

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PRAIRIE RIVERS NETWORK,)	
)	
Complainant,)	
)	
v.)	PCB 2019-093
)	(Enforcement - Water)
DYNEGY MIDWEST GENERATION, LLC,)	
)	
Respondent.)	
)	

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on June 5, 2019, I electronically filed with the Clerk of the Illinois Pollution Control Board (“Board”) the attached COMPLAINANT’S RESPONSE TO RESPONDENT’S MOTION TO STAY OR DISMISS, copies of which are served on you along with this notice.

Dated: June 5, 2019

Respectfully Submitted,

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COMPLAINANT’S RESPONSE TO RESPONDENT’S MOTION TO STAY OR DISMISS

I. INTRODUCTION

Complainant Prairie Rivers Network (“Prairie Rivers”) files this response to Respondent Dynegy Midwest Generation, LLC’s (“Dynegy”) Motion to Stay or Dismiss (“Dynegy Mot.”). Dynegy seeks to stay this action initiated by Prairie Rivers because Dynegy contends that it is similar to an earlier action filed by Prairie Rivers in federal court, No. 2:18-cv-02148 (C.D. Ill. May 30, 2018) (the “Federal Complaint”), which was dismissed on November 14, 2018. In the alternative, Dynegy seeks dismissal of Counts 4 and 5 of the Prairie Rivers’ Complaint in this matter as duplicative of Count 2 of the Federal Complaint for alleging substantially similar violations, and dismissal of Count 4 as frivolous because the alleged discharges do not entail effluent as a matter of law. As discussed herein, Dynegy’s contentions are meritless and its Motion to Stay or Dismiss should be denied.

II. FACTUAL BACKGROUND

On May 30, 2018, Prairie Rivers filed a citizen suit in the U.S. District Court for the Central District of Illinois against Dynegy for violations of the federal Clean Water Act, 33

U.S.C. §§ 1311 and 1342. *See* Prairie Rivers' Federal Complaint (Ex. A to Dynegy's Mot.). Prairie Rivers alleged that Dynegy was discharging pollutants into the Middle Fork of the Vermilion River without a National Pollutant Discharge Elimination System ("NPDES") permit, as well as violating the company's existing NPDES permit for its shuttered Vermilion plant near Oakwood, Illinois. *See id.* ¶¶ 58-78. That lawsuit was dismissed on November 14, 2018, after the court held that it lacked jurisdiction under the federal statute. *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 350 F. Supp. 3d 697 (C.D. Ill. 2018).

On March 29, 2019, Prairie Rivers filed a citizen enforcement complaint ("Complaint" or "Compl.") in this matter against Dynegy alleging hundreds of violations of the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.*, as well multiple violations of applicable Illinois regulations. Specifically, Prairie Rivers alleged five counts of water pollution at Dynegy's Vermilion Power Station. Compl. ¶¶ 45-60. The Complaint alleges the following distinct violations that were not alleged in the Federal Complaint:

- at least 540 exceedances of Illinois Class I Groundwater Quality Standards and 476 exceedances of Illinois Class II Groundwater Quality Standards in violation of sections 12(a) and 12(d) of the Illinois Environmental Protection Act and multiple Illinois groundwater regulations;
- at least 9 violations of Illinois effluent standards; and
- at least 5 violations of Illinois water quality standards.

Id. Dynegy filed its Motion to Stay or Dismiss on May 1, 2019.

III. STANDARD OF REVIEW

Illinois is a fact-pleading state that requires a pleader to set out the ultimate facts which support the cause of action; legal conclusions unsupported by allegations of specific facts are

insufficient. *Schilling v. Hill*, PCB 10-100, 2012 WL 975480, at *6 (Mar. 15, 2012). “A complainant’s allegations are ‘sufficiently specific if they reasonably inform the defendants by factually setting forth the elements necessary to state a cause of action.’” *Id.* (quoting *People ex rel. Scott v. College Hills Co.*, 91 Ill. 2d 138, 145 (1982)). In determining whether a complaint alleges facts sufficient to support a cause of action, “only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts.” *Id.* (quoting *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 308 (1981)). The complaint must include only enough facts to reasonably allow the respondent to prepare a defense. *People v. Inverse Invs., L.L.C.*, PCB 11-79, 2012 WL 586821, at *7 (Feb. 16, 2012) (citing *Cunningham v. City of Sullivan*, 15 Ill. App. 2d 561 (1958); 35 Ill. Adm. Code 103.204(c)(2)).

Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed. 35 Ill. Adm. Code 101.514(a). The decision whether to grant or deny a motion for a stay is “vested in the sound discretion of the Board.” *Midwest Generation EME, LLC v. Ill. Envtl. Prot. Agency*, PCB 04-216, 2006 WL 1046981, at *6 (Apr. 6, 2006) (quoting *People v. State Oil Co.*, PCB 97-103, 2003 WL 21246825, at *2 (May 15, 2003), *aff’d* 352 Ill. App. 3d 813 (2004)). In making stay determinations, the Board may consider the following factors: “(1) comity; (2) prevention of multiplicity, vexation, and harassment; (3) likelihood of obtaining complete relief in the foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment in the local forum, i.e., in the Board proceeding,” as well as (5) prejudice to the non-moving party, *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, 2014 WL 1630316, at *11 (Apr. 17, 2014) [hereinafter “*Sierra Club 2*”], and (6) environmental harm that would result from staying the proceeding. *See id.* at *16.

When “ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant.” *Schilling*, PCB 10-100, 2012 WL 975480, at *5; *see, e.g., People v. Freeman United Coal Mining Co.*, PCB 10-61, 2010 WL 2816605, at *11 (July 15, 2010); *United City of Yorkville v. Hamman Farms*, PCB 08-96, 2008 WL 4742379, at *12 (Oct. 16, 2008). “Unless the Board determines that [the] complaint is duplicative or frivolous, it shall schedule a hearing.” 415 ILCS 5/31(d)(1); *see also* 35 Ill. Adm. 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. Adm. Code 101.202. The factors the Board considers in determining whether a matter is the same or substantially similar as one pending before the Board or another forum are whether “(1) the parties to the two matters are the same; (2) the proceedings are based on the same legal theories; (3) the violations alleged in the two matters occurred over the same time period; and (4) the same relief is sought in the two proceedings.” *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, 2013 WL 5524474, at *22 (Oct. 3, 2013) [hereinafter “*Sierra Club I*”]; *see Freeman United Coal Mining Co.*, PCB 10-61, 2010 WL 2816605, at *13. Any one of these criteria alone is sufficient to establish that a complaint is not duplicative. *See Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Caterpillar Inc.*, PCB 94-240, slip op. at 5 (Nov. 3, 1994) (complaint not duplicative solely because issues before the Board were not being “litigated before any other judicial forum”); *League of Women Voters v. N. Shore Sanitary Dist.*, PCB 70-7, 1970 WL 3665, at *2 (Oct. 8, 1970) (complaint not duplicative when violations of different laws alleged but same relief sought).

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.

Adm. Code 101.202. “Dismissal is proper only if it is clear that no set of facts could be proven that would entitle complainant to relief.” *Beers v. Calhoun*, PCB 04-204, 2004 WL 1707731, at *1 (July 22, 2004) (citing *People v. Peabody Coal Co.*, PCB 99-134, 2002 WL 1396124, at *1 (June 20, 2002)); *Callaizakis v. Astor Dev. Co.*, 4 Ill. App. 3d 163, 167-68 (1972) (“dismissal is proper only where under no set of circumstances could the allegations support a cause of action”); *see also Schilling*, PCB 10-100, 2012 WL 975480, at *5 (“[I]t is well established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief.” (quoting *Smith v. Cent. Ill. Reg’l Airport*, 207 Ill. 2d 578, 584-85 (2003))).

IV. ARGUMENT

A. **Prairie Rivers’ Complaint Should Not Be Stayed.**

After arguing in federal court that Prairie Rivers could and should address its concerns regarding groundwater pollution in a state proceeding before the Board,¹ once Prairie Rivers did just that, Dynegy changed its tune. Dynegy now asserts that the same federal suit in which it made that argument – a suit dismissed months ago by the federal court – requires a stay of Prairie Rivers’ suit here. Dynegy’s argument is both disingenuous and unavailing. First, a stay is inappropriate where, as here, the lawsuit that purportedly justifies the stay has been dismissed. Second, none of the factors that the Board looks to in evaluating stay motions support a stay here. Finally, a stay would both prejudice Prairie Rivers and cause environmental harm. Dynegy’s motion to stay should be denied.

¹ *See* Dynegy’s Mem. in Supp. of Mot. to Dismiss at 12-13, *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, No. 2:18-cv-02148 (C.D. Ill. Aug. 28, 2018), ECF No. 15 (attached hereto as Exhibit A) (noting Prairie Rivers’ “familiar[ity]” with the Board and stating that, “even if Plaintiff’s claims are dismissed by the Court, there is another forum where citizen groups and the state may address concerns regarding groundwater at the Vermilion site”); *see also id.* at 1-2 (“any concern that [Prairie Rivers] has regarding discharges to groundwater at the site are properly addressed under Illinois law . . .”).

1. There is No Other Pending Case.

Dynegy acknowledges that, for a stay to be justified, there must be a “case pending in another forum” Mem. in Supp. of Dynegy’s Mot. to Stay or Dismiss at 3 (“Dynegy Mem.”). Twelve pages into its memorandum, Dynegy finally mentions that Prairie Rivers’ federal suit alleging violations of the federal Clean Water Act at the Vermilion plant was dismissed in late 2018 after the court held that it lacked jurisdiction under the federal statute. *See* Dynegy Mem. at 12; *Prairie Rivers Network*, 350 F. Supp. 3d at 704-07.

The Board has made clear that a stay is inappropriate if the case purportedly addressing similar issues has been dismissed. *See Env’tl. Site Developers, Inc. v. White & Brewer Trucking, Inc.*, PCB 96-180 & 97-11, 1997 WL 593937, at *2 (Sept. 18, 1997) [hereinafter “*ESDI 2*”] (“In the event that count IV is dismissed by the federal court, . . . the Board’s stay of proceedings . . . will be lifted.”). Other courts in Illinois have come to the same conclusion. *See Trippe Mfg. Co. v. Am. Power Conversion Corp.*, 46 F.3d 624, 628 (7th Cir. 1995) (holding that once a claim was dismissed by an Illinois court, a Rhode Island court was free to address the merits of that claim “without risk of duplicative litigation”).

Prairie Rivers’ appeal of the dismissal order does not undermine that conclusion. Dynegy cites no cases holding that a dismissed action that has been appealed is a “pending action” – probably because relevant authority holds otherwise. *See* Report & Recommendation, *Somasekharan v. Lawrence & Assocs., Inc.*, No. 07-2087, 2007 WL 2680954, at *3 (C.D. Ill. July 13, 2007) (“[D]ismissed claims do not constitute currently pending claims even if the suit in which those claims were originally brought has not yet proceeded to a final judgment.”), *accepted by* No. 07-2087, 2007 WL 2685154 (C.D. Ill. Aug. 1, 2007). Because Prairie Rivers’ federal suit against Dynegy concerning pollution at the Vermilion plant was dismissed for lack of

jurisdiction, there is no “case pending in another forum.” Accordingly, a stay is not appropriate here.

2. None of the *Staley* Factors Support a Stay.

Even if Prairie Rivers’ dismissed federal suit were “pending,” Dynegey’s motion to stay still should be denied because none of the four factors that the Board looks to in evaluating stay motions – specifically, *res judicata*; prevention of multiplicity, vexation, and harassment; comity; and likelihood of obtaining complete relief in the foreign jurisdiction, *see Midwest Generation EME, LLC*, PCB 04-216, 2006 WL 1046981, at *6 (citing *A.E. Staley Mfg. Co. v. Swift & Co.*, 84 Ill. 2d 245, 254 (1980) (“*Staley*”)) – support a stay here.

i. The Dismissed Federal Case is Not a Res Judicata Bar to this Suit.

First, a decision in the federal case would not be a *res judicata* bar to this suit. The doctrine of *res judicata* does not apply when a party could not bring the same claims in the other action. *See Mather Inv. Props., LLC v. Ill. State Trapshooters Assoc., Inc.*, PCB 05-29, 2005 WL 1943585, at *13 (July 21, 2005); *People v. State Oil Co.*, PCB 97-103, 1999 WL 676187, at *8 (Aug. 19, 1999). The judgment in Prairie Rivers’ federal lawsuit could not be a *res judicata* bar of Prairie Rivers’ claims here because the Board has exclusive jurisdiction over citizen enforcement suits under the Illinois Environmental Protection Act. *See Mather Inv. Props., LLC*, PCB 05-29, 2005 WL 1943585, at *13 (holding that, “[s]ince [complainant] could not have brought its claim under the Act in the circuit court case, *res judicata* would not apply even if the three elements of the doctrine were present”); *State Oil Co.*, PCB 97-103, 1999 WL 676187, at *8. Prairie Rivers could not have brought its claims under the Illinois Environmental Protection Act in federal court. *Res judicata*, therefore, does not apply.

The doctrine of *res judicata* also does not apply because there is no identity of cause of action between Prairie Rivers' Clean Water Act claims in its federal suit and the violations of the Illinois Environmental Protection Act and implementing regulations that Prairie Rivers alleges here. *Res judicata* requires, among other things, "identity of cause of action." *Sierra Club 2*, PCB 13-15, 2014 WL 1630316, at *16 (quoting another source). The legal theory in this case differs significantly from that in the federal suit. The federal suit involved allegations that Dynegy was unlawfully discharging pollution into the Middle Fork without a federally-required permit, as well as violating certain conditions of its discharge permit. *See, e.g.*, Prairie Rivers' Federal Complaint ¶¶ 58-78. It does not include any allegations that Dynegy violated the Illinois Environmental Protection Act, state regulatory prohibitions on groundwater pollution, or Illinois groundwater quality standards. *Id.* The Complaint here, in contrast, alleges that Dynegy is violating the Illinois Environmental Protection Act as well as several regulatory bars on polluting groundwater in excess of limits specified in Illinois regulations, among other allegations. *See* Compl. ¶¶ 45-60.

The respective causes of action also differ significantly in terms of timeframe and number of violations. Prairie Rivers' Federal Complaint alleges violations of the Clean Water Act only within that statute's five-year statute of limitations. *See, e.g.*, Prairie Rivers' Federal Complaint ¶¶ 48, 57. The Complaint here, in contrast, alleges hundreds of violations of the Illinois Environmental Protection Act and implementing regulations over twenty-seven years. *See, e.g.*, Compl. ¶¶ 45-60 & Exs. 3, 4. Where separate violations are alleged over a different period of time in another matter, *res judicata* does not apply, even when both lawsuits allege violations of the same legal standard. *See Sangamon Cty. v. ESG Watts, Inc.*, PCB 94-28 *et al.*, 1997 WL 114430, at *4 (Mar. 6, 1997) (holding that *res judicata* does not apply to claims

alleging violations of the same legal provisions, based on similar facts, and adjudicated in a separate case when the alleged violations are later-in-time, and additional violations of those provisions were not addressed in the first action). Here, not only are the number of violations and the time period over which they are alleged dramatically different than the allegations in the federal suit, but the violations alleged are those of a different regulatory scheme altogether.

The order dismissing the federal case underscores just how different the causes of action are in Prairie Rivers' dismissed federal suit and this matter. When dismissing Prairie Rivers' Clean Water Act claims on the ground that it lacked jurisdiction under federal law, the federal district court concluded that Prairie Rivers "is not without recourse. Despite this court's holding that the allegations are not covered by the [Clean Water Act], [Prairie Rivers] may pursue this claim in the Illinois state courts" *Prairie Rivers Network*, 350 F. Supp. 3d at 706 n.2.

Clearly, the federal district court did not view its order – which was limited to construing the scope of its jurisdiction under the federal Clean Water Act – as limiting Prairie Rivers' ability to bring the claims in the present matter. In sum, there is no identity of cause of action between the Clean Water Act claims in Prairie Rivers' dismissed federal lawsuit and the present matter.

Hence, *res judicata* does not apply.² See *Sierra Club 2*, PCB 13-15, 2014 WL 1630316, at *16

² The cases Dynegey cites in support of its argument that *res judicata* supports a stay here are either easily distinguishable or, in some cases, actually support Prairie Rivers' position. In *ESG Watts, Inc. v. Illinois Environmental Protection Agency*, the Board held that *res judicata* did not apply when the "inquir[ies]" involved in two different cases involving the same site were different. PCB 96-181, 1998 WL 430564, at *2 (July 23, 1998). That is true here: whether a company is violating the Clean Water Act via unauthorized discharges and violations of a National Pollutant Discharge Elimination System permit is a very different legal "inquiry" than whether the company's pits are causing or contributing to violations of the Illinois Environmental Protection Act and Illinois water protection regulations. As explained herein, *Sangamon County* makes clear that *res judicata* does not apply where the violations alleged are additional to those adjudicated in another case, even when the violations are of the same provision of law and stem from the same factual circumstances. AC 94-28, 1997 WL 114430, at *4. Finally, although the Board did grant a stay in *Midwest Generation EME, LLC*, that decision was not made on *res judicata* grounds. See PCB 04-216, 2006 WL 1046981, at *7 ("Midwest does not assert that USEPA's final confidentiality determination will necessarily have *res judicata* effect in this Board proceeding . . .").

(holding that, where there is no identity of cause of action, “[t]hat is sufficient to defeat *res judicata*”).

ii. A Stay Would Not Prevent “Multiplicity, Vexation, and Harassment.”

Second, a stay would not prevent “multiplicity, vexation, and harassment.” Where resolution of the other suit would not obviate, or render moot, the case at issue, the Board has found that a stay is not appropriate. *See id.* at *14 (concluding that there was “no reason to hold up this proceeding pending the conclusion of rulemaking proceedings that, whenever completed, cannot be expected to moot this case”); *Vill. of Park Forest v. Sears, Roebuck & Co.*, PCB 01-77, 2001 WL 179913, at *4 (Feb. 15, 2001) (denying motion to stay, in part, when “the case before the Board, which will determine whether or not Sears is liable for violations of the [Illinois Environmental Protection] Act, could not be obviated by the resolution of the contract dispute in the circuit court”); *cf. Midwest Generation EME, LLC*, PCB 04-216, 2006 WL 1046981, at *7 (stay granted, in part, because “[Illinois Environmental Protection Agency] does not dispute . . . that public release by [U.S. Environmental Protection Agency] of the documents at issue may render this appeal before the Board moot”).

Here, as explained above, a final judgment on the violations alleged in the dismissed federal lawsuit – namely, violations of the federal Clean Water Act – could not resolve Prairie Rivers’ allegations of violations of the Illinois Environmental Protection Act or its implementing regulations. Whether Dynegey was required to obtain a federally-required permit to discharge pollution into the Middle Fork, and whether it violated the terms of its existing permit, are wholly distinct legal questions from whether Dynegey is polluting Illinois waters in violation of the Illinois Environmental Protection Act or implementing regulations. As noted above, the federal court itself concluded that Prairie Rivers could seek relief under Illinois law in the course

of holding that it lacked jurisdiction under the federal Clean Water Act. Because the federal lawsuit was based on a different legal theory and would not obviate this enforcement action, this factor weighs against a stay. *See Sierra Club 2*, PCB 13-15, 2014 WL 1630316, at *14; *Vill. of Park Forest*, PCB 01-77, 2001 WL 179913, at *4; *Mather Inv. Props., LLC*, PCB 05-29, 2005 WL 1943585, at *12 (holding that a stay would not prevent multiplicity of litigation when cases brought on different legal theories).

The “prevention of multiplicity” factor also weighs against a stay here because it is not clear whether, or when, the dismissed federal lawsuit might be resolved on the merits. The Board has repeatedly held that uncertain timing and delay of resolution of the allegedly similar issues in another pending matter renders a stay inappropriate. *See Am. Disposal Servs. of Ill., Inc. v. Cty. Bd. of McLean Cty.*, PCB 11-60, 2014 WL 3924268, at *8 (Aug. 7, 2014) (denying a stay when the issuance of a permit for a later-submitted permit application might resolve the issues in the case but it was unclear “when the County Board will act on that application or whether it will be approved” or whether that other permit would be appealed); *Sierra Club 2*, PCB 13-15, 2014 WL 1630316, at *14 (holding that “a stay is unwarranted based on the coal ash rulemaking proposals because of the uncertain timing and duration of the rulemakings”). To allow a stay where the timing of resolution of the other suit is uncertain and environmental harm is ongoing is particularly inappropriate because, in such circumstances, a stay would be “inconsistent with the Board’s obligation as a unit of state government to manage its activities so as to minimize environmental damage.” *See Env’tl. Site Developers, Inc. v. White & Brewer Trucking*, PCB 96-180 & 97-11, 1997 WL 411202, at *5 (July 10, 1997) [hereinafter “*ESDI I*”].

Here, a final judgment on the merits in the dismissed federal lawsuit faces multiple levels of uncertainty: first, whether any decision on the merits of Prairie Rivers’ claims beyond federal

jurisdictional issues will be issued in federal court, and second, when that decision might be rendered, if ever. The U.S. District Court dismissed Prairie Rivers' federal lawsuit on the grounds that the Clean Water Act does not govern discharges of pollutants into surface water that first pass through groundwater. *See Prairie Rivers Network*, 350 F. Supp. 3d at 704-07. Nowhere did the court evaluate whether Dynegy had violated the specific terms of its discharge permit; rather, it held that the permit did not apply to the discharges at issue. *Id.* at 707. Although Prairie Rivers appealed that decision, the appeal is currently being held in abeyance pending the outcome of a case now before the U.S. Supreme Court involving the same Clean Water Act jurisdictional question upon which the federal court grounded the dismissal order. *See Order, Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, No. 18-3644 (7th Cir. Mar. 7, 2019), ECF No. 12. Uncertainty thus plagues not only when the appeal of the federal suit will move forward, but also how long that appeal might take, whether the appellate court will reinstate the lawsuit, and, if it does, how long it will take before any order is issued in the remanded suit. In short, uncertainty colors all aspects of the dismissed federal action while the pollution of groundwater and the Middle Fork continue. Accordingly, a stay is inappropriate here.³

³ None of the cases cited by Dynegy change that conclusion. *Midwest Generation EME, LLC* is distinguishable. PCB 04-216, 2006 WL 1046981. That case addressed whether data could be withheld from disclosure under state law when the U.S. Environmental Protection Agency was evaluating whether the exact same data should be withheld from disclosure under "similar if not the same" federal standards. A federal determination allowing release of data would render the state case moot. *See* 2006 WL 1046981, at *7. Far from supporting Dynegy's argument, *ESDI 2* favors denying a stay here. PCB 96-180 & 97-11, 1997 WL 593937. In *ESDI 2*, the Board determined that a stay was inappropriate in one of two consolidated cases, PCB 97-11, in part because the allegations in that case "cover a wider range of time and additional violations of the Act." *Id.* at *2. Similarly, this matter covers a much wider range of time, with many additional and different violations, than those in the federal suit. *Compare* Compl. ¶¶ 45-60 (alleging violations starting in 1992), *with, e.g.*, Prairie Rivers' Federal Complaint ¶¶ 48, 57 (alleging violations starting in 2013). Thus, under *ESDI 2*, a stay is not appropriate here.

iii. *Comity Does Not Support a Stay.*

Third, the principle of comity weighs against a stay of Prairie Rivers' Complaint. Comity is "the principle that courts give effect to the decisions of a court of another jurisdiction, not as a matter of obligation but as a matter of deference and respect." *Sierra Club 2*, PCB 13-15, 2014 WL 1630316, at *12. Where a case pending in a different jurisdiction is based on a different legal theory and seeks different relief than the case in which a stay is sought, comity does not support a stay even when the facts addressed in the cases are similar or even identical. *See Mather Inv. Props., LLC*, PCB 05-29, 2005 WL 1943585, at *12 (concluding that comity does not require a stay when "this matter and the [other] complaint do not allege substantially the same violations and do not seek the same relief"); *ESDI 1*, PCB 96-180 & 97-11, 1997 WL 411202, at *3, *rev'd on other grounds*, *ESDI 2*, PCB 96-180 & 97-11, 1997 WL 593937, at *1-3 (denying motion to stay when "both this case and the federal case involve alleged violations of environmental law at the landfill, and both seek, among other relief, orders requiring cessation of pollution from the landfill," but the cases seek relief "under a different regulatory scheme").

As explained in detail above, Prairie Rivers' federal suit involves a wholly different legal theory and alleges far fewer violations – and consequently far different relief, *see Sierra Club 1*, PCB 13-15, 2013 WL 5524474, at *22 – than the complaint in this matter. Indeed, the federal district court could not rule on Prairie Rivers' claims of violations of the Illinois Environmental Protection Act even if it wanted to since the Board has exclusive jurisdiction over such claims. *See Mather Inv. Props., LLC*, PCB 05-29, 2005 WL 1943585, at *13; *State Oil Co.*, PCB 97-103, 1999 WL 676187, at *8; *see also People v. Bell Sports, Inc.*, PCB 95-91, 1995 WL 476013, at *2 (Aug. 3, 1995) (noting that the Board is the "statutorily-authorized forum to hear violations of the [Illinois] Environmental Protection Act and Illinois' regulations, is comprised of technically

qualified members designated to hold hearings on violations of the Act, determine issues of fact regarding the alleged violations and to consider any other . . . issues”). Comity does not, therefore, support a stay in this case.

iv. There is No Possibility of Obtaining Complete Relief in the Federal Suit.

As to the fourth factor the Board looks to in evaluating motions to stay – the likelihood of obtaining complete relief in the foreign jurisdiction – Dynegy does not even argue that it supports a stay of this matter. It plainly does not. To begin with, the violations alleged are different and far more extensive in this matter than in the federal suit. *See supra* at 8-9. That alone renders a stay inappropriate here. *See Sierra Club 2*, PCB 13-15, 2014 WL 1630316, at *14 (denying motion to stay when the complaint “alleges violations extending over a different time period than those alleged” in the other matter and therefore the relief mandated by the other matter “cannot provide all the relief complainants seek in this case”).

Moreover, in the federal lawsuit, Prairie Rivers sought declaratory relief that Dynegy violated the Clean Water Act, an order directing Dynegy to comply with the Clean Water Act, civil penalties under the Clean Water Act for each violation during the 5-year statute of limitations period, and reasonable attorneys’ fees, among other things. *See Prairie Rivers’ Federal Complaint* at 16-17 (Prayer for Relief). Here, in contrast, Prairie Rivers seeks declaratory relief that Dynegy violated the Illinois Environmental Protection Act and implementing regulations, civil penalties under section 42 of the Act for violating the Act and implementing regulations over 27 years, an order directing Dynegy to cease and desist from violating the Act, and any other relief the Board deems proper. *See Compl.* at 15 (Relief Requested). Even if the total daily civil penalties authorized under the Clean Water Act were granted for every day of the five-year statute of limitations period, those penalties would be dwarfed by the twenty-seven

years of penalties for multiple violations available under the Illinois Environmental Protection Act. *See In re Johns Manville v. Ill. Dep't of Transp.*, PCB 14-3, 2016 WL 6837230, at *26-28 (Nov. 14, 2016) (holding that no statute of limitations applies in citizen enforcement suits under the Illinois Environmental Protection Act); *Landfill Emergency Action Comm. v. McHenry Cty. Sanitary Landfill & Recycling Ctr., Inc.*, PCB 85-9, 1985 WL 21267, at *1-2 (Mar. 22, 1985) (same); 415 ILCS 5/42 (authorizing the Board to impose penalties of up to \$50,000 plus \$10,000 per day for each water pollution violation). “Complete relief” is, thus, unavailable in the federal suit. Because none of the *Staley* factors supports a stay, Dynegy’s motion to stay this case should be denied.

3. Staying this Case Will Result in Environmental Harm and Prejudice Prairie Rivers.

Finally, a stay is inappropriate here because environmental harm would result and Prairie Rivers would be prejudiced. The Board has held that allegations of ongoing coal ash pollution in excess of applicable groundwater quality standards, if proven, would constitute a “serious” risk of environmental harm that “weighs strongly against a stay.” *Sierra Club 2*, PCB 13-15, 2014 WL 1630316, at *16; *see also ESDI 1*, PCB 96-180 & 97-11, 1997 WL 411202, at *1, *5 (concluding that to stay a case involving allegations of leachate flowing out of a landfill “ultimately” into a creek when resolution of a federal suit addressing similar issues was delayed would “be inconsistent with the Board’s obligation . . . to manage its activities so as to minimize environmental damage”). The allegations here are nearly identical: toxic pollutants from coal ash disposal sites are leaching into Illinois waters in excess of applicable groundwater and surface water standards. Because the Complaint here alleges that the coal ash pollution is ongoing and resolution of the federal suit that concerns similar factual circumstances is far from certain, staying this case would be inconsistent with the Board’s obligation to minimize harm. A stay is

accordingly inappropriate. *See ESDI 1*, PCB 96-180 & 97-11, 1997 WL 411202 at *1, *5; *Sierra Club 2*, PCB 13-15, 2014 WL 1630316, at *16.

A stay is also inappropriate here because it would prejudice Prairie Rivers. In determining whether to grant a stay, “[t]he Board may also weigh the prejudice a stay would cause the nonmovant.” *Sierra Club 2*, PCB 13-15, 2014 WL 1630316, at *11 (citing *Vill. of Mapleton v. Cathy’s Tap, Inc.*, 313 Ill. App. 3d 264, 267 (2000)). Loss of evidence constitutes prejudice. *See id.* at *17; *Am. Disposal Servs. of Ill., Inc.*, PCB 11-60, 2014 WL 3924268, at *9 (recognizing “loss of evidence” as “actual prejudice”). Here, there is a real risk of loss of evidence of ongoing pollution if a stay were granted. Dynegy has submitted to the U.S. Army Corps of Engineers a “bank stabilization” proposal for the Middle Fork along the Vermilion coal ash impoundments. *See* Dynegy section 404 permit application (attached hereto as Exhibit B). The project consists, in essence, of a massive rock wall that would block access to, and view of, the coal ash “seeps” transporting pollutants into the Middle Fork. *See* Earthjustice and Prairie Rivers’ January 10, 2019 comments on Dynegy’s Clean Water Act section 404 permit application, at 4, 9-10, 19-20 (attached hereto as Exhibit C). If the project is approved, contamination of the river will continue, but Prairie Rivers and the public will be unable to sample those seeps and their discoloration of the Middle Fork will be obscured by the rock wall. *See id.* at 9-10, 19-20. Although recent press reports indicate that Dynegy may be planning to revise its proposal, those reports do not suggest that the revised proposal will allow full access to the multitude of seeps marring the riverbank.⁴ If a stay were granted, some version of Dynegy’s proposed rock wall could be approved and construction begun before litigation in this case were

⁴ *See, e.g.*, Tracy Crane, Dynegy re-evaluating plans for Middle Fork stabilization after public input, The News-Gazette (May 21, 2019), <http://www.news-gazette.com/news/local/2019-05-21/dynegy-re-evaluating-plans-middle-fork-stabilization-after-public-input.html> (attached hereto as Exhibit D).

reinitiated, causing Prairie Rivers to lose evidence or the opportunity to obtain it. For that additional reason, a stay should not be granted here.

B. Counts 4 and 5 of PRN's Complaint Should Not Be Dismissed.

1. Counts 4 and 5 Are Not Duplicative of Count 2 of PRN's Federal Complaint.

Dynegy asserts that Counts 4 and 5 of Prairie Rivers' Complaint are "duplicative" of allegations in Prairie Rivers' dismissed federal Clean Water Act lawsuit, arguing that the Board should therefore dismiss those counts. *See* Dynegy Mot. ¶¶ 3, 5-6. Dynegy's argument fails. First, there is no "pending" federal lawsuit, and thus no action pending in another forum to render this action duplicative. Second, even if there were a pending federal lawsuit, Prairie Rivers' claims in this matter are based on different legal theories, and seek different relief, than its dismissed claims in the federal lawsuit. Counts 4 and 5 of Prairie Rivers' Complaint in this matter are accordingly not "duplicative" of that suit. Dynegy's motion should be denied.

Prairie Rivers' dismissed Federal Complaint asserted that Dynegy violated the federal Clean Water Act, 33 U.S.C. §§ 1311 and 1342, at Vermilion by both (1) discharging to the Middle Fork without authorization in a NPDES permit and (2) violating conditions of the permit that Dynegy does have for the site. *See* Prairie Rivers' Federal Complaint ¶¶ 58-78. With respect to the second of those two claims for relief, Prairie Rivers alleged that Dynegy violated several conditions of its federal permit that incorporate Illinois effluent limits and water quality standards. *Id.* ¶¶ 36-46, 67-74.

In Counts 4 and 5 in its Complaint in this case, by contrast, Prairie Rivers seeks to enforce the Illinois Environmental Protection Act. Specifically, section 12 of the Illinois Environmental Protection Act provides that no person shall "[c]ause or threaten or allow the discharge of any contaminants into the environment . . . so as to cause or tend to cause water

pollution in Illinois,” 415 ILCS 5/12(a), and prohibits the deposition of “any contaminants upon the land in such place and manner so as to create a water pollution hazard.” *Id.* § 12(d).⁵

Consistent with this broad statutory mandate, Prairie Rivers here seeks relief from the Board from Dynegey’s discharges of iron and manganese in excess of effluent limits in 35 Ill. Adm. Code 304.124; discharges of pollutants in a distinct, bright orange-red color not “below obvious levels,” in violation of 35 Ill. Admin. Code 304.106; and discharges of pollutants that have discolored, and are continuing to discolor, the Middle Fork a bright orange-red color not of natural origin, in violation of 35 Ill. Adm. Code 302.203. *See* Compl. ¶¶ 56-60.

Although each of these Illinois regulations is also incorporated into Dynegey’s federal Clean Water Act permit that was the subject of the federal action, an action before this Board is not duplicative of that suit for several reasons. First and foremost, Dynegey’s entire argument for dismissal under the duplicative claims rule is premised on the federal action being an available alternative forum for Prairie Rivers to seek relief. *See* Dynegey Mot. ¶¶ 3-6. However, as noted above and as Dynegey itself acknowledges, Prairie Rivers’ federal claims were dismissed by an order of the United States District Court for the Central District of Illinois and are no longer currently pending. *See Prairie Rivers Network*, 350 F. Supp. 3d at 707. Although Prairie Rivers has appealed the district court’s order to the United States Court of Appeals for the Seventh Circuit, that appeal is currently stayed. *See Order, Prairie Rivers Network v. Dynegey Midwest Generation, LLC*, No. 18-3644 (7th Cir. Mar. 7, 2019). ECF No. 12. Only if Prairie Rivers is able to prevail in its appeal would it be able to proceed with its federal claims, a prospect that is currently uncertain. As noted above, dismissed claims are not pending claims. *See* Report &

⁵ “Water pollution” is defined as the “discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.” 415 ILCS 5/3.545.

Recommendation, *Somasekharan.*, No. 07-2087, 2007 WL 2680954, at *3, *accepted*, No. 07-2087, 2007 WL 2685154; *see also Trippe Mfg. Co.*, 46 F.3d at 628.

None of the cases cited by Dynegy in its motion to dismiss provide support for the Board deviating from this general rule in determining whether claims dismissed but pending appeal in another forum can be considered duplicative of claims before the Board. Rather, as this Board has previously observed, “[t]he Board is not precluded from accepting complaints merely because it is possible that another matter may, at some later date, end up in court” *Finley v. IFCO ICS-Chicago, Inc.*, PCB 02-208, 2002 WL 1876193, at *6 (Aug. 8, 2002). Dynegy’s failure to provide any authority that dismissed claims that are pending appeal can be duplicative of active claims before the Board is fatal to its argument that Counts 4 and 5 should be dismissed as duplicative.

Even if *Prairie Rivers’* dismissed federal suit could be the basis for finding duplicative claims, Counts 4 and 5 would still not be duplicative. A suit before the Board is not duplicative of an action involving the same parties in a different forum if the second action is based on statutes and legal theories that are separate and distinct from the Illinois Environmental Protection Act. *Dayton Hudson Corp. v. Cardinal Indus., Inc.*, PCB 97-134, 1997 WL 530523, at *4 (Aug. 21, 1997) (CERCLA and common law counts in other forum); *Lake Cty. Forest Pres. Dist. v. Ostro*, PCB 92-80, 1992 WL 196684, at *1-2 (July 30, 1992) (same); *see also Mather Inv. Props., LLC*, PCB 05-29, 2005 WL 1943585, at *12 (finding that the matter before the Board and the circuit court complaint did not allege substantially the same violations, therefore, “the issue before the Board is not squarely before the circuit court, and vice versa”) (common law counts in other forum); *Mayer v. Lincoln Prairie Water Co., et al.*, PCB 11-22, 2011 WL 1462534, at *10 (Apr. 7, 2011) (finding cases not to be substantially similar because although the

circuit court case may have involved the same action, that action did not allege violations of the Act) (common law counts and sought punitive damages in other forum); *Vill. of Park Forest*, PCB 01-77, 2001 WL 179913, at *4 (finding that the case before the Board, which involved violations of the Illinois Environmental Protection Act, could not be obviated by the resolution of the contract dispute in the circuit court because it involved a separate cause of action from the issue before the circuit court) (common law counts in other forum).

This Board's precedents confirm that the rule against duplicative claims was not intended to apply to cases such as this one, where a party is pursuing claims before the Board under the Illinois Environmental Protection Act while pursuing different claims in a different forum. As the Board observed in one of its earliest decisions interpreting the Act,

[t]he reason for the ban on "duplicitous" complaints was the fear that allowing private complaints might flood the Board with too many cases raising the same issue and unduly harass a respondent. The fear was not of one complaint before the Board but of many. The very purpose of permitting private complaints was to allow an alleged polluter to be brought before the Board.

League of Women Voters, PCB 70-7, 1970 WL 3665, at *2. In other words, the rule against duplicative claims is designed to guard against a proliferation of claims before the Board under the Illinois Environmental Protection Act itself, *not* to prevent a party from pursuing different legal theories in different forums. *See Env'tl. Prot. Agency v. Illinois Cent. R.R.*, PCB 72-155, 1972 WL 5356, at *2 (Nov. 14, 1972) ("The statutory reference to 'duplicitous' complaints is designed to prevent repeated complaints on the same basis by different people . . .") (citing *League of Women Voters*); *see also Winnetkans Interested in Protecting the Env't (WIPE) v. Ill. Pollution Control Bd.*, 55 Ill. App. 3d 475, 479-80 (1977) (deferring to Board's interpretation of duplicative claims rule in *League of Women Voters* as "aptly stat[ing] the intent of the legislature to empower the Board to dismiss complaints raising allegations identical or substantially similar to *matters previously brought before the Board*" (emphasis added)).

Although the Board later broadened its construction of the duplicative claims rule to apply to claims “identical or substantially similar to one[s] brought in another forum,” *Brandle v. Ropp*, PCB 85-68, 1985 WL 21380, at *1 (June 13, 1985), this Board has continued to hold that parties may seek relief from the Board at the same time that they pursue other statutory claims in court under different legal theories, even those seeking similar relief as the party is seeking from the Board. *See, e.g., Finley*, PCB 02-208, 2002 WL 1876193, at *8 (“[A]llegations in court of violations of a statute other than the Act do not make a citizen[] complaint before the Board duplicative, even if the same relief is sought.” (citing *League of Women Voters*)).

This Board’s decisions in *Dayton Hudson* and *Lake County* are particularly instructive. In both cases, the Board held that a plaintiff’s pursuit of federal statutory and common law claims in another forum was not duplicative of its Illinois Environmental Protection Act claims before the Board. *See Dayton Hudson Corp.*, PCB 97-134, 1997 WL 530523, at *4; *Lake Cty. Forest Pres. Dist.*, PCB 92-80, 1992 WL 196684, at *1-2.

As in *Dayton Hudson* and *Lake County*, the argument against applying the duplicative claims rule is even stronger in this case because Prairie Rivers sought different relief in its federal action than it now seeks from the Board. *See Dayton Hudson Corp.*, PCB 97-134, 1997 WL 530523, at *4 (claims before Board found not to be duplicative of claims in judicial forum where different legal theories were raised and different relief was requested); *Lake Cty. Forest Pres. Dist.*, PCB 92-80, 1992 WL 196684, at *1-2 (same). In the federal action, Prairie Rivers sought declaratory relief, an order from the federal court that Dynegy be required to comply with the federal Clean Water Act and its federal permit, and civil penalties in the amount of up to \$53,484 per day for each violation within the five-year statute of limitations period. *See Prairie Rivers’ Federal Complaint* at 16-17 (Prayer for Relief). In this case, by contrast, Prairie Rivers

requests that the Board (1) declare that Dynegy has violated the Illinois Environmental Protection Act; (2) order Dynegy to pay civil penalties for each violation pursuant to 415 ILCS 5/42 (which authorizes the Board to impose penalties of up to \$10,000 for each day of a water pollution violation); and (3) order Dynegy to cease and desist its unlawful water pollution, modify its waste disposal practices to prevent future violations, and remediate contaminated groundwater and surface water to bring it into compliance with Illinois water quality standards. *See* Compl. at 15 (Relief Requested).⁶

Although there is potential overlap between the relief requested in the two cases, each case will be governed by the different statutory requirements at issue, with the court and the Board each exercising separate discretion as to the specific relief that it may choose to award should Prairie Rivers be successful in establishing liability in either case. *See, e.g., Finley*, PCB 02-208, 2002 WL 1876193, at *9 (complaint not duplicative of order issued by Chicago Department of Environment [DOE] in part because discretionary relief Board could order was not available in, and could differ from, relief available in similar matter being addressed by the DOE).

Moreover, although both the federal action and this case involve a request for civil penalties, different legal standards apply to when those penalties may be awarded and how they may be calculated, as well as the entity to which those penalties would be paid (the United States Government vs. the State of Illinois). *Compare* 33 U.S.C. §§ 1319(d) & 1365 and 40 C.F.R. § 19.4, with 415 ILCS 5/42. The Board has previously held that such differences in civil penalty

⁶ Dynegy's assertion that the relief requested by Prairie Rivers is outside of the Board's authority to grant, *see* Dynegy Mem. at 14 n.14, is without merit. As this Board recently found in a similar case, "Section 33 of the Act gives the Board 'wide discretion in fashioning a remedy,'" and thus that the same types of remedies that Prairie Rivers is requesting in this case are "not necessarily outside the Board's authority to impose." *Sierra Club 2*, PCB 13-15, 2014 WL 1630316, at *15 (internal citations omitted).

requests are, in and of themselves, sufficient to render an action before the Board not duplicative of an action in another forum. *See United City of Yorkville v. Hamman Farms*, PCB 08-96, 2009 WL 926750, at *6 (Apr. 2, 2009) (citing differences in the amount of civil penalties requested in two cases as sufficient to make them not duplicative).

