No. 18-3644

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Prairie Rivers Network,
Plaintiff-Appellant,
v.
Dynegy Midwest Generation, LLC,
Defendant-Appellee.

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

REPLY BRIEF OF PLAINTIFF-APPELLANT PRAIRIE RIVERS NETWORK

Oral Argument Requested

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INTRODUCTION

This Court should summarily reverse the district court's decision below and remand for further proceedings consistent with *County of Maui v. Hawai'i Wildlife Fund*, 140 S. Ct. 1462 (2020). The Supreme Court reached a different conclusion from the district court below on the central issue in this appeal: whether the federal Clean Water Act applies, under any circumstances, to point source discharges through groundwater. Prairie Rivers Network has standing to pursue this case based on the well-pleaded allegations in its compliant, unchallenged below, which it has further supported here with declarations proving standing. This Court need not reach the other arguments presented by Dynegy and *amici*, but if it does, it should reject them as meritless. *County of Maui* established a "functional equivalence" test whose application does not depend on the absence of state groundwater or Resource Conservation and Recovery Act ("RCRA") regulation. This Court should remand to allow the district court to apply this fact-specific test in the first instance. Reversal on Count 2 of the Complaint is also appropriate because it alleges permit violations that create an independent basis for Clean Water Act jurisdiction.

ARGUMENT

I. PRAIRIE RIVERS NETWORK HAS STANDING.

Prairie Rivers Network has demonstrated standing, both here and in the district court below. Prairie Rivers Network's complaint alleged sufficient facts to satisfy the *Twombly-Iqbal* "'plausibility'" standard. *See Silha v. ACT, Inc.*, 807 F.3d 169, 174 (7th Cir. 2015). Because Dynegy did not challenge standing below, no factual record has yet been developed. Prairie Rivers Network seeks leave to supplement the appellate record with declarations not to cure a deficiency in its Complaint, as Dynegy asserts, Appellee Br. at 14, but to provide the Court with evidence of specific facts to meet its burden to demonstrate standing at every stage of the case.

See Spokeo v. Robins, 136 S. Ct. 1540, 1547 (2016); Plaintiff-Appellant's Motion for Leave to File Documents (Dkt. #20-1) ("Motion to File").

Dynegy now brings a facial challenge to Prairie Rivers Network's standing, *see* Appellee Br. at 13, and this Court evaluates the plaintiff's factual allegations in a facial standing challenge under the *Twombly/Iqbal* plausibility standard. *Silha*, 807 F.3d at 173-74. To plausibly allege standing, the complaint must "contain sufficient factual matter, accepted as true" such that it "allows the court to draw the reasonable inference" that the plaintiff has standing to sue. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (internal quotations omitted); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (at the pleading stage, courts "'presume that general allegations embrace those specific facts that are necessary to support the claim'" of injury) (citation omitted); *Silha*, 807 F.3d at 173 (internal citation omitted) ("[T]he court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff.").

Prairie Rivers Network alleged facts to support each element of standing. *See Sierra Club v. Franklin Cty. Power of Ill., LLC*, 546 F.3d 918, 924 (7th Cir. 2008). Regarding injury-in-fact, the Complaint states that "[i]ndividual members of [Prairie Rivers Network] live near, study, work, and recreate in and around, the Middle Fork, including in the vicinity of the Vermilion Power Station" and value the river's "aesthetic beauty and ecological vitality." Compl. ¶ 13, APP0024. Drawing a reasonable inference in plaintiff's favor, as the court must at this stage, *see Iqbal*, 556 U.S. at 678, the area these individuals use includes waters immediately adjacent to and downstream from Vermilion Station, the areas most likely to be negatively impacted by Dynegy's pollutant discharges and the unsightly orange-red color of the river adjacent to the coal ash pits. *See* Compl. ¶¶ 13, 48-57, APP0024, APP0031-33. The discharges

thus harm these members by diminishing the aesthetic values of the river and potentially through health impacts from contact with the water. *Id.* ¶ 13. This injury constitutes a concrete and particularized harm. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.(TOC), Inc.*, 528 U.S. 167, 183 (2000) ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.") (internal quotations omitted). The injury is actual, because the discharges presently impact members, and ongoing. The injury is also fairly traceable to Dynegy's unauthorized discharges, *see* Compl. ¶¶ 14, 48-57, APP0024, APP0031-33, and would be redressed by injunctive relief (compliance with the Clean Water Act and cessation of unauthorized discharges) and civil penalties, *id.* ¶ 15, APP0024-25.

The Complaint also sufficiently alleges facts to establish the remaining elements of organizational standing. *See Sierra Club v. Franklin Cty.*, 546 F.3d at 924. This litigation is germane to Prairie Rivers Network's purpose of "champion[ing] clean, healthy rivers and lakes and safe drinking water to benefit the people and wildlife of Illinois." Compl. ¶ 11, APP0023. The organization's requested relief is not unique to any member, and therefore does not require participation of any individual. *Id.* ¶ 15, APP0024-25, Prayer for Relief.

