

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PRAIRIE RIVERS NETWORK)	
)	
Complainant,)	
)	
v.)	PCB No. 19-93
)	(Enforcement – Water)
DYNEGY MIDWEST)	
GENERATION, LLC)	
)	
Respondent.)	

NOTICE OF FILING

To:

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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board a **MOTION TO STAY OR DISMISS AND ACCOMPANYING MEMORANDUM IN SUPPORT**, copies of which are herewith served upon you.

/s/ Ryan C. Granholm
Ryan C. Granholm

Dated: May 1, 2019

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MOTION TO STAY OR DISMISS

NOW COMES Respondent Dynegy Midwest Generation, LLC (“DMG”), by and through its attorneys, Schiff Hardin LLP, and pursuant to 415 ILCS 5/31(d)(1) and 35 Ill. Admin. Code §§ 101.500(a), 101.514, and 103.212(a), hereby move to stay this action initiated by the Complaint filed on March 29, 2019 (the “Complaint”) by Complainant Prairie Rivers Network (“PRN”) because it is similar to an earlier action filed by PRN in the federal courts, No. 2:18-cv-02148 (C.D. Ill. May 30, 2018) (the “Federal Complaint”). In the alternative, DMG moves to dismiss Counts 4 & 5 of the Complaint as duplicative of Count 2 the Federal Complaint. DMG also moves to dismiss Count 4 as frivolous because the alleged discharges do not entail effluent as a matter of law. In support of its Motion, DMG states as follows:

1. The Complaint was served on DMG’s registered agent by certified mail on April 1, 2019. Proof of Service, at 4 (Apr. 11, 2019).
2. This motion is filed within 30 days of receipt of service of the Complaint and is therefore timely pursuant to 35 Ill. Admin. Code 103.212(b). Under the Board’s rules, this timely-filed motion stays DMG’s 60-day deadline to file an Answer to PRN’s Complaint. 35 Ill. Admin. Code § 103.204(e).

3. The Complaint is PRN's second attempt in just ten months to obtain relief against DMG for alleged subsurface discharges from impoundments at the retired Vermilion Power Station. The first case, the Federal Complaint, is currently pending before the U.S. Court of Appeals for the Seventh Circuit. No. 18-3644. Without resolving that federal litigation, PRN has initiated this essentially redundant matter before the Board.

4. The Board has discretion to stay a case where it is similar to a case pending in another forum, in order to conserve resources and prevent conflicting rulings. 35 Ill. Admin. Code § 101.514; *Midwest Generation EME v. IEPA*, PCB 04-216, Order of the Board, at 7 (April 6, 2006). Applying the factors identified by the Illinois Supreme Court in *A.E. Staley Mfg. Co. v. Swift & Co.*, 84 Ill. 2d 245, 254 (Ill. 1980) and the Board's precedent, a stay is appropriate here to allow final resolution of the Federal Complaint before determining whether PRN should be allowed to move forward with the Complaint.

5. The Illinois Environmental Protection Act ("Act") and the Board's rules direct it to dismiss a complaint if it is "duplicative." 415 ILCS 5/31(d)(1); 35 Ill. Admin. Code 103.212(a). A complaint is duplicative if it is "**identical or substantially similar** to one brought before the Board or another forum." 35 Ill. Admin. Code 101.202 (emphasis added).

6. Counts 4 & 5 of the Complaint involve the same parties and operative facts as Count 2 of the Federal Complaint. *See* DMG's Memorandum in Support of Motion to Stay or Dismiss at Section II.B. Furthermore, Counts 4 & 5 of the Complaint are based on the same Illinois regulations as Count 2 of the Federal Complaint, and both complaints seek the same relief. *Id.* Because the Illinois Protection Act, the Board's rules, and its precedent prohibit "duplicative" litigation, Counts 4 & 5 of the Complaint should be dismissed. 415 ILCS 5/31(d)(1); 35 Ill. Admin. Code 103.212(a).

7. The Board may also dismiss a complaint, or strike a claim, where it is “frivolous.” 415 ILCS 5/31(d)(1); 35 Ill. Admin. Code 103.212(a). A claim is frivolous if it requests relief “that the Board does not have the authority to grant . . . or fails to state a cause of action upon which the Board can grant relief.” 35 Ill. Admin. Code § 101.202. *Id.*

8. Count 4 of the Complaint alleges that subsurface discharges from the Impoundments violations of “Illinois effluent standards,” provided in 35 Ill. Admin. Code §§ 304.106 and 304.124. Compl. ¶¶ 21, 23 24, 56, 58. Because the Board has clearly held that subsurface discharges from impoundments are not “effluent,” those regulations are inapplicable and Count 4 should be dismissed as frivolous. *Central Ill. Pub. Serv. Co. v. IEPA*, PCB 84-105, 1984 WL 37567, Opinion and Order of the Board, at *3 (Nov. 8, 1984).

WHEREFORE, DMG respectfully requests that the Board grant this motion and stay this matter pending final resolution of the Federal Complaint, or, in the alternative dismiss Counts 4 & 5 of the Complaint as duplicative and Count 4 of the Complaint as frivolous.

/s/ Daniel J. Deeb

Daniel J. Deeb

Dated: May 1, 2019

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**MEMORANDUM IN SUPPORT OF DMG's
MOTION TO STAY OR DISMISS**

Prairie Rivers Network's ("PRN's") Complaint, filed March 29, 2019 (the "Complaint"), is its second lawsuit in just ten months against Dynegy Midwest Generation, LLC ("DMG") with respect to alleged subsurface discharges from three impoundments (the "Impoundments") at the retired Vermilion Power Station (the "Vermilion Facility"). Indeed, as explained in Part I below, the substantial similarities of this matter and the earlier filed Federal Complaint (defined below) warrant a stay of these proceedings. Alternatively, DMG respectfully submits that Counts 4 & 5 of the Complaint should be dismissed as duplicative of PRN's earlier and yet ongoing federal suit and that Count 4 should further be dismissed as frivolous, as the alleged subsurface discharges from the Impoundments are not "effluent" as a matter of law. *See* Parts II and III, *infra*.

I. THIS MATTER SHOULD BE STAYED PENDING RESOLUTION OF PRN'S EARLIER FILED FEDERAL LITIGATION.

PRN's first suit regarding the Impoundments was filed in the U.S. District Court for the Central District of Illinois on May 30, 2018 (the "Federal Complaint"). No. 2:18-cv-02148.¹

¹ A complete copy of the Federal Complaint is attached as Exhibit A.

That case is currently pending before the U.S. Court of Appeals for the Seventh Circuit. No. 18-3644. Without resolving that federal litigation, PRN has initiated this essentially redundant matter before the Board.

Both the Complaint and the Federal Complaint address the same alleged discharges of groundwater from the Impoundments. Compl. ¶¶ 21, 23; Fed. Compl. ¶ 53. In fact, nearly half of the first forty-four paragraphs in the Complaint (which lay out PRN's factual and legal allegations) were copied verbatim, or nearly verbatim, from the Federal Complaint.²

Unquestionably, the Complaint and the Federal Complaint are predicated upon the same central factual allegations. And the key paragraph in both the Federal Complaint and the Complaint—the paragraph that describes how contaminants are alleged to travel from the Impoundments to the environment—is essentially identical:

Coal ash at the [Vermilion plant/Vermilion Power Station] 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 [in the groundwater/contained within the discharge to the Middle Fork]. Compl. ¶ 21; Fed. Compl. ¶ 53.³

Most strikingly, as explained at Part II below, Counts 4 & 5 of the Complaint and Count 2 of the Federal Complaint repeat identical claims of violations of Illinois effluent and groundwater standards, specifically, 35 Ill. Admin. Code §§ 304.124, 304.106 & 302.203 (respectively, “Section 304.124”, “Section 304.106”, and “Section 302.203”).

² See Comparison Chart of the Complaint and the Federal Complaint, attached as Exhibit B.

³ The bracketed language in this quotation shows the only differences between the paragraph in each complaint. In each bracketed portion of the paragraph, the Complaint is quoted first, and the Federal Complaint is quoted second. Footnotes are omitted in each.

Finally, the overall relief sought by the Complaint overlaps that of the Federal Complaint: (a) a declaration of violations (including violations of Section 304.124, Section 304.106, and Section 302.203); (b) injunctive relief ordering DMG to cease the alleged discharges from the Impoundments in violation of, *inter alia*, the Illinois Administrative Code; and (c) civil penalties. Compare Compl. p. 15 with Fed. Compl. p. 16-17.

A. Stays Are Appropriate Where Similar Cases are Pending in Two Forums.

The Board has discretion to stay a case where it is similar to a case pending in another forum, in order to conserve resources and prevent conflicting rulings. 35 Ill. Admin. Code § 101.514; *Midwest Generation EME v. IEPA*, PCB 04-216, Order of the Board, at 7 (April 6, 2006). The Board considers the following factors, none of which is singularly determinative, when deciding whether a matter pending in another forum warrants a stay of a Board proceeding: (1) comity;⁴ (2) prevention of multiplicity of litigation, vexation, and harassment; (3) likelihood of obtaining complete relief in the foreign jurisdiction, and; (4) the *res judicata* effect.⁵ *Midwest Generation EME*, at 7 (citing *A.E. Staley Mfg. Co. v. Swift & Co.*, 84 Ill. 2d 245, 254 (Ill. 1980)) (collectively, the “*Staley* Factors”).

⁴ “Where another court has taken jurisdiction over a controversy, a court with jurisdiction over the same controversy as a result of a later-filed suit will generally, as a matter of comity, defer to the first court in ruling on the matter before both courts.” *Environmental Site Developers v. White & Brewer Trucking, Inc.*, PCB 96-180, Order of the Board, at 4 (July 10, 1997).

⁵ “*Res judicata* is the legal doctrine providing that once a cause of action has been adjudicated by a court of competent jurisdiction, it cannot be retried again between the same parties or their privies in a new proceeding.” *Midwest Generation EME v. IEPA*, at 8 (internal quotation omitted). “The elements of *res judicata* are (1) a final judgment on the merits rendered by a court of competent jurisdiction, (2) an identity of cause of action, and (3) an identity of parties, or privity between subsequent parties and the original parties.” *ESG Watts v. IEPA*, PCB 96-181, Order of the Board, 1998 WL 430564, at *2 (July 23, 1998). The Board has held, however, that causes of action need not be identical for *res judicata* to apply, rather, “[t]he test generally employed . . . is whether the evidence needed to sustain the second cause of action would have sustained the first. Courts have also employed a transactional approach, which considers whether both suits arise from the same transaction, incident or factual situation.” *Sangamon County, Complainant v. ESG Watts, Inc.*, AC 94-28, Order of the Board, 1997 WL 114430, at *1 (Mar. 6, 1997) (citation omitted).

For example, in *Midwest Generation EME*, the Board issued a stay where both the Board and U.S. EPA were asked to consider whether certain information should be disclosed under separate state and federal FOIA provisions. PCB 04-216, Order of the Board, at 8-9 (Apr. 6, 2006). In that case, there was no allegation of vexation or harassment and an administrative determination by U.S. EPA would have not *res judicata* effect. *Id.* at 7. Still, the Board held that common information was at issue in both forums, and that a stay would “diminish[] the opportunity for potentially conflicting determinations.” *Id.* Additionally, the Board held that a stay would “avoid multiplicity [of litigation] and the potential for unnecessarily expending the resources of the Board and [the parties].” *Id.* at 8.