The cases cited by Dynegy in its motion to dismiss do not require a different result. Dynegy cites to several inapposite Board decisions in which the Board dismissed the claims before it as duplicative only after finding that those claims involved substantially the same legal theories as claims pursued by the same parties before a judicial forum. *See Vill. of Addison v. City of Wood Dale*, PCB 98-104, 1998 WL 112507, at *2 (Mar. 5, 1998) (dismissing case because “the same violation is being litigated in circuit court”); *Doall Co. v. Skokie Valley Asphalt Co.*, PCB 94-256, 1995 WL 415502, at *2 (July 7, 1995) (dismissing case based on finding that it involved substantially the same legal theory as pending circuit court case); *Ropp*, PCB 85-68, 1985 WL 21380, at *1 (dismissing case where complainant acknowledged that the same claims were being litigated in circuit court).⁷ As discussed above, that is not this case here, because Prairie Rivers sought relief in federal court on federal Clean Water Act claims, but seeks different relief in this case on different legal claims under the Illinois Environmental Protection Act. *See supra* at 13-15.

Dynegy also cites to Illinois court decisions interpreting an inapplicable provision of the Code of Civil Procedure, 735 ILCS 5/2-619(a)(3), which bars actions in Illinois courts when “there is another action pending between the same parties for the same cause.” *See Dynegy Mem.* at 8 (citing *Quantum Chem. Corp. v. Hartford Steam Boiler Inspection & Ins. Co.*, 246 Ill.

⁷ Dynegy also cites to *ESDI 2*, PCB 97-11, 1997 WL 593937, at *1, but that case analyzes only the *Staley* stay factors rather than a motion to dismiss and thus is inapposite. To the extent it is relevant, it supports denial of the motion to dismiss here. *See supra* at note 3.

App. 3d 557, 560 (1993)). This argument also misses the mark, however, for the same reason: Prairie Rivers' claims under the Illinois Environmental Protection Act do not arise under the same cause of action as federal statutory claims, as is well-established in this Board's precedents applying the duplicative claims rule. *See supra* at 8. Further, as this Board has recognized, the legislature's intent in enacting the Illinois Environmental Protection Act was "to centralize initial decision-making in pollution cases in a single specialized Board" and to encourage private litigants to pursue their claims before the Board. *League of Women Voters*, PCB 70-7, 1970 WL 3665, at *1-2 (citing section 45(b) of the Act). Dynegy's argument that this Court should look outside of its own precedents in construing the duplicative claims rule is inconsistent with this legislative intent to encourage Illinois Environmental Protection Act claims to be brought before the Board.

Accordingly, because Prairie Rivers' Federal Complaint was dismissed and is now pending appeal, and because Counts 4 and 5 of Prairie Rivers' Complaint in this case seek different relief from the Board under a different cause of action than its Federal Complaint did, the Board may not dismiss Counts 4 and 5 of Prairie Rivers' Complaint as duplicative.

2. Count 4 Is Not Frivolous.

Count 4 alleges a viable, non-frivolous claim for violations of Illinois's Effluent Standards, and the Board should not dismiss it. At the Vermilion coal plant site, Dynegy and its predecessors mixed coal ash at the plant with water and for decades collected this wastewater in three coal ash ponds next to the Middle Fork. Compl. ¶¶ 5-8. The ash ponds hold this coal ash in unlined pits, where groundwater moves laterally through the ash and then conveys coal ash pollutants directly into the adjacent river via numerous, discrete seeps. *Id.* ¶¶ 21, 23. These discharges are "effluent" subject to the Illinois's Effluent Standards set forth in part 304 of the

Administrative Code. *See* 35 Ill. Adm. Code 301.275. The discharges contain iron and manganese in concentrations well above the effluent limits for those pollutants. Compl. ¶ 24; *see* 35 Ill. Adm. Code 304.124. The bright orange-red color of the discharges also violates state qualitative effluent standards. Compl. ¶ 25; *see also* 35 Ill. Adm. Code 304.106. With these facts taken as true, Prairie Rivers has stated a claim on which relief can be granted.

The discharges from Dynegy's coal ash ponds are "effluent" by the plain language of the regulation. The Board's rules define "effluent" 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, but does not otherwise include nonpoint source discharges such as runoff from land or any livestock management facility

35 Ill. Adm. Code 301.275. The coal ash ponds contain wastewater from coal-fired power production in an unlined pit. Compl. ¶ 5; *see also* 35 Ill. Adm. Code 301.425 (defining "wastewater"). This wastewater discharges to the Middle Fork via groundwater seeps, as Dynegy's own reports confirm. Compl. ¶ 23. The Middle Fork is a water of the State. *Id.* ¶ 2. Thus, the discharges from Dynegy's coal ash ponds are "wastewater discharged . . . to the waters of the State." As such, they are "effluent" and subject to Illinois's effluent standards in part 304 of the Illinois Administrative Code by the plain language of the regulation, and Dynegy is liable for violations of those standards.

Moreover, the wastewater discharged from the Vermilion ash ponds is a point source discharge and therefore does not fall under the regulatory exception for "nonpoint source discharges such as runoff from land or any livestock management facility" 35 Ill. Adm. Code 301.275. Where a term related to the state NPDES program is defined in the Clean Water Act or federal regulations, the Board must use those definitions, 35 Ill. Adm. Code 301.325, and the Clean Water Act defines "point source" as "any discernable, confined and discrete

conveyance, including, but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . from which pollutants are or may be discharged.” 33 U.S.C.

§ 1362(14). Dynegy’s coal ash pits are “discernible, confined, and discrete” surface impoundments designed to hold accumulated wastewater, and therefore “container[s]” within the meaning of “point source.” The coal ash pollutant-laden wastewater is then discharged to the Middle Fork via hydrologically connected groundwater. Dynegy’s own reports and plaintiff’s evidence shows that contamination from the coal ash pits leaches into the groundwater flowing laterally through the ash, and the coal ash pollutants then discharge via numerous groundwater seeps into the Middle Fork. Compl. ¶¶ 20-21. These facts establish that Dynegy’s ash pits are “point source discharges” as defined in the Clean Water Act. 33 U.S.C. § 1362(14).⁸

Numerous courts have recognized that coal ash impoundments and other industrial waste impoundments are “point sources” under the Clean Water Act.⁹ This conclusion is consistent with congressional intent when enacting the point source discharge requirements that they be applied broadly to wherever points of pollutant discharge could be identified and controlled. *See Earth Scis., Inc.*, 599 F.2d at 373 (“The concept of a point source . . . embrace[es] the broadest

⁸ A minority of courts have held that the point source discharges that pass through hydrologically connected groundwater are not subject to the Clean Water Act. *See, e.g., Prairie Rivers Network*, 350 F. Supp. 3d at 704-707. In *Prairie Rivers*’ federal district court litigation, the court held, on purely federal grounds, that Dynegy’s coal ash discharges are not subject to the Clean Water Act because the discharges passed through groundwater before entering the Middle Fork. *Id.* The court did not, however, dispute that the coal ash ponds were point sources. *See id.* *Prairie Rivers* has appealed this decision to the Seventh Circuit, where the appeal is stayed, as discussed *supra*. *See Order, Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, No. 18-3644 (7th Cir. Mar. 7, 2019), ECF No. 12.

⁹ *See, e.g., Comm. to Save Mokolumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308-09 (9th Cir. 1993) (mine runoff capture system); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (sediment basins); *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 249-50 (4th Cir. 1979), *rev’d on other grounds*, 449 U.S. 64 (1980) (coal slurry ponds); *United States v. Earth Scis., Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (groundwater seeps from sump pit); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas*, 141 F. Supp. 3d 428, 443-44 (M.D.N.C. 2015) (coal ash pond discharges via groundwater); *Residents Against Indus. Landfill Expansion v. Diversified Sys., Inc.*, 804 F. Supp. 1036, 1038 (E.D. Tenn. 1992) (sediment ponds collecting waste from landfill).

possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States”).

Central Illinois Public Service Company (“*CIPSCO*”), the case cited by Dynegy, does not change this conclusion. *See Cent. Ill. Pub. Serv. Co. v. Ill. Env'tl. Prot. Agency*, PCB 84-105, 1984 WL 37567 (Nov. 8, 1984). Although the Board in *CIPSCO* determined that the subsurface leachate from coal ash ponds at issue in that case were nonpoint source discharges, *CIPSCO* is distinguishable because the link between groundwater contamination by leachate and the eventual discharge of that leachate to surface water was much more attenuated than it is here. In *CIPSCO*, the Board upheld the denial of a permit for construction of a coal ash impoundment. *See id.* at *5. Illinois EPA had denied the permit in part based on evidence that existing impoundments at that site were contaminating groundwater, which later flowed into the Wabash River. *Id.* at *2. The contaminated groundwater then flowed “generally” towards the Wabash River, where it “ultimately” discharged. *Id.* The Board also noted that the leachate-polluted groundwater spread radially out from the borders of the pond. *Id.*

For Dynegy’s discharges, however, the hydrological connection is more definite and immediate. Here, the coal ash ponds are adjacent to the Middle Fork, where the water table is high. Compl. ¶¶ 21, 23. Because of this proximity to the river, coal ash pollution from the ash ponds discharges directly to the Middle Fork via the groundwater that saturates and flows laterally through the ash. *Id.* Dynegy’s own reports confirm that the groundwater flows, with minimal exception, into the Middle Fork, which is adjacent to the ponds. In contrast to the discharges at issue in *CIPSCO*, these are classic point source discharges, as described above, because the coal ash impoundment is a “container” from which pollutants are discharged into the Middle Fork. *See* 33 U.S.C. § 1362(14).

To the extent the facts are similar, the Board in *CIPSCO* came to an uninformed, erroneous conclusion because it did not consider the weight of authority confirming that discharges from coal ash are point sources—authority which was not before the Board when it made its decision because apparently the Agency did not cite any of that broad authority. *CIPSCO* at *3 (“The Agency cites no authority in support of this interpretation [that a coal ash pond is a point source].”) Today’s Board should not rely on a decision made without any consideration of the ample authority available at that time making clear that discharges from coal ash ponds and other industrial wastewater impoundments are point source discharges. *See, e.g., Sierra Club v. Abston Constr. Co.*, 620 F.2d at 45; *Consolidation Coal Co.*, 604 F.2d at 249-50, *rev’d on other grounds*, 449 U.S. 64 (1980); *Earth Scis., Inc.*, 599 F.2d at 374. Since then, many courts have agreed with the conclusion that discharges like Dynegy’s are point source discharges. *See, e.g., Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637, 647-48 (4th Cir. 2018); *Hawai’i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 744-45 (9th Cir. 2018);¹⁰ *Comm. to Save Mokelumne River*, 13 F.3d at 308-09; *Yadkin Riverkeeper*, 141 F. Supp. 3d at 443-44; *Residents Against Indus. Landfill Expansion*, 804 F. Supp. at 1038.

Because its holding was based largely on the faulty conclusion that subsurface coal ash pond discharges cannot be point source discharges, *see CIPSCO* at *3, the Board should give little weight to the *CIPSCO* decision. The Board can, and should, recognize *CIPSCO* as an erroneous decision precipitated by incomplete presentation of authority, and hold that the discharges at issue here are “effluent” because they are “wastewater discharged . . . to the waters of the State” from a point source. 35 Ill. Adm. Code. 301.275; *see also Hunt Super Serv., Inc. v.*

¹⁰ *Hawai’i Wildlife Fund* is currently before the Supreme Court, which granted certiorari to determine whether point sources that discharge to navigable waters via hydrologically connected groundwater must obtain a federal Clean Water Act discharge permit. *See Cty. of Maui, Hawai’i v. Hawai’i Wildlife Fund*, 139 S. Ct. 1164 (2019) (granting certiorari).

Edgar, 172 Ill. App. 3d 512, 518 (1988) (concluding that the Board is “not absolutely bound by its prior rulings but can make adjustments to its precedents as long as the adjustments are not arbitrary or capricious”); *People v. Sheridan-Joliet Land Dev., LLC*, PCB 13-19, 2013 WL 5762896, at *3 (Oct. 17, 2013) (citing *Hunt Super Serv., Inc.*, 172 Ill. App. 3d 512; *Ill. Council of Police v. Ill. Labor Relations Bd.*, 404 Ill. App. 3d 589, 596-97 (2010)).

V. CONCLUSION

For the foregoing reasons, Prairie Rivers respectfully requests that the Board deny Dynegy’s Motion to Stay or Dismiss.

Respectfully submitted the 5th of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2019, I electronically served the foregoing Complainant's Response to Respondent's Motion to Stay or Dismiss, including exhibits A-D, upon the parties of record at the email addresses indicated in the service list below.

I further certify that my email address is jcassel@earthjustice.org; the number of pages in the email transmission is 169; and the email transmission took place today before 5:00 p.m. CT.

Respectfully Submitted,

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Exhibit A

**IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS**

PRAIRIE RIVERS NETWORK,)	
)	
Plaintiff,)	No. 2-18-cv-02148
)	
v.)	Hon. Judge Colin S. Bruce
)	
DYNEGY MIDWEST GENERATION,)	
)	
LLC)	
)	
Defendant.)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Plaintiff Prairie River Network's Complaint should be dismissed in its entirety because it rests on a theory of Clean Water Act jurisdiction and liability that is foreclosed by binding Seventh Circuit precedent. Specifically, Prairie Rivers Network's ("PRN") Complaint is predicated entirely on the allegation that man-made ponds on the site of the retired Vermilion Power Station ("Vermilion") are "add[ing]" "contaminants" to groundwater and that the "contaminated *groundwater* flows right into the adjacent Middle Fork [of the Vermilion River]" through "discrete *groundwater* seeps." Complaint ¶¶ 53-55 (emphasis added). Both counts of PRN's Complaint rest on the legal theory that this alleged condition is a violation of the federal Clean Water Act ("CWA") that is redressable through a federal CWA citizen suit for penalties and injunctive relief. *Id.* at ¶¶ 62-66, 74-78.

The primary problem with Plaintiff's theory—and the reason its Complaint should be dismissed—is that it is directly contrary to binding Seventh Circuit precedent, which holds that the addition of contaminants from man-made ponds to groundwater *does not* fall within the statutory scope of the CWA, regardless of where that groundwater may ultimately flow. *See Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 964-6 (7th Cir. 1994) (affirming dismissal of CWA citizen suit). As the Seventh Circuit held in *Oconomowoc*, groundwaters are *not* part of the statutory 'waters of the United States,' and "[n]either the Clean Water Act nor the EPA's definition [of 'waters of the United States'] asserts authority over ground waters, *just because these may be hydrologically connected with surface waters.*" *Id.* at 965 (emphasis added). As in *Oconomowoc*, PRN's Complaint in this case should be dismissed because the CWA does not assert "authority over artificial ponds that drain into ground waters." *Id.* at 966. Instead, as discussed below, any concern that PRN has regarding discharges to

groundwater at the site are properly addressed under Illinois law by the Illinois Environmental Protection Agency (“IEPA”), not under the CWA by way of a citizen suit in this Court.

I. Legal and Regulatory Background

This case arises under (and only under) the citizen suit provision of the CWA, 33 U.S.C. § 1365(a). *See* Complaint ¶ 5. The sole basis for the Complaint is alleged violations of the CWA at Vermilion. *Id.* at ¶¶ 62 (Count 1), 74 (Count 2).

The CWA was enacted “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To carry out that policy, the statute prohibits the “discharge of any pollutant” except as authorized by a CWA permit known as a National Pollution Discharge Elimination System (“NPDES”) permit. *Id.* §§ 1311; 1342(a). The CWA, however, strictly limits the types of discharges that fall within the statute’s coverage and may be subject to a citizen suit. The statute defines the term “discharge of a pollutant” as the “addition of any pollutant *to* navigable waters *from* any point source.” *Id.* § 1362(12) (emphasis added). The term “navigable waters” means “the waters of the United States, including the territorial seas.” *Id.* § 1362(7).¹ These definitions serve as an important “limitation of the Act’s coverage.” *Oconomowoc*, 24 F.3d at 964; *see also Nat’l Ass’n of Mfrs. v. Dept. of Defense*, 138 S. Ct. 617, 625 (2018) (“The statutory term ‘waters of the United States’ delineates the geographic reach of many of the Act’s substantive provisions, including the [NPDES] permitting program[.]”).

Although the CWA is a federal statute, it was designed by Congress to “recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and

¹ The statute does not define the term “waters of the United States,” but EPA’s regulations do. 40 C.F.R. § 230.3(o). That regulatory definition does *not* include either groundwater or man-made ponds. *Id.* at § 230.30(o)(2); *see also Oconomowoc*, 24 F.3d at 965.

eliminate pollution[.]” 33 U.S.C. § 1251(b). The CWA authorizes state agencies with EPA-approved regulatory programs to issue and enforce the NPDES permit program. 33 U.S.C. § 1342(b). The State of Illinois has an EPA-approved NPDES permitting program and is authorized to issue NPDES permits to facilities in the state. Complaint ¶ 23.² IEPA has issued a valid NPDES permit for discharges of pollutants from Vermilion’s three coal combustion residual impoundments (the “Impoundments”). Complaint ¶ 36.

Separate from the federal permitting requirements in the CWA, Illinois law regulates other aspects of water quality, including groundwater quality. The State of Illinois has adopted and actively enforces a comprehensive *state-only* statutory and regulatory program to protect groundwater. The Illinois Groundwater Protection Act directs IEPA to establish “comprehensive water quality standards which are specifically for the protection of groundwater.” 415 ILCS § 55/8(a). IEPA has carried out this statutory mandate, adopting regulations that establish specific groundwater standards for different classes of groundwater. 35 Ill. Admin. Code §§ 620.410–450. IEPA’s regulations provide that “[n]o person shall cause, threaten or allow the release of any contaminant to groundwater so as to cause a groundwater quality standard . . . to be exceeded.” 35 Ill. Admin. Code § 620.405. The groundwater at the Vermilion site is designated by IEPA as Class I. *See* PRN, Notice of Intent to Sue, ECF 1, Ex. A at 4 n.28 (Jan. 31, 2018) (“Notice”).

² Illinois’ NPDES regulations are codified at 35 Ill. Admin. Code §§ 309.101-191. The specific regulations PRN alleges are being violated—as incorporated in Standard Conditions 23 and 25 of the Permit—were adopted by Illinois as part of its NPDES program to implement CWA requirements in Illinois. *See* Complaint ¶¶ 24-26.

II. Factual Background and Plaintiff's Allegations

From 1955 until its retirement in 2011, Vermilion supplied reliable and affordable electricity to the people and businesses of central Illinois. Throughout that time, electricity generation at Vermilion, which used coal as a fuel source, created a by-product known as coal combustion residuals (“CCR”) or, more commonly, coal ash. The U.S. Environmental Protection Agency (“EPA”) regulates CCR as a non-hazardous waste.³ As occurs at hundreds of coal-fueled power plants across the country,⁴ CCR at Vermilion was deposited in the Impoundments, a series of man-made ponds designed to store the material on-site. Beginning in the mid-1950s, CCR was deposited into the “Old East Ash Pond.”⁵ From the 1970s until approximately 1990, CCR was placed into the “North Ash Pond.”⁶ At that time a new pond was constructed—the “New East Ash Pond”—which was expanded in 2002 and received CCR until Vermilion ceased operating in 2011.⁷

A series of engineered berms contain the CCR material within each of the Impoundments. The NPDES permit for Vermilion (“Permit”) authorizes direct discharges from

³ See 80 Fed. Reg. 21,302 (Apr. 17, 2015) and 40 C.F.R. § 257, Subpart D (regulating CCR as a non-hazardous waste under the Resource Conservation and Recovery Act (RCRA)).

⁴ EPA has explained: “CCR is one of the largest industrial waste streams generated in the U.S. In 2012, over 470 coal-fired electric utilities burned over 800 million tons of coal, generating approximately 110 million tons of CCR in 47 states and Puerto Rico.” 80 Fed. Reg. at 21,303 (Apr. 17, 2015). EPA further determined that (as of 2015) “CCR disposal currently occurs at over 310 active on-site landfills, averaging over 120 acres in size with an average depth of over 40 feet, and at over 735 active on-site surface impoundments, averaging over 50 acres in size with an average depth of 20 feet.” *Id.*

⁵ Hydrogeology and Groundwater Quality of the North Ash Pond System, Kelron Environmental at 1 (March 15, 2012) (“Kelron NAP Report”). The Kelron NAP Report was cited both in PRN’s Complaint at ¶ 12 n.1 (May 30, 2018) (“Complaint”), as well as PRN’s Notice of Intent to Sue, ECF No. 1, Ex. A at 2 n.1 (Jan. 31, 2018).

⁶ Kelron NAP Report at 1.

⁷ *Id.*

the Impoundments to the Middle Fork of the Vermilion River (“Middle Fork”).⁸ The Permit contains numeric limitations on the levels of pollutants (for example, iron) that may be present in these direct discharges to the Middle Fork, as well as sampling and reporting requirements to ensure those limitations are met. Complaint ¶¶ 36, 37, 44.

There is *no allegation* in PRN’s Complaint that discharges from the permitted outfalls at the Impoundments to the Middle Fork are violating or have violated any of the numeric limitations or other conditions in the Permit or cause any environmental harm to the river. That is, there is no allegation that discharges from the Impoundments to the Middle Fork, via pipe, contain contaminants or pollutants above acceptable regulatory levels.

Instead, the Complaint alleges that natural groundwater flows through the Impoundments, becomes “contaminated” by the material in the Impoundments “at depths of more than 21 feet,” and eventually reaches the Middle Fork via “groundwater seeps” along the riverbank. Complaint ¶¶ 53–55. Discharges to groundwater form the basis for both counts of the Complaint:

Coal ash [in the Impoundments] 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. Complaint ¶ 53 (footnotes omitted).

The Complaint goes on to allege that migration of contaminated groundwater to the Middle Fork occurs via “seeps on the riverbank.” *Id.* at ¶ 2. PRN’s Notice of Intent to Sue contains the same allegations and references to “groundwater seeps.” *See, e.g.*, Notice at 6.⁹ The alleged

⁸ The word “vermilion” means “bright red” or “a vivid redish orange.” *Vermilion*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, at 1390 (11th ed. 2011). The Complaint alleges that the groundwater seeps are unlawful because they are “a bright orange-red color.” Complaint ¶ 70.

⁹ Before a citizen plaintiff may file a suit, the CWA requires it to send a notice specifically describing its potential claims, and the plaintiff may not change its claims without providing

groundwater seeps, PRN contends, violate the CWA and are not authorized by, and are in violation of, the Permit. Complaint ¶ 61.

III. ARGUMENT

Plaintiff's Complaint should be dismissed because the groundwater pollution that it alleges is outside the scope and jurisdiction of the CWA, and the Complaint alleges no other violations of the CWA or the facility's NPDES permit. The Complaint is premised entirely on the allegation that the man-made Impoundments at Vermilion are adding contaminants *to groundwater* and that *groundwater* is carrying these contaminants to the Middle Fork. Seventh Circuit precedent unquestionably establishes that the CWA does not regulate discharges to groundwater, including discharges to groundwater that ultimately carry pollutants to surface waters regulated by the CWA. Thus, even assuming the truth of Plaintiff's allegations, they do not establish a violation of the CWA or fall within this Court's jurisdiction. The Complaint should therefore be dismissed in its entirety under Federal Rule of Civil Procedure 12(b)(1) & 12(b)(6).

A. Legal Standard

When considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a court must accept all well-pleaded factual allegations as true. *Esekiel v. Michel*, 66 F.3d 894, 897 (7th Cir. 1995). The court may consider all of the evidence submitted to determine whether subject matter jurisdiction exists. *Id.* A plaintiff facing a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) bears the burden of establishing that the jurisdictional requirements have been met. *Center for Dermatology and Skin Cancer v.*

further notice. 33 U.S.C. § 1365(b); *Atlantic States Legal Found. v. Stroh Die Casting Co.*, 116 F.3d 814, 818-19 (7th Cir. 1997) (“[T]he notice must be sufficiently specific to inform the alleged violator about what it is doing wrong so that it will know what corrective actions will avert a lawsuit.”).

Burwell, 770 F.3d 586, 588-89 (7th Cir. 2014). Where a court determines that it lacks subject-matter jurisdiction, it must dismiss the Complaint in its entirety. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

As with Rule 12(b)(1), motions to dismiss under Rule 12(b)(6) require courts to accept all well-pleaded factual allegations as true and draw all inferences in favor of the plaintiff. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). Dismissal under Rule 12(b)(6) is appropriate where the plaintiff can prove no set of facts that would entitle it to relief. *Chavez v. Illinois State Police*, 251 F.3d 612, 648 (7th Cir. 2001).

Courts considering the threshold question of whether the CWA covers discharges to groundwater have differed on whether to apply the Rule 12(b)(1) standard or the Rule 12(b)(6) standard. In *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, the district court granted a motion to dismiss under Rule 12(b)(1) on grounds that the CWA did not apply to facts strikingly similar to those raised here and was subsequently affirmed by the Seventh Circuit. No. 93-c-0707, 1993 WL 668975 at *3 (E.D. Wis. Sept. 24, 1993), *aff'd* 24 F.3d 962 (7th Cir. 1994). The district court, however, declined to address the plaintiff's suggestion that the motion should be considered under Rule 12(b)(6), deciding that it "need not resolve this conceptual wrinkle . . . because its decision does not hinge on facts outside the complaint." *Id.* at *1 n.2. Here, Defendant Dynegy Midwest Generation, LLC moves under both Rule 12(b)(1) and Rule 12(b)(6) and requests that the Court consider both avenues, as two district courts did in cases addressing the issue. *See Upstate Forever v. Kinder Morgan Energy Partners*, 252 F. Supp. 3d 488, 498 (D.S.C. 2017) (citing both 12(b)(1) and 12(b)(6) as grounds for dismissal), *rev'd on other grounds* 887 F.3d 637 (4th Cir. 2018); *Sierra Club v. Va. Elec. and Power Co.*, 145 F. Supp. 3d 601, 604 (E.D. Va. 2015).

B. Seventh Circuit Precedent Holds that the CWA Does Not Regulate Discharges to Groundwater

Seventh Circuit precedent is clear: the CWA does not regulate discharges of contaminants to groundwater, even where that contaminated groundwater reaches navigable waters. The Seventh Circuit's decision in *Village of Oconomowoc Lake v. Dayton Hudson Corp.* is on all fours and is dispositive of Plaintiff's claims here. Because PRN's claims are entirely predicated upon alleged discharges to groundwater, the Court should dismiss PRN's Complaint.

PRN's Complaint mirrors the allegations rejected by the district court and the Seventh Circuit in *Oconomowoc*. No. 93-0707, 1993 WL 668975 (E.D. Wis. Sept. 24, 1993), *aff'd* 24 F.3d 962 (7th Cir. 1994). That case involved alleged discharges to groundwater from a commercial retention pond that the plaintiff alleged reached nearby surface waters. *Id.* at *3. The plaintiff alleged—as PRN does here—that contaminants “will be intentionally discharged from a large retention pond into the groundwater system, through which the polluted runoff will migrate ‘into nearby wetlands and surface waters that are waters of the United States.’” *Id.* The plaintiff in *Oconomowoc* sued the site's owner for failing to obtain an NPDES permit authorizing those discharges to groundwater. *Id.* The district court granted the defendants' motion to dismiss, holding that “because plaintiffs' CWA claim is based on allegations of groundwater pollution, the claim must be dismissed” as groundwater is not a water regulated by the CWA. *Id.* The district court held that the plaintiffs' allegations that the impacted groundwater was hydrologically connected to nearby wetlands and surface waters (alleged to be waters regulated by the CWA) were insufficient to “bring [the alleged discharges to groundwater] within the terms of the CWA.” *Id.*

The Seventh Circuit affirmed the district court, rejecting the plaintiff's hydrological connection theory. The Court of Appeals held that “[n]either the Clean Water Act nor the EPA's

definition [of ‘waters of the United States’] asserts authority over ground waters, just because these may be hydrologically connected with surface waters.” 24 F.3d at 965.¹⁰ The Seventh Circuit explained that the CWA’s phrase “waters of the United States” serves as a “limitation of the Act’s coverage” and *must* exclude some waters if it is to have any meaning. *Id.* at 964-65. Looking to legislative history and decisions from other courts, the court found that “Congress elected to leave the subject [i.e., the regulation of groundwater] to state law.” *Id.* at 965. Accordingly, the court deferred to the state’s decision to allow construction to proceed without a permit for discharges to groundwater. *Id.* at 965-66.

The Seventh Circuit’s holding in *Oconomowoc* is good law and has been followed by other courts. *See, e.g., Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 n.5 (5th Cir. 2001); *Kentucky Waterways Alliance*, 303 F. Supp. 3d 530, 542 (E.D. Ky. 2017) (citing *Oconomowoc* for the proposition that “considering ground waters to be ‘navigable waters’ would strain the language of the CWA”); *26 Crown Street Associates*, No. 15-1439, 2017 WL 2969506 at *7-8 (D. Conn. Jul. 11, 2017) (holding that pollution of navigable waters via groundwater is not “a discrete and channelized conveyance of the kind that is required for the Clean Water Act’s NPDES permitting requirements to apply”); *Cape Fear River Watch v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 810 (E.D.N.C. 2014) (“[T]his court finds the reasoning of the . . . Seventh Circuit persuasive, and holds that Congress did not intend for the CWA to extend

¹⁰ The EPA definition of “waters of the United States” cited by the Seventh Circuit in *Oconomowoc* has since changed in some ways but continues to specifically exclude groundwater. 40 C.F.R. § 230.3(o)(2).

federal regulatory authority over groundwater, regardless of whether that groundwater is . . . ‘hydrologically connected’ to navigable surface waters.”¹¹

In an unsuccessful attempt to plead around *Oconomowoc*, PRN repeatedly emphasizes alleged groundwater discharges to the Middle Fork via “numerous, discrete, unpermitted seeps.” *See, e.g.*, Complaint ¶ 2. But whether groundwater emerges to the surface via groundwater seeps before entering the Middle Fork is irrelevant. As discussed above, *Oconomowoc* establishes that discharges of pollutants from a pond to groundwater that later enters a regulated surface water are outside of CWA jurisdiction. The discharges to groundwater from the Impoundments alleged by the Complaint are fully within the scope of the Seventh Circuit’s decision. The fact that groundwater allegedly carrying contaminants from the Impoundments may emerge along the riverbank shortly before entering the Middle Fork does nothing to alter *Oconomowoc*’s applicability here, as *Oconomowoc* plainly establishes that such discharges to groundwater are not subject to the CWA.

To the extent that PRN would have the Court follow contrary decisions from other circuits, the Court should decline to do so. For example, recent decisions by the Fourth and Ninth Circuits have held, contrary to *Oconomowoc*, that if groundwater is shown to be closely connected to a navigable surface water it may fall within the CWA’s coverage.¹² *See Hawaii’s Wildlife Fund v. County of Maui*, 886 F.3d 737, (9th Cir.); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, 887 F.3d 637 (4th Cir. 2018). However, these cases—which themselves

¹¹ *See also Kelley v. United States*, 618 F. Supp. 1103, 1106-07 (W.D. Mich. 1985) (granting a motion to dismiss a complaint against the Coast Guard for contamination of groundwater near Lake Michigan based on similar reasoning to that in *Oconomowoc*).

¹² The two circuits used slightly different wording to describe the required nexus between ground and surface water.

take different approaches on the issue—are still being litigated.¹³

More importantly, those decisions conflict with binding Seventh Circuit precedent. In *Oconomowoc*, the Seventh Circuit directly rejected a “hydrological connection” theory of CWA jurisdiction. 24 F.3d at 965 (holding that CWA does not “assert[] authority over ground waters just because these may be hydrologically connected with surface waters”). Unless *Oconomowoc* is overturned by the Seventh Circuit or the U.S. Supreme Court, it must be followed here. Because this case involves the same alleged operative facts as *Oconomowoc*—alleged improper discharges of pollutants from a pond to groundwater that later enters a CWA-regulated surface water—it should be dismissed for the same reason: “the federal government has not asserted a claim of authority over artificial ponds that drain into ground waters.” *Id.* at 966.

C. Consistent with Congress’ Intent and *Oconomowoc*, Illinois Actively Regulates Groundwater

Not only is *Oconomowoc* binding precedent, its underlying rationale applies with particular force in this case. One of the bases for the Seventh Circuit’s decision was its conclusion that the structure and legislative history of the CWA demonstrate that Congress intended to leave the regulation of groundwater to the states. Here, the State of Illinois actively regulates potential contamination of groundwater under state, not federal, law.

As the Seventh Circuit explained, “[t]he omission of ground waters from the regulations is not an oversight.” *Oconomowoc*, 24 F.3d at 965. In fact, the court noted, Congress rejected an attempt in 1972 to expand the scope of the CWA to cover groundwater because, in the words of

¹³ The County of Maui filed a Petition for Writ of Certiorari with the U.S. Supreme Court on August 27, 2018. In *Upstate Forever*, a petition for rehearing en banc was denied on May 30, 2018. See Order, ECF No. 123 (4th Cir. May 30, 2018). As of this filing, no Petition for Writ of Certiorari has been filed but the deadline for such a Petition has not yet expired. In addition, the Sixth Circuit heard oral argument on August 2, 2018, in two conflicting cases that raise the issue. *Tenn. Clean Water Network v. TVA*, No. 17-6155 (6th Cir.); *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, No. 18-5115 (6th Cir.).

a Senate committee, “the jurisdiction regarding groundwaters is so complex and varied from State to State.” *Id.* (quoting S.Rep. No. 414, 92d Cong., 1st Sess. 73 (1972)). For that reason, the court concluded “we are confident that the statute Congress enacted excludes *some* waters, and ground waters are a logical candidate.” *Id.* (emphasis in original). The Seventh Circuit looked also to the Fifth Circuit’s analysis of the CWA’s legislative history in *Exxon v. Train*, 554 F.2d 1310 (5th Cir. 1977). *Oconomowoc*, 24 F.3d at 965. In that case, the Fifth Circuit found that “a clear pattern of congressional intent with respect to groundwaters emerges upon close examination of . . . the Act That pattern is one of . . . encouragement of state efforts to control groundwater pollution—but not of direct federal control over groundwater pollution.” *Exxon*, 554 F.2d at 1322; *see also id.* at 1325 (concluding that the legislative history in the Senate “also evidences a clear intent to leave the establishment of standards and controls for groundwater pollution to the states”).

Consistent with Congress’ intent to leave groundwater regulation to the states, Illinois has adopted and actively enforces a comprehensive groundwater regulatory program under state law. Specifically, the Illinois Groundwater Protection Act directs IEPA to establish “comprehensive water quality standards which are specifically for the protection of groundwater.” 415 ILCS § 55/8(a). IEPA, in turn, has carried out this statutory mandate, adopting regulations that establish specific groundwater standards for different classes of groundwater. 35 Ill. Admin. Code §§ 620.410–450. Further, IEPA’s regulations provide that “No person shall cause, threaten or allow the release of any contaminant to groundwater so as to cause a groundwater quality standard . . . to be exceeded.” 35 Ill. Admin. Code § 620.405.

This state regulatory scheme is familiar to the Plaintiff here. PRN, in fact, has participated as a named plaintiff in at least two groundwater contamination cases before the

Illinois Pollution Control Board—both involving alleged discharges from coal ash ponds similar to those at Vermilion. *See Sierra Club, PRN, et al. v. City Water, Light & Power*, PCB 18-11, Complaint ¶¶ 28-29 (Sept. 27, 2017) (alleging groundwater pollution as a result of discharges from coal ash ponds);¹⁴ *Sierra Club, PRN, et al., v. Midwest Generation, LLC*, PCB 13-15, Complaint ¶¶ 52, 55, 58, 61 (Oct. 3, 2012) (alleging groundwater pollution at various facilities as a result of discharges from coal ash ponds).¹⁵ The Illinois Attorney General also actively enforces Illinois groundwater standards. *See, e.g., People v. Six M. Corp.*, PCB 12-35, Motion for Leave to File First Amended Complaint, Ex. A at ¶¶ 31-32 (Jul. 2, 2018) (alleging violation of state groundwater standards by gas station with leaking underground storage tanks).¹⁶ Thus, even if Plaintiff's claims are dismissed by the Court, there is another forum where citizen groups and the state may address concerns regarding groundwater at the Vermilion site.

IV. Conclusion

Defendant Dynegy Midwest Generation, LLC respectfully requests that the Court grant its Motion to Dismiss and dismiss the Complaint in its entirety for the reasons stated herein.

¹⁴ Available at <https://pcb.illinois.gov/documents/dsweb/Get/Document-95868> (last accessed Aug. 28, 2018).

¹⁵ Available at <https://pcb.illinois.gov/documents/dsweb/Get/Document-77623> (last accessed Aug. 28, 2018).

¹⁶ Available at <https://pcb.illinois.gov/documents/dsweb/Get/Document-98194> (last accessed Aug. 28, 2018).

Dated: August 29, 2018.

Respectfully submitted,

/s/ Daniel J. Deeb

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*Attorneys for Defendant Dynegy Midwest
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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2018, I electronically filed the foregoing **Memorandum in Support of Defendant's Motion to Dismiss**, with the Court's CM/ECF system, which caused an electronic copy of this filing to be served on counsel for Plaintiff Prairie Rivers Network.

This 29th day of August, 2018.

/s/ Daniel J. Deeb
Schiff Hardin LLP
233 South Wacker Drive, Suite 7100
Chicago, IL 60606

*Attorneys for Defendant Dynegy Midwest
Generation, LLC*

Exhibit B



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U.S. Army Corps of Engineers
Louisville District
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8902 Otis Avenue, Suite S106B
Indianapolis, IN 46216
ATTN: (b) (6)

June 28, 2018

RE: Middle Fork Vermilion River Erosion Mitigation and Streambank Stabilization
Vermilion Site; Oakwood, Illinois
Section 404 and 401 Joint Permit Application

(b) (6)

Pleased find enclosed our section 404 and 401 joint permit application, for a proposed, 1,900 linear feet streambank stabilization project located along the right descending bank of the Middle Fork Vermilion (MFV) River. Luminant is requesting a meeting with your office, to further review our design approach.

Please contact Mr. Phil Morris, a member of our Corporate Environmental team, with any questions or concerns at phil.morris@vistraenergy.com or (618) 343-7794.

Sincerely,
Dynergy Midwest Generation, LLC

A handwritten signature in blue ink, appearing to read "Matt Goering", written over a horizontal line.

Matt Goering
Vice President – Asset Closure

Enclosures

cc

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Midwest Region
601 Riverfront Drive
Omaha, Nebraska 68102-4226
ATTN: Mr. Hector Santiago

Illinois Department of Natural Resources
Planning Division
One Natural Resources Way
Springfield, Illinois 62702-1271
ATTN: Mr. Louis Yockey

Illinois Environmental Protection Agency
Bureau of Water
Division of Water Pollution Control
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Electronic Filing: Received, Clerk's Office 06/05/2019

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Project Summary and Section 404/401 Joint Permit Application

**MIDDLE FORK VERMILION RIVER
EROSION MITIGATION AND STREAMBANK STABILIZATION**

**VERMILION SITE
OAKWOOD, ILLINOIS
June 2018**

**Prepared for:
DYNEGY MIDWEST GENERATION, LLC**

SCI No. 2017-3081.31



SCI ENGINEERING, INC.

EARTH • SCIENCE • SOLUTIONS

GEOTECHNICAL
ENVIRONMENTAL
NATURAL RESOURCES
CULTURAL RESOURCES
CONSTRUCTION SERVICES

June 14, 2018

Mr. Phil Morris
Dynergy Midwest Generation, LLC
1500 Eastport Plaza Drive
Collinsville, Illinois 62234

RE: Project Summary and Section 404/401 Joint Permit Application
Middle Fork Vermilion River Erosion Mitigation and Streambank Stabilization – Vermilion Site
Oakwood, Illinois
SCI No. 2017-3081.31

Dear Mr. Morris:

SCI Engineering, Inc. (SCI) has prepared the following *Project Summary and Section 404/401 Joint Permit Application* for a proposed project located at the Dynergy Midwest Generation, LLC Vermilion Site along a portion of the Middle Fork Vermilion (MFV) River. The enclosed information is intended to provide the U.S. Army Corps of Engineers (USACE), the Illinois Environmental Protection Agency (IEPA), and the Illinois Department of Natural Resources (IDNR) the documentation typically needed to initiate the Section 404/401 application process. A combination of stone toe protection, embedded toe boulders, void-filled riprap, and live branch layering is being proposed to stabilize a segment of the riverbank on the project site. The project will stabilize an area below the ordinary high-water mark that is approximately

1,900 linear feet (LF) along the right descending bank of the MFV River. This report and the attached Section 404/401 Joint Permit Application Form should be submitted to the USACE, IEPA, and IDNR to initiate the permitting process. The attached report should be read in its entirety. We appreciate the opportunity to provide you with our natural resource services.

If you have any questions, or if we can be of further assistance, please do not hesitate to call.

Respectfully,

SCI ENGINEERING, INC.

A handwritten signature in black ink, appearing to read 'Scott E. Billings'.

Scott E. Billings
Project Scientist

A handwritten signature in black ink, appearing to read 'Michael R. Hartoin'.

Michael R. Hartoin
Vice President

SEB/MRH/tlw

Enclosure

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- Appendix B – Middle Fork Vermilion River – Erosion Mitigation and Riverbank Stabilization Drawings (Stantec)
- Appendix C – Joint Permit Application Form
- Appendix D – Bat Habitat Assessment Report
- Appendix E – Information for Planning and Consultation (IPaC) Report
- Appendix F – Ecological Compliance and Assessment Tool (EcoCAT) Report
- Appendix G – Middle Fork Vermilion River – Erosion Mitigation and Riverbank Stabilization Planting and Maintenance Plan (Stantec)

Project Summary and Section 404/401 Joint Permit Application

**MIDDLE FORK VERMILION RIVER
EROSION MITIGATION AND STREAMBANK
STABILIZATION**

**VERMILION SITE
OAKWOOD, ILLINOIS**

1.0 INTRODUCTION

As part of the Section 404/401 permitting process, Dynegy Midwest Generation, LLC (Dynegy) is submitting a Section 404/401 Joint Permit Application to the U.S. Army Corps of Engineers (USACE), Illinois Environmental Protection Agency (IEPA), and the Illinois Department of Natural Resources (IDNR). The permit application is being prepared for a proposed streambank stabilization project located along a stretch of the Middle Fork Vermilion (MFV) River. The project will stabilize approximately 1,900 linear feet (LF) of the riverbank. This portion of the MFV River is experiencing erosion along the right descending bank within the northern portion of the Vermilion Site, located near Oakwood, Illinois. Bank stabilization within this section of the river is important to mitigate the erosion and lateral migration of the MFV River. Stantec, Inc. has prepared a stream stabilization plan that includes the utilization of stone toe protection, embedded toe boulders, void-filled riprap, and live branch layering (Appendix B). This report includes the plan prepared by Stantec, as well as a summary of the proposed direct disturbance to areas below the ordinary high-water mark (OHWM) along this stretch of the MFV River.