Tellingly, Dynegy did not challenge standing in the district court, and the court did not raise it. If Dynegy had challenged the adequacy of the standing allegations in the Complaint, Prairie Rivers Network would have submitted declarations of its members as evidence of specific facts to support its standing claim. *See Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 656 (7th Cir. 2011) ("[A] plaintiff, to establish Article III standing to sue, must allege, and *if the allegation is contested must present evidence*, that the relief he seeks will if granted avert or mitigate or compensate *him* for an injury – though not necessarily a great injury

– caused or likely to be caused by the defendant.") (first emphasis added, second in original). Those declarations, which would have been similar to the ones Prairie Rivers Network seeks to file here, *see* Motion to File and attached Declarations (Dkt. #20:1-5), would now be in the record for this court to review.

In claiming that the Complaint "fails to allege any specific injury in fact to any of PRN's individual members," Appellee Br. at 10, Dynegy forgets that at the pleading stage, courts will "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561. In nearly every case that Dynegy cites, the courts determined standing *after a record had been developed* and considered evidence plaintiffs had submitted to support the allegations in the complaint. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009) (affidavit filed after standing was challenged in district court); *Pollack v. Dept. of Justice*, 577 F.3d 736, 738 (7th Cir. 2009) (affidavits filed after standing challenged in district court); *Envt. Tex. Citizen Lobby v. ExxonMobil Corp.*, 968 F.3d 357, 367-68 (5th Cir. 2020) (standing for most claims established by a preponderance of evidence during trial); *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 536 (5th Cir. 2019) (declarations attached to opening brief in the appellate court); *N.M. Off-Highway Vehicle All. v. U.S. Forest Serv.*, 645 F. App'x 795, 800 (10th Cir. 2016) (evidence included affidavits, administrative record, and a hearing transcript); *Wilderness Soc'y, Inc., v. Rey*, 622 F.3d 1251, 1256 (9th Cir. 2010) (declaration filed after standing challenged in district court). These cases do not support Dynegy's argument that the Complaint is deficient; they were decided based on the same type of evidence that Prairie Rivers Network has asked this Court to consider to determine standing here.[1]

[1] One exception is *Protecting Air for Waterville v. Ohio Envtl. Prot. Agency,* where the Sixth Circuit found that the plaintiffs lacked standing and faulted them for not attaching affidavits with their opening brief – as Prairie Rivers Network seeks leave to do here – where there was no

In seeking leave to file standing declarations – the sufficiency of which Dynegy has not challenged[2] – Prairie Rivers Network aims to provide this court with the evidence typically available at this stage of litigation, only for the purpose of establishing standing, which the court must consider (even though it was not raised below) because it is jurisdictional. *See Brown v. Disciplinary Comm. of the Edgerton Volunteer Fire Dep't*, 97 F.3d 969, 972 (7th Cir. 1996). Although the Complaint's allegations are sufficient at the pleading stage, should this court wish to engage in a standing inquiry that did not occur below, the specific facts alleged in Prairie Rivers Network's declarations provide ample support. *See* Appellant Br. at 10-15; Motion to File and attached Declarations, Dkt. #20:1-5.[3]

II. *COUNTY OF MAUI* REQUIRES SUMMARY REVERSAL OF THE DISTRICT COURT'S OPINION.

County of Maui requires summary reversal of the district court's decision below and an immediate remand. Appellant Br. at 15-30. The Supreme Court's decision abrogates the district

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record from the state agency adjudication below. 763 F. App'x 504, 508 (6th Cir. 2019). The other exception is *Silha*, 807 F.3d at 169, in which plaintiffs do not seem to have offered declarations or other evidence in support of their standing.

[2] Dynegy incorrectly characterizes the declarations as "pure, inadmissible hearsay" because they are unable to cross-examine the declarants. Appellee Response to Motion to File, Dkt. #25 at 1-2. If this case is remanded to the district court (as Prairie Rivers Network seeks), Dynegy would have an opportunity to cross-examine the declarants if the case proceeds to fact-finding. Moreover, the declarations are admissible in the same manner as sworn testimony pursuant to 28 U.S.C. § 1746.

[3] That Prairie Rivers Network's Motion to File is not styled as a "motion to correct or modify the record on appeal" under Federal Rule of Appellate Procedure 10(e) is no reason to deny it, as Dynegy contends. *See* Appellee Br. at 14; Appellee Response to Motion for Leave to File Documents, Dkt. #25 at 1. The motion conforms with Rule 10(e)(3) by "present[ing]" the question regarding supplementation of the record concerning standing "to the court of appeals" and allowing the Court to determine whether to admit the evidence. Fed. R. App. Proc. 10(e)(3). Rules 10(e)(1) and 10(e)(2) do not apply because there is no dispute that the "record truly discloses what occurred in the district court," nor any claim that the declarations were "omitted from or misstated in the record by error or accident," contrary to Dynegy's mischaracterization. *See* Appellee Response to Motion to File, Dkt. #25, at 1. The declarations were not inadvertently omitted; the factual record on standing was never developed because it was not challenged in the district court.

court's holding. *Id*. at 17-20. Moreover, the Supreme Court noted that application of the "functional equivalence" test that it established would require fact-finding by district courts. *Id*. at 20 (citing *County of Maui*, 140 S. Ct. at 1476-77). This Court should decline Dynegy's invitation to expand the scope of its arguments on appeal beyond the grounds on which Dynegy moved to dismiss below. *See Box v. A & P Tea Co*., 772 F.2d 1372, 1376 (7th Cir. 1985); *see also Lexington Ins. Co. v. RLI Ins. Co*., 949 F.3d 1015, 1025 n.6 (7th Cir. 2020). If the Court does choose to reach the arguments that Dynegy raised for the first time on appeal, it should reject them as without merit, for the reasons stated below and in Prairie Rivers Network's opening brief.