Similarly, the Board has stayed cases even where it found that the claims in two cases did not overlap completely, such that a decision in another forum may not have fully resolved the case before the Board. In *Environmental Site Developers, Inc. v. White & Brewer Trucking*, the Board found that the complainant sought “some different relief from the Board than the federal court (i.e., statutory penalties).” PCB 97-11, 1997 WL 593937, Order of the Board, at *2 (Sept. 18, 1997). Nevertheless, because the two cases involved the same “central” issues, the Board found (a) that “if [the Board case] and the federal case continue[d] simultaneously, multiplicity of litigation would occur;” and (b) that the competing matters presented a *res judicata* concern. *Id.*

B. Application of the *Staley* Factors Dictates a Stay Here.

As a result of the substantial similarity between the Complaint and the Federal Complaint, three of the four *Staley* Factors weigh in favor of a stay here. *A.E. Staley Mfg. Co. v. Swift & Co.*, 84 Ill. 2d 245, 254 (Ill. 1980). Taking these factors in reverse, first, a final ruling on Count 2 of the Federal Complaint would have *res judicata* effect on the Board. Specifically, the

Federal Complaint involves the same parties and shares an identity of cause of action with the Complaint. *ESG Watts v. IEPA*, PCB 96-181, Order of the Board, 1998 WL 430564, at *2 (July 23, 1998). Under either a “transactional” approach or an “evidentiary” approach, both complaints involve the same set of operative facts: allegations that the Impoundments at the Vermilion Facility have and continue to discharge contaminants to groundwater and to the Middle Fork. *Sangamon County v. ESG Watts, Inc.*, AC 94-28, Order of the Board, 1997 WL 114430, at *1 (Mar. 6, 1997); *see supra* p. 2-3. Therefore, a final ruling of the U.S. District Court for the Central District of Illinois on the Federal Complaint may resolve many or all of the legal and factual issues in the Complaint. *Midwest Generation EME v. IEPA*, PCB 04-216, Order of the Board, at 8 (April 6, 2006).

Next, the prevention of a multiplicity of litigation weighs in favor of a stay here. As in *Environmental Site Developers Inc. v. White & Brewer Trucking*, the Complaint and the Federal Complaint involve the same “central” issues. PCB 97-11, 1997 WL 593937, Order of the Board, at *2 (Sept. 18, 1997). Therefore, although the claims and theories in each case may not be completely identical, allowing both to move forward would result in a multiplicity of litigation that would waste both the Board’s and the parties’ resources. *Id.*; *Midwest Generation EME*, at 8. The same evidence regarding the Impoundments, the hydrology associated with the Vermilion Facility, alleged contaminants, monitoring data, and the Middle Fork, to name a few, are implicated in both cases. *See, e.g.*, Exhibit B. And, PRN raised identical legal claims in each venue: Counts 4 & 5 of the Complaint and Count 2 of the Federal Complaint. *See infra* Part II.B.i & ii. Even where the claims are not identical, the requested relief, particularly the requests for injunctive relief, may overlap. *Compare* Compl. p. 15 *with* Fed. Compl. p. 16-17.

Finally, comity weighs in favor of stay. The Federal Complaint was filed ten months before the Complaint. No. 2:18-cv-02148 (C.D. Ill.) (filed May 30, 2018); PCB No. 19-93 (filed Mar. 29, 2019). While PRN asked the 7th Circuit to stay its appeal relating to the Federal Complaint, the matter remains pending before the court of appeals. *Prairie Rivers Network v. Dynege Midwest Generation, LLC*, Order, No. 18-3644 (7th Cir. Mar. 7, 2019). Therefore, because both cases involve the “same controversy”—alleged groundwater and surface water contamination caused by the Impoundments at the Vermilion Facility—comity requires that the Board “defer to the first court in ruling on the matter before both courts.” *Environmental Site Developers v. White & Brewer Trucking, Inc.*, PCB 96-180, Order of the Board, at 4 (July 10, 1997).

Taken together, the *Staley* Factors and the Board’s precedent suggest that a stay is appropriate here, to allow final resolution of the Federal Complaint before determining whether PRN should be allowed to move forward with the Complaint.

II. COUNTS 4 AND 5 OF THE COMPLAINT MUST BE DISMISSED AS DUPLICATIVE.

In the alternative, should the Board decide that it is inappropriate to stay this case, Counts 4 & 5 of the Complaint must be dismissed because the Act, the Board’s rules, and case law prohibit overlapping and redundant litigation.

A. Duplicative Actions Must be Dismissed.

The Illinois Environmental Protection Act (“Act”) and the Board’s rules direct it to dismiss a complaint if it is “duplicative or frivolous.” 415 ILCS 5/31(d)(1); 35 Ill. Admin. Code 103.212(a). A complaint is duplicative if it is “**identical or substantially similar** to one brought before the Board or another forum.” 35 Ill. Admin. Code 101.202 (emphasis added).

For example, in *DoAll Co. v. Skokie Valley Asphalt Co.*, DoAll Co. sought to recover remediation costs from two other companies, suing in both state court and before the Board. PCB 94-256, Order of the Board, at 3 (July 7, 1995). The Board found the cost recovery claims duplicative, because “[i]n both actions, DoAll seeks to hold the same parties responsible for the same costs DoAll incurred in remediating the same contamination.” *Id.* Therefore, the Board dismissed the cost recovery claims from the suit, even though the cost recovery claims before the Board were based on the Act, while those brought in the state court were premised on common law. *Id.*; see *Village of Addison v. City of Wood Dale*, PCB 98-104, 1998 WL 112507, Order of the Board, at *1-2 (Mar. 5, 1998) (finding a complaint before the Board “clearly duplicitous” of a circuit court complaint, even though the two cases involved different parties and different relief was requested).

A complaint need not raise identical issues, or be based on identical facts, to be “duplicative” under the Act and the Board’s rules. See 35 Ill. Admin. Code. § 101.202 (defining “duplicative” as “substantially similar”). In *Brandle v. Ropp*, the respondent moved to dismiss a complaint regarding an allegedly unpermitted waste disposal operation where a similar complaint was pending in state court. PCB 85-68, Order of the Board, at 1 (June 13, 1985).⁶ Over the complainant’s objections, the Board dismissed the case, holding that “[a]lthough the complaints are not precisely identical the issues are substantially similar to those pending before the Circuit Court.” *Id.* at 2.⁷

⁶ This case applied an earlier version of the Board’s rules, under which complaints could be dismissed as “duplicitous.” *Id.* at 1. The Board has explained, however, that the terms “duplicitous” and “duplicative” are interchangeable. *Rulon v. Double D Gun Club*, PCB 03-07, Order of the Board, at 2, n.1 (Aug. 22, 2002).

⁷ Should the Board decide not to stay the entire case, or to dismiss Counts 4 & 5, DMG asks that Counts 4 & 5 be stayed pending resolution of the Federal Complaint.

Similar to the Act, the Illinois Code of Civil Procedure allows for dismissal of a complaint where “there is another action pending between the same parties for the same cause.” 735 ILCS 5/2-619(a)(3) (“Section 619(a)(3)”). Illinois courts’ interpretation of Section 619(a)(3) is persuasive authority for the Board in interpreting the motion to dismiss standards under the Act. The Board has repeatedly noted that it “looks to Illinois civil practice law for guidance” when considering motions to strike or dismiss pleadings. *People v. Amsted Rail Co.*, PCB 16-61, Order of the Board, at 2 (Mar. 3, 2016); *Mayer v. Lincoln Prairie Water Co.*, PCB 11-22, Order of the Board, at 5 (Apr. 7, 2011).

Interpreting Section 619(a)(3), Illinois courts have, like the Board, held that dismissal may be appropriate even where the causes of action, the legal theories, or the relief sought in the two cases is not identical. Specifically, Illinois Appellate Courts have held that “[t]he crucial inquiry is whether the two causes of action arise out of the same transaction or occurrence, not whether the legal theories, issues, burden of proof or relief sought materially differ between the two actions.” *Quantum Chemical Corp. v. Hartford Steam Boiler Inspection and Ins. Co.*, 246 Ill. App. 3d 557, 560 (Ill. App. Ct. 3d Dist. 1993) (dismissing a state court breach of contract suit in between an insurer and its insured where a declaratory judgment suit was pending between the same parties in federal court) (quotation omitted); see *Praxair v. Slifka*, 61 F. Supp. 2d 753, 761-63 (N.D. Ill. 1999) (citing *Quantum Chemical* to dismiss a suit in federal court in Illinois where another was pending in a Canadian court).

B. Counts 4 & 5 of PRN's Complaint are Duplicative of Count 2 PRN's Federal Complaint.

As noted above, large portions of PRN's Complaint, including the operative factual allegations and the requested relief mirror those included in the Federal Complaint.⁸ Counts 4 & 5, however, go further—they present identical legal claims, under identical theories of law, as those advanced in Count 2 of the Federal Complaint. In particular, Count 4 of the Complaint consists of alleged violations of two Board effluent rules, Section 304.124 and Section 304.106. Count 5, in turn, claims violations of Section 302.203 regarding color narrative water quality standards. Count 2 of the Federal Complaint entails those same alleged violations of Sections 304.124, Section 304.106, and Section 302.203. Counts 4 & 5 of the Complaint are therefore “duplicative” of Count 2 of the Federal Complaint and must be dismissed.

i. Count 4's Claims Concerning Section 304.124 and Section 304.106 are Substantively Identical to Claims in the Federal Complaint.

Like Count 2 of the Federal Complaint, Count 4 of the Complaint alleges violations of effluent standards for iron and manganese under Section 304.124. *Compare* Compl. ¶¶ 56-57 *with* Fed. Compl. ¶¶ 41, 43-44, 71 (alleging past and ongoing violations of iron and manganese effluent standards Section 304.124). Specifically, after both alleging iron and manganese testing results from May 2016 and September 2017 (*see* Compl. ¶ 57 and Fed. Compl. ¶¶ 55-56), Complaint paragraph 56 and Federal Complaint paragraph 71, respectively, state the following nearly identical allegations:

Dynergy's discharges have included, and continue to include, iron, and manganese at concentrations exceeding the effluent limits in 35 Ill. Admin. Code § 304.124.

⁸ *See supra* p. 2-3.

Dynegy's discharges have included, and continue to 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.

The only difference between these paragraphs is that the latter refers to "Subsection C of the Illinois Administrative Code" and "Standard Condition 25 of the Permit." Fed. Compl. ¶ 71. A reading of the Federal Complaint makes it clear that PRN believes Standard Condition 25 of the Vermilion Facility's NPDES permit requires compliance with Subtitle C of the Illinois Administrative Code, including Section 304.124.⁹ Fed. Compl. ¶¶ 41, 43, 44. Accordingly, PRN is alleging the same violations of Section 304.124 in Federal Court that it now wishes to bring before the Board.

Similarly, Count 4 of the Complaint alleges violations of Section 304.106 regarding color effluent standards, which mirror those in the Federal Complaint.¹⁰ Compare paragraph 58 of the

⁹ Furthermore, PRN's notice letter attached to the Federal Complaint as its Exhibit A explains PRN's argument regarding Section 304.124 as follows:

Second, the unpermitted discharges violate 35 Ill. Adm. Code § 304.124. That provision states: "No 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)." The maximum level for iron (total) is 2.0 mg/l, while the maximum level for manganese, a long-recognized indicator of coal ash pollution, is 1.0 mg/l. *Id.*

Grab samples that Prairie Rivers Network took of unpermitted discharges from the Vermilion Ash Ponds into the Middle Fork in 2016 and 2017 contain manganese pollution in excess of 5 mg/l and iron pollution well in excess of 10 mg/l. As such, those discharges violate 35 Ill. Adm. Code § 304.124 and, therefore, violate Standard Condition 25 of NPDES Permit IL0004057. Fed. Compl. at Ex. A, p. 8-9.

¹⁰ PRN's notice letter attached to the Federal Complaint as its Exhibit A explains PRN's argument regarding Section 304.106 as follows:

First, the unpermitted discharges violate 35 Ill. Adm. Code § 304.106. That provision states, in relevant part, that: "[N]o 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." "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. The discharges from the Vermilion Power Station into the Middle Fork constitute "effluent," and, as can be seen in Figures 1 and 2 below, that effluent contains both solids that are settling on the riverbed as well as bright colors that stand in stark contrast with unaffected portions of the riverbank. The shimmery orange, rust, and purple colors in those discharges are, in short, about as obvious as can be. As such, each unpermitted discharge from the Vermilion Power Plant into the Middle Fork violates 35 Ill. Adm. Code § 304.106 and Standard Condition 25 of NPDES Permit IL0004057 on each and every day that it occurs. Fed. Compl. at Ex. A, p. 7 (alteration in original).