2.0 PROJECT DESCRIPTION

The project area is located along the MFV River near Oakwood, Illinois (T20N, R12W, Section 21). The 1,900-foot-long project area is located within a 17.1-mile stretch of the MFV River that is listed as a nationally-designated scenic river that falls under the regulations of the National Wild and Scenic River Act.

Bank stabilization is being proposed to mitigate river migration and must be determined allowable under the criteria of the National Wild and Scenic Rivers Act (Public Law 90-542). Under Public Law 90-542, no water resource project can be implemented within the designated area that will have any adverse impact on the scenic, geologic, fish and wildlife, ecological, recreational or historic resources of the river system.

3.0 EROSION MITIGATION AND STABILIZATION PLAN

On April 27, 2017, representatives from Dynergy, Stantec, and SCI Engineering, Inc. (SCI) performed a field exploration of the subject site to assess current conditions and discuss the concept of streambank stabilization. Following the meeting, Stantec developed a stabilization plan that includes a combination of stone toe protection, embedded toe boulders, void-filled riprap, and live branch layering along approximately 1,900 LF of the right descending bank of the MFV River. As part of the project, the existing gabion baskets along the river edge within the central portion of the 1,900 LF disturbance area will be removed. A photographic summary of the representative site conditions is included as Appendix A. The proposed plan is included on the drawings completed by Stantec titled *Middle Fork Vermilion River – Erosion Mitigation and Riverbank Stabilization*, dated May 2018 (Appendix B).

Based on the plans developed by Stantec, the proposed project will feature stabilization along the right-descending bank of the MFV River. Approximately 1,900 LF of the right-descending bank of the MFV River has been identified for streambank stabilization, including the use of stone toe protection, embedded toe boulders, void-filled riprap, live branch layering, and removal of exiting gabion baskets. Based on calculations provided by Stantec, the result is approximately 2,130 cubic yards of stone toe protection boulders and approximately 20,240 cubic yards of void-filled riprap to be placed below the OHWM of the MFV River. More details on the specific quantities and locations of riprap fill and grading for construction access can be found on the site drawings completed by Stantec (Appendix B). In addition, the details of the proposed planting and maintenance as part of the project can be found in the *Middle Fork Vermilion River – Erosion Mitigation and Riverbank Stabilization Planting and Maintenance Plan* prepared by Stantec, and included as Appendix G.

4.0 EROSION CONTROL PLAN

The project will be conducted under the guidance of IEPA National Pollutant Discharge Elimination System (NPDES) permit requirements. An erosion control plan and subsequent Best Management Practice's (BMP's) will be submitted and approved by the IEPA prior to project construction.

5.0 THREATENED AND ENDANGERED SPECIES

Various available resources were consulted to determine the listed threatened and endangered species that may be present within the vicinity of the project area. The United States Fish and Wildlife Service (USFWS) Information, Planning and Conservation (IPaC) tool was utilized on June 4, 2018 to obtain a species list for the project to be used in project planning. Additionally, a list was obtained from IDNR by utilizing the Ecological Compliance Assessment Tool (EcoCAT). Both the IPaC and EcoCAT reports provide a list of the threatened and endangered species or their critical habitat that may exist within the

June 2018

vicinity of the area for project planning, however they are not a substitute for detailed site surveys or field surveys required for environmental assessments. Both the USFWS IPaC document and the IEPA EcoCAT report should be read in their entirety and are enclosed as Attachments E and F, respectively.

According to information compiled by the USFWS IPaC report, there are six federally threatened and/or endangered species that have the potential to occur within the site boundaries and/or may be affected by the proposed project. These species include: Indiana bat (*Myotis sodalis*), northern long-eared bat (*Myotis septentrionalis*), clubshell mussel (*Pleurobema clava*), rabbitsfoot mussel (*Quadrula cylindrica cylindrica*), Eastern prairie fringed orchid (*Platanthera leucophaea*), and Mead's milkweed (*Asclepias meadii*). In addition, certain birds are protected under the Migratory Bird Treaty Act, as well as the Bald and Golden Eagle Protection Act. Based on the results of the IPaC report, 12 bird species or particular concern were identified because they occur on the USFWS Birds of Conservation Concern list or warrant special attention within the project location. The birds of concern are identified on the IPaC report and attached as Appendix E.

Additionally, the IDNR EcoCAT report lists eight state-listed threatened and/or endangered species that have the potential to occur within the vicinity of the project area. Most listed species are aquatic mussels, and include the clubshell (*Pleurobema clava*), little spectaclecase (*Villosa lienosa*), Northern riffleshell (*Epioblasma torulosa rangiana*), purple wartyback (*Cyclonaias tuberculata*), salamander mussel (*Simpsonias ambigua*), and wavy-rayed lampmussel (*Lampsilis fasciola*). Additionally, one fish species (blue breast darter, *Etheostoma camurum*), one plant species (fibrous-rooted sedge, *Carex communis*), and six Illinois Natural Area Inventory (INAI) Sites and conservation areas were listed within the vicinity of the project boundaries. As stated in the attached USFWS and IDNR correspondence, further discussions and coordination with the USFWS and/or IDNR will likely be required to determine if the listed species will potentially be affected by the project actions.

SCI previously performed a field exploration of the project site to determine if suitable summer roosting habitat for the federally-listed endangered Indiana bat (*Myotis sodalis*) and the threatened northern long-eared bat (*Myotis septentrionalis*) exists within the project boundaries. A team of SCI scientists, led by a Federally-licensed bat biologist, performed the bat habitat assessment along the right descending bank of the MFV River within the limits of the proposed stabilization area on March 5, 2018. The area surveyed during the field exploration extended beyond the proposed construction limits as detailed on the attached Figure 3. The survey area was determined to have low suitability as Indiana and northern long-eared bat

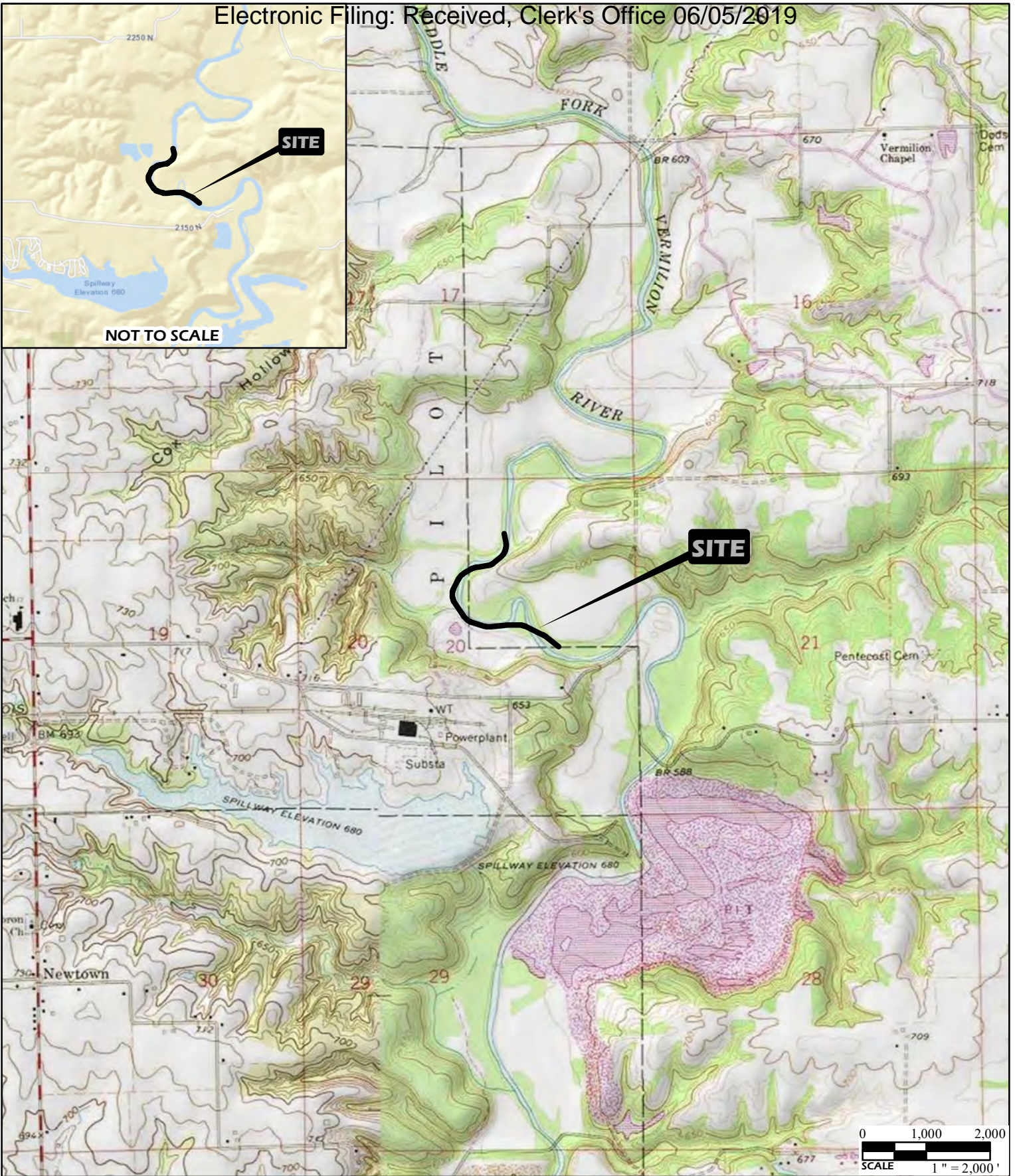
summer roosting habitat, as only two suitable snag trees were identified in the northern portion of the site. No additional potential roost trees were identified in the central and southern areas of the site. Our findings are provided in the *Bat Habitat Assessment Report*, included as Appendix D.



7.0 SUMMARY

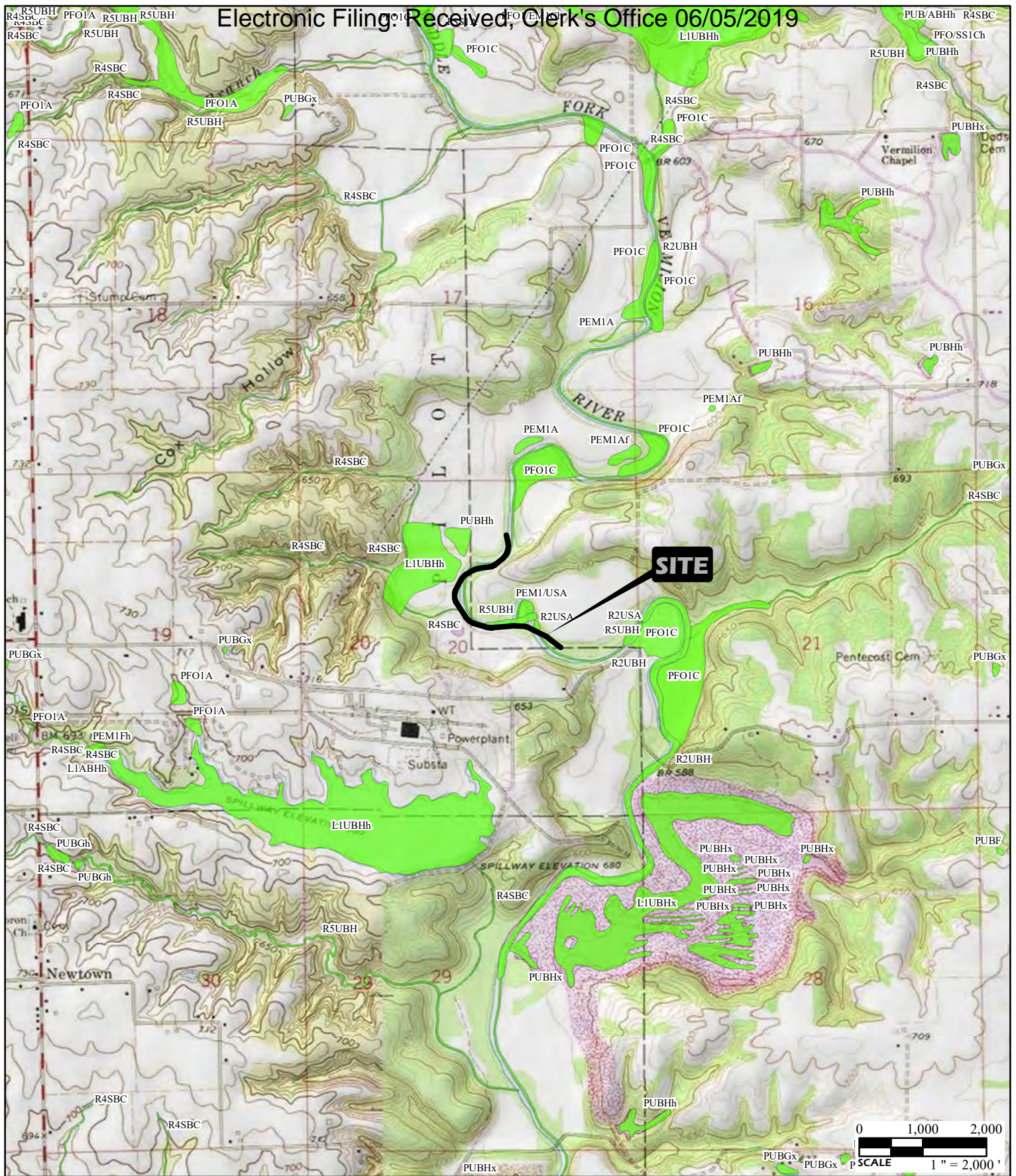
Dynergy will stabilize and protect approximately 1,900 LF of the right descending bank of the MFV River to reduce and mitigate the potential effects of erosion. As the stabilization area becomes established following construction, the stone toe protection and live branch layering are intended to restore the eroding bank to a stable condition. Based on the proposed impacts to a water of the United States, the project will require a Section 404 Permit from the USACE, Section 401 Water Quality Certification from IEPA, and may require general wetland permits or further authorization from IDNR. The *Joint Permit Application Form* is included as Appendix C for submittal to the USACE, IEPA, and IDNR.

8.0 LIMITATIONS

This report has been prepared for the exclusive use of Dynergy, the USACE, IEPA, and IDNR. SCI is not responsible for independent conclusions or recommendations made by others. SCI is not responsible for surveys, calculations, or plans that were prepared by others. The anticipated impacts to the MFV River as presented in this report are based on the information and drawings prepared and provided by Stantec, dated May 2018 and attached as Appendix B. Any variation from this plan may require additional submittals to the regulatory agencies.



	<p>PROJECT NAME VERMILION SITE OAKWOOD, ILLINOIS</p>			<p>GENERAL NOTES/LEGEND USGS TOPOGRAPHIC MAP COLLISION, ILLINOIS QUADRANGLE DATED 1968 DANVILLE NW, ILLINOIS QUADRANGLE DATED 1978 10' CONTOURS</p>	
	<p>VICINITY AND TOPOGRAPHIC MAP</p>				
<p>DRAWN BY RCV CHECKED BY SEB</p>	<p>DATE 06/2018</p>	<p>JOB NUMBER 2017-3081.31</p>	<p>STREET MAP HTTP://GOTO.ARCGISONLINE.COM/MAPS/WORLD_STREET_MAP</p>	<p>FIGURE 1</p>	



PROJECT NAME
 VERMILION SITE
 OAKWOOD, ILLINOIS

NATIONAL WETLANDS INVENTORY

DRAWN BY	RCV	DATE	06/2018	JOB NUMBER	2017-3081.31
CHECKED BY	SEB				

GENERAL NOTES/LEGEND

NATIONAL WETLAND INVENTORY DATA
 OBTAINED FROM www.fws.gov.

USGS TOPOGRAPHIC MAP
 COLLISION, ILLINOIS QUADRANGLE
 DATED 1968
 DANVILLE NW, ILLINOIS QUADRANGLE
 DATED 1978

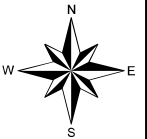







FIGURE
 2

-  INDICATES PHOTO LOCATION, DESIGNATION AND ORIENTATION (SEE APPENDIX A)
 -  INDICATES CONSTRUCTION LIMITS
 -  INDICATES PROPOSED ACCESS ROAD
 -  INDICATES CARBON BASKETS (CB)
 -  INDICATES RIVER IMPACT AREA
- ALL PHOTOGRAPHS OBTAINED FROM ARCGIS ONLINE, WORLD IMAGERY DATED 2/06/2016
LAND USE PHOTOS, DATED 7/09/2017.

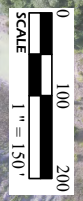
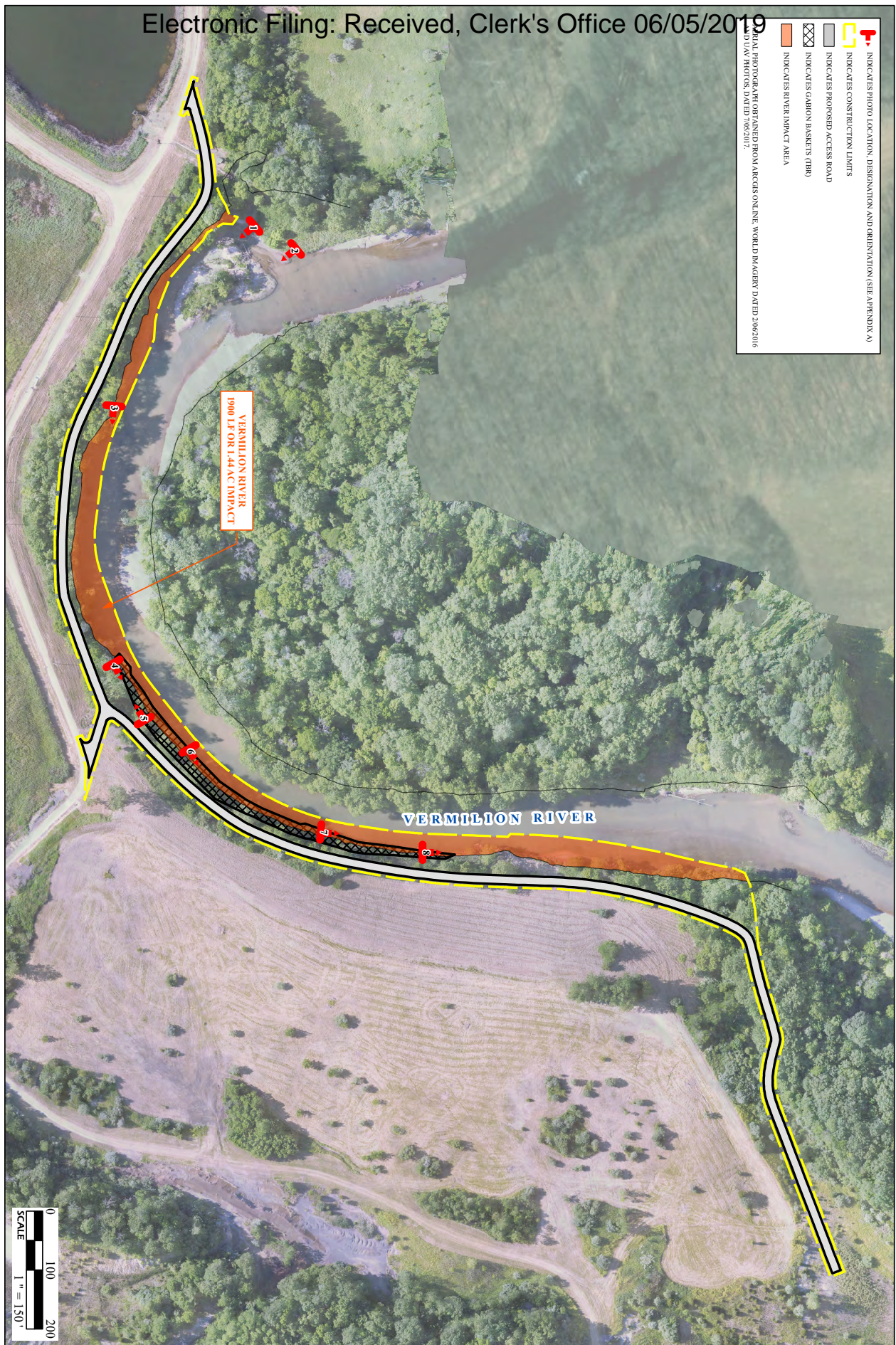
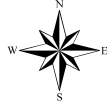


FIGURE	3
CHECKED BY	SEB
DRAWN BY	RCV
DATE	06/20/18
DATE	2017-08-31
JOB NUMBER	2017-08-31



PROJECT NAME	VERMILION SITE OAKWOOD, ILLINOIS
GENERAL NOTES/LEGEND	
IMPACT ASSESSMENT & AERIAL PHOTOGRAPH	



APPENDIX A



Photo 1. Upstream portion of the project area along the right descending river bank, facing downstream southwest (4-26-17)



Photo 2. Northern portion of the project area. Project location will be along the right descending bank, facing downstream southwest (4-26-17)

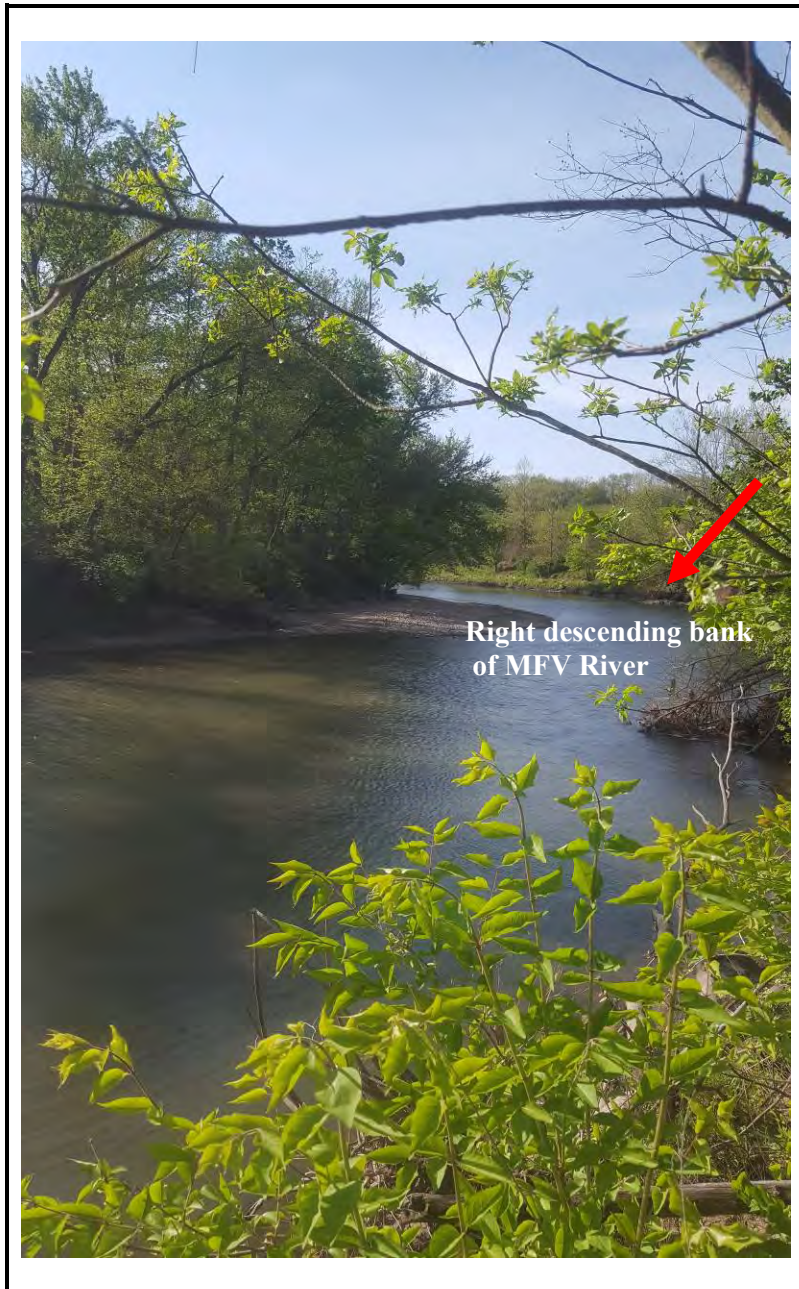


Photo 3. Photo taken from right descending bank of the river showing the central portion of the project site, facing downstream south (4-26-17)



Photo 4. Photo along the right descending bank of the river showing the existing gabion baskets, facing downstream south (4-26-17)



Photo 5. Photo along right descending bank of the river near existing gabion area, facing upstream north (4-26-17)

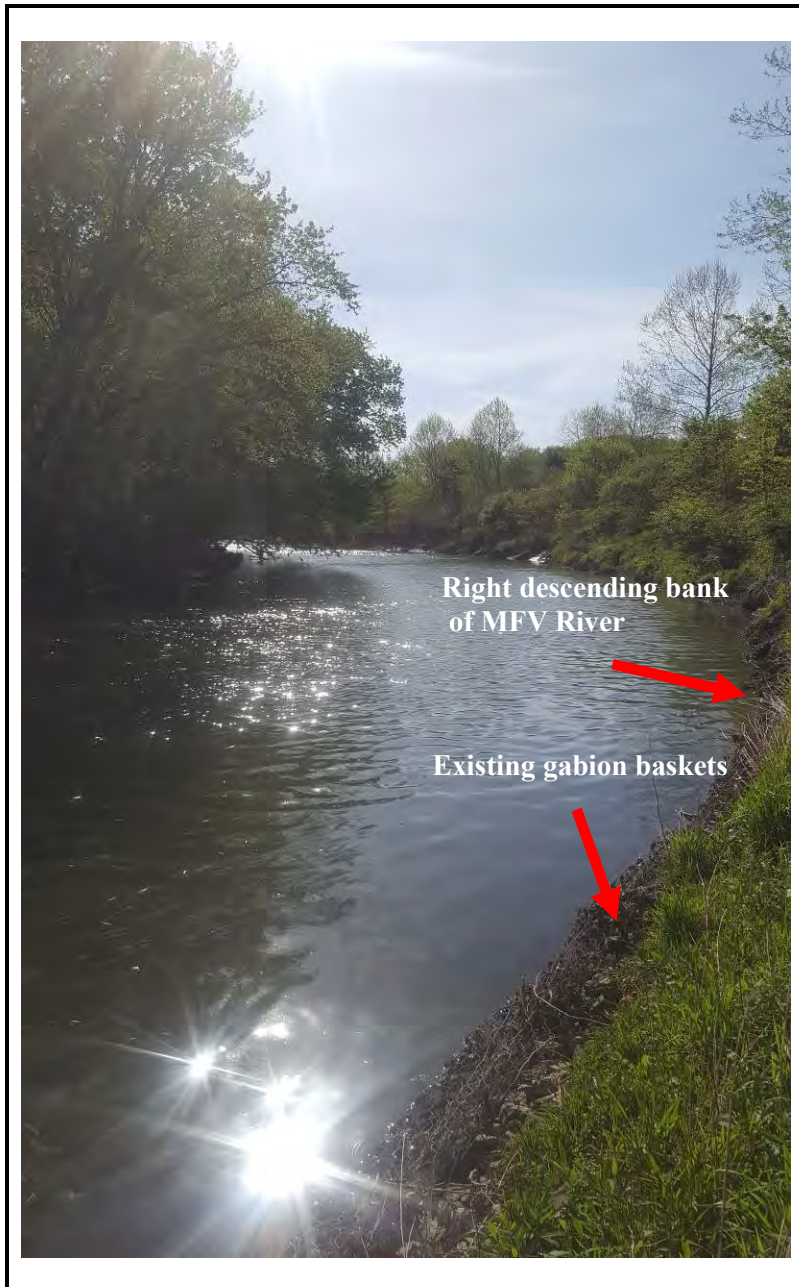


Photo 6. Central portion of the project area along the right descending bank of the river. Photo taken near bend in the river and near existing gabion area, facing downstream southeast (4-26-17)

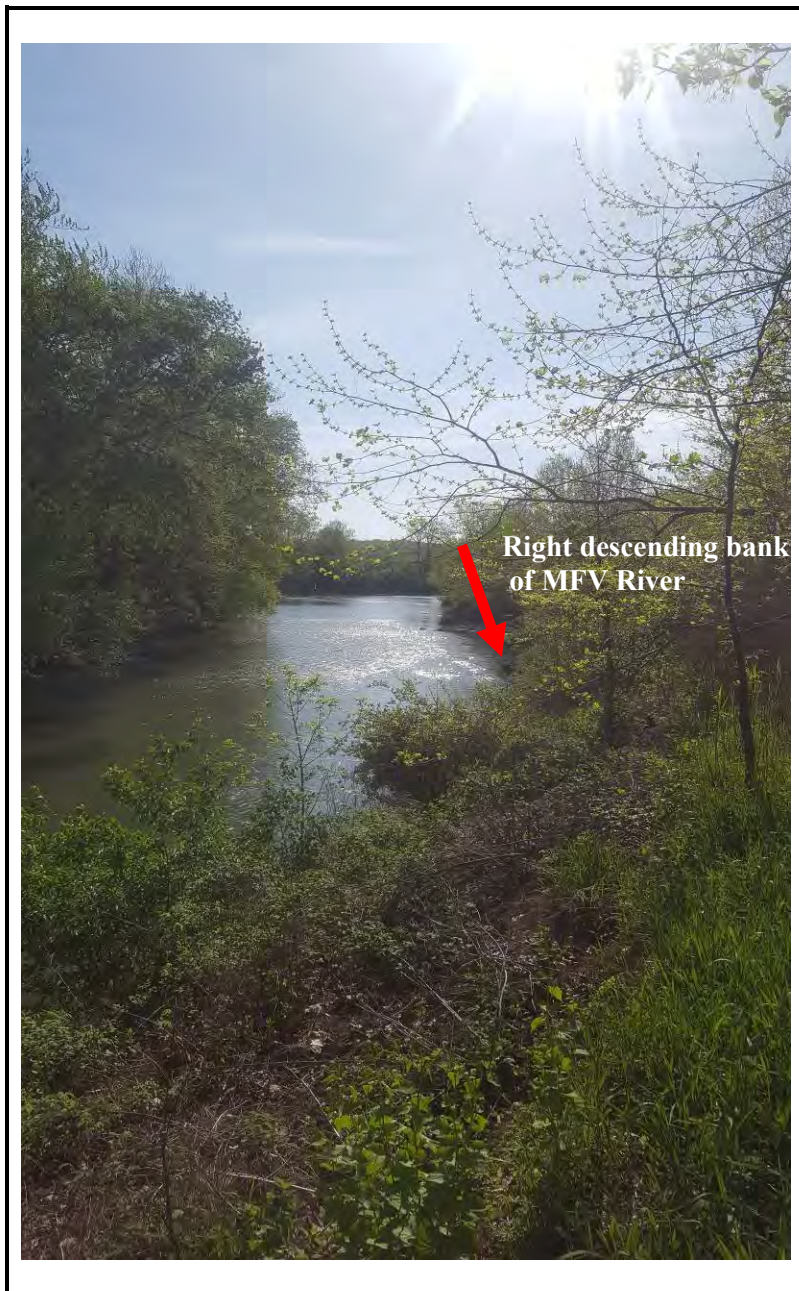


Photo 7. View of the southern portion of the project area from the right descending river bank, facing downstream east (4-26-17)



Photo 8. Southern portion of the project area facing downstream. Photo taken from the right descending river bank, facing east (4-26-17)

APPENDIX B



Stantec

MIDDLE FORK VERMILION RIVER
EROSION MITIGATION AND RIVERBANK STABILIZATION
DRAWINGS FOR PERMIT APPLICATION
NOT FOR CONSTRUCTION

DYNEGY MIDWEST GENERATION, LLC
1300 EASTPORT PLAZA DRIVE
COLLINGSVILLE, ILLINOIS 62234

MAY 2018

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CONSTRUCTION
SEAL PLACEHOLDER



3000 Development Center Circle
 St. Louis, Missouri 63103
 www.stantec.com

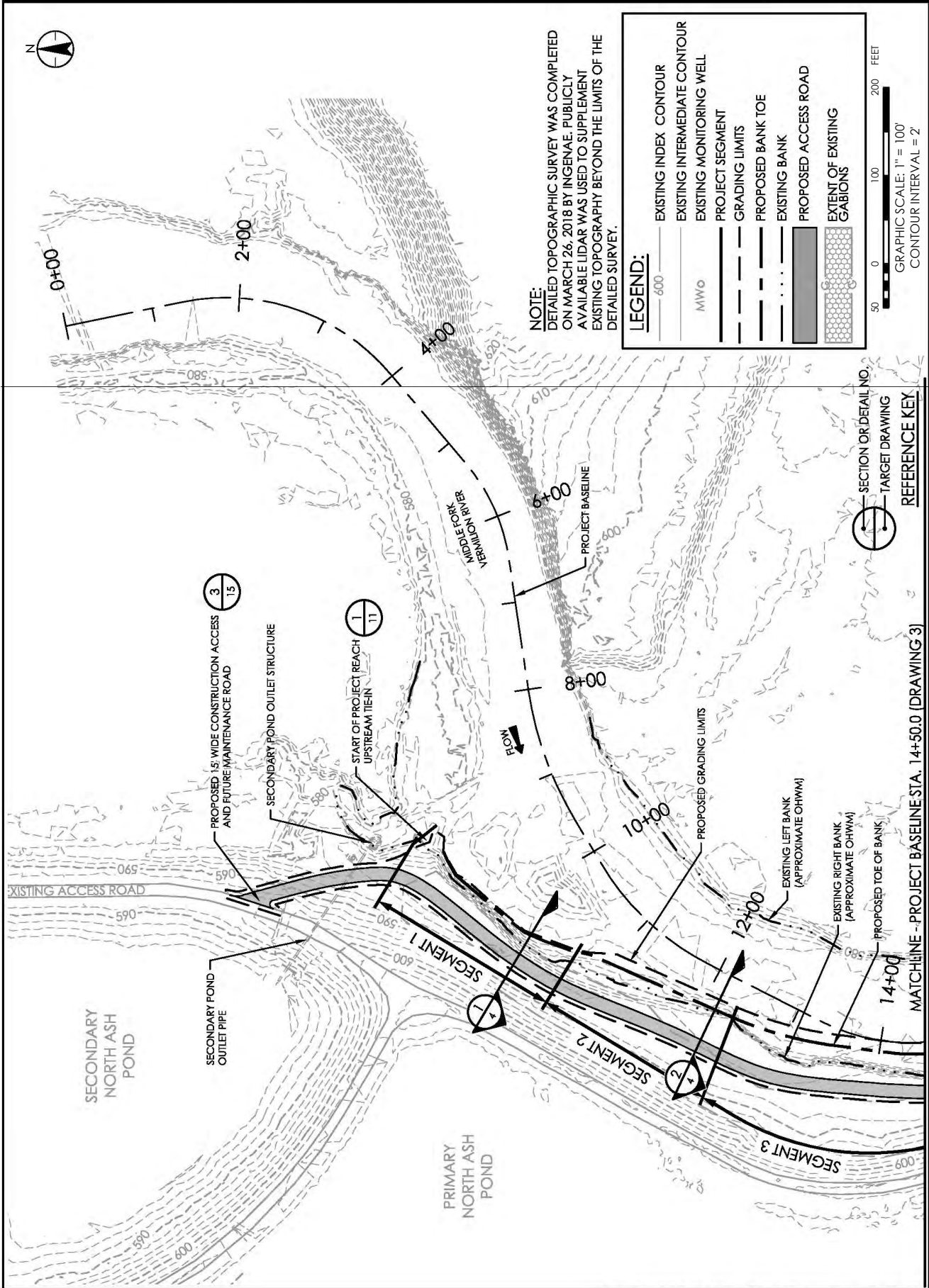
DATE	BY	APP'D	DESCRIPTION

Electronic Filing: Received, Clerk's Office 06/05/2019

MIDDLE FORK VERMILION RIVER EROSION MITIGATION AND RIVERBANK STABILIZATION
 DYNEXY MIDWEST GENERATION, LLC
 Client/Project
 Permit/Spec

DRAFT - NOT FOR CONSTRUCTION
 SEAL PLACEHOLDER

Project Number: 175597154
 Drawing No.: 2
 Revision: 0
 Date: 06/05/2019
 Scale: 1" = 100'
 Contour Interval: 2'



NOTE:
 DETAILED TOPOGRAPHIC SURVEY WAS COMPLETED ON MARCH 26, 2018 BY INGENAE. PUBLICLY AVAILABLE LIDAR WAS USED TO SUPPLEMENT EXISTING TOPOGRAPHY BEYOND THE LIMITS OF THE DETAILED SURVEY.

LEGEND:

(Symbol)	EXISTING INDEX CONTOUR
(Symbol)	EXISTING INTERMEDIATE CONTOUR
(Symbol)	EXISTING MONITORING WELL
(Symbol)	PROJECT SEGMENT
(Symbol)	GRADING LIMITS
(Symbol)	PROPOSED BANK TOE
(Symbol)	EXISTING BANK
(Symbol)	PROPOSED ACCESS ROAD
(Symbol)	EXTENT OF EXISTING GABBIONS

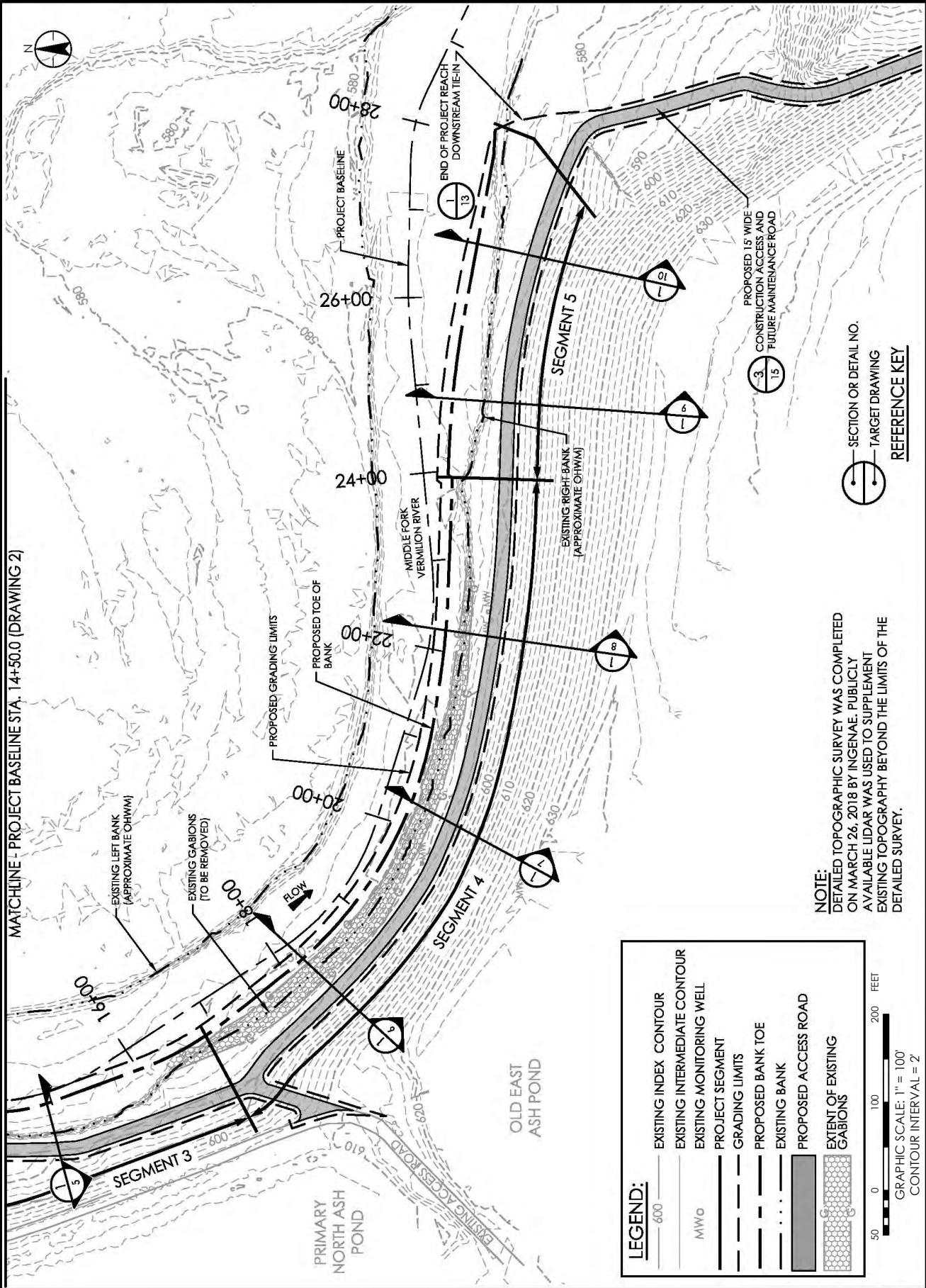


REFERENCE KEY

Revision	By	App'd	Date

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 Permit/Spec: **OVERVIEW**
 DYNEGY MDMWEST GENERATION, LLC

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 SEAL PLACEHOLDER
 Project Number: 17567154
 Job Name: 0716163010000
 Date: 03/26/2018
 User: JCH
 Drawing No.: 3
 Revision: 0



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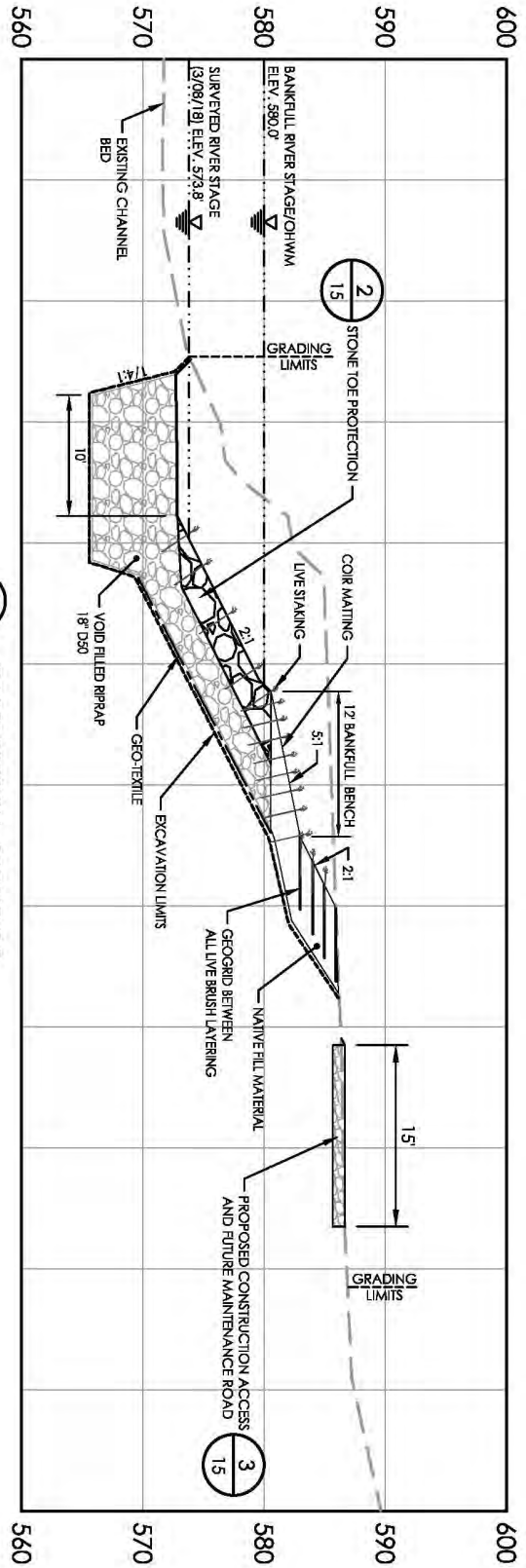
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 TARGET DRAWING
 REFERENCE KEY

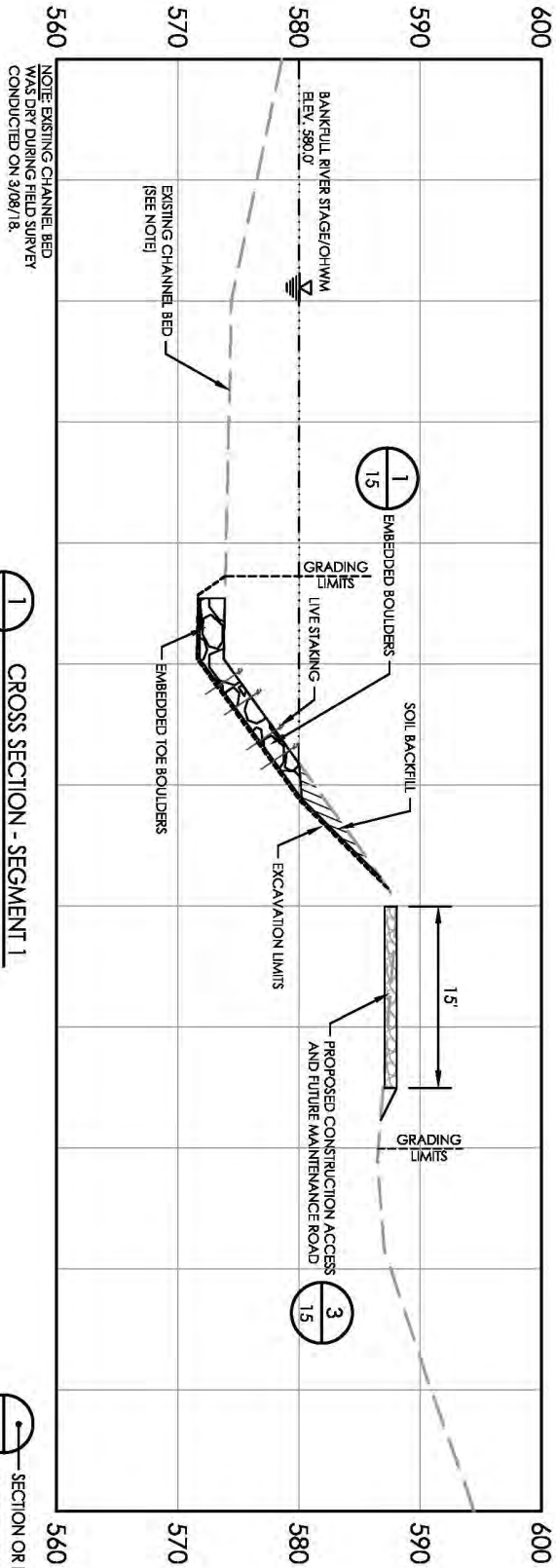
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- M/W — EXISTING INTERMEDIATE CONTOUR
- — EXISTING MONITORING WELL
- — PROJECT SEGMENT
- — GRADING LIMITS
- — PROPOSED BANK TOE
- — EXISTING BANK
- — PROPOSED ACCESS ROAD
- — EXTENT OF EXISTING GABIONS

50 0 100 200 FEET
 GRAPHIC SCALE: 1" = 100'
 CONTOUR INTERVAL = 2'



2 CROSS SECTION - SEGMENT 2
 SCALE: 1"=10'



1 CROSS SECTION - SEGMENT 1
 SCALE: 1"=10'

NOTE: EXISTING CHANNEL BED WAS DRY DURING FIELD SURVEY CONDUCTED ON 3/08/18.

