1, of the Illinois Constitution, IL. CONST. ART. XI, Sec. 1, provides as follows:

> The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.

The General Assembly provided for the implementation and enforcement of this provision of the Constitution by enacting of Sections 2, 11, 12, 20 and 22.51 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/2, 11, 12, 20 and 22.51 (2010), as well as its enactment of the Illinois Groundwater Protection Act, 415 ILCS 55/1 *et seq.* (2010).

A. In 2005, The General Assembly Enacted Section 22.51 Which Required CCDD Fill Operations To Be Permitted By The Illinois EPA And The Board To Promulgate Regulations.

Section 22.51 of the Act, was created by Public Act P.A. 94-272, § 10, which became effective on July 19, 2005. Section 22.51 initially required authorization and thereafter a permit from the Illinois EPA to operate a CCDD fill site. In addition, Section 22.51(c)(1) required the Illinois EPA to propose and the Board to adopt regulations by September 1, 2006. 415 ILCS 5/22.51(c)(1) (2006).

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[2] The requirement to inspect each incoming load of CCDD with photo ionization detector ("PID") was replaced by the new soil certification requirements.

The General Assembly clearly recognized that there was a need for regulatory oversight of CCDD fill operations and expressed its concern that non-CCDD was potentially being disposed of at CCDD fill sites.[3] This is evident in the General Assembly's mandate that each incoming truckload of CCDD be screened with a photo ionization detector ("PID") for the presence of volatile organic chemicals ("VOCs"). As discussed below, there have been several enforcement cases involving CCDD fill operations, where the operators were allegedly failing to comply with the Section 22.51 of the Act and the Board's Part 1100 CCDD Regulations.

B. In 2010, The General Assembly Amended Section 22.51 And Required The Illinois EPA To Propose And The Board To Adopt Regulations To Protect The State's Groundwater.

Section 22.51 of the Act was amended by Public Act 096-1416, which became effective on July 30, 2010. Section 22.51(f)(1) contains the General Assembly's position on the Part 1100 Rulemaking:

> (f)(1) ... *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(f)(1) (2010) (*Emphasis added*).

The Illinois EPA was created by the Act and charged with carrying out its purposes. 415 ILCS 5/4 (2010). Section 22.51(f)(1) required the Illinois EPA to propose rules to the Board to ensure the protection of the State's groundwater, which it attempted to do on July 29, 2011. As

[3] In 1997, the General Assembly adopted a new definition for CCDD in §3.78 (*See*, P.A. 90-475), which essentially provided that to the extent provided by federal law CCDD could be disposed of without any regulations in place or requirement for an Illinois EPA-issued permit.

part of the Illinois EPA's proposal, in Subpart G, it set forth rules for groundwater monitoring of CCDD fill operations, along with a limited program of corrective actions. The People in their October 17, 2011 pre-filed questions to the Illinois EPA, at the October 25 and 26, 2011 public hearings, and in their December 2, 2011 public comment advocated that the Board adopt a more comprehensive approach to protecting the State's groundwater, including at a minimum groundwater monitoring and timely corrective action to address any negative impacts to groundwater of CCDD fill operations . The People remain committed to this position.

C. The General Assembly Has Consistently Required Protection Of The State's Groundwater.

The General Assembly set forth its findings and public policy regarding pollution of the State's waters, including groundwater, in Section 11 of the Act.

a) The General Assembly finds:

(1) that pollution of the waters of this State constitutes a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish, and aquatic life, impairs domestic, agricultural, industrial, recreational, and other legitimate beneficial uses of water, depresses property values, and offends the senses;

* * *

(4) *that it would be inappropriate and misleading for the State of Illinois to issue permits to contaminant sources subject to such federal law, as well as State law, which do not contain such terms and conditions as are required by federal law, or the issuance of which is contrary to federal law*;

* * *

b) It is the purpose of this Title *to restore, maintain and enhance the purity of the waters of this State in order to protect health, welfare, property, and the quality of life, and to assure that no contaminants are discharged into the waters of the State*, as defined herein, including, but not limited to, waters to any sewage works, or into any well, or from any source within the State of Illinois, *without being given the degree of treatment or control necessary to prevent pollution, or without being made subject to such conditions as are required to achieve and maintain compliance with State and federal law*; . . .

415 ILCS 5/11 (2010) (*Emphasis added*).

In addition, the General Assembly set forth its findings and public policy regarding the State's groundwater in Section 2 of the Illinois Groundwater Protection Act.

(a) The General Assembly finds that:

(i) a large portion of Illinois' citizens rely on groundwater for personal consumption, and industries use a significant amount of groundwater;

(ii) *contamination of Illinois groundwater will adversely impact the health and welfare of its citizens and adversely impact the economic viability of the State*;

(iii) contamination of Illinois' groundwater is occurring;

(iv) *protection of groundwater is a necessity for future economic development in this State*.

(b) Therefore, 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*. The State recognizes the essential and pervasive role of groundwater in the social and economic well-being of the people of Illinois, and its vital importance to the general health, safety, and welfare. It is further recognized as consistent with this policy that the groundwater resources of the State be utilized for beneficial and legitimate purposes; *that waste and degradation of the resources be prevented*; and *that the underground water resource be managed to allow for maximum benefit of the people of the State of Illinois*.

