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 AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT PRAIRIE RIVERS NETWORK

Oral Argument Requested

Earthjustice
Thomas Cmar (IL #6298307)
Counsel of Record for Appellant Prairie Rivers Network
Jennifer Cassel (IL #6296047)
Mychal Ozaeta (CA #309851)
Melissa Legge (NY #5596739)
311 S. Wacker Dr., Ste. 1400
Chicago, IL 60606
(312) 500-2191
(312) 667-8961 (fax)
tcmar@earthjustice.org
jcassel@earthjustice.org
mlegge@earthjustice.org
mozaeta@earthjustice.org

Solberg & Bullock, LLC
Ellyn Bullock (IL #6224579)
Counsel for Appellant Prairie Rivers Network
100 N. Chestnut St., Ste. 230
Champaign, IL 61820
(217) 351-6156
(217) 351-6203 (fax)
ellyn@solbergbullock.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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):

Prairie Rivers Network

(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:

Earthjustice; Solberg & Bullock LLC

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(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/ Thomas Cmar Date: 07/01/2020

Attorney's Printed Name: Thomas Cmar

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

Address: 311 S. Wacker Drive, Suite 1400, Chicago IL 60606

Phone Number: 312-500-2191 Fax Number: 312-667-8961

E-Mail Address: tcmar@earthjustice.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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):

Prairie Rivers Network

(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:

Earthjustice; Solberg & Bullock LLC

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(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 Cassel Date: 07/01/2020

Attorney's Printed Name: Jennifer Cassel

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

Address: 311 S. Wacker Drive, Suite 1400, Chicago IL 60606

Phone Number: 312-500-2198 Fax Number: 312-667-8961

E-Mail Address: jcassel@earthjustice.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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):

Prairie Rivers Network

(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:

Earthjustice, Solberg & Bullock, LLC

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(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/Melissa Legge Date: 07/01/2020

Attorney's Printed Name: Melissa Legge

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

Address: 48 Wall St., 15th Fl. New York, NY 10005

Phone Number: 212-823-4978 Fax Number: 212-918-1556

E-Mail Address: mlegge@earthjustice.org

rev. 12/19 AK

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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):

Prairie Rivers Network

(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:

Earthjustice, Solberg & Bullock, LLC

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(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/Mychal Ozaeta Date: 07/01/2020

Attorney's Printed Name: Mychal Ozaeta

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

Address: 707 Wilshire Blvd., Ste. 4300 Los Angeles, CA 90017

Phone Number: 213-766-1069 Fax Number: 212-918-1556

E-Mail Address: mozaeta@earthjustice.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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):

Prairie Rivers Network

(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:

Ellyn Bullock, Solberg & Bullock, LLC; Earthjustice

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(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 Ellyn Bullock Date: 07/01/2020

Attorney's Printed Name: Ellyn Bullock

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

Address: 100 N. Chestnut, Ste. 230, Champaign, IL 61820

Phone Number: 217-351-6156 Fax Number: 217-351-6203

E-Mail Address: ellyn@solbergbullock.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

STATEMENT OF SUPPORT FOR ORAL ARGUMENT

Prairie Rivers Network respectfully requests oral argument to clarify the issues, respond to any questions, and otherwise assist the Court in the resolution of this appeal. The issues presented in this proceeding – pertaining to the ability of members of the public to bring legal actions to protect scenic and recreational waterways like the Middle Fork of the Vermilion River from illegal discharges of toxic coal ash pollution – are of significant jurisprudential and public concern.

JURISDICTIONAL STATEMENT

The Central District of Illinois had jurisdiction pursuant to the citizen suit provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(a), as well as 28 U.S.C. § 1331. The district court entered a final judgment on November 14, 2018. Plaintiff-Appellant Prairie Rivers Network timely noticed its appeal on December 14, 2018. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

First, whether the district court erred in holding that federal Clean Water Act permitting requirements do not apply to Dynegy's unauthorized point source discharges of toxic coal ash pollutants into the Middle Fork of the Vermilion River that pass through hydrologically connected groundwater.

Second, whether the district court erred in declining to exercise federal Clean Water Act jurisdiction over Prairie Rivers Network's separate claim that Dynegy is violating conditions of its Clean Water Act permit for the Vermilion Power Station.

STATEMENT OF THE CASE

I. UNAUTHORIZED DISCHARGE OF POLLUTANTS FROM VERMILION COAL ASH IMPOUNDMENTS TO MIDDLE FORK

From the mid-1950s until 2011, the Vermilion Power Station burned coal to generate electricity and produced millions of tons of coal combustion residuals ("coal ash") as a waste by-product in the process. Dkt. #1, Appendix p. 28,[1] ¶ 30. Defendant-Appellee Dynegy Midwest Generation LLC ("Dynegy") and its predecessor mixed the coal ash generated at the Vermilion Station with water and sluiced it into three unlined coal ash pits, known as the Old East Ash Pond, the North Ash Pond, and the New East Ash Pond. *Id.* Dynegy has acknowledged that coal ash was deposited into those pits, which it describes as "man-made ponds" or "[i]mpoundments," beginning in the 1950s. Dkt. #15, APP0059. Coal ash was deposited into the Old East Ash Pond beginning in the 1950s, into the North Ash Pond "[f]rom the 1970s until approximately 1990," and then into the New East Ash Pond until the plant's closure in 2011. *Id.* Although the coal ash pits are out of service, all three continue to store coal ash, as deep as forty-four feet in some locations. Dkt. #1, APP0028, ¶ 32. The three unlined coal ash pits contain an approximate total of 3.33 million cubic yards of coal ash, *id.*, and sit perilously close to the Middle Fork of the Vermilion River, which is Illinois' only National Scenic River and is a navigable water that is protected by the federal Clean Water Act. Dkt. #1, APP0031, ¶ 49.

Under its delegated authority under the Clean Water Act, 33 U.S.C. § 1342(b), the Illinois Environmental Protection Agency granted Dynegy a limited authorization to discharge

[1] Record documents cited repeatedly in this brief are included in the Appendix accompanying this brief. Per the direction of the local rules, the first document in the Appendix is the decision appealed from and it is attached to this brief. The remainder of the Appendix documents are separately bound. Citations follow the convention of the district court docket number followed by the pages in the Joint Appendix, referenced as "APP#". Documents cited from this Court's docket in this case are not included in the Appendix and will be referenced by their docket number, title and filing date.

wastewater from the Vermilion Station by issuing National Pollutant Discharge Elimination System ("NPDES") permit IL0004057 (the "Permit"). Dkt. #1, APP0029, ¶ 36. The Permit regulates discharges of pollutants from the Vermilion Station, specifying which wastewater streams may be discharged from which points at the plant (defined as nine permitted "outfalls") and under what conditions. *Id.*, ¶ 37. The Permit also includes several federally-enforceable conditions derived from Illinois law that regulate activities at the site other than discharges themselves, including Standard Conditions 23 and 25. Dkt. #1, APP0029-30, ¶¶ 38, 41.

Vermilion's impoundments convey pollutants from the coal ash disposed in them into the Middle Fork through groundwater, discharging them via numerous unpermitted seeps on the riverbank adjacent to the North Ash Pond and Old East Ash Pond in areas where there are no permitted outfalls. Dkt. #1, APP0031, ¶ 48. These unpermitted discharges from the Vermilion coal ash impoundments occur year-round on an ongoing basis and "flow[] right into the adjacent Middle Fork" through hydrologically connected groundwater. Dkt. #1, APP0031-34, ¶¶ 48-54, 60. Dynegy's own reports and evidence gathered by Prairie Rivers Network shows that the impoundments are the source of these discharges, as groundwater flows through the coal ash in the pits, picking up contaminants in the process, and mixes with precipitation draining down through the top of the coal ash before discharging coal ash pollutants into the adjacent Middle Fork. Dkt. #1, APP0033, ¶¶ 53, 54. Vermilion's unpermitted discharges have discolored, and are continuing to discolor, the Middle Fork in low-flow areas of the river adjacent to the coal ash pits with a bright orange-red color not of natural origin. *Id.*, ¶ 57. The discharges have also included, and continue to include, iron and manganese at concentrations exceeding effluent limits in the Illinois Administrative Code that are incorporated into Vermilion's Permit. Dkt. #1, APP0033, APP0035, ¶¶ 56, 71. Finally, the discharges from the ash pits have contained, and

continue to contain, solids that settle on the riverbed. Dkt. #1, APP0032-33, APP0035, ¶¶ 53, 73.

II. HARM RESULTING FROM DISCHARGES OF COAL ASH POLLUTION INTO THE MIDDLE FORK

Vermilion's discharges of coal ash pollution into the Middle Fork have harmful effects on the people who use and enjoy the Middle Fork. The Middle Fork and the flora and fauna the river supports draw visitors from near and far. Dkt. #1, APP0029, ¶ 35. Canoeing and kayaking on the Middle Fork are popular pastimes, as is hiking the trails of the Kickapoo State Recreation Area and other nearby parks located along the Middle Fork. *Id.* Other visitors come to the river and its shoreline parks to camp, walk their dogs, ride horses, hunt, photograph wildlife, picnic, or just to bask in the Middle Fork's scenic beauty. *Id.*

Coal ash contamination is dangerous because wastewater such as that which is discharged from the Vermilion coal ash impoundments contains heavy metals and other toxic pollutants that are harmful and at times deadly to people, aquatic life, and animals. Dkt. #1, APP0028-29, ¶ 34. Among the contaminants found in coal ash are arsenic, barium, boron, chromium, lead, manganese, molybdenum, nickel, and sulfate. *Id.* These contaminants can inflict severe harm, including brain damage, cancer, learning disabilities, birth defects, and reproductive defects. *Id.*

III. PRAIRIE RIVERS NETWORK LAWSUIT AND THIS APPEAL

On May 30, 2018, Prairie Rivers Network filed a citizen suit under 33 U.S.C. § 1365(a), seeking declaratory and injunctive relief from Dynegy's unpermitted discharges of pollutants from Vermilion into the Middle Fork as well as Dynegy's violations of its Permit. Dkt. #1, APP0032-33 (Prayer for Relief).[2] Prairie Rivers Network seeks a court order requiring Dynegy

[2] The Clean Water Act prohibits "the discharge of any pollutant" unless authorized, in relevant part, by a NPDES permit. 33 U.S.C. § 1311(a). The statute defines "discharge of pollutants" as

to take all actions at the Vermilion site necessary to comply with the Clean Water Act and the Permit. *Id.* Prairie Rivers Network also seeks civil penalties, to be assessed under 33 U.S.C. §§ 1319(d) & 1365, and 40 C.F.R. § 19.4, for violations of the Clean Water Act. Dkt. # 1 APP0033. Dynegy moved to dismiss Prairie Rivers Network's Complaint on August 29, 2018. Dkt. #14, APP0052-54. The sole basis for dismissal that Dynegy raised in its motion was its contention that "the [Clean Water Act] does not regulate discharges to groundwater, even where that groundwater is hydrologically connected to surface waters regulated by the [Act]." Dkt. #14, APP0052. The district court granted Dynegy's motion on November 14, 2018, holding that "[d]ischarges from artificial ponds into groundwater are not governed by the [Clean Water Act], even if there is an alleged hydrological connection between the groundwater and surface waters qualifying as 'navigable waters' of the United States." Dkt. #23, APP0013-18. The district court dismissed both counts of Prairie Rivers Network's Complaint on this basis. Dkt. #23, APP0018.

Prairie Rivers Network timely noticed an appeal to this Court on December 14, 2018. Because the Supreme Court at that time was considering multiple petitions for a writ of *certiorari* on the same Clean Water Act jurisdiction issue that was the basis of the district court's holding below, Prairie Rivers Network moved for two extensions of time of the briefing deadlines in this appeal. 7th Cir. Dkt. #5, Plaintiff-Appellant's Consent Motion for Extension of Time to File Appellant Brief (Dec. 21, 2018); 7th Cir. Dkt. #9, Plaintiff-Appellant's Consent Motion for Extension of Time to File Appellant Brief (Feb. 2, 2019). Dynegy consented to both motions, and this Court granted them. 7th Cir. Dkt. #6, Order (Dec. 26, 2018); Dkt. #10, Order (Feb. 5, 2019). On March 6, 2019, after the Supreme Court granted *certiorari* in one of those

"any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12).

cases, *County of Maui v. Hawai'i Wildlife Fund*, Prairie Rivers Network moved for a stay of proceedings pending a final decision from the Supreme Court in that case. 7th Cir. Dkt. #11, Plaintiff-Appellant's Consent Motion to Stay Pending Supreme Court Proceedings (Mar. 6, 2019). Dynegy again consented to the motion to stay, and this Court granted it on March 7, 2019 and directed the parties to file statements of position within 14 days after the Supreme Court's decision. 7th Cir. Dkt. #12, Order (Mar. 7, 2019).

The Supreme Court decided *County of Maui* on April 23, 2020. *See* 140 S. Ct. 1462 (2020). The Supreme Court held that discharges of pollutants from point sources to navigable waters that pass through hydrologically connected groundwater are subject to Clean Water Act requirements if they are the functional equivalent of direct discharges. *Id.* at 1476. Because the Supreme Court reached the opposite conclusion as the district court below on the Clean Water Act jurisdiction question that is central to this appeal, Prairie Rivers Network in its statement of position moved for summary reversal of the district court's decision and remand for further proceedings consistent with *County of Maui*. 7th Cir. Dkt. #15-1, Plaintiff-Appellant's Statement of Position and Motion for Summary Reversal of District Court Judgment and Remand (May 21, 2020). In its statement of position, Dynegy raised several alternate grounds that were not squarely raised before the district court and requested that this Court dismiss this appeal on the basis of one of those grounds. 7th Cir. Dkt. #16, Statement of Position of Defendant-Appellee Dynegy Midwest Generation, LLC (May 21, 2020). On June 1, 2020, this Court directed the parties to brief the issues in this appeal. 7th Cir. Dkt. #17, Order (June 1, 2020).