A. The Supreme Court's interpretation of the Clean Water Act in *Maui* did not depend on the scope of state groundwater regulation.

1. The Court's functional equivalence test accounts for state regulation of groundwater.

Contrary to Dynegy's arguments, Appellee Br. at 16-21, the Clean Water Act is not contingent on the scope of state regulation. *County of Maui* leaves no ambiguity on that point. Rather, the Supreme Court took into account state regulatory schemes in holding that the Clean Water Act applies to point source discharges through groundwater into navigable waters that are the functional equivalent of direct discharges. Perhaps the clearest example of this is where the Court explained that the "[Act's] words reflect Congress' basic aim to provide federal regulation of identifiable sources of pollutants entering navigable waters *without undermining the States' longstanding regulatory authority over land and groundwater*" and concluded that the new functional equivalence test "best captures, in broad terms, those circumstances in which Congress intended to require a federal permit." *County of Maui*, 140 S. Ct. at 1476 (emphasis added).

Rather than seeing the two as at odds, the *County of Maui* Court clearly acknowledges state groundwater regulation but holds that the Clean Water Act also applies. *See id*. (stating that "context imposes natural limits as to when a point source can properly be considered the origin of pollution that travels through groundwater," and notes that "context includes the need, reflected in the statute, *to preserve state regulation of groundwater* and other nonpoint sources of pollution") (emphasis added). Likewise, the Court's statement that "[d]ecisions should not create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the [Clean Water Act's] basic federal regulatory objectives" is part of its guidance to courts concerning how to apply the functional equivalence test, not an analysis to be completed separately or before that test is utilized. *Id*. at 1476-77. In addition, the record before the Court indicated that virtually all states regulate groundwater. *See id*. at 1471 (noting that "[o]ver many decades . . . the States have developed methods of regulating nonpoint source pollution through water quality standards and otherwise"); *Brief for Amici Curiae Water Systems Council et al*. at 22, *County of Maui*, Case No. 18-260, 140 S. Ct. 1462 (2020)[4] (discussing nationwide survey which found that "all 49 states that responded and the District of Columbia regulate groundwater"); *Brief for Amici Curiae State of West Virginia et al*. at 10-11, *County of Maui* (arguing that states already regulate groundwater).

The *County of Maui* Court reiterated the functional equivalence test five times in its opinion, *see id*. at 1468, 1476-77, and not once did the Court indicate that the test would not apply if a state groundwater regulatory regime were in place. The Supreme Court does not hide elephants in mouseholes. *Al-Bihani v. Obama*, 619 F.3d 1, 44 (D.C. Cir. 2010) (concurrence of

[4] *Amicus curiae* briefs filed in *County of Maui* are cited hereinafter using the case name rather than the full citation.

J. Kavanaugh). Had the Court intended to condition Clean Water Act jurisdiction on the absence of state groundwater regulatory regimes, it would have made that clear.

2. The functional equivalence test does not apply only where the location of a discharge has been "intentionally manipulated."

County of Maui likewise provides no basis for Dynegy's and *amici's* claim that the functional equivalence test can be met only in instances where a party "intentionally manipulates" its discharge location by, for example, cutting off a pipe a few feet before a navigable water. *See* Appellee Br. at 16-17; Brief of *Amicus Curiae* Washington Legal Foundation, Dkt. #46, at 16-17. Quite the opposite: the Court's discussion makes clear that the test applies to any point source discharges through groundwater that are functionally equivalent to direct discharges to navigable waters. *County of Maui*, 140 S. Ct. at 1474-77.[5]

Were the circumstances to which the test applies as narrow as Dynegy alleges, the Court would have had no need to set out the many factual considerations that it states "may prove relevant" to the test, such as "the extent to which the pollutant is diluted or chemically changed as it travels," the "amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source," or "the degree to which the pollution (at that point) has maintained its specific identity." *Id*. at 1476-77. Rather, the Court could have directed courts to determine whether the discharge involved intentional manipulation, without more. It did not do so. In fact, the Court did not mention intention at all in articulating the functional equivalence test. Instead, the Court made clear that the test is of general application, including to "middle instances" – in between where the "pipe ends a few feet from navigable waters" and where "the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with

[5] *Amicus* Illinois Energy Regulatory Group recognizes the broad applicability of the test, stating that it "would cover those situations . . . where groundwater contamination migrates to navigable waters." Brief of *Amicus Curiae* Illinois Energy Regulatory Group, Dkt. #44, at 5.

groundwater, mix with much other material, and end up in navigable waters only many years later."[6] *Id*. at 1476. This language describes a test that is not limited only to intentional manipulation.