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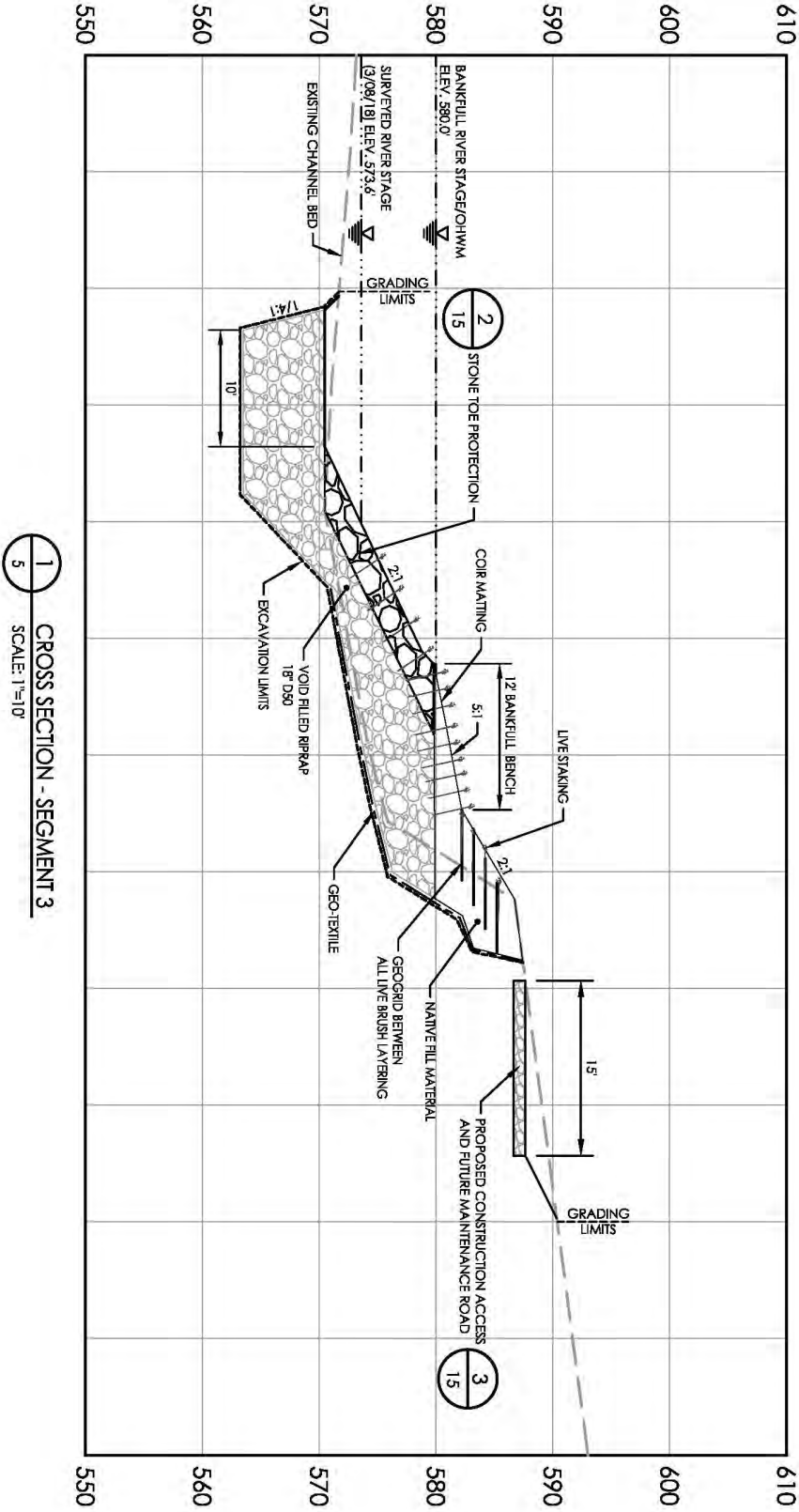
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 Title: MIDDLE FORK VERMILION RIVER EROSION MITIGATION AND RIVERBANK STABILIZATION
 Location: OAKWOOD, ILLINOIS

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Client/Project: DYNEGY MIDWEST GENERATION, LLC

MIDDLE FORK VERMILION RIVER EROSION MITIGATION AND RIVERBANK STABILIZATION

OAKWOOD, ILLINOIS

Title: CROSS SECTION - SEGMENT 3

Rev.	By	App'd.	TYAWMO

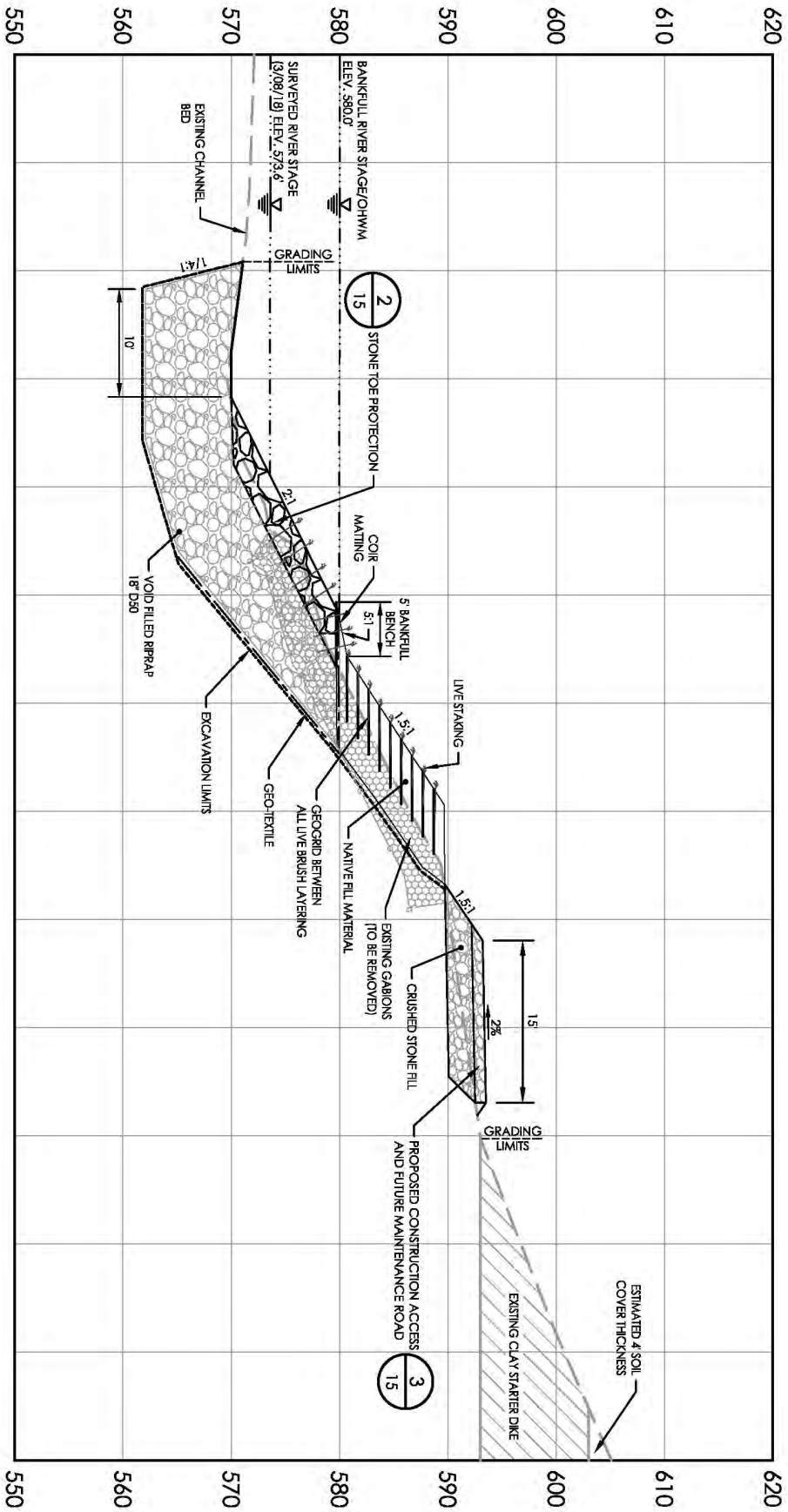
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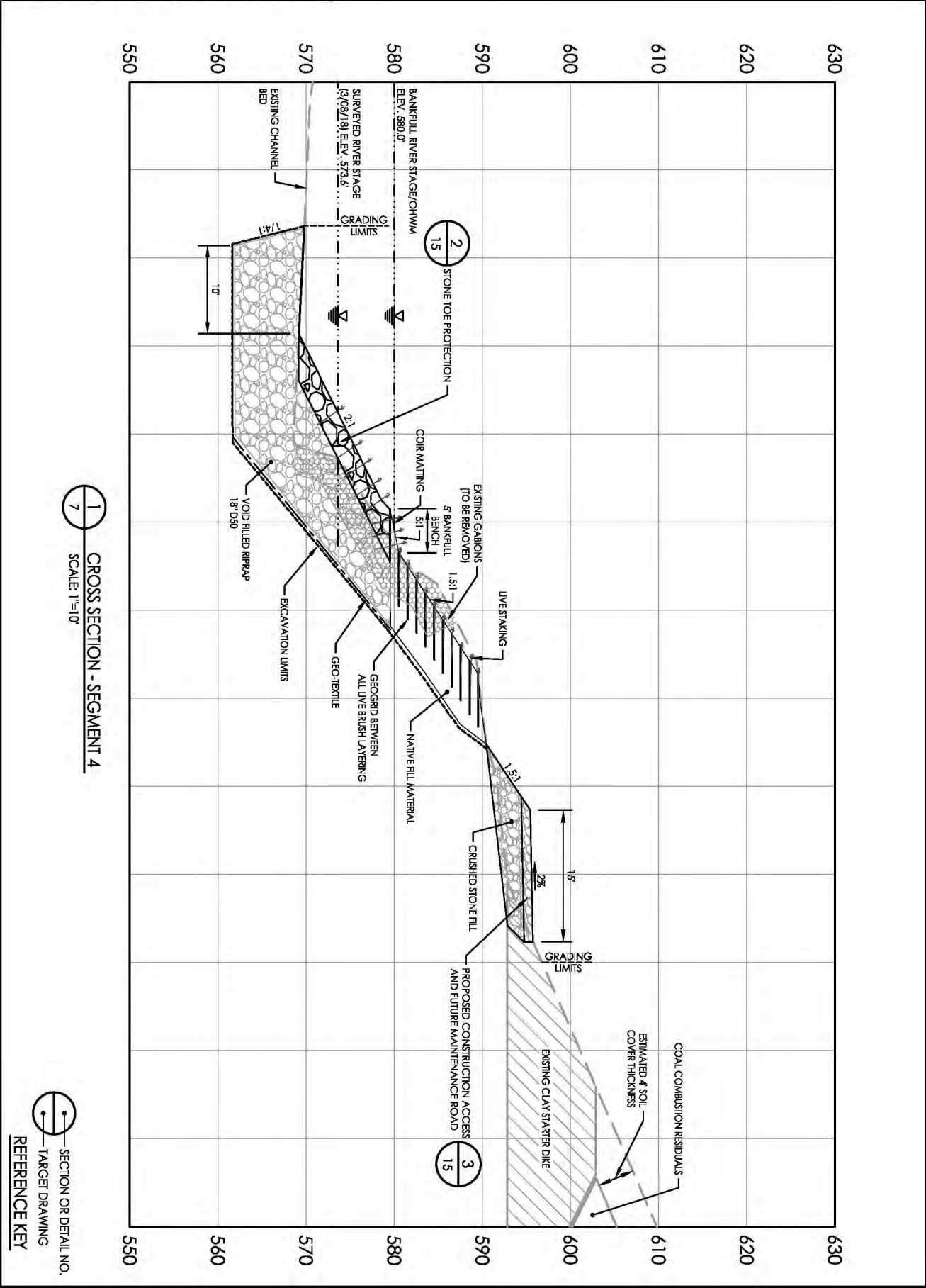
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 OAKWOOD, ILLINOIS
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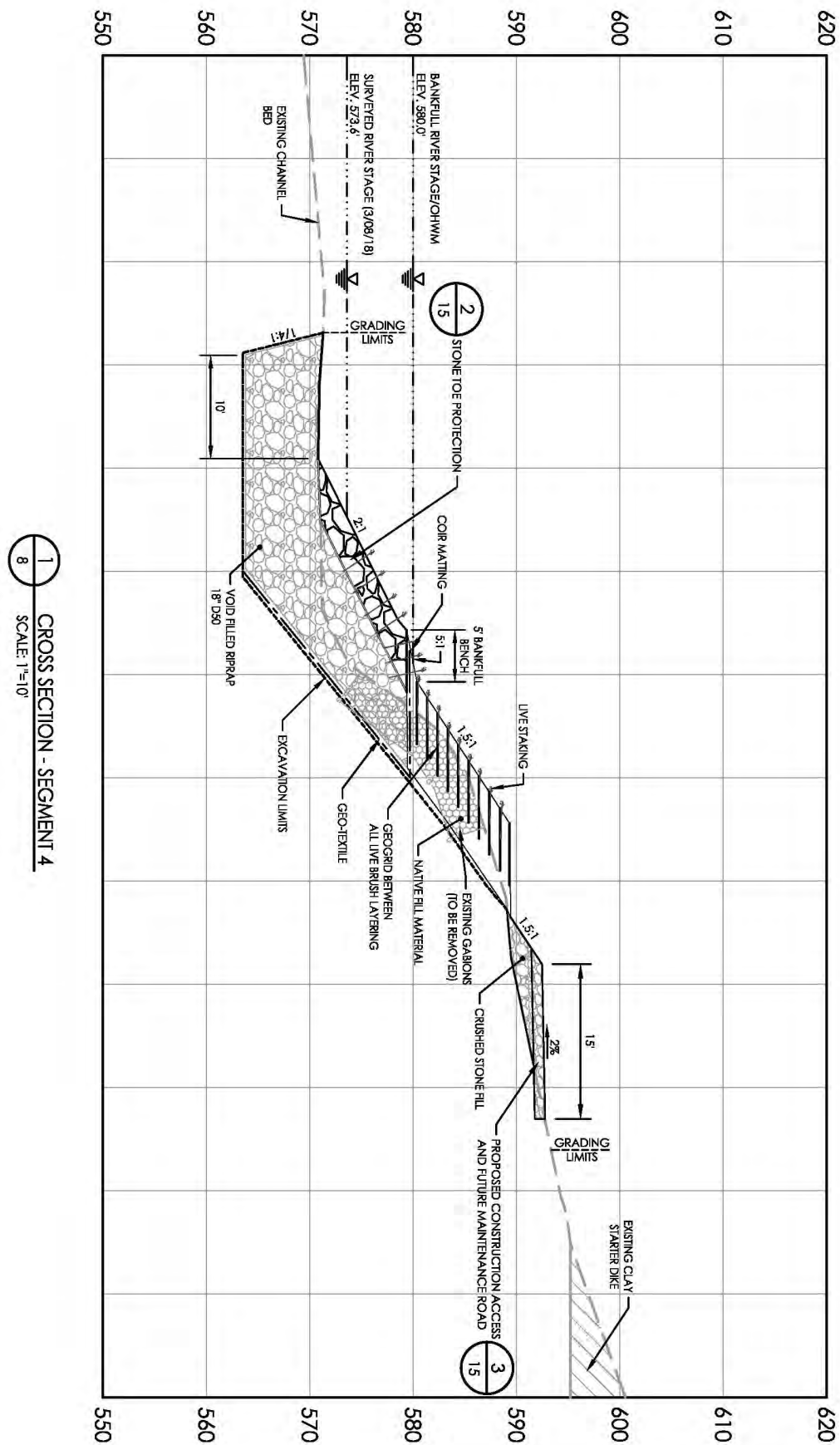
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 Title: CROSS SECTION - SEGMENT 4

Revision	By	Appd.	TYAMDD

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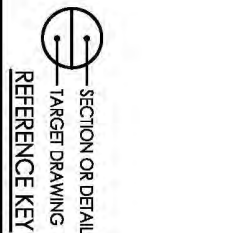
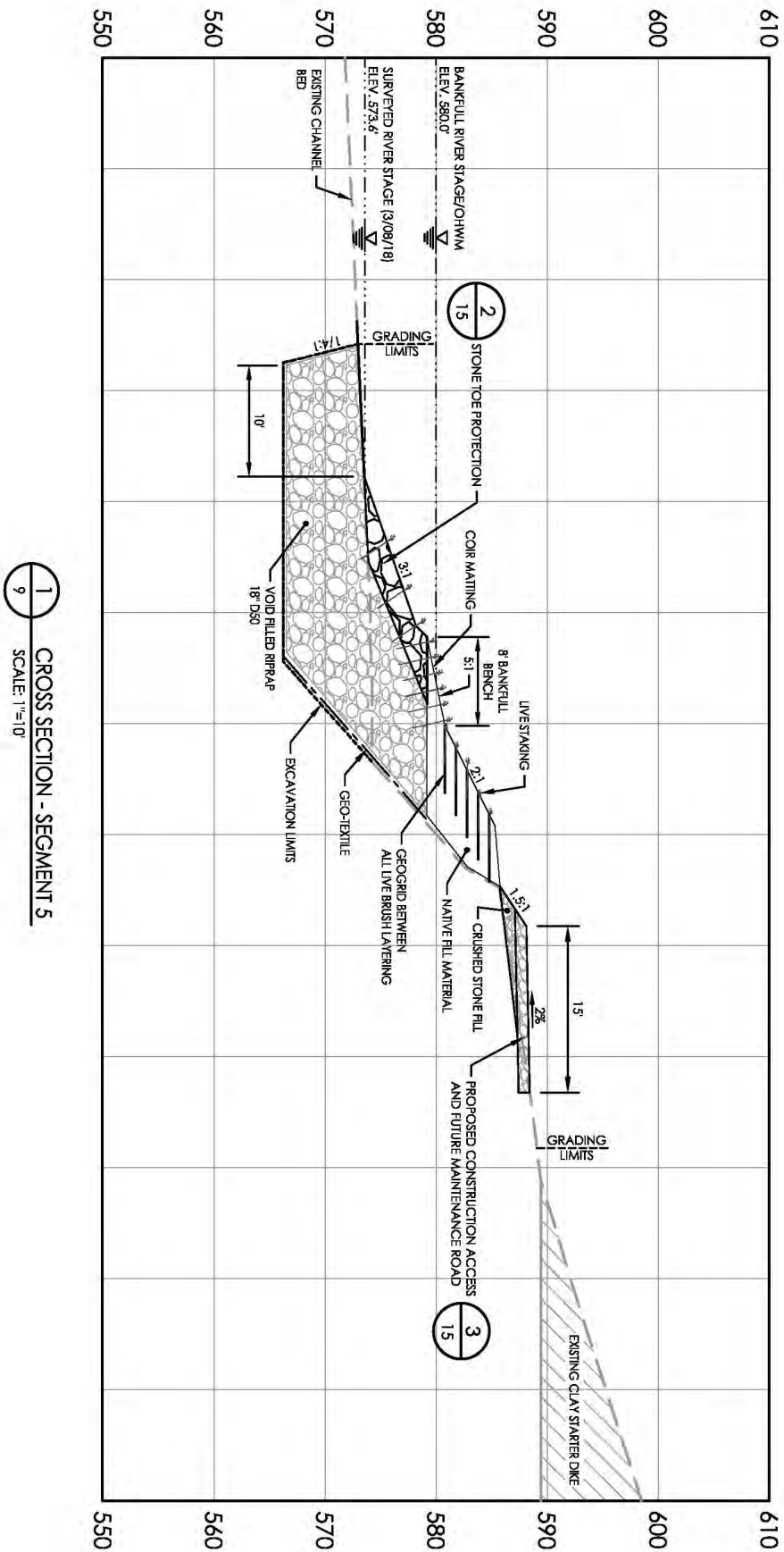
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 0 of 15

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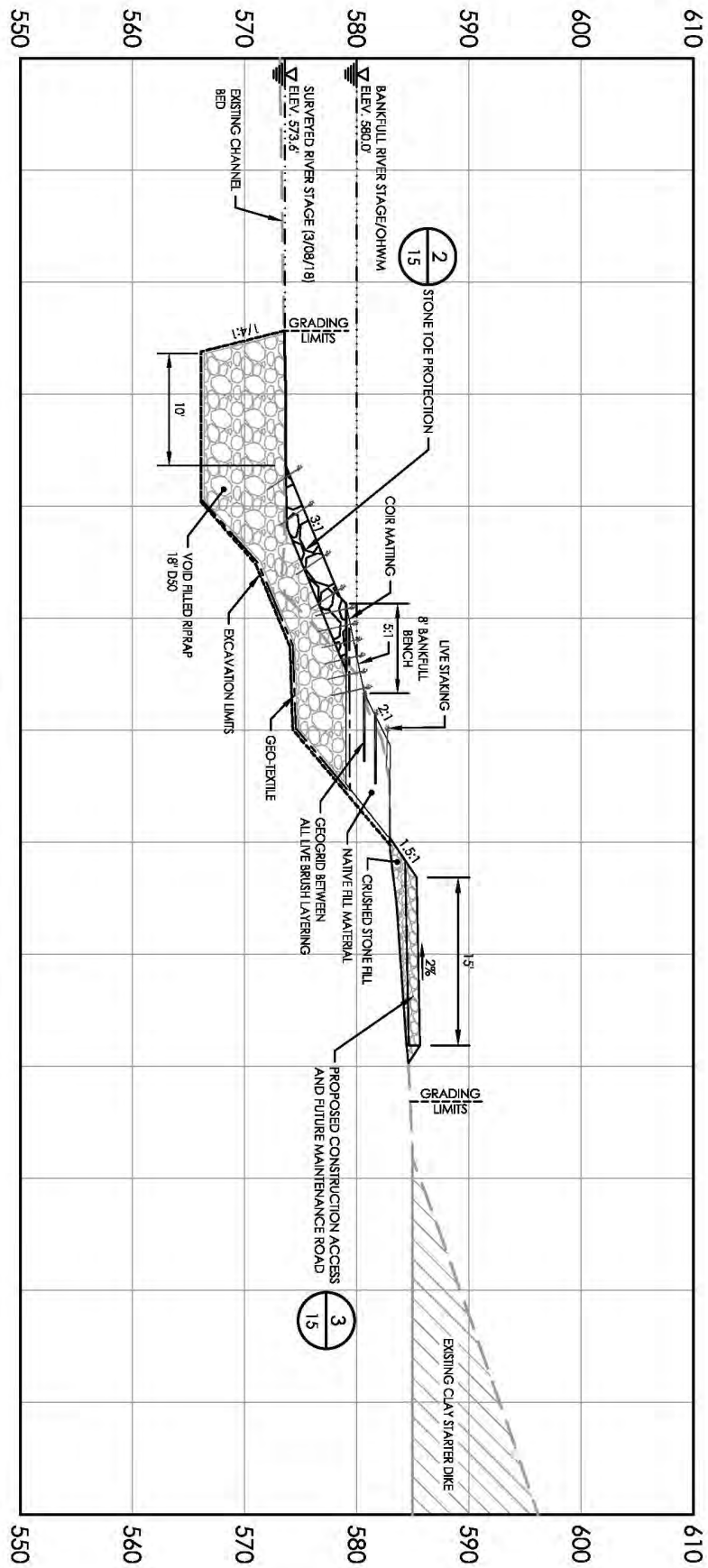
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Checked By: TMM/DO	Scale: 1"=10'
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Project Location: OAKWOOD, ILLINOIS	Project Name: MIDDLE FORK VERMILION RIVER EROSION MITIGATION AND RIVERBANK STABILIZATION
Draft - NOT FOR CONSTRUCTION SEAL PLACERHOLDER	Revision
0	By: []
9 of 15	Appd: TMM/DO





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 SCALE: 1"=10'

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 TARGET DRAWING
 REFERENCE KEY

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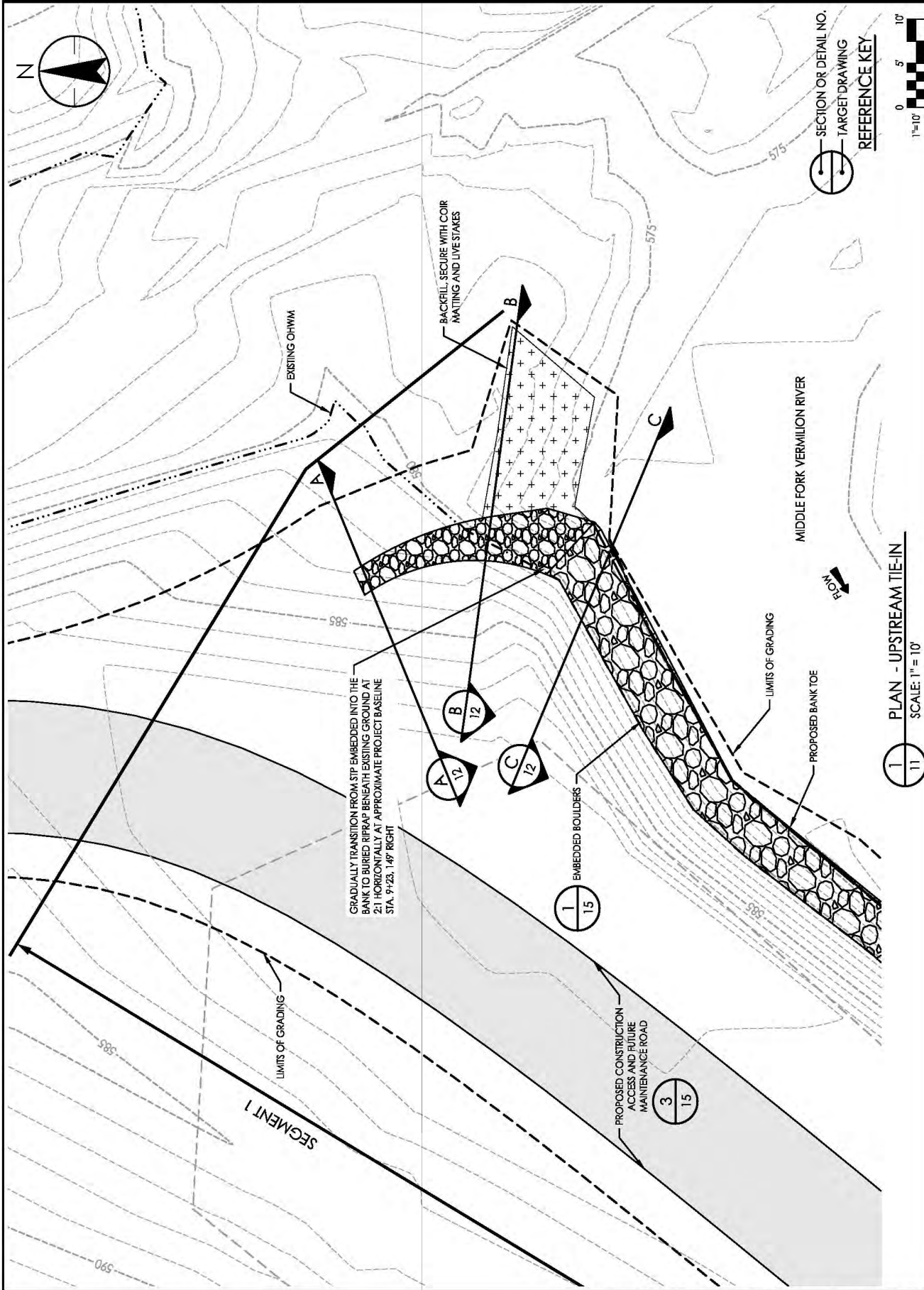
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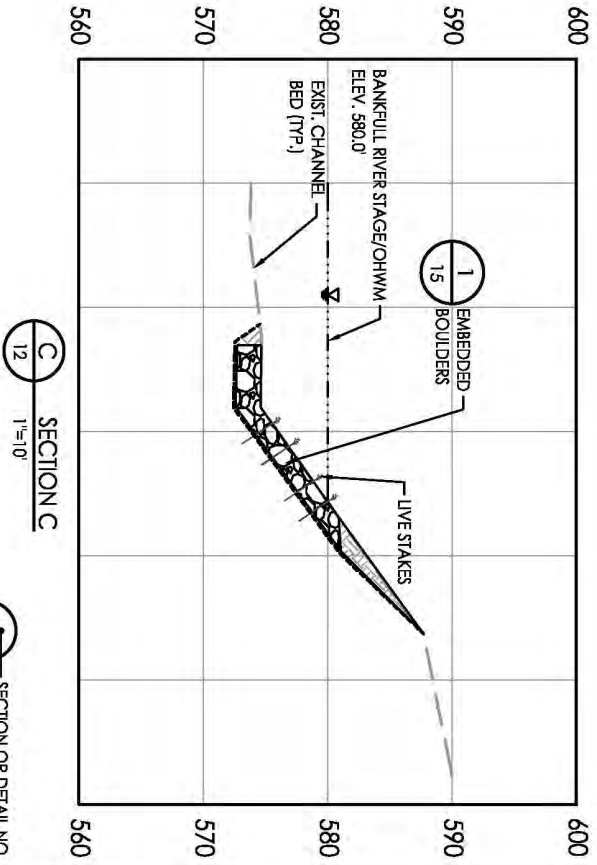
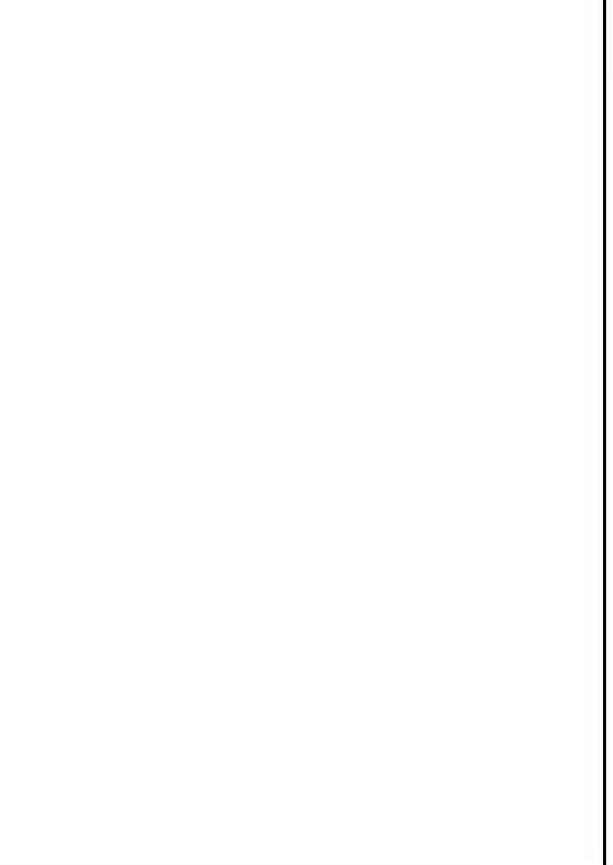
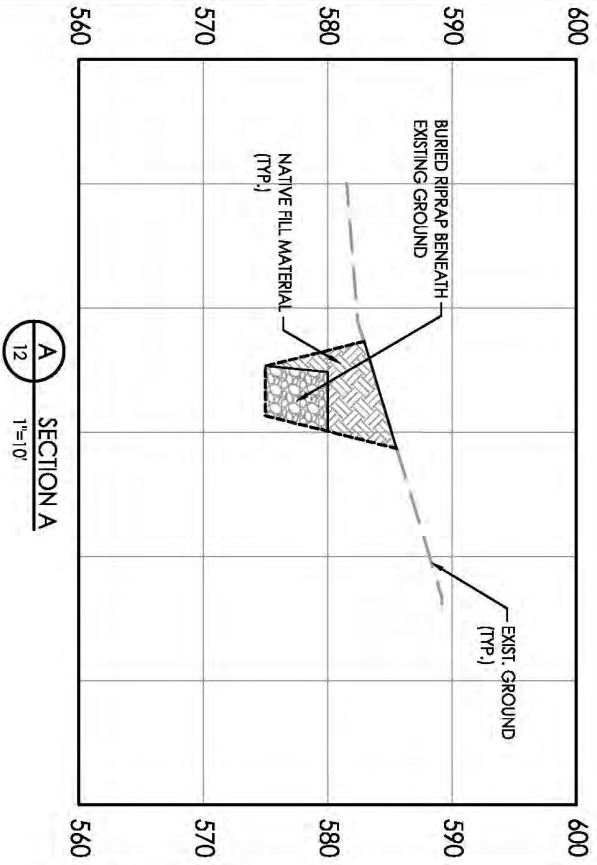
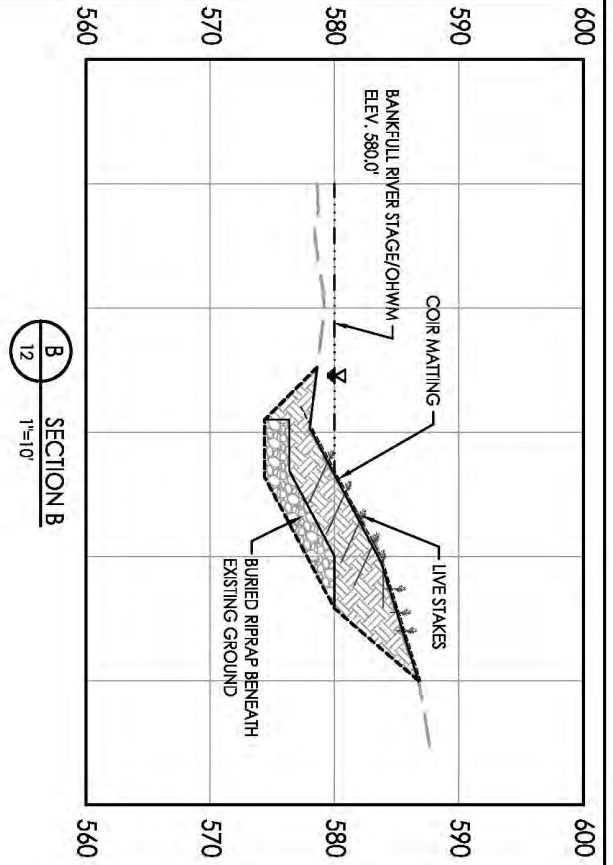
Client/Project: DYNEXY MIDWEST GENERATION, LLC
 Permit/Spec: MIDDLE FORK VERMILION RIVER EROSION MITIGATION AND RIVERBANK STABILIZATION
 PLAN - UPSTREAM TIE-IN

DRAFT - NOT FOR CONSTRUCTION
 SEAL PLACEHOLDER
 Project Number: 17567154
 Date Plotted: 06/05/2019
 User: JSM
 Plot Date: 06/05/2019
 Plot Time: 11:11 AM
 Drawing No. 11
 Revision 0

Sheet 11 of 15



1 PLAN - UPSTREAM TIE-IN
 SCALE: 1" = 10'



DRAFT - NOT FOR CONSTRUCTION
 SEAL PLACEHOLDER

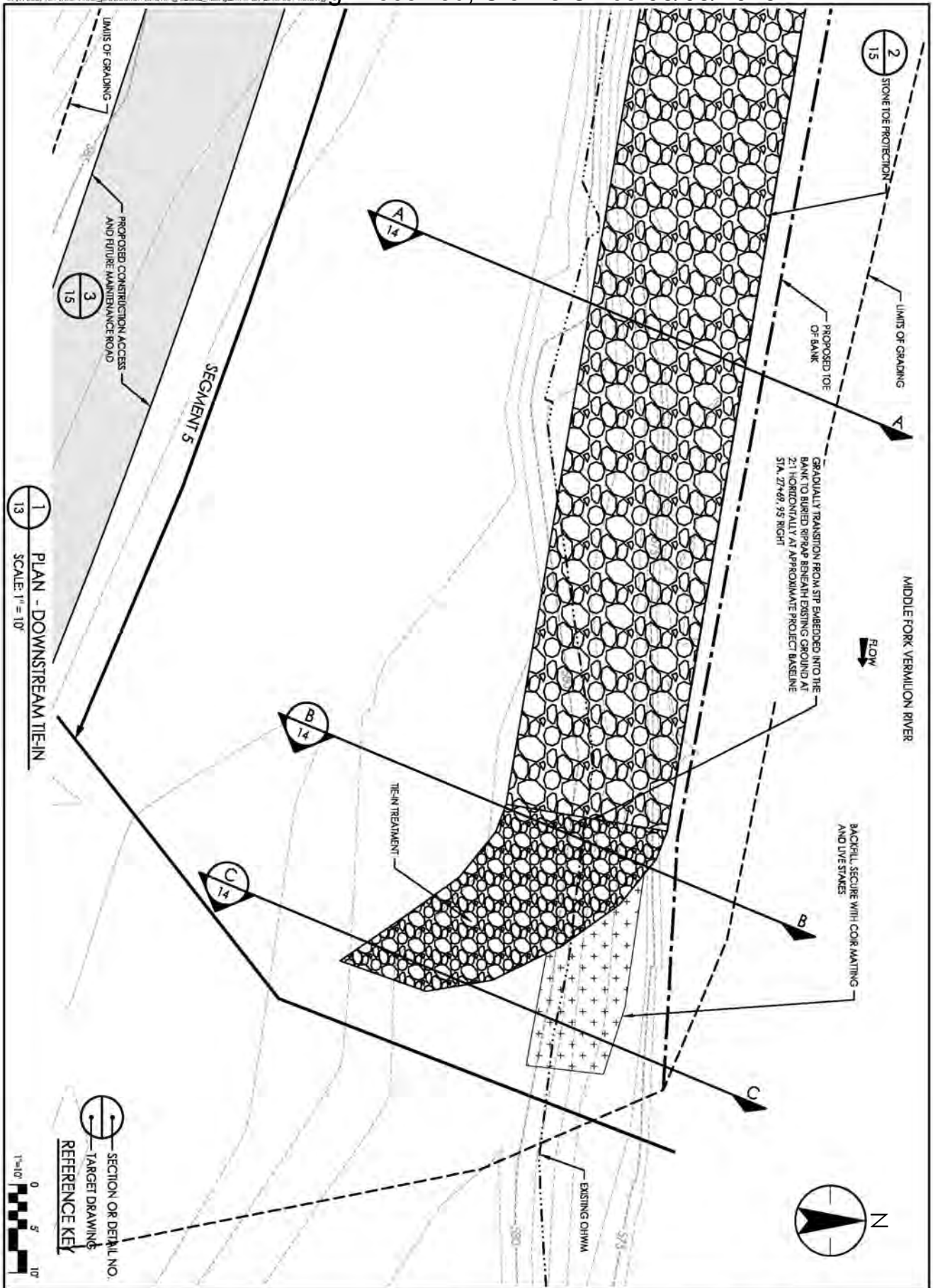
Project Number: 172657154
 Date: 07/25/2018
 User: T.YAMADO
 Drawing No. 12
 Revision: 0
 Sheet: 12 of 15