SUMMARY OF THE ARGUMENT

Dynegy owns the now-retired Vermilion Power Station, at which there are three legacy unlined coal ash impoundments that sit directly on the banks of the Middle Fork of the Vermilion River – with only earthen embankments standing between them and the river. The Middle Fork is Illinois' only National Scenic River: a vital ecological, scenic, and economic resource for the State of Illinois that draws visitors from near and far to canoe, kayak, hike, fish, and hunt at the Middle Fork and its surrounding areas. The Vermilion coal ash impoundments contain approximately 3.33 million cubic yards of coal ash, from which pollutants are conveyed through hydrologically connected groundwater into the Middle Fork via numerous, discrete, unpermitted seeps on the riverbank. These discharges from the coal ash impoundments are discoloring the Middle Fork an unnatural bright orange-red color in adjacent low-flow areas of the river. The discharges also include iron and manganese at concentrations exceeding Illinois water quality criteria designed to protect human health.

Prairie Rivers Network has standing to challenge Dynegy's unpermitted discharges and violations of its Clean Water Act permit. Prairie Rivers Network members who recreate in and near the Middle Fork are harmed by discharges to the river from the Vermilion coal ash impoundments. As set forth in the declarations filed concurrently with this brief, these members' enjoyment of the Middle Fork is diminished by their reasonable concerns about the toxic chemicals that they understand to be in the multi-colored seeps the Vermilion coal ash impoundments discharge. The harms to these Prairie Rivers Network members are fairly traceable to Dynegy's discharges from the Vermilion coal ash impoundments – as documented in Dynegy's own reports – and would be redressed by a court order that Dynegy cease its illegal discharges and comply with its permit. Because this case is also germane to Prairie Rivers

Network's mission and individual member participation is not necessary, Prairie Rivers Network has associational standing to pursue this case.

The Supreme Court's recent *County of Maui* decision is controlling precedent that requires summary reversal of the district court's decision below. The Supreme Court has now determined that discharges to navigable waters that pass through hydrologically connected groundwater are subject to Clean Water Act jurisdiction if they are the functional equivalent of direct discharges. Because Prairie Rivers Network has alleged facts about the Vermilion coal ash impoundment discharges that, if proven true, would satisfy the functional equivalence test, summary reversal and remand are appropriate so that the district court can find the facts and apply this new test in the first instance.

The other issues raised by Dynegy in this appeal were not addressed by the district court below and are in any event without merit. Prairie Rivers Network's Clean Water Act claims are well-grounded in both fact and law. Prairie Rivers Network has sufficiently alleged that the Vermilion coal ash impoundments are point sources under the Clean Water Act; this is a question of fact that a remand is required to resolve. Federal court adjudication of Prairie Rivers Network's claims in this case would not interfere with state regulation of groundwater, as the Supreme Court just held in *County of Maui*. Nor does the Resource Conservation and Recovery Act ("RCRA") preclude Prairie Rivers Network's claims here. Both the United States Environmental Protection Agency ("EPA") and courts have long found that both RCRA and the Clean Water Act apply to disposal sites such as coal ash impoundments that combine waste and water. Moreover, even if there was any conflict or inconsistency between RCRA and the Clean Water Act here (which there is not), RCRA expressly provides that the Clean Water Act takes precedence.

In addition, even if *County of Maui* did not require summary reversal and remand, this Court must reverse and remand the district court's dismissal of Count 2 of Prairie Rivers Network's Complaint because Count 2 asserts a separate claim with an independent basis for Clean Water Act jurisdiction. The flows of contaminated groundwater from the Vermilion coal ash impoundments into the Middle Fork violate Standard Conditions 23 and 25 of Dynegy's Clean Water Act permit, whether or not a court ultimately concludes that they are point source discharges under *County of Maui*. Standard Conditions 23 and 25 are enforceable in federal court and, under their plain language, require Dynegy to comply with them throughout the entire Vermilion site.

STANDARD OF REVIEW

This Court applies *de novo* review of a ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) and (b)(6), accepting a plaintiff's allegations as true and drawing all permissible inferences in the plaintiff's favor. *West Bend Mut. Ins. Co. v. Schumacher*, 844 F.3d 670, 675 (7th Cir. 2016); *Johnson v. Orr*, 551 F.3d 564, 567 (7th Cir. 2008).

ARGUMENT

I. PRAIRIE RIVERS NETWORK HAS STANDING.

A voluntary membership organization "has standing to sue if (1) at least one of its members would otherwise have standing; (2) the interests at stake in the litigation are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit." *Sierra Club v. Franklin Cty. Power of Ill., LLC*, 546 F.3d 918, 924 (7th Cir. 2008); *see also Friends of the Earth v. Laidlaw Envt'l Servs.*, 528 U.S. 167, 181 (2000). Prairie Rivers Network satisfies all three parts of this test, and so has standing to bring this suit.

A. Prairie Rivers Network's Members Have Standing in Their Own Right.

Individuals have standing to sue in their own right where they can show that they have "suffered an 'injury in fact' that is both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; that the injury is "fairly traceable to the challenged action"; and that "a favorable decision will redress the injury." *Sierra Club v. Franklin Cty. Power*, F.3d at 925 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)); *see also Laidlaw*, 528 U.S. at 181. Under *Laidlaw*, "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetics and recreational values of the area will be lessened' by the challenged activity." 528 U.S. at 183 (citation omitted). Actual environmental harm from the defendant's conduct need not be shown, as "reasonable concerns" that harm will occur are enough. *Id.* at 183-84; *see also Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). Individuals need not show that the harm is especially great or severe to establish standing; an "identifiable trifle" suffices to establish injury-in-fact. *Sierra Club v. Franklin Cty.*, 546 F.3d at 925. Further, individuals do not need to show that they have totally abandoned a site because of pollution; they just need to show that their "pleasure is diminished." *Am. Bottom Conservancy v. U.S. Army Corps. of Eng'rs*, 650 F.3d 652, 658 (7th Cir. 2011).

As the declarations of Kristin Camp, Philip Hult, and Germaine Light ("Camp, Hult, and Light Decls.")[3] show, individual members of Prairie Rivers Network would have standing to bring this case in their own right. These members (1) are either injured or have a reasonable concern of injury, which is (2) caused by the discharges from Dynegy's coal ash ponds, and (3)

[3] Along with this brief, Prairie Rivers Network is filing a motion for leave to file declarations for the purpose of demonstrating Article III standing. Prairie Rivers Network also included well-pleaded allegations in support of its standing in its Complaint. *See* Dkt. #1, APP0023-25, ¶¶ 11-15.

their injuries would be redressed by the Court ordering Dynegy to cease discharging coal ash pollutants into the Middle Fork.

These three Prairie Rivers Network members have been harmed by the discharges from Dynegy's coal ash ponds, as they have each seen their pleasure from recreating in and near the Middle Fork diminished by fear of toxic chemicals being discharged into the river from the Vermilion coal ash ponds. Kristin Camp lives only about a mile and a half from the Middle Fork and has been visiting the Middle Fork and Kickapoo State Park for about 45 years. Camp Decl. ¶¶ 1, 8. For the past five to ten years, Ms. Camp has visited the Middle Fork once or twice per month to hike, canoe, kayak, walk, or simply sit along the river. *Id.* ¶¶ 9-10. She understands that the coal ash ponds next to the former Vermilion Power Station leak dangerous chemicals like arsenic and mercury into the river. *Id.* ¶ 15. Ms. Camp's "concern about the contamination from the coal ash ponds limits [her] enjoyment of the Middle Fork." *Id.* ¶ 17. Out of this concern, Ms. Camp no longer visits a beloved picnic spot – a sandbar just downstream of the ash ponds – that she used to visit with her grandkids, and she will no longer get out or let her grandkids out, when canoeing or kayaking past the ash ponds. *Id.*

Philip Hult has been visiting the Middle Fork twice a year to canoe, hike, and volunteer with land conservation efforts for approximately 30 years, and plans to visit more frequently when he retires. Hult Decl. ¶¶ 6-7. Mr. Hult is deeply concerned about the dangerous chemicals leaking into the river from the ash ponds. *Id.* ¶ 11. Ever since he started seeing bright red and orange colors seeping through the banks into the river at the ash ponds, Mr. Hult has been careful not to swim near or downstream of the ash ponds because he does not trust that the water is clean. *Id.* ¶¶ 11-12. In his words, he "would like to be able to swim downstream of the ash ponds without worry, but due to the seepage, [he] cannot." *Id.* ¶ 12.

Germaine Light has lived on land abutting the Vermilion River, downstream of the Middle Fork since 2014. Light Decl. ¶¶ 1-2. Ms. Light visits the Middle Fork ten to twelve times per year and kayaks on a route that takes her past the Vermilion coal ash ponds once or twice per year. *Id.* ¶ 6. Ms. Light is deeply concerned about the coal ash ponds leaking dangerous chemicals into the river, and has witnessed the colorful seeps into the Middle Fork next to the coal ash ponds. *Id.* ¶ 9. Ms. Light used to swim and wade in the Middle Fork while kayaking, but ever since she learned about the coal ash ponds and witnessed the seeps, she only swims upriver of the ash ponds. *Id.* ¶ 10. Were it not for the contamination, she would not limit her swimming in the Middle Fork. *Id.*

The injuries experienced by Ms. Camp, Mr. Hult, and Ms. Light are fairly traceable to Dynegy and a favorable outcome in this case will redress those injuries. The causation requirements of traceability and redressability exist to "eliminate those cases in which a third party and not a party before the court causes injury." *Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 542 (6th Cir. 2004); *see also Lujan*, 504 U.S. at 560 ("[T]he injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.") (internal quotation omitted). Where the injury is pollution, the traceability requirement is met by showing that the defendant is the likely source of the pollutants that injure the plaintiff. *Sierra Club v. Franklin Cty.*, 546 F.3d at 927 (finding traceability requirement met where a proposed power plant would "release some pollutants" and a member of the plaintiff organization reasonably believes that the pollution would diminish their enjoyment of a recreational area); *see also Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618, 623 (7th Cir. 2014) (To demonstrate standing, the "injury must be fairly traceable to the challenged action of the defendant – *i.e.*, there must be

a causal connection between the injury and the conduct.") (citing *Lujan*, 504 U.S. at 561). Here, Dynegy is the source of the pollutants that injure Prairie Rivers Network's members. Dynegy's own reports conclude that its ash ponds are the source of these discharges of pollutants to the Middle Fork. Dkt. #1, APP0033, ¶ 54. Fear of this pollution restricts the Prairie Rivers Network members' enjoyment of the river. *See, e.g.*, Camp Decl. ¶ 17; Hult Decl. ¶ 12; Light Decl. ¶ 12. Because the pollution that injures Prairie Rivers Network's members is attributable to Dynegy's coal ash ponds, the injury is fairly traceable to the defendant.

The Court could redress the injuries described above by ordering the Dynegy to cease its unpermitted discharges and comply with the terms of its NPDES permit. *See* Dkt. #1, APP0025-26 ¶ 15, Prayer for Relief. Prairie Rivers Network also seeks civil penalties, which would likewise redress the Prairie Rivers Network members' injuries by deterring future discharges and "limiting the defendant's economic incentive to delay its attainment of permit limits." *Laidlaw*, 528 U.S. at 185; *see also Nat. Res. Def. Council v. Ill. Power Res., LLC*, 202 F. Supp. 3d 859, 873 (C.D. Ill. 2016) ("[C]ivil penalties redress Plaintiffs' injuries for the same reason that injunctive relief does.").

Thus, Prairie Rivers Network members Kristin Camp, Philip Hult, and Germaine Light meet all requirements for standing in their own right.

B. Prairie Rivers Network Seeks to Protect Interests Germane to Its Organizational Purpose.

Prairie Rivers Network seeks the Court's intervention to end Dynegy's unpermitted discharges of toxic coal ash pollutants into the Middle Fork of the Vermilion River and violations of its Clean Water Act permit. This issue is germane to Prairie Rivers Network's core purpose of "advocat[ing] for clean water and healthy rivers for the people, fish and wildlife of Illinois." Brinkman Decl. ¶ 2. Moreover, this action is consistent with Prairie Rivers Network's

decades of work to "protect water quality and river health from the impacts of coal waste pollution and toxic chemicals which can leach from coal ash ponds into groundwater, lakes and rivers," *id.*, and its longstanding advocacy specifically to "protect the Middle Fork and its scenic, ecological, and recreational resources," *id.* ¶ 4. This action seeks to end Dynegy's illegal pollution of the Middle Fork and improve the quality of the Middle Fork and downstream waters – goals that fit squarely within Prairie Rivers Network's declared organizational purpose.

C. Participation of Any Individual Harmed by Dynegy's Violations is Not Necessary for Adjudication of Prairie Rivers Network's Complaint.

Finally, neither the claims nor the relief sought in this litigation requires individual participation of Prairie Rivers Network's members. Prairie Rivers Network does not seek private damages or injunctive relief that would be unique to any particular person. The relief Prairie Rivers Network seeks is for Dynegy to cease its unpermitted discharges and comply with the terms of its permit and the Clean Water Act. *See* Dkt. #1, APP0024-25 ¶ 15, Prayer for Relief. Successful resolution of this case would provide relief to all injured individuals.