3. Requiring permits for groundwater discharges to navigable waters does not undermine Illinois' regulation of groundwater.

Requiring permits for discharges to navigable waters that pass through groundwater does not interfere with state regulation of groundwater in Illinois (or elsewhere). Historic practice belies this claim. As the Court noted in *County of Maui*, permits for pollutants discharged to navigable waters through groundwater are nothing new. *See id*. at 1472 ("EPA itself for many years has applied the permitting provision to pollution discharges from point sources that reached navigable waters only after traveling through groundwater"); *see also* Brief of *Amici Curiae* Former EPA Officials, *County of Maui*, at 16-20 (listing Clean Water Act permits for discharges from groundwater into navigable waters in 11 states and Tribal lands) (EPA Officials *Amicus* Br.); Brief of *Amici Curiae* States of Maryland *et al*., *County of Maui*, at 21-26 (discussing EPA guidance directing permit writers to regulate discharges from groundwater into navigable waters and identifying permits for such discharges in 3 states and 2 Tribal communities) (Maryland *Amicus* Br.). This permitting has occurred for decades without disrupting state regulatory regimes. *See id*. at 24.

There is likewise no reason based on the Clean Water Act itself to believe that regulation of discharges through groundwater to navigable waters will conflict with state regulation of groundwater. As *amici*, including Illinois, explained in *County of Maui*, the limits imposed on discharges through groundwater to navigable waters need not be the same as limits on pollution

[6] Even in the latter circumstances, the Court does not rule out the possibility that a permit is required but rather states that permitting requirements "likely do not apply." *County of Maui*, 140 S. Ct. at 1476.

entering groundwater. *See* Maryland *Amicus* Br. at 29-30 ("Nothing in the definition of 'effluent limitation' requires that compliance be assessed where a pollutant leaves the point source, rather than where it enter or affects navigable waters") (citing 33 U.S.C. § 1362(11)). Contrary to the assertions of Dynegy and *amici* in this case, limits on discharges *to* groundwater are not the same as limits on discharges *through* groundwater *to* navigable waters, the latter of which was at issue in *County of Maui* and is here.

Moreover, even if Clean Water Act permitting of discharges through groundwater does require implementing controls at the point at which the discharge enters groundwater, nothing in Illinois' groundwater regulatory scheme or Clean Water Act regulations suggests that the two sets of requirements would conflict. Illinois' general groundwater regulations require controls only if groundwater standards are not met; they do not call for permits or specific safeguards but rather are achieved – if at all – by means of groundwater monitoring, as-needed clean-up, and enforcement. *See* 35 Ill. Adm. Code Part 620; 415 ILCS 5/31. In contrast, the Clean Water Act requires permits for all point source dischargers to navigable waters, 33 U.S.C. § 1342, who must meet effluent limitations based on application of best available treatment technologies, *id*. § 1311(b), and state water quality standards. *See* 40 C.F.R. § 122.44. There is no "fundamental conflict" between the two schemes; if anything, compliance with Clean Water Act limitations should assist dischargers in achieving Illinois' groundwater standards.

In the limited instances where Illinois is proposing more comprehensive permitting requirements for groundwater dischargers – such as proposed regulations for coal ash impoundments, under the recently-adopted Illinois Coal Ash Pollution Prevention Act, Pub. Act

101-171 (2019)[7] – there is likewise no reason to believe that the Act's limits on discharges to navigable waters would conflict with state-required controls. As former EPA officials explained in *County of Maui*, compliance with state proscriptions of contamination of waters (whether groundwater or surface water) often depends on similar models and controls as those needed to comply with NPDES permits limiting groundwater discharges to navigable waters. *See* EPA Officials *Amicus* Br. at 30 n.59. That is true of Illinois' proposed regulations for coal ash ponds. Precisely because they are "extensive," Brief of *Amicus Curiae* Washington Legal Foundation, Dkt. #46, at 16, little more will likely be needed to meet the Clean Water Act's distinct mandate to limit discharges of pollutants through groundwater to navigable waters.

If Illinois' groundwater regulations were truly jeopardized by Clean Water Act jurisdiction over groundwater discharges into navigable waters, one would suppose that Illinois would be the first to urge the Supreme Court not to recognize that jurisdiction. Tellingly, Illinois did exactly the opposite: it joined an *amicus curiae* brief in *support* of respondents in *County of Maui*. *See* Maryland *Amicus* Br. In that brief, Illinois supported EPA's longstanding practice of requiring NPDES permits for discharges through groundwater, and had no trouble distinguishing between pollution of groundwater itself and pollution of navigable waters through groundwater. "This case," Illinois argued, "is not about harnessing the Clean Water Act to regulate groundwater pollution, a subject that is largely a matter of traditional state regulation." *Id*. at 1. Illinois emphasized that requiring NPDES permits for discharges to navigable waters through groundwater does not "encroach[] upon states' rights," *id*. at 13, and would apply to a relatively

[7] Proposed 35 Ill. Admin. Code Part 845, *Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments*, 44 Ill. Reg. 6696 (May 1, 2020), https://www.cyberdriveillinois.com/departments/index/register/volume44/register_volume44_issue_18.pdf.

limited universe of dischargers. *See id*. at 27 ("Affirming the court of appeals' decision will not mean that *every* point source discharging into groundwater must seek an NPDES permit, only those with discharges that can fairly be traced to navigable waters.") (emphasis in original).