Client/Project: DYNegy MIDWEST GENERATION, LLC
 MIDDLE FORK VERMILION RIVER EROSION MITIGATION AND RIVERBANK STABILIZATION
 OAKWOOD, ILLINOIS
 Title: CROSS SECTIONS - UPSTREAM TIE-IN

Revision	By	Appd.	TYAMADO

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0 5 10'
 1"=10'

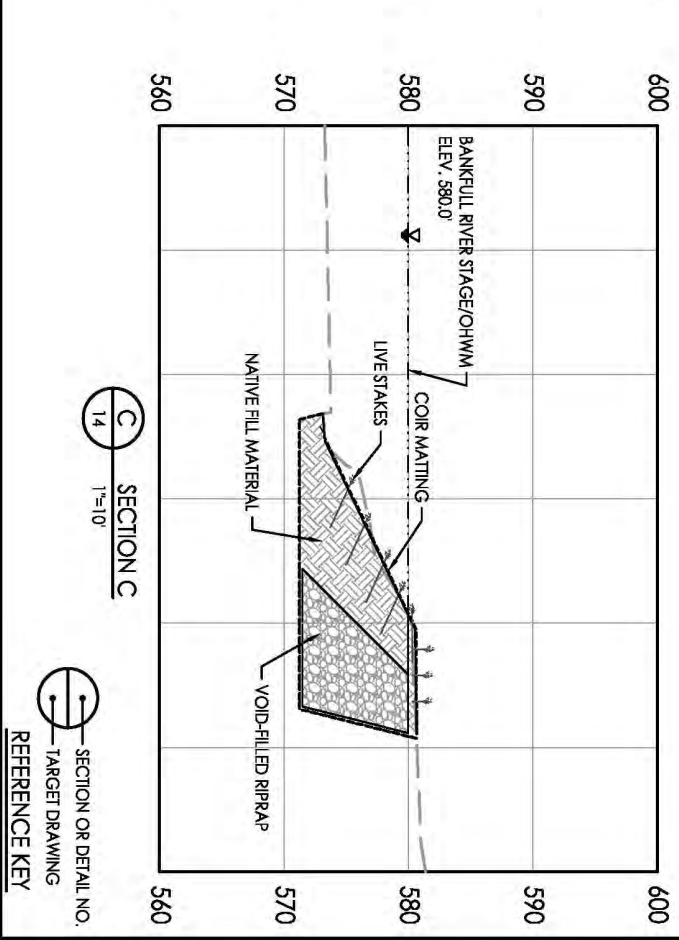
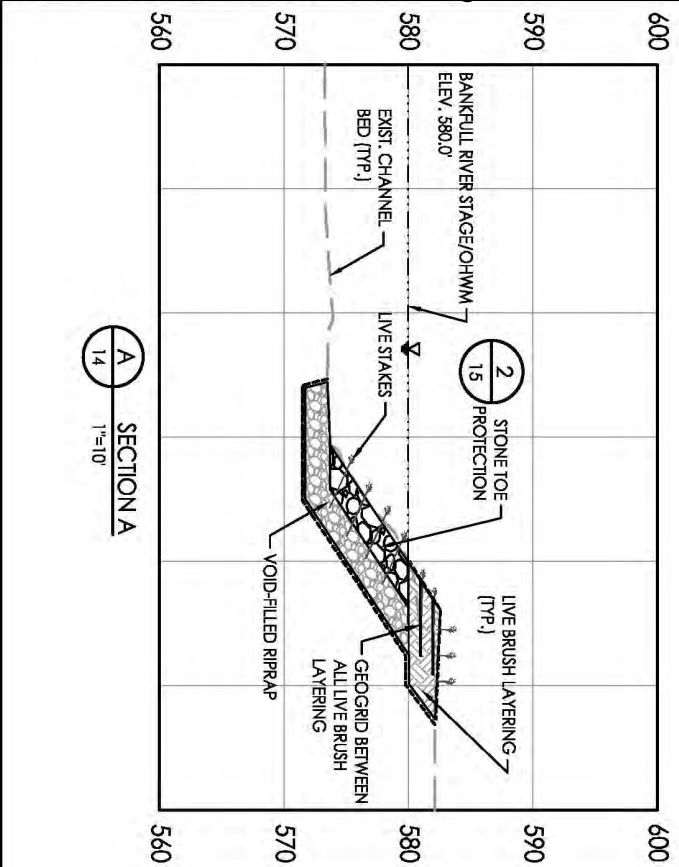
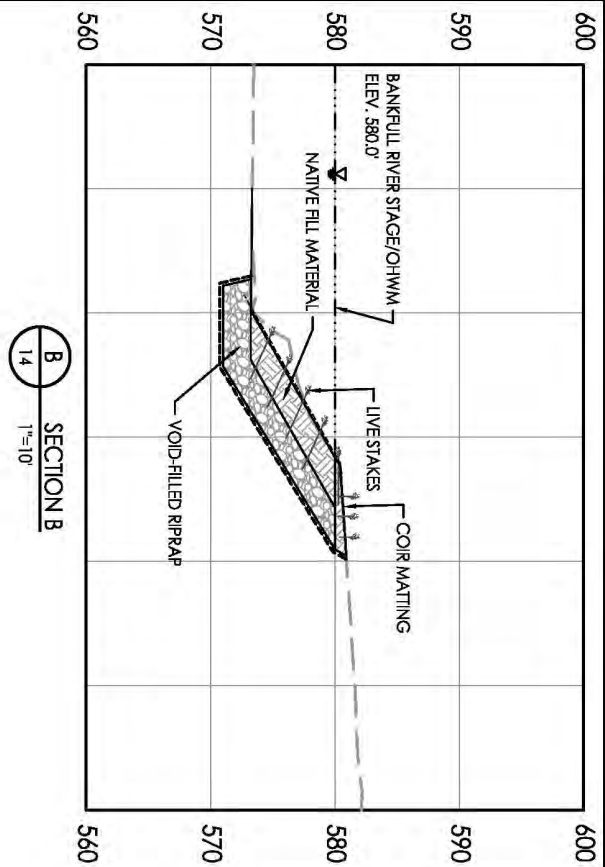
Project Number:	173A57154
Client:	DYNEGY MIDWEST GENERATION, LLC
Project Name:	MIDDLE FORK VERMILION RIVER EROSION MITIGATION AND RIVERBANK STABILIZATION
Location:	OAKWOOD, ILLINOIS
Revision:	0
Scale:	1"=10'
Sheet:	13 of 15

Revision	By	Appr.	Y/M/D

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SECTION OR DETAIL NO.
TARGET DRAWING
REFERENCE KEY

Project/Client: DYNEGY MIDWEST GENERATION, LLC
MIDDLE FORK VERMILION RIVER EROSION MITIGATION AND RIVERBANK STABILIZATION
OAKWOOD, ILLINOIS

Revision	By	App'd	DATE

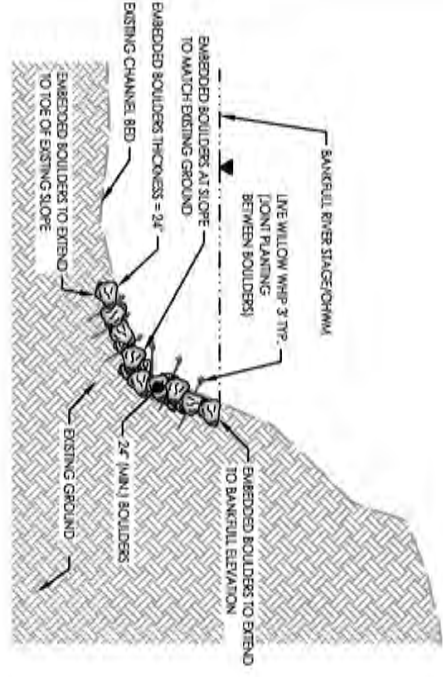
Issued

By	App'd	DATE
	TYAM/DO	

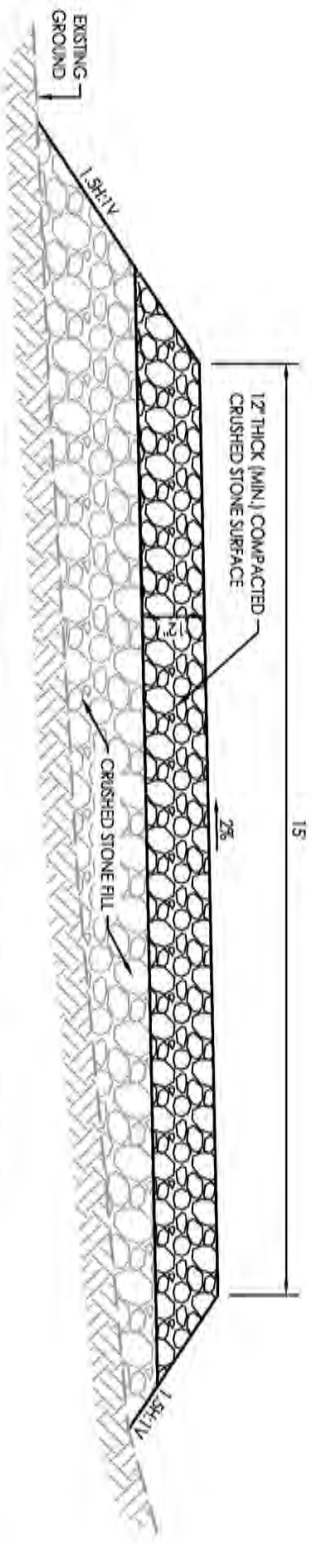
0
14 of 15

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1 EMBEDDED BOULDERS - SEGMENT 1
NOT TO SCALE



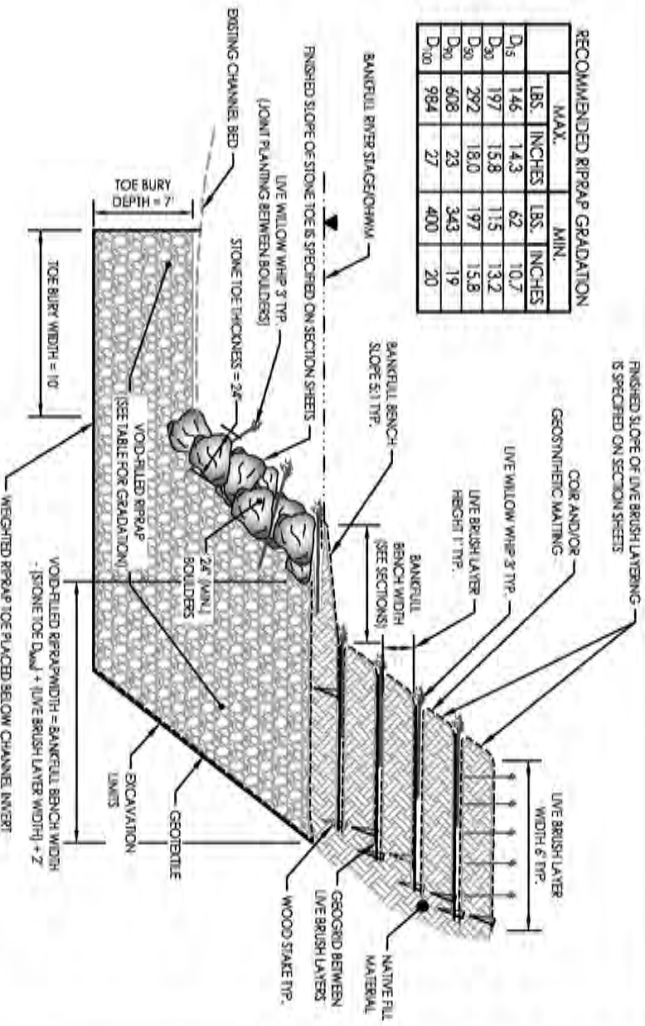
2 STONE TOE PROTECTION - SEGMENTS 2-5
NOT TO SCALE

RECOMMENDED RIPRAP GRADATION

	MAX. LBS.	MIN. LBS.	MIN. INCHES	MAX. INCHES
D ₁₅	146	14.3	62	10.7
D ₃₀	197	15.8	11.5	13.2
D ₆₀	292	18.0	197	15.8
D ₉₀	608	23	343	19
D ₁₀₀	984	27	400	20

3 CONSTRUCTION ACCESS AND FUTURE MAINTENANCE ROAD
SCALE: 1/2" = 1'-0"

SECTION OR DETAIL NO. TARGET DRAWING REFERENCE KEY



Client/Project: DYNESY MIDWEST GENERATION, LLC
 MIDDLE FORK VERMILION RIVER EROSION MITIGATION AND RIVERBANK STABILIZATION
 OAKWOOD, ILLINOIS
 Title: DETAILS
 Project Number: 170567154
 Drawing No. 15
 Revision: 0
 Date: 5/15/19

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 Leawood, Kansas 66211
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Revision	Date	By	Check

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APPENDIX C

JOINT APPLICATION FORM FOR ILLINOIS

ITEMS 1 AND 2 FOR AGENCY USE

1. Application Number	2. Date Received
-----------------------	------------------

3. and 4. (SEE SPECIAL INSTRUCTIONS) NAME, MAILING ADDRESS AND TELEPHONE NUMBERS

3a. Applicant's Name: Phil Morris Company Name (if any): Dynegy Midwest Generation, LLC Address: 1500 Eastport Plaza Drive Collinsville, Illinois 62234 Email Address: phil.morris@vistraenergy.com	3b. Co-Applicant/Property Owner Name (if needed or if different from applicant): Company Name (if any): Address: Email Address:	4. Authorized Agent (an agent is not required): Company Name (if any): Address: Email Address:
Applicant's Phone Nos. w/area code Business: 618-343-7794 Residence: Cell: Fax:	Applicant's Phone Nos. w/area code Business: Residence: Cell: Fax:	Agent's Phone Nos. w/area code Business: Residence: Cell: Fax:

STATEMENT OF AUTHORIZATION

I hereby authorize, _____ to act in my behalf as my agent in the processing of this application and to furnish, upon request, supplemental information in support of this permit application.

Applicant's Signature

Date

5. ADJOINING PROPERTY OWNERS (Upstream and Downstream of the water body and within Visual Reach of Project)

Name	Mailing Address	Phone No. w/area code
a. IDNR, Wayne Rosenthal	One Natural Resources Way, Springfield, IL 62702	217 782-6302
b. Kenneth Divan	9370E 2100N Road, Oakwood, IL 61858	217 354-4446
c. Tom Fletcher	9287E 2085N Road, Oakwood, IL 61858	217 354-4000
d. John Sandusky	9878E 2150N Road, Danville, IL 61834	217 776-2746

6. PROJECT TITLE:
Middle Fork Vermilion River Erosion Mitigation and Streambank Stabilization - Vermilion Site

7. PROJECT LOCATION:

LATITUDE: 40.18307 °N	UTMs				
LONGITUDE: -87.74537 °W	Northing:				
	Easting:				
STREET, ROAD, OR OTHER DESCRIPTIVE LOCATION	LEGAL DESCRIPT	QUARTER	SECTION	TOWNSHIP NO.	RANGE
Vermilion Site, 10188 E 2150N		SE	20	20N	12W
<input type="checkbox"/> IN OR <input checked="" type="checkbox"/> NEAR CITY OF TOWN (check appropriate box)	WATERWAY			RIVER MILE (if applicable)	
Municipality Name Oakwood	Middle Fork Vermilion River				
COUNTY	STATE	ZIP CODE			
Vermilion	IL	61858			

Revised 2010

- Corps of Engineers
 IL Dep't of Natural Resources
 IL Environmental Protection Agency
 Applicant's Copy

8. PROJECT DESCRIPTION (Include all features):
 The proposed project is for approximately 1,900 linear feet (LF) of river bank stabilization along the right descending bank of the Middle Fork Vermilion (MFV) River at Dynegy Midwest Generation, LLC's (Dynegy) Vermilion Site. In an effort to prevent erosional issues along this stretch of the river, Dynegy is proposing to lay back the embankments and construct an access bench at the toe of the embankment to provide construction access. The stabilization methods will include a combination of stone toe protection, embedded toe boulders, void-filled rip rap, and live branch layering. In addition, the existing gabion baskets along the river edge within the project area will be removed as part of the project. A detailed description of the proposed site plan is included in the plans completed by Stantec titled: Middle Fork Vermilion River Erosion Mitigation and Riverbank Stabilization, dated May 2018 (see attached report).

9. PURPOSE AND NEED OF PROJECT:
 The purpose of the project is to protect the eroding streambank from the continued lateral migration of the stretch of the MFV River as noted in the project description.

COMPLETE THE FOLLOWING FOUR BLOCKS IF DREDGED AND/OR FILL MATERIAL IS TO BE DISCHARGED

10. REASON(S) FOR DISCHARGE:
 Installation of void-filled rip rap, embedded boulders, and live branch layering to facilitate the construction of the proposed stone toe protection along a reach of the MFV River.

11. TYPE(S) OF MATERIAL BEING DISCHARGED AND THE AMOUNT OF EACH TYPE IN CUBIC YARDS FOR WATERWAYS:
 TYPE: rip rap (various gradation), boulders (minimum of 24 inches)
 AMOUNT IN CUBIC YARDS:
 Stone Toe Protection Boulders - 2,130 CY / Void-Filled Rip Rap - 20,240 CY

12. SURFACE AREA IN ACRES OF WETLANDS OR OTHER WATERS FILLED (See Instructions)
 1,900 LF or 1.44 acres

13. DESCRIPTION OF AVOIDANCE, MINIMIZATION AND COMPENSATION (See Instructions)
 Several design alternatives were considered to provide an engineering plan that meets the purpose and need of the project. The combined embedded boulders, live brush layering, and stone toe protection plan is the preferred project plan to provide the necessary bank stabilization.

14. Date activity is proposed to commence: Fall 2018 Date activity is expected to be completed: Summer 2019

15. Is any portion of the activity for which authorization is sought now complete? Yes No NOTE: If answer is "YES" give reasons in the Project Description and Remarks section. Indicate the existing work on drawings.
 Month and Year the activity was completed: N/A

16. List all approvals or certification and denials received from other Federal, Interstate, state, or local agencies for structures, construction, discharges or other activities described in this application.

Issuing Agency	Type of Approval	Identification No.	Date of Application	Date of Approval	Date of Denial

17. CONSENT TO ENTER PROPERTY LISTED IN PART 7 ABOVE IS HEREBY GRANTED. Yes No

18. APPLICATION VERIFICATION (SEE SPECIAL INSTRUCTIONS)
 Application is hereby made for the activities described herein. I certify that I am familiar with the information contained in the application, and that to the best of my knowledge and belief, such information is true, complete, and accurate. I further certify that I possess the authority to undertake the proposed activities.

[Signature] 6-28-18
 Signature of Applicant or Authorized Agent Date

 Signature of Applicant or Authorized Agent Date

 Signature of Applicant or Authorized Agent Date

- Corps of Engineers Revised 2010 IL Dep't of Natural Resources IL Environmental Protection Agency Applicant's Copy

APPENDIX D



March 15, 2018

Mr. Vic Modeer, P.E., D.GE
Dynergy Midwest Generation, LLC
1500 Eastport Plaza Drive
Collinsville, Illinois 62234

RE: Bat Habitat Assessment
Middle Fork Vermilion River
Erosion Mitigation and Streambank Stabilization – Vermilion Site
Oakwood, Illinois
SCI No. 2017-3081.3B Task 200

Dear Mr. Modeer:

SCI Engineering, Inc. (SCI) performed a bat habitat assessment at the above referenced site. Our scope of work included performing a site reconnaissance to determine if suitable summer roosting habitat for the federally-listed endangered Indiana bat (*Myotis sodalis*) and the threatened northern long-eared bat (*Myotis septentrionalis*) exists within the proposed project boundaries. SCI understands that Dynergy is requesting permitting services for the submittal of a Section 404/401 permit application to the U.S. Army Corps of Engineers (USACE) and the Illinois Environmental Protection Agency (IEPA) for stabilization work on approximately 1,900 linear feet along the Middle Fork Vermilion (MFV) River. It is our understanding that Stantec, Inc. is currently preparing a stream stabilization plan for the project. However, a final design plan has not been determined at this time. As such, an approximate acreage of woodland that may need to be felled during project activities is currently not available.

BAT HABITAT ASSESSMENT SUMMARY

On February 27, 2018, a team of SCI Scientists, led by a Federally-licensed bat biologists, performed a field exploration of the project site in an effort to identify potentially suitable Indiana bat and northern long-eared bat summer roosting habitat, as defined in the U.S. Fish and Wildlife Service (USFWS) Range-wide Indiana Bat Summer Survey Guidelines, dated May 2017. Some of the necessary habitat characteristics include live and/or dead snag trees ≥ 3 inches in diameter at breast height (DBH) that have sloughing bark, cracks, crevices, and/or hollows. The *Indiana Bat Habitat Assessment Datasheets* of the Range-wide Guidelines, provided as Appendix 1, were completed at four representative locations within the survey area. The location of these sample sites can be found on the *Bat Habitat Assessment and Aerial Photograph*, enclosed as Figure 2.

Surrounding Area

The surrounding area consists of forested areas fragmented by agricultural fields, the Dynergy Vermilion facility to the south, the MFV River to the east, and a large lake to the southwest of the project area. There are sparse residential developments within 3 miles, but the area is primarily developed for

agricultural purposes. Within a 10-mile radius, the project area is within proximity of two conservation areas and State parks. The project site is approximately 2.5 miles north of Middle Fork Woods Nature Preserve and approximately 3 miles north of Kickapoo State Recreation Area.

On-Site Habitat Assessment

Sample Site 1 occurs in the northernmost portion of the site near an existing pump station. The wooded area contains a densely vegetated understory, midstory and moderately vegetated canopy. Dominant mature tree species in the site include black walnut (*Juglans nigra*), American elm (*Ulmus americana*), honey locust (*Gleditsia triacanthos*), American sycamore (*Platanus occidentalis*), eastern red cedar (*Juniperus virginiana*), and black cherry (*Prunus serotina*). Two snags were documented along the forested hillside in the northern portion of the site. These trees contain sloughing bark, crevices, and/or cracks that are suitable for roosting Indiana and northern long-eared bats. The remaining trees within the site contain smooth bark that are not suitable for summer roosting bats. **As such, Sample Site 1 has low suitability as summer roosting habitat for Indiana and northern long-eared bats.**

Sample Site 2 occurs within the northern portion of the site and southwest of Sample Site 1. The wooded area contains a densely vegetated understory, midstory and moderately vegetated canopy. Dominant mature tree species in the site include American elm, eastern cottonwood (*Populus deltoides*), silver maple (*Acer saccharinum*), honey locust, and American sycamore. No snags or live trees that contain sloughing bark, crevices, and/or cracks that are suitable for roosting Indiana and northern long-eared bats were identified within Sample Site 2. **As such, Sample Site 2 is not suitable as summer roosting habitat for Indiana and northern long-eared bats.**

Sample Site 3 occurs in the southern forested portion of the site and southeast of Sample Site 2. The wooded area contains a sparsely vegetated understory, midstory and canopy. Dominant mature tree species in the site include eastern red cedar, American basswood (*Tilia americana*), white poplar (*Populus alba*), and American sycamore. No snags or live trees that contain sloughing bark, crevices, and/or cracks that are suitable for roosting Indiana and northern long-eared bats were identified within Sample Site 3. **As such, Sample Site 3 is not suitable as summer roosting habitat for Indiana and northern long-eared bats.**

Sample Site 4 occurs in the southern forested portion of the site and southeast of Sample Site 3. The site contains a sparse stand of young trees. The wooded corridor contains an open understory, midstory and moderately vegetated canopy. Dominant mature tree species in the site include American sycamore and box elder (*Acer negundo*). No snags or live trees that contain sloughing bark, crevices, and/or cracks that are suitable for roosting Indiana and northern long-eared bats were identified within Sample Site 4. The remaining trees within the site contain smooth bark that are not suitable for summer roosting bats. **As such, Sample Site 4 is not suitable as summer roosting habitat for Indiana and northern long-eared bats.**

In summary, based on the site characteristics and surrounding land use, the project site has low suitability as Indiana and northern long-eared bat summer roosting habitat. The only suitable habitat (low suitability) present occurs within Sample Site 1. The remaining sites (Sample Site 2 through 4) are not suitable as roosting habitat. Based on the surrounding landscape, the site may be used as a travel and foraging corridor for bats, as the forested corridor is part of a larger contiguous woodland corridor that runs north to south and connects with other large woodlands.

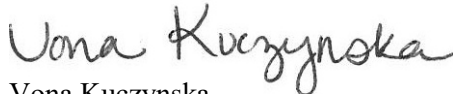
Project sites containing suitable bat habitat have the potential to result in a USFWS “may affect” determination and will likely require additional consultation with the USFWS if impacts to suitable habitat are proposed. The USFWS may request a presence/probable absence survey to determine if threatened and endangered species are present within the project area and/or will be affected by project activities. Please note that the official USFWS mandated summer survey season for Indiana and northern long-eared bats is May 15 to August 15.

SCI is providing our professional opinion regarding the suitability of habitat for the Indiana and northern long-eared bats, as defined in the USFWS Range-wide Indiana Bat Summer Survey Guidelines, dated May 2017. Please keep in mind that the USFWS has the sole authority to determine which areas are classified as suitable habitat. Additionally, the USFWS has the authority to regulate any action which may affect a listed threatened or endangered species. If desired, SCI is available to submit this assessment to the USFWS for their review.

If you have any questions regarding this assessment or need additional information, please contact me at (618) 206-3038 or sbillings@sciengineering.com.

Respectfully,

SCI ENGINEERING, INC.



Vona Kuczynska
Staff Scientist

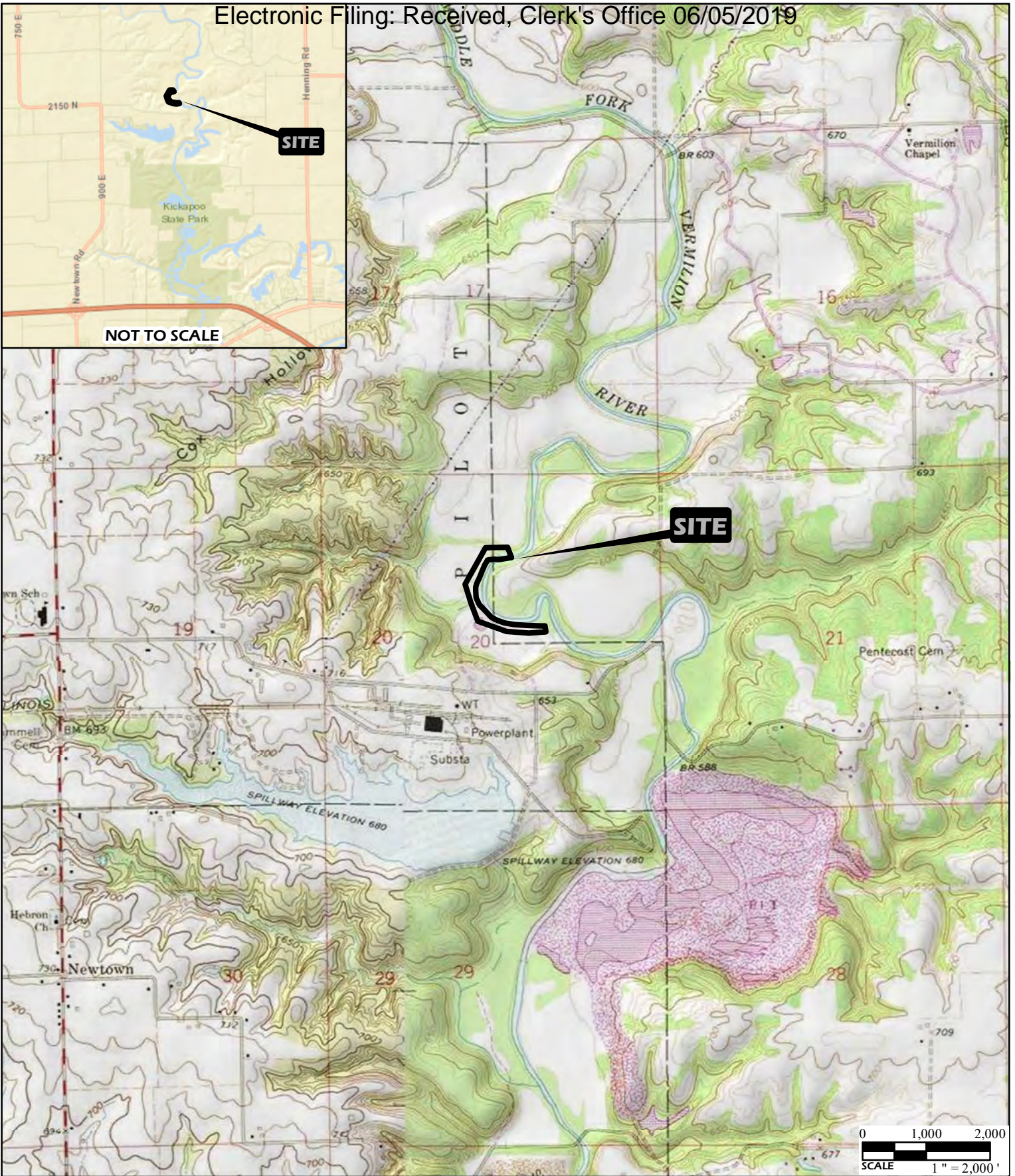




Scott E. Billings
Project Scientist

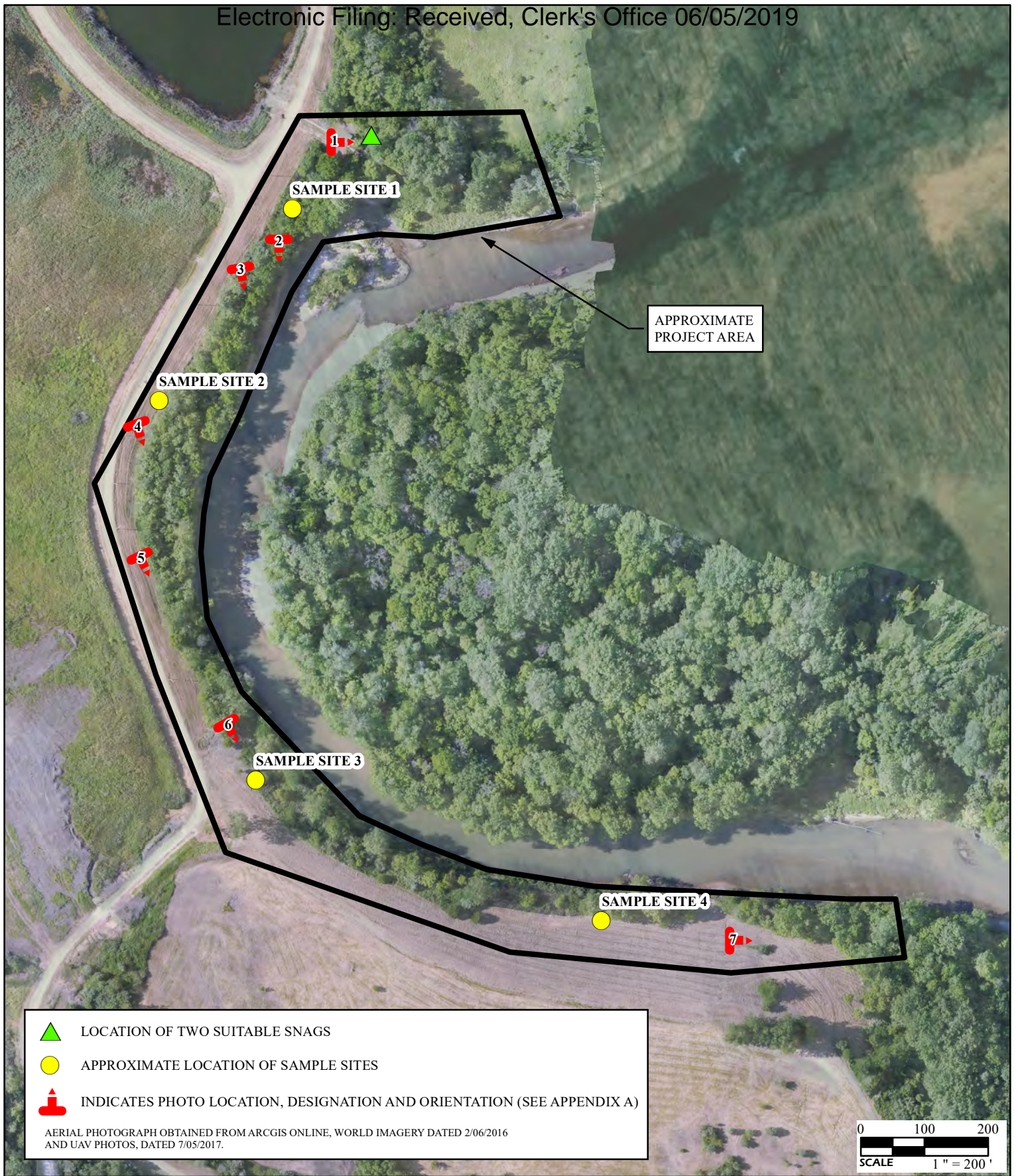
VK/SEB/tlw

Enclosures

- Figure 1 – Vicinity and Topographic Map
- Figure 2 – Bat Habitat Assessment and Aerial Photograph
- Appendix 1 – Indiana Bat Habitat Assessment Datasheets
- Appendix 2 – Photographic Summary



	PROJECT NAME VERMILION SITE OAKWOOD, ILLINOIS		GENERAL NOTES/LEGEND USGS TOPOGRAPHIC MAP COLLISON, ILLINOIS QUADRANGLE DATED 1968 DANVILLE NW, ILLINOIS QUADRANGLE DATED 1978 10' CONTOURS		 FIGURE 1	
	VICINITY AND TOPOGRAPHIC MAP					
	DRAWN BY RCV CHECKED BY VK	DATE 03/2018	JOB NUMBER 2017-3081.3B	STREET MAP HTTP://GOTO.ARCGISONLINE.COM/MAPS/WORLD_STREET_MAP		



 LOCATION OF TWO SUITABLE SNAGS
 APPROXIMATE LOCATION OF SAMPLE SITES
 INDICATES PHOTO LOCATION, DESIGNATION AND ORIENTATION (SEE APPENDIX A)

AERIAL PHOTOGRAPH OBTAINED FROM ARCGIS ONLINE, WORLD IMAGERY DATED 2/06/2016
 AND UAV PHOTOS, DATED 7/05/2017.



PROJECT NAME VERMILION SITE OAKWOOD, ILLINOIS			
BAT HABITAT ASSESSMENT & AERIAL PHOTOGRAPH			
DRAWN BY	BDG	DATE	JOB NUMBER
CHECKED BY	VK	03/2018	2017-3081.3B

GENERAL NOTES/LEGEND




FIGURE
 2

Appendix .

INDIANA AND NORTHERN LONG-EARED BAT HABITAT ASSESSMENT FORM

Project Name	Vermilion Site - Stabilization	Project No.	2017.3081.3B
Township/Range/Section	Oakwood, Illinois	Survey Date	2/27/2018
Latitude/Longitude	40.183527°, -87.745912°	Surveyor	Vona Kuczynska

Project Description:	
<p>SCI understands that Dynege is planning to submit a Section 404/401 permit application to the U.S. Army Corps of Engineers and the Illinois Environmental Protection Agency for stabilization work on approximately 1,900 linear feet along the Middle Fork Vermilion (MFV) River at the Vermilion site, located near Oakwood, Illinois.</p>	

Project Area				
Total Acres	Forested Acres		Open Acres (non-forested or developed)	
	% of Site	% w/in 1 mile	% of Site	% Site w/in 1 mile
1,900 LF	80%	50%	20%	60%

Proposed Project Tree Removal (acres)		
Completely Cleared	Partially Cleared (will leave trees)	Reserved (no clearing)
N/A	N/A	N/A

Landscape Within 3 Mile Radius
<p>Corridors to other forested areas? The trees on site are part of a contiguous riparian corridor that is adjacent to the MFV River.</p>
<p>Describe Adjacent Property (e.g. forest, grassland, commercial, residential development, water resources). The surrounding area consist of forested areas fragmented by agricultural fields, the MFV River to the east, and a large lake to the southwest of the project area. There are sparse residential developments within 3 miles, but the area is primarily developed for agricultural purposes.</p>

Proximity to Public Land Within 10 miles	
<p>What is the distance (miles) from the project area to public lands? (i.e. national and state parks, conservation areas, local parks). Use the distance between the boundaries of the site and the public land.</p>	
Location	Distance (miles)
Kickapoo State Recreation Area	less than 0.5
Middle Fork Woods Nature Preserve	less than 0.5

Electronic Filing: Received, Clerk's Office 06/05/2019

Site Name	Vermillion River Stabilization	Visit Date	2/27/18
Sample Point	1		

General Description

Sample Site 1 occurs in the northern portion of the project site. The area contains mostly young trees less than 8 inches in diameter at breast height. There are two suitable snags present on the border of the site. Otherwise the site does not contain suitable trees.

Water Resources At Sample Site			
	Ephemeral	Intermittent	Perennial
Nr. & Length	N/A	N/A	1 - MFV River

Wetlands		
	Permanent	Seasonal
Approx. Acreage	N/A	N/A

Number and Size of Ponds/Pool	Open and Accessible to Bats?
N/A	Yes <input type="checkbox"/> No <input type="checkbox"/>

Describe Existing Condition of Water Resources:

The MFV River is adjacent to the site and contains fast flowing water.

Dominant Species of Mature Trees

Black walnut, American elm, honey locust, black willow, American sycamore, eastern red cedar, black cherry.

% Closure/Density of Vegetation		
Understory	Midstory	Canopy
3	3	2
1 = 1-10%	2 = 11-20%	3 = 21-40%
4 = 41-60%	5 = 61-80%	6 = 81-100%

Size Composition of Trees		
Small	Medium	Large
90	10	0
Small (4-8)	Medium (8-15)	Large (>15)

Preferred Tree Species ≥ 9 DBH						
Tree Species	N/A	N/A	N/A	N/A	N/A	N/A
Relative Abundance (%)	N/A	N/A	N/A	N/A	N/A	N/A
% with > 30 % Exfoliating Bark	N/A	N/A	N/A	N/A	N/A	N/A

% Dominance = The relative density of the tree species within the sample plot
% of trees of this species in the sample plot containing exfoliating bark

Number of Suitable Snag Trees	2
--------------------------------------	---

Includes standing dead trees with sloughing bark, crevices, or holes.

Is site suitable for Indiana bats?	(check)	Yes	X	No	
*Level may not be applicable		Level?	L	(L = Low, M = Moderate, H = High)	
For northern long-eared bats?	(check)	Yes	X	No	
*Level may not be applicable		Level?	L	(L = Low, M = Moderate, H = High)	

Notes

Electronic Filing: Received, Clerk's Office 06/05/2019

Site Name	Vermillion River Stabilization	Visit Date	2/27/18
Sample Point	2		

General Description	
Sample Point 2 occurs in the northern portion of the forested corridor and south of Sample Site 1.	

Water Resources At Sample Site			
	Ephemeral	Intermittent	Perennial
Number & Length	N/A	N/A	1 - MFV River

Wetlands		
	Permanent	Seasonal
Approx. Acreage	N/A	N/A

Number and Size of Ponds/Pool	Open and Accessible to Bats?
None	Yes <input type="checkbox"/> No <input type="checkbox"/>

Describe Existing Condition of Water Resources:
The MFV River is adjacent to the site and contains fast flowing water.

Dominant Species of Mature Trees
American sycamore, eastern cottonwood, silver maple, honey locust.

% Closure/Density of Vegetation		
Understory	Midstory	Canopy
3	3	2
1 = 1-10%	2 = 11-20%	3 = 21-40%
4 = 41-60%	5 = 61-80%	6 = 81-100%

Size Composition of Trees		
Small	Medium	Large
90	10	0
Small (4-8)	Medium (8-15)	Large (>15)

Preferred Tree Species ≥ 9 DBH						
Tree Species	N/A	N/A	N/A	N/A	N/A	N/A
Relative Abundance (%)	N/A	N/A	N/A	N/A	N/A	N/A
% with > 30 % Exfoliating Bark	N/A	N/A	N/A	N/A	N/A	N/A

% Dominance = The relative density of the tree species within the sample plot
 % of trees of this species in the sample plot containing exfoliating bark

Number of Suitable Snag Trees	0
-------------------------------	---

Includes standing dead trees with sloughing bark, crevices, or holes.

Is site suitable for Indiana bats?	(check)	Yes		No	X
*Level may not be applicable		Level?		(L = Low, M = Moderate, H = High)	
For northern long-eared bats?	(check)	Yes		No	X
*Level may not be applicable		Level?		(L = Low, M = Moderate, H = High)	

Notes

Electronic Filing: Received, Clerk's Office 06/05/2019

Site Name	Vermillion River Stabilization	Visit Date	2/27/18
Sample Point	3		

General Description	
Sample Point 3 occurs along the southern boundary of the clearing limits and northwest of Sample Point 2.	

Water Resources At Sample Site			
	Ephemeral	Intermittent	Perennial
Number & Length	N/A	N/A	1 - MFV River

Wetlands		
	Permanent	Seasonal
Approx. Acreage	N/A	N/A

Number and Size of Ponds/Pool	Open and Accessible to Bats?
N/A	Yes <input type="checkbox"/> No <input type="checkbox"/>

Describe Existing Condition of Water Resources:
The MFV River is adjacent to the site and contains fast flowing water.

