

No. 18-3644

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Prairie Rivers Network,
Plaintiff-Appellant,

v.

Dynegy Midwest Generation, LLC,
Defendant-Appellee.

Appeal from the United States District Court
For the Central District of Illinois
Case No. 18-CV-02148
The Honorable Judge Colin S. Bruce

**BRIEF OF ILLINOIS ENVIRONMENTAL REGULATORY GROUP AS *AMICUS
CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE DYNEGY MIDWEST
GENERATION, LLC AND AFFIRMANCE**

HeplerBroom, LLC
Stephen R. Kaufmann
*Counsel for the Illinois Environmental Regulatory
Group, Inc.*
Stephen R. Kaufmann (IL# 3126728)
Jennifer M. Martin (IL# 6210218)
Julieta A. Kosiba (IL# 6324187)
Brian J. Dodds (IL# 6323824)
4340 Acer Grove Drive
Springfield, IL 62711
(217) 528-3674
(217) 528-3964 (fax)
Stephen.Kaufmann@heplerbroom.com

Appellate Court No: 18-3644

Short Caption: Prairie Rivers Network v. Dynegy Midwest Generation, LLC

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item 3):
Illinois Environmental Regulatory Group, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
HeplerBroom, LLC

(3) If the party, amicus or intervenor is a corporation:
i) Identify all its parent corporations, if any; and
None
ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:
None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:
N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:
N/A

Attorney's Signature: /s/ Stephen R. Kaufmann Date: 9/8/20

Attorney's Printed Name: Stephen R. Kaufmann

Please indicate if you are *counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: 4340 Acer Grove Drive
Springfield, IL 62711

Phone Number: 217-528-3674 Fax Number: 217-528-3964

E-Mail Address: stephen.kaufmann@heplerbroom.com

Appellate Court No: 18-3644

Short Caption: Prairie Rivers Network v. Dynegy Midwest Generation, LLC

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item 3):
Illinois Environmental Regulatory Group, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
HeplerBroom, LLC

(3) If the party, amicus or intervenor is a corporation:
i) Identify all its parent corporations, if any; and
None
ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:
None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:
N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:
N/A

Attorney's Signature: /s/ Jennifer M. Martin Date: 9/8/20

Attorney's Printed Name: Jennifer M. Martin

Please indicate if you are *counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: 4340 Acer Grove Drive
Springfield, IL 62711

Phone Number: 217-528-3674 Fax Number: 217-528-3964

E-Mail Address: jennifer.martin@heplerbroom.com

Appellate Court No: 18-3644

Short Caption: Prairie Rivers Network v. Dynegy Midwest Generation, LLC

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item 3):
Illinois Environmental Regulatory Group, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
HeplerBroom, LLC

(3) If the party, amicus or intervenor is a corporation:
i) Identify all its parent corporations, if any; and
None
ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:
None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:
N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:
N/A

Attorney's Signature: /s/ Julieta A. Kosiba Date: 9/8/20

Attorney's Printed Name: Julieta A. Kosiba

Please indicate if you are *counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: 4340 Acer Grove Drive
Springfield, IL 62711

Phone Number: 217-528-3674 Fax Number: 217-528-3964

E-Mail Address: Julieta.Kosiba@heplerbroom.com

Appellate Court No: 18-3644

Short Caption: Prairie Rivers Network v. Dynegy Midwest Generation, LLC

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item 3):
Illinois Environmental Regulatory Group, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
HeplerBroom, LLC

(3) If the party, amicus or intervenor is a corporation:
i) Identify all its parent corporations, if any; and
None
ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:
None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:
N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:
N/A

Attorney's Signature: /s/ Brian J.D. Dodds Date: 9/8/20

Attorney's Printed Name: Brian J.D. Dodds

Please indicate if you are *counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: 4340 Acer Grove Drive
Springfield, IL 62711

Phone Number: 217-528-3674 Fax Number: 217-528-3964

E-Mail Address: Brian.Dodds@heplerbroom.com

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

INTEREST OF *AMICUS CURIAE*..... 1

ARGUMENT 3

 I. The Supreme Court’s Decision in *County of Maui* Should Not Be Applied in a Way That Would Undermine State Groundwater Regulatory Programs 3

 II. Nondegradation of Groundwater Quality is the Objective of the Illinois Groundwater Protection Program6

 III. Requiring a CWA Permit for Certain Discharges to Groundwater is Fundamentally at Odds with the Goals of the Illinois GPA and Part 620 Standards..... 16

