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

January 31, 2018

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

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

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

Dear Mr. Flexon:

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

I. Background

The Unlined Coal Ash Pits

The Vermilion Power Station is a retired coal-fired power plant located approximately five miles north of the village of Oakwood, Illinois. The plant sits on the west bank of the Middle Fork of the Vermilion River ("Middle Fork"), in a 17-mile section designated as Illinois' only

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National Scenic River and first State Scenic River. From the mid-1950s until 2011, the plant burned coal and generated millions of tons of coal combustion residuals ("coal ash").[1]

Coal ash, the residue left when coal is burned, contains heavy metals and other toxic pollutants that are harmful and at times deadly to people, aquatic life, and animals. Among the contaminants found in coal ash are arsenic, barium, boron, chromium, lead, manganese, molybdenum, nickel, and sulfate.[2] These contaminants can inflict severe harm, including brain damage, cancer, learning disabilities, birth defects, and reproductive defects. Arsenic is a well-known carcinogen that also damages the nervous system.[3] Manganese is associated with learning disabilities and nervous system impairment, and can render water unusable by discoloring the water, giving it a metallic taste, and causing black staining.[4] Molybdenum has been linked to gout (joint pain, fatigue), increased blood uric acid levels, high blood pressure, liver disease, and potential adverse impacts on the reproductive system.[5] And boron, a dependable indicator of coal ash contamination, can lead to reduced sperm count, testicular degeneration, birth defects, and low birth weight among humans.[6]

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

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

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

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

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

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

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

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

[8] Kelron Hydro. Report, NAPS at 1.

[9] *Id.*

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

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

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

The Middle Fork of the Vermilion River

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

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

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[11] *Id.* at Figure 7.

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

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

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

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

[16] Illinois Natural History Survey, " Vermilion River," *available at* http://wwx.inhs.illinois.edu/research/rra/site17/.

[17] Corridor Management Plan at 37.

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

[19] *Id.* at 15.

[20] *Id.* at 17.

[21] *Id.* at 15-19; Vermilion County Conservation District, "Wildlife," http://www.vccd.org/wildlife.html.

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

The Middle Fork and the flora and fauna the river supports draw visitors from near and far. Canoeing and kayaking on the Middle Fork are popular pastimes, as is hiking the trails of the Kickapoo State Recreation Area, Kennekuk Cove County Park, and Middle Fork State Fish and Wildlife Area, all located along the Middle Fork. Other visitors come to the river and its shoreline parks to camp, walk their dogs, ride horses, hunt, photograph wildlife, picnic, or just to bask in the Middle Fork's scenic beauty. These recreational activities, which Prairie Rivers Network's members take part in, provide a significant bump to the local economy. Nearly 1.5 million people visited Kickapoo State Recreation Area in 2009 alone,[23] and tourism brought over $70 million in revenue to Vermilion County in 2010.[24] Local residents envision the Middle Fork and downstream Vermilion Rivers as focal points for the future of the county: in fact, the Vermilion River is a centerpiece of a plan for riverfront development in Danville, an urban hub just downriver from the Middle Fork.[25,26]

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

Dynegy is Discharging Coal Ash Contaminants into the Middle Fork

Dynegy's own documents demonstrate that the coal ash pits at Vermilion Power Station are discharging toxic pollutants into the Middle Fork via hydrologically connected groundwater. In 1992, Dynegy's predecessor began monitoring groundwater adjacent to the two older coal ash pits, the North Ash Pond System and the Old East Ash Pond, and continued that monitoring until 2007. Groundwater adjacent to the Vermilion Power Station coal ash pits was sampled again in 2011. Over that extended period of groundwater monitoring, concentrations of boron and sulfate – primary indicators of coal ash contamination[27] – consistently exceeded Illinois' groundwater protection standards[28] and, on numerous occasions, also exceeded U.S. EPA standards for those contaminants.[29] Dynegy consultant Natural Resources Technology, Inc. ("NRT") concluded that

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

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

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

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

[26] *See* http://www.cityofdanville.org/uploads/6/7/5/0/6750232/danvilleriverfront_conceptualplanfinal.pdf.