Dominant Species of Mature Trees
Eastern red cedar, American basswood, white poplar, American sycamore.

% Closure/Density of Vegetation		
Understory	Midstory	Canopy
1	1	1
1 = 1-10%	2 = 11-20%	3 = 21-40%
4 = 41-60%	5 = 61-80%	6 = 81-100%

Size Composition of Trees		
Small	Medium	Large
50	50	0
Small (4-8) (8-15) Large (>15)		

Preferred Tree Species ≥ 9 DBH						
Tree Species	N/A	N/A	N/A	N/A	N/A	N/A
Relative Abundance (%)	N/A	N/A	N/A	N/A	N/A	N/A
% with > 30 % Exfoliating Bark	N/A	N/A	N/A	N/A	N/A	N/A

% Dominance = The relative density of the tree species within the sample plot
 % of trees of this species in the sample plot containing exfoliating bark

Number of Suitable Snag Trees	0
--------------------------------------	---

Includes standing dead trees with sloughing bark, crevices, or holes.

Is site suitable for Indiana bats?	(check)	Yes		No	X
*Level may not be applicable		Level?		(L = Low, M = Moderate, H = High)	
For northern long-eared bats?	(check)	Yes		No	X
*Level may not be applicable		Level?		(L = Low, M = Moderate, H = High)	

Notes

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Site Name	Vermillion River Stabilization	Visit Date	2/27/18
Sample Point	4		

General Description

Sample Site 4 occurs in the southern forested corridor and southeast of Sample Site 3. The site contains a sparse stand of young trees that are not suitable as bat habitat.

Water Resources At Sample Site			
	Ephemeral	Intermittent	Perennial
Number & Length	N/A	N/A	1 - MFV River

Wetlands		
	Permanent	Seasonal
Approx. Acreage	N/A	N/A

Number and Size of Ponds/Pools	Open and Accessible to Bats?
N/A	Yes <input type="checkbox"/> No <input type="checkbox"/>

Describe Existing Condition of Water Resources:

The MFV River is adjacent to the site and contains fast flowing water.

Dominant Species of Mature Trees

American sycamore, box elder maple, white poplar.

% Closure/Density of Vegetation		
Understory	Midstory	Canopy
1	1	1

1 = 1-10% 2 = 11-20% 3 = 21-40%
 4 = 41-60% 5 = 61-80% 6 = 81-100%

Size Composition of Trees		
Small	Medium	Large
75	25	0

Small (4-8) Medium (8-15) Large (>15)

Preferred Tree Species ≥ 9 DBH						
Tree Species	N/A	N/A	N/A	N/A	N/A	N/A
Relative Abundance (%)	N/A	N/A	N/A	N/A	N/A	N/A
% with > 30 % Exfoliating Bark	N/A	N/A	N/A	N/A	N/A	N/A

% Dominance = The relative density of the tree species within the sample plot
 % of trees of this species in the sample plot containing exfoliating bark

Number of Suitable Snag Trees	0
--------------------------------------	---

Includes standing dead trees with sloughing bark, crevices, or holes.

Is site suitable for Indiana bats?	(check)	Yes		No	X
*Level may not be applicable		Level?	H	(L = Low, M = Moderate, H = High)	
For northern long-eared bats?	(check)	Yes		No	X
*Level may not be applicable		Level?	H	(L = Low, M = Moderate, H = High)	

Notes

Appendix 2



Photo 1. Photo showing the two identified snag trees within Sample Site 1, located near the northern portion of the project area. Facing east (2-27-18)



Photo 2. Representative view of the younger trees that dominate the majority of Sample Site 1 within the northern portion of the site, facing south (2-27-18)



Photo 3. Photo depicting the representative size of the existing trees within Sample Site 1, facing south (2-27-18)



Photo 4. View of the forested area within Sample Site 2 that was found to be dominated by young trees unsuitable for bat roosting habitat, facing south (2-27-18)



Photo 5. Existing conditions along the edge of the forested corridor along the right descending bank of the MFV River between Sample Site 2 and Sample Site 3, facing south (2-27-18)



Photo 6. Photo showing the relatively narrow riparian corridor along the right descending bank of the MFV river near the location of Sample Site 3, facing southeast (2-27-18)



Photo 7. Forested area near the southern portion of the project site along the right descending bank of the MFV River near Sample Site 4, facing east (2-27-18)

APPENDIX E

IPaC resource list

This report is an automatically generated list of species and other resources such as critical habitat (collectively referred to as *trust resources*) under the U.S. Fish and Wildlife Service's (USFWS) jurisdiction that are known or expected to be on or near the project area referenced below. The list may also include trust resources that occur outside of the project area, but that could potentially be directly or indirectly affected by activities in the project area. However, determining the likelihood and extent of effects a project may have on trust resources typically requires gathering additional site-specific (e.g., vegetation/species surveys) and project-specific (e.g., magnitude and timing of proposed activities) information.

Below is a summary of the project information you provided and contact information for the USFWS office(s) with jurisdiction in the defined project area. Please read the introduction to each section that follows (Endangered Species, Migratory Birds, USFWS Facilities, and NWI Wetlands) for additional information applicable to the trust resources addressed in that section.

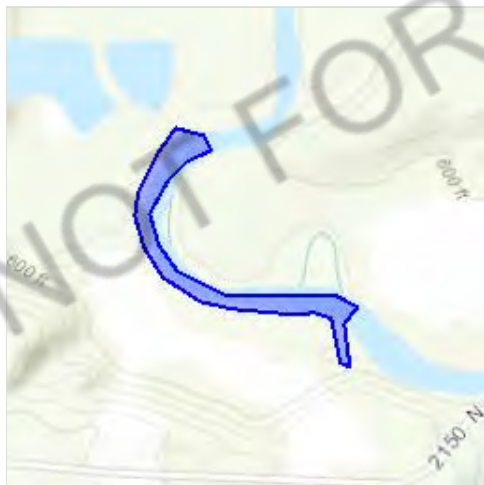
Project information

NAME

Vermilion Bank Stabilization Project

LOCATION

Vermilion County, Illinois



Local offices

Illinois-Iowa Ecological Services Field Office

☎ (309) 757-5800

📠 (309) 757-5807

Illinois & Iowa Ecological Services Field Office
1511 47th Ave

Southern Illinois Sub-Office

☎ (618) 997-3344

📠 (618) 997-8961

Marion Illinois Sub-office

8588 Route 148

Marion, IL 62959-5822

<http://www.fws.gov/midwest/Endangered/section7/s7process/step1.html>

NOT FOR CONSULTATION

Endangered species

This resource list is for informational purposes only and does not constitute an analysis of project level impacts.

The primary information used to generate this list is the known or expected range of each species. Additional areas of influence (AOI) for species are also considered. An AOI includes areas outside of the species range if the species could be indirectly affected by activities in that area (e.g., placing a dam upstream of a fish population, even if that fish does not occur at the dam site, may indirectly impact the species by reducing or eliminating water flow downstream). Because species can move, and site conditions can change, the species on this list are not guaranteed to be found on or near the project area. To fully determine any potential effects to species, additional site-specific and project-specific information is often required.

Section 7 of the Endangered Species Act **requires** Federal agencies to "request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action" for any project that is conducted, permitted, funded, or licensed by any Federal agency. A letter from the local office and a species list which fulfills this requirement can **only** be obtained by requesting an official species list from either the Regulatory Review section in IPaC (see directions below) or from the local field office directly.

For project evaluations that require USFWS concurrence/review, please return to the IPaC website and request an official species list by doing the following:

1. Log in to IPaC.
2. Go to your My Projects list.
3. Click PROJECT HOME for this project.
4. Click REQUEST SPECIES LIST.

Listed species¹ and their critical habitats are managed by the [Ecological Services Program](#) of the U.S. Fish and Wildlife Service (USFWS) and the fisheries division of the National Oceanic and Atmospheric Administration (NOAA Fisheries²).

Species and critical habitats under the sole responsibility of NOAA Fisheries are **not** shown on this list. Please contact [NOAA Fisheries](#) for [species under their jurisdiction](#).

1. Species listed under the [Endangered Species Act](#) are threatened or endangered; IPaC also shows species that are candidates, or proposed, for listing. See the [listing status page](#) for more information.
2. [NOAA Fisheries](#), also known as the National Marine Fisheries Service (NMFS), is an office of the National Oceanic and Atmospheric Administration within the Department of Commerce.

The following species are potentially affected by activities in this location:

Mammals

NAME

STATUS

Indiana Bat *Myotis sodalis*

Endangered

There is **final** critical habitat for this species. Your location is outside the critical habitat.

<https://ecos.fws.gov/ecp/species/5949>

Northern Long-eared Bat *Myotis septentrionalis*

Threatened

No critical habitat has been designated for this species.

<https://ecos.fws.gov/ecp/species/9045>

Clams

NAME	STATUS
Clubshell <i>Pleurobema clava</i> No critical habitat has been designated for this species. https://ecos.fws.gov/ecp/species/3789	Endangered
Rabbitsfoot <i>Quadrula cylindrica cylindrica</i> There is final critical habitat for this species. Your location is outside the critical habitat. https://ecos.fws.gov/ecp/species/5165	Threatened

Flowering Plants

NAME	STATUS
Eastern Prairie Fringed Orchid <i>Platanthera leucophaea</i> No critical habitat has been designated for this species. https://ecos.fws.gov/ecp/species/601	Threatened
Mead's Milkweed <i>Asclepias meadii</i> No critical habitat has been designated for this species. https://ecos.fws.gov/ecp/species/8204	Threatened

Critical habitats

Potential effects to critical habitat(s) in this location must be analyzed along with the endangered species themselves.

THERE ARE NO CRITICAL HABITATS AT THIS LOCATION.

Migratory birds

Certain birds are protected under the Migratory Bird Treaty Act¹ and the Bald and Golden Eagle Protection Act².

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Any person or organization who plans or conducts activities that may result in impacts to migratory birds, eagles, and their habitats should follow appropriate regulations and consider implementing appropriate conservation measures, as described [below](#).

1. The [Migratory Birds Treaty Act](#) of 1918.
2. The [Bald and Golden Eagle Protection Act](#) of 1940.

Additional information can be found using the following links:

- Birds of Conservation Concern <http://www.fws.gov/birds/management/managed-species/birds-of-conservation-concern.php>
- Measures for avoiding and minimizing impacts to birds <http://www.fws.gov/birds/management/project-assessment-tools-and-guidance/conservation-measures.php>
- Nationwide conservation measures for birds <http://www.fws.gov/migratorybirds/pdf/management/nationwidestandardconservationmeasures.pdf>

The birds listed below are birds of particular concern either because they occur on the [USFWS Birds of Conservation Concern](#) (BCC) list or warrant special attention in your project location. To learn more about the levels of concern for birds on your list and how this list is generated, see the FAQ [below](#). This is not a list of every bird you may find in this location, nor a guarantee that every bird on this list will be found in your project area. To see exact locations of where birders and the general public have sighted birds in and around your project area, visit the [E-bird data mapping tool](#) (Tip: enter your location, desired date range and a species on your list). For projects that occur off the Atlantic Coast, additional maps and models detailing the relative occurrence and abundance of bird species on your list are available. Links to additional information about Atlantic Coast birds, and other important information about your migratory bird list, including how to properly interpret and use your migratory bird report, can be found [below](#).

For guidance on when to schedule activities or implement avoidance and minimization measures to reduce impacts to migratory birds on your list, click on the PROBABILITY OF PRESENCE SUMMARY at the top of your list to see when these birds are most likely to be present and breeding in your project area.

NAME

BREEDING SEASON (IF A BREEDING SEASON IS INDICATED FOR A BIRD ON YOUR LIST, THE BIRD MAY BREED IN YOUR PROJECT AREA SOMETIME WITHIN THE TIMEFRAME SPECIFIED, WHICH IS A VERY LIBERAL ESTIMATE OF THE DATES INSIDE WHICH THE BIRD BREEDS ACROSS ITS ENTIRE RANGE. "BREEDS ELSEWHERE" INDICATES THAT THE BIRD DOES NOT LIKELY BREED IN YOUR PROJECT AREA.)

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- American Golden-plover** *Pluvialis dominica* Breeds elsewhere
This is a Bird of Conservation Concern (BCC) throughout its range in the continental USA and Alaska.
- Bald Eagle** *Haliaeetus leucocephalus* Breeds Oct 15 to Aug 31
This is not a Bird of Conservation Concern (BCC) in this area, but warrants attention because of the Eagle Act or for potential susceptibilities in offshore areas from certain types of development or activities.
- Bobolink** *Dolichonyx oryzivorus* Breeds May 20 to Jul 31
This is a Bird of Conservation Concern (BCC) throughout its range in the continental USA and Alaska.
- Cerulean Warbler** *Dendroica cerulea* Breeds Apr 21 to Jul 20
This is a Bird of Conservation Concern (BCC) throughout its range in the continental USA and Alaska.
<https://ecos.fws.gov/ecp/species/2974>
- Henslow's Sparrow** *Ammodramus henslowii* Breeds May 1 to Aug 31
This is a Bird of Conservation Concern (BCC) throughout its range in the continental USA and Alaska.
<https://ecos.fws.gov/ecp/species/3941>
- Kentucky Warbler** *Oporornis formosus* Breeds Apr 20 to Aug 20
This is a Bird of Conservation Concern (BCC) throughout its range in the continental USA and Alaska.
- Least Bittern** *Ixobrychus exilis* Breeds Aug 16 to Oct 31
This is a Bird of Conservation Concern (BCC) only in particular Bird Conservation Regions (BCRs) in the continental USA
<https://ecos.fws.gov/ecp/species/6175>
- Lesser Yellowlegs** *Tringa flavipes* Breeds elsewhere
This is a Bird of Conservation Concern (BCC) throughout its range in the continental USA and Alaska.
<https://ecos.fws.gov/ecp/species/9679>
- Prothonotary Warbler** *Protonotaria citrea* Breeds Apr 1 to Jul 31
This is a Bird of Conservation Concern (BCC) throughout its range in the continental USA and Alaska.
- Red-headed Woodpecker** *Melanerpes erythrocephalus* Breeds May 10 to Sep 10
This is a Bird of Conservation Concern (BCC) throughout its range in the continental USA and Alaska.

Electronic Filing: Received, Clerk's Office 06/05/2019Short-billed Dowitcher *Limnodromus griseus*

Breeds elsewhere

This is a Bird of Conservation Concern (BCC) throughout its range in the continental USA and Alaska.

<https://ecos.fws.gov/ecp/species/9480>

Wood Thrush *Hylocichla mustelina*

Breeds May 10 to Aug 31

This is a Bird of Conservation Concern (BCC) throughout its range in the continental USA and Alaska.

Probability of Presence Summary

The graphs below provide our best understanding of when birds of concern are most likely to be present in your project area. This information can be used to tailor and schedule your project activities to avoid or minimize impacts to birds. Please make sure you read and understand the FAQ "Proper Interpretation and Use of Your Migratory Bird Report" before using or attempting to interpret this report.

Probability of Presence (■)

Each green bar represents the bird's relative probability of presence in the 10km grid cell(s) your project overlaps during a particular week of the year. (A year is represented as 12 4-week months.) A taller bar indicates a higher probability of species presence. The survey effort (see below) can be used to establish a level of confidence in the presence score. One can have higher confidence in the presence score if the corresponding survey effort is also high.

How is the probability of presence score calculated? The calculation is done in three steps:

1. The probability of presence for each week is calculated as the number of survey events in the week where the species was detected divided by the total number of survey events for that week. For example, if in week 12 there were 20 survey events and the Spotted Towhee was found in 5 of them, the probability of presence of the Spotted Towhee in week 12 is 0.25.
2. To properly present the pattern of presence across the year, the relative probability of presence is calculated. This is the probability of presence divided by the maximum probability of presence across all weeks. For example, imagine the probability of presence in week 20 for the Spotted Towhee is 0.05, and that the probability of presence at week 12 (0.25) is the maximum of any week of the year. The relative probability of presence on week 12 is $0.25/0.25 = 1$; at week 20 it is $0.05/0.25 = 0.2$.
3. The relative probability of presence calculated in the previous step undergoes a statistical conversion so that all possible values fall between 0 and 10, inclusive. This is the probability of presence score.

To see a bar's probability of presence score, simply hover your mouse cursor over the bar.

Breeding Season (■)

Yellow bars denote a very liberal estimate of the time-frame inside which the bird breeds across its entire range. If there are no yellow bars shown for a bird, it does not breed in your project area.

Survey Effort (I)

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Vertical black lines superimposed on probability of presence bars indicate the number of surveys performed for that species in the 10km grid cell(s) your project area overlaps. The number of surveys is expressed as a range, for example, 33 to 64 surveys.

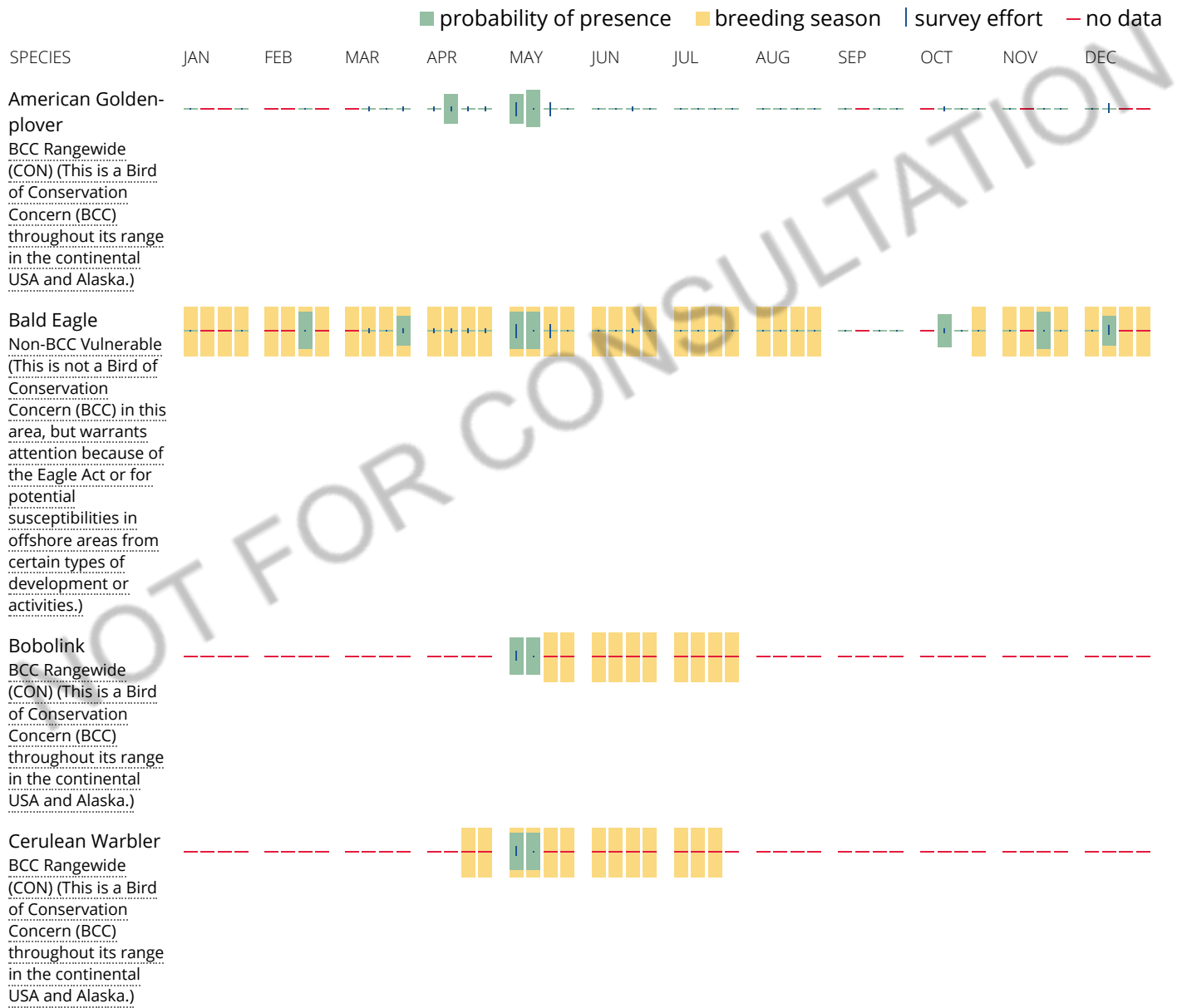
To see a bar's survey effort range, simply hover your mouse cursor over the bar.

No Data (-)

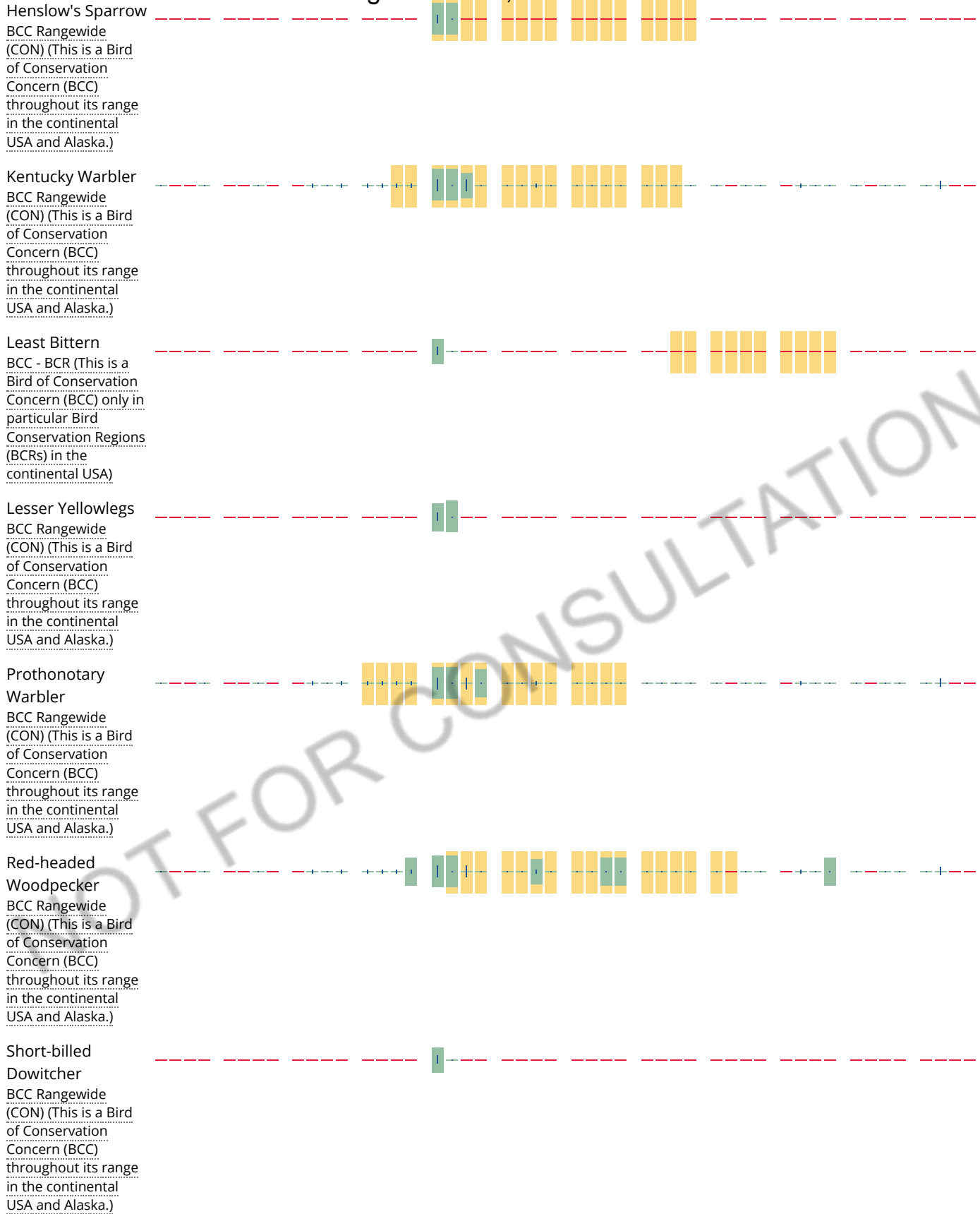
A week is marked as having no data if there were no survey events for that week.

Survey Timeframe

Surveys from only the last 10 years are used in order to ensure delivery of currently relevant information. The exception to this is areas off the Atlantic coast, where bird returns are based on all years of available data, since data in these areas is currently much more sparse.



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Wood Thrush
 BCC Rangewide
 (CON) (This is a Bird
 of Conservation
 Concern (BCC)
 throughout its range
 in the continental
 USA and Alaska.)



Tell me more about conservation measures I can implement to avoid or minimize impacts to migratory birds.

[Nationwide Conservation Measures](#) describes measures that can help avoid and minimize impacts to all birds at any location year round. Implementation of these measures is particularly important when birds are most likely to occur in the project area. When birds may be breeding in the area, identifying the locations of any active nests and avoiding their destruction is a very helpful impact minimization measure. To see when birds are most likely to occur and be breeding in your project area, view the Probability of Presence Summary. [Additional measures](#) and/or [permits](#) may be advisable depending on the type of activity you are conducting and the type of infrastructure or bird species present on your project site.

What does IPaC use to generate the migratory birds potentially occurring in my specified location?

The Migratory Bird Resource List is comprised of USFWS [Birds of Conservation Concern \(BCC\)](#) and other species that may warrant special attention in your project location.

The migratory bird list generated for your project is derived from data provided by the [Avian Knowledge Network \(AKN\)](#). The AKN data is based on a growing collection of [survey, banding, and citizen science datasets](#) and is queried and filtered to return a list of those birds reported as occurring in the 10km grid cell(s) which your project intersects, and that have been identified as warranting special attention because they are a BCC species in that area, an eagle ([Eagle Act](#) requirements may apply), or a species that has a particular vulnerability to offshore activities or development.

Again, the Migratory Bird Resource list includes only a subset of birds that may occur in your project area. It is not representative of all birds that may occur in your project area. To get a list of all birds potentially present in your project area, please visit the [E-bird Explore Data Tool](#).

What does IPaC use to generate the probability of presence graphs for the migratory birds potentially occurring in my specified location?

The probability of presence graphs associated with your migratory bird list are based on data provided by the [Avian Knowledge Network \(AKN\)](#). This data is derived from a growing collection of [survey, banding, and citizen science datasets](#).

Probability of presence data is continuously being updated as new and better information becomes available. To learn more about how the probability of presence graphs are produced and how to interpret them, go the Probability of Presence Summary and then click on the "Tell me about these graphs" link.

How do I know if a bird is breeding, wintering, migrating or present year-round in my project area?

To see what part of a particular bird's range your project area falls within (i.e. breeding, wintering, migrating or year-round), you may refer to the following resources: [The Cornell Lab of Ornithology All About Birds Bird Guide](#), or (if you are unsuccessful in locating the bird of interest there), the [Cornell Lab of Ornithology Neotropical Birds guide](#). If a bird on your migratory bird species list has a breeding season associated with it, if that bird does occur in your project area, there may be nests present at some point within the timeframe specified. If "Breeds elsewhere" is indicated, then the bird likely does not breed in your project area.

What are the levels of concern for migratory birds?

Migratory birds delivered through IPaC fall into the following distinct categories of concern:

1. "BCC Rangewide" birds are [Birds of Conservation Concern](#) (BCC) that are of concern throughout their range anywhere within the USA (including Hawaii, the Pacific Islands, Puerto Rico, and the Virgin Islands);
2. "BCC - BCR" birds are BCCs that are of concern only in particular Bird Conservation Regions (BCRs) in the continental USA; and
3. "Non-BCC - Vulnerable" birds are not BCC species in your project area, but appear on your list either because of the [Eagle Act](#) requirements (for eagles) or (for non-eagles) potential susceptibilities in offshore areas from certain types of development or activities (e.g. offshore energy development or longline fishing).

Although it is important to try to avoid and minimize impacts to all birds, efforts should be made, in particular, to avoid and minimize impacts to the birds on this list, especially eagles and BCC species of rangewide concern. For more information on conservation measures you can implement to help avoid and minimize migratory bird impacts and requirements for eagles, please see the FAQs for these topics.

Details about birds that are potentially affected by offshore projects

For additional details about the relative occurrence and abundance of both individual bird species and groups of bird species within your project area off the Atlantic Coast, please visit the [Northeast Ocean Data Portal](#). The Portal also offers data and information about other taxa besides birds that may be helpful to you in your project review. Alternately, you may download the bird model results files underlying the portal maps through the [NOAA NCCOS Integrative Statistical Modeling and Predictive Mapping of Marine Bird Distributions and Abundance on the Atlantic Outer Continental Shelf](#) project webpage.

Bird tracking data can also provide additional details about occurrence and habitat use throughout the year, including migration. Models relying on survey data may not include this information. For additional information on marine bird tracking data, see the [Diving Bird Study](#) and the [nanotag studies](#) or contact [Caleb Spiegel](#) or [Pam Loring](#).

What if I have eagles on my list?

If your project has the potential to disturb or kill eagles, you may need to [obtain a permit](#) to avoid violating the Eagle Act should such impacts occur.

Proper Interpretation and Use of Your Migratory Bird Report

The migratory bird list generated is not a list of all birds in your project area, only a subset of birds of priority concern. To learn more about how your list is generated, and see options for identifying what other birds may be in your project area, please see the FAQ "What does IPaC use to generate the migratory birds potentially occurring in my specified location". Please be aware this report provides the "probability of presence" of birds within the 10 km grid cell(s) that overlap your project; not your exact project footprint. On the graphs provided, please also look carefully at the survey effort (indicated by the black vertical bar) and for the existence of the "no data" indicator (a red horizontal bar). A high survey effort is the key component. If the survey effort is high, then the probability of presence score can be viewed as more dependable. In contrast, a low survey effort bar or no data bar means a lack of data and, therefore, a lack of certainty about presence of the species. This list is not perfect; it is simply a starting point for identifying what birds of concern have the potential to be in your project area, when they might be there, and if they might be breeding (which means nests might be present). The list helps you know what to look for to confirm presence, and helps guide you in knowing when to implement conservation measures to avoid or minimize potential impacts from your project activities, should presence be confirmed. To learn more about conservation measures, visit the FAQ "Tell me about conservation measures I can implement to avoid or minimize impacts to migratory birds" at the bottom of your migratory bird trust resources page.

Facilities

Electronic Filing: Received, Clerk's Office 06/05/2019 Wildlife refuges and fish hatcheries

REFUGE AND FISH HATCHERY INFORMATION IS NOT AVAILABLE AT THIS TIME

Wetlands in the National Wetlands Inventory

Impacts to [NWI wetlands](#) and other aquatic habitats may be subject to regulation under Section 404 of the Clean Water Act, or other State/Federal statutes.

For more information please contact the Regulatory Program of the local [U.S. Army Corps of Engineers District](#).

Please note that the NWI data being shown may be out of date. We are currently working to update our NWI data set. We recommend you verify these results with a site visit to determine the actual extent of wetlands on site.

This location overlaps the following wetlands:

LAKE

[L1UBHh](#)

RIVERINE

[R2UBH](#)

[R4SBC](#)

[R2USA](#)

A full description for each wetland code can be found at the [National Wetlands Inventory website](#)

Data limitations

The Service's objective of mapping wetlands and deepwater habitats is to produce reconnaissance level information on the location, type and size of these resources. The maps are prepared from the analysis of high altitude imagery. Wetlands are identified based on vegetation, visible hydrology and geography. A margin of error is inherent in the use of imagery; thus, detailed on-the-ground inspection of any particular site may result in revision of the wetland boundaries or classification established through image analysis.

The accuracy of image interpretation depends on the quality of the imagery, the experience of the image analysts, the amount and quality of the collateral data and the amount of ground truth verification work conducted. Metadata should be consulted to determine the date of the source imagery used and any mapping problems.

Wetlands or other mapped features may have changed since the date of the imagery or field work. There may be occasional differences in polygon boundaries or classifications between the information depicted on the map and the actual conditions on site.

Data exclusions

Certain wetland habitats are excluded from the National mapping program because of the limitations of aerial imagery as the primary data source used to detect wetlands. These habitats include seagrasses or submerged aquatic vegetation that are found in the intertidal and subtidal zones of estuaries and nearshore coastal waters.

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Some deepwater reef communities (coral or tubercid worm reefs) have also been excluded from the inventory. These habitats, because of their depth, go undetected by aerial imagery.

Data precautions

Federal, state, and local regulatory agencies with jurisdiction over wetlands may define and describe wetlands in a different manner than that used in this inventory. There is no attempt, in either the design or products of this inventory, to define the limits of proprietary jurisdiction of any Federal, state, or local government or to establish the geographical scope of the regulatory programs of government agencies. Persons intending to engage in activities involving modifications within or adjacent to wetland areas should seek the advice of appropriate federal, state, or local agencies concerning specified agency regulatory programs and proprietary jurisdictions that may affect such activities.

NOT FOR CONSULTATION

APPENDIX F

Applicant: SCI Engineering, Inc *IDNR Project Number:* 1811584
Contact: Scott E. Billings 06/04/2018 *Date:*
Address: 650 Pierce Boulevard
O'Fallon, IL 62269

Project: Vermilion River Bank Stabilization
Address: East 2150 North Road, Oakwood

Description: The project is proposing stabilization work on approximately 2,000 linear feet (LF) along the Middle Fork Vermilion (MFV) River from the old East Ash Pond (OEAP) to the North Ash Pond (NAP) system at the Vermilion Power site. This portion of the MFV River is experiencing erosion along the right descending bank within the eastern portion of the power station.

Natural Resource Review Results

This project was submitted for information only. It is not a consultation under Part 1075.

The Illinois Natural Heritage Database shows the following protected resources may be in the vicinity of the project location:

Kennekuk Cove County Park INAI Site
Middle Fork Of The Vermilion River INAI Site
Orchid Hill INAI Site
Vermilion040 INAI Site
Kickapoo Hill Prairie Land And Water Reserve
Orchid Hill Natural Heritage Landmark
Bluebreast Darter (*Etheostoma camurum*)
Bluebreast Darter (*Etheostoma camurum*)
Clubshell (*Pleurobema clava*)
Fibrous-Rooted Sedge (*Carex communis*)
Little Spectaclecase (*Villosa lienosa*)
Northern Riffleshell (*Epioblasma torulosa rangiana*)
Purple Wartback (*Cyclonaias tuberculata*)
Salamander Mussel (*Simpsonaias ambigua*)
Wavy-Rayed Lampmussel (*Lampsilis fasciola*)
Wavy-Rayed Lampmussel (*Lampsilis fasciola*)

Location

The applicant is responsible for the accuracy of the location submitted for the project.

County: Vermilion

Township, Range, Section:

20N, 12W, 20

IL Department of Natural Resources

Contact

Impact Assessment Section

217-785-5500

Division of Ecosystems & Environment

Disclaimer

The Illinois Natural Heritage Database cannot provide a conclusive statement on the presence, absence, or condition of natural resources in Illinois. This review reflects the information existing in the Database at the time of this inquiry, and should not be regarded as a final statement on the site being considered, nor should it be a substitute for detailed site surveys or field surveys required for environmental assessments. If additional protected resources are encountered during the project's implementation, compliance with applicable statutes and regulations is required.



APPENDIX G

Planting and Maintenance
Plan

Middle Fork Vermilion River
Erosion Mitigation and Riverbank
Stabilization



Prepared for:
Dynergy Midwest Generation, LLC

Prepared by:
Stantec Consulting Services Inc.

June 27, 2018

PLANTING AND MAINTENANCE PLAN

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PLANTING AND MAINTENANCE PLAN

1.0 INTRODUCTION

This Planting and Maintenance Plan includes a description of the proposed seed mixtures and plantings and an outline of the basic procedures to be followed in order to promote the successful establishment of vegetation following construction of the Middle Fork Vermilion River Erosion Mitigation and Riverbank Stabilization Project.

As a result of Dynegy Midwest Generation, LLC's (DMG) commitment to this project, enhancements have been included in this Planting and Maintenance Plan to provide aesthetic improvements to the constructed project beyond those typically identified in similar design projects. These enhancements include:

1. Increased density of plantings. Plantings in similar designs are typically spaced on approximately 6 to 10-foot centers. Plantings in this plan are called for on approximately 4-foot centers, randomly spaced to reflect native recruitment.
2. Use of containerized plants. In addition to the use of live stakes and whips, containerized trees and shrubs are identified in the plans to supplement the stakes and whips. The intent of these are to provide more rapid revegetation of the riverbank.
3. Increased shrub plantings. The planting plan includes a heavier mix of shrubs than in typical similar designs. The intent of these shrubs is to aid in more rapid covering of exposed rock.
4. Maintenance schedule. DMG is committed to establishing a dense stand of vegetation along the project. The maintenance schedule identified in this plan includes more frequent inspections, and associated mitigation of identified planting deficiencies, than similar design projects.

2.0 PLANTING PLAN

Permanent planting and/or seeding will be required for all areas within the limits of disturbance. Only certified seed and nursery stock will be allowed. Conceptual planting plan details describing the vegetation design are located in Appendix A; however, exact types, sizes, and sources of propagules, as well as seed mixes and rates of application, will be further refined in the final design. Note that the drawing included in Appendix A is an enhanced version of Sheet 15 of the Permit Drawings. The Stone Toe Protection detail has been modified to clearly illustrate planting zones.

2.1 LIVE STAKES AND LIVE BRUSH LAYERING

Proposed live staking and live brush layering (willow whips) plant material is shown in Table 1. All plant material will be harvested locally or purchased from a local source. All live stakes and willow whips will be dormant at time of acquisition and planting. Live stakes should be installed between November 1 and May 15. Typically, willow cuttings are installed after spring thaw but before bud break, or in autumn after leaves change color and/or fall.



PLANTING AND MAINTENANCE PLAN

2.1.1 Live Stakes

Live stakes will be ½ - 2" in diameter and approximately 3 feet in length. During preparation, the basal ends of the live stakes will be cleanly cut at an angle to facilitate easy insertion into the soil, while the tops will be cut square or blunt for tamping. All limbs will be removed from the sides of the live cutting prior to installation.

Cuttings for live brush layers will be harvested in manner such that they are cut and planted immediately or within 24 hours. If plant material for live brush layers is sourced from offsite and cannot be planted on the same day as harvest, the willow whips should immediately be put into water, soaked for up to 5 days, and then planted as soon as possible. Cuttings will remain wet until they are planted. Outside storage locations should be continually shaded and protected from wind and direct sunlight.

Live stakes will primarily be used as joint planting along the face of the stone toe protection. Installation of the live stakes will need to occur concurrent with the finalized placement of stone toe protection and void filled riprap for sufficient coverage/penetration of the live stakes within the final grade (2/3 of the stake length within the ground). A minimum of 6" of soil will be placed around the buried portion of the stake prior to continuation of stone toe/void filled riprap placement.

Stakes will be spaced approximately 2 feet on center. Live stakes should be installed according to the configuration presented in the details of the plans. One or two inches will be cut cleanly off of the top of each live stake (with loppers) at an angle of approximately 15 degrees following installation. Any stakes that are split or damaged during installation will be removed and replaced.

Areas where live stakes have been installed will be watered on a daily basis, throughout the duration of construction (anticipated as 6 to 8 months), immediately following successful installation.

2.1.2 Live Brush Layering – Willow Whips

Willow whips, which are used for the live brush layering, will be ½ - 2" in diameter and 4 – 6 feet in length. During preparation, the basal ends of the whips will be cleanly cut, while the tops will remain uncut leaving the terminal end of the whip, as well as all lateral branches, intact.

Cuttings for live brush layers will be harvested in manner such that they are cut and planted immediately or within 24 hours. If plant material for live brush layers is sourced from offsite and cannot be planted on the same day as harvest, the basal ends of the willow whips (minimum 12 inches of basal end length) should immediately be put into water, soaked for up to 5 days, and then planted as soon as possible. Cuttings will remain wet until they are planted. Outside storage locations should be continually shaded and protected from wind and direct sunlight.

Willow whips will be placed in thin, overlapping layers between- and perpendicular-to soil wraps, with the tips of the willow whips oriented towards the river and slightly upward, while the cut ends are oriented downward toward the back of the soil lift. Brush layers will either be covered by additional soil lifts or covered with a minimum of 3" of soil.



PLANTING AND MAINTENANCE PLAN

Stakes will be spaced evenly across the top of a soil lift at an approximate density of 2-4 stems per linear foot, such that any lateral branches overlap. Live brush layers should be installed according to the configuration presented in the details of the final plan sheets. Any willow whips that are damaged during installation will be removed and replaced.

Areas where live brush layers have been installed will be watered on daily basis, throughout the duration of construction (anticipated as 6 to 8 months), immediately following successful installation.

Table 1. Live Stakes and Live Brush Layering Species

Common Name	Scientific Name
Silky dogwood	<i>Cornus amomum</i>
Gray dogwood	<i>Cornus foemina</i>
Red-osier dogwood	<i>Cornus sericea</i>
Peachleaf willow	<i>Salix amigdyloides</i>
Pussy willow	<i>Salix discolor</i>
Sandbar willow	<i>Salix interior</i>
Black willow	<i>Salix nigra</i>
Elderberry	<i>Sambucus canadensis</i>
Nannyberry	<i>Viburnum lentago</i>

2.2 BANKFULL BENCH ZONE

Bankfull revegetation will consist of the planting of rooted cuttings, container-grown plants (Table 2) and broadcast seeding (Table 3). The installation of plants, seedlings can occur at any time of year, though no planting will occur when the temperature is below freezing. Seeding will immediately precede planting for a given restoration reach.

Soil that is compacted in the bankfull bench area of planting and seeding will be amended with compost at a rate of 403 yd³/acre (depth of 3"); deep-ripped and graded to contour. Fertilizer used for topdressing will be 10-10-10 (N-P-K) analysis and will be applied at the rate of 50 pounds per acre. The sub-grade should be loosened to a minimum depth of 8 inches and graded to a smooth even surface with a loose, fine texture. The areas to be planted and seeded are then to be rolled and raked to remove any ridges and fill depressions that are greater than +/-0.2 feet to meet finish grades. Prepared areas are to be moistened prior to seeding when soil is dry, but care will be taken not to create muddy conditions. Prepared areas are to be restored if eroded or otherwise disturbed after final grading and before planting.

Seed will be sown with a spreader or a seeding machine at a rate of 41 pounds per acre. Seed is not to be broadcast or dropped when wind velocity exceeds 5 mph and will be evenly sown. Wet seed or seed that is moldy or otherwise damaged in transit or storage is not to be used. After being sown, the seed will be raked into the top 1/4 inch of the topsoil, lightly rolled, and watered with fine spray. Seeded areas on riverbanks will be covered with weed-free straw mulch and protected/secured with staked coir fiber matting.