415 ILCS 55/2 (2010) (*Emphasis added*).

Furthermore, Section 12 of the Act sets forth the General Assembly's mandate to preserve waters of the State including groundwater.

No person shall:

(a) Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act.

*   *   *

(d) Deposit any contaminants upon the land in such place and manner so as to create a water pollution hazard.

*   *   *

415 ILCS 5/12 (2010).

Section 12(a) prohibits persons from even threatening to cause or tend to cause water pollution to waters of the State, including groundwater (i.e. potentially contaminating State waters). The standard is even lower for Section 12(d) of the Act. The Appellate Court has found that a Section 12(d) "water pollution hazard can be found although the actor does not yet threaten to cause pollution." *Tri-County Landfill Co. v. Illinois Pollution Control Bd.*, 41 Ill.App.3d 249, 258 (2nd Dist. 1976). Further, the Illinois EPA has the duty to administer permit systems established by the Act or regulations and has the authority to require permit applicants to submit plans and specifications and to require the submission of such reports regarding actual or potential violations of this Act. 415 ILCS 5/4(h); *see Landfill, Inc. v. Pollution Control Bd.*, 74 Ill.2d 541, 555 (1978).

The General Assembly's findings in Section 11 of the Act, Section 2 of the Illinois Groundwater Protection Act and the prohibitions found in Section 12 of the Act, lead to the conclusion that the use of CCDD as fill in what are, for all intents and purposes, unlined landfills, at a minimum may constitute a water pollution hazard or threaten water pollution of State groundwater. Furthermore, the plain language of Section 22.51 establishes that the General Assembly clearly determined that CCDD fill operations threaten to contaminate groundwater, since it ordered the Board to specifically "protect groundwater." 415 ILCS 5/22.51(f)(1) (2010). Accordingly, groundwater monitoring and appropriate corrective action should be included as part of the Part 1100 CCDD Regulations.

2. CCDD Is Waste Unless (To the Extent Permitted By Federal Law) The Owner/Operator Can Demonstrate That It Meets One Of The Use Exceptions.

Because the Board contends that "CCDD and uncontaminated soils are by statutory definition clean and uncontaminated *and not a waste*," the Board does not require the stringent rules that exist for nonhazardous waste landfills. February 2, 2012 Board Order at p. 57 (*Emphasis added*). Respectfully, the Board's contention is not supported by a plain reading of the applicable statutory provisions. To the contrary, a review of the Act's statutory provisions and the Board's Regulations demonstrate that the General Assembly has very clearly attempted to increase the protections the People are entitled to as provided in the State's Constitution. In Illinois, construction or demolition debris, including CCDD, has always been and continues to be considered "waste," unless a person could prove that (to the extent permitted by federal law) the use of that waste came within certain exceptions set forth by the General Assembly.

The Act generally defines "waste" as any "discarded material," 415 ILCS 5/3.535, and materials are "discarded" unless they are returned to the economic mainstream in the form of raw materials or products. *See* Recycling, reclamation or reuse defined at 415 ILCS 5/3.380; *Alternate Fuels, Inc. v. Director of Illinois E.P.A.*, 215 Ill.2d 219, 240 (2004) *See also, NISC v. E.P.A.*, 381 Ill.App.3d 171, 177 (2nd Dist. 2008).

Of course, the Board is very familiar with the concept of CCDD as waste. The Board in its quasi-judicial function frequently presides over hearings[4] for administrative citations, where the Illinois EPA or other delegated entities are alleging that CCDD is waste. Specifically, Section 21(p)(7)(ii) provides:

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[4] Section 21(p) provides that "[t]he prohibitions specified in this subsection (p) shall be enforceable by the Agency either by administrative citation under Section 31.1 of this Act or as otherwise provided by this Act.

p) In violation of subdivision (a) of this Section, cause or allow the *open dumping of any waste* in a manner which results in any of the following occurrences at the dump site:

* * *

(7) deposition of:

* * *

(ii) *clean construction or demolition debris as defined in Section 3.160(b) of this Act.*

415 ILCS 5/21(p)(7)(ii) (2010) (*Emphasis added*).

CCDD fill operations are typically sites where third party entities go to discard material (i.e. CCDD) for a fee. The CCDD Landfill in Ford Heights was such a site. The Appellate Court in the *People ex rel. Madigan v. Lincoln, Ltd.* case held that, "Clean construction or demolition debris constitutes 'waste' under the meaning of the Act, unless it comes within one of the exemptions created by the Illinois legislature." 383 Ill.App.3d 198, 203 (1st Dist. 2008). The *Lincoln, Ltd.* site at issue accepted CCDD for disposal and placed it above-ground in a mound that was measured by the Illinois EPA as 1780 feet long by 800 feet wide by 70 feet tall. *Id.* at 202.

Paradoxically, had the Defendants in *Lincoln, Ltd.* disposed of their CCDD into an unlined hole in the ground, the CCDD they accepted at their CCDD landfill might not have been considered "waste." To understand why CCDD is not considered waste to the extent permitted by federal law when it is disposed of in a below-ground CCDD landfill, as opposed to being considered "waste" when it is placed in an above-ground CCDD landfill, requires a review of the historical regulation of construction and demolition debris.

A. Construction Or Demolition Debris -- In The Beginning.

The term construction or demolition debris first appeared in the Act as part of the definition of municipal waste.