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

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

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

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

Reports from Dynegy's own consultants explain how pollutants from the ash pits discharge into the Middle Fork through connected groundwater. Due to the depth of the ash buried in the coal ash pits and the elevation of the groundwater table in the area, coal ash at the Vermilion Power Station has groundwater flowing through it year round.[32] While the thickness of saturated ash varies as groundwater levels rise and fall with the seasons, during some times of the year more than 21 feet of coal ash is saturated by groundwater.[33] That groundwater flows laterally through the ash, picking up contaminants in the process, while precipitation leaching down through the top of the coal ash mixes with the groundwater and further adds to the pollutant load contained within the discharge to the Middle Fork.[34] Dynegy's consultants' reports, as well as Dynegy's Dec. 2016 corporate disclosure filing with the federal Securities and

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

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

[32] *Id.* at v.

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

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

Exchange Commission ("SEC"), conclude that—with minimal exception[35]—the coal ash contaminated groundwater flows right into the adjacent Middle Fork.[36]

Analysis of groundwater seeps discharging into the Middle Fork confirms that conclusion. In May 2016 and September 2017, Prairie Rivers Network sampled five discrete groundwater seeps discharging into the river. Independent laboratory testing revealed concentrations of arsenic, barium, boron, chromium, manganese, molybdenum and sulfate in those seeps that exceed background levels and, for multiple pollutants, exceed health-based standards set by U.S. EPA and Illinois EPA.

II. Clean Water Act Violations

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

a. Unpermitted Discharges

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

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

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

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

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

b. Violations of Standard Condition 25 of NPDES Permit IL0004057

The numerous unpermitted discharges from the Vermilion Power Station into the Middle Fork also violate Standard Condition 25 of NPDES Permit IL0004057. That condition provides: "The permittee shall comply with, in addition to the requirements of the permit, all applicable provisions of 35 Ill. Adm. Code Subtitle C, Subtitle D, Subtitle E and all applicable orders of the Board [IPCB]." The unpermitted discharges contravene multiple provisions of 35 Ill. Adm. Code Subtitle C.

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

First, the unpermitted discharges violate 35 Ill. Adm. Code § 304.106. That provision states, in relevant part, that: "[N]o effluent shall contain settleable solids, floating debris, visible oil, grease, scum or sludge solids. Color, odor and turbidity must be reduced to below obvious levels." "Effluent" is defined, in relevant part, as "any wastewater discharged, directly or indirectly, to the waters of the State or to any storm sewer, and the runoff from land used for the disposition of wastewater or sludges . . . ." 35 Ill. Adm. Code § 301.275. The discharges from the Vermilion Power Station into the Middle Fork constitute "effluent," and, as can be seen in Figures 1 and 2 below, that effluent contains both solids that are settling on the riverbed as well as bright colors that stand in stark contrast with unaffected portions of the riverbank. The shimmery orange, rust, and purple colors in those discharges are, in short, about as obvious as can be. As such, each unpermitted discharge from the Vermilion Power Plant into the Middle Fork violates 35 Ill. Adm. Code § 304.106 and Standard Condition 25 of NPDES Permit IL0004057 on each and every day that it occurs.

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

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

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

Second, the unpermitted discharges violate 35 Ill. Adm. Code § 304.124. That provision states: "No person shall cause or allow the concentration of the following constituents in any effluent to exceed the following levels, subject to the averaging rules contained in Section

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

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

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

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

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

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

c. Violation of Standard Condition 23 of NPDES Permit IL0004057

Standard Condition 23 of NPDES Permit IL0004057 states that "Collected screening, slurries, sludges, and other solids shall be disposed of in such a manner as to prevent entry of those wastes (or runoff from the wastes) into waters of the State. The proper authorization for such disposal shall be obtained from the Agency and is incorporated as part hereof by reference." As is shown in Figures 1 through 4 above and in Dynegy's own documents, coal ash has not been disposed of in a manner to prevent that entry of that ash waste into the Middle Fork.

Under Illinois regulations, coal ash meets the definition of sludge. *See* 35 Ill. Adm. Code § 301.395 ("'Sludge' means any solid, semisolid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects."). That coal ash sludge has been disposed of in the coal ash pits at the Vermilion Power Station. *See* 415 ILCS 5/3.185 (2012) (defining "disposal" as "discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water… so that such waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.").[38] As discussed above, constituents of that waste are discharged through groundwater channels into the Middle Fork, which is a water of the State. Because the coal ash at the Vermilion Power Station has not

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

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

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

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

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

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

III. Identification of the Party Giving Notice and Counsel

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

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

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

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IV. Conclusion

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

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

Respectfully submitted,

Thomas Cmar
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