CONCLUSION..... 18

CERTIFICATE OF RULE 32 COMPLIANCE 20

PROOF OF SERVICE 21

TABLE OF AUTHORITIES

Cases	Page(s)
<i>County of Maui, Hawaii v. Hawaii Wildlife Fund, et al.</i> , No. 18-260, slip op., 590 U.S. ___, 140 S.Ct. 1462, 2020 WL 1941966 (Apr. 23, 2020)	3,4,5,16,17,18
<i>Environmental Protection Agency v. V.P. Kremm and Virginia Kremm, d/b/a Chem-Met Corporation</i> , PCB 72-173 (Aug. 30, 1973)	7
<i>In the Matter of: A Plan for Protecting Illinois Groundwater</i> , PCB R86-8 (Aug. 28, 1986)	1,8
<i>In the Matter of: Groundwater Quality Standards</i> (35 Ill. Adm. Code 620), PCB R89-14(A) and (B) (July 25, 1991)	2
<i>In the Matter of: Illinois Groundwater Quality Standards</i> (35 Ill. Adm. Code 620), PCB R89-14(B) (Nov. 7, 1991)	9,10
<i>In the Matter of: Proposed Amendments to Groundwater Quality Standards</i> (35 Ill. Adm. Code 620), PCB R2008-018 (August 9, 2012)	3
<i>In the Matter of: Site Remediation Program and Groundwater Quality</i> (35 Ill. Adm. Code 740 and 35 Ill. Adm. Code 620), PCB R97-11 (June 5, 1997).	3
<i>Illinois Environmental Protection Agency v. Service Disposal, Inc.</i> , PCB 78-192 (Nov. 16, 1978)	7
<i>International Union, et al. v. Caterpillar, Inc.</i> , PCB 94-240 (Aug. 1, 1996)	13,14
<i>People of the State of Illinois v. ESG Watts, Inc.</i> , PCB 96-107 (Feb. 5, 1998)	14
<i>People of the State of Illinois v. Heritage Coal Company, LLC</i> , PCB 99-134 (Sept. 6, 2012)	14
<i>Prairie Rivers Network v. Dynegy Midwest Generation LLC</i> , PCB 2019-093 (April 1, 2019)	14
Ill.Rev.Stat., 1971, ch. 111 ½, par. 1003(0)	7
33 U.S.C. § 1311(a)	16
33 U.S.C. § 1342	16

8 Ill. Adm. Code 259 App. D 15

35 Ill. Adm. Code § 620.110..... 11

35 Ill. Adm. Code § 620.230(a) and (b)..... 12

35 Ill. Adm. Code § 620.301(a) 14

35 Ill. Adm. Code § 620.401, *et seq*..... 12

35 Ill. Adm. Code § 620.405..... 13

35 Ill. Adm. Code § 620.430..... 12

35 Ill. Adm. Code § 620.440..... 13

35 Ill. Adm. Code § 620.450..... 13

35 Ill. Adm. Code §§ 620.201 – 620.240 10

35 Ill. Adm. Code § 742.105(b) and (f)..... 15

35 Ill. Adm. Code §§ 811.320 and 817.416..... 15

77 Ill. Adm. Code § 920.190..... 15

415 ILCS 55/2(b). 9

415 ILCS 55/4(a), (b)..... 9

415 ILCS § 55/5..... 9

415 ILCS 55/8..... 9

INTEREST OF *AMICUS CURIAE*¹

The Illinois Environmental Regulatory Group, Inc. (“IERG”) is an Illinois non-profit corporation, currently comprised of forty-six (46) member companies, that was established in 1985 to represent the interests of various industries in the development and negotiation of environmental regulations and laws in Illinois. Its members are regulated by governmental agencies that promulgate, enforce, or administer environmental laws, rules, regulations, or other policies in Illinois. IERG offers this brief, pursuant to the provisions of Federal Rule of Appellate Procedure 29, to outline the legislative and regulatory scheme for the regulation of groundwater pollution in Illinois and to explain the impact that a decision in this case may have on such environmental legislation and regulation.

IERG has actively participated in the promulgation, administration, and implementation of environmental laws, regulations, and policies in Illinois. This includes participation in the development of water quality standards and regulatory relief mechanisms in Illinois. Going as far back as 1986, IERG participated extensively in proceedings mandated by the Illinois General Assembly for a comprehensive review of groundwater protection in Illinois. Report of the Board, *In the Matter of: A Plan for Protecting Illinois Groundwater*, PCB R86-8 (Aug. 28,

¹ This brief was authored by IERG’s counsel, and no counsel for a party authored this brief in whole or in part. Other than IERG or its members, no person or entity (which includes the parties or their counsel) contributed money to fund the preparation or submission of this brief.