In summary, the history of permitting of discharges through groundwater into navigable water, the flexibility in the Act for the regulation of such discharges, the nature of Illinois' groundwater regulatory scheme, and Illinois' advocacy in *County of Maui* all belie claims that Clean Water Act permits will conflict with Illinois requirements. The regulatory schemes complement each other and can work together.

B. There is no conflict between the Clean Water Act's application to discharges to navigable waters and RCRA's regulation of coal ash waste disposal.

Dynegy further argues that the Clean Water Act cannot apply to its pollution of the Middle Fork because RCRA also regulates groundwater contamination. This argument mischaracterizes applicable law, and Dynegy has failed to identify any conflict between the two statutes here.

1. EPA and courts have long interpreted both the Clean Water Act and RCRA to apply to leaking waste impoundments like Dynegy's.

As Prairie Rivers Network explained in its opening brief, both EPA and federal courts have recognized that industrial disposal sites such as Vermilion that combine waste and water are subject to regulation under *both* the Clean Water Act *and* RCRA. Appellant Br. at 28-29. Under a longstanding EPA interpretation, RCRA's exclusion of point source discharges from the definition of solid waste only applies to "the actual point source discharge," whereas RCRA applies to all other waste disposal activities (including any leaking to groundwater that is not the functional equivalent of direct point source discharges to navigable waters). 40 C.F.R. § 261.4(a)(2) cmt.; *see also* 45 Fed. Reg. 33,084, 33,098 (May 19, 1980) (in promulgating 40 C.F.R. § 261.4(a)(2), EPA noted that wastewater impoundments should remain subject to RCRA

except for their "actual discharges into navigable waters" because "most of the environmental hazards posed by wastewaters in treatment and holding facilities – primarily groundwater contamination – cannot be controlled under the Clean Water Act" or other statutes than RCRA). EPA further elaborated on this interpretation in a 1995 guidance memo, concluding that point source discharges – including point source discharges via groundwater – from "leaking waste management units" are subject to Clean Water Act requirements while RCRA regulates other groundwater contamination from those units. EPA, *Interpretation of Industrial Wastewater Discharge Exclusion from the Definition of Solid Waste*, 1-3 (1995), https://www3.epa.gov/npdes/pubs/owm607.pdf.

This Court accepted EPA's "objectively reasonable" interpretation of the RCRA solid waste exclusion in *Inland Steel Co. v. EPA*, 901 F.2d 1419, 1424 (7th Cir. 1990). In *Inland Steel*, the issue was whether discharges to groundwater through deep well injection would be subject to the exclusion; this Court held that they were not because there was no evidence that they were point source discharges to navigable waters that could be regulated by the Clean Water Act. 901 F.2d at 1421-24. Noting that RCRA's definition of "disposal" includes "discharges," this Court nonetheless accepted EPA's distinction between "discharges" subject to the Clean Water Act – i.e., point source discharges – and other "disposals" that RCRA regulates. *Id.* at 1422-24. The *Inland Steel* Court declined to address the question of under what circumstances a discharge to navigable waters through groundwater is a point source discharge subject to the Clean Water Act, *id.* at 1422-23, the question that the Supreme Court has now resolved in *County of Maui*.

Many other federal courts have also followed EPA's interpretation of the RCRA solid waste exclusion. *See United States v. Dean*, 969 F.2d 187, 194 (6th Cir. 1992) (noting that Clean

Water Act applies to point source discharges from a waste impoundment, but concluding that RCRA otherwise applied) (citing 40 C.F.R. § 261.4(a)(2) cmt.); *Little Hocking Water Ass'n v. E.I. du Pont Nemours & Co.*, 91 F. Supp. 3d 940, 959-62 (S.D. Ohio 2015) (finding that RCRA applies to wastewater disposed in leaking industrial impoundments that contaminates groundwater unless the leaking constitutes a point source discharge) (citing 40 C.F.R. § 261.4(a)(2) cmt.); *see also Humboldt Baykeeper v. Union Pac. R.R. Co.*, Case No. C 06-02560 JSW, 2006 WL 3411877, at *3-7 (N.D. Cal. Nov. 27, 2006) (holding that plaintiffs can pursue Clean Water Act claims alleging unpermitted point source discharges and RCRA claims alleging pollution of groundwater at the same disposal site) (citing 40 C.F.R. § 261.4(a)(2) cmt.); *accord State v. PVS Chems. Inc.*, 50 F. Supp. 2d 171, 176-79 (W.D.N.Y. 1998) (citing 40 C.F.R. § 261.4(a)(2) cmt. and 1995 EPA memo). These cases reaffirm EPA's longstanding interpretation that waste impoundments can be both point source dischargers subject to the Clean Water Act and disposal sites subject to RCRA.[8]