Prairie Rivers Network thus meets all of the requirements for associational standing.

II. *COUNTY OF MAUI* REQUIRES SUMMARY REVERSAL AND REMAND.

Summary reversal is appropriate because the U.S. Supreme Court's recent decision in *County of Maui v. Hawai'i Wildlife Fund*, 140 S. Ct. 1462 (2020), controls the outcome of this appeal and requires reversal and remand. In light of this controlling authority, there is no longer any substantial question as to the outcome of this appeal. *See Williams v. Chrans*, 42 F.3d 1137, 1139 (7th Cir. 1994) (per curiam).

County of Maui is controlling precedent as to the only issue that was actually decided by the district court below. Prairie Rivers Network alleges that Dynegy is illegally discharging pollutants that "flow[] right into the adjacent Middle Fork" through hydrologically connected

groundwater without authorization in a Clean Water Act permit. Dkt. #1, APP0031-33 ¶¶ 48-54. The district court's dismissal of both counts of Prairie Rivers Network's Complaint was based on the erroneous holding that point source discharges through groundwater to nearby surface waters are not, in any circumstances, subject to Clean Water Act jurisdiction. Order, Dkt. #23, at APP0012-15. The Supreme Court has now definitively resolved this question in the opposite direction, holding that point source discharges through groundwater to nearby surface waters *are* subject to Clean Water Act jurisdiction if they are the functional equivalent of direct discharges to surface water. *See County of Maui*, 140 S. Ct. at 1476.

Count 1 of Prairie Rivers Network's Complaint alleges facts that, if proven to be true, would establish a viable Clean Water Act claim under *County of Maui*. Dkt. #1, APP0031-33 ¶¶ 48-54. Moreover, as discussed in Argument Section III below, while Count 2 of Prairie Rivers Network's Complaint alleges a separate basis for Clean Water Act jurisdiction based on Dynegy's violations of conditions in its NPDES permit for Vermilion, the district court erroneously dismissed that separate claim on the same ground that it dismissed Count 1. Because *County of Maui* directly overrules the district court's basis for dismissal of both claims and establishes a new fact-specific test for when discharges through groundwater are the functional equivalent of direct point source discharges, summary reversal and remand to the district court is warranted so that the district court can make the necessary factual findings and apply this new precedent in the first instance.[4]

[4] An immediate remand here would also be consistent with the approach that the Ninth Circuit recently followed in *County of Maui* after the Supreme Court's decision. There, *sua sponte* and without requesting any briefing from the parties, the Ninth Circuit remanded the case to the district court for further proceedings consistent with the Supreme Court's opinion, so that the district court could apply the new Supreme Court precedent in the first instance. *Haw. Wildlife Fund v. County of Maui*, No. 15-17447, 2020 WL 2945054, at *1 (9th Cir. June 3, 2020).

In its Statement of Position filed with this Court in response to the *County of Maui* decision, Dkt. #16, Statement of Position of Defendant-Appellee Dynegy Midwest Generation, LLC (May 21, 2020), Dynegy raises a number of issues that were not squarely raised before the district below, go far afield of the issue that the district court actually decided, and are in any event without merit. As *County of Maui* requires summary reversal on the one issue that the district court actually did decide below, this Court should decline Dynegy's invitation to expand the scope of its arguments on appeal to add alternate grounds for dismissal that were not the basis of Dynegy's motion to dismiss before the district court. *See Box v. A & P Tea Co.*, 772 F.2d 1372, 1376 (7th Cir. 1985) (noting that this Court should not affirm a district court judgment on an alternate ground if it was not "adequately presented in the trial court so that the non-moving party had an opportunity to submit affidavits or other evidence and contest the issue"); *see also Lexington Ins. Co. v. RLI Ins. Co.*, 949 F.3d 1015, 1025 n.6 (7th Cir. 2020) (citing *Box* approvingly). Alternatively, if the Court chooses to reach any of the additional issues now raised by Dynegy, for the reasons explained below it should reject them as without merit.

A. *County of Maui* Controls the Outcome of this Appeal.

In *County of Maui*, the Supreme Court resolved the question of federal Clean Water Act jurisdiction that is the central issue in this appeal: whether Clean Water Act permitting requirements apply to discharges of pollutants from point sources to navigable waters that pass through hydrologically connected groundwater. The Supreme Court held that such discharges are subject to Clean Water Act requirements if they are the functional equivalent of direct point source discharges. *See County of Maui*, 140 S. Ct. at 1476. In so holding, the Supreme Court made clear that determining functional equivalence requires a fact-specific inquiry based on a number of potentially relevant factors. *See County of Maui*, 140 S. Ct. at 1476-77 (articulating factors for courts to consider in determining functional equivalence in specific cases). The

Supreme Court found that, in conducting this inquiry, courts should remain true to the "broad[]" and "expansive" language of the Clean Water Act,[5] which requires a discharge permit for "'any addition' of a pollutant to navigable waters '*from any point source*.'" *Id.* at 1468-69, 1473-75 (emphasis in original).[6]

The Supreme Court's holding in *County of Maui* directly contradicts the district court's holding below and requires its reversal. In response to Prairie Rivers Network's allegations that the Vermilion coal ash impoundments discharged "right into the adjacent Middle Fork" through hydrologically connected groundwater without authorization in a Clean Water Act permit, Dkt. #1, APP0031-33, ¶¶ 48-54, the district court below held that "[d]ischarges from artificial ponds into groundwater are not governed by the [Clean Water Act], even if there is an alleged hydrological connection between the groundwater and surface waters qualifying as 'navigable waters' of the United States." Dkt. #23, at APP0013 (citing *Vill. of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965-66 (7th Cir. 1994)). On this basis, the district court below dismissed both counts of Prairie Rivers Network's Complaint. *See id.* at APP0016, APP0018. The Supreme Court in *County of Maui* definitively rejected the district court's interpretation of the Clean Water Act. *Compare* Dkt. #23, at APP0012-15 (reasoning that discharges of pollutants that pass through groundwater are outside of federal Clean Water Act

[5] The stated objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by, among other things, achieving the goal of "eliminat[ing] . . . the discharge of pollutants into the navigable waters." 33 U.S.C. § 1251(a), (a)(1).

[6] This scheme creates "a default regime of strict liability" for discharges of pollutants not authorized by a NPDES permit. *Sierra Club v. ICG Hazard, LLC*, 781 F.3d 281, 284 (6th Cir. 2015). Any affected citizen may commence a civil action against a defendant "who is alleged to be in violation of . . . an effluent standard or limitation" under the CWA citizen suit provision. 33 U.S.C. § 1365(a)(1). Such violations include any discharge of a pollutant not authorized by a NPDES permit. *Id.* §§ 1311(a), 1342, 1365(f)(6).

jurisdiction, even if the discharges "later find their way to navigable surface waters via a discrete hydrological connection") (citing *Vill. of Oconomowoc Lake*, 24 F.3d at 965-66), *with County of Maui*, 140 S. Ct. at 1473-75 (rejecting this interpretation of the Clean Water Act as "too narrow").

Dynegy's suggestion in its Statement of Position that *County of Maui* can be read consistently with this Court's precedent in *Village of Oconomowoc Lake*, 7th Cir. Dkt. #16, Statement of Position of Defendant-Appellee Dynegy Midwest Generation, LLC, at 5-6 (May 21, 2020), which was cited by the district court below, does not in any way save the district court's holding from reversal under *County of Maui*. As Prairie Rivers Network argued before the district court below (Dkt. #19, APP0083), *Village of Oconomowoc Lake* only focused on the narrow question of whether the Clean Water Act governs discharges into groundwater itself, absent evidence that the discharges pass through groundwater into navigable waters in a manner that is functionally equivalent to direct discharges. *See Vill. of Oconomowoc Lake*, 24 F.3d at 965. In that case, there was no specific allegation of a point source discharge to navigable waters through hydrologically connected groundwater, and the court declined to find that the mere "possibility of a hydrological connection" between groundwater and surface waters was sufficient to create Clean Water Act jurisdiction. *Id.* Rather, the court found that "neither the [Clean Water Act] nor [EPA] regulations makes such a *possibility* a sufficient ground of regulation" of pollution of groundwater itself, and that "[n]either the Clean Water Act nor the EPA's definition [of navigable waters] asserts authority over ground waters, just because these *may* be hydrologically connected with surface waters." *Id.* (emphasis added). Thus, the *Village of Oconomowoc Lake* Court did not purport to address the question at issue in this case, of

whether the Clean Water Act applies to point source discharges to navigable waters through hydrologically connected groundwater.

By contrast, in *County of Maui*, the Supreme Court has now clarified that Clean Water Act jurisdiction does apply to point source discharges that pass through groundwater, where they are the functional equivalent of direct discharges to navigable waters, *see* 140 S. Ct. at 1473-77, as Prairie Rivers Network alleges, *see* Dkt. #1, APP0031-33, ¶¶ 48-54, and must be accepted as true at this stage of the case. Moreover, the Supreme Court noted that district courts, exercising their discretion to make factual determinations in specific cases, would apply this new functional equivalence test in the first instance. *See County of Maui*, 140 S. Ct. at 1476-77. *County of Maui* therefore requires reversal of the district court's decision and a remand back to district court for further proceedings in this case.

B. The Other Issues that Dynegy Seeks to Raise Before This Court Were Not Decided by the District Court Below and Are in Any Event Without Merit.

In its Statement of Position, Dynegy raises several other "alternate grounds" that were not the basis of Dynegy's motion to dismiss before the district court and that Prairie Rivers Network accordingly did not have an adequate opportunity to respond to there. As these other issues raised by Dynegy go far afield of what the district court actually decided below, and because they are in any event without merit, this Court need not reach them or, if it does decide to reach them, should reject them as alternate grounds for dismissing the case.

1. Prairie Rivers Network has adequately alleged that the Vermilion coal ash impoundments are point sources.

Prairie Rivers Network pleaded sufficient facts to establish that the coal ash pits at the Vermilion Station site are "point source[s]" that are discharging pollutants in violation of the Clean Water Act. *See* Dkt. #1, APP0031, APP0032-33, ¶¶ 48, 50-55. A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch,

channel, tunnel, conduit, well, discrete fissure, [or] container . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The coal ash pits are "discernible, confined and discrete" surface impoundments designed to hold accumulated coal ash waste and are, therefore, "container[s]" within the meaning of this definition. *See, e.g.*, *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (sediment basins may be characterized as "container[s]"). Further, the Vermilion coal ash impoundments were designed to be part of a closed system of managing waste and water at the site; when such a system "fails . . . , with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, the escape of liquid from the confined system is from a point source." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979). Numerous courts have recognized that coal ash ponds and other industrial waste impoundments that discharge pollutants to navigable waters are point sources under the Clean Water Act. *See, e.g.*, *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308-09 (9th Cir. 1993) (mine runoff capture system); *Consol. Coal Co. v. Costle*, 604 F.2d 239, 249-50 (4th Cir. 1979), *rev'd on other grounds*, 449 U.S. 64 (1980) (coal slurry ponds); *Earth Sciences*, 599 F.2d at 374 (groundwater seeps from sump pit); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, 141 F. Supp. 3d 428, 443-44 (M.D.N.C. 2015) (coal ash pond discharges via groundwater); *Residents Against Indus. Landfill Expansion v. Diversified Sys., Inc.*, 804 F. Supp. 1036, 1038 (E.D. Tenn. 1992) (sediment ponds collecting waste from landfill). This is consistent with both the plain language of the Act and its legislative history, which make clear that "[t]he concept of a point source . . . embrac[es] the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." *Earth Sciences*, 599 F.2d at 373.

In its motion to dismiss in the district court below, Dynegy did not dispute that Prairie Rivers Network's allegations, if accepted as true – as they must be for purposes of a motion to dismiss – establish that the Vermilion coal ash impoundments are "point sources" that are discharging pollutants subject to the CWA. *See* Dkt. #15, APP0065. Nor could Dynegy have disputed this, because "[w]hether a discharge from a point source exists is a question of fact," *Ohio Valley Envtl. Coal. Inc. v. Pocahontas Land Corp.*, 2015 WL 2144905, at *8 (S.D. W.Va. May 7, 2015) (citing *Abston Constr. Co.*), and Prairie Rivers Network's well-pleaded allegations are more than sufficient to survive a motion to dismiss. In its Statement of Position filed with this Court, Dynegy concedes that the point source issue is not amenable to a motion to dismiss and was not presented to the district court below, even as it asserts (without any support) that Prairie Rivers Network "will be unable to prove that the coal ash impoundments at issue here are 'point sources.'" 7th Cir. Dkt. #16, Statement of Position of Defendant-Appellee Dynegy Midwest Generation, LLC, at 7-8 n.8 (May 21, 2020).

Accordingly, this Court need not reach the issue of whether the Vermilion coal ash impoundments are point sources in order to resolve this appeal. This is the same approach that the district court took below: the district court did not question whether the Vermilion coal ash impoundments were point sources, instead limiting its decision to whether the Clean Water Act applies to discharges that pass through groundwater. Dkt. #23, APP0010-16. Now that the Supreme Court's *County of Maui* decision requires reversal of the district court's holding, as discussed above, remand to the district court is appropriate so that Prairie Rivers Network can present evidence demonstrating that the Vermilion coal ash impoundments are point sources that are discharging pollutants to the Middle Fork in a manner that is functionally equivalent to direct discharges. *See County of Maui*, 140 S. Ct. at 1476-77.