1986), at *I, I-1 (“Report of the Board”).² These proceedings were conducted by the Illinois Pollution Control Board (“Board”), and one of the concerns raised by IERG highlighted the need to avoid conflict between state and federal regulation of groundwater. *Id.* at *VI-2 and VI-3.

The Board’s findings and recommendations from these proceedings assisted lawmakers in drafting the Illinois Groundwater Protection Act (“Illinois GPA”). IERG had a primary role in the rulemaking proceeding mandated by the Illinois GPA for the establishment of comprehensive water quality standards for the protection of groundwater within the State of Illinois, culminating in the adoption of the Illinois Groundwater Quality Standards at 35 Ill. Adm. Code Part 620 (“Part 620 Standards”). Opinion and Order of the Board, *In the Matter of: Groundwater Quality Standards* (35 Ill. Adm. Code 620), PCB R89-14(A) and (B) (July 25, 1991), at *3. IERG not only participated in the adoption of the Part 620 Standards, but has also coordinated with the Illinois Environmental Protection Agency (“Illinois EPA”) and other stakeholders in regulatory updates to the Part 620 standards, as well as the adoption of other regulatory programs utilizing the Part 620 Standards. In docket R97-11, the Board finalized regulations implementing the groundwater monitoring and protection requirements of the Site Remediation Program (“SRP”), concerning “investigat[ion] and remedial activities at sites where there is a release, threatened release, or suspected release of hazardous substances, pesticides, or

² Docket materials filed with the Illinois Pollution Control Board are available electronically, including submissions to the Board, as well as the Board’s reports, Opinions and Orders, and other materials cited below:
<http://pcb.illinois.gov/ClerksOffice/SearchCases>.

petroleum.” Opinion and Order of the Board, *In the Matter of: Site Remediation Program and Groundwater Quality* (35 Ill. Adm. Code 740 and 35 Ill. Adm. Code 620), PCB R97-11 (June 5, 1997), at *2-3, 6. The Board rulemaking in R08-18 updated regulatory standards to track the refined scientific data on groundwater pollution and adopted groundwater quality standards for additional chemical constituents. Opinion and Order of the Board, *In the Matter of: Proposed Amendments to Groundwater Quality Standards* (35 Ill. Adm. Code 620), PCB R2008-018 (August 9, 2012), at *2-3.

As regulated entities with compliance obligations under the Illinois GPA, Part 620 Standards and other Illinois groundwater programs, as well as the CWA, IERG’s members have a vital and direct interest in the application of the Supreme Court’s decision in *County of Maui* to groundwater in Illinois.

ARGUMENT

I. The Supreme Court’s Decision in *County of Maui* Should Not Be Applied in a Way That Would Undermine State Groundwater Regulatory Programs

The central question addressed by the United States Supreme Court in *County of Maui, Hawaii v. Hawaii Wildlife Fund, et al.*, No. 18-260, slip op., 590 U.S. ___, 140 S.Ct. 1462, 2020 WL 1941966 (Apr. 23, 2020), is whether the Clean Water Act (“CWA”) requires a permit when pollutants originating from a point source are conveyed to navigable waters by groundwater. 140 S.Ct. at 1468. The Supreme Court concluded that the CWA requires a permit when there is the *functional equivalent of a direct discharge* from a point source into navigable waters. *Id.* at 1476. However, the Supreme Court also included several cautionary

admonitions in its *County of Maui* opinion regarding the application of the functional equivalent test by federal courts and the potential impact of the *County of Maui* decision on state groundwater programs.

As an initial matter, the Supreme Court looked closely at Congressional intent behind the passage of the CWA, and observed that Congress rejected amendments to the CWA “that would have extended the permitting provision to groundwater.” *Id.* at 1472. As the Supreme Court noted:

The upshot is that Congress was fully aware of the need to address groundwater pollution, but it satisfied that need through a variety of state-specific controls. Congress left general groundwater regulatory authority to the States; its failure to include groundwater in the general EPA permitting provision was deliberate.

Id.

Next, the Supreme Court examined the central role of the States in regulating groundwater pollution. As explained by the Supreme Court, the CWA “envisions EPA’s role in managing . . . groundwater pollution as limited to studying the issue, sharing information with and collecting information from the States, and issuing monetary grants.” *Id.* at 1471. The Supreme Court went on to observe that:

In truth, the most these provisions show is that Congress thought that the problem of groundwater pollution, as distinct from navigable water pollution, would primarily be addressed by the States or perhaps by other federal statutes.