Dynegy's attempt to distinguish these cases is meritless. Dynegy asserts that the Vermilion impoundments cannot be subject to both RCRA and the Clean Water Act at the same time, ignoring EPA's longstanding interpretation, accepted by courts, that the solid waste exclusion only applies to the "actual point source discharges" regulated by the Clean Water Act, while leaving other groundwater pollution to RCRA. 40 C.F.R. § 261.4(a)(2) cmt. Prairie Rivers Network's Clean Water Act claim in this case would not interfere with RCRA regulation

[8] Two additional cases cited by Dynegy, Appellee Br. at 31 n.35, do not support a different interpretation. In both *Coldani v. Hamm*, Case No. Civ. S-07-660 RRB EFB, 2007 WL 2345016 (E.D. Cal. Aug. 16, 2007), and *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300 (S.D. Iowa 1997), courts found that the RCRA solid waste exclusion applied because there were point source discharges subject to the Clean Water Act. These cases did not involve whether RCRA would apply to other disposal activities at these sites, including other discharges to groundwater.

of waste disposal activities at Vermilion, including groundwater contamination that is not an "actual point source discharge."[9]

2. The cases that Dynegy primarily relies on are no longer good law after County of Maui.

For its RCRA argument, Dynegy primarily relies on two recent Circuit Court decisions that are no longer good law after *County of Maui*. Appellant Br. at 24, 29-30. In *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, the Sixth Circuit held that discharges through groundwater to navigable waters could never be subject to Clean Water Act jurisdiction, under any circumstances. 905 F.3d 925, 932-38 (6th Cir. 2018). This decision led to a Circuit split between the Sixth and Ninth Circuits, leading the Supreme Court to take up the issue, *County of Maui*, 140 S. Ct. at 1469-70, and reach a different conclusion that discharges to navigable waters through groundwater, such as those alleged in this case, are subject to the Clean Water Act if they meet the functional equivalence test, *id.* at 1476-77. The Supreme Court's decision thus abrogates *Kentucky Waterways Alliance*, and the Sixth Circuit's reasoning concerning the potential impact on RCRA of recognizing Clean Water Act jurisdiction over coal ash impoundment discharges is *dicta* to its now-invalid holding and has no persuasive authority here.

Similarly, the Fourth Circuit's statements concerning RCRA in *Sierra Club v. Virginia Electric & Power Co.*, 903 F.3d 403 (4th Cir. 2018) do not require a different result in this case. In *Virginia Electric & Power Co.*, the Fourth Circuit held that the coal ash disposal sites at issue were not point sources, based on facts that are distinguishable from the allegations in this appeal.

[9] Moreover, the extent to which groundwater contamination at Vermilion would meet *County of Maui*'s test for Clean Water Act applicability, as opposed to being subject to RCRA, is a question of fact that the district court should address in the first instance on remand.

Appellant Br. at 23.[10] The court also relied on a rationale that is no longer good law after *County of Maui*: adopting a "means-of-delivery" test for point source discharges that *County of Maui* rejected. *See* Appellant Br. at 24 (comparing *Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d at 411, with *County of Maui*, 140 S. Ct. at 1473-74). In addition, based on its holding that the pollution at issue did not constitute point source discharges under the Clean Water Act, the Fourth Circuit found instead that it was "groundwater pollution from solid waste [that] falls squarely within the regulatory scope of the RCRA." *Sierra Club v. Va. Elec. Power Co.*, 903 F.3d at 412. This finding is entirely consistent with the authorities discussed above demonstrating that RCRA applies to groundwater pollution at waste disposal sites other than "actual point source discharges."

3. Applying the Supreme Court's County of Maui decision to point source discharges would not undermine the CCR Rule.

Dynegy repeatedly asserts that there is somehow a conflict between regulation of the Vermilion impoundments' discharges to navigable waters under the Clean Water Act and regulation of coal ash waste disposal under RCRA, but it fails to point to *any* concrete evidence of an actual conflict. There is nothing novel, let alone problematic or harmful, about both statutes applying to waste impoundments; rather, "Congress recognized that there would be overlapping coverage between the CWA and RCRA." *Ecological Rts. Found. v. Pac. Gas & Elec. Co.*, 874 F.3d 1083, 1095-97 (9th Cir. 2017). In fact, Congress anticipated overlap between the two statutes and provided that, where there is a direct conflict, the Clean Water Act takes precedence. Appellant Br. at 27-28 (citing *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 505-06 (4th Cir. 2015)).

[10] Dynegy concedes that this Court need not reach the issue of whether Vermilion's impoundments are point sources. *See* Appellee Br. at 25 n.24; *see also* Appellant Br. at 22.