The Fourth Circuit's recent decision in *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403 (4th Cir. 2018), does not require a different result. In that case, the Fourth Circuit held that coal ash disposal areas at a power plant site in Virginia were not conveyances of pollutants, based on a factual record that had been fully developed through a trial on the merits before the district court. 903 F.3d at 410-12. As bases for its holding, the Fourth Circuit emphasized district court findings that the arsenic pollution of a nearby surface water body in that case was merely the result of passive percolation of rainwater through the coal ash disposal areas and found that there was insufficient evidence in the record that the coal ash disposal areas were themselves conveying or channeling pollutants. *Id.* at 410-11. The *Sierra Club v. Va. Elec. & Power Co.* court also noted that there was insufficient evidence in the record to determine the rate or concentration at which arsenic was being discharged through the groundwater. *Id.* at 411.

The facts alleged by Prairie Rivers Network in this case are distinguishable from the findings of the *Sierra Club v. Va. Elec. & Power Co.* court. First and foremost, as noted above, Prairie Rivers Network has specifically alleged that the coal ash impoundments at issue in this case are conveyances, in that they collect and channel water that flows through the coal ash disposed of in them and directly discharges that polluted water into the Middle Fork through groundwater. Dkt. #1, APP0031-33, ¶¶ 48-54. Second, unlike the discharges at issue in *Sierra Club v. Va. Elec. & Power Co.*, sampling done by Prairie Rivers Network indicates that the Vermilion coal ash impoundment discharges are measurable, with concentrations of multiple pollutants in excess of background levels and, for some pollutants, in excess of water quality criteria established to protect human health. *Id.* at APP0033, ¶¶ 55-56. The differences between Prairie Rivers Network's allegations in this case and the facts found in *Sierra Club v. Va. Elec. &*

Power Co. underscore why reversal and remand to the district court for further proceedings are warranted to develop a factual record.

In addition, a key element of the Fourth Circuit's reasoning in *Sierra Club v. Va. Elec. & Power Co.* is inconsistent with *County of Maui*. In holding that the coal ash disposal areas in that case were not point sources, the court reasoned that "the actual means of conveyance of the arsenic [to surface waters] was the rainwater and groundwater flowing *diffusely* through the soil" rather than the coal ash disposal areas from which the arsenic originated. *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d at 411 (emphasis in original). However, the Supreme Court has now rejected this approach to determining whether point source discharges are occurring that are subject to the Clean Water Act. *See County of Maui*, 140 S. Ct. at 1473-74 (rejecting "means-of-delivery test" for point source discharges and noting that the Clean Water Act defines a point source based on "*where* the pollution originated" and not "*how* it got" to a surface water body) (emphasis in original). Under *County of Maui*, discharges of pollutants need not flow directly from a point source conveyance into surface waters to be subject to the Clean Water Act, as long as they pass through groundwater in a manner that is functionally equivalent to direct point source discharges. *Id.* at 1474-77 (citing *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (plurality opinion of Scalia, J.)).

Thus, for all of the reasons discussed above, Prairie Rivers Network's well-pleaded allegations of point source discharges from the Vermilion coal ash impoundments to the Middle Fork should be addressed by the district court in the first instance, after reversal of its decision below and a remand for further proceedings consistent with *County of Maui*.

2. Clean Water Act regulation of the point source discharges at issue in this case would not interfere with state groundwater regulations.

Dynegy's assertion that Illinois' regulation of groundwater somehow deprives this Court of Clean Water Act jurisdiction over unlawful discharges to surface water, *see* 7th Cir. Dkt. #16, Statement of Position of Defendant-Appellee Dynegy Midwest Generation, LLC, at 6-9 (May 21, 2020), likewise falls short. That states have authority to regulate groundwater is not in dispute here. Rather, this case centers on federal jurisdiction over point source discharges of pollutants into a navigable water – Illinois' only National Scenic River – that happen to pass through groundwater on their way into the river. As discussed above, the Supreme Court has now confirmed in *County of Maui* that such discharges are subject to Clean Water Act requirements if they are the functional equivalent of direct discharges, *see* 140 S. Ct. at 1476-77, and this Court should reverse and remand so that the district court can find the facts and apply this new precedent.

Federal court adjudication of this case would in no way interfere with state regulation of groundwater. Clean Water Act regulation of point source discharges that pass through groundwater on their way to a navigable water, as in this case, is *not* regulation of groundwater itself, which the Clean Water Act leaves to state jurisdiction. *See County of Maui*, 140 S. Ct. at 1470-75.

Dynegy's assertion that federal Clean Water Act jurisdiction does not apply in this case because there is no state "regulatory gap" that federal law must fill, 7th Cir. Dkt. #16, Statement of Position of Defendant-Appellee Dynegy Midwest Generation, LLC, at 6-8 (May 21, 2020), mischaracterizes the relationship between the Clean Water Act and applicable state laws. The Supreme Court in *County of Maui* found that interpreting the Clean Water Act as applying to point source discharges that pass through groundwater, if they are the functional equivalent of

direct point source discharges to surface water, is consistent with the statute's recognition that states retain jurisdiction over regulation of groundwater itself. *County of Maui*, 140 S. Ct. at 1474-77. The Supreme Court did not make its holding contingent on whether there is a "regulatory gap" in state law, nor is there any basis to do so in either the *County of Maui* decision or the Clean Water Act itself.

Rather, the Clean Water Act (as construed by *County of Maui*) must be read consistently with the federal courts' "virtually unflagging obligation" to exercise the jurisdiction given to them by Congress. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (quoting *Colo. River. Water Conserv. Dist. v. United States*, 424 U.S. 800, 821 (1976)); *see also Prop. & Cas. Ins. Ltd. v. Central Nat'l Ins. Co. of Omaha*, 936 F.2d 319, 320-21 (7th Cir. 1991) ("Jurisdiction, if properly conferred, is meant to be exercised."); *Or. State Pub. Int. Res. Grp., Inc. v. Pac. Coast Seafoods Co.*, 341 F. Supp. 2d 1170, 1178 (D. Or. 2004) (noting that "Congress has explicitly granted jurisdiction to federal district courts to hear [Clean Water Act] citizen suits"). This is true even in a case such as this one in which members of the public are seeking to enforce a Clean Water Act permit requirement that a state agency may not have itself recognized. *See, e.g.*, *Haw. Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980, 991 (D. Haw. 2014) ("'[A] court may, in entertaining a citizen suit, decide whether a discharge of particular matter into navigable waters violates the CWA even though the regulating agency determined that the discharge was not subject to the requirement of a permit.'") (quoting *S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007)); *see also Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1014 (9th Cir. 2002) ("The plain language of the Clean Water Act has created opportunity for citizen suit when government agencies do not

act."). The mere fact that a federal Clean Water Act claim might overlap with state law requirements does not preclude a federal lawsuit.

Accordingly, the Court should decline to reach this issue. In the alternative, if the Court reaches the merits of this issue, it must reject Dynegy's argument pursuant to the Supreme Court's holding in *County of Maui* that point source discharges that pass through groundwater are subject to Clean Water Act jurisdiction if they are the functional equivalent of direct point source discharges.

3. RCRA regulation of coal ash waste disposal does not preclude the Clean Water Act's prohibition on unpermitted point source discharges.

Nor is there any conflict between applying the Clean Water Act to Vermilion's coal ash impoundment discharges and EPA's regulation of coal ash under RCRA.[7] RCRA contains an anti-duplication provision that addresses the potential for overlapping regulation by the Clean Water Act:

> Nothing in this chapter shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act [and certain other environmental statutes] . . . except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts.

42 U.S.C. § 6905(a). RCRA also has a separate provision that excludes from solid waste regulation "industrial discharges . . . subject to permits" under the Clean Water Act, which again provides that the Clean Water Act is controlling. *Id.* § 6903(27). Although Dynegy argues in its Statement of Position, 7th Cir. Dkt. #16, Statement of Position of Defendant-Appellee Dynegy Midwest Generation, LLC, at 9-13 (May 21, 2020), that EPA regulation of coal ash under RCRA somehow precludes Prairie Rivers Network's Clean Water Act claim in this case, the plain

[7] *See* 40 C.F.R. Part 257.

language of RCRA establishes the opposite: that to the extent there is any inconsistency between a Clean Water Act permitting requirement and RCRA regulation, the Clean Water Act takes precedence.

Moreover, there is no basis to conclude that there actually is an inconsistency between the Clean Water Act and RCRA here. Courts interpreting RCRA's integration with other statutes have made clear that regulated entities must comply with all applicable environmental law requirements unless there is a direct conflict between statutes. *See Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 509-10 (4th Cir. 2015) (construing "inconsist[ency]" according to its "ordinary dictionary meaning: 'lacking consistency: incompatible, incongruous, inharmonious . . . so related that both or all cannot be true'") (quoting *Webster's Third Int'l Dictionary*, at 1144 (3d ed. 1961)); *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 337 (D.C. Cir. 1993) (noting that any "burdens" on industry from the need to comply with multiple environmental laws at the same time "are to be expected" given how RCRA is structured); *see also Ecological Rts. Found. v. Pac. Gas & Elec. Co.*, 874 F.3d 1083, 1095-97 (9th Cir. 2017). Specifically addressing overlap between the Clean Water Act and RCRA, the Fourth Circuit found that "RCRA mandates that are just different, or even greater, than what the [Clean Water Act] requires are not necessarily the equivalent of being 'inconsistent' with the [Act]." *Goldfarb*, 791 F.3d at 510; *see also Ecological Rts. Found.*, 874 F.3d at 1096 (9th Cir. 2017) ("Congress recognized that there would be overlapping coverage between the CWA and RCRA").[8]

The Vermilion coal ash impoundments are subject to regulation *both* under the Clean Water Act, for their point source discharges to surface waters, *and* under RCRA, because they

[8] Further, consistent with the plain language of RCRA discussed above, the Fourth Circuit noted that if it were to find a direct conflict between RCRA and the Clean Water Act, the Clean Water Act's requirements would take precedence. *Goldfarb*, 791 F.3d at 505-06.

are waste storage and disposal sites. EPA has long recognized that industrial disposal sites such as coal ash impoundments that combine waste and water, and discharge pollutants through groundwater, are subject to regulation under both the Clean Water Act and RCRA. *See* 40 C.F.R. § 261.4(a)(2) cmt (interpreting RCRA's exclusion of point source discharges subject to Clean Water Act permits under 42 U.S.C. § 6903(27) to exclude "only . . . the actual point source discharge" from RCRA regulation while noting that "industrial wastewaters while they are being collected, stored or treated before discharge" and "sludges that are generated by industrial wastewater treatment" remain subject to RCRA requirements).[9] Many courts have also followed this approach, finding that both the Clean Water Act and RCRA apply to such sites. *See, e.g.*, *United States v. Dean*, 969 F.2d 187, 194 (6th Cir. 1992) (RCRA liability for waste present in point source lagoon that had not discharged to navigable waters); *Little Hocking Water Ass'n v. E.I. du Pont Nemours & Co.*, 91 F. Supp. 3d 940, 959-62 (S.D. Ohio 2015) (RCRA liability for seepage from ponds that ultimately discharged to navigable waters); *see also Inland Steel Co. v. EPA*, 901 F.2d 1419, 1422 (7th Cir. 1990) (noting that RCRA applies to "disposals that are not discharges"). Prairie Rivers Network's Clean Water Act claim in this case is in keeping with this longstanding dual scheme of regulation.

In its Statement of Position, Dynegy cites to two cases in support of its claim that RCRA regulation of coal ash should preclude Clean Water Act claims – but neither case remains good law after *County of Maui*. In *Kentucky Waterways Alliance v. Kentucky Utilities Company*, the

[9] *See also* EPA, *Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste*, 1-3 (1995) (finding that RCRA applies to discharges of pollutants "into groundwater from leaking waste management units," even as the Clean Water Act applies to "point source discharges to groundwater [from those same units] where there is a direct hydrologic connection between the point source and nearby surface waters of the United States"), https://www3.epa.gov/npdes/pubs/owm607.pdf.

Sixth Circuit found "problematic" the overlap between Clean Water Act jurisdiction over point source discharges through groundwater and RCRA regulation over coal ash waste that was the source of those same discharges. 905 F.3d 925, 937-38 (6th Cir. 2018). The Sixth Circuit made these findings, however, in support of a holding that the Clean Water Act did not apply at all to point source discharges that pass through groundwater, *see id.*, an interpretation of the Clean Water Act that the Supreme Court has now definitively rejected in *County of Maui*, *see* 140 S. Ct. at 1473-77. Further, the Sixth Circuit in *Kentucky Waterways Alliance* did not consider the authorities, discussed above, demonstrating EPA's longstanding interpretation that both Clean Water Act and RCRA regulation have important roles to play at industrial waste disposal sites. Similarly, the Fourth Circuit in *Sierra Club v. Virginia Electric & Power Company*, notes that RCRA regulations apply to coal ash waste sites, but it only does so in support of its holding that the coal ash disposal areas at issue in that case are not point sources. 903 F.3d 403, 415 (4th Cir. 2018). As discussed above, this decision both is factually distinguishable from this case and critical elements of the *Sierra Club v. Virginia Electric & Power Company* court's interpretation of the Clean Water Act are no longer good law after *County of Maui*. *See supra* Argument Section II.B.I.

Accordingly, Dynegy's arguments about the applicability of RCRA, which it did not cite in support of its motion to dismiss in the district court below, are in any event without merit. The Court should decline to reach this issue or, in the alternative, reject on the merits Dynegy's argument that RCRA precludes Prairie Rivers Network's Clean Water Act claim.