Id. at 1474.

Ultimately, the Supreme Court in *County of Maui* adopted a middle ground approach, which reflected Congressional intent in providing federal regulation of pollutants entering navigable waters “without undermining the States’

longstanding regulatory authority over land and groundwater.” *Id.* at 1476. The functional equivalent test announced by the Supreme Court would cover those situations involving the loophole identified by the Supreme Court where groundwater contamination migrates to navigable waters. *Id.*

Finally, the Supreme Court discussed the role of the federal courts in applying the functional equivalent approach described in the *County of Maui* decision. As the Supreme Court explained, the “object in a given scenario will be to advance, in a manner consistent with the statute’s language, the statutory purposes that Congress sought to achieve . . . That context includes the need, reflected in the statute, to preserve state regulation of groundwater . . .” *Id.*

After outlining some of the factors that *may* be relevant to the functional equivalent determination, the Supreme Court opined that “courts can provide guidance through decisions in individual cases,” but cautioned that such decisions “should not create serious risks . . . of undermining state regulation of groundwater . . .” *Id.* at 1477. All of these points considered, it is clear that, while the Supreme Court adopted the functional equivalent test, it did not intend for the test to supplant state groundwater regulatory programs, but only to ensure that the federal CWA program was available to address any loopholes or gaps in such regulatory programs.

There is no such regulatory loophole or gap in the Illinois groundwater regulatory program. As explained below, the regulation of groundwater pollution by the State of Illinois predated the CWA. Moreover, since the passage of the Illinois

GPA in 1987, groundwater pollution in Illinois has been addressed under separate statutory authority and a comprehensive regulatory program, with the stated goal of preventing the degradation of groundwater. The Illinois groundwater quality standards provide the basis for addressing groundwater issues under several regulatory programs overseen by Illinois EPA, as well as regulatory programs administered by the Illinois Department of Public Health and the Illinois Department of Agriculture. As discussed below, the Supreme Court's repeated warnings regarding undermining state groundwater regulatory programs are particularly relevant with respect to the Illinois program due to fundamental inconsistencies between the objectives and intent of the Illinois groundwater protection program and the federal CWA permitting program. Application of the *County of Maui* functional equivalent test to groundwater pollution in Illinois would undermine the robust and comprehensive groundwater protection program in Illinois and would conflict with the intent and goals of the Illinois program.

II. Nondegradation of Groundwater Quality is the Objective of the Illinois Groundwater Protection Program

Before the U.S. Congress determined to leave regulation of groundwater to the states, the State of Illinois had already asserted jurisdiction over groundwater protection. Illinois Public Act 76-2429 (adopted by the Illinois General Assembly on June 29, 1970 as House Bill 3788) created the Illinois Environmental Protection Act ("Illinois Act"), which took effect on July 12, 1971. The original Illinois Act, whose effective date predated the CWA by fifteen months, defined "waters" as "all accumulations of water, surface *and underground*, . . . which are wholly or partially

within, flow through, or border upon this State.” Ill.Rev.Stat., 1971, ch. 111 ½, par. 1003(0) (emphasis added). Sections 12(a) and 12(d) of the original Illinois Act contained the following prohibitions:

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.

Id. ¶¶ 12(a), 12(d).

Following the adoption of the Illinois Act, decisions in enforcement cases brought by the State of Illinois confirmed that groundwater pollution could be the basis for violations of Sections 12(a) and 12(d) of the Illinois Act. In *Environmental Protection Agency v. V.P. Kremm and Virginia Kremm, d/b/a Chem-Met Corporation*, PCB 72-173 (Aug. 30, 1973), the State of Illinois filed a complaint alleging violations of Sections 12(a) and 12(d) resulting from a ferric chloride release to the ground at an industrial facility on the Chicago Ship and Sanitary Canal. PCB 72-173 at *1. Groundwater seepage and runoff was discharged to the Canal, and the Board found that such discharges violated Sections 12(a) and 12(d) of the Illinois Act. *Id.* at *3; *see also Illinois Environmental Protection Agency v. Service Disposal, Inc.*, PCB 78-192 (Nov. 16, 1978) (migration of landfill leachate

caused, threatened or allowed water pollution of sub-surface waters and created a water pollution hazard to sub-surface waters).