Complaint (stated first below) with paragraph 72 of the Federal Complaint (stated second below):

Dynergy's discharges of pollutants have been, and continue to be, a bright orange-red color that stands out distinctly and is not "below obvious levels," in violation of 35 Ill. Adm. Code § 304.106. Such brightly-colored discharges have occurred on at least five occasions and, upon information and belief, are ongoing.

Dynergy's discharges of pollutants have been, and continue to be, a bright orange-red color that stands out distinctly and is not "below obvious levels," in violation of Standard Condition 25 of the Permit.

Like PRN's 304.124 allegations, its Section 304.106 claim is substantively identical to that which PRN is already pursuing in federal court. *See* Federal Complaint 41-42 (alleging that Section 304.106 is incorporated into the Vermilion Facility's NPDES permit via Standard Condition 25).

ii. Count 5's Claims Concerning Duplicative Section 302.203 are Substantively Identical to Claims in the Federal Complaint.

Exceedances of the narrative water quality standards of Section § 302.203 are claimed both by Count 5 of the Complaint and Count 2 of the Federal Complaint. Specifically, paragraph 60 of the Complaint and paragraph 70 of the Federal Complaint, respectively, make the same substantive claim as follows:

Dynergy's discharges of pollutants have discolored, and are continuing to discolor, the Middle Fork a bright orange-red color not of natural origin, in violation of 35 Ill. Admin. Code § 302.203. Such brightly-colored discharges have discolored the Middle Fork in colors not of natural origin on at least five occasions and, upon information and belief, are ongoing.

Dynergy's discharges of pollutants have discolored, and are continuing to discolor, the Middle Fork a bright orange-red color not of natural origin, in violation of Standard Condition 25 of the Permit.

Again, the only variance between these allegations concern the latter's reference to Standard Condition 25 which, as explained above, PRN alleges is incorporated Subtitle C of the Illinois Administrative Code, including Section 302.203.¹¹ Fed. Compl. ¶¶ 41, 46.

iii. PRN is Actively Pursuing its Federal Litigation.

As illustrated above, the only facial difference between Count 2 of the Federal Complaint and Counts 4 and 5 of the Complaint is that the former seeks to enforce Section 304.124, Section 302.106, and Section 302.203 via their incorporation into Standard Condition 25 of the NPDES permit for the Vermilion Facility. *See* Fed. Compl. ¶¶ 41-46. That difference is immaterial and does not change the fact that PRN is now attempting to litigate alleged violations Sections 304.124, Section 304.106, and Section 302.203 in Counts 4 and 5 of the Complaint before the Board while also litigating the same alleged violations before the Seventh Circuit by way of Count 2 of the Federal Complaint.

While the Central District has dismissed the Federal Complaint, PRN has filed an appeal which remains pending before the U.S. Court of Appeals for the Seventh Circuit. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 350 F. Supp. 3d 697 (C.D. Ill. 2018); *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, Docketing Statement, No. 18-3644 (7th Cir. Dec. 21, 2018). At PRN's request, the Seventh Circuit has stayed the appeal pending

¹¹ PRN's notice letter attached to the Federal Complaint as its Exhibit A explains PRN's argument regarding Section 302.203 as follows:

Finally, the unpermitted discharges from the Vermilion Power Station into the Middle Fork contravene 35 Ill. Adm. Code § 302.203, also contained in 35 Ill. Admin Code Subtitle C. That section, titled "Offensive Conditions," dictates that "[w]aters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, *color* or turbidity *of other than natural origin*" (emphasis added). As shown in Figure 3, the color of the Middle Fork adjacent to the ash ponds is quite plainly not of "natural origin." If it were, portions of the river that are not adjacent to the ash pits would share a similar red-orange tint. They do not, as shown in Figure 4. Because ongoing discharges from the Vermilion Power Station are failing to keep the Middle Fork "free from . . . color . . . of other than natural origin," Dynegy is violating 35 Ill. Adm. Code § 302.203 and Standard Condition 25 of NPDES Permit IL0004057. Fed. Compl. at Ex. A, p. 9.

resolution of a matter currently before the U.S. Supreme Court. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, Order, No. 18-3644 (7th Cir. Mar. 7, 2019).¹² The ultimate outcome of the Federal Complaint, therefore, remains unknown.

iv. Factors Previously Considered by the Board Weigh Heavily In Favor of Dismissal.

The Board's decision in *Yorkville v. Hamman Farms* weighed four factors when evaluating whether a citizen suit before the Board was duplicative of a circuit court suit by the State of Illinois: (1) whether the parties are the same in both matters, (2) whether the claims are based on the same legal theories, (3) whether the actions involve the same time frame and (4) whether the requested relief differs. PCB 08-96, Order of the Board, at 5-6 (Apr. 2, 2009). There, the Board found that all four factors weighed against a duplicative determination in that the parties were different, the counts at issue in the Board action entailed claims not involved with the circuit court matter, different time periods were at issue, and, given the differing time periods, the civil penalty sums requested by each case could differ. *Id.* at 6.

The opposite is true here. Counts 4 and 5 of the Complaint involve the exact same parties as Count 2 of the Federal Complaint, and the same facts over the same period. Further, both Counts 4 and 5 of the Complaint and Count 2 of the Federal Complaint entail identical substantive claims alleging violations of Section 304.124, Section 304.106 and Section 302.203. That is, Counts 4 and 5 state claims which are completely redundant to claims of Count 2 of the Federal Complaint.

Evaluation of the final factor (requested relief) relative to Counts 4 and 5 is complicated by the fact that neither the Complaint nor Federal Complaint explain which relief requests are

¹² Following an inquiry from PRN in which PRN did not state an intention to pursue an action before the Board, DMG did not oppose PRN's motion for stay.

attributable to which claims. Assuming PRN believes all requested relief is somehow appropriate under Counts 4 and 5 of the Complaint and Count 2 of the Federal Complaint, both appear to seek the same relief over the same period: (a) a declaration of violations of Section 304.124, Section 304.106, and Section 302.203;¹³ (b) injunctive relief ordering DMG to cease the alleged discharges from the Impoundments in violation of, *inter alia*, the Illinois Administrative Code; and (c) civil penalties for such violations of Section 304.124, Section 304.106 and Section 302.203.¹⁴ Compare Compl. p. 15 with Fed. Compl. p. 16-17. In any event, even if PRN argues it is seeking different remedies from the Board, the other three factors weigh heavily in favor of dismissal of Counts 4 and 5 under the Board's "duplicative" standard.

Because they at least involve the same parties and the same facts, over the same time period, and they are predicated upon the same legal claims (purported violations of Section 304.124, Section 304.106 and Section 302.203), Counts 4 and 5 of the Complaint are duplicative (and "substantially similar") to Count 2 of the Federal Complaint, which PRN continues to pursue in the Seventh Circuit. 35 Ill. Admin. Code § 101.202; *Quantum Chemical Corp.* 246 Ill. App. 3d at 560. Therefore, the Act, the Board's rules, Board precedent, and Illinois case law require dismissal of the overlapping claims, in order to prevent a "multiplicity of litigation" that would waste party and Board resources and could lead to conflicting outcomes in the two forums. *Brandle v. Ropp*, PCB 85-68, Order of the Board, at 1-2 (June 13, 1985); *Environmental*

¹³ Such a declaration by the Board ahead of the identical Section 304.124, Section 304.106, and Section 302.203 claims of the earlier filed Federal Complaint would likely raise res judicata issues for the earlier filed case. See Part I.B. above. In effect, after seeking a stay of its Federal Litigation, PRN is now asking the Board to determine an issue it raised in its Federal Complaint.

¹⁴ The Complaint appears to also impermissibly seek mandatory injunctive relief, including a request for remediation. See, e.g., *Clean the Uniform Co.-Highland vs. Aramark Uniform & Career Apparel, Inc.*, PCB 03-21, Order of the Board at 2 (Nov. 7, 2002) ("The Board is not authorized to grant injunctive relief . . . and that portion of the complaint is stricken.")

Site Developers v. White & Brewer Trucking, PCB 97-11, 1997 WL 593937, Order of the Board, at *2 (Sept. 18, 1997); *Quantum Chemical Corp.* 246 Ill. App. 3d at 560.

III. COUNT 4 SHOULD ALSO BE DISMISSED AS FRIVOLOUS BECAUSE SUBSURFACE DISCHARGES FROM IMPOUNDMENTS ARE NOT “EFFLUENT,” AS A MATTER OF LAW.

If not stayed, Count 4 of the Complaint should also be dismissed as frivolous. Count 4 of the Complaint alleges violations of “Illinois effluent standards” of Section 304.106 and Section 304.124. Compl. ¶¶ 56-58.¹⁵ The Complaint is clear that such discharges are not from a discrete or confined point source. Compl. ¶¶ 21, 23-24. PRN describes the pathway of discharge from the Impoundments as “groundwater flow[ing] laterally through the ash” (Compl. ¶ 21) and “groundwater seeps discharging to the river.” Compl. ¶ 24. But the Board has unambiguously held that such subsurface, non-point discharges from impoundments are not “effluent.” Accordingly, Count 4 does not state a claim for which relief can be granted and fails as a matter of law.

As noted above, the Act and the Board’s rules require dismissal of claims that are “duplicative or frivolous.” 415 ILCS 5/31(d)(1); 35 Ill. Admin. Code 103.212(a). A complaint is frivolous if it requests relief “that the Board does not have the authority to grant . . . or fails to state a cause of action upon which the Board can grant relief.” 35 Ill. Admin. Code § 101.202.

The Board’s rules define “effluent” as “any wastewater discharged, directly or indirectly, to the waters of the state or to any sewer . . . **but does not otherwise include nonpoint source discharges.** . . .” 35 Ill. Admin. § 301.275 (emphasis added). Applying this definition of “effluent,” the Board has held that subsurface leachate from unlined impoundments at another

¹⁵ “Dynergy’s discharges have included, and continue to include, iron, and manganese at concentrations exceeding the effluent limits in 35 Ill. Admin. Code § 304.124.” Compl. ¶ 56. “Dynergy’s discharges of pollutants have been, and continue to be, a bright orange-red color that stands out distinctly and is not ‘below obvious levels,’ in violation of 35 Ill. Adm. Code § 304.106. Such brightly-colored discharges have occurred on at least five occasions and, upon information and belief, are ongoing.” Compl. ¶ 58.

Illinois coal-fired generating station was “a classic nonpoint source of pollution” under Illinois law, because leachate “emanates from the entire pond area and radiates out beyond the entire perimeter of the facility.” *Central Ill. Pub. Serv. Co. v. IEPA*, PCB 84-105, 1984 WL 37567, Opinion and Order of the Board, at *3 (Nov. 8, 1984). In that case, the Board found that its own rulemaking history demonstrates that it “did not intend [Part 304 standards] to apply to nonpoint subsurface leachate.” *Id.*; see *IEPA v. Cabot Corp.*, PCB 81-27, Opinion and Order of the Board, at 7 (Jan. 9, 1986) (finding that the release of chemicals following the collapse of a storage tank was not “effluent”).

Ignoring this Board precedent, Count 4 of the Complaint nonetheless alleges that “Dynege’s discharges” violate the “effluent standards” provided by 35 Ill. Admin. Code §§ 304.106 and 304.124. Compl. ¶¶ 56-58. Specifically, PRN claims that pollutants “leach[]” from the Impoundments, “mix[] with the groundwater,” and then discharge into the Middle Fork of the Vermilion River (“Middle Fork”) via multiple “seeps.” Compl. ¶¶ 21, 23, 24.