> "Municipal waste" means garbage, general household and commercial waste, industrial lunchroom or office waste, landscape waste, and *construction or demolition debris.*

415 ILCS 5/3.290[5] (2010) (*Emphasis added.*).

B. 1989: The First Appearance of "Clean" Construction Or Demolition Debris.

In 1989, the General Assembly added a definition for CCDD to the Act. The term at that time was defined to mean 'broken concrete without protruding metal bars, bricks, rock, stone, or uncontaminated dirt or sand generated from construction or demolition activities."[6, 7] At the same time that it adopted the CCDD definition, the General Assembly also amended Section 21(d)(1)(ii) of the Act to include the following permitting exception for one particular use of CCDD:

> 1021. Act prohibited
>
> § 21. No person shall:
>
> *　　　*　　　*
>
> (d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:
>
> (1) without a permit granted by the Agency or in violation of any conditions imposed by such permit, ...; provided, however, that no permit shall be required ... (ii) *for a corporation organized under the General Not For Profit Corporation Act of 1986, as now or hereafter amended, or a predecessor Act, constructing a land form in conformance with local zoning provisions, within a municipality having a population of more than 1,000,000 inhabitants, with clean construction or demolition debris generated within the municipality, provided that the corporation has contracts for economic development planning with the municipality*; or ....

IL ST CH 111 1/2 P 1021 (*Emphasis added*).

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[5] Construction or demolition debris has been included as part of the definition of municipal waste since the definition first appeared in the Act in 1986. P.A. 84-1308.

[6] IL ST CH 111 1/2 P 1003.78.

[7] Note: asphalt is not in the original list of items comprising CCDD.

That CCDD was considered waste in 1989 when the above-referenced definition of CCDD was adopted seems clear; otherwise, the above-referenced permitting exception would have been unnecessary. In addition, the definition of municipal waste was not changed at that time and continues to include all construction or demolition debris without any limitation or qualification.

C. 1997: "General" Construction Or Demolition Debris And The "Not Waste To the Extent Permitted By Federal Law" Use Exceptions For CCDD.

In 1997, the General Assembly simultaneously repealed the then existing definition of CCDD; adopted a definition for a newly defined category of construction or demolition debris -- "general construction or demolition debris" ("GCDD") (§3.78); and then re-adopted a new definition for CCDD in §3.78(a). *See*, P.A. 90-475.[8] GCDD was defined to include, *inter alia*, "uncontaminated soil, rock, reclaimed asphalt and concrete" and CCDD was defined as "uncontaminated concrete without protruding metal bars, bricks, rock, stone, reclaimed asphalt[9] or soil generated from construction or demolition activities." Since all of the items listed as constituents of CCDD also fall within the list of items comprising GCDD, CCDD is merely a subset of the broader set of items comprising GCDD. That is, all CCDD is also GCDD, but not all GCDD is CCDD.

The 1997 re-adoption of CCDD in §3.78(a) was also notable for the inclusion of several new "use" exceptions whereby "*to the extent permitted by federal law*" CCDD would "*not be*

[8] In 2002, the Environmental Protection Act was renumbered: 415 ILCS 5/3.78 became 415 ILCS 5/3.160(a) and 415 ILCS 5/3.78(a) became 415 ILCS 5/3.160(b).

[9] Asphalt makes its first appearance as CCDD.

considered waste" when used in any of 3 particular ways.[10] For the first time, the General Assembly provided that to the extent permitted by federal law, CCDD could be disposed of at CCDD fill site without any regulations in place or requirement for an Illinois EPA-issued permit. The current formulation of the CCDD use exceptions provides:

> *To the extent allowed by federal law, clean construction or demolition debris shall not be considered "waste" if* it is (i) *used as fill material* outside of a setback zone if the fill is placed no higher than the highest point of elevation existing prior to the filling immediately adjacent to the fill area, and if covered by sufficient uncontaminated soil to support vegetation within 30 days of the completion of filling or if covered by a road or structure, and, if used as fill material in a current or former quarry, mine, or other excavation, is used in accordance with the requirements of Section 22.51 of this Act and the rules adopted thereunder or (ii) separated or processed and returned to the economic mainstream in the form of raw materials or products, if it is not speculatively accumulated and, if used as a fill material, it is used in accordance with item (i), or (iii) solely broken concrete without protruding metal bars used for erosion control, or (iv) generated from the construction or demolition of a building, road, or other structure and used to construct, on the site where the construction or demolition has taken place, a manmade functional structure not to exceed 20 feet above the highest point of elevation of the property. . . .

415 ILCS 5/3.160(b) (2010) (*Emphasis added*).

D. Section 20 And The Board's Solid Waste Disposal Regulations.

The General Assembly set forth the following legislative findings in Section 20 of the Act:

Sec. 20. Legislative declaration.

(a) The General Assembly finds:

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[10] The original 3 use exceptions were expanded to include a fourth exception in 1998. And, in 2005, 415 ILCS 5/3.160(a) defining GCDD was amended to add the following paragraph (5th use exception):

> To the extent allowed by federal law, uncontaminated concrete with protruding rebar shall be considered clean construction or demolition debris and shall not be considered "waste" if it is separated or processed and returned to the economic mainstream in the form of raw materials or products within 4 years of its generation, if it is not speculatively accumulated and, if used as a fill material, it is used in accordance with item (i) in subsection (b) of this Section.