In 1983, the Illinois General Assembly turned its focus to the issue of protection of Illinois groundwater. Public Act 83-1268, which was signed into law in August 1984, outlined a three-phase approach for the review of groundwater protection in Illinois. PCB R86-8, Report of the Board, at *I-1. The first and second phases required the completion of a comprehensive study of Illinois groundwater quality and development of a groundwater protection plan by the Illinois EPA. *Id.* Illinois EPA's report entitled "A Plan for Protecting Illinois Groundwater" was presented to the Governor, Illinois General Assembly, and Board in January, 1985. *Id.* Phase three included public review of the groundwater quality study and Illinois EPA groundwater protection plan, and included seven days of hearing, sworn testimony from 39 witnesses, and a voluminous public record. *Id.* at *I-1, I-2. The Board published its findings and conclusions as its 104-page Report of the Board. *Id.* at *i. One of the issues addressed in the Report of the Board was the concern raised by IERG regarding the potential for inconsistency between state and federal regulation of groundwater. As the Report of the Board noted, "[c]onsistency of regulations is a matter particularly and justifiably dear to the regulated community, lest they find themselves in the position of attempting to comply with conflicting regulations," *Id.* at *VI-2. Implementation of the three-phase approach outlined in Public Act 83-1268 took three years, and resulted in the adoption of the Illinois GPA in 1987 (P.A. 85-863).

The Illinois GPA provides independent statutory authority for groundwater protection, including the stated goal of preventing “waste and degradation” of groundwater resources in Illinois. 415 ILCS 55/2(b). Section 4 of the Illinois GPA established the Interagency Coordination Committee on Groundwater (“ICCG”), with members from all Illinois state agencies with jurisdiction over groundwater.³ 415 ILCS § 55/4(a), (b). Since 1988, the ICCG has met on a regular basis to address issues concerning the Illinois groundwater protection program. The ICCG reviews state laws and regulations concerning groundwater to ensure a broad, multiagency approach to improving Illinois’ groundwater. The Illinois GPA also established a Groundwater Advisory Council, composed of representatives from different affiliations and interests, which is tasked with making recommendations regarding the Illinois groundwater protection program. 415 ILCS § 55/5. The Groundwater Advisory Council continues to provide guidance regarding development and implementation of the Illinois groundwater protection program.

The Illinois GPA further directed the Illinois EPA to “propose regulations establishing comprehensive water quality standards which are specifically for the protection of groundwater.” 415 ILCS § 55/8. The IEPA filed its original proposal for Groundwater Quality Standards on September 21, 1989. Final Order, *In the Matter of: Illinois Groundwater Quality Standards* (35 Ill. Adm. Code 620), PCB R89-14(B) (Nov. 7, 1991), at *1. Over the next two years, state agencies, environmental groups,

³ <https://www2.illinois.gov/epa/topics/water-quality/groundwater/Pages/gw-advisory-council.aspx>

trade associations (including IERG), and individuals participated in the Board rulemaking proceeding for the Groundwater Quality Standards (“the Part 620 Standards”). Competing rulemaking proposals were filed, several public hearings were held, and the Board received public comments on the proposal. *Id.* at *1-2.

The Board adopted the Part 620 Standards on November 7, 1991. *Id.* at *1. The Board was bound by several parameters in promulgating groundwater quality standards, including requirements to classify groundwaters by their utility as a resource or susceptibility to contamination, develop numerical groundwater quality standards, and apply appropriate nondegradation provisions to Illinois groundwaters. *Id.* at *4.

With respect to the designation of groundwater classes, the Board noted that:

“Basic to the groundwater classification effort is the concept that groundwater constitutes a valued resource. *** It is recognized, however, that not all groundwaters constitute the same level of resource; some groundwaters have greater resource value by virtue of their higher quality, quantity, etc. Moreover, it is generally agreed that the degree of protection required is in some measure a function of the nature of the particular groundwater resource.”

Id., at *8-9. The Board further noted that “[p]erhaps no other facet of this proceeding has focused as much effort as has determining how best to classify the State’s groundwaters.” *Id.* at *9.

The classes of groundwater established by the Part 620 Standards include: (i) Class I (Potable Resource Groundwater), (ii) Class II (General Resource Groundwater), (iii) Class III (Special Resource Groundwater), and (iv) Class IV (Other Groundwater). 35 Ill. Adm. Code §§ 620.201 – 620.240. Whether a particular groundwater is properly categorized under Classes I through IV depends on several

variables, including potability, depth, hydraulic conductivity, proximity to water supply wells, and the particular ecological circumstances of the water system. *See generally* 35 Ill. Adm. Code §§ 620.210-620.240. With respect to Class I Potable Resource Groundwater, the Board noted that “among the most necessary facets of the State’s groundwater protection program is the need to protect all drinkable water at a drinkable level . . . we simply cannot allow the sullyng of a resource that future generations may need.” R89-14(B) Final Order at 11 (emphasis supplied).