III. REVERSAL AND REMAND IS ALSO WARRANTED BECAUSE COUNT 2 OF PRAIRIE RIVERS NETWORK'S COMPLAINT HAS AN INDEPENDENT JURISDICTIONAL BASIS.

The district court erroneously dismissed Count 2 of Prairie Rivers Network's Complaint on the same grounds that it dismissed Count 1, Dkt. #23, APP0018, even though Count 2 alleges

a separate basis for Clean Water Act jurisdiction. As noted above in Argument Section II, *County of Maui* directly overrules the district court's basis for dismissal of both claims and requires summary reversal and remand. Alternatively, reversal and remand of the district court's dismissal of Count 2 is also appropriate because the Clean Water Act authorizes private suits to enforce violations of a NPDES permit, even when those violations are not directly tied to point source discharges to navigable waters. Although the Court need not reach this issue here in light of *County of Maui*'s confirmation that Clean Water Act jurisdiction applies to the unpermitted Vermilion coal ash impoundment discharges alleged by Prairie Rivers Network, if the Court does choose to reach this issue, it must hold that Prairie Rivers Network's separate claims in Count 2 that those discharges also violate Standard Conditions 23 and 25 of Vermilion's NPDES permit, Dkt. #1, APP0035-36, ¶¶ 67-78, have an independent jurisdictional basis under the Act.

A. Prairie Rivers Network Adequately Alleged Violations of the Vermilion NPDES Permit.

Prairie Rivers Network asserted a valid claim in Count 2 of its Complaint that Dynegy has violated Standard Conditions 23 and 25 of its NPDES permit for the Vermilion Station. Dkt. #1, APP0035-36, ¶¶ 67-78. Standard Condition 23 prohibits disposing of "slurries, sludges, and other solids," such as coal ash, "in such a manner as to [allow] entry of those wastes (or runoff from the wastes) into waters of the State," Dkt. #1, APP0029-30, ¶ 38, such as the Middle Fork.[10] Prairie Rivers Network's allegations, if accepted as true – as they must be for purposes

[10] Applicable Illinois regulations define "sludge" as "any solid, semisolid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects." 35 Ill. Admin. Code § 301.395. Applicable Illinois law defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water . . . so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 415 ILCS 5/3.185.

of a motion to dismiss – establish that coal ash contaminated groundwater flows from Dynegy's impoundments into the adjacent Middle Fork, Dkt. #1, APP0032-33, ¶¶ 51-56, which is inconsistent with the plain language of Standard Condition 23 and a violation of Vermilion's NPDES permit.

Standard Condition 25 of Vermilion's NPDES permit incorporates all applicable provisions of Subtitles C, D, and E of Title 35 of the Illinois Administrative Code.[11] Dkt. #1, APP0030, ¶ 41; *see also* 35 Ill. Admin. Code §§ 301.275, 302.203, 304.104, 304.106, 304.124(a). Among other applicable provisions, Subtitle C of the Illinois Administrative Code requires that a permittee's effluent – which is defined under Illinois law to include both direct and indirect discharges[12] – not contain settleable solids, irrespective of whether the discharge itself is a permitted or unpermitted point source discharge. *See id.* § 304.106. Subtitle C also bars discoloring Illinois' waters in tints above "obvious" levels and discharging contaminants in concentrations that exceed the applicable Illinois statutory limits. Dkt. #1, APP0030-31, ¶¶ 42-43. Prairie Rivers Network's allegations establish that Dynegy's discharges of pollutants have discolored, and are continuing to discolor, the Middle Fork a bright orange-red color not of natural origin and not below obvious levels, and have included, and continue to include, iron and manganese at concentrations exceeding the effluent limits in Subtitle C of the Illinois Administrative Code. Dkt. #1, APP0033, ¶¶ 56-57. As with Standard Condition 23, Dynegy's

[11] The Middle Fork has no specific use designation and thus is subject to the general use standards codified at 35 Ill. Admin. Code Part 302 Subpart B, as well as the general effluent limitations set forth at 35 Ill. Admin. Code Part 304 Subpart A, both of which form part of 35 Ill. Admin. Code Subtitle C. Dkt. #1, APP0031-32, ¶ 49.

[12] The term "effluent" is defined, in relevant part, as "any wastewater discharged, directly or *indirectly*, to the waters of the State or to any storm sewer, and the runoff from land used for the disposition of wastewater or sludges." 35 Ill. Admin. Code § 301.275 (emphasis added); Dkt. #1, APP0030, ¶ 42.

actions are inconsistent with the plain language of Standard Condition 25 and a violation of Vermilion's NPDES permit.

The fact that Standard Conditions 23 and 25 of Dynegy's NPDES permit are based on permit conditions imposed by the State of Illinois, rather than federal standards, is no impediment to Prairie Rivers Network's ability to enforce those conditions in federal court. The Clean Water Act authorizes private plaintiffs to bring a federal enforcement action against any person who has violated an effluent standard or limitation. 33 U.S.C. § 1365(a). The term "effluent standard or limitation" is defined to include not only EPA-promulgated standards, but also (*inter alia*) "a permit or condition of a permit issued under section 1342" of title 33 of the U.S. Code (i.e., a state-issued NPDES permit). *Id.* § 1365(f)(7). EPA regulations implementing this provision have long interpreted it to mean that "[a]ny permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action[.]" 40 C.F.R. § 122.41(a). "Any" permit noncompliance includes noncompliance with more protective permit conditions that states are authorized to include in their NPDES permits to protect local water quality. *See id.*; *see also* 40 C.F.R. § 122.44(d) (state NPDES permits shall contain "any requirements in addition to or more stringent than" promulgated limits in order to protect their water quality). The U.S. Supreme Court and other courts have long agreed that 33 U.S.C. § 1365(a) authorizes enforcement of NPDES permit conditions that go above and beyond federal mandates. *See, e.g.*, *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 223-24 (1976); *see also Laidlaw*, 528 U.S. at 174 ("Noncompliance with a [NPDES] permit constitutes a violation of the [Clean Water] Act.").[13] Therefore, Standard Conditions 23 and 25,

[13] *See also Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1005 (11th Cir. 2004) ("The plain language of the CWA and the relevant case law dealing with the CWA convince us that there is federal jurisdiction over citizen-suit claims that allege violations of a state-issued

which incorporate Illinois effluent limits and water quality standards, are as enforceable as any other requirement of Dynegy's NPDES permit for the Vermilion Station.

Dynegy's NPDES permit violations alleged in Count 2 of Prairie Rivers Network's Complaint turn, as such, not on any federal mandate but on the plain language of the permit conditions cited. "An NPDES permit is interpreted just like any contract or other legal document." *Nat. Res. Def. Council v. Metro. Water Reclamation Dist. of Greater Chi.*, 175 F. Supp. 3d 1041, 1051 (N.D. Ill. 2016) (citing *Nat. Res. Def. Council, Inc. v. Cty. of L.A.*, 725 F.3d 1194, 1204 (9th Cir. 2013)). Further, "if 'the language is plain and capable of legal construction, the language alone must determine' the permit's meaning." *Piney Run Pres. Ass'n v. Cty. Comm'rs of Carroll Cty.*, 268 F.3d 255, 270 (4th Cir. 2001) (quoting another source). Therefore, if a permittee takes actions inconsistent with the plain language of the NPDES permit, it is in violation of the permit and thus in violation of the Clean Water Act. 33 U.S.C. § 1365(a); *see, e.g., Laidlaw*, 528 U.S. at 174. Because Prairie Rivers Network alleges that Dynegy has done

---

NPDES permit."); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152 (4th Cir. 2000) (en banc) (finding that 33 U.S.C. § 1365(f) allows citizen suits for "any term or condition of an approved [NPDES] permit"); *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir.1995) ("The plain language of [section 1365 of the Clean Water Act] authorizes citizens to enforce *all* [NPDES] permit conditions.") (emphasis original); *Am. Canoe Ass'n, Inc. v. D.C. Water & Sewer Auth.*, 306 F. Supp. 2d 30, 36 (D.D.C. 2004) (finding that plaintiffs had standing because the Clean Water Act "allows citizen suits to enforce any NPDES permit provision"); *Harpeth River Watershed Ass'n v. City of Franklin*, No. 3:14-1743, 2016 WL 827584, at *6 (M.D. Tenn. Mar. 3, 2016) (finding that overflow prohibitions and the NPDES permit provisions requiring monitoring and nutrient management were not beyond the scope of federal law); *Ohio Vally [sic] Envtl. Coal., Inc. v. Fola Coal Co., LLC*, No. CIV. 2:12-3750, 2013 WL 6709957, at *19 (S.D. W.Va. Dec. 19, 2013) (allowing plaintiffs to use the citizen suit provision to seek enforcement of state water quality standards); *Locust Lane v. Swatara Twp. Auth.*, 636 F. Supp. 534, 537-38 (M.D. Pa. 1986) (holding that plaintiffs had standing to enforce NPDES permit provision that set a schedule for the construction of wastewater treatment facilities); *Pymatuning Water Shed Citizens for a Hygienic Env't v. Eaton*, 506 F. Supp. 902, 908 (W.D. Pa. 1980) ("Inasmuch as we have found violations of the NPDES permit it is unnecessary to determine whether plaintiffs have proved violations of effluent standards or limitations under . . . 33 U.S.C. § 1311 or any other section of the Clean Water Act.").

just that here by violating Standard Conditions 23 and 25 of its NPDES permit for the Vermilion Station, Prairie Rivers Network has adequately alleged independently enforceable violations of the Clean Water Act.

B. Violations of Standard Conditions 23 and 25 Need Not be Directly Tied to a Point Source Discharge into Navigable Waters to be Federally Enforceable.

Standard Conditions 23 and 25 of Dynegy's NPDES permit for the Vermilion Station need not be directly tied to a point source discharge into navigable waters to be enforceable under the Clean Water Act. The district court erroneously determined that only point source discharges into navigable waters can violate NPDES permit conditions. Dkt. #23, APP0017. The Court's conclusion is erroneous for at least two reasons. Section 301(a), which is one of the central provisions of the Clean Water Act, requires permittees to comply with all provisions of their NPDES permits. *See* 33 U.S.C. § 1311(a) (requiring compliance with NPDES permit provisions in 33 U.S.C. § 1342). Thus, if a permittee discharges pollution in a manner or at a location that is not authorized by its NPDES permit – or, as here, is explicitly disallowed by that permit – it is also in violation of section 301(a) of the Clean Water Act.[14] Moreover, neither Standard Condition 23 nor Standard Condition 25 turn on whether the permittee directly discharges pollutants from a point source into navigable waters. They are independent permit conditions that need not be directly tied to a point source discharge to be enforceable.

[14] Section 301(a) of the Clean Water Act states that "[e]xcept as in compliance with this section and section[] . . . [402], the discharge of any pollutant by any person shall be unlawful." This means that discharges not in compliance with a NPDES permit are unlawful and in violation of section 301(a). As noted below, Dynegy has a NPDES permit for the Vermilion Station that implements specific limits on the discharges permitted at the Vermilion site and includes additional conditions that Dynegy must comply with across the entire Vermilion site. If Dynegy is not in compliance with its NPDES permit because it has violated conditions of the permit, its discharges are unlawful and in violation of section 301(a).

Even if this Court upholds the district court's ruling on Count 1 that the alleged discharges are not "point source discharges" under the Clean Water Act, Dynegy's violations of Standard Conditions 23 and 25 are still enforceable because the Vermilion permit defines, and sets conditions on, the amount and type of pollution the Vermilion Station may discharge and the points from which that pollution may be discharged into the Middle Fork (defined as permitted "outfalls"), Dkt. #1, APP0029, ¶ 37.[15] By violating Standard Conditions 23 and 25, Dynegy is discharging those pollutants in a manner that is not authorized by the permit. As long as Dynegy has an active NPDES permit for the Vermilion Station, the permit's conditions are enforceable, and any and all violations of the permit are unlawful under the Clean Water Act. *See Am. Canoe Ass'n*, 306 F. Supp. 2d at 36; *Friends of the Earth*, 204 F.3d at 152; *Nw. Envtl. Advocates*, 56 F.3d at 986; *Harpeth River Watershed Ass'n*, 2016 WL 827584, at *6; *Ohio Vally [sic] Envtl. Coal., Inc.*, 2013 WL 6709957, at *19; *Locust Lane*, 636 F. Supp. at 537-38; *Pymatuning Water Shed Citizens for a Hygienic Env't*, 506 F. Supp. at 908. Prairie Rivers Network has thus adequately alleged that Dynegy's violations of Standard Conditions 23 and 25 are unlawful under the Clean Water Act.

Second, the plain language of Standard Conditions 23 and 25 does not limit violations of either condition to direct discharges from a point source into navigable waters. As discussed above, Standard Condition 23 states that "[c]ollected screening, slurries, sludges, and other solids shall be disposed of in such a manner as to prevent entry of those wastes (or runoff from the wastes) into waters of the State." Under applicable Illinois regulations, coal ash meets the definition of "sludge." *See* 35 Ill. Admin. Code § 301.395. In addition, applicable Illinois law

[15] The Vermilion permit specifically defines nine external outfalls at the Vermilion Station – Outfalls 001, A01, B01, C01, 002, 003, A03, B03, and C03 – each of which authorizes limited discharges of certain pollutants at specific outfalls to the Middle Fork. Dkt. #1, APP0029, ¶ 37.

defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water . . . so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 415 ILCS 5/3.185.