*   *   *

(2) that excessive quantities of refuse[11] and inefficient and improper methods of refuse disposal result in scenic blight, cause serious hazards to public health and safety, create public nuisances, divert land from more productive uses, depress the value of nearby property, offend the senses, and otherwise interfere with community life and development;

*   *   *

(11) that Subtitle D of the Resource Conservation and Recovery Act of 1976 (P.L. 94-580)[12], as amended, provides for comprehensive regulation of the disposal of solid waste;

(12) *that it would be inappropriate for the State of Illinois to adopt a solid waste management program that is less stringent than or conflicts with federal law*:

(13) that Subtitle D of the Resource Conservation and Recovery Act of 1976 (P.L. 94-580), as amended, provides that the United States Environmental Protection Agency shall implement the solid waste management program authorized in that Act unless

> (i) the State is authorized by and under its law to establish and administer its own solid waste management program, and
>
> (ii) pursuant to such federal Act, the Administrator of the United States Environmental Protection Act finds that the State solid waste program is equivalent to the federal program;

(14) *that it is in the interest of the people of the State of Illinois to authorize such a solid waste management program and secure federal approval of the program, and thereby avoid the existence of duplicative, overlapping or conflicting State and federal programs*;

(15) *that the federal requirements for the securing of State solid waste management program approval*, as set forth in Subtitle D of the Resource Conservation and Recovery Act of 1976 (P.L. 94-580), as amended, and in regulations promulgated by the Administrator of the United States Environmental Protection Agency under that Act *are complex and detailed, and the General Assembly cannot conveniently or advantageously set forth in this Act all of the requirements of the federal Act or all regulations which may be established under the federal Act*

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[11] "Refuse" is defined as waste under Section 5/3.385 of the Act, 415 ILCS 5/3.385.

[12] 42 U.S.C. §§6901 *et seq.*

> (b) It is the purpose of this Title to prevent the pollution or misuse of land, ..., and upgrading waste collection, treatment, storage, and disposal practices; *and to authorize, empower, and direct the Board to adopt such regulations and the Agency to adopt such procedures as will enable the State to secure federal approval of the State hazardous waste and solid waste management programs pursuant to the provisions of subtitles C and D of the Resource Conservation and Recovery Act of 1976 (P.L. 94-580), as amended, and federal regulations pursuant thereto.*

415 ILCS 5/20 (*Emphasis added.*).

In furtherance of the General Assembly's legislative findings referenced above, the Board did adopt regulations and the State of Illinois, in fact, did petition the United States Environmental Protection Agency ("U.S. EPA") in 1993 to obtain an adequacy determination for the State's solid waste management program. Subsequently, on January 3, 1994, the United States Environmental Protection Agency (U.S. EPA) issued its Illinois: Final Determination of Adequacy of State Municipal Solid Waste Permit Program. 59 *Federal Register* 86, January 3, 1994.[13]

E. The Board's Inert Waste Disposal Regulations And CCDD.

Among the regulations adopted by the Board and impliedly determined to be adequate by the U.S. EPA were provisions governing the regulation of inert waste. *See* 35 Ill. Adm. Code

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[13] In its decision on adequacy of the State of Illinois' solid waste management program, the United States Environmental Protection Agency specifically found that:

> The combination of the State's existing permit program, the incorporation of certain portions of the revised Federal Criteria, and the interim period of IEPA enforcement created by Public Law 88-496, will ensure full compliance with all of the revised Federal Criteria. In its application, Illinois demonstrated that the State's permit program adequately meets the ***location restrictions, operating criteria, design criteria, groundwater monitoring and corrective action requirements, closure and post-closure care requirements, and financial assurance criteria*** in the revised Federal Criteria.
>
> In addition, Illinois demonstrated that the State's MSWLF permit program has the authority to issue permits incorporating the requirements of the revised Federal Criteria for all MSWLFs in the State. The USPEA determined that Illinois' permit program contains provisions for public participation, compliance monitoring, and enforcement. (*Emphasis added.*)

at 59 *Fed.Reg.* 86 (1/3/94).

Part 811, Subpart B & Subpart B of Part 812. Inert wastes include "only non-biodegradable and non-putrescible solid wastes; including, but not limited to, bricks, masonry, and concrete." 35 Ill. Adm. Code 810.103. Similarly, the definition for clean construction or demolition debris ("CCDD") means *to the extent allowed by federal law, clean construction or demolition debris shall not be considered "waste" if* uncontaminated broken concrete without protruding metal bars, bricks, rock, stone, reclaimed or other asphalt pavement, or soil generated from construction or demolition activities. 415 ILCS 5/3.160 (2010). There are two differences in the definitions: 1) CCDD is not considered waste when used as fill (to the extent permitted by federal law), unlike inert waste; and 2) CCDD includes asphalt, which is a source of polynuclear aromatic hydrocarbons ("PAHs"), which by operation of the Board Solid Waste Disposal Regulations would classify CCDD as a "chemical waste." *See* 35 Ill. Adm. Code 810.103.