In fact, nondegradation of Illinois groundwater was and is one of the guiding principles of the Part 620 Standards, as set forth in 35 Ill. Adm. Code 620.301(a):

- a) No person shall cause, threaten or allow the release of any contaminant to a resource groundwater such that:
 - 1) Treatment or additional treatment is necessary to continue an existing use or to assure a potential use of such groundwater; or
 - 2) An existing or potential use of such groundwater is precluded.

35 Ill. Adm. Code § 620.301(a).⁴

As the Board noted in the Final Order, 35 Ill. Adm. Code § 620.301 is a prohibition against impairment of any existing or potential use of groundwater. Final Order, PCB R89-14(B), at *15. The establishment of groundwater quality standards for all classes of Illinois groundwater was intended to be the primary

⁴ “Resource groundwater” is defined as “groundwater that is presently being, or in the future is capable of being, put to beneficial use by reason of being of suitable quality.” 35 Ill. Adm. Code § 620.110.

means of ensuring nondegradation of groundwater. Once categorized, groundwater is subject to specific water quality standards applicable to that class. *See* 35 Ill. Adm. Code § 620.401, *et seq.* (“Groundwaters must meet the standards appropriate to the groundwater’s class as specified in this Subpart and the nondegradation provisions of Subpart C.”). Accordingly, groundwater in Illinois that meets the definition for Class I groundwater must not exceed the concentration limits for the organic and inorganic constituents listed in 35 Ill. Adm. Code § 620.410. Class I groundwater is further subject to requirements in this provision for explosive, carcinogenic, pH, and radioactivity properties. 35 Ill. Adm. Code § 620.401(c)-(f).

A similar, but less stringent, set of concentration limits applies to Class II General Resource Groundwaters. 35 Ill. Adm. Code § 620.420. Class III Special Resource Groundwater includes groundwater within a designated nature preserve, or groundwater that has been designated by the Board as demonstrably unique or vital for a particular ecosystem. 35 Ill. Adm. Code § 620.230(a) and (b). The Class I limits for inorganic and organic chemical constituents apply to Class III Special Resource Groundwaters unless the Board adopts a special adjusted standard imposing a different concentration limit. 35 Ill. Adm. Code § 620.430. Class IV Other Groundwater includes “certain waters that, due to particular practices or natural conditions, are limited in their resource potential,” *e.g.*, groundwater impacted by releases and groundwater within mined areas. R89-14(B) Final Order at *14; 35 Ill. Adm. Code § 620.240. In accordance with the nondegradation goals of the Illinois GPA and the Part 620 Standards, the groundwater quality standards

applicable to most Class IV groundwater are existing (or post-reclamation/post-corrective action) groundwater concentrations. 35 Ill. Adm. Code § 620.440. Finally, Section 620.450 concerns Alternative Groundwater Quality Standards, and allows for standards tailored to groundwater management zones (“GMZs”), which rely on natural attenuation and monitoring, along with other unique groundwater circumstances. 35 Ill. Adm. Code § 620.450.

In furtherance of the nondegradation goals of the Illinois GPA and Part 620 Standards, Section 620.405 prohibits exceedances of Illinois groundwater quality standards:

No person shall cause, threaten or allow the release of any contaminant to groundwater so as to cause a groundwater quality standard set forth in this Subpart to be exceeded.

35 Ill. Adm. Code § 620.405.

After the promulgation of the Part 620 Standards, enforcement proceedings addressing groundwater contamination typically alleged violations of Sections 12(a) and 12(d) of the Illinois Act and the Part 620 Standards. One such citizens’ enforcement case was *International Union, et al. v. Caterpillar, Inc.*, PCB 94-240 (Aug. 1, 1996), a complaint filed before the Board involving allegations of soil and groundwater contamination at Caterpillar’s East Peoria facility. *International Union*, PCB 94-240, at *1. The complainants, an association of labor unions, alleged that Caterpillar had violated Sections 12(a) and (d) of the Illinois Act and various Part 620 regulations in connection with groundwater contamination at the East Peoria facility. *Id.* at *1-2. The Board upheld the alleged violations, noting that:

The Part 620 standards of the Board's groundwater quality regulations establish a classification scheme for groundwater which is designed to protect them from degradation and to protect the continued viability of Illinois' groundwater resources. Though not adopted pursuant to the Act, but to the Illinois Groundwater Protection Act (IGPA), the IGPA directs the Board to adopt regulations “establishing comprehensive water quality standards which are specifically for the protection of groundwater.” (Groundwater Quality Standards: 35 Ill. Adm. Code 620, (November 7, 1991), 127 PCB 53.) The IGPA further declares groundwater to be a resource, the protection of which is essential to the social and economic well-being of the people of Illinois, and which is of vital importance to their general health, safety, and welfare. (*Id.*) In this case, we find that exceedances of the Part 620 standards, therefore, constitutes degradation of one of the State's water resources and indicates the presence of water pollution caused by respondent.