PLANTING AND MAINTENANCE PLAN

Within one week of seeding the bankfull zone, woody species will be planted in the seeded areas. Trees and shrubs are to be planted 4 feet on center, random spacing, at approximately 2,700 stems per acre to emulate native regenerative patterns (~1 stem every 16 ft², though actual spacing will be determined in the field to create a heterogenous irregularly-spaced mixture of species throughout the bankfull planting zone). The planting area should be cleared of straw mulch immediately prior to digging the planting hole, if necessary. The planting trench or hole will be deep and wide enough to permit roots to spread out and down without J-rooting, at least twice the diameter of the root ball. Topsoil and subsoil will be kept separate during excavation. The root ball will be placed on solid soil and not loose backfill. The plant stem will remain upright. Soil will be replaced around the transplanted vegetation and tamped around the tree firmly to eliminate air pockets. Mulching should be replaced in the area around the new planting.

Table 2. Bankfull Zone Plantings

Common Name	Scientific Name	Pot Size/Caliper	Life Form
Box elder	<i>Acer negundo</i>	5-Gallon / 1"	Tree
Red maple	<i>Acer rubrum</i>	5-Gallon / 1"	Tree
Hackberry	<i>Celtis occidentalis</i>	5-Gallon	Tree
Green ash	<i>Fraxinus pennsylvanica</i>	5-Gallon	Tree
Sweetgum	<i>Liquidambar styraciflua</i>	5 or 15-Gallon	Tree
Sycamore	<i>Platanus occidentalis</i>	5 or 15-Gallon/ 1-2"	Tree
Swamp white oak	<i>Quercus bicolor</i>	5 or 15-Gallon / 1-2"	Tree
Bur oak	<i>Quercus macrocarpa</i>	5 or 15-Gallon / 1-2"	Tree
American hazelnut	<i>Corylus americana</i>	2 or 5-Gallon	Shrub
Shrubby Cinquefoil	<i>Dasiphora fruticosa</i>	5-Gallon	Shrub
Shrubby St. John's-Wort	<i>Hypericum prolificum</i>	5-Gallon	Shrub
Ninebark	<i>Physocarpus opulifolius</i>	5-Gallon	Shrub
Climbing prairie rose	<i>Rosa setigera</i>	5-Gallon	Shrub
Bittersweet	<i>Celastrus scandens</i>	Plugs/bareroot	Vine
Virgin's-bower	<i>Clematis virginiana</i>	Plugs	Vine
Virginia creeper	<i>Parthenocissus quinquefolia</i>	Plugs	Vine



PLANTING AND MAINTENANCE PLAN

Table 3. Bankfull Zone Seed Mix

Common Name	Scientific Name	Growth Form	Pounds per Acre
Blue joint grass	<i>Calamagrostis canadensis</i>	Grass	5
Nodding wild rye	<i>Elymus canadensis</i>	Grass	5
Virginia wild rye	<i>Elymus virginicus</i>	Grass	5
Fowl manna grass	<i>Glyceria striata</i>	Grass	5
Rice cut grass	<i>Leersia oryzoides</i>	Grass	5
Switchgrass	<i>Panicum virgatum</i>	Grass	5
Prairie cordgrass	<i>Spartina pectinata</i>	Grass	5
Common water plantain	<i>Alisma subcordatum</i>	Forb	0.25
Swamp milkweed	<i>Asclepias incarnata</i>	Forb	0.25
Tall tickseed	<i>Coreopsis tripteris</i>	Forb	0.25
Prairie mimosa	<i>Desmanthus illinoensis</i>	Forb	0.25
Boneset	<i>Eupatorium perfoliatum</i>	Forb	0.25
Queen-of-the-prairie	<i>Filipendula rubra</i>	Forb	0.25
Sneezeweed	<i>Helenium autumnale</i>	Forb	0.25
Sawtooth sunflower	<i>Helianthus grosseserratus</i>	Forb	0.25
Foxglove beardtongue	<i>Penstemon digitalis</i>	Forb	0.25
Common mountain-mint	<i>Pycnanthemum virginianum</i>	Forb	0.25
Brown-eyed Susan	<i>Rudbeckia triloba</i>	Forb	0.25
Prairie rosinweed	<i>Silphium terebinthinaceum</i>	Forb	0.25
Late goldenrod	<i>Solidago gigantea</i>	Forb	0.25
Riddell's goldenrod	<i>Solidago riddellii</i>	Forb	0.25
New England aster	<i>Symphyotrichum novae-angliae</i>	Forb	0.25
Purplestem aster	<i>Symphyotrichum puniceum</i>	Forb	0.25
Blue vervain	<i>Verbena hastata</i>	Forb	0.25
Blunt spike rush	<i>Eleocharis obtusa</i>	Rush	0.25
Creeping spike rush	<i>Eleocharis smallii</i>	Rush	0.25
Chairmaker's rush	<i>Scirpus americanus</i>	Rush	0.25
Willow sedge	<i>Carex lurida</i>	Sedge	0.5
Fox sedge	<i>Carex vulpinoidea</i>	Sedge	0.5

PLANTING AND MAINTENANCE PLAN

2.3 UPLANDS

Upland revegetation will consist of the planting of bare root seedlings, rooted cuttings, or container-grown plants (Table 4) as well as broadcast seeding and incorporation of upland seed mix within the soil lifts (Table 5). The upland soil lifts will utilize the live brush layering (discussed above) to create a robust bioengineered bank conducive for rapid revegetation and side slope stability.

The upland area beyond the soil lifts will include broadcast seed, which will be raked into the top 1/4 inch of the topsoil, lightly rolled, and watered with fine spray. Seeded areas are to be protected by spreading weed-free straw mulch uniformly to form a continuous blanket over seeded areas. Straw mulch is to be spread by hand, blower, or other suitable equipment. Fertilizer used for topdressing will be 10-10-10 (N-P-K) analysis and will be applied at the rate of 50 pounds per acre. Additionally, a mix of larger caliper (1-2") containerized trees will be planted with a 4' on center spacing to encourage more rapid revegetation.

Table 4. Upland Zone Plantings

Common Name	Scientific Name	Pot Size/Caliper	Life Form
Redbud	<i>Cercis canadensis</i>	5 or 15-Gallon/ 1-2"	Tree
American beech	<i>Fagus grandifolia</i>	5 or 15-Gallon/ 1-2"	Tree
Black walnut	<i>Juglans nigra</i>	5 or 15-Gallon/ 1-2"	Tree
Tulip tree	<i>Liriodendron tulipifera</i>	5 or 15-Gallon/ 1-2"	Tree
White oak	<i>Quercus alba</i>	5 or 15-Gallon/ 1-2"	Tree
Red oak	<i>Quercus rubra</i>	5 or 15-Gallon/ 1-2"	Tree
American hazelnut	<i>Corylus americana</i>	2 or 5-Gallon	Shrub
Shrubby cinquefoil	<i>Dasiphora fruticosa</i>	4 or 5-Gallon	Shrub
Shrubby St. John's-Wort	<i>Hypericum prolificum</i>	5 or 5-Gallon	Shrub
Ninebark	<i>Physocarpus opulifolius</i>	3 or 5-Gallon	Shrub
Climbing prairie rose	<i>Rosa setigera</i>	2 or 5-Gallon	Shrub
Virgin's-bower	<i>Clematis virginiana</i>	Plugs	Vine
Bittersweet	<i>Celastrus scandens</i>	Plugs/bareroot	Vine

PLANTING AND MAINTENANCE PLAN

Table 5. Upland Zone Seed Mix

Common Name	Scientific Name	Growth Form	Pounds per Acre
Big bluestem	<i>Andropogon gerardii</i>	Grass	5
Indian grass	<i>Sorghastrum nutans</i>	Grass	5
Little bluestem	<i>Schizachyrium scoparium</i>	Grass	5
Switchgrass	<i>Panicum virgatum</i>	Grass	5
Wild river oats	<i>Chasmanthium latifolium</i>	Grass	5
Side-oats gramma	<i>Bouteloua curtipendula</i>	Grass	5
Blue false indigo	<i>Baptisia australis</i>	Forb	1
Brown-eyed Susan	<i>Rudbeckia hirta</i>	Forb	1
Common milkweed	<i>Asclepias syrica</i>	Forb	1
Dotted Horsemint	<i>Monarda punctata</i>	Forb	1
Golden Alexander	<i>Zizia aurea</i>	Forb	0.5
Hairy Woodmint	<i>Blephilia hirsuta</i>	Forb	0.5
Hoary vervain	<i>Verbena stricta</i>	Forb	0.5
Ohio Spiderwort	<i>Tradescantia ohiensis</i>	Forb	0.5
Partridge pea	<i>Chamaecrista fasciculata</i>	Forb	0.5
Prairie coneflower	<i>Ratibida pinnata</i>	Forb	0.5
Purple coneflower	<i>Echinacea purpurea</i>	Forb	0.5
Showy tick-trefoil	<i>Desmodium canadense</i>	Forb	0.5
Smooth oxeye	<i>Heliopsis helianthoides</i>	Forb	0.5
Tall Ironweed	<i>Vernonia gigantea</i>	Forb	0.5
Tall tickseed	<i>Coreopsis tripteris</i>	Forb	0.5
Wild bergamot	<i>Modarda fistulosa</i>	Forb	0.5

2.4 IRRIGATION

As each reach is planted following construction, workers will use a pump submersed in the channel to irrigate freshly planted and/or seeded areas. Irrigation will occur daily through construction (anticipated as 6 to 8 months) to help plants establish. Supplemental watering may be necessary on a periodic basis following construction completion if dry conditions occur.

3.0 SUCCESS CRITERIA

Success criteria for riparian vegetation include:

- 80% of the planted trees and shrubs are alive after Years 1 through 3, and 70% of the trees and shrubs, including native recruitment, survive through Years 4 and 5.
- Vegetation canopy cover of at least 40% after Year 3, as determined by a point-intercept quantitative cover method.



PLANTING AND MAINTENANCE PLAN

- Weed cover not greater than 5% absolute cover, and no areas of 100 ft² or larger dominated by weed species.
- An herbaceous plant species diversity of at least 15 desirable native plants.

4.0 MONITORING

4.1 QUALITATIVE MONITORING

Following construction, the riverbank will be monitored throughout each growing season following seeding and planting for a minimum period of 5 years.

Monitoring will consist of: 1) inspection of leaf development, shoot elongation, and general survivability, 2) estimation of overall vegetated ground cover, 3) photo documentation at pre-determined permanent photo points.

Monthly monitoring will occur during the initial growing season (spring months) to assess the early establishment of the riparian and upland plantings. Additionally, during the first 12 months after project completion an inspection will occur following any storm event in excess of 4,500 cfs, recorded at the USGS Gage downstream. A minimum of 8 monthly site inspections annually (April – November) will be conducted for years 1 - 5 after planting.

4.2 QUANTITATIVE MONITORING

Annually, vegetation canopy cover will be quantified along 10-meter-long, permanently established transects within each of the 5 segments along the project reach. For each segment, transects will be established at two riparian/bankfull benches and two upland locations with permanent markers at each end, for a total of 20 transects. A photograph will be taken each monitoring year from each end of the transects. Vegetation canopy cover will be quantified using a point-intercept method (Mueller-Dombois and Ellenberg 1974). Twenty points will be sampled at one-meter intervals along each 10-meter transect. The sample point will be perpendicular to- and 0.50 meters from- the transect.

At each sample point, a pin flag will be lowered to ground-level, point down, first on the right and then on the left. If overstory vegetation is present, the pin will first be elevated vertically to record any overstory vegetation, and then directed downward to record vegetation in potential shrub and herbaceous canopies. Vegetation along the vertical profiles will be recorded as first, second, and third hits. If vegetation is not present along the vertical profile, litter, rock, soil, etc. will be recorded. All vegetation hits will be tallied by species.

For each cover transect, the absolute percent cover of vegetation, litter, rock, and soil will be calculated using only first hit data. The relative cover of each species will be calculated using all hit data. The data for all 20 transects will be summed to describe the entire community. Data on

PLANTING AND MAINTENANCE PLAN

species richness (diversity) will be collected by identifying all plant species present in a two-meter-wide quadrat centered along the 10-meter cover transect.

Qualitative and quantitative monitoring results will be compiled in an annual report, to be submitted to DMG for the monitoring period covering the first 5 years. The annual report will include summary of findings, photographs, and recommendations for remedial actions to address any areas that are not meeting the success criteria.

5.0 MAINTENANCE ACTIVITIES

A qualified scientist, will conduct the quantitative monitoring described above, and will also note hydrological functioning, evaluate the success of the seeding and planting, and note any problems with erosion, or weeds. If any of the permanent transects are shown to not be meeting the success criteria, appropriate remedial action will be recommended. Additionally, if any of the following deficiencies are observed the following actions will be implemented.

- a. If the seed mix has not germinated in some areas, these areas will be reseeded.
- b. If shrubs or trees are not meeting the survivability and/or canopy cover criteria, additional containerized trees/shrubs will be planted.
- c. Weed control will be conducted throughout the monitoring period. If weed cover exceeds the success criteria, hand weeding or other weed control methods will be performed during monitoring to keep weeds from producing seeds and to control weed competition during the establishment period of native plants.
- d. If live stakes and/or live brush layering are not meeting the minimum survivability criteria

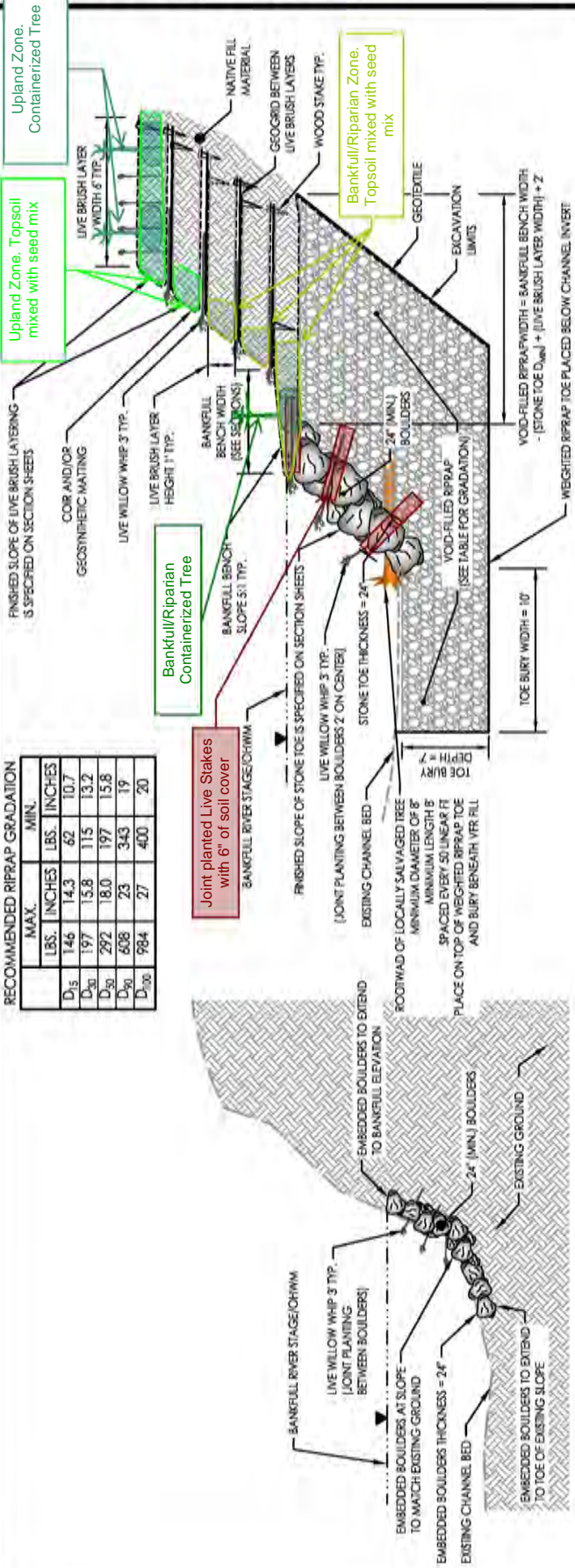
6.0 CLOSURE

This Planting and Maintenance Plan has been prepared to demonstrate DMG's commitment to implementing the project in a manner that will promote the successful establishment of dense native vegetation that screens the stone toe protection and provides scenery that is consistent with the riverbank upstream and downstream of the project site.

APPENDIX A
PLANTING DETAIL

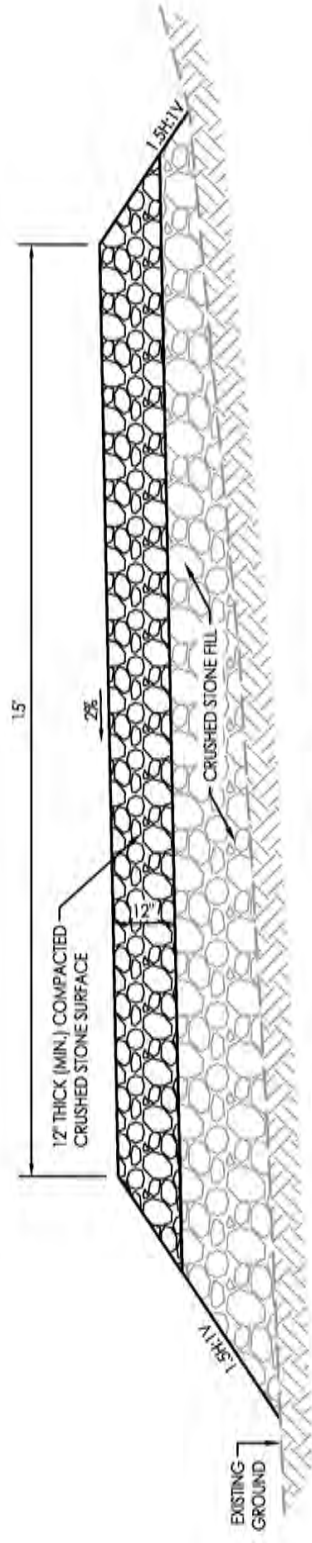
RECOMMENDED RIPRAP GRADATION

	MAX.	MIN.
	LBS.	LBS.
	INCHES	INCHES
D ₁₅	146	62
D ₃₀	197	115
D _{47.5}	292	197
D ₆₀	408	343
D ₁₀₀	984	400



1 15 DETAIL - EMBEDDED BOULDERS - SEGMENT 1
 NOT TO SCALE

2 15 DETAIL - STONE TOE PROTECTION - SEGMENTS 2-5
 NOT TO SCALE



3 15 DETAIL - CONSTRUCTION ACCESS AND FUTURE MAINTENANCE ROAD
 SCALE: 1/2" = 1'-0"

SECTION OR DETAIL NO.
 TARGET DRAWING
 REFERENCE KEY

DRAFT - NOT FOR CONSTRUCTION
 SEAL PLACEHOLDER

Exhibit C

January 10, 2019

VIA EMAIL AND U.S. MAIL

ATTN: Sarah Keller
U.S. Army Corps of Engineers, Louisville District
8902 Otis Avenue, Suite S106B
Indianapolis, IN 46216

Re: Public Notice No. LRL-2018-602-sjk (Dynergy Midwest Generation, LLC)

Dear Ms. Keller,

Please accept these comments submitted on behalf of Prairie Rivers Network and Earthjustice in reference to Dynergy Midwest Generation, LLC's ("Dynergy") application for an individual Clean Water Act ("CWA") § 404 permit to prevent the coal ash from its Vermilion Power Station from spilling into the Middle Fork of the Vermilion River ("Middle Fork"). Dynergy's proposed project would discharge fill material into 2,000 linear feet of the right descending bank of the Middle Fork utilizing a combination of 11,500 cubic yards of void-filled riprap and stone toe protection, 2,000 cubic yards of clean soil, and live branch layering. For the reasons set forth below, the § 404 permit may not be approved as submitted. Rather, a full environmental impact analysis pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 et seq., is required to thoroughly and objectively evaluate all environmental impacts of, and alternatives to, the proposed construction to allow the Corps to make a fully-informed decision as to whether the proposal should be allowed to move ahead. Moreover, prior to making any decision on the final project, the Corps should hold a public hearing on the project due to its size, scope, and environmental impact, in accordance with 33 C.F.R. § 327.4.

Dynergy's § 404 permit application may not be approved as submitted. The application does not meet the Corps' 404(b)(1) guidelines because (1) Dynergy has failed to demonstrate that there are no practicable alternatives that achieve the goal of the project with less adverse environmental impact; (2) Dynergy has failed to demonstrate that the proposed project will not jeopardize threatened species; (3) Dynergy has not shown that the proposed project will not "cause or contribute to significant degradation" of the Middle Fork's delicate ecology, aesthetic beauty, and recreational value; and (4) Dynergy has failed to take the necessary steps to minimize the proposed project's potential adverse impacts on the aquatic ecosystem. Without the comprehensive analysis and scrutiny provided by the NEPA process, this application leaves important unanswered questions about the severity of its impacts on the Middle Fork's delicate ecology and scenic beauty.

Furthermore, the project, as proposed, may not be approved because Dynergy has not demonstrated that it meets the requirements of the Wild and Scenic Rivers Act. The Middle Fork's outstanding remarkable values, free-flowing nature, and water quality are all put at risk by this project. The significant direct, indirect, and cumulative environmental impacts associated

with the proposed project trigger requirements that the Corps comply with the NEPA process, including completing a comprehensive Environmental Impact Statement (“EIS”), before issuing any permit for the proposed construction at the Middle Fork. Once a full EIS is conducted, the permit should be re-noticed to provide the public with a meaningful opportunity to comment on the final plan for the project.

While the environmental review is underway, the Corps should evaluate whether temporary, easily-removable stabilization measures are necessary to reduce any imminent risks of coal ash release into the beautiful Middle Fork. If the Corps finds that immediate stabilization is necessary, it should consider targeted, short-term, easily-removable alternatives, as discussed *infra* section VII.

I. Factual Background

A. The Facility

The Vermilion Power Station owned by Dynegey 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. From the mid-1950s until 2011, the plant burned coal and generated millions of tons of coal combustion residuals (“coal ash”).

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, manganese, molybdenum, 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.

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. All three coal ash pits were constructed decades ago. 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. All three of the unlined ash pits sit right next to the Middle Fork.

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. 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. Together, the coal ash pits loom over nearly a half-mile of the banks of the Middle Fork.

B. The Middle Fork

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 1989, 17.1 miles of the Middle Fork were designated as Illinois’ only Scenic River under the federal National Wild and Scenic Rivers Act.¹

The Middle Fork is, in the words of Illinois’ Department of Conservation,² “clearly one of Illinois’ finest [rivers].”³ According to the National Park Service, the Middle Fork provides “scenic, geologic, fish and wildlife, ecological, recreational, and historic resources.”⁴ The Middle Fork and its surrounding area are home to twenty threatened or endangered species,⁵ fifty-seven types of fish,⁶ forty-six different mammal species,⁷ and two hundred seventy different bird species.⁸ 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.⁹ 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.¹⁰

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. The local canoe outfitter puts upwards of 10,000 people on the river each year in canoes, kayaks and tubes. Other visitors come to the

¹ 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.

² 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>.

³ 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>.

⁴ Letter from Martin Sterkel to Rick Diericx on March 31, 2009 at 1.

⁵ Illinois Natural History Survey, “Vermilion River,” available at <http://www.inhs.illinois.edu/research/rra/site17/>.

⁶ Corridor Management Plan at 37.

⁷ 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>.

⁸ *Id.* at 15.

⁹ *Id.* at 17.

¹⁰ *Id.* at 15-19; Vermilion County Conservation District, “Wildlife,” <http://www.vccd.org/wildlife.html>.

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,¹¹ which generates an annual revenue stream of \$11-15 million for Vermilion County, and tourism brought a total of over \$70 million in revenue to Vermilion County in 2010.¹²

Local residents envision the Middle Fork and downstream Vermilion River 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.^{13,14}

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.

C. The Proposed Project

Dyney seeks to prevent their coal ash from spilling into the Middle Fork. They have identified approximately 1,900 linear feet of the right-descending bank of the Middle Fork for streambank stabilization, including the use of stone toe protection, embedded toe boulders, void-filled riprap, live branch layering, and removal of exiting gabion baskets. Based on calculations provided by Stantec, Dyney's consultant, the result is approximately 2,130 cubic yards of stone toe protection boulders and approximately 20,240 cubic yards of void-filled riprap to be placed below the ordinary high water mark of the Middle Fork.¹⁵ Furthermore, approximately 9,000 cubic yards of existing riverbed and bank material, which includes existing gabion baskets, below the ordinary high water mark would be excavated and removed offsite to an undesignated location. Initial design documents show fill extending over 25 feet into the river's flow path, and over seven feet below the bed of the river. In short, Dyney proposes to erect a massive rock wall along more than one-third of a mile of the Middle Fork's scenic riverbank and into the river, in an area of the Middle Fork whose scenic beauty has already been disturbed by a 485-foot white rock wall installed in 2016.

II. Section 404 Permitting Process

Section 404 of the CWA requires a permit before fill material may be discharged into waters of the U.S. 33 U.S.C. § 1344. The Corps may only issue individual permits for specific sites after extensive administrative proceedings and investigation, including site-specific documentation, public notice and comment, and the evaluation of the probable impact on the public interest. 33 U.S.C. § 1344(a); 33 C.F.R. §§ 323, 325.

¹¹ See <http://nprillinois.org/post/welcome-visitors-illinois-tourism-industry-means-big-business#stream/0>.

¹² See http://www.commercial-news.com/news/local_news/tourists-keep-county-busy/article_17385cb3-63b3-5f08-92ba-01cf6f331e9e.html.

¹³ See <http://www.vermilioncountyfirst.com/2016/02/25/new-2025-plan-focuses-on-tourism-other-areas/>.

¹⁴ See http://www.cityofdanville.org/uploads/6/7/5/0/6750232/danvillerverfront_conceptualplanfinal.pdf.

¹⁵ The calculations provided by Stantec are significantly greater than the calculations provided by the Corps in the Public Notice.

When evaluating individual permit applications, the Corps is required to conduct a public interest review. Before issuing a CWA § 404 permit, the Corps must evaluate “the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.” 33 C.F.R. § 320.4(a)(1). Factors relevant to all permit applications include “conservation, economics, aesthetics, general environmental concerns, . . . fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, . . . safety, . . . and, in general, the needs and welfare of the people.” *Id.* In addition, the Corps is required to consider the following criteria in evaluating all permit applications:

- (i) the relative extent of the public and private need for the proposed structure or work;
- (ii) where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and
- (iii) the extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited.

33 C.F.R. § 320.4(a)(2).

In performing the required “careful weighing” of all relevant factors in each particular case, the Corps balances the “benefits which reasonably may be expected to accrue from the proposal . . . against its reasonably foreseeable detriments.” *Id.* Although the Corps has discretion in weighing benefits and detriments, their scope must correspond: the Corps cannot credit the benefits of an aspect of a project but ignore its adverse impacts. *Sierra Club v. Sigler*, 695 F.2d 957, 979-83 (5th Cir. 1983) (finding Corps impermissibly skewed CWA public interest and NEPA analyses by crediting benefits of bulk cargo activities that a port expansion project would enable without analyzing their environmental impacts); *Fla. Wildlife Fed’n v. U.S. Army Corps of Eng’rs*, 401 F. Supp. 2d 1298, 1332 (S.D. Fla. 2005) (finding Corps violated CWA and NEPA because it analyzed benefits, including job creation, of entire project, but analyzed adverse impacts only of project’s first phase). Furthermore, when the proposed activity involves a scenic river, the Corps is required to give due consideration to “the effect which the proposed structure or activity may have on values such as those associated with wild and scenic rivers. . . . and avoid significant adverse effects on the values or purposes for which those classifications, controls, or policies were established.” 33 C.F.R. § 320.4(e).

The Corps must also evaluate § 404 permit applications pursuant to the joint U.S. Environmental Protection Agency and Army Corps permit guidelines (“the Guidelines”), codified at 40 C.F.R. Pt. 230. *Friends of the Earth v. Hintz*, 800 F.2d 822, 831 (9th Cir.1986). The Guidelines establish that no discharge of dredged or fill material shall be permitted unless a number of strict conditions are met: (1) there must be no practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem; (2) the discharge must not cause or contribute to violations of any applicable state water quality standard; (3) the discharge must not cause or contribute to significant degradation of the environment; and (4) all

appropriate steps must have been taken to minimize potential adverse impacts. 40 C.F.R. § 230.10(a)-(d).

A proposed activity will cause or contribute to significant degradation of the environment if it will have a significant adverse effect on human health or welfare; aquatic life and other water dependent wildlife; aquatic ecosystem diversity, productivity, and stability; or recreational, aesthetic, and economic values. 40 C.F.R. § 230.10(c)(1)-(4). These factors both individually and cumulatively must be considered when evaluating the specific details of an application to fill jurisdictional waters. Moreover, a proposed disposal site must be rejected if there is insufficient information to make a reasonable determination as to whether the proposed discharge will comply with the applicable regulations. 40 C.F.R. § 230.12(a)(3)(iv). As set forth below, Dynegey's application has not met the requirements set out in the Guidelines and other applicable law and regulations. No decision should be made on this behemoth of a project without the deep scrutiny and comprehensive evaluation the NEPA process demands.

III. The Proposed Project Does Not Meet The Corps' 404(b)(1) Guidelines.

The Corps' Guidelines for issuance of § 404 permits include numerous criteria that must be met in order for a § 404 permit to be issued. The present project does not meet several of those criteria.

A. Failure to demonstrate that there is no less environmentally-adverse practicable alternative.

Dynegey's application may not be approved as submitted because the company has not demonstrated that there are no less-environmentally adverse practicable alternative to the proposed project. Under the Guidelines, the Corps may not issue a § 404 permit unless there is no "practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem." 40 C.F.R. § 230.10(a). As discussed below, *infra* section V, the Corps' Public Notice states that Dynegey has "considered multiple alternatives to further minimize proposed impacts to waters of the United States, *some of which* would result in an increase in erosion and sediment loading and a greater impact to aesthetic appearance of the banks in comparison to the preferred alternative" (emphasis added), without providing any additional information about what those "multiple alternatives" entail, in particular those that would not result in more erosion, sediment loading, or aesthetic impacts than the "preferred alternative." Dynegey's application likewise does not include any sort of alternatives analyses nor does it include any discussion of the multiple alternatives that it purportedly considered. Without a comprehensive evaluation of those alternatives and their environmental impacts, the Corps lacks information sufficient to determine whether Dynegey's proposed project is the least environmentally adverse practicable alternative, and thus may not approve the project. *See* 40 C.F.R. § 230.12(a)(3)(iv).

The fact is that there are practicable alternatives to Dynegey's proposed project that can achieve the same purpose with less adverse environmental impact than that proposal. As explained below, the real aim of this project is not, as purported, to stop erosion of the Middle Fork, but rather to prevent the toxic coal ash stored at Dynegey's Vermilion plant from cascading

into the river. One obvious and practicable method to achieve that aim is to excavate the ash and move it out of the river's floodplain to a safe, monitored disposal area elsewhere. Coal ash has been, or will be, removed from coal ash ponds across South Carolina and Georgia and in various other ash ponds throughout the country,¹⁶ and is practicable here. The removal alternative would be more consistent with the suite of closure options Dynegy has submitted to Illinois EPA. Many of these options, including their apparent preferred closure plan called "Option 4a," include the removal of the coal ash in the Old East Ash Pond and its berm. Approximately half of the proposed bank armoring project is along this section of the Old East Ash Pond, and it would no longer be necessary if Dynegy's preferred closure plan is accepted. The bank armoring project will not be easy to remove, and significant construction inside the riverbed will have already occurred by the time Dynegy moves the Old East Ash Pond.

Should Dynegy move the coal ash entirely, there will be no need for a design that will leave a scar on the Middle Fork for decades. When comparing removal as an alternative to this project, it is imperative to consider the permanent nature of removal as opposed to the temporary nature of the bank armoring. Indeed, armoring the riverbank – which will, as discussed herein, cause significant erosion, sediment loading, and other harmful impacts – is not a true solution to this problem because given enough time it will one day fail. The only way to ensure that the threat of coal ash collapsing into the river will not recur in perpetuity is by removing the coal ash from the floodplain of the Middle Fork.

A combination of moving the ash, together with – if necessary – a temporary, easily-removable barrier to prevent a coal ash dam breach while removing is taking place, is both practicable and less-environmentally adverse than the proposed project. As detailed in the letter from University of Illinois Engineering Professor Scott Olson, attached hereto as Exhibit 1, there are practicable alternatives that would kick up less sediment, require less construction far into the river, and disrupt the Middle Fork's scenery far less than the proposed project.

In sum, the application as submitted may not be approved because Dynegy has not demonstrated that there are no "practicable alternative[s] to the proposed discharge that would have less adverse effect on the aquatic ecosystem." 40 C.F.R. § 230.10(a). A full NEPA analysis must be conducted to evaluate all practicable alternatives, including removal of the coal ash, that address the present threat of toxic coal ash cascading into the Middle Fork.

B. Jeopardizing threatened or endangered species.

Dynegy has failed to demonstrate that the project will not jeopardize threatened species. The Guidelines prohibit the issuance of a § 404 permit if the proposed dredging or fill "[j]eopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended." 40 C.F.R. § 230.10(b)(3). Dynegy identifies several federally-listed threatened or endangered species in the vicinity of the project, including two mussel species. Coal ash pollutants, including heavy metals, have been leaching into the Middle Fork for years. As discussed in the comments submitted by Eco-Justice Collaborative:

¹⁶ See, e.g., https://www.postandcourier.com/business/south-carolina-utilities-lead-the-region-in-efforts-to-clean/article_bcfb1eec-670a-11e7-a2ea-e778e26af132.html; <https://www.southernenvironment.org/news-and-press/news-feed/georgia-power-commits-to-another-29-million-tons-in-coal-ash-cleanup>.

Contaminants become available to fish and other aquatic organisms via ingestion or through active or passive uptake of dissolved metals. The cumulative effects of existing pollution and additional stress generated by in-stream construction and the dispersal of contaminated soils from the bank and bottom of the river could negatively affect aquatic biota in the river.

Eco-Justice Collaborative Comments at 7 (Jan. 7, 2019). Hydraulic changes resulting from the project or taking place during construction – such as potentially increased flow, limited available river channel, and changes in the river bottom geology – also might potentially affect those delicate species. Without analyses characterizing and measuring coal ash contamination in sediment or soil disturbed by the project, evaluating whether the project will potentially result in those soils or sediments releasing more of those dangerous contaminants into the river, and evaluating the potential impact of such soil or sediment disturbance or other hydraulic changes on those endangered species, Dynegy has not shown – and cannot show – that the project will not jeopardize threatened or endangered species.

C. Significant degradation of the Middle Fork.

Dynegy has likewise not shown that the project will not “cause or contribute to significant degradation” of the Middle Fork’s scenic, delicate ecology and recreational value. Rather, available information strongly indicates that the project will cause or contribute to such significant degradation. Under the Guidelines, no § 404 permit may be granted if the project at issue “will cause or contribute to significant degradation of the waters of the United States.” Effects “contributing to significant degradation considered individually or collectively, include, but are not limited to, the following:

- “Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes;”
- “Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability...;” and
- “Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.”

40 C.F.R. § 230.10(c)(2)-(4). An effect is “significant” if it is more than “trivial.” Preamble to Guidelines for Specification of Disposal Sites for Dredged or Fill Material (“Preamble”), 45 Fed. Reg. 85,336, 85,343 (Dec. 24, 1980).

Dynegy’s proposed project likely causes or contributes to significantly adverse effects on aquatic life, aquatic ecosystems, and other wildlife dependent on aquatic ecosystems, and will almost certainly cause or contribute to significantly adverse effects on recreational, aesthetic, and economic values of the Middle Fork.

Aquatic life and ecosystems

The project likely will adversely affect aquatic life and ecosystems in several ways.

First, as discussed above, Dynegy has not adequately evaluated the potential impact of disturbing contaminated soil and sediment, and the consequent potential release of additional coal ash contamination into the Middle Fork, on aquatic ecosystems. Such an analysis is necessary because the impacted soil and sediment is almost certainly contaminated, and Dynegy has failed to complete necessary analyses to determine whether its proposed control measure to limit soil pollution – a turbidity curtain – can be effective in these circumstances. *See* Letter of Mark Quarles, attached as Exhibit 2 (including references attached as Exhibits 12, 13, 14, 15, 16, and 17). Without those analyses, Dynegy, the public, and the Corps cannot meaningfully evaluate whether the turbidity curtain can effectively control soil and sediment pollution from the project, and may not assume it will work – particularly when nearby river gauges indicate that the Middle Fork’s flow velocity frequently exceeds the maximum flow velocity for which turbidity curtains are designed to function. *See id.*; *see also* Eco-Justice Collaborative Comments at 7 (“Flow data are not available for the construction site. Based on the width of the channel and bankfull depth, a 5 ft/sec current speed approximates a flow of 3,000 cfs. The gauge at Kickapoo State Park recorded flows in excess of 3,000 cfs at least six times in 2018.”).

Second, changes to the river channel and consequent changes to river hydraulics resulting from the project or taking place during construction – including but not limited to changes to flow dynamics, transport of sediments, and river bottom geology – also may affect the delicate ecosystem of the Middle Fork. The impacts to aquatic life of those changes likewise have not been evaluated, which they must be before Dynegy can demonstrate that the project will not have significant adverse effects to aquatic life.

Importantly, the impacts of disturbing contaminated soil or sediment and hydraulic changes to the river channel resulting from the project should not be reviewed in isolation, but rather together, as the river’s aquatic life will experience them. The analyses should also take into account that coal ash pollution is already putting ecological stress on the river and its ecosystem. As Eco-Justice Collaborative noted in its comment, “coal ash contaminants [including arsenic, cadmium, cobalt, mercury and thallium, among others] were found in significantly greater concentrations in snails collected downstream from the Vermilion coal ash pits.” The combined effect of these stressors to the delicate ecosystem and rare species inhabiting the Middle Fork must be fully evaluated and mitigated before any § 404 permit may be issued.

Third, Dynegy’s project may adversely affect the aquatic life and ecosystem of the Middle Fork by limiting access to sample the groundwater seeps leaking coal ash pollutants into the river. Due to the nature of the project, many such seeps will be covered up by the proposed project, limiting the ability of regulators and the public to sample them and test their contents even though they will continue to release contaminants into the river. *See* Letter of Mark A. Hutson, P.G. (Jan. 9, 2019), attached as Exhibit 3. Without the ability to sample the seeps, the public and regulators will be deprived of information necessary to evaluate the continuing severity of that pollution and when or if further corrective action is needed to protect the delicate

ecosystem of the Middle Fork – potentially causing greater harm to that ecosystem. A full analysis must be performed of the continuing impacts on wildlife from those seeps and of how ongoing contamination from the seeps can be meaningfully measured, with proper frequency, to ensure the biome of the river is adequately and timely protected.

Recreational, aesthetic and economic values

The proposed project will almost certainly have significantly adverse effects on the high recreational, aesthetic, and economic values of the Middle Fork.

The adverse effects of the construction of the proposed project alone will almost certainly be significant. The narrowing of the river channel, together with construction equipment and increased pollution during that period, would adversely affect recreation and the local economy. As stated in the comments of Eco-Justice Collaborative:

The proposed project would require in-stream construction on over a 1/3 mile of the river, and take place, over nine months or more. Recent plans prepared by the applicant for bidding purposes show heavy equipment in operation and the construction zone would extend up to 70 feet into the channel. This would inhibit or prevent recreational use of the river for significant periods of time, particularly since construction would need to take place when water levels are low, which generally coincides with prime recreational months.

We understand that the applicant is working with IDNR to develop a plan to maintain use of the river while construction is in process. Yet, key stakeholders, such as the owner and operator of Kickapoo Adventures, have not been included in the conversation. Kickapoo Adventures took over the canoe livery and concession in 2017, after the closure of the previous rental operation. The new owner has worked hard to promote its business and raise regional awareness of the positive recreational experience that the Middle Fork of the Vermilion offers.

... The prospect of large-scale construction and the dispersal of additional pollution into the river may dissuade future users from coming to the Middle Fork. Kayakers and canoeists encountering a lengthy, unpleasant and perhaps intimidating experience of 2,000 feet of in-stream construction may choose never to return to the Middle Fork. The majority of people patronizing Kickapoo Adventures are inexperienced paddlers. Expecting families and amateur paddlers to portage more than 2,000 feet around a construction zone is unrealistic, and will severely limit the number of people willing to use the river. This could result in significant economic impacts to Kickapoo Adventures.

Those who do continue to use the river for canoeing and kayaking would encounter navigational challenges and potential safety issues as they pass the 2,000-foot construction zone. Given the configuration of the river, currents may move boaters toward the outer bend of the stream, placing them dangerously close to the

construction zone. Silt curtains installed in mid-channel...would constitute an additional safety hazard for boaters swept toward the outer bank.

Importantly, the significant adverse effects on recreational, aesthetics, and economic values from the proposed project are not limited to the period of construction. As described above, the Middle Fork is well known as an aesthetically beautiful, scenic river, with its twists through forested cliffs full of rare species, including, among others, bald eagles and blue heron. That natural beauty is rare in Illinois and is a major draw for the thousands of people who kayak, canoe, tube or swim in the Middle Fork as a reprieve from the urban landscapes or farm fields normally surrounding them.

The Middle Fork's scenic beauty would be significantly compromised by the proposed project. The 24-inch diameter white boulders Dynege proposes to install will prove a jarring intrusion to the otherwise scenic landscape. Although Dynege includes a proposal to use vegetation to minimize the project's adverse effects on the Middle Fork, that proposal falls short. Dynege proposes to use "live branch layering," constructed by planting willow and alder whips amidst the rip-rap, to mitigate the harsh visuals of the white rock. There is good reason to doubt that such "live branch layering" will successfully obscure the rock wall. Seasonal flooding and harsh growing conditions are likely to take their toll. The whips may not successfully take root or survive the wildlife: the willow stakes used in the previous bank armoring proposal – in an adjacent portion of the river – were, according to Dynege's consultant, severely damaged by beavers, "trimm[ing] some stakes down to only about three to four inches above-ground." Dynege project completion report (Feb. 2017), attached as Exhibit 4. In addition, portions of the gabions installed in the early 1980s on the same riverbanks on which Dynege proposes to construct its project remain visible even after nature has had over 40 years to reclaim them. Even the most overgrown sections are still plainly visible in the spring before the plants regrow the majority of their foliage. No amount of planting will hide this eyesore.