In addition, inert waste landfills are required to collect and analyze leachate samples at least every 6 months and notification shall be provided to the Illinois EPA within 1 business day after the discovery of any leachate contamination. *See* 35 Ill. Adm. Code 811.206. Moreover, Section 811.206(d) of the inert waste landfill regulations provides, among other things, that a landfill that accepts only inert wastes becomes subject to regulation as a chemical or putrescible waste landfill (Subparts C of Parts 811 & 812) if the leachate becomes contaminated at any time. In accordance with §§811.206(d), 810.103, & 811.202(a), leachate is contaminated if it contains concentrations of constituents greater than the water supplies standards set forth at 35 Ill. Adm. Code 302.301, -.304, & -.305.

Since the U.S. EPA accepted in 1994 that the inert waste regulations, among others, as adequately consistent with federal law and since CCDD (with the exception of reclaimed asphalt) appears to fall in the category of inert waste as defined by the Board's solid waste

management regulations,[14] the regulatory safeguards provided by the Board's federally accepted inert waste regulations should be viewed as safely providing at least a regulatory floor when it comes to regulating CCDD operations.

F. When Waste Is Not Waste Under The Federal Regulation.

A fundamental question that arises from the creation of the "use" exceptions is whether, or to what extent, federal law actually does allow CCDD, *i.e.,* municipal waste, to be not considered waste when "... used as fill material ..." in accordance with 415 ILCS 5/3.160(b)(i).

In its 1994 acceptance of the Illinois Solid Waste Management Program, the Illinois EPA stated, "In its application, Illinois demonstrated that the State's permit program adequately meets the *location restrictions, operating criteria, design criteria, groundwater monitoring and corrective action requirements, closure and post-closure care requirements, and financial assurance criteria* in the revised Federal Criteria." *Supra.* And, the Board's Solid Waste Regulations for inert waste do indeed address all of these Federal Criteria.

Except for providing the following definition for a construction and demolition debris landfill, federal regulations are silent as to the specific regulation of construction or demolition debris:

> "CONSTRUCTION AND DEMOLITION (C&D) LANDFILL" means a solid waste disposal facility subject to the requirements of subparts A or B of this part

[14] The Board's definition of "Municipal solid waste landfill unit" or "MSWLF unit" found at 35 Ill. Adm. Code 810.103 contain the following note that seems to support the notion that a CCDD landfill in Illinois (although the inclusion of asphalt as CCDD would possibly convert it to a chemical waste landfill) would be considered an inert waste landfill:

> BOARD NOTE: The final sentence of corresponding 40 C.F.R. 258.2 provides as follows: "A construction and demolition landfill that receives residential lead-based paint waste and which does not receive any other household waste is not a MSWLF Unit." A construction and demolition landfill is a type of landfill that does not exist in Illinois, so the Board omitted the reference to "construction and demolition landfill." A landfill in Illinois that receives residential lead-based paint waste and no other type of household waste would be permitted as a chemical waste landfill or a putrescible waste landfill under Subpart C of 35 Ill. Adm. Code 811, as appropriate.

> that receives construction and demolition waste and does not receive hazardous waste (defined in §261.3 of this chapter) or industrial solid waste (defined in §258.2 of this chapter). Only a C&D landfill that meets the requirements of subpart B of this part may receive conditionally exempt small quantity generator waste (defined in §261.5 of this chapter). *A C&D landfill typically receives any one or more of the following types of solid wastes: roadwork material, excavated material, demolition waste, construction/renovation waste, and site clearance waste.*