Id. at *33-34 (*aff'd* 291 Ill. App. 3d 1135, 716 N.E.2d 885 (3rd Dist. 1997)); *see also* *People of the State of Illinois v. ESG Watts, Inc.*, PCB 96-107, *54 (Feb. 5, 1998) (exceedance of Class II groundwater quality standards in groundwater at landfill were violations of Section 12(a) of the Illinois Act and 35 Ill. Adm. Code 620.301 and 620.115); *People of the State of Illinois v. Heritage Coal Company, LLC*, PCB 99-134, *18 (Sept. 6, 2012) (rejecting respondent's contention that the Mining Law and Part 620 are *in pari materia*, and noting that “the purpose of the Board's implementing [Part 620] rules is to appropriately classify groundwater, establish non-degradation provisions, GWQS, and methods for the management and protection of groundwater.”); *Prairie Rivers Network v. Dynegy Midwest Generation LLC*, PCB 2019-093 (April 1, 1996) (complaint includes the identical violations of Part 620 Standards alleged in this case).

While the Part 620 Standards establish the standards and mechanism for Illinois enforcement of groundwater quality violations, the Part 620 Standards are

also incorporated and utilized in Illinois EPA regulatory programs. The Part 620 Standards are the predicate for the groundwater remediation objectives used in the Illinois Tiered Approach to Corrective Action Objectives (“TACO”), and TACO is the risk-based remediation approach utilized by the Illinois Leaking Underground Storage Tank Program, the Illinois SRP, and the Illinois Resource Conservation and Recovery Act (“RCRA”) Part B Permits and Closure Program. 35 Ill. Adm. Code § 742.105(b) and (f). Regulations governing the operation of chemical and putrescible waste landfills and new steel and foundry industry waste landfills also specifically incorporate the Part 620 Standards. 35 Ill. Adm. Code §§ 811.320 and 817.416.

The Part 620 Standards are also recognized and enforced by state agencies besides Illinois EPA. The Illinois Department of Public Health uses the Part 620 Standards as the standard for whether a potable water supply well is contaminated. 77 Ill. Adm. Code § 920.190. The Illinois Department of Agriculture incorporates the Part 620 Standards in its Agrichemical Facility Response Program. 8 Ill. Adm. Code 259 App. D.

Regulation of groundwater protection by the State of Illinois began with the passage of the Act in 1970, and the current Illinois regulatory program for groundwater protection was the product of the Illinois General Assembly’s focus on groundwater protection in the 1980s. The Illinois groundwater protection program is a robust and comprehensive regulatory program that exists under independent statutory and regulatory authority and is dedicated to groundwater protection and nondegradation of Illinois groundwater resources.

III. Requiring a CWA Permit for Certain Discharges to Groundwater is Fundamentally at Odds with the Goals of the Illinois GPA and Part 620 Standards

Section 301 of the CWA states that “[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a) (emphasis added). Section 402 of the CWA, which is one of the exceptions to the prohibition on discharges of pollutants, is the statutory authority for the National Pollutant Discharge Elimination System (“NPDES”) permit program. 33 U.S.C. § 1342. Section 402 provides, in relevant part:

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318 and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

Id.

The premise of the CWA’s NPDES permit program is that a permit must be obtained for a discharge to navigable waters. In *County of Maui*, the Supreme Court extended this permitting requirement to situations involving the *functional equivalent of a direct discharge*. *County of Maui*, 140 S.Ct. at 1476. The Supreme Court’s holding in *County of Maui* was significantly influenced by its concern regarding a potential loophole or regulatory gap that would provide no regulatory authority over a discharge from a pipe that “ends a few feet from navigable waters

and the pipe emits pollutants that travel those few feet through groundwater” to navigable waters. *Id.* at 1475-76. Under the reasoning adopted by the Supreme Court in *County of Maui*, the groundwater contamination migrating toward navigable waters should be covered by a CWA permit. As the Supreme Court explained, it will fall to the federal courts to decide which factual situations involving groundwater pollution will require a CWA permit. *Id.* at 1476.