As in *Central Ill. Pub. Serv. Co.*, PRN has alleged diffuse, widespread discharges of leachate from the Impoundments to groundwater at the Vermilion Facility. Compl. ¶ 21. Because the Board has held that discharges of the type alleged by PRN are nonpoint source pollution, which are not “effluent” under Illinois law, these discharges are not subject to 35 Ill. Admin. Code §§ 304.106 or 304.124. *Central Ill. Pub. Serv. Co.*, 1984 WL 37567, at *3. Count 4 therefore “fails to state a cause of action upon which the Board can grant relief” and must be dismissed as frivolous. 35 Ill. Admin. Code § 101.202.

CONCLUSION

For the reasons stated above, DMG respectfully requests that the Board stay this matter, or, in the alternative, to dismiss Counts 4 & 5 of the Complaint as duplicative and dismiss Count 4 as frivolous.

Dated: May 1, 2019

/s/ Daniel J. Deeb

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Exhibit A

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION**

PRAIRIE RIVERS NETWORK,)	
)	
<i>Plaintiff,</i>)	No. 2:18-cv-02148
v.)	
)	
DYNEGY MIDWEST GENERATION, LLC,)	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
)	
<i>Defendant.</i>)	
)	

NATURE OF THE CASE

1. Plaintiff Prairie Rivers Network (“PRN”) brings this citizen enforcement action against Defendant Dynegy Midwest Generation, LLC (“Dynegy”) for violations of the Clean Water Act (“CWA”), 33 U.S.C. §§ 1311 and 1342, at the Vermilion Power Station in Vermilion County, Illinois.

2. Dynegy has discharged, and is discharging on an ongoing basis, pollutants into the Middle Fork of the Vermilion River (“Middle Fork”) from numerous, discrete, unpermitted seeps on the riverbank. Although Dynegy holds a permit that authorizes the company to discharge pollutants from the Vermilion Power Station to the Middle Fork through nine external outfalls, Dynegy’s discharges 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 Dynegy’s discharge permit.

3. Dynegy has 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, Dynegey is also in violation of the CWA.

4. Through this suit, Plaintiff seeks:
 - a. a declaratory judgment that Dynegey is violating the CWA at the Vermilion Power Station;
 - b. injunctive relief compelling Dynegey to cease all unpermitted discharges of pollutants into the Middle Fork from the Vermilion Power Station; and
 - c. an order directing Dynegey to pay civil penalties for its violations of the CWA.

JURISDICTION AND VENUE

5. This action arises under the citizen suit provision of the CWA, 33 U.S.C. § 1365(a). This Court has jurisdiction pursuant to the CWA, as well as 28 U.S.C. § 1331 (the federal question statute). This Court has jurisdiction over the parties. This Court may award Prairie Rivers Network declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

6. The CWA's citizen suit provision authorizes any affected citizen to commence a civil action against anyone "who is alleged to be in violation of . . . an effluent standard or limitation." 33 U.S.C. § 1365(a)(1). The term "violation of . . . an effluent standard or limitation" means, *inter alia*, a discharge of a pollutant without authorization in a National Pollutant Discharge Elimination System ("NPDES") permit, or any violation of a NPDES "permit or condition thereof." *Id.* § 1365(f)(1), (6); *see also id.* §§ 1311(a), 1342. The CWA citizen suit provision, *id.* § 1365(a), empowers the Court to enforce such an effluent standard or limitation and to impose any appropriate civil penalties under section 309(d) of the CWA, *id.* § 1319(d).

7. Plaintiff has provided Dynegy with notice of the CWA violations alleged in this Complaint and of its intent to sue Dynegy, as required by 33 U.S.C. § 1365(b)(1)(A). A copy of this notice letter is attached as Exhibit A and was sent to Dynegy and its registered agent on January 31, 2018. Plaintiff also sent copies of the notice letter to the Administrator and the Regional Administrator of the U.S. Environmental Protection Agency (“EPA”) and to the Illinois Environmental Protection Agency (“IEPA”).

8. More than sixty days have passed since the January 31, 2018, notice letter was served, and, based on information and belief, the violations outlined in the notice letter and alleged in this Complaint are continuing at this time and are likely to persist.

9. Neither EPA nor IEPA has commenced or is diligently prosecuting a civil or criminal action to redress the asserted violations as described in 33 U.S.C. § 1365(b)(1)(B).

10. The Vermilion Power Station is located in Vermilion County in this judicial district. Therefore, venue in this judicial district is appropriate pursuant to 33 U.S.C. § 1365(c)(1), and this case is properly filed in this court’s Urbana Division.

PARTIES

11. Plaintiff PRN 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. Drawing upon sound science and working cooperatively with others, PRN advocates public policies and cultural values that sustain the ecological health and biological diversity of water resources and aquatic ecosystems.

12. PRN holds events for members of the organization and the public along and on the Middle Fork, including immediately downstream of the pollution discharge points of Dynegy. It intends to hold similar events in the near future and thereafter.

13. Individual members of PRN live near, study, work, and recreate in and around, the Middle Fork, including in the vicinity of the Vermilion Power Station. These individuals' use and enjoyment of the Middle Fork is harmed, and has been harmed for years, by Dynegy's unauthorized and prohibited discharges of pollutants into the Middle Fork and the resulting degraded water quality. Maintaining the aesthetic beauty and ecological vitality of the Middle Fork is crucial to a wide array of activities that occur on the Middle Fork, including recreation that involves direct and extended bodily contact with the water, many of which PRN members participate in. Unauthorized and prohibited discharges from the Vermilion Power Station thus directly harm PRN members. These members have a strong, direct, and immediate interest in ensuring that the water quality and environmental health of the Middle Fork support its full use and appreciation and that their neighbors on the Middle Fork use this shared resource in a manner consistent with state and federal law.

14. The injuries suffered by the respective individual members of PRN are traceable to Dynegy's unauthorized and prohibited discharges from the Vermilion Power Station, because the unauthorized and prohibited discharges add pollution to the Middle Fork that contributes to degradation of the water quality adjacent to, and downstream of, the plant. PRN members have already been harmed by unauthorized and prohibited discharges from the Vermilion Power Station, and they will continue to be harmed by such discharges.

15. The requested declaratory and injunctive relief mandating that Dynegy comply with the CWA, as well as the imposition of civil penalties to deter future violations, will redress PRN's members' injuries. These injuries will not be redressed except by an order from this Court assessing civil penalties against Dynegy and/or requiring Dynegy to take immediate and

effective action to stop the unauthorized and prohibited discharges into the Middle Fork, and ordering the other relief sought in this action.

16. Defendant Dynege owns the Vermilion Power Station. Dynege, a subsidiary of Vistra Energy, is headquartered at 6555 Sierra Drive in Irving, TX 75039. Dynege is incorporated in the State of Delaware.

LEGAL BACKGROUND

17. The CWA is the principal federal statute enacted to protect the quality of the waters of the United States. The stated objective of the CWA 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). The CWA also seeks to attain “water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” *Id.* § 1251(a)(2). Further, the CWA establishes that “it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited.” *Id.* § 1251(a)(3).

18. Section 301(a) of the CWA, *id.* § 1311(a), provides that “the discharge of any pollutant . . . shall be unlawful” unless, in pertinent part, the discharge is made pursuant to and is authorized by a NPDES permit, as provided by section 402 of the CWA, *id.* § 1342. A NPDES permit is required to establish limits that, among other things, restrict the amount or concentration of pollutants that can be discharged into navigable waters. NPDES permits also require that a discharger monitor and publicly report the amount or concentration of pollutants it discharges. NPDES permits are issued for fixed terms that may not exceed five years in length. *Id.* § 1342(b)(1)(B).

19. The CWA defines “discharge of a pollutant” to include, *inter alia*, “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12).

20. The CWA defines “pollutant” to include, among other things, “solid waste,” “chemical wastes,” and “industrial . . . waste discharged into water.” *Id.* § 1362(6).

21. The CWA defines “navigable waters” to mean “the waters of the United States.” *Id.* § 1362(7).

22. The CWA defines “point source” to include “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.” *Id.* § 1362(14).

23. The CWA provides that a State may establish its own permit program, and after receiving EPA’s approval, may issue NPDES permits. *Id.* § 1342(b). EPA first approved Illinois’ NPDES program covering many of the waters of Illinois, including the Middle Fork and the Vermilion River, on October 23, 1977.

24. Section 303 of the CWA “requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters.” *PUD No. 1 of Jefferson Cnty. v. Wash. Dep’t of Ecology*, 511 U.S. 700, 704 (1994) (citing 33 U.S.C. §§ 1311(b)(1)(C), 1313).

25. Under Section 303 of the CWA, water quality standards developed by States: shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

33 U.S.C. § 1313(c)(2)(A).

26. The Illinois Pollution Control Board promulgates water quality standards in Illinois. Section 302, Water Quality Standards, Section 303, Water Use Designations and Site Specific Water Quality Standards, and Section 304, Effluent Standards, contain standards applicable to waters of the state of Illinois.

27. 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). The term violation of “an effluent standard or limitation” includes any discharge of a pollutant that is not authorized by a NPDES permit, as well as any violation of any NPDES “permit or condition thereof.” *Id.* § 1365(f); *see also id.* §§ 1311(a), 1342. The CWA citizen suit provision, *id.* § 1365(a), empowers the Court to enforce such an effluent standard or limitation and to impose any appropriate civil penalties under section 309(d) of the CWA, *id.* § 1319(d). The action “may be brought . . . only in the judicial district” in which the alleged violation occurs. *Id.* § 1365(c)(1). Before commencing the action, the plaintiff must first give notice of its claims to the defendant and to federal and state government officials, and it may bring the action sixty days after notice is given. *Id.* § 1365(b)(1)(A).

FACTUAL BACKGROUND

The Facility and Location

28. The Vermilion Power Station is owned by Defendant Dynegy.

29. The Vermilion Power Station is a retired coal-fired power plant located approximately five miles north of the village 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.

30. From the mid-1950s until 2011, the plant burned coal and generated millions of tons of coal combustion residuals (“coal ash”). Dynegey and its predecessor mixed the coal ash generated at the Vermilion Power Station 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.

31. 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.

32. 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.

33. Dynegey continues to own these coal ash pits and remains responsible for maintaining them, as well as performing any remaining activities at the plant.

34. 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. And

boron, a dependable indicator of coal ash contamination, can lead to reduced sperm count, testicular degeneration, birth defects, and low birth weight among humans.

35. The Middle Fork and the flora and fauna the river supports draw visitors from near and far. Canoeing and kayaking on the Middle Fork are popular pastimes, as is hiking the trails of the Kickapoo State Recreation Area, Kennekuk Cove County Park, and Middle Fork State Fish and Wildlife Area, all located along the Middle Fork. 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.

Dynergy's NPDES Permit for the Vermilion Power Station

36. Dynergy's limited authorization to discharge wastewater from the Vermilion Power Station is set out in NPDES Permit IL0004057 ("the Permit"), granted by IEPA pursuant to the state agency's delegated authority under the CWA, 33 U.S.C. § 1342(b).

37. The Permit regulates discharges of pollutants from the Vermilion Power Station, specifying which wastewater streams may be discharged from which points at the plant (defined as permitted "outfalls"). 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 Vermilion Power 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.

38. Standard Condition 23 of NPDES Permit IL0004057 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. The proper

authorization for such disposal shall be obtained from the Agency and is incorporated as part hereof by reference.”

39. 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.

40. 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.

41. 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.”

42. 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.” *Id.* § 301.275.

43. 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).” *Id.*

§ 304.124(a).

44. Subtitle C of the Illinois Administrative Code sets the effluent limit for iron (total) at 2.0 mg/l, while the maximum level for manganese is 1.0 mg/l. *Id.*

45. Subtitle C of the Illinois Administrative Code contains averaging rules which provide that no “grab sample” – that is, a sample “taken at a single time” – “shall exceed five times the prescribed numerical standard.” *Id.* § 304.104(a)(3), (b)(3).