40 CFR 257.2 (*Emphasis added*).

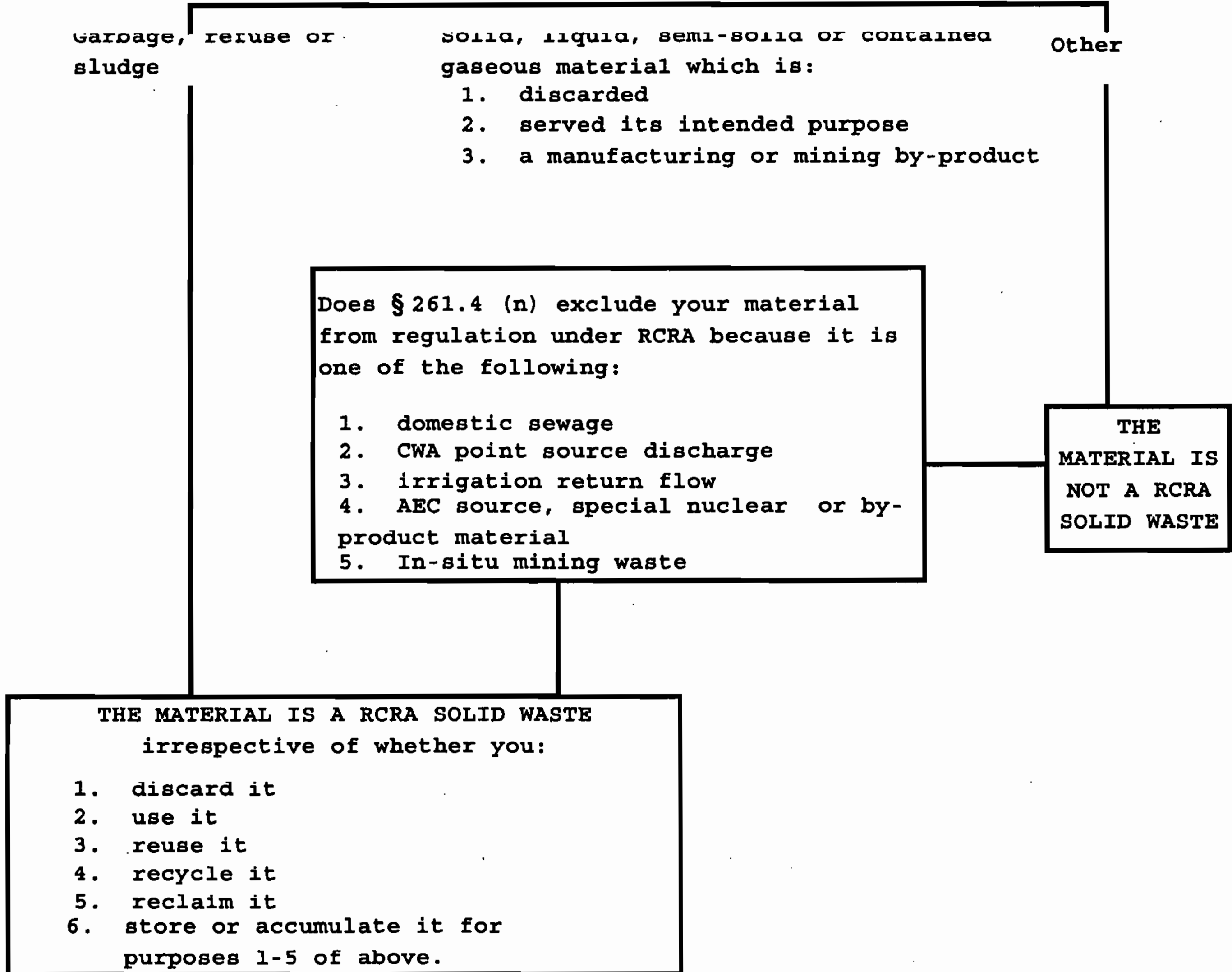
Although federal regulations do not provide any specific requirements for construction or demolition debris, the above definition does make it clear that construction or demolition debris is considered a solid waste under federal law. Further, the types of items contemplated for receipt at a C&D landfill seem broad enough to include the types of waste that Illinois defines as CCDD. But, does federal law provide a mechanism whereby using CCDD as fill material would justify considering the CCDD so used as no longer being a solid waste? The People submit that the answer to that question is found in the rather extensive set of federal regulations at 40 CFR Part 260 that define solid waste. For the sake of brevity, Appendix I to 40 CFR Part 260 contains a chart synopsizing when materials are or are not solid wastes[15] for purposes of RCRA regulation. That chart is presented below.

[15] Solid waste is defined as "waste" in Section 3.470 of the Act. 415 ILCS 5/3.470 (2010).

FIGURE 1

DEFINTION OF A SOLID WASTE

All materials



As explained in the regulations, "Figure 1 demonstrates that all materials are either: (1) Garbage, refuse, or sludge; (2) solid, liquid, semi-solid or contained gaseous material; or (3) something else. No materials in the third category are solid waste. All materials in the first category are solid waste. Materials in the second category are solid waste unless they are one of the five exclusions specified in §261.4(a)." 40 CFR Pt. 260, App. I.

Since CCDD falls under the second category and does not match any of the exclusions in 40 CFR 261.4(a), CCDD, even when used as fill material, would still arguably be considered a solid waste under federal law. And, if CCDD used as fill material is still a solid waste, its disposal must comport with the appropriate waste disposal regulations. To date, the People have not located any legal opinions or Board or Illinois court decisions that definitively answer this rather fundamental question. The conclusion that using CCDD as fill material may not convert the CCDD from a solid waste to a non-waste under federal law supports the proposition that the Board's Solid Waste Regulations for inert waste provide a floor for regulating CCDD used as fill material.[16]

G. The Board's Solid Waste Disposal Regulations Place The Burden On The Applicant To Demonstrate That Their Operation Won't Impair Waters Of The State.

Leaving aside the question of to what extent federal law permits CCDD when used as fill to not be considered waste, one thing is clear: CCDD is being disposed of in unlined landfills, and at this time the litany of requirements to protect groundwater set forth in Section 22.51 of the Act, all of which are required for nonhazardous waste landfills, have not been given effect under

[16] In the case of non-inert CCDD items such as reclaimed or other asphalt, the Board's chemical or putrescible waste regulations would be appropriate.

the Board's proposal. As mentioned above, it is apparent that the General Assembly concluded that CCDD fill operations pose a threat to the State's groundwater. The People submit that faced with the threat of contamination, the Board's approach should be the same as the approach provided by the Board's Solid Waste Disposal Regulations for nonhazardous landfills; namely placing upon the applicants the burden to demonstrate to the satisfaction of the Illinois EPA that their operations would not impact waters, including groundwater, of the State. Specifically, Sections 807.315 and 807.316 provide as follows:

> Section 807.315 Protection of Waters of the State
>
> No person shall cause or allow the development or operation of a sanitary landfill *unless the applicant proves to the satisfaction of the Agency that no damage or hazard will result to waters of the State* because of the development and operation of the sanitary landfill.
>
> Section 807.316 Application
>
> a) An Application for a Development Permit for a sanitary landfill *shall contain evidence adequate to prove to the Agency that the development of the sanitary landfill will not cause or tend to cause water or air pollution*; will not violate applicable air and water quality standards; and will not violate any rule or regulation adopted by the Board. …

35 Ill. Adm. Code 807.315 and 807.316(a) (*Emphasis added*)

Accordingly, the Board should at a minimum require groundwater monitoring for all CCDD fill operations and corrective action as appropriate.