Nor does Dynegy identify any provision of EPA's Coal Combustion Residuals ("CCR") Rule, 40 C.F.R. Part 257, that would conflict with Clean Water Act jurisdiction over the Vermilion impoundments' point source discharges. The CCR Rule's environmental and health protections such as groundwater monitoring, corrective action to address groundwater contamination, and closure standards, *see* 40 C.F.R. §§ 257.90-257.98, can easily coexist with the Clean Water Act's limits on point source discharges to navigable waters. The two statutes' requirements are complementary, with the CCR Rule addressing general environmental and health risks from coal ash waste disposal and the Clean Water Act specifically focusing on protecting surface water quality from harm from point source discharges. As the Fourth Circuit noted, "RCRA mandates that are just different, or even greater, than what the [Clean Water Act] requires are not necessarily the equivalent of being 'inconsistent' with the [Act]." *Goldfarb*, 791 F.3d at 510. Dynegy's repeated assertions that Prairie Rivers Network's Clean Water Act claim conflicts with RCRA are meritless, because it is unable to offer any reason why it cannot comply with both laws.[11]

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

Reversal and remand of the district court's dismissal of Count 2 is also appropriate because Prairie Rivers Network's separate claims in Count 2 that Dynegy's discharges violate Standard Conditions 23 and 25 of Vermilion's NPDES permit have an independent jurisdictional basis under the Clean Water Act. Dynegy asserts that Count 2 of Prairie Rivers Network's Complaint is exclusively predicated on 33 U.S.C. § 1311(a), and therefore, Prairie Rivers

[11] Dynegy's reference to Congress' 2016 amendment to RCRA to specifically address coal ash, *see* Appellee Br. at 34-36, adds nothing to its arguments. That Congress intended for coal ash to be regulated under RCRA does not mean that the Clean Water Act does not also apply to point source discharges to navigable waters from coal ash impoundments.

Network must allege a point source discharge into navigable waters to establish Clean Water Act jurisdiction. Appellee Br. at 36-37. However, as Prairie Rivers Network noted in its opening brief, Appellant Br. at 35, Standard Conditions 23 and 25 of Dynegy's NPDES permit for the Vermilion Station need not be directly tied to a point source discharge to be enforceable because 33 U.S.C. § 1311(a) requires permittees to comply with all provisions of their NPDES permits. *See* 33 U.S.C. § 1311(a) (requiring compliance with NPDES permit provisions in 33 U.S.C. § 1342).

Section 301(a) of the Clean Water Act states that "[e]xcept as in compliance with this section and section[] . . . [402], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Discharges not in compliance with a NPDES permit (which is issued pursuant to Section 402) are unlawful and in violation of section 301(a). As noted in Prairie Rivers Network's opening brief, Dynegy has a NPDES permit for the Vermilion Station that defines, and sets conditions on, the amount and type of pollutants the Vermilion Station may discharge and the points from which it may discharge (defined as permitted "outfalls"). Appellant Br. at 36. The Vermilion NPDES permit also includes conditions, such as Standard Conditions 23 and 25, with which Dynegy must comply across the entire Vermilion site. Therefore, if Dynegy discharges pollutants in a manner or at a location not authorized by its NPDES permit – or, as here, explicitly disallowed by that permit – it also violates section 301(a) even if this Court upholds the district court's holding on Count 1 that the alleged discharges are not point source discharges under the Clean Water Act.

Dynegy argues that the fact that it has an active NPDES permit for Vermilion "does not supplant the need for PRN's Complaint to establish a jurisdictional discharge."[12] Appellee Br. at 38. However, Vermilion's NPDES permit authorizes discharges from multiple outfalls that are "jurisdictional," because the permit would not exist otherwise. Dkt. #1, APP0029, ¶ 37. Alternatively, even if this Court is not entitled to assume "jurisdictional discharges" based on Vermilion's NPDES permit, case law does not support Dynegy's assertion that the Court must find a "jurisdictional discharge" to enforce the permit's conditions.

Dynegy asserts that in each case cited in Prairie Rivers Network's opening brief "some jurisdictional 'discharge' was established, undisputed, or assumed before a permit condition was enforced against the discharger." Appellee Br. at 38. This is not the case. Rather, many courts explicitly state that alleged violations of NPDES permits do not have to be directly tied to a point source discharge to navigable waters to be enforceable under the Clean Water Act. *See Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1005 (11th Cir. 2004) ("Even assuming . . . that we do not have jurisdiction of the plaintiffs' first claim regarding a discharge into United States' waters . . . we conclude that we do have jurisdiction over the case pursuant to the second claim – that the defendants violated conditions of their permit."); *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 988-89 (9th Cir.1995) ("[C]itizens groups may enforce even valid permit conditions that regulate discharges outside the scope of the Clean Water Act, namely discharges that may never reach navigable waters."); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas,*

[12] Dynegy cites two cases in an attempt to support its assertion that even though it "has sought, or received, approval to discharge wastewater [that] does not prove that such a discharge has occurred." Appellee Br. at 38 n.40. However, both cases are clearly distinguishable, as neither involved an active NPDES permit or permit condition violations. *See Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964, 973 (7th Cir. 2005); *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 430 F. Supp. 2d 996, 1010 (N.D. Cal. 2006).