46. Subtitle C of the Illinois Administrative Code further provides that “[w]aters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin.” *Id.* § 302.203.

47. The current iteration of the Permit was issued and became effective on March 7, 2003.

Dynergy’s Discharges into the Middle Fork

48. Upon information and belief, dating back to at least May 2013, the coal ash pits at the Vermilion Power Station 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 total 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.

49. 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).

50. Groundwater monitoring at the North Ash Pond System and Old East Ash Pond was performed from 1992 through 2007, and again in 2011. Upon information and belief, groundwater monitoring at the site was reinitiated in 2017.

51. Over the extended period of groundwater monitoring undertaken between 1992 and 2011, concentrations of boron and sulfate – primary indicators of coal ash contamination¹ – consistently exceeded Illinois' groundwater protection standards² and, on numerous occasions, also exceeded EPA drinking water health advisories for those contaminants.³

52. Dynegy's consultants have concluded that the presence of boron and sulfate at the concentrations found at the Vermilion Power Station “indicat[e] that groundwater quality at the facility has been impacted by leachate from the [Old East Ash Pond] and [North Ash Pond System],”⁴ 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.⁵

53. Coal ash at the Vermilion Power Station has groundwater flowing through it year round.⁶ While the thickness of saturated ash varies as groundwater levels rise and fall with the

¹ *See* Kelron Environmental, Hydrogeology and Groundwater Quality of the Old East Ash Pond, Vermilion Power Station, at 33, 35 (Mar. 15, 2012) [hereinafter “OEAP Report”].

² *See* Kelron Environmental, Hydrogeology and Groundwater Quality of the North Ash Pond System, at Tables 10 & 11 (Mar. 15, 2012) [hereinafter “NAPS Report”].

³ *Id.*; *see also* EPA, 2018 Edition of the Drinking Water Standards and Health Advisories Tables (Mar. 2018), <https://www.epa.gov/sites/production/files/2018-03/documents/dwtable2018.pdf>.

⁴ Natural Resource Technology, Inc. (“NRT”), Application for Groundwater Management Zone, North Ash Pond System and Old East Ash Pond, at 1-3 (Mar. 27, 2012); *see also* NRT, Corrective Action Plan: North Ash Pond System (Revised), at 1-2 (Apr. 2, 2014) [hereinafter “NAPS Revised CAP”]; NRT, Corrective Action Plan: Old East Ash Pond (Revised), at 1-2 (Apr. 2, 2014).

⁵ OEAP Report at vi.

⁶ *Id.* at v.

seasons, groundwater has saturated coal ash at depths of more than 21 feet.⁷ 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.⁸

54. Dynegy's own reports and information have concluded that the coal ash contaminated groundwater flows right into the adjacent Middle Fork.⁹

55. 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 IEPA.

56. Plaintiff's sampling also detected iron concentrations as high as 241 mg/l and manganese concentrations as high as 7.35 mg/l.

57. Upon information and belief, dating back to at least May 2013, discharges from the coal ash pits at Vermilion Power Station 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.

⁷ *Id.*; see also NAPS Report at 22, Figures 6A, 6D.

⁸ See OEAP Report at 26; NAPS Report at 26; NAPS Revised CAP at 2-2.

⁹ See, e.g., OEAP Report at vi, 26; NAPS Report at 26, Tables 10 & 11; NAPS Revised CAP at 2-2; Dynegy Form 10-K, at 22 (fiscal year ending Dec. 31, 2016), https://www.dynegy.com/sites/default/files/Dynegy_2016_Annual_Report.pdf.

CLAIMS FOR RELIEF

Count 1: Discharges Without Authorization in a NPDES Permit

58. Plaintiff re-alleges and incorporates the allegations of all the preceding paragraphs of this Complaint, as well as all exhibits, as if fully set forth herein.

59. The Middle Fork is a navigable water as defined in the CWA, 33 U.S.C. § 1362(7).

60. Dynegy is discharging and has discharged pollutants, as defined in the CWA, *id.* § 1362(6), (12), from the coal ash pits at the Vermilion Power Station to the Middle Fork. Upon information and belief, these discharges will continue after the date of the filing of this Complaint.

61. Discharges of pollutants from the Vermilion Power Station into the Middle Fork from discrete, unpermitted seeps on the riverbank adjacent to the North Ash Pond and Old East Ash Pond are not authorized by Permit IL0004057, and they are contrary to the limited authorization to discharge contained in that permit.

62. Dynegy has violated and is continuing to violate the CWA, *id.* § 1311(a). Therefore, under the CWA citizen suit provision, *id.* § 1365, a civil action may be maintained against Dynegy.

63. By committing the acts and omissions alleged above, Dynegy is subject to an assessment of civil penalties pursuant to 33 U.S.C. §§ 1319(d) & 1365 and 40 C.F.R. § 19.4.

64. In a letter postmarked January 31, 2018, Plaintiff sent Dynegy notice of the violations alleged in this claim for relief as required by 33 U.S.C. § 1365(b)(1). Plaintiff's notice letter is attached to this Complaint as Exhibit A.

65. Unless Dynege desists in its violations of 33 U.S.C. § 1311(a), Plaintiff, its respective members, and their communities will suffer irreparable harm.

66. Plaintiff has no adequate remedy at law, and therefore equitable relief is warranted.

Count 2: Discharges in Violation of NPDES Permit Conditions

67. Plaintiff re-alleges and incorporates the allegations of all the preceding paragraphs of this Complaint, as well as all exhibits, as if fully set forth herein.

68. The Middle Fork is a water of the state of Illinois.

69. Discharges of pollutants from the Vermilion coal ash pits into the Middle Fork violate Standard Condition 23 of the Permit.

70. Dynege's discharges of pollutants have discolored, and are continuing to discolor, the Middle Fork a bright orange-red color not of natural origin, in violation of Standard Condition 25 of the Permit.

71. Dynege's discharges have included, and continue to 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.

72. Dynege's discharges of pollutants have been, and continue to be, a bright orange-red color that stands out distinctly and is not "below obvious levels," in violation of Standard Condition 25 of the Permit.

73. Dynege's discharges of pollutants have contained, and continue to contain, solids that settle on the riverbed, in violation of Standard Condition 25 of the Permit.

74. By violating the conditions of the Permit, Dynegey has violated and is continuing to violate the CWA, 33 U.S.C. § 1311(a). Therefore, under the CWA citizen suit provision, *id.* § 1365, a civil action may be maintained against Dynegey.

75. By committing the acts and omissions alleged above, Dynegey is subject to an assessment of civil penalties pursuant to 33 U.S.C. §§ 1319(d) & 1365 and 40 C.F.R. § 19.4.

76. In a letter postmarked January 31, 2018, Plaintiff sent Dynegey notice of the violations alleged in this claim for relief as required by 33 U.S.C. § 1365(b)(1). Plaintiff's notice letter is attached to this Complaint as Exhibit A.

77. Unless Dynegey desists in its violations of 33 U.S.C. § 1311(a), Plaintiff, its respective members, and their communities will suffer irreparable harm.

78. Plaintiff has no adequate remedy at law, and therefore equitable relief is warranted.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Prairie Rivers Network respectfully demands that this Court enter a judgment:

a) declaring that Dynegey's discharges of pollutants into the Middle Fork from the coal ash pits at the Vermilion Power Station are not authorized by NPDES Permit IL0004057 and violate the CWA, 33 U.S.C. § 1311(a);

b) ordering that Dynegey take all actions necessary to comply with the CWA, including ceasing all discharges that are not authorized by, or that violate a condition of, NPDES Permit IL0004057;

- c) assessing Dynegy civil penalties under 33 U.S.C. §§ 1319(d) & 1365 and 40 C.F.R. § 19.4 not to exceed \$53,484 per day for each violation of the CWA within the five-year statute of limitations period;
- d) awarding Plaintiff its litigation costs and reasonable attorney fees incurred in prosecuting this action, pursuant to 33 U.S.C. § 1365(d); and
- e) ordering such other relief as the Court may deem just and proper.

Dated: May 30, 2018

Respectfully submitted,

s/ Thomas Cmar
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Counsel for Plaintiff Prairie Rivers Network

Exhibit A

**EARTHJUSTICE**ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

January 31, 2018

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Robert Flexon, President
Dynergy Midwest Generation, LLC
601 Travis Street, Suite 1400
Houston, TX 77002

RE: 60-Day Notice of Intent to File Citizen Suit Under Clean Water Act Section 505(a)(1) for Dynergy Midwest Generation, LLC's Violations of Clean Water Act and National Pollutant Discharge Elimination System Permit No. IL0004057 at the Vermilion Power Station in Vermilion County, Illinois

Dear Mr. Flexon:

In accordance with Section 505 of the Clean Water Act (the "Act" or the "CWA"), 33 U.S.C. § 1365, and 40 C.F.R. Part 135, Prairie Rivers Network hereby notifies you that Dynergy Midwest Generation, LLC ("Dynergy" or "the company") has violated and continues to violate "effluent standard[s] or limitation[s]" under Section 505(a)(1)(A) & (f) of the Act, 33 U.S.C. § 1365(a)(1)(A) & (f), by discharging pollutants at the Vermilion Power Station in Vermilion County, Illinois without authorization in a National Pollutant Discharge Elimination System ("NPDES") permit and outside the limited authorization to discharge in Vermilion's NPDES Permit, Permit IL0004057. Dynergy is also violating NPDES Permit IL0004057 and 33 U.S.C. § 1365(a)(1)(A) & (f) by allowing offensive discharges into the Middle Fork of the Vermilion River, resulting in offensive conditions in that scenic river, as well as by discharging pollutants in excess of allowed limits. If, within sixty days of the postmark of this letter, you do not bring your discharges into full compliance with the Act and your NPDES permit, we intend to file a citizen suit seeking civil penalties for your ongoing violations and an injunction compelling you to comply with the Act.

I. Background

The Unlined Coal Ash Pits

The Vermilion Power Station is a retired coal-fired power plant located approximately five miles north of the village of Oakwood, Illinois. The plant sits on the west bank of the Middle Fork of the Vermilion River ("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”).¹

Coal ash, the residue left when coal is burned, 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.² 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.³ 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.⁴ 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.⁵ And boron, a dependable indicator of coal ash contamination, can lead to reduced sperm count, testicular degeneration, birth defects, and low birth weight among humans.⁶

Dynegy and its predecessor mixed the coal ash generated at the Vermilion Power Station with water and sluiced it into three unlined coal ash pits,⁷ known as the Old East Ash Pond, the North Ash Pond System, and the New East Ash Pond. All three coal ash pits were constructed decades ago. When the plant opened in 1955, ash was flushed into the Old East Ash Pond.⁸ That pit was in service until the North Ash Pond System, a two-cell pit, was built in the mid-1970s.⁹ In 1989, the coal ash was diverted to the New East Ash Pond,¹⁰ which received coal ash

¹ See Kelron Environmental, Hydrogeology and Groundwater Quality of the North Ash Pond System (Mar. 15, 2012) [hereinafter “Kelron Hydro. Report, NAPS”] at iv (reporting years of operation of Vermilion Power Station); Natural Resource Technology, Inc., Corrective Action Plan, Old East Ash Pond, Vermilion Power Station, Oakwood, Illinois, Dynegy Midwest Generation, LLC (Mar. 27, 2012) [hereinafter “NRT CAP, OEAP”] at 76 (noting that the Old East Ash Pond contains 1,183,413 cubic yards of ash); Natural Resource Technology, Inc., Corrective Action Plan, North Ash Pond System, Vermilion Power Station, Oakwood, Illinois, Dynegy Midwest Generation, LLC (Mar. 27, 2012) [hereinafter “NRT CAP, NAPS”] at 72 (noting that the North Ash Pond System contains 1,618,000 cubic yards of ash); Dewberry & Davis, 2012, Coal Combustion Waste Impoundment, Round 6-Dam Assessment Report, Vermilion Power Station, Site 015, Fly Ash Dikes, Dynegy Midwest Generation, Inc., Oakwood, Illinois [hereinafter “Dewberry & Davis 2012”] at 2-3 (reporting that the New East Ash Pond contains 534,013 cubic yards of coal ash).