However, the potential loophole or regulatory gap that the Supreme Court was concerned with in *County of Maui* does not exist under the Illinois groundwater protection regulatory program. Because the Part 620 standards, including the applicable groundwater quality standards, apply to all Illinois groundwater, the Part 620 standards will apply to groundwater pollution caused by a point source that has the potential to impact navigable waters. Therefore, under the Supreme Court’s hypothetical, the groundwater traveling those few feet between a point source and navigable waters is regulated under the Part 620 Standards, and any exceedance of applicable groundwater quality standards is an enforceable violation of Section 12(a) and 12(d) of the Illinois Act and the Part 620 Standards.

Moreover, as noted above, nondegradation of groundwater is the cornerstone of the Illinois groundwater protection program established by the Illinois GPA and the Part 620 Standards. Under the Illinois groundwater protection program, it is a violation to release any contaminant into groundwater that might cause an exceedance of a groundwater quality standard. 35 Ill. Adm. Code § 620.405. For this reason, there is a fundamental conflict between the objectives and intent of the

Illinois groundwater protection program and the CWA permitting program. While the goal of the Illinois groundwater protection program is no discharges of pollutants to groundwater, the purpose and structure of the CWA NPDES permit program would allow such discharges subject to permit conditions. In addition, the relevant factors identified by the Supreme Court for application of the functional equivalent test do not go as far as Illinois requires to take into account the Illinois groundwater classification system or the prohibition against any impairment of resource groundwater. If the functional equivalent test is recognized as the appropriate legal standard for some or most discharges of pollutants to groundwater, the potential exists for the CWA's NPDES program to subsume the application and enforcement of the Part 620 Standards. This is the "serious risk" that the Supreme Court warned against. For these reasons, the Court should not apply the *County of Maui* holding or functional equivalent test in this case.

CONCLUSION

The Court should affirm the District Court's dismissal of the case.

Dated: September 8, 2020

Respectfully submitted,

/s/ Stephen R. Kaufmann

HeplerBroom, LLC

Stephen R. Kaufmann (IL# 3126728)

Jennifer M. Martin (IL# 6210218)

Julieta A. Kosiba (IL# 6324187)

Brian J. Dodds (IL# 6323824)

4340 Acer Grove Drive

Springfield, IL 62711

(217) 528-3674

(217) 528-3964 (fax)

Stephen.Kaufmann@heplerbroom.com

Jennifer.Martin@heplerbroom.com

Julieta.Kosiba@heplerbroom.com

Brian.Dodds@heplerbroom.com

Counsel for Illinois Environmental Regulatory Group, Inc.

CERTIFICATE OF RULE 32 COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29 and 32(g)(1) and Circuit Rules of the United States Court of Appeals for the Seventh Circuit 29 and 32(c), I hereby certify that this brief complies with the stated type-volume limitations. The text of the brief was prepared in Century 12-point font, with footnotes in Century 11-point font. This brief consists of 4,727 words, excluding those items noted in Federal Rule of Appellate Procedure 32(f). This certification is based on the word count function of the Microsoft Office Word processing software, which was used in preparing this brief.

Dated: September 8, 2020

Respectfully submitted,

/s/ Stephen R. Kaufmann

HeplerBroom, LLC

Stephen R. Kaufmann (IL# 3126728)

Jennifer M. Martin (IL# 6210218)

Julieta A. Kosiba (IL# 6324187)

Brian J. Dodds (IL# 6323824)

4340 Acer Grove Drive

Springfield, IL 62711

(217) 528-3674

(217) 528-3964 (fax)

Stephen.Kaufmann@heplerbroom.com

Jennifer.Martin@heplerbroom.com

Julieta.Kosiba@heplerbroom.com

Brian.Dodds@heplerbroom.com

Counsel for Illinois Environmental Regulatory Group, Inc.

PROOF OF SERVICE

I hereby certify that on September 8, 2020, I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 8, 2020

Respectfully submitted,

/s/ Stephen R. Kaufmann

HeplerBroom, LLC

Stephen R. Kaufmann (IL# 3126728)

Jennifer M. Martin (IL# 6210218)

Julieta A. Kosiba (IL# 6324187)

Brian J. Dodds (IL# 6323824)

4340 Acer Grove Drive

Springfield, IL 62711

(217) 528-3674

(217) 528-3964 (fax)

Stephen.Kaufmann@heplerbroom.com

Jennifer.Martin@heplerbroom.com

Julieta.Kosiba@heplerbroom.com

Brian.Dodds@heplerbroom.com

Counsel for Illinois Environmental Regulatory Group, Inc.