In short, it is highly unlikely that the live branch layering will suffice to meaningfully mitigate the adverse impacts to the river's scenic beauty, with negative, long-term effects on the aesthetic and recreational values of the Middle Fork. At minimum, more analysis is required to evaluate the likelihood of success of the live branch layering, including evaluation by independent arborists familiar with the species and landscape.

These numerous adverse effects on aesthetics and recreation are far more than trivial for the many people who travel to the Middle Fork to spend days kayaking, canoeing, tubing or swimming in the affected areas; for the property owners who purchased land on the Middle Fork specifically to enjoy its beauty; and for the businesses that rely on those tourists and locals to visit the area and use their services. Due to these significant adverse impacts to the Middle Fork, the Corps may not approve Dynege's § 404 permit application and should require much more in-depth analysis of the likely impacts on recreational, aesthetic, and economic values before making a decision on the proposal.

D. Failure to minimize adverse impacts.

The Corps also may not approve Dynegy's § 404 permit application because the company has failed to take "appropriate and practical steps . . . [to] minimize potential adverse impacts of the discharge on the aquatic ecosystem." See 40 C.F.R. § 230.10(d). Under those circumstances, approval is not permitted by the Guidelines. *Id.*

For example, as discussed above, Dynegy could consider – but has not considered – minimizing damage to the aesthetically-pleasing features of the Middle Fork over the long term by putting up erosion protection for much shorter period of time while the true danger to the river, the coal ash, is removed. See 40 C.F.R. § 230.76(a) & (d) (actions that can be taken to minimize adverse effects on human use potential include “[s]electing discharge sites and following discharge procedures to prevent or minimize any potential damage to the aesthetically pleasing features of the aquatic site (e.g. viewscapes)” and “[f]ollowing discharge procedures which avoid or minimize the disturbance of aesthetic features of an aquatic site or ecosystem”). As noted above, such a proposal would be more consistent with closure options Dynegy has described in submissions to Illinois EPA, which call for at least partial removal of the ash in portions closest to the riverbank.

The company also could evaluate, but has not comprehensively evaluated, whether it could time the construction of the project to avoid high season for recreation in the river. See 40 C.F.R. § 230.76(c) (actions that can be taken to minimize adverse effects on human use potential include “[t]iming the discharge to avoid the seasons or periods when human recreational activity associated with the aquatic site is most important”).

Dynegy has also failed to minimize many other potential adverse effects of the project on the Middle Fork. As noted by Eco-Justice Collaborative, in Dynegy's application, “[n]othing is said about mitigating impacts to water quality, aquatic biota, recreational users and the recreation economy. Nothing is said about meeting the challenges of managing and maintaining native vegetation on a rip-rap structure, nor performance standards required in order to comply with aesthetic requirements of this National Scenic River. No emergency or contingency plans are provided for demobilization in the event of heavy storm events. No reference is made to construction staging, operations, or precautions to be employed as contaminated soils are excavated along and into the open river channel.” Eco-Justice Collaborative Comments at 16.

Because there are numerous “appropriate and practical steps” that Dynegy could take, but has not taken, to minimize potential adverse impacts of the project, the Corps may not approve the § 404 application as proposed. A full NEPA analysis is both required and necessary here.

IV. The Corps Must Properly Identify the Purpose of the Proposed Project As To Prevent Release of Coal Ash into the Middle Fork.

Contrary to § 404 Guidelines and NEPA's mandate, the Corps has not properly identified the purpose of Dynegy's proposed rock wall. Instead, it has simply accepted the applicant's flawed statement of purpose. As noted above, *supra* section II, the Corps may not grant a § 404 permit unless there are no “practicable alternatives” with less adverse effect on the aquatic

ecosystem. 40 C.F.R. § 230.10(a). A “practicable” alternative is one that is “available and capable of being done after taking into consideration cost, existing technology, and logistics *in light of overall project purposes.*” 40 C.F.R. § 230.10(a)(2) (emphasis added). Thus, the overall project purpose must be identified by the Corps in order for the agency to comply with the § 404 Guidelines and conduct a proper alternatives analysis. *See id.*; *Northwest Env't Defense Center v. Wood*, 947 F. Supp. 1371, 1377 (D.Or. 1996).

Importantly, the Corps is not restricted to the definition of project purpose contained in a permit application. Although the Corps must “take into account the objectives of the applicant’s project,” *La. Wildlife Fed’n, Inc. v. York*, 761 F.2d 1044, 1048 (5th Cir. 1985), the Corps is “required independently to review and define the project’s overall purpose,” *Alameda Water & Sanitation Dist. v. Reilly*, 930 F. Supp. 486, 492 (D.Colo. 1996), and to ensure that the applicant's stated purpose is legitimate. *Friends of the Earth*, 800 F.2d at 833-34. Nonetheless, “an applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is practicable appear impracticable.” *Sierra Club v. U.S. Army Corps of Eng’rs*, No. CIV.A. 05-1724JAP, 2005 WL 2090028, at *9 (D.N.J. Aug. 29, 2005) (quoting *Sylvester v. U.S. Army Corps of Eng’rs*, 882 F.2d 407, 409 (9th Cir. 1989)).

Based on the Public Notice, the Corps has simply accepted Dynegy’s definition of the project’s purpose, which is improperly constrained to avoid discussing the imminent threat that the coal ash buried beneath the banks poses to the Middle Fork. This portion of the Middle Fork is experiencing erosion, and Dynegy defines the purpose of its application as “to protect the eroding streambank from the continued lateral migration of the stretch of the MFV River....” June 28, 2018 Permit Application. The Corps offers an even more limited statement of purpose in the Public Notice it issued on November 26, 2018: “[c]onstruction of streambank stabilization.”

These statements ignore the underlying problem that is the true purpose here: preventing coal ash from entering the Middle Fork. Rather than a problem, the lateral migration of the Middle Fork is a virtue: it is the natural meandering for which it was designated a National Scenic River. The lateral migration poses a risk at this location only because the river is actively meandering toward Dynegy’s unlined North Ash Pond System and Old East Ash Pond, threatening a major coal ash spill. Thus, to comply with the § 404 Guidelines, the Corps must define the purpose of the project under evaluation for a permit to address its real aim: preventing Dynegy’s buried coal ash and associated leachate from entering the Middle Fork.

There is abundant evidence that the buried coal ash’s proximity to the river is the underlying problem that must be resolved here. Pollutants entering the Middle Fork through groundwater seeps along the bank have been documented for years now, and the contamination of the groundwater and surface water has been the source of multiple Illinois EPA violation notices. Dynegy’s own documents demonstrate that the coal ash pits are discharging toxic pollutants into the Middle Fork via hydrologically connected groundwater. In 1992, Dynegy’s predecessor began monitoring groundwater adjacent to the North Ash Pond System and the Old East Ash Pond and continued that monitoring until 2007. Groundwater adjacent to the 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 contamination¹⁷ – consistently exceeded Illinois’ groundwater protection standards¹⁸ and, on numerous occasions, also exceeded U.S. EPA standards for those contaminants.¹⁹ See Kelron Environmental, Hydrogeology and Groundwater Quality of the Old East Ash Pond, Vermilion Power Station (Mar. 15, 2012), attached as Exhibit 5; Kelron Environmental, Hydrogeology and Groundwater Quality of the North Ash Pond System, Vermilion Power Station (Mar. 15, 2012), attached as Exhibit 6. Dynege consultant Natural Resources Technology, Inc. (“NRT”) concluded that 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.”²⁰ See NRT, “Application for Groundwater Management, Zone North Ash Pond System and Old East Ash Pond” (Mar. 27, 2012), attached as Exhibit 7; NRT, Revised Corrective Action Plan: North Ash Pond System (April 2, 2014), attached as Exhibit 8; NRT, Revised Corrective Action Plan: Old East Ash Pond (Apr. 2, 2014), attached as Exhibit 9. Kelron Environmental, which conducted hydrogeological and groundwater quality studies of those two coal ash pits for Dynege, 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”²¹

Reports from Dynege’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.²² While the thickness of saturated ash varies as groundwater levels rise and fall with the seasons, during some times of

¹⁷ 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.”).

¹⁸ See Kelron Environmental, Hydrogeology and Groundwater Quality of the North Ash Pond System, Vermilion Power Station (Mar. 15, 2012) [hereinafter “Kelron Hydro. Report, NAPS”], at Tables 10 & 11. Illinois’ Class I groundwater protection standards are set out in 35 Ill. Admin. Code Part 620.

¹⁹ *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>.

²⁰ 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.”).

²¹ 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.”).

²² *Id.* at v.

the year more than 21 feet of coal ash is saturated by groundwater.²³ 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.²⁴ Dynegy's consultants' reports, as well as Dynegy's Dec. 2016 corporate disclosure filing with the federal Securities and Exchange Commission ("SEC"), conclude that—with minimal exception²⁵—the coal ash contaminated groundwater is channeled into the adjacent Middle Fork.²⁶

Dynegy's recent groundwater modeling indicates that, if the coal ash is left in place – even under a cap – coal ash contaminants such as boron will continue to leach out at unsafe levels for hundreds of years. *See* 2018 Groundwater Monitoring and Modeling Report (Oct. 2018), attached as Exhibit 10. The impoundments also pose a serious risk of a sudden, catastrophic pollution event due to failure of the embankments that are currently holding back the coal ash – a risk that must be managed as long as the ash remains in the floodplain.

Although many options exist for preventing an eventual catastrophic release of coal ash into the river, the viability and environmental impacts of any option will be significantly dependent on the number of years that the ash will remain in the floodplain. If the ash is removed within a short timeframe, a temporary bank stabilization much smaller in comparison to scale of the proposed project can be considered. If, in contrast, the ash is left in place next to the river, a series of engineered solutions will need to be installed, maintained, and replaced for centuries. The river has left no doubt that even apparently sturdy bank stabilization measures stand little chance against its meandering over decades. For example, the gabions installed in 1980 began failing within 20 years.

²³ *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.

²⁴ *See* Kelron Hydro. Report, OEAP at 26; Kelron Hydro. Report, NAPS at 26; and NRT, Revised CAP NAPS at 2-2.

²⁵ *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.”).

²⁶ *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.”).

Instead of proposing to remove the ash to halt the ongoing pollution of groundwater and the Middle Fork and eliminate the risk of a catastrophic coal ash spill, Dynegy proposes to extensively armor the riverbank without removing the ash. Dynegy's proposal would temporarily address the coal ash breach problem at the cost of the recreational and scenic values of the river, while still leaving future generations subject to the same – or greater – risks than those posed by the ash ponds today. The river has been meandering across its floodplain for millennia. Aerial photography from the 1940s show that the ponds were built over old meander scars in the landscape, and the curves of the steep bluffs on either side of the floodplain were clearly carved by the river itself. *See* Bruce Rhoads Letter (Jan. 7, 2019). It is just a matter of time until the river re-occupies the part of its floodplain where the ash is stored. *Id.* The rate at which the river has been meandering within its floodplain has been highly variable, sometimes alarming, and difficult to predict. However, this process is relentless and will eventually overcome any non-permanent stabilization effort aimed at preventing it. *Id.* Migration patterns can change gradually by erosion, or abruptly due to a meander cutoff or a fallen tree blocking a secondary high-flow channel.²⁷ In February 2018, the river broke through a 20 feet tall, 50-year-old embankment on the opposite side of the river with no warning just 60 yards upstream of Dynegy's abandoned pump house.²⁸

The proposed project is a short-term deferral of the ongoing risk posed by the irresponsibly sited coal ash disposal facility. Failure of embankments holding back coal ash would be a tragedy for the Middle Fork, the people and businesses who treasure the river, the wildlife that depend on the river, and the reputation of the State of Illinois, charged with protecting its only nationally-designated Scenic River. Alternatives for protecting river must be considered, and compared based on design life, scale and lifecycle cost. The analyses of all options should be transparent, with adequate opportunities for public participation and comment. Environmental impacts in general, and water quality in particular, will vary dramatically with the scale of the project. The Corps must fully evaluate Dynegy's application and consider other alternatives – including, in particular, the option, described *infra* section VII, of removing the ash and, until that process is complete, installing articulated concrete mats – that would properly address the issues at the Middle Fork while not undermining, in the long term, the values for which the Middle Fork was designated a National Scenic River. *See* Olson Letter.

V. The Corps' Public Notice Regarding the Proposed § 404 Application is Inadequate and Must Be Amended.

The Corps' Public Notice regarding the proposed § 404 fill application is inadequate for purposes of its § 404 regulations. The Corps' regulations require that “the public notice for the proposed activity must contain a statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and compensated for.” 33 C.F.R. § 332.4(b)(1). “The level of detail provided in the public notice must be commensurate with the scope and scale of

²⁷ A logjam blocking a parallel channel accelerated erosion at the base of Dynegy's newest ash dewatering pond during the 2008-16 period. SCI Engineering 2009 Bank Armoring Proposal, *available at* <https://prairierivers.org/wp-content/uploads/2018/09/KinneyBankStabilizationReport2009.pdf>.

²⁸ The embankment was built by the previous owner of the Dynegy plant to protect a coal strip mining operation from the meandering river. Dynegy riprapped around its pump house when the river's westward migration undermined the foundation. The riprap stopped the westward migration, and it is unclear whether disrupting the natural meandering of the river contributed to the failure of the embankment on the opposite bank.

the impacts.” *Id.* At a minimum, “the notice must . . . provide enough information to enable the public to provide meaningful comment on the proposed mitigation.” *Id.*

The Corps’ public notice for the proposed project devotes merely a few sentences to describing proposed mitigation that is intended to offset the effects of filling nearly 2,000 linear feet of the Middle Fork’s right descending bank. The notice simply states that Dynegy has “considered multiple alternatives to further minimize proposed impacts to waters of the United States, some of which would result in an increase in erosion and sediment loading and a greater impact to aesthetic appearance of the banks in comparison to the preferred alternative,” without providing any additional information about what those “multiple alternatives” entail, in particular those that would not result in more erosion, sediment loading, or aesthetic impacts than the “preferred alternative.” The level of detail provided in the public notice is not “commensurate with the scope and scale of the impacts” of Dynegy’s proposed project. For example, the public notice makes no indication that Dynegy or the Corps have considered mitigation measures to reduce the proposal’s adverse impact on recreational use of the Middle Fork, much less the associated economic impact on the river’s nearby canoe outfitter. *See* 40 C.F.R. § 230.76 (listing procedures to minimize the adverse effects on human use potential).

The Corps’ regulations also require that the applicant must prepare and the Corps must approve a final mitigation plan. *See* 33 C.F.R. § 332.4(c)(1)(i). Providing an opportunity for public comment only on a mere summary of the proposed mitigation in its draft stage without providing any necessary detail effectively excludes the public from offering meaningful input on a crucial aspect of the § 404 permitting process. Because the Corps cannot certify a proposed fill unless it determines that the project, as mitigated, will not have “an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystem of concern,” 40 C.F.R. § 230.10(c), the adequacy of proposed mitigation is vital to the § 404 permitting process; permits can only be issued where the Corps determines that the proposed mitigation will reduce to insignificance the ecosystem impacts of the project. The Corps should therefore provide opportunity for public comment on the proposed mitigation at a stage after it has been reviewed by the Corps and subsequently revised.

VI. The Proposed Project Violates the Wild and Scenic Rivers Act.

The proposed project does not comply with the WSRA because it would harm the Middle Fork’s outstanding remarkable values, free-flowing nature, and water quality. The Wild and Scenic Rivers Act (“WSRA”), which was enacted in 1968, established a national policy that certain rivers with “outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition,” and that these rivers “and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.” 16 U.S.C. § 1271. Congress implemented this policy by establishing a national Wild and Scenic River System and developing a process so that other rivers with “outstandingly remarkable values” could be added to the system.

The WSRA contains several provisions designed to protect designated rivers and their environments. Foremost among these is Section 10(a), which mandates that wild and scenic

rivers be managed “in such manner as to protect and enhance the values which caused it to be included in said system without . . . limiting other uses that do not substantially interfere with public use and enjoyment of these values.” 16 U.S.C. § 1281(a).

Wild and scenic rivers are also protected by Section 7 of the WSRA. Section 7 provides that “no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by [the administering agency].” 16 U.S.C. § 1278(a). Section 7 thus requires the National Park Service (“NPS”) to evaluate whether a “water resources project” – such as a bank stabilization project, docking facility, or bridge – “would have a direct and adverse effect” on the river’s outstandingly remarkable values. *See Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1027 (9th Cir. 2008) (“The WSRA framework designates rivers based on specific ‘outstandingly remarkable values’ . . . which both justify the initial designation of a river as a WSRS component and provide the benchmark for evaluating a proposed project affecting a designated river.”). Here, NPS is required to evaluate and determine that any proposed project will not have a direct and adverse effect on the river’s free-flowing condition, water quality, and outstanding remarkable values, which include scenic, geologic, fish and wildlife, ecologic, recreational, and historic resources. If NPS finds that a water resources project would have a “direct and adverse effect,” the project cannot be authorized or funded absent congressional intervention.

NPS has expressed significant concern about bank stabilization work of this nature as the agency has been extremely reluctant to approve such projects in order to protect the Middle Fork and its values as a National Scenic River. Bank armoring is prohibited by the free-flowing definition in the WSRA²⁹, but can be allowed if NPS finds it necessary to protect economically valuable infrastructure that existed prior to designation. NPS previously expressed significant concern about Dynegy’s 2016 bank stabilization at the New East Ash Pond, but reluctantly approved the project after denying previous proposals, as a temporary measure, until the ash storage facilities are removed. As NPS stated in the agency’s Section 7(a) determination letter, “[i]n the absence of the immediate removal of the fly ash ponds, the re-establishment of the bank and associated armoring is necessary as a temporary practice for the protection of the River and its values, until such time the ponds are removed.” National Park Service Section 7(a) determination, June 2016, *available at* https://prairierivers.org/wp-content/uploads/2016/08/NPS-Determination-7-5-16_Redacted.pdf.

If NPS was reluctant to approve Dynegy’s 2016 bank stabilization project, the agency should be even more concerned that the currently proposed project will harm the Middle Fork’s outstanding remarkable values, free-flowing nature, and water quality. The proposed project is nearly four times the size of Dynegy’s bank stabilization project along the New East Ash Pond. When considered together with the 2016 bank stabilization and the 2009 bank stabilization at the

²⁹ “Section 16(b) of the Act defines the term ‘free-flowing’ as ‘existing or flowing in natural condition without impoundment, diversion, straightening, rip-rapping, or other modification of the waterway.’” National Park Service Section 7(a) determination, June 2016, *available at* https://prairierivers.org/wp-content/uploads/2016/08/NPS-Determination-7-5-16_Redacted.pdf.

pump house, Dynegy's bank armoring projects will have marred a half mile of the river bank. As noted before, the volume of rocks that the plan proposes to place below the ordinary high water mark is enormous, far greater in scale than either of the previous projects. Furthermore, approximately 9,000 cubic yards of existing riverbed and bank material, which includes existing gabion baskets, below the ordinary high water mark would be excavated and removed offsite to an undesignated location. Initial design documents show fill extending over 25 feet into the river's flow path, and over seven feet below the bed of the river.

The size and scale of the project would also impact the public's ability to use and enjoy the river. The proposed project would require in-stream construction on more than one-third of a mile of the Middle Fork's scenic riverbank and require construction time of at least nine months. The construction would also need to occur when water levels are low, which generally occurs during the prime recreational months of the year. As a result, construction of the proposed project would likely inhibit or prevent recreational use of the river for a significant period of time.

Moreover, by definition, efforts to prevent erosion are impeding the free-flow of a river, and that is certainly the case here. The free-flowing nature of the Middle Fork will be impeded by these massive rock intrusions into the river, which will reach well into the narrow waterway. Further, the armoring will increase flow resistance and undoubtedly push erosion upstream or downstream of the project site, altering the natural erosive behavior of the river with unknown consequence to upstream and downstream meandering. *See Rhoads Letter*. Such erosion could potentially threaten the coal ash pits in unanticipated ways and has not been considered in the proposed project. *Id.* Ultimately, the relentless erosive force of the river will likely lead to the demise of the project itself, as occurred with the gabions placed along the Middle Fork's banks in the same location a few decades ago.

The scenic value of the river will be marred by nearly a half mile of bright white stone. Except for Dynegy's property, very little human influence is visible from the river. Like the bank stabilization downstream, the proposed stone toe protection will always be visible at lower flow stages, during which the river is often paddled. The project would clear-cut the currently vegetated riverbank which hides the coal ash ponds, leaving behind nothing but fill stones that look nothing like the natural river rock found in the Middle Fork, shattering the immersion that creates the scenic and recreational values of the river. Replanting, if successful, will take years to regrow trees high enough to disguise the ash, and the bank armoring will be visible even if vegetation takes hold, as evidenced by the gabions from the 80s.

Additionally, the natural function of a meandering river like the Vermilion River is to migrate across its floodplain over time, with associated connections of this natural process to ecological conditions along the river. *See Rhoads Letter*. Proposing a project that would severely constrain the natural process of a designated scenic river, which was one of the bases of its designation, opposes the inherent natural dynamics of the river. *Id.*

Furthermore, as explained in the attached letter of hydrogeologist Mark Hutson, the proposed project will do nothing to remediate the pollution risks from seeps of coal ash leachate.

Dynegy's coal ash impoundments are unlined and exposed to the groundwater, and the coal ash is saturated and leaching contaminants into the groundwater. The leachate discharges into the Middle Fork, seeping continuously through the river bank which is stained orange and purple with an oily sheen. Groundwater seeps are common on the Middle Fork, but the discoloration and scale of the seeps at the site are unique. At least 200 feet of the river bank along the Middle Fork continually seeps coal ash leachate into the river. This seep water collects in orange puddles when the river's flow is low, concentrating the toxic pollutants at dangerous levels.³⁰ *See also* Images and Figures for Comments on LRL-2018-602-sjk, attached as Exhibit 11. Sampling has revealed that the seeps contain concentrations of arsenic, barium, boron, chromium, manganese, molybdenum, and sulfate that exceed background levels and, for multiple pollutants, exceed health-based standards set by EPA and Illinois EPA. The Illinois EPA has itself issued violation notices for groundwater violations in 2012 and surface water violations in 2018.

The permit application proposes excavation of significant portions of the riverbank where the seeps are known to occur (predominantly but not exclusively in Segments 4 and 5). These soils could contain high levels of toxic chemicals due to continual exposure to groundwater with coal ash leachate, and could be discharged into the river in the construction process. An anti-degradation assessment should address the plan for testing these soils, and explain where those soils will be placed upon removal. Additionally, the proposed bank armoring would bury the coal ash seeps behind piles of void filled riprap, as the current gabions keep some of the coal ash seeps from view. The seeps will continue to carry contaminated groundwater into the Middle Fork, but will be physically inaccessible to sample and likely less visible.

The proposal likewise does not limit or remediate the impact of the toxic leachate on soils along the riverbank. As previously discussed, Dynegy has not adequately evaluated the potential impact of disturbing contaminated soil and sediment, and the consequent potential release of additional coal ash contamination into the Middle Fork, on aquatic ecosystems. Such an analysis is necessary because the impacted soil and sediment is almost certainly contaminated, and Dynegy has failed to complete necessary analyses to determine whether its proposed control measure to limit soil pollution – a turbidity curtain – can be effective in these circumstances. *See* Quarles Letter. Without those analyses, Dynegy, the public, and the Corps cannot meaningfully evaluate whether the turbidity curtain can effectively control soil and sediment pollution from the project, and may not assume it will work – particularly when nearby river gauges indicate that the Middle Fork's flow velocity frequently exceeds the maximum flow velocity for which turbidity curtains are designed to function. *Id.* Neither Dynegy's application nor the public notice include any indication that Dynegy will test the soil it plans to excavate for contamination, or put in place silt screens or other sediment controls to reduce the impacts of potentially polluted soils on the river during construction. Such testing should be done not only to ensure proper controls are used in construction of bank armoring, but also to determine how to safely dispose of that soil. *See* Hutson Letter. In short, the proposal fails to adequately evaluate the

³⁰ *See* Kelron Hydro. Report, OEAP at 26; Kelron Hydro. Report, NAPS at 26; and NRT, Revised CAP NAPS at 2-2.

potential threat that contaminated soils may pose to the Middle Fork and surrounding environment.

An apparent drainage tile sticking out of the river bank near segment 2 or 3 (below the North Ash Pond System) poses another environmental and perhaps structural risk. Adjacent to the drainage tile are additional seeps. The permit application makes no mention of the drainage tile, which could be a pathway for coal ash leachate. Before approving any permit that might disturb that tile, a full investigation must be undertaken of whether the tile threatens the river, and if so, mitigating measures should be put in place to ensure that disturbing the tile does not open it as an additional pathway for coal ash leachate to enter the Middle Fork.

Finally, there is no basis for NPS's stance on the need for removal of the coal ash to have changed. In order to protect and enhance the Middle Fork and its values, NPS and the Corps may not approve any proposed application that is not intended to address the true need at the Middle Fork; preventing coal ash leachate from entering the river. Accordingly, the Corps should not approve this application. Rather, a full-scale environmental analysis should be conducted to determine the best path forward to protect the Middle Fork against further release of toxic coal ash pollution.

VII. The Corps Should Evaluate Whether Targeted, Easily-Removable Stabilization Measures Are Needed to Provide Immediate Protection at the Middle Fork.

Although the Corps may not approve Dynege's § 404 permit application without a comprehensive EIS and further evaluation of how to achieve its purpose, the ongoing erosion at the site, coupled with the proximity of the coal ash ponds, indicates that some interim action may be necessary while that analysis is underway to protect against release of coal ash into the Middle Fork. The Corps should conduct an immediate evaluation of the imminence of the threat and, if needed, require that such action be taken. Any such action should be temporary and carefully targeted to meet the urgent need at the Middle Fork while not undermining the Middle Fork's outstanding remarkable values, free-flowing nature, and water quality. Furthermore, such temporary stabilization should only be in place until Dynege is able to propose a long-term project properly aimed at preventing Dynege's buried coal ash and associated leachate from entering the Middle Fork.

One temporary, interim action that the Corps should consider, if necessary, is the option described in the attached letter of Professor Scott Olson. Prof. Olson explains that Dynege could temporarily stabilize the riverbank "using articulated concrete mats, also known as revetment mats. Articulated concrete mats consist of concrete blocks that are tied together into 'mats' using steel reinforcement. These mats have provided erosion protection successfully on a large number of waterfront projects, including numerous U.S. Army Corps of Engineers projects." Articulated concrete mats would be a cost-effective option that could be removed fairly readily after installation. Furthermore, "compared to the proposed riverbank stabilization, this temporary option would involve substantially less disturbance to the riverbed." As Professor Olson explains, Dynege's proposed project "involves significant excavation and replacement of

soils below the base river elevation, which requires a wider construction limit and will cause some amount of riverbed soils to become entrained in the river flow. In contrast, placing the mats should require a smaller construction limit and should decrease riverbed disturbance.”

A targeted, temporary project such as that proposed by Professor Olson would allow the Corps to properly evaluate and consider long-term solutions to the true need at the Middle Fork while making sure that the river is protected from a potential catastrophic coal ash spill.

VIII. The Corps Must Carry Out an EIS Before Issuing Any § 404 Permit to Dynegy.

As noted throughout this comment, the Corps should conduct a full EIS to thoroughly and objectively evaluate all environmental impacts of, and alternatives to, the proposed construction so that a fully-informed decision can be made as to whether the proposal should be allowed to move ahead. NEPA requires that federal agencies prepare an EIS prior to authorizing activities that significantly affect the environment. 42 U.S.C. § 4332(2)(C); *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997); *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998). An EIS must include three main elements. First, the agency must define the purpose and goals of the proposed project in a way that is broad enough to allow for the consideration of reasonable alternatives. *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997). Second, the agency must “rigorously explore and objectively evaluate all reasonable alternatives” for achieving the purpose and goals of the project. 40 C.F.R. § 1502.14(a). Finally, the agency is required to take a “hard look” at the environmental consequences of the proposed action and reasonable alternatives. *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983).

Done correctly, this NEPA process serves two critically important functions. First, it helps agencies make fully informed and well-considered decisions by ensuring that significant environmental impacts are not overlooked or underestimated, and alternative methods for addressing an identified need are considered. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Second, the process provides important information about a project to the public, which may then, in turn, assist the agency in making better decisions through the comment process. *DuBois v. U.S. Dep’t of Agriculture*, 102 F.3d 1273, 1285-86 (1st Cir. 1996).

In evaluating whether a proposed activity would “significantly affect the environment” and, therefore, trigger NEPA’s EIS requirement, an agency must consider not only the direct impacts of the proposal, but also the indirect and cumulative impacts. 40 C.F.R. § 1508.25(c). “Indirect impacts” are those that are caused by the action, but are removed in time or distance while still being reasonably foreseeable. 40 C.F.R. § 1508.8(b). “Cumulative impacts” are “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7. The purpose of the cumulative impacts requirement is to ensure that the public is provided with a “realistic evaluation of the total impacts” of various activities by avoiding just looking at

individual activities “in a vacuum.” *Grand Canyon Trust v. Federal Aviation Administration*, 290 F.3d 339, 342 (D.C. Cir. 2002).

So, for example, the direct impact of a proposal to clearcut a 100-acre forest is the loss of trees and the habitat they provide. The indirect impacts include the increased water pollution in nearby streams due to increased runoff from the clearcut land. The cumulative impacts are the impacts to the environment resulting from the proposed logging and other past, present, and reasonably foreseeable future logging in the area.

In addition to evaluating the direct, indirect, and cumulative impacts of a proposed action, NEPA also requires an agency to consider “connected” actions in combination. 40 C.F.R. § 1508.25(a). Actions are considered “connected” if one action “[c]annot or will not proceed unless other actions are taken previously or simultaneously,” or they are “interdependent parts of a larger action and depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a)(1). Connected actions must be evaluated together so that an agency cannot make the impacts of a proposed action appear smaller by segmenting a single large project into a number of smaller actions.

Applying these requirements of NEPA, it is clear that the Corps must carry out an EIS before approving any permit for the proposed construction at the Middle Fork because the construction would have significant direct, indirect, and cumulative impacts on the environment, as previously discussed throughout these comments.

A. Impacts on water quality and the ecosystem.

The proposed project would limit access to the groundwater seeps leaking coal ash pollutants into the Middle Fork. Pollutants entering the Middle Fork through groundwater seeps along the bank have been documented for years now, and the contamination of the groundwater and surface water has been the source of multiple Illinois EPA violation notices. Dynegey’s own documents demonstrate that the coal ash pits are discharging toxic pollutants into the Middle Fork via hydrologically connected groundwater. Due to the nature of the project, many such seeps will be covered up by the proposed project, limiting the ability of regulators and the public to sample them and test their contents even though they will continue to release contaminants into the river. *See* Hutson Letter. Without the ability to sample the seeps, the public and regulators will be deprived of information necessary to evaluate the continuing severity of that pollution and when or if further corrective action is needed to protect the delicate ecosystem of the Middle Fork – potentially causing greater harm to that ecosystem.

The proposed project would also likely disturb the contaminated soil and sediment at the Middle Fork, potentially resulting in further release of additional coal ash contamination into the Middle Fork. The impacted soil and sediment is almost certainly contaminated and the control measures Dynegey has proposed to limit soil pollution – a turbidity curtain – are likely to be largely ineffective in these circumstances. *See* Quarles Letter. Additionally, changes to the river channel and consequent changes to river hydraulics resulting from the project or taking place during construction – including but not limited to changes to flow dynamics, transport of sediments, and river bottom geology – also may impact the delicate ecosystem of the Middle

Fork. Furthermore, the coal ash pollution at the Middle Fork is already putting ecological stress on the river and its ecosystem. As Eco-Justice Collaborative noted in its comment, “coal ash contaminants [including arsenic, cadmium, cobalt, mercury and thallium, among others] were found in significantly greater concentrations in snails collected downstream from the Vermilion coal ash pits.”

B. Impacts on threatened or endangered species.

Dynegy identifies several federally-listed threatened or endangered species in the vicinity of the project, including two mussel species. Coal ash pollutants, including heavy metals, have been leaching into the Middle Fork for years. As discussed in the comments submitted by Eco-Justice Collaborative:

Contaminants become available to fish and other aquatic organisms via ingestion or through active or passive uptake of dissolved metals. The cumulative effects of existing pollution and additional stress generated by in-stream construction and the dispersal of contaminated soils from the bank and bottom of the river could negatively affect aquatic biota in the river.

Eco-Justice Collaborative Comments at 7. Hydraulic changes resulting from the project or taking place during construction – such as potentially increased flow, limited available river channel, and changes in the river bottom geology – also might potentially affect those delicate species.

C. Impacts to recreational, aesthetic, and economic values of the Middle Fork.

The proposed project would significantly impact the high recreational, aesthetic, and economic values of the Middle Fork. The narrowing of the river channel, together with construction equipment and increased pollution during that period, would adversely affect recreation and the local economy. The proposed project would require in-stream construction on more than one-third of a mile of the Middle Fork’s scenic riverbank and require construction time of at least nine months. The construction would also need to occur when water levels are low, which generally occurs during the prime recreational months of the year. As a result, construction of the proposed project would likely inhibit or prevent recreational use of the river for a significant period of time.

As discussed in the comments submitted by Eco-Justice Collaborative:

[t]he prospect of large-scale construction and the dispersal of additional pollution into the river may dissuade future users from coming to the Middle Fork. Kayakers and canoeists encountering a lengthy, unpleasant and perhaps intimidating experience of 2,000 feet of in-stream construction may choose never to return to the Middle Fork. The majority of people patronizing Kickapoo Adventures are inexperienced paddlers. Expecting families and amateur paddlers to portage more than 2,000 feet around a construction zone is unrealistic, and will

severely limit the number of people willing to use the river. This could result in significant economic impacts to Kickapoo Adventures.

Those who do continue to use the river for canoeing and kayaking would encounter navigational challenges and potential safety issues as they pass the 2,000-foot construction zone. Given the configuration of the river, currents may move boaters toward the outer bend of the stream, placing them dangerously close to the construction zone. Silt curtains installed in mid-channel...would constitute an additional safety hazard for boaters swept toward the outer bank.

Moreover, by definition, efforts to prevent erosion are impeding the free-flow of a river, and that is certainly the case here. The free-flowing nature of the Middle Fork will be impeded by these massive rock intrusions into the river, which will reach well into the narrow waterway. Further, the armoring will increase flow resistance and undoubtedly push erosion upstream or downstream of the project site, altering the natural erosive behavior of the river with unknown consequence to upstream and downstream meandering. *See* Rhoads Letter. Such erosion could potentially threaten the coal ash pits in unanticipated ways and has not been considered in the proposed project. *Id.* Ultimately, the relentless erosive force of the river will likely lead to the demise of the project itself, as occurred with the gabions placed along the Middle Fork's banks in the same location a few decades ago.

The scenic value of the river will be marred by nearly a half mile of bright white stone. Except for Dynegy's property, very little human influence is visible from the river. Like the bank stabilization downstream, the proposed stone toe protection will always be visible at lower flow stages, during which the river is often paddled. The project would clear-cut the currently vegetated riverbank which hides the coal ash ponds, leaving behind nothing but fill stones that look nothing like the natural river rock found in the Middle Fork, shattering the immersion that creates the scenic and recreational values of the river. Additionally, the natural function of a meandering river like the Vermilion River is to migrate across its floodplain over time, with associated connections of this natural process to ecological conditions along the river. *See* Rhoads Letter. Proposing a project that would severely constrain the natural process of a designated scenic river, which was one of the bases of its designation, opposes the inherent natural dynamics of the river. *Id.*

As discussed above, *supra* section VII, the Corps should evaluate whether some interim action is necessary while the EIS process is underway to protect against release of coal ash into the Middle Fork. During the NEPA process, an agency can take any action which would not "(1) have an adverse environmental impact; or (2) limit the choice of reasonable alternatives." 40 C.F.R. § 1506.1(a). Agencies have previously been found to have complied with NEPA when taking an interim action that was determined by the agency to not have an adverse environmental impact or limit the choice of reasonable alternatives while an EIS was still being prepared. *See N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 842-44 & n.30 (9th Cir. 2007); *Native Vill. of Point Hope v. Minerals Mgmt. Serv.*, 564 F. Supp. 2d 1077, 1084 (D. Alaska 2008); *Intertribal Bison Co-op v. Babbitt*, 25 F.Supp.2d 1135, 1139 (D.Mont. 1998); *Fund for Animals v. Lujan*, 794 F.Supp. 1015, 1024-25 (D.Mont. 1991), *aff'd*, 962 F.2d 1391 (9th Cir. 1992). A targeted, easily-

removable stabilization project such as that proposed by Professor Olson would not have an adverse environmental impact or limit the choice of reasonable alternatives. Such a temporary project would actually allow the Corps to properly evaluate and consider reasonable alternatives to Dynegy's proposal. Therefore, the Corps should conduct an immediate evaluation of the imminence of the threat and, if needed, require that such action be taken.

IX. Conclusion

For the foregoing reasons, the Corps may not approve Dynegy's § 404 permit application as submitted. Rather than approve that application, the Corps should conduct a full environmental review of the proposal, and other alternatives to achieve its purpose, under NEPA. While that process is underway, the Corps should evaluate whether there is a need for immediate protection of the Middle Fork from a potentially disastrous coal ash spill. If the Corps deems such protection necessary, it should consider targeted, short-term, easily-removable alternatives to provide immediate, temporary protection at the Middle Fork.

Thank you for providing us with this opportunity to comment.

Respectfully submitted,



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Exhibit D

Dynergy re-evaluating plans for Middle Fork stabilization after public input

Tue, 05/21/2019 - 8:40pm | [Tracy_Crane](#)

NEWTOWN — Dynergy is going "back to the drawing board" to redesign a controversial riverbank-stabilization project along the Middle Fork River in a way that's more compatible with the waterway's designation as a National Scenic River, according to the United States Army Corps of Engineers.

Sarah Keller, an engineer with the corps, has been working with Dynergy officials in their quest to get work permits for the project along a section of bank that holds back toxic coal ash stored in pits on the company's former Vermilion Power Station property.

Keller said Dynergy officials notified her in writing May 13 that they are redesigning the stabilization project as a result of discussions with the Army Corps of Engineers and the National Park Service, which is involved in the permitting process due to the river's special designation.

Coal ash contains contaminants like mercury, cadmium and arsenic that can pollute waterways, groundwater, drinking water and the air.

In the last several years since Dynergy closed the coal-fired Vermilion Power Station along the Middle Fork, the river has continued to seriously erode the banks adjacent to the coal-ash pits, risking a spill into the river.

Last year, Dynergy decided to take short-term action to stabilize the bank while the company — now a subsidiary of Texas-based Vistra Energy — continues working with the Illinois Environmental Protection Agency on a permanent closure plan for the former power station property and coal-ash pits.

New legislation is moving forward in Springfield that could affect that closure plan and more than 80 other coal-ash sites around the state.

At a news conference Tuesday in Springfield, state Sen. Scott Bennett, D-Champaign, and state Reps. Mike Marron, R-Fithian, and Carol Ammons, D-Champaign, discussed a bill introduced by Bennett, which has already passed the Senate, that would require the IEPA

and the Illinois Pollution Control Board to establish rules and regulations for handling coal ash on sites like the Dynegy property. The bill has also been approved by the House Energy and Environment committee with bipartisan support and now awaits a full vote in the House.

But in regards to Dynegy's short-term bank-stabilization plans, the input of local citizens may have played an important role in its decision to go back to the drawing board.

In an email, Keller said the National Park Service has voiced its continued concern over the previously proposed bank-stabilization design that would have included large white rock rip rap, stretching along the bank for 2,000 feet and would have required two construction seasons and closure of the river to recreation to make way for a construction site in the river channel.

The park service said the plan would result in an "adverse determination" under the National Wild and Scenic Rivers Act, according to Keller, who added that, as a result of that input, Dynegy acknowledged it will have to reduce the scope of the proposed project and choose a more environmentally friendly method in order to comply with the park service's requirements.

"We spent some time brainstorming possible stabilization methods, and Dynegy indicated they would consult with alternative design firms that specialize in bioengineering and 'greener' stabilization approaches," Keller said. "Dynegy indicated their desire to choose a stabilization method that would not project/encroach into the river."

She also said that Dynegy is "proactively working on a plan for emergency stabilization in the event there is a catastrophic loss of bank this season," which has been a fear of government officials and others as the Middle Fork banks are more at risk of erosion during heavy spring rains.

"I have not seen the plan, but they have told me their goal is for it to be easily removable, short-term, and temporary in nature," Keller said of the emergency stabilization design.

On March 26, more than 200 people attended an IEPA hearing held to gather public comments on Dynegy's stabilization project, which the state agency must sign off on prior to the Corps of Engineers granting a permit.

Most of the more than 50 people who made formal comments objected to the project as not compatible for a national scenic river. Many called for the IEPA to demand that the coal ash be removed altogether from the three pits that are adjacent to the Middle Fork as the best

long-term solution for protecting the environment.

River advocates have feared that Dynegy's stabilization project was a first step in its long-term plan to leave the coal ash next to the river forever. River advocates prefer more of a stop-gap stabilization until Dynegy can move the coal ash, which was stored in the pits for decades as a byproduct of the coal burning process at the former power plant.

Lan and Pam Richart, co-directors of Champaign-based Eco-Justice Collaborative, have been actively campaigning for the removal of the coal ash for years. Lan Richart said the news that Dynegy is going back to the drawing board was a surprise victory.

"All along, we've been saying that the project was too large, too destructive and wasn't a good idea, and a precursor to leaving the ash in place," he said.

Richart said it's a significant victory in the fight to protect the Middle Fork.

"We firmly believe that the hundreds of letters sent to the National Park Service by the public helped solidify the agency's position that the stream-bank stabilization originally proposed was not compatible with the river's designation as a National Scenic River," he said. "This is a good decision for the river and also for the people who enjoy and depend on it. We remain committed to continuing our campaign calling for the clean up of coal ash along the river."

Eco-Justice Collaborative, Prairie Rivers Network and other private citizens have also been campaigning for passage of Bennett's bill, which would require the state to develop rules for regulating the storage of coal-ash waste and the closure of coal-ash sites. Currently, Illinois has no such regulations, and the laws that do come into play when closing such sites apply only to groundwater. The legislation would also require companies to provide financial assurances — that coal-ash sites will be cleaned up even if the property owners abandon them.

Marron said there are about 84 sites where coal ash is stored in Illinois, so it's imperative to have clear, concise guidelines to help alleviate environmental damage and encourage safe and responsible storage of coal ash.

Lan Richart said there are upwards of 50 unlined, leaking coal-ash impoundments on power plant sites throughout the state, and federal rules — the only ones currently in force in Illinois — do not include a permit process for closing these pits, nor a means of enforcement.