No. 18-3644

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Prairie Rivers Network,
Plaintiff-Appellant,

v.

Dynegy Midwest Generation, LLC,
Defendant-Appellee.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is Washington Legal Foundation ("WLF"). WLF is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus curiae* in important cases arising under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*, to urge strict adherence to the CWA's jurisdictional limits. *See, e.g., Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020) ("*County of Maui*"); *Rapanos v. United States*, 547 U.S. 715 (2006); *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281 (3d Cir. 2015).

INTRODUCTION

Congress made a deliberate choice to regulate the alleged pollution at issue here under the 1976 Resource Conservation and Recovery Act ("RCRA"). Under authority conferred by RCRA, EPA in 2015 wrote detailed and specific regulations for impoundments containing coal ash and other coal combustion residuals ("CCRs"). Those 2015 regulations addressed the pollution of groundwater and surface water by coal ash impoundments in the manner alleged by Plaintiff-Appellant Prairie River Network's ("PRN") Complaint. Congress ratified this approach to regulating groundwater pollution by coal ash impoundments with the 2016 Water Infrastructure Improvements for the Nation ("WIIN") Act. The WIIN

[1] This brief was submitted with a motion for leave to file pursuant to Federal Rule of Appellate Procedure 29(b). No counsel for a party authored this brief in whole or in part, and no party or its counsel or any person other than *amicus*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

Act created a permitting regime—to be administered either by the states or by EPA—that would apply the requirements EPA established in its 2015 regulations for coal ash impoundments.

The district court's dismissal of PRN's Complaint, which sought to turn an issue of groundwater contamination into a federal CWA case by invoking the CWA's general permitting requirement, honors Congress' decision that pollution of groundwater by coal ash is a matter for RCRA and related state laws—even if that groundwater connects with surface water. PRN argues the Supreme Court's *County of Maui* opinion adopting the "functional equivalent" test for "the general EPA permitting provision," 140 S. Ct. at 1472, requires reversal and remand. PRN misreads that case.

The Supreme Court in *County of Maui* did not consider RCRA or its regulation of solid waste of the type at issue here. Instead, the Supreme Court considered what was required to fulfill Congress' objectives in the National Pollutant Discharge Elimination System ("NPDES") program, the CWA's general federal permitting requirement for discharges by "point sources" into navigable waters. The Supreme Court created the "functional equivalent" test to require permitting for some indirect discharges to address the limited circumstance where it would be trivially easy, through physical adjustment, to evade the CWA's general permitting provisions and where no other regulation may apply. *Id.* at 1473.

Here, however, interpreting the CWA to require an NPDES permit for releases to groundwater from coal ash impoundments would not plug a regulatory

gap, prevent trivially easy evasion of the CWA, or otherwise fulfill congressional objectives. Rather, doing so would produce essentially the opposite result—it would eliminate regulation of those releases under RCRA and the EPA's Coal Combustion Residuals ("CCR") Rule, which Congress has specified would apply to this type of solid waste and to the very conduct alleged.

Even if Congress had not already decided which set of laws and regulations apply in this specific instance, the CWA's general permitting provision cannot be applied here. None of the coal ash impoundments is a "point source" for which the CWA's general permitting provisions apply. Moreover, the Supreme Court in *County of Maui* placed significant limitations on when the "functional equivalent" test may require NPDES permitting. For example, the test cannot be used to "undermin[e] state regulation of groundwater." *Id.* at 1477. Nor should it cause an "unmanageable expansion" of NPDES jurisdiction. *Id.* Even if a coal ash impoundment could be considered a "point source," interpreting its releases to groundwater as the "functional equivalent" of a direct discharge to navigable waters (thereby subjecting the impoundment to the CWA's general permitting provision) would inappropriately displace Illinois' active regulation of the same groundwater. In fact, it would inevitably lead to the broad expansion of NPDES jurisdiction that the Supreme Court rejected.

For these reasons, this Court should affirm the district court's order dismissing PRN's claims.

ARGUMENT

I. Congress intended that RCRA, not the