Standard Condition 25 incorporates all applicable provisions of Subtitles C, D, and E of Title 35 of the Illinois Administrative Code. The applicable Illinois regulations that Dynegy has violated require that a permittee's effluent not contain settleable solids, irrespective of whether the discharge itself is a permitted or unpermitted point source discharge. *See* 35 Ill. Admin. Code § 304.106. The term "effluent" is defined, in relevant part, as "any wastewater discharged, directly or *indirectly*, to the waters of the State or to any storm sewer, and the runoff from land used for the disposition of wastewater or sludges." *Id.* § 301.275 (emphasis added). In addition, Dynegy has violated applicable Illinois regulations that prohibit the discoloring of Illinois' waters in tints not of natural origin and above "obvious" levels and the discharging of contaminants in concentrations that exceed the applicable Illinois statutory limits. A plain reading of the NPDES permit and Illinois regulations and law indicate that violations of Standard Conditions 23 and 25 need not be directly tied to point source discharges.

Additional persuasive authority further supports a reading of the Vermilion permit and applicable regulations and law as not requiring permit provisions to be directly tied to a discharger's point source discharges themselves in order to be enforceable under the Clean Water Act. *See Nw. Envtl. Advocates*, 56 F.3d at 988-89 ("[C]itizens groups may enforce even valid permit conditions that regulate discharges outside the scope of the Clean Water Act, namely discharges that may never reach navigable waters."); *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1115 (4th Cir. 1988) (enforcing monitoring requirements provision); *Yadkin*

Riverkeeper, Inc. 141 F. Supp. 3d at 446-48 (enforcing dam safety provision and removed substances provision[16]); *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798 (E.D.N.C. 2014), amended, No. 7:13-CV-200-FL, 2014 WL 10991530 (E.D.N.C. Aug. 1, 2014) (clarifying that citizens can enforce removed substances provisions under the Clean Water Act's citizen suit provision); *Sierra Club v. City & Cty. of Honolulu*, No. 04-00463 DAE-BMK, 2008 WL 3850495, at *16-18 (D. Haw. Aug. 18, 2008) (finding that a ground-only spill was a violation of the applicable NPDES permit provision and was thus enforceable via citizen suit even though the violation did not involve a discharge to navigable waters); *Conn. Fund for Env't v. Raymark Indus., Inc.*, 631 F. Supp. 1283, 1285 (D. Conn. 1986) ("There is nothing in the language or legislative history of the [Clean Water] Act to suggest that a citizen[] suit may seek to enforce only those conditions of an NPDES permit that regulate the quality of a discharge immediately before its release into navigable waters."). The legislative history of the Clean Water Act also supports this reading. *See* S. Rep. No. 414, 92d Cong., 2d Sess. 1972, 1972 U.S.C.C.A.N. 3668, 3747 ("*In addition to* violations of section 301(a) citizens are granted authority to bring enforcement actions for violations of . . . any condition of any permit issued under section 402.") (emphasis added).

One category of NPDES permit conditions that courts have repeatedly found to be enforceable are those that are necessary to ensure that the NPDES permit's limits on point source discharges are not circumvented. In *Yadkin Riverkeeper*, the court found that although the dam

[16] Similar to Standard Condition 23 of the Vermilion permit, a removed substances provision prohibits the disposal of substances "removed in the course of treatment or control of wastewaters . . . in a manner such as to prevent any pollutant from such materials from entering waters of the State or navigable waters of the United States except as permitted by the Commission." *See Yadkin Riverkeeper*, 141 F. Supp. 3d at 437 (quoting the removed substances provision included in the NPDES permit at issue).

safety provision of the NPDES permit did not "regulate the discharge of pollutants, dam safety is vital to Duke Energy's efforts to prevent unlawful discharge and comply with the conditions of its permit." *Yadkin Riverkeeper, Inc.*, 141 F. Supp. 3d at 448. Therefore, the permit conditions "need not address the discharge of pollutants to be enforceable through a citizen suit." *Id.* Similarly, courts have found that conditions such as removed substances provisions "'aim[] to ensure the integrity of wastewater treatment and control systems,' and, thus, address[] a different standard or limitation" than unpermitted seep or unauthorized discharge claims. *Roanoke River Basin Ass'n v. Duke Energy Progress, LLC*, No. 1:16CV607, 2017 WL 5654757, at *4 (M.D.N.C. Apr. 26, 2017); *see also Yadkin Riverkeeper, Inc.*, 141 F. Supp. 3d at 446. Therefore, courts have held that these types of permit provisions are independently enforceable. *Roanoke River Basin Ass'n*, 2017 WL 5654757, at *7; *Yadkin Riverkeeper*, 141 F. Supp. 3d at 447. Here, Standard Conditions 23 and 25 are similarly vital to preventing unlawful discharges and ensuring compliance with other conditions of the NPDES permit. They limit pollution in different ways than the prohibition on unpermitted seeps addressed in Count 1, such as by proscribing the discoloring of the Middle Fork and the discharging of contaminants in concentrations that exceed the applicable Illinois statutory limits. They are, accordingly, federally enforceable permit conditions. To sufficiently allege violations of the Vermilion permit and the Clean Water Act, Prairie Rivers Network need only allege that Dynegy has taken actions inconsistent with the plain language of the NPDES permit, regardless of whether there are point source discharges directly at issue. *See, e.g.*, *Laidlaw*, 528 U.S. at 174. Prairie Rivers Network's allegations meet that standard.

Recent decisions from the Sixth Circuit, in *Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436 (6th Cir. 2018), and the Fourth Circuit, in *Sierra Club v. Virginia*

Electric & Power Company, 903 F.3d 403 (4th Cir. 2018), do not suggest otherwise. Both cases are plainly distinguishable from this case, as they apply only to the provisions at issue in those specific cases and do not apply generally to all instances where violations of NPDES permit provisions are asserted.

In *Tennessee Clean Water Network*, plaintiffs alleged violations of two provisions in the defendant's NPDES permit: a removed substances provision and a sanitary-sewer overflow provision. *Tenn. Clean Water Network*, 905 F.3d at 446-47. The court found that the defendant did not violate the permit provisions in question because, based on the plain language of the provisions, they did not apply to the specific discharges of coal ash wastewater alleged by the plaintiff. *Id.* at 447. The removed substances provision specifically indicated the permitted outfalls that the provision applied to, and the sanitary-sewer overflow provision specifically applied to sewage, which the court determined did not include coal ash wastewater. *Id.*

In *Sierra Club v. Virginia Electric & Power Company*, the court found that the term "discharge into state waters" used in the NPDES permit provision at issue had a specific meaning in the context of the Clean Water Act, and therefore, the discharges could not violate the permit conditions if they were not discharges of pollution into navigable water from a point source. *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d at 413-15. The permit at issue in *Sierra Club* prohibited "[d]ischarge into state waters" not in compliance with the NPDES permit and removed substances from "entering state water." *Id.* at 413-14. The court determined that both conditions were limited in scope by its context in the Clean Water Act as result of the terms "discharge" and "state water" being explicitly included in the permit conditions. *Id.* at 413-14.

By contrast, Prairie Rivers Network has sufficiently alleged that Dynegy has violated the plain language of Standard Conditions 23 and 25 of the Permit. Unlike *Tennessee Clean Water*

Network, nowhere in the Vermilion permit does it explicitly state that Standard Conditions 23 and 25 only apply to permitted outfalls. Additionally, as previously noted, Illinois regulations indicate that both conditions apply to the disposal or discharge of coal ash wastewater. *See* 35 Ill. Admin. Code § 301.395 (defining "sludge" as "any solid, semisolid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant"); *id.* § 301.275 (defining "effluent" as "any wastewater"). Moreover, unlike in *Sierra Club v. Virginia Electric & Power Company*, the terms "discharge" or "discharge into state water" are not included in any of the Illinois regulations incorporated into Standard Condition 25 that Prairie Rivers Network alleges Dynegy has violated, *see* 35 Ill. Admin. Code §§ 301.275, 302.203, 304.104, 304.106, 304.124(a), nor does Standard Condition 23 include the term "discharge" or "discharged." Although Standard Condition 23 uses the term "disposed," applicable Illinois law defines the term "disposal" to go far beyond discharge, as that term is used in the context of the Clean Water Act, and includes the "discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water . . . so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 415 ILCS 5/3.185. In short, the language limiting the applicability of the provisions at issue in *Tennessee Clean Water Network* and *Sierra Club v. Virginia Electric & Power Company* is not present in the relevant provisions of the Vermilion Station NPDES permit, nor is any other language that would similarly limit the scope of those provisions. For the reasons explained above, Standard Conditions 23 and 25 are independently enforceable provisions that are not, and need not be, directly tied to point source discharges to be enforceable under the Clean Water Act.

In sum, reversal and remand of the district court's order is warranted because Count 2 of Prairie Rivers Network's Complaint alleging Dynegy's violations Standard Conditions 23 and 25 of the Vermilion permit has an independent jurisdictional basis and should not have been dismissed regardless of the district court's decision concerning the unpermitted discharges alleged in Count 1.

CONCLUSION

For the reasons set forth above, Prairie Rivers Network respectfully requests that this Court summarily reverse the district court's order and remand for further proceedings consistent with the Supreme Court's *County of Maui* decision. In the alternative, Prairie Rivers Network respectfully requests that this Court reverse the district court's order and remand for further proceedings after consideration of the parties' briefs and oral argument.

Respectfully submitted,

s/ Thomas Cmar

Thomas Cmar (IL #6298307)
Counsel of Record
Jennifer Cassel (IL #6296047)
Mychal Ozaeta (CA #309851)
Melissa Legge (NY #5596739)
Earthjustice
311 S. Wacker Dr., Ste. 1400
Chicago, IL 60606
(312) 500-2191
(312) 667-8961 (fax)
tcmar@earthjustice.org
jcassel@earthjustice.org
mozaeta@earthjustice.org
mlegge@earthjustice.org

Ellyn Bullock (IL #6224579)
Solberg & Bullock, LLC
100 N. Chestnut St., Ste. 230
Champaign, IL 61820
(217) 351-6156

(217) 351-6203 (fax)
ellyn@solbergbullock.com

Counsel for Appellant Prairie Rivers Network

CERTIFICATE OF RULE 32 COMPLIANCE

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure and Circuit Rule 32(c), I hereby certify that this brief complies with the stated type-volume limitations. The text of the brief was prepared in Times New Romans 12-point font, with footnotes in Times New Roman 12 point font. All portions of the brief, other than the Disclosure Statement, Table of Contents, Table of Authorities, Statement in Support for Oral Argument, and Certificates of Counsel contain 13,471 words. This certification is based on the word count function of the Microsoft Office Word processing software, which was used in preparing this brief.

DATED this 1st day of July, 2020.

s/ Thomas Cmar
Thomas Cmar (IL #6298307)
Counsel of Record
Jennifer Cassel (IL #6296047)
Mychal Ozaeta (CA #309851)
Melissa Legge (NY #5596739)
Earthjustice
311 S. Wacker Dr., Ste. 1400
Chicago, IL 60606
(312) 500-2191
(312) 667-8961 (fax)
tcmar@earthjustice.org
jcassel@earthjustice.org
mozaeta@earthjustice.org
mlegge@earthjustice.org

Ellyn Bullock (IL #6224579)
Solberg & Bullock, LLC
100 N. Chestnut St., Ste. 230
Champaign, IL 61820
(217) 351-6156
(217) 351-6203 (fax)
ellyn@solbergbullock.com

Counsel for Appellant Prairie Rivers Network

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 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 this 1st day of July, 2020.

s/ Thomas Cmar
Thomas Cmar (IL #6298307)
Counsel of Record
Jennifer Cassel (IL #6296047)
Mychal Ozaeta (CA #309851)
Melissa Legge (NY #5596739)
Earthjustice
311 S. Wacker Dr., Ste. 1400
Chicago, IL 60606
(312) 500-2191
(312) 667-8961 (fax)
tcmar@earthjustice.org
jcassel@earthjustice.org
mozaeta@earthjustice.org
mlegge@earthjustice.org

Ellyn Bullock (IL #6224579)
Solberg & Bullock, LLC
100 N. Chestnut St., Ste. 230
Champaign, IL 61820
(217) 351-6156
(217) 351-6203 (fax)
ellyn@solbergbullock.com

Counsel for Appellant Prairie Rivers Network

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Circuit Rule 30(d), all required materials as outlined within the scopes of Circuit Rule 30(a) and (b) are included in this Appendix.

DATED this 1st day of July, 2020.

s/ Thomas Cmar
Thomas Cmar (IL #6298307)
Counsel of Record
Jennifer Cassel (IL #6296047)
Mychal Ozaeta (CA #309851)
Melissa Legge (NY #5596739)
Earthjustice
311 S. Wacker Dr., Ste. 1400
Chicago, IL 60606
(312) 500-2191
(312) 667-8961 (fax)
tcmar@earthjustice.org
jcassel@earthjustice.org
mozaeta@earthjustice.org
mlegge@earthjustice.org

Ellyn Bullock (IL #6224579)
Solberg & Bullock, LLC
100 N. Chestnut St., Ste. 230
Champaign, IL 61820
(217) 351-6156
(217) 351-6203 (fax)
ellyn@solbergbullock.com

Counsel for Appellant Prairie Rivers Network

ATTACHED REQUIRED SHORT APPENDIX

TABLE OF CONTENTS
SHORT APPENDIX AND APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

PRAIRIE RIVERS NETWORK,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 18-CV-2148**
	)	
DYNEGY MIDWEST GENERATION, LLC,	)	
	)	
Defendant.	)	

ORDER

Plaintiff, Prairie Rivers Network, filed this citizen enforcement action against Defendant Dynegy Midwest Generation, LLC for violations of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1311 and 1342, at the Vermilion Power Station in Vermilion County, Illinois, on May 30, 2018. Defendant filed a Motion to Dismiss (#14) on August 29, 2018, to which Plaintiff filed a Response (#19) on September 26, 2018. Defendant filed its Reply (#21) on October 9, 2018. The motion is now fully briefed and ready for ruling. For the following reasons, the Motion to Dismiss (#14) is GRANTED.