² See 80 Fed. Reg. 21,311 (Apr. 17, 2015), <https://www.gpo.gov/fdsys/pkg/FR-2015-04-17/pdf/2015-00257.pdf>.

³ See, e.g., U.S. EPA, Integrated Risk Information System: Arsenic, inorganic, <http://www.epa.gov/iris/subst/0278.htm>; U.S. Agency for Toxic Substances and Disease Registry (“ATSDR”), Toxicological Profile for Arsenic (Aug. 2007), <https://www.atsdr.cdc.gov/toxprofiles/tp.asp?id=22&tid=3>.

⁴ See, e.g., U.S. EPA, Integrated Risk Information System: Manganese, <http://www.epa.gov/iris/subst/0373.htm>; U.S. EPA, Secondary Drinking Water Regulations: Guidance for Nuisance Chemicals, <http://water.epa.gov/drink/contaminants/secondarystandards.cfm>.

⁵ See ATSDR, Toxicological Profile for Molybdenum: Draft for Public Comment, April 2017, at 9-10, <https://www.atsdr.cdc.gov/toxprofiles/tp212.pdf>.

⁶ See, e.g., U.S. EPA, Toxicological Review of Boron and Compounds at 60-61 (June 2004), https://cfpub.epa.gov/ncea/iris/iris_documents/documents/toxreviews/0410tr.pdf.

⁷ Prairie Rivers Network is aware of only three coal ash pits at the Vermilion plant, but Dynegy and its predecessor may have also deposited coal ash in other areas of the site.

⁸ Kelron Hydro. Report, NAPS at 1.

⁹ *Id.*

¹⁰ *Id.* However, the North Ash Pond System continued to receive runoff from coal piles until the piles were removed in 2011. *Id.* Runoff appears to continue from residual coal left at the pile site.

until the plant's closure in 2011. All three of the unlined ash pits sit right next to the Middle Fork. Dynegey continues to own those coal ash pits and remains responsible for operating and maintaining them, as well as performing any remaining activities at the plant.

Although the coal ash pits are out of service, all three continue to store vast quantities of ash – including coal ash as deep as 44 feet in some locations.¹¹ Dynegey's consultants estimate the volume of coal ash in those unlined pits as 1.2 million cubic yards in the Old East Ash Pond, as 1.6 million cubic yards in the North Ash Pond System, and as 0.53 million cubic yards in the New East Ash Pond, for a total of 3.33 million cubic yards of coal ash.¹² Together, the coal ash pits loom over a half-mile of the banks of the Middle Fork.

The Middle Fork of the Vermilion River

The Middle Fork is, in the words of Illinois' Department of Conservation,¹³ “clearly one of Illinois' finest [rivers].”¹⁴ According to the National Park Service, the Middle Fork provides “scenic, geologic, fish and wildlife, ecological, recreational, and historic resources.”¹⁵ The Middle Fork and its surrounding area are home to twenty threatened or endangered species,¹⁶ fifty-seven types of fish,¹⁷ forty-six different mammal species,¹⁸ and two hundred seventy different bird species.¹⁹ Among the aquatic life that have been found in the Middle Fork are the state-endangered Blue Breast Darter and several species of rare, threatened, and endangered mussels.²⁰ The American bald eagle, river otter, and wild turkey have all returned to the area, sharing their habitat with mink, turtles, Great Blue Heron, and other species that never left.²¹

The Middle Fork's beauty has been recognized in both state and federal law. In 1986, Republican Governor James Thompson designated the Vermilion River as a State Scenic River, the first state scenic river designation in Illinois. State legislation that same year “designated [the Vermilion] as a permanently protected river of the State of Illinois,” 615 ILCS 95/2, and “deem[ed] the middle fork of the Vermilion River to be a natural resource of Statewide significance such that its natural and recreational values should be permanently preserved for the enjoyment of the people of the State of Illinois.” 615 ILCS 95/1 (1986). Three years later, in

¹¹ *Id.* at Figure 7.

¹² 2012 NRT CAP for OEAP at 76; 2012 NRT CAP for NAPS at 72; Dewberry & Davis 2012 at 2-3.

¹³ The Illinois Department of Conservation was merged into the Illinois Department of Natural Resources in 1995. See <https://www.dnr.illinois.gov/education/documents/timelineto1996.pdf>.

¹⁴ Illinois Department of Conservation, “Corridor Management Plan, Middle Fork of the Vermilion River, National Wild and Scenic River System” (Apr. 1992) [hereinafter “Corridor Management Plan”] at 1, <https://www.rivers.gov/documents/plans/middle-fork-vermilion-plan.pdf>.

¹⁵ Letter from Martin Sterkel to Rick Diericx on March 31, 2009 at 1.

¹⁶ Illinois Natural History Survey, “Vermilion River,” available at <http://www.inhs.illinois.edu/research/rra/site17/>.

¹⁷ Corridor Management Plan at 37.

¹⁸ Illinois Department of Natural Resources, “The Vermilion River Basin: An Inventory of the Region's Resources,” (2000) at 16, <https://www.dnr.illinois.gov/publications/Documents/00000416.pdf>.

¹⁹ *Id.* at 15.

²⁰ *Id.* at 17.

²¹ *Id.* at 15-19; Vermilion County Conservation District, “Wildlife,” <http://www.vccd.org/wildlife.html>.

1989, 17.1 miles of the Middle Fork were designated as Illinois' only Scenic River under the federal National Wild and Scenic Rivers Act.²²

The Middle Fork and the flora and fauna the river supports draw visitors from near and far. Canoeing and kayaking on the Middle Fork are popular pastimes, as is hiking the trails of the Kickapoo State Recreation Area, Kennekuk Cove County Park, and Middle Fork State Fish and Wildlife Area, all located along the Middle Fork. 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. These recreational activities, which Prairie Rivers Network's members take part in, provide a significant bump to the local economy. Nearly 1.5 million people visited Kickapoo State Recreation Area in 2009 alone,²³ and tourism brought over \$70 million in revenue to Vermilion County in 2010.²⁴ Local residents envision the Middle Fork and downstream Vermilion Rivers as focal points for the future of the county: in fact, the Vermilion River is a centerpiece of a plan for riverfront development in Danville, an urban hub just downriver from the Middle Fork.^{25,26}

In short, the Middle Fork is a vital ecological, scenic, and economic resource for Illinois whose value depends, in large part, on maintaining clean, safe water within its banks.

Dynegy is Discharging Coal Ash Contaminants into the Middle Fork

Dynegy's own documents demonstrate that the coal ash pits at Vermilion Power Station are discharging toxic pollutants into the Middle Fork via hydrologically connected groundwater. In 1992, Dynegy's predecessor began monitoring groundwater adjacent to the two older coal ash pits, the North Ash Pond System and the Old East Ash Pond, and continued that monitoring until 2007. Groundwater adjacent to the Vermilion Power Station coal ash pits was sampled again in 2011. Over that extended period of groundwater monitoring, concentrations of boron and sulfate – primary indicators of coal ash contamination²⁷ – consistently exceeded Illinois' groundwater protection standards²⁸ and, on numerous occasions, also exceeded U.S. EPA standards for those contaminants.²⁹ Dynegy consultant Natural Resources Technology, Inc. (“NRT”) concluded that

²² See <https://www.rivers.gov/rivers/vermilion.php>. As a result of this designation, Illinois developed a Corridor Management Plan for the Vermilion River which calls on the State to “protect and enhance the essential aspects of stream habitat, which are water quality [and] instream flow . . .,” Corridor Management Plan at 12, and to “work toward abatement of activities within the river area which are degrading water quality.” *Id.* at 11.

²³ See <http://nprillinois.org/post/welcome-visitors-illinois-tourism-industry-means-big-business#stream/0>.

²⁴ See http://www.commercial-news.com/news/local_news/tourists-keep-county-busy/article_17385cb3-63b3-5f08-92ba-01cf6f331e9e.html.

²⁵ See <http://www.vermilioncountyfirst.com/2016/02/25/new-2025-plan-focuses-on-tourism-other-areas/>.

²⁶ See http://www.cityofdanville.org/uploads/6/7/5/0/6750232/danvillerverfront_conceptualplanfinal.pdf.

²⁷ See Kelron Environmental, Hydrogeology and Groundwater Quality of the Old East Ash Pond, Vermilion Power Station (Mar. 15, 2012) [hereinafter “Kelron Hydro. Report, OEAP”], at 33 (“Boron is a primary indicator parameter of coal ash impact on groundwater quality.”), and 35 (“Sulfate is also a primary indicator parameter of coal ash impact on groundwater quality.”).

²⁸ See Kelron Hydro. Report, NAPS at Tables 10 & 11. Illinois' Class I groundwater protection standards are set out in 35 Ill. Admin. Code Part 620.

²⁹ *Id.* U.S. EPA's Drinking Water Health Advisories for boron and the Secondary Maximum Contaminant Level for sulfate can be found in U.S. E.P.A., “2012 Edition of the Drinking Water Standards and Health Advisories,” at 8, 10, <https://www.epa.gov/sites/production/files/2015-09/documents/dwstandards2012.pdf>.

the presence of boron and sulfate at the concentrations found at the site “indicat[e] that groundwater quality at the facility has been impacted by leachate from the Old East Ash Pond and North Ash Pond System.”³⁰ Kelron Environmental, which conducted hydrogeological and groundwater quality studies of those two coal ash pits for Dynegy, reiterated that conclusion, finding that the elevated concentrations of boron, sulfate, manganese, iron, pH, and total dissolved solids in groundwater at the site was at least partially “due to CCR impacts to groundwater”³¹

Reports from Dynegy’s own consultants explain how pollutants from the ash pits discharge into the Middle Fork through connected groundwater. Due to the depth of the ash buried in the coal ash pits and the elevation of the groundwater table in the area, coal ash at the Vermilion Power Station has groundwater flowing through it year round.³² While the thickness of saturated ash varies as groundwater levels rise and fall with the seasons, during some times of the year more than 21 feet of coal ash is saturated by groundwater.³³ 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.³⁴ Dynegy’s consultants’ reports, as well as Dynegy’s Dec. 2016 corporate disclosure filing with the federal Securities and

³⁰ NRT, “Application for Groundwater Management, Zone North Ash Pond System and Old East Ash Pond” (Mar. 27, 2012) at 1-3. *See also* NRT, *Revised Corrective Action Plan: North Ash Pond System* (April 2, 2014) [hereinafter “NRT, Revised CAP, NAPS”] at 1-2 (“Boron and sulfate have high concentrations . . . indicating that groundwater quality at the facility has been impacted by leachate from the NAPS.”) and NRT, *Revised Corrective Action Plan: Old East Ash Pond* (Apr. 2, 2014) at 1-2 (“[C]oncentrations of boron and sulfate . . . indicat[e] that groundwater quality at the facility has been impacted by leachate from the OEAP.”).

³¹ Kelron Hydro. Report, OEAP, at vi (“The primary indicator parameters for CCR impacts to groundwater at the site are boron and sulfate, both of which have elevated concentrations above Class I groundwater standards in downgradients monitoring wells;” “Other parameters with exceedances of Class I groundwater standards or highly elevated concentrations due to CCR impacts to groundwater, are iron, manganese, and [Total Dissolved Solids] within the Middle Groundwater Unit;” and “[t]he only other parameter related to CCR impacts to groundwater and with exceedances of a Class I groundwater standard is pH.”).

³² *Id.* at v.