3. The Record In This Proceeding Includes Evidence Of Groundwater Contamination And/Or The Threat Of Groundwater Contamination.

Mr. Cobb of the Illinois EPA correctly points out in his pre-filed testimony that the record was supported with evidence of a threat and/or actual groundwater contamination from CCDD fill operations in the State.

> [T]he Agency provided testimony of a poorly run CCDD facility operating under statutory authority of Section 3.160 with limited groundwater sampling showing "levels

of lead and cadmium many times higher than the groundwater standards." An enforcement action ensued that resulted in an order requiring groundwater monitoring. Testimony of Mr. Purseglove, Tr. 1 at 27. The Agency's position is that the potential for groundwater contamination also arises from well-run facilities, but poorly run facilities certainly increase that potential.

Mr. Purseglove also testified that sampling of fill materials from a round of compliance inspections in the infancy of the program "f[ound] contaminants at a variety of sites across the State." *Id.* at 31. Enforcement cases were initiated against facilities with the higher levels of contamination. *Id.* Mr. Hock's testimony at least partially confirms the Agency's experience. Mr. Hock provided the most detailed data concerning contaminants in fill material. He testified that data from 44 samples collected from 44 borings at three facilities in northern Illinois with roughly 80% soil as fill material produced detections of PNAs above their respective MACs in seven of the samples and detections of metals above their respective MACs in 36 samples. Testimony of Mr. Hock, Exh. 12 at 3 – 5; Tr. 2 at 37 – 42.

To the extent anything can be concluded from these limited examples, it is that fill operations do accept material presenting the potential for groundwater contamination.

The following litigated case identified in Mr. Purseglove's testimony involving the unpermitted disposal of CCDD revealed actual contamination of soil and or groundwater. In *People v J.T. Einoder, Inc., et al.*, (Cook County Circuit Court, 00 CH 10635), a limited Phase II investigation performed by Consoer Townsend Envirodyne Engineers, Inc. showed the following results:

Contaminants of Concern	Monitoring Well	Contaminant of Concern's Concentration (mg/l)[17]	Multiple Above Class I Groundwater Standard[18]
LEAD	MW-A	4.23	564 times
	MW-B	0.011	1.5 times
	MW-C	0.025	3.3 times
CADMIUM	MW-A	0.015	3 times

[17] [1] Analytical Results (Source: December 22, 2000 Report from Consoer Townsend Envirodyne Engineers, Inc. regarding April, 2000 Phase II sampling effort.)

[18] Class I Groundwater Standard for Lead is .0075 mg/l; Class I Groundwater Standard for Cadmium is .005 mg/l. (Source: 35 Il Adm Code 620.420)

SUMMARY OF EXCEEDANCES:
#2 - SOIL BACKGROUND LEVELS "TACO"
- J.T. Einoder Landfill Site -
(Based Upon Review of CTE Engineers, Inc. April, 2000 Phase II)

Contaminants of Concern	Soil Borings	Contaminant of Concern's Concentration (mg/kg)[19]	Multiple Above TACO Soil Background Levels[20]
Benzo (a) anthracene	B-4-D	1.85	1.0 times
	B-6-A	6.02	3.3 times
	B-7-A	4.35	2.4 times
	B-8-B	2.86	1.6 times
	B-10-D	5.71	3.2 times
Benzo (a) pyrene	B-6-A	6.73	3.2 times
	B-7-A	4.4	2.1 times
	B-8-B	2.81	1.3 times
	B-10-D	3.63	1.7 times
Benzo (b) fluoranthene	B-6-A	6.08	2.9 times
	B-7-A	4.65	2.2 times
	B-8-B	2.85	1.4 times
	B-10-D	4.81	2.3 times
Dibenzo (a,h) anthracene	B-6-A	0.583	1.4 times
Indeno (1,2,3-cd) pyrene	B-6-A	3.14	2.0 times
Lead	B-6-A	452	12.6 times
	B-11-E	866	24.1 times

[19] Analytical Results (Source: December 22, 2000 Report from Consoer Townsend Envirodyne Engineers, Inc. regarding April, 2000 Phase II sampling effort.)

[20] Tiered Approach to Corrective Objectives ("TACO") Soil Background Levels: Benzo (a) anthracene - 1.8 mg/kg; Benzo (a) pyrene - 2.1mg/kg; Benzo (b) flouranthene - 2.1 mg/kg; Dibenzo (a,h) anthracene - 0.42 mg/kg; Indeno (1,2,3-cd) pyrene - 1.6 mg/kg; Lead - 36 mg/kg. (Source: 35 Il Adm Code 742, Appendix A, Tables G & H)

4. The Board's Solid Waste Regulations Have Proven Not To Have Been Sufficient To Prevent Disposal Of Non-Permitted Wastes.