BACKGROUND

The following background is taken from the allegations in Plaintiff's Complaint (#1). At this stage of the proceedings, the court must accept as true all material allegations of the complaint, drawing all reasonable inferences therefrom in the plaintiff's favor. *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 966 (7th Cir. 2016).

Case Overview

Defendant has discharged, and is discharging on an ongoing basis, pollutants into the Middle Fork of the Vermilion River ("the Middle Fork") from numerous, discrete, unpermitted seeps on the riverbank. Although Defendant holds a permit that authorizes the company to discharge pollutants from the Vermilion Power Station to the Middle Fork through nine external outfalls, Defendant's discharge of pollutants into the Middle Fork from these seeps violate the CWA because they are not authorized by any permit and are contrary to the limited authorization to discharge within Defendant's discharge permit. Defendant also discharged and is discharging on an ongoing basis, pollutants into the Middle Fork in concentrations, colors, and with characteristics that violate Illinois effluent limits and water quality standards that are incorporated as conditions of the Vermilion permit. By violating these permit conditions, Defendant is also in violation of the CWA.

Parties

Plaintiff is an Illinois non-profit organization with more than 1,000 members that champions clean, healthy rivers and lakes and safe drinking water to benefit the people and wildlife of Illinois. Plaintiff advocates public policies and cultural values that sustain ecological health and biological diversity of water resources and aquatic ecosystems. Plaintiff holds events for members of the organization and the public along and on the Middle Fork, including immediately downstream of the pollution and discharge points of Defendant. Its members, some of whom live, work, and recreate around the Middle Fork, have had their use and enjoyment of the Middle Fork harmed by Defendant's unauthorized and prohibited discharge of pollutants.

Defendant, a Delaware corporation, owns the Vermilion Power Station. Defendant is a subsidiary of Vistra Energy, which is headquartered in Texas.

Factual Background

The Vermilion Power Station (VPS) is a retired coal-fired power plant located five miles north of Oakwood, Illinois. The plant sits on the west bank of the Middle Fork, in a 17-mile section designated as Illinois' only National Scenic River and first State Scenic River. From the mid-1950s until 2011, the plant burned coal and generated millions of tons of coal combustion residuals ("coal ash"). Defendant and its predecessor mixed the coal ash generated at VPS with water and sluiced it into three unlined coal ash pits, known as the Old East Ash Pond, the North Ash Pond System, and the New East Ash Pond. When the plant opened in 1955, ash was flushed into the Old East Ash Pond. That pit was in service until the North Ash Pond System, a two-cell pit, was built in the mid-1970s. In 1989, the coal ash was diverted to the New East Ash Pond, which received coal ash until the plant's closure in 2011. Although the coal ash pits are out of service, all three continue to store coal ash- including coal ash as deep as 44 feet in some locations. The three unlined coal ash pits contain an approximate total of 3.33 million cubic yards of coal ash. Defendant continues to own these pits and remains responsible for maintaining them, as well as performing any remaining activities at the plant.

Coal ash wastewater such as that in the coal ash pits contains heavy metals and other toxic pollutants that are harmful and at times deadly to people, aquatic life, and animals. Among the contaminants found in coal ash are arsenic, barium, boron, chromium, lead, manganese, molybdenum, nickel, and sulfate. These contaminants can

inflict severe harm, including brain damage, cancer, learning disabilities, birth defects, and reproductive defects. Arsenic is a well-known carcinogen that also damages the nervous system. Manganese is associated with learning disabilities and nervous system impairment, and can render water unusable by discoloring the water, giving it a metallic taste, and causing black staining. Molybdenum has been linked to gout (joint pain, fatigue), increased blood uric acid levels, high blood pressure, liver disease, and potential adverse impacts on the reproductive system. Boron, a dependable indicator of coal ash contamination, can lead to reduced sperm count, testicular degeneration, birth defects, and low birth weight among humans.

Defendant's limited authorization to discharge wastewater from the VPS is set out in NPDES Permit IL0004057 ("the Permit"), granted by the Illinois Environmental Protection Agency (IEPA) pursuant to the IEPA's delegated authority under the CWA, 33 U.S.C. § 1342(b). The Permit regulates discharges of pollutants from the VPS, specifying which wastewater streams may be discharged from which points at the plant. It also establishes effluent limitations, as well as monitoring and reporting requirements for certain pollutants within those wastewater streams. To this effect, the Permit defines nine external outfalls at the VPS, each of which authorizes limited discharges of pollutants at specific outfalls to the Middle Fork.

Standard Condition 23 of the Permit states that "collected screening, slurries, sludges, and other solids shall be disposed of in such a manner as to prevent entry of those wastes (or runoff from the wastes) into the waters of the State. The proper authorization for such disposal shall be obtained from the Agency and is incorporated as part hereof by reference." Applicable Illinois regulations define "sludge" as "any

solid, semisolid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects." 35 Ill. Adm. Code § 301.395. Applicable Illinois law defines "disposal" as being "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any waste or hazardous waste into or on any land or water ... so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 415 Ill. Comp. Stat. 5/3.185.

Standard Condition 25 provides: "The permittee shall comply with, in addition to the requirements of the permit, all applicable provisions of 35 Ill. Adm. Code Subtitle C, Subtitle D, Subtitle E, and all applicable orders of the [Illinois Pollution Control] Board."

Subtitle C of the Illinois Administrative Code provides that "no effluent shall contain settleable solids, floating debris, visible oil, grease, scum or sludge solids. Color, odor and turbidity must be reduced to below obvious levels." 35 Ill. Adm. Code § 304.106. The term "effluent" is defined, in relevant part, as "any wastewater discharged, directly or indirectly, to the waters of the State or to any storm sewer, and the runoff from land used for the disposition of wastewater or sludges." 35 Ill. Adm. Code § 301.275.

Subtitle C of the Illinois Administrative Code further provides that "[n]o person shall cause or allow the concentration of the following constituents in any effluent to

exceed the following levels, subject to the averaging rules contained in Section 304.104(a)." Ill. Adm. Code § 304.124(a). The current iteration of the Permit was issued and became effective on March 7, 2003.

Dating back to at least May 2013, the coal ash pits at VPS have discharged, and continue to discharge on an ongoing basis, pollutants – including, but not limited to, arsenic, barium, boron, chromium, iron, lead, manganese, molybdenum, nickel, sulfate, and totally dissolved solids – into the Middle Fork from numerous, discrete, unpermitted seeps on the riverbank adjacent to the North Ash Pond and Old East Ash Pond in areas where there are no permitted outfalls.

The Middle Fork is a surface water body within the jurisdiction of the CWA as well as a water of the state of Illinois. The Middle Fork has no specific use designation and, as such, is subject to the general use standards codified at 35 Ill. Adm. Code Part 302 Subpart B, which forms part of 35 Ill. Adm. Code Subtitle C. See 35 Ill. Admin. Code §§ 303.201, 302.101(b). The Middle Fork is also subject to the general effluent limitations set forth at 35 Ill. Adm. Code Part 304 Subpart A, which also forms part of 35 Ill. Adm. Code Subtitle C. See id. § 304.101(a).

Groundwater monitoring at the North Ash Pond System and Old East Ash Pond was performed from 1992 through 2007, and again in 2011. The groundwater monitoring at the site was reinitiated in 2017. Over the extended period of groundwater monitoring undertaken between 1992 and 2011, concentrations of boron and sulfate – primary indicators of coal ash contamination – consistently exceeded Illinois' groundwater protection standards and, on numerous occasions, also exceeded U.S. Environmental Protection Agency (EPA) drinking water health advisories for those

contaminants. Defendant's consultants have concluded that the presence of boron and sulfate at the concentrations found at the VPS "indicat[e] that groundwater quality at the facility has been impacted by leachate from the [Old East Ash Pond] and [North Ash Pond System]," and that the elevated concentrations of boron, sulfate, manganese, iron, pH, and total dissolved solids in groundwater at the site are partially due to the impacts of coal ash.

Coal ash at the VPS has groundwater flowing through it year round. While the thickness of saturated ash varies as groundwater levels rise and fall with the seasons, groundwater has saturated coal ash at depths of more than 21 feet. That groundwater flows laterally through the ash, picking up contaminants in the process, while precipitation leaching down through the top of the coal ash mixes with the groundwater and further adds to the pollutant load contained within the discharge to the Middle Fork. Defendant's own reports and information have concluded that the coal ash contaminated groundwater flows right into the adjacent Middle Fork.

In May 2016 and September 2017, Plaintiff sampled five discrete groundwater seeps discharging into the river. Independent laboratory testing revealed concentrations of arsenic, barium, boron, chromium, manganese, molybdenum, and sulfate in those seeps that exceed background levels and, for multiple pollutants, exceed health-based standards set by EPA and Illinois EPA. Plaintiff's sampling also detected iron concentrations as high as 241 mg/l and manganese concentrations as high as 7.35 mg/l. Dating back to at least May 2013, discharges from the coal ash pits at VPS have discolored, and are continuing to discolor, the Middle Fork in low-flow areas of the river adjacent to the coal ash pits with a bright orange-red color not of natural origin.

Plaintiff's Claims for Relief

Count I of Plaintiff's Complaint alleges that Defendant discharged pollutants without authorization in an NPDES Permit. Plaintiff alleges the Middle Fork is a navigable water as defined in § 1362(7) of the CWA, and that Defendant has discharged pollutants as defined in the CWA from the coal ash pits at the VPS to the Middle Fork. The discharge of pollutants from the VPS into the Middle Fork from discrete, unpermitted seeps on the riverbank adjacent to the North Ash Pond and Old East Pond are not authorized by the Permit, and are contrary to the limited authorization to discharge contained in the Permit. Because Defendant violated § 1311 of the CWA, Plaintiff has brought suit.

Count II alleges discharges in violation of the NPDES Permit Conditions. Plaintiff alleges that the discharge of pollutants from the VPS coal ash pits into the Middle Fork violates Standard Condition 23 of the Permit. Further, Defendant's discharge of pollutants have discolored the Middle Fork, and include iron and manganese at concentrations exceeding the effluent limits in Subtitle C of the Illinois Administrative Code, in violation of Standard Condition 25 of the Permit. Plaintiff also alleges that the pollutants are a bright orange-red color that stands out "distinctly," and are not below "obvious levels," as well as containing solids that settle on the riverbed, in violation of Condition 25 of the Permit. By violating these conditions, Plaintiff alleges, Defendant has violated § 1311(a) of the CWA and is subject to suit.

ANALYSIS

Defendant's motion argues that, because Plaintiff's Complaint alleges that the coal ash residuals at VPS were releasing contaminants to groundwater, and that the groundwater was discharging to the Middle Fork via discrete unpermitted seeps, the Complaint should be dismissed because Seventh Circuit precedent establishes that the CWA does not regulate discharges to groundwater, even where the groundwater is hydrologically connected to surface waters regulated by the CWA. Plaintiff counters that the Seventh Circuit decision is distinguishable and inapposite to the instant case. Further, Plaintiff alleges the allegations in Count II set forth distinct violations of the CWA that provide an independent basis for the court's jurisdiction.

Motion to Dismiss Standard

Defendant asks that the Motion to Dismiss be considered under both Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Motions to dismiss under Rule 12(b)(1) are meant to test the sufficiency of the complaint, not to decide the merits of the case. *Center for Dermatology and Skin Cancer, Ltd. v. Burwell*, 770 F.3d 586, 588 (7th Cir. 2014). In the context of a motion to dismiss for lack of subject matter jurisdiction, the court accepts as true the well pleaded factual allegations, drawing all reasonable inferences in favor of the plaintiff, but a plaintiff faced with a 12(b)(1) motion to dismiss bears the burden of establishing that the jurisdictional requirements have been met. *Burwell*, 770 F.3d at 588-89.

A motion under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief may be granted. *Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009). A complaint must contain sufficient

factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). These allegations "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The allegations that are entitled to the assumption of truth are those that are factual, rather than mere legal conclusions. *Iqbal*, 556 U.S. at 678-79.

Defendant argues that the court should evaluate its motion under both Rules 12(b)(1) and 12(b)(6), as some recent district courts have done in similar cases. See *Upstate Forever v. Kinder Morgan Energy Partners*, 252 F.Supp.3d 488, 498 (D.S.C. 2017), reversed on other grounds 887 F.3d 637 (4th Cir. 2018); *Sierra Club v. Virginia Electric and Power Co.*, 145 F.Supp.3d 601, 604 (E.D. Va. 2015). However, in the Seventh Circuit's *Oconomowoc* decision, the district court dismissed the complaint pursuant to Rule 12(b)(1), a decision affirmed by the appeals court. *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 963 (7th Cir. 1994). Based on the Seventh Circuit precedent, the court will analyze the motion under Rule 12(b)(1). However, the court would note that, under either 12(b)(1) or 12(b)(6), the result would be the same.