³³ *Id.*; *see also* Kelron Hydro. Report, NAPS at 22 and Figure 6A, 6D. Notably, the full depth and extent of the coal ash at the Vermilion ash pits remains unknown because the studies done by Dynegy’s consultants have been limited in scope. Thus, it is possible that over 21 feet of ash is actually saturated in groundwater at the site at times.

³⁴ *See* Kelron Hydro. Report, OEAP at 26; Kelron Hydro. Report, NAPS at 26; and NRT, Revised CAP NAPS at 2-2.

Exchange Commission (“SEC”), conclude that—with minimal exception³⁵—the coal ash contaminated groundwater flows right into the adjacent Middle Fork.³⁶

Analysis of groundwater seeps discharging into the Middle Fork confirms that conclusion. In May 2016 and September 2017, Prairie Rivers Network 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 U.S. EPA and Illinois EPA.

II. Clean Water Act Violations

Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person, except (in pertinent part) when authorized by a NPDES permit. *See also* 40 C.F.R. § 122.41; 35 Ill. Adm. Code § 309.102(a). Citizens may sue any person who violates an effluent standard or limitation, 33 U.S.C. § 1365(a)(1), which is defined to include both unlawful acts, such as discharges of pollutants that are not authorized by a NPDES permit, *id.* § 1365(f)(1), and violations of any “permit or condition thereof,” *id.* § 1365(f)(6).

a. Unpermitted Discharges

NPDES Permit IL0004057 authorizes Dynegy to discharge pollutants from the Vermilion Power Station to the Middle Fork of the Vermilion River through 9 external outfalls.³⁷ However, the coal ash pits at the Vermilion Power Station also have discharged, and are discharging on an ongoing basis, pollutants including but not limited to arsenic, barium, boron, chromium, iron, lead, manganese, molybdenum, nickel, sulfate, and total dissolved solids into the Middle Fork from numerous, discrete, unpermitted seeps on the riverbank. *See* Figures 1 and 2 below and Natural Resource Technology, Revised Corrective Action Plan at 5-1 (stating that one objective of the document is to analyze methods of “mitigating off-site migration and

³⁵ *See* Kelron Hydro. Report, OEAP at 26 (“Although a gaining stream through most of the year, there are periods of high precipitation during which surface water runoff. . . directly into the Middle Fork results in higher river elevations and the Middle Fork temporarily becomes a losing stream, with surface water moving outward from the river into the adjacent groundwater units. . . . However, no effects of flow reversals were apparent in any of the quarterly groundwater level measurements.”).

³⁶ *See, e.g.,* Kelron Hydro. Report, OEAP, at vi (noting that high concentrations of boron, sulfate, iron, manganese, and total dissolved solids “due to CCR impacts” were found in the Middle Groundwater Unit at the site) and 26 (“Groundwater elevations measured in the Middle Groundwater Unit . . . for all four quarters of 2011 . . . demonstrate that groundwater on the west side of the Middle Fork valley generally . . . discharges into, the Middle Fork of the Vermilion River.”); Kelron Hydro. Report, NAPS at 26 (same) and at Tables 10 & 11 (showing that water table elevations are above the river level on some parts of the riverbank, coinciding with the locations where seeps are observed); NRT, Revised CAP, NAPS at 2-2 (explaining that “[m]ass is added to groundwater via vertical recharge through coal ash, and horizontal groundwater flow through coal ash where it lies below the water table. Mass is discharged to the Middle Fork.”); Dynegy Form 10-K (fiscal year ending Dec. 31, 2016) at 22, https://www.dynegy.com/sites/default/files/Dynegy_2016_Annual_Report.pdf (“Our hydrogeological investigation indicates that [the old east and north coal ash pits at the Vermilion Power Station] impact groundwater quality onsite and that such groundwater migrate offsite to the north of the property and to the adjacent Middle Fork of the Vermilion River.”).

³⁷ NPDES Permit IL0004057 authorizes discharges at Outfalls 001, A01, B01, C01, 002, 003, A03, B03, and C03 to discharge to the Middle Fork Vermilion River. NPDES Permit No. IL0004057 at 1 (Mar. 7, 2003).

reducing mass flux of boron discharge into the river”). Those discharges of pollutants from the Vermilion Power Station into the Middle Fork are not authorized by NPDES Permit IL0004057 and are contrary to the limited authorization to discharge set forth in that permit. Therefore, each unpermitted discharge of pollutants from the Vermilion Power Station into the Middle Fork violates Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), 35 Ill. Adm. Code § 309.102(a), as well as Permit IL0004057, on each and every day that it occurs.

b. Violations of Standard Condition 25 of NPDES Permit IL0004057

The numerous unpermitted discharges from the Vermilion Power Station into the Middle Fork also violate Standard Condition 25 of NPDES Permit IL0004057. That condition 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 Board [IPCB].” The unpermitted discharges contravene multiple provisions of 35 Ill. Adm. Code Subtitle C.

Violations of Narrative Limits for Effluent Set Forth in 35 Ill. Adm. Code § 304.106

First, the unpermitted discharges violate 35 Ill. Adm. Code § 304.106. That provision states, in relevant part, that: “[N]o 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.” “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. The discharges from the Vermilion Power Station into the Middle Fork constitute “effluent,” and, as can be seen in Figures 1 and 2 below, that effluent contains both solids that are settling on the riverbed as well as bright colors that stand in stark contrast with unaffected portions of the riverbank. The shimmery orange, rust, and purple colors in those discharges are, in short, about as obvious as can be. As such, each unpermitted discharge from the Vermilion Power Plant into the Middle Fork violates 35 Ill. Adm. Code § 304.106 and Standard Condition 25 of NPDES Permit IL0004057 on each and every day that it occurs.



Figure 1: discharges into the Middle Fork from the Vermilion Power Station, Sept. 2017



Figure 2: discharges into the Middle Fork from the Vermilion Power Station, Sept. 2017

Violation of numeric limits for effluent set forth at 35 Ill. Adm. Code § 304.124

Second, the unpermitted discharges violate 35 Ill. Adm. Code § 304.124. That provision states: “No 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).” The maximum level for iron (total) is 2.0 mg/l, while the maximum level for manganese, a long-recognized indicator of coal ash pollution, is 1.0 mg/l. *Id.* The averaging rules in 35 Ill. Adm. Code 304.104(a) provide that no “grab sample” – that is, a sample “taken at a single time” – “shall exceed five times the prescribed numerical standard.” 35 Ill. Adm. Code § 304.104(a)(3) and (b)(3).

Grab samples that Prairie Rivers Network took of unpermitted discharges from the Vermilion Ash Ponds into the Middle Fork in 2016 and 2017 contain manganese pollution in excess of 5 mg/l and iron pollution well in excess of 10 mg/l. As such, those discharges violate 35 Ill. Adm. Code § 304.124 and, therefore, violate Standard Condition 25 of NPDES Permit IL0004057.

Violation of Narrative Water Quality Standards Set Forth at 35 Ill. Adm. Code 302.203

Finally, the unpermitted discharges from the Vermilion Power Station into the Middle Fork contravene 35 Ill. Adm. Code § 302.203, also contained in 35 Ill. Admin Code Subtitle C. That section, titled “Offensive Conditions,” dictates that “[w]aters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, *color* or turbidity *of other than natural origin*” (emphasis added). As shown in Figure 3, the color of the Middle Fork adjacent to the ash ponds is quite plainly not of “natural origin.” If it were, portions of the river that are not adjacent to the ash pits would share a similar red-orange tint. They do not, as shown in Figure 4. Because ongoing discharges from the Vermilion Power Station are failing to keep the Middle Fork “free from . . . color . . . of other than natural origin,” Dynegy is violating 35 Ill. Adm. Code § 302.203 and Standard Condition 25 of NPDES Permit IL0004057.



Figure 3: The Middle Fork River adjacent to Vermilion Power Station Ash Ponds, Sept. 2017



Figure 4: Middle Fork River upstream of the Vermilion Power Station, Sept. 2017

c. Violation of Standard Condition 23 of NPDES Permit IL0004057

Standard Condition 23 of NPDES Permit IL0004057 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 waters of the State. The proper authorization for such disposal shall be obtained from the Agency and is incorporated as part hereof by reference.” As is shown in Figures 1 through 4 above and in Dynegy’s own documents, coal ash has not been disposed of in a manner to prevent that entry of that ash waste into the Middle Fork.

Under Illinois regulations, coal ash meets the definition of sludge. *See* 35 Ill. Adm. Code § 301.395 (“‘Sludge’ means 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.”). That coal ash sludge has been disposed of in the coal ash pits at the Vermilion Power Station. *See* 415 ILCS 5/3.185 (2012) (defining “disposal” as “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.”).³⁸ As discussed above, constituents of that waste are discharged through groundwater channels into the Middle Fork, which is a water of the State. Because the coal ash at the Vermilion Power Station has not

³⁸ Coal ash pits that are leaching ash contamination into groundwater, which per Dynegy’s own documents is the case here, *see supra* notes 28-32, are “disposing” of that waste. *See In re Sierra Club v. Midwest Generation, LLC*, PCB No. 2013-015, 2013 WL 5524474, slip. op at 25-27 (Ill. Pol. Control. Bd. Oct. 3, 2013); *see also In re Consol. Land Disposal Regulation Litig.*, 938 F.2d 1386, 1389 (D.C. Cir. 1991) (interpreting a nearly identical definition of “disposal” to include facilities where waste was continuing to leak into the environment).

been “disposed of in such a manner as to prevent entry of those wastes (or runoff from the wastes) into waters of the State,” Dynegy is violating Standard Condition 23 of NPDES Permit IL0004057.

Dynegy’s Violations are Harming the Middle Fork and the People Who Enjoy It.

Dynegy’s illegal discharges of pollutants into the Middle Fork harm the river and the people who use and enjoy it, including members of Prairie Rivers Network who live, work, and/or recreate in areas near the Vermilion Power Station. These harms will continue until Dynegy comes into compliance with the Clean Water Act and its NPDES permit at Vermilion Power Station.

Prairie Rivers Network provide this notice for the violations outlined above, as well as all ongoing and continuing violations, including those committed subsequent to the date of this notice. This notice is given pursuant to 33 U.S.C. § 1365 and 40 C.F.R. § 135.3(a). If Dynegy does not cease those violations within 60 days, Prairie Rivers Network intends to bring a citizen suit against Dynegy under Section 505 of the CWA, 33 U.S.C. § 1365.

Under the CWA, 33 U.S.C. § 1319(d) and 40 C.F.R. § 19.4, each of the violations described herein occurring within the statute of limitations period is subject to a penalty of up to \$52,414 per day per violation. Dynegy is also potentially subject to injunctive relief, for example, mitigating the impacts associated with discharging coal ash wastewater into the Middle Fork of the Vermilion River. Moreover, under 33 U.S.C. § 1365, prevailing parties may recover costs of litigation, including attorneys’ fees.

III. Identification of the Party Giving Notice and Counsel

The address of Prairie Rivers Network, the party giving notice, is as follows:

Prairie Rivers Network
1605 South State Street, Ste. 1
Champaign, IL 61820-7231
(217) 344-2371

Prairie Rivers Network is represented by legal counsel, identified below:

Thomas Cmar
Earthjustice
1101 Lake Street, Ste. 405B
Oak Park, IL 60301
(312) 257-9338

Jennifer Cassel
Earthjustice
1101 Lake Street, Ste. 308
Oak Park, IL 60301
(215) 717-4525

Mychal Ozaeta
Earthjustice
1617 John F. Kennedy Blvd., Ste. 1130
Philadelphia, PA 19103
(215) 717-4529

IV. Conclusion

As discussed above, if Dynegy fails to come into compliance with the Clean Water Act and the terms of NPDES Permit IL0004057 within 60 days, Prairie Rivers Network intends to file a citizen suit under Section 505(a)(1) of the CWA seeking civil penalties and injunctive relief. Prairie Rivers Network, through this notice letter, further reserves the right to seek civil penalties for any further violations of the Act and NPDES Permit IL0004057 stemming from the issues identified herein that occur after today. *Pub. Interest Research Grp. of N.J., Inc. v. Hercules, Inc.*, 50 F.3d 1239 (3d Cir. 1995).