Any belief that the Board's Solid Waste Disposal Regulations are a sufficient deterrent for keeping unwanted materials from being disposed of in permitted disposal sites is erroneous, and can be easily disabused through real life examples from the enforcement annals of this State. Even highly regulated landfills end up accepting materials for which they were not permitted, as the following case examples demonstrate. *See, e.g., People v Wood River Refinery*, PCB 99-120 (Wood River Refinery, now ConocoPhillips/WRB Refining, sent hazardous waste to Roxana landfill); *People v Tosco Refining Company*, PCB 02-81; (Tosco, now ConocoPhillips/WRB Refining, sent hazardous waste to Roxana landfill); *People v GKN Aerospace*, PCB 06-05 (GKN Aerospace sent hazardous waste to Milam Landfill in East St. Louis); *People v Big River Zinc et al.*, PCB 06-151 (Big River Zinc sent hazardous waste to Roxana Landfill, Allied Waste (now Republic) was the transporter); *People v. Waste Management of Illinois, Inc.*, PCB 06-42 (Waste Management of Illinois accepted and disposed of hazardous waste at the Prairie Hill landfill).

5. The Board's Existing Part 1100 CCDD Regulations Have Not Been Sufficient To Ensure Non-CCDD Is Always Rejected At CCDD Fill Sites.

With regard to the CCDD fill operations in the State, since the Board's Part 1100 CCDD Regulations have been in effect, there have also been a number of cases where enforcement action have had to be initiated for regulatory violations that call into question the ability to determine the nature of materials accepted by the facility. *See, e.g., People v. Stark Excavating*, PCB 09-65 (The People alleged that Stark violated the Act and Part 1100 Regulations by (1) allowing for the accumulation and use of clean construction and demolition debris on the site without following the requisite inspection and record-keeping practices, and (2) failing to inspect incoming loads of clean construction or demolition debris with a PID.); *People v R.A. Cullian &*

Sons, Inc., PCB 09-105 (The People alleged that Respondent violated the Act and Part 1100 Regulations by allowing waste material that does not meet the definition of CCDD to be commingled with the facility's CCDD fill material, failing to inspect incoming loads of clean construction and demolition debris at the site with a PID device, failing to maintain CCDD records for the facility, and disposing of CCDD without a permit.); *People v. Western Sand & Gravel Company, LLC*, PCB 10-022 (The People alleged that Respondent failed to: (1) conduct visual inspections, inspections with a PID instrument for each incoming load, and discharge inspections of at least one randomly selected load delivered to the facility each day, (2) retain records evidencing that a load checking program is being used at the facility, (3) properly train its personnel at the facility to identify material that is not CCDD, and (4) keep and maintain a calibrated PID instrument at the facility for checking loads of CCDD.); *People v. Reliable Sand & Gravel Co. Inc.*, PCB 09-29 (The People alleged that Respondent failed to: 1) conduct and maintain records of routine inspections of incoming loads and at least one discharge load by failing to both visually inspect the loads and use a specified PID or other device; (2) demonstrate that site personnel are trained to identify non-CCDD material; (3) conduct field measurements in accordance with permitted operating procedures; (4) keep records of training reports, written procedures for load checking, and load rejection notifications; and (5) obtain an interim authorization for operating the facility. The People also alleged that Respondent failed to restrict vehicular access to the working face of the area or post a sign excluding non-CCDD waste.); *People v. E.F. Heil, LLC*, PCB 09-110 (The People alleged that Respondent (1) disposed of waste at the site without a permit; (2) failed to determine if waste accepted at the site was special waste or hazardous waste; (3) accepted for disposal non-clean construction or demolition debris waste at the site and failed to ensure that personnel were properly trained to identify material that

was not CCDD; (4) failed to use a PID to check all incoming loads at the site; and (5) failed to conduct daily discharge inspections.); *People v. Reliable Materials Lyons, LLC, et al.*, PCB 12-52 (The People alleged that Respondent accepted waste in the form of soils contaminated with inorganic metals); *People v. 87th & Greenwood, LLC, et al.*, PCB 10-71 (The People alleged that Respondent accepted waste in the form of contaminated soils at CCDD facility); *People v. Fischer Brothers Excavating*, LLC 09 CH 228, Ogle County (The People alleged that Defendant operated a CCDD fill operation without a permit.); *People v. City of Princeton*, 09 CH 71, Bureau County (The People alleged that Defendant failed to conduct and maintain records of routine inspections of incoming loads and failed to inspect the loads using a specified PID or other device.); *People v. Big Fish Carlson Properties*, LLC *et al.*, 11 CH 1062, Winnebago County (The People alleged that Defendant operated a CCDD fill site without a permit); *People v. Northwest Illinois Construction, LLC*, 11 CH 137, Whiteside County (The People alleged Defendant failed to implement a load checking program for incoming loads of CCDD).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, STEPHEN J. SYLVESTER, an Assistant Attorney General in this case, do certify that I caused to be served this 5th day of March, 2012, the foregoing Illinois Attorney General's Office's Pre-filed Testimony on the Illinois Pollution Control Board's First Notice Proposal and Notice of Filing upon the persons listed on the Service List by depositing same in an envelope, first class postage prepaid, with the United States Postal Service at 100 West Randolph Street, Chicago, Illinois, at or before the hour of 5:00 p.m.

STEPHEN J. SYLVESTER