LLC, 141 F. Supp. 3d 428, 448 (M.D.N.C. 2015) ("[A] permit condition need not address the discharge of pollutants to be enforceable through a citizen suit."); *Conn. Fund for Env't v. Raymark Indus., Inc.*, 631 F. Supp. 1283, 1285 (D. Conn. 1986) ("There is nothing in the language or legislative history of the [Clean Water] Act to suggest that a citizen[] suit may seek to enforce only those conditions of an NPDES permit that regulate the quality of a discharge immediately before its release into navigable waters."); *Pymatuning Water Shed Citizens for a Hygienic Env't v. Eaton*, 506 F. Supp. 902, 908 (W.D. Pa. 1980) ("Inasmuch as we have found violations of the NPDES permit it is unnecessary to determine whether plaintiffs have proved violations of effluent standards or limitations under . . . 33 U.S.C. § 1311 or any other section of the Clean Water Act.").[13] Other courts explicitly state that *any and all* permit conditions may be enforced under the Clean Water Act.[14]

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[13] *See also Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1115 (4th Cir. 1988) (holding that "the phrase 'an effluent standard or limitation' of [33 U.S.C.] § 1365(a)" should not be "construed to exclude citizen suits that do not allege discharge of pollutants in violation of permit limitations"); *Harpeth River Watershed Ass'n v. City of Franklin*, No. 3:14-1743, 2016 WL 827584, at *5 (M.D. Tenn. Mar. 3, 2016) (noting that the Clean Water Act "is explicit as to seven categories of 'effluent standard or limitation under this chapter' whose violation will satisfy the citizen suit provision," including violating "a permit or condition thereof issued under section 1342." (quoting *Citizens' All. for Prop. Rights v. City of Duvall*, 2014 WL 1379575, at *2 (W.D. Wash. Apr. 8, 2014)); *Ohio Vally [sic] Envtl. Coal. v. Fola Coal Co.*, No. CIV. 2:12-3750, 2013 WL 6709957, at *19 (S.D.W.Va. Dec. 19, 2013) (holding that "[a] permit condition is enforceable as an 'effluent standard or limitation' under [33 U.S.C.] § 1365(a)").

[14] *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 152 (4th Cir. 2000) (en banc) ("An 'effluent standard or limitation' is defined to include *any* term or condition of an approved permit. Citizens are thus authorized to bring suit against *any* NPDES permit holder who has allegedly violated its permit.") (citations omitted) (emphasis added); *Nw. Envtl. Advocates*, 56 F.3d at 986 (9th Cir. 1995) ("The plain language of [33 U.S.C. § 1365] authorizes citizens to enforce *all* [NPDES] permit conditions.") (emphasis in original); *Am. Canoe Ass'n, Inc. v. D.C. Water & Sewer Auth.*, 306 F. Supp. 2d 30, 37 (D.D.C. 2004) ("Simply, the CWA allows citizen suits to enforce *any* NPDES permit provision, whether or not the provision directly regulates water quality.") (emphasis added); *Locust Lane v. Swatara Twp. Auth.*, 636 F. Supp. 534, 539 (M.D. Pa. 1986) (finding that "citizens are granted authority to bring enforcement actions for violations of . . . *any* condition of *any* permit issued under section 402") (citations omitted) (emphasis added).

For example, in *Sierra Club v. City & Cty. of Honolulu*, the district court found that the ground-only spills alleged by the plaintiffs were violations of the applicable NPDES permit provisions and were thus enforceable even though the violations did not involve a discharge into navigable waters. No. 04-00463 DAE-BMK, 2008 WL 3850495, at *17-18 (D. Haw. Aug. 18, 2008). The court stated that "as long as the permit is valid, a violation of a permit in turn is a violation of the CWA because the Administrator has authority to include in a permit conditions to assure compliance with the CWA as he deems appropriate." *Id.* at *17. Accordingly, as long as Dynegy has an active NPDES permit for Vermilion, the permit's conditions are enforceable, and any and all violations of the permit are unlawful under the Clean Water Act, 33 U.S.C. § 1311(a).

Prairie Rivers Network has sufficiently alleged that Dynegy has violated section 301(a) of the Clean Water Act by violating conditions of Vermilion's NPDES permit. Thus, Count 2 of Prairie Rivers Network's Complaint alleging Dynegy's violations of Standard Conditions 23 and 25 of Vermilion's NPDES permit has an independent jurisdictional basis and should not have been dismissed regardless of the district court's decision concerning the unpermitted discharges alleged in Count 1.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF RULE 32 COMPLIANCE

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure and Circuit Rule 32(c), I hereby certify that this brief complies with the stated type-volume limitations. The text of the brief was prepared in Times New Roman 12-point font, with footnotes in Times New Roman 12 point font. All portions of the brief, other than the Table of Contents, Table of Authorities, and Certificates of Counsel contain 6,996 words. This certification is based on the word count function of the Microsoft Office Word processing software, which was used in preparing this brief.

DATED this 13th day of October, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, I caused a true and correct copy of the foregoing to be electronically filed with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED this 13th day of October, 2020.

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