If Dynegy has taken any steps to eradicate the underlying cause of the violations described above, or if Dynegy believes that anything in this letter is inaccurate, please let us know. If Dynegy does not advise us of any remedial steps or inaccuracies during the 60-day period, we will assume that no such steps have been taken, that the information in this letter is accurate, and that violations are likely to continue. We would be happy to meet with Dynegy or its representatives to attempt to resolve these issues within the 60-day notice period.

Respectfully submitted,



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Oak Park, IL 60301
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tcmar@earthjustice.org

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Philadelphia, PA 19103
(215) 717-4529
mozaeta@earthjustice.org

Cc: Scott Pruitt, Administrator
U.S. Environmental Protection Agency
Office of the Administrator, Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Cathy Stepp, Regional Administrator
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604-3507

Alec Messina, Director
Illinois Environmental Protection Agency
1021 North Grand Ave. East
P.O. Box 19276
Springfield, IL 62794-9276

Capital Corporate Services, Inc.
Registered Agent – Dynegy Midwest Generation, LLC
1315 Lawrence Ave.
Springfield, IL 62704

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
Prairie Rivers Network
1605 S. State Street, Suite 1
Champaign, IL 61820
(b) County of Residence of First Listed Plaintiff Champaign
(EXCEPT IN U.S. PLAINTIFF CASES)
(c) Attorneys *(Firm Name, Address, and Telephone Number)*
(1) Thomas Cmar, Earthjustice, 1101 Lake St., Ste. 405B, Oak Park, IL 60301, 312-257-9338; (2) Jennifer Cassel, 1101 Lake St., Ste. 308, Oak Park, IL 60301, 215-717-4525; (3) Mychal Ozaeta, Earthjustice, 1617 JFK Blvd., Ste. 1130, Philadelphia, PA 19103, 215-717-4529; (4) Elynn Bullock, Solberg & Bullock, LLC, 100 N Chestnut St., Ste. 230, Champaign, IL 61820, 217-351-6156

DEFENDANTS
Dynegy Midwest Generation, LLC
6555 Sierra Drive
Irving, TX 75039
County of Residence of First Listed Defendant Dallas
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.
Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*
 1 U.S. Government Plaintiff
 3 Federal Question *(U.S. Government Not a Party)*
 2 U.S. Government Defendant
 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)* [Click here for: Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN *(Place an "X" in One Box Only)*
 1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from Another District *(specify)*
 6 Multidistrict Litigation - Transfer
 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity):*
33 U.S.C. § 1365(a)
Brief description of cause:
Citizen suit for violations of Clean Water Act from discharges from Vermilion Power Station

VII. REQUESTED IN COMPLAINT:
 CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____
CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY *(See instructions):*
JUDGE _____ DOCKET NUMBER _____

DATE 05/30/2018 SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY
RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

UNITED STATES DISTRICT COURT

for the

Central District of Illinois

Prairie Rivers Network

Plaintiff(s)

v.

Dynegy Midwest Generation, LLC

Defendant(s)

Civil Action No. 2:18-cv-02148

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Dynegy Midwest Generation, LLC
6555 Sierra Drive
Irving, TX 75039

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Thomas Cmar, Earthjustice, 1101 Lake Street, Suite 405B, Oak Park, IL 60301

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Central District of Illinois

Prairie Rivers Network

Plaintiff(s)

v.

Dynegy Midwest Generation, LLC

Defendant(s)

Civil Action No. 2:18-cv-02148

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Capital Corporate Services, Inc.
Registered Agent - Dynegy Midwest Generation, LLC
1315 Lawrence Avenue
Springfield, IL 62704

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Thomas Cmar, Earthjustice, 1101 Lake Street, Suite 405B, Oak Park, IL 60301

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Exhibit B

	Federal Complaint ¶	Complaint ¶
	<p>NOTE: Additions to text used in the Federal Complaint are shown via blue underlining; deletions are shown with red strikethrough. All footnotes are omitted. Ellipses show where the quoted text represents less than an entire paragraph.</p>	
1.	<p>“The Vermilion Power Station is a retired coal-fired power plant located approximately five miles north of the village of Oakwood, Illinois. . . .” Fed. Compl. ¶ 29.</p>	<p>“ . . . The Vermilion Power Station (<u>“Vermilion plant”</u> or <u>“the plant”</u>) is a retired coal-fired power plant located approximately five miles north of the village of Oakwood, Illinois.” Compl. ¶ 1.</p>
2.	<p>“ . . . 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.” Fed. Compl. ¶ 29.</p>	<p>“The plant sits on the west bank of the Middle Fork <u>of the Vermilion River</u> (<u>“Middle Fork”</u>), in a 17-mile section designated as Illinois’ only National Scenic River and first State Scenic River.” Compl. ¶ 2.</p>
3.	<p>“The Middle Fork and the flora and fauna the river supports draw visitors from near and far. Canoeing and kayaking on the Middle Fork are popular pastimes, as is hiking the trails of the Kickapoo State Recreation Area, Kennekuk Cove County Park, and Middle Fork State Fish and Wildlife Area, all located along the Middle Fork. 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.” Fed. Compl. ¶ 35.</p>	<p>“The Middle Fork and the flora and fauna the river supports draw visitors from near and far. Canoeing and kayaking on the Middle Fork are popular pastimes, as is hiking the trails of the Kickapoo State Recreation Area, Kennekuk Cove County Park, and Middle Fork State Fish and Wildlife Area, all located along the Middle Fork. 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.” Compl. ¶ 4.</p>
4.	<p>“From the mid-1950s until 2011, the plant burned coal and generated millions of tons of coal combustion residuals (“coal ash”). Dynegy and its predecessor mixed the coal ash generated at the Vermilion Power Station 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.” Fed. Compl. ¶ 30.</p>	<p>“From the mid-1950s until 2011, the <u>Vermilion</u> plant burned coal and generated millions of tons of coal combustion residuals (“coal ash”). Dynegy and its predecessors mixed the coal ash generated at the Vermilion Power Station<u>plant</u> 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.” Compl. ¶ 5.</p>
5.	<p>“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.” Fed. Compl. ¶ 31.</p>	<p>“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.” Compl. ¶ 6.</p>

6.	<p>“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.” Fed. Compl. ¶ 32.</p>	<p>“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.” Compl. ¶ 7.</p>
7.	<p>“Dynege continues to own these coal ash pits and remains responsible for maintaining them, as well as performing any remaining activities at the plant.” Fed. Compl. ¶ 33.</p>	<p>“Dynege continues to own these coal ash pits and remains responsible for maintaining them, as well as performing any remaining activities at the plant.” Compl. ¶ 8.</p>
8.	<p>“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....” Fed. Compl. ¶ 34.</p>	<p>“Coal ash wastewater, such as that in the coal ash pits at the Vermilion plant, 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.” Compl. ¶ 9.</p>
9.	<p>...These contaminants can inflict severe harm, including brain damage, cancer, learning disabilities, birth defects, and reproductive defects....” Fed. Compl. ¶ 34.</p>	<p>“These contaminants can inflict severe harm, including brain damage, cancer, learning disabilities, birth defects, and reproductive defects....” Compl. ¶ 10.</p>
10.	<p>“...Arsenic is a well-known carcinogen that also damages the nervous system....” Fed. Compl. ¶ 34.</p>	<p>“Arsenic is a well-known carcinogen that also damages the nervous system.” Compl. ¶ 12.</p>
11.	<p>“...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....” Fed. Compl. ¶ 34.</p>	<p>“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.” Compl. ¶ 13.</p>
12.	<p>“...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....” Fed. Compl. ¶ 34.</p>	<p>“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.” Compl. ¶ 14.</p>
13.	<p>“...And boron, a dependable indicator of coal ash contamination, can lead to reduced sperm count, testicular degeneration, birth defects, and low birth weight among humans.” Fed. Compl. ¶ 34.</p>	<p>“And bBoron, a dependable indicator of coal ash contamination, can lead to reduced sperm count, testicular degeneration, birth defects, and low birth weight among humans.” Compl. ¶ 15.</p>

<p>14.</p>	<p>“Coal ash at the Vermilion Power Station 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.” Fed. Compl. ¶ 53.</p>	<p>“Coal ash at the Vermilion Power Station <u>plant</u> 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 <u>in the groundwater</u>contained within the discharge to the Middle Fork.” Compl. ¶ 21.</p>
<p>15.</p>	<p>“Upon information and belief, dating back to at least May 2013, discharges from the coal ash pits at Vermilion Power Station 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.” Fed. Compl. ¶ 57.</p>	<p>“Upon information and belief, dating back to at least May 2013 <u>June 2015</u>, discharges from the coal ash pits at Vermilion Power Station <u>plant</u> 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 <u>and not below obvious levels. See photos, attached hereto as Exhibit 9.</u>” Compl. ¶ 25.</p>
<p>16.</p>	<p>“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.’ <i>Id.</i> § 301.275.” Fed. Compl. ¶ 42.</p>	<p>“Subtitle C of the Illinois Administrative Code <u>Section 304.106</u> 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 <u>Id.</u> § 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.’ <i>Id.</i> § 301.275.” Compl. ¶ 40.</p>
<p>17.</p>	<p>“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).’ <i>Id.</i> § 304.124(a).” Fed. Compl. ¶ 43.</p>	<p>“Subtitle C of the Illinois Administrative Code <u>further</u> <u>Section 304.124</u> 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).’ <i>Id.</i> <u>§ 304.124(a).</u>” Compl. ¶ 41.</p>

<p>18.</p>	<p>“Subtitle C of the Illinois Administrative Code sets the effluent limit for iron (total) at 2.0 mg/l, while the maximum level for manganese is 1.0 mg/l. <i>Id.</i>” Fed. Compl. ¶ 44.</p>	<p>“Subtitle C of the Illinois Administrative CodeSection 304.124 sets the effluent limit for iron (total) at 2.0 mg/l, while the maximum level for manganese is 1.0 mg/l. <i>Id.</i>” Compl. ¶ 42.</p>
<p>19.</p>	<p>“Subtitle C of the Illinois Administrative Code contains averaging rules which provide that no ‘grab sample’ – that is, a sample ‘taken at a single time’ – ‘shall exceed five times the prescribed numerical standard.’ <i>Id.</i> § 304.104(a)(3), (b)(3).” Fed. Compl. ¶ 45.</p>	<p>“Subtitle C of the Illinois Administrative CodeSection 304.104(a) contains averaging rules which provide that no ‘grab sample’ - that is, a sample taken at a single time’ - ‘shall exceed five times the prescribed numerical standard.’ <i>Id.</i> § 304.104(a)(3), (b)(3).” Compl. ¶ 43.</p>
<p>20.</p>	<p>“Subtitle C of the Illinois Administrative Code further provides that ‘[w]aters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin.’ <i>Id.</i> § 302.203.” Fed. Compl. ¶ 46.</p>	<p>“Subtitle C of the Illinois Administrative CodeSection 302.203 provides that ‘[w]aters of the State shall be free from sludge or bottom deposits, floating debris, visible oil, odor, plant or algal growth, color or turbidity of other than natural origin.’ <i>Id.</i> § 302.203.” Compl. ¶ 44.</p>

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 1st day of May, 2019, I have served electronically the attached **MOTION TO STAY OR DISMISS AND ACCOMPANYING MEMORANDUM IN SUPPORT**, upon the following persons by e-mail at the email addresses indicated below:

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I further certify that my email address is rgranholm@schiffhardin.com; the number of pages in the email transmission is 66; and the email transmission took place today before 5:00 p.m.

/s/ Ryan C. Granholm

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