Count I

For Count I, Defendant argues that Seventh Circuit decision in *Oconomowoc* is "on all fours" with the factual situation in the instant case, and is clear that the CWA does not regulate discharges of contaminants to groundwater, even where that contaminated groundwater reaches navigable waters. Because Plaintiff's Complaint is entirely predicated upon alleged discharges to groundwater, the court should dismiss it. Plaintiff responds that *Oconomowoc* is inapposite and that Defendant is mischaracterizing the decision, because that case "governs discharges *into groundwater*

itself, absent evidence that the groundwater discretely conveys pollution into a navigable water." Plaintiff contends that "is a separate question not at issue here," and that, in the specific factual circumstances of this case, the majority of courts have held that the plain language of the CWA applies to and prohibits such discharges.

In *Oconomowoc*, a local village sued Target for violations of the Clean Air Act and CWA. Target operated a warehouse in the area. Trucks parked at the warehouse dripped oil, which collected into rainwater runoff from storms. Rainwater runoff from the site then collected in a 6-acre artificial pond on the site. From the retention pond water seeped into the ground, possibly carrying hydrocarbons and other unwelcome substances. The district court judge, regarding the rainwater runoff, dismissed the complaint, finding that parking lots and retention ponds were not "navigable waters" under the CWA. Even though groundwater eventually reached streams, lakes, and oceans, the district court held, it was not part of the "waters of the United States," as defined in § 1362(7) of the CWA.

The Seventh Circuit affirmed. The court began by noting that the CWA applied to "the waters of the United States," and that the CWA was a "broad statute, reaching waters and wetlands that are not navigable or even directly connected to navigable waters." *Oconomowoc*, 24 F.3d at 964. The court then noted that, though broad, the CWA's reach was not total, finding that the EPA's regulatory definition of "waters of the United States" included "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect

interstate or foreign commerce'[.]" *Oconomowoc*, 24 F.3d at 965, quoting 40 C.F.R. § 230.3(s)(3).

The court then asked the question "[w]hat of the possibility that water from the pond will enter the local ground waters, and thence underground aquifers that feed lakes and streams that are part of the 'waters of the United States'?" *Oconomowoc*, 24 F.3d at 965. Citing to *Wickard*'s[1] holding that wheat a farmer bakes into bread and eats at home is part of "interstate commerce" because those activities affect the volume of interstate shipments, the court theorized that, on a similar rationale, "all ground waters *could* be thought within the power of the national government." *Oconomowoc*, 24 F.3d at 965 (emphasis in original). However, the court found that:

> But the Clean Water Act does not attempt to assert national power to the fullest. "Waters of the United States" must be a subset of "water"; otherwise why insert the qualifying clause in the statute? (No one suggests that the function of this phrase is to distinguish domestic waters from those of Canada or Mexico.) Neither the Clean Water Act nor the EPA's definition asserts authority over ground waters, just because these may be hydrologically connected with surface waters.

Oconomowoc, 24 F.3d at 965.

The court concluded that the omission of groundwaters from the CWA was not an oversight, and Congress had elected to leave the subject of groundwater regulation to state law. *Oconomowoc*, 24 F.3d at 965.

The court then addressed the problem of pollutants traveling from groundwater to surface waters via a hydrological connection, writing:

> The possibility of a hydrological connection cannot be denied, see *Sierra Club v. Colorado Refining Co.*, 838 F.Supp. 1428 (D. Colo. 1993); *McClellan*

[1]*Wickard v. Filburn*, 317 U.S. 111 (1942).

> *Ecological Seepage Situation v. Cheney*, 763 F.Supp. 431, 437 (E.D. Cal. 1989), but neither the statute nor the regulations makes such a possibility a sufficient ground of regulation. On several occasions the EPA has noted the potential connection between ground waters and surface waters, but it has left the regulatory definition alone. E.g., Preamble to NPDES Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990) ("[T]his rule-making only addresses discharges to waters of the United States, consequently discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body.")) Collateral reference to a problem is not a satisfactory substitute for focused attention in rule-making or adjudication. By amending its regulations, the EPA could pose a harder question. As the statute and regulations stand, however, the federal government has not asserted a claim of authority over artificial ponds that drain into ground waters.

Oconomowoc, 24 F.3d at 965-66.

Based on the forgoing, the court finds that the Seventh Circuit's decision in *Oconomowoc* is directly applicable to the facts of the instant case. Discharges from artificial ponds into groundwater are not governed by the CWA, even if there is an alleged hydrological connection between the groundwater and surface waters qualifying as "navigable waters" of the United States.

Plaintiff, however, argues that *Oconomowoc* is not applicable because *Oconomowoc* concerned only on whether the CWA governed discharges into the groundwater itself, absent evidence that the groundwater discretely conveyed pollution into a navigable water. Plaintiff focuses on the court's use of "may" and "possibility[,]" seeming to argue that the court only considered the hydrological connection as a hypothetical, and did not actually make any determination or ruling as to whether the scenario faced by this court in the instant case is covered by the CWA.

The court finds Plaintiff's argument unpersuasive. The Seventh Circuit affirmatively held that the CWA did not assert authority over groundwaters, just because those waters "may" be hydrologically connected with surface waters. This court's reading of that passage is that the Seventh Circuit found any hydrological connection between surface waters and groundwater to be irrelevant in terms of whether groundwaters were covered by the CWA. If the discharge is made into groundwater, and the pollutants somehow later find their way to navigable surface waters via a discrete hydrological connection, the CWA is still not implicated, because the offending discharge was made into groundwater, which is not subject to the CWA. This interpretation is bolstered later in the decision, where the Seventh Circuit again considered "[t]he possibility of a hydrological connection" between groundwater and covered navigable waters, but concluded that "neither the statute nor the regulations makes such a possibility a sufficient ground of regulation." *Oconomowoc*, 24 F.3d at 965.

The Seventh Circuit acknowledged that the EPA has, on several occasions, noted the connection between surface and groundwaters, but found that the EPA has "left the regulatory definition alone[,]" concluding that "[c]ollateral reference to a problem is not a satisfactory substitute for focused attention in rule-making or adjudication." *Oconomowoc*, 24 F.3d at 965-66.

The Seventh Circuit in *Oconomowoc* was not distinguishing between discharges of pollutants into groundwater with only the hypothetical possibility of further seepage into navigable waters and discharge of pollutants into groundwater with *definite* seepage into navigable waters. Rather, the court finds, the Seventh Circuit was holding that *even if* there was a possibility (or reality) of discharged pollutants into groundwater

seeping into navigable waters, such a discharge was not covered by the CWA, because the *actual discharge* from the artificial pond was into groundwater, regardless of whether those pollutants later seep into navigable surface waters via discrete groundwater seepage.

The court's interpretation of *Oconomowoc* is supported by a subsequent district court case citing the decision. In *Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F.Supp.3d 798 (E.D.N.C. 2014), a district court in the Eastern District of North Carolina noted that *Oconomowoc* "held that an NPDES permit is not required for discharges to groundwater even if those discharges eventually migrate to surface waters." *Cape Fear River Watch*, 25 F.Supp.3d at 809. In its own case, which involved discharges into groundwater that was hydrologically flowing into a lake, the court concluded that "[a]fter close review of the competing analyses, this court finds the reasoning of the Court of Appeals for the Seventh Circuit persuasive, and holds that Congress did not intend for the CWA to extend federal regulatory authority over groundwater, regardless of whether that groundwater is eventually or somehow 'hydrologically connected' to navigable surface waters." *Cape Fear River Watch*, 25 F.Supp.3d at 810. The court dismissed the groundwater claim for lack of subject matter jurisdiction.

Plaintiff cites to out of circuit cases to support its argument that the CWA covers discharges to groundwater where the pollutants seep into navigable waters through hydrological connection. However, this court is a district court in the Seventh Circuit, and is bound by that court's precedent, despite contrary precedent from other circuit courts. See *Hart v. Wal-Mart Stores, Inc. Associates' Health and Welfare Plan*, 360 F.3d 674,

680 (7th Cir. 2004) ("it would generally be an abuse of discretion for a district court to follow out-of-circuit precedent which conflicts with binding precedent from its own circuit"); *Jacobson v. SLM Corp. Welfare Benefit Plan*, 669 F.Supp.2d 940, 941 (S.D. Ind. 2009). Further, it should be noted, the Sixth Circuit Court of Appeals has recently held that CWA does not cover discharges of pollutants through groundwater that is hydrologically connected to navigable waters. *Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436, 446 (6th Cir. 2018); *Kentucky Waterways Alliance v. Kentucky Utilities Company*, 905 F.3d 925, 936-37 (6th Cir. 2018). Count I of Plaintiff's Complaint is dismissed.[2]

Count II

Plaintiff argues that, even if the court dismisses Count I for lack of subject matter jurisdiction under the CWA, Count II should survive because its claim that Defendant's discharges have violated the conditions of the Permit are independent of and unaffected by Defendant's argument that the CWA requires a direct discharge from a point source to navigable waters. Plaintiff argues that because the discharges violate the Permit, it has asserted a viable claim under 33 U.S.C. § 1311(a). Plaintiff elaborates that Conditions 23 and 25 of the Permit are "stand-alone" permit conditions that, if violated, constitute independent violations of the CWA. In support, Plaintiff notes that "[n]oncompliance with a permit constitutes a violation of the [CWA]." *Friends of the*

[2]The court is not unsympathetic to Plaintiff's claims about the pollution being discharged into groundwater that is finding its way into the Middle Fork of the Vermilion River. As characterized in Plaintiff's Complaint, this is a serious problem. However, Plaintiff is not without recourse. Despite this court's holding that the allegations are not covered by the CWA, Plaintiff may pursue this claim in the Illinois state courts with the Illinois EPA.

Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 174 (2000), quoting 33 U.S.C. § 1342(h).

Defendant responds that Plaintiff, as in Count I, still bases its claim on a violation of § 1311(a), which requires a discharge to navigable waters. To establish liability in Count II, Defendant argues, Plaintiff must show (1) a discharge to navigable waters and (2) a violation of the Permit. Because Plaintiff has failed to meet the first condition, as explained above based on *Oconomowoc*, Count II is not actionable under the CWA.

The CWA prohibits point sources from discharging pollutants into waters of the United States unless in conformance with a valid NPDES permit obtained prior to the discharge. 33 U.S.C. §§ 1311, 1342; *Save the Valley, Inc. v. United States EPA*, 223 F.Supp.2d 997, 1007 (S.D. Ind. 2002).

> As noted, Section 301(a) of the CWA states that "the discharge of any pollutant by any person shall be unlawful," unless authorized by an NPDES permit. 33 U.S.C. § 1311(a). The CWA sets forth guidelines for the NPDES permits for the discharge of pollutants in Section 402, 33 U.S.C. § 1342. To establish a violation of these sections, a plaintiff must prove that the defendant (1) discharged (2) a pollutant (3) into navigable waters (4) from a point source (5) without a permit. See *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir.1982).

Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1141-42 (10th Cir. 2005).

The purpose of the Permit in question would be to allow certain discharges within the limitations set by the Permit that would otherwise be in violation of the CWA. Plaintiff itself, at paragraph 74 of the Complaint, in Count II, states that by violating the conditions of the Permit Defendant violated § 1311(a). In order to violate § 1311(a), a defendant polluter must have "discharge[d]" a pollutant "into 'navigable waters from a point source.'" *Oconomowoc*, 24 F.3d at 963, quoting 33 U.S.C. § 1362(12).

The court has already determined that the CWA has no subject matter jurisdiction over the discharges in question because the discharges were made into groundwaters, which are not covered by the CWA, and are not "navigable waters" under § 1362(12), and thus there was no violative discharge of a pollutant under § 1311(a). The violations alleged in Count II of Plaintiff's Complaint are identical to those alleged in Count I, different only in that, rather than just a violation of § 1311(a) in general, the discharges also violate Conditions 23 and 25 of the Permit. Plaintiff still has not shown that there has been any "discharge into navigable waters" so as to invoke the jurisdiction of the CWA.

The question then becomes, for Plaintiff, can a claim be brought under the CWA for a violation of an NPDES permit even though the actual discharges in question were not into navigable waters and thus outside the jurisdiction of the CWA pursuant to § 1311(a)? The CWA prohibits the discharge of any pollutant into the navigable waters of the United States. *Wisconsin Resources Protection Council v. Flambeau Mining Co.*, 727 F.3d 700, 702 (7th Cir. 2013). However, there is nothing in the statute stating that the CWA covers discharges *not* into the navigable waters of the United States, so long as those discharges violate conditions of an NPDES permit. Plaintiff has cited to no authority holding that, if the CWA does not cover the discharge in question, a plaintiff can still bootstrap a complaint into federal court because those same discharges violated a condition of the NPDES permit held by the defendant polluter. Count II is dismissed.

IT IS THEREFORE ORDERED:

(1) Defendant's Motion to Dismiss (#14) is GRANTED. Plaintiff's Complaint (#1) is dismissed in full. Judgment is entered in favor of Defendant and against Plaintiff.

(2) This case is terminated.

ENTERED this 14th day of November, 2018.

s/ COLIN S. BRUCE
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

for the
Central District of Illinois

PRAIRIE RIVERS NETWORK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case Number: 18-2148**
	)	
DYNEGY MIDWEST GENERAL LLC,	)	
	)	
Defendant.	)	

JUDGMENT IN A CIVIL CASE

☐ **JURY VERDICT**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **DECISION BY THE COURT**. This action came before the Court, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this matter is hereby DISMISSED.

Dated: 11/14/2018

s/ Shig Yasunaga
Shig Yasunaga
Clerk, U.S. District Court