

No. 122813

IN THE
SUPREME COURT OF ILLINOIS

COUNTY OF WILL AND WILL COUNTY LAND USE DEPARTMENT, Petitioners-Appellants,	)	On Petition for Leave to
	)	Appeal from the
	)	Appellate Court of Illinois,
	)	Third District,
	)	Nos. 3-15-637 & 3-16-058
)	
v.	)	There Heard on Appeal
	)	from Review of
ILLINOIS POLLUTION CONTROL BOARD, Respondent-Appellee.	)	the Illinois Pollution
	)	Control Board
	)	PCB No. R2012-009(B)
)	
	)	Marie Tipsord
	)	Hearing Officer
PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant)	
)	
v.)	
)	
)	
ILLINOIS POLLUTION CONTROL BOARD, Respondent-Appellee.)	
)	
)	

REPLY BRIEF AND ARGUMENT FOR
PETITIONER-APPELLANT, COUNTY OF WILL AND
WILL COUNTY LAND USE DEPARTMENT

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ORAL ARGUMENT REQUESTED

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ARGUMENT

THE RULING OF THE ILLINOIS POLLUTION CONTROL BOARD, CONFIRMED BY THE MAJORITY OF THE APPELLATE COURT, ARBITRARILY AND CAPRICIOUSLY ABANDONED THE BOARD'S MANDATE TO PROTECT THE GROUNDWATER UPON WHICH THE HEALTH AND WELFARE OF ILLINOIS CITIZENS DEPENDS.

When the Board of the Illinois Environmental Protection Agency arbitrarily, capriciously or unreasonably refuses to promulgate a rule, its decision should be set aside. *Granite City Division of National Steel Company et al. v. The Illinois Pollution Control Board*, 155 Ill.2d 149, 162 (1993); *Celotex Corp. v. Pollution Control Board*, 94 Ill.2d 107, 125 (1983); *Illinois State Chamber of Commerce v. Pollution Control Board*, 177 Ill.App.3d 923, 928 (2d Dist. 1988).

In its August 6, 2015 Order, the Board concluded that it “remains unconvinced that groundwater monitoring” of fill sites “is required for the protection of groundwater.” (R. 538) Respondent now advances that finding to: “The Board found that the use of CCDD and USF at fill facilities that met the requirements of these rules will not impact groundwater, and that groundwater is protected.” (Resp. Br. p. 49) In support of this statement, the Board asserts that there is no evidence of groundwater contamination at CCDD or USF sites. (Resp. Br. p. 39, 45) The reason, however, that there is no evidence of contamination is because the water has never been tested.

Will County is concerned about the groundwater at the CCDD and USF sites because at 10 of 12 sites (83.33%), random testing of the dirt found exceedances of the maximum allowable concentrations (MACs) for heavy metals and volatile organic

compounds. (Ex. 63 at 9; PC 74 at 5) Furthermore, 16% (7 out of 44) of deep borings, showed MACs exceedances. (Ex. 12 at 3-5, PC 74 at 5) And the Attorney General has had to pursue 11 enforcement actions at regulated CCDD and USF facilities. (PC 63 at 10-11) Thus, the Board is mistaken in its insistence that the front-end regulations are adequate protection at these facilities. (Resp. Br. p. 21, 29)

Moreover, the groundwater at these sites is at risk because the CCDD and USF is being used to fill deep quarries, and so is being placed directly into the water table. Because the dirt at the site is unsafe, there is reason to suspect the safety of the dirt and materials deeper in, especially those sitting directly in the water table. This is a grave concern, as 71% of Will County residents rely on groundwater for their drinking supply.

Amicus on behalf of the Illinois CCDD Coalition in support of the Board asserts that the violations cited above were “minor and resolved or withdrawn without enforcement or adjudication.” (Amicus Br. p. 16) However, this assertion is made without benefit of citation to the Record, so there is no way to determine its accuracy. Moreover, this downplaying of any seriousness of the problem is entirely inconsistent with the strident position taken by the industry, which insists that merely testing the water will drive them out of the CCDD business. (Mr. Henriksen, 5/20/13 Tr. at 188-91) Mr. Huff went so far as to say that, rather than test the water and comply, he would rather not put the fill into a CCDD or USF facility. (PC 71 at 4) In light of the fact that dumping in a landfill is 75% more expensive than dumping in a CCDD or USF facility, this statement does not suggest that he expects the problems to be “minor.”

The Board argues that there are further protections at the front end because the licensed geologists and engineers certifying the loads will suffer professional

ramifications if the loads they certify are contaminated. (Resp. Br. p. 31) This is not so, unless contamination is detected from a spot check before dumping. Once the load is dumped, there are no boundaries that distinguish between loads, making it impossible to trace contamination back to the certifying professional.

The Board argues that it is unreasonable to put even more regulations on the CCDD and USF facilities when the same fill can be dumped in a borrow pit without any regulation. (Resp. Br. p. 40, 47) The Board, however, ignores the obvious difference in size and depth between a borrow pit and a quarry. A borrow pit is small and shallow. So, unlike a quarry, the quantity of fill in a borrow pit is much less, and it is not likely to be sitting deep enough to be directly in the water table.

The Board argues that Will County is looking for a comprehensive program to detect and remediate groundwater contamination across the County or the State, and that Subpart G was not designed for that. (Resp. Br. p. 32, 35, 38) Subpart G, in fact, proposes groundwater monitoring “to ensure that the fill operation does not cause an exceedance of the Class 1 groundwater quality standards.” (R. 63-64) Will County’s proposal for groundwater monitoring is entirely consistent with Subpart G. Will County, like the EPA, has asked to install a well up-gradient of the CCDD or USF site, and then another three wells down-gradient. (PC 72 at 1; PC 74 at 16) By testing the water before it goes through the CCDD or USF fill, and then immediately after, the impact of the fill on the groundwater will be immediately detectable. This kind of testing is exactly what is anticipated by the language of Subpart G.

The Board asserts that its focus is on preventing groundwater contamination rather than detecting it. (Resp. Br. p. 30) However, the task of the Illinois Environmental

Protection Agency, and its Board, is to restore, protect, and enhance the quality of the environment. 415 ILCS 5/1. Presumably, this includes detecting contaminants in groundwater at CCDD and USF facilities.

In conclusion, the majority of the Appellate Court and the Illinois Pollution Control Board have lost sight of the mandate of the Illinois Constitution to “provide and maintain a healthful environment for the benefit of this and future generations.” Ill. Const. Art. XI, §1. The decision of the Board in which it refused to test the safety of the groundwater at CCDD and USF facilities, confirmed by the majority of the Appellate Court, was arbitrary and capricious and so should be reversed.

CONCLUSION

For the reasons stated herein, Will County and the Will County Land Use Department respectfully request that this Honorable Court reverse the decision of the Illinois Appellate Court, Third District and direct the Illinois Pollution Control Board to promulgate rules to test for groundwater contamination near unlined quarries being filled with uncontaminated soil and clean construction or demolition debris.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341 (a) and (b). The length of this brief, excluding the pages containing the Rule 341 (d) cover, the Rule 341 (c) certificate of compliance, and the certificate of service is 5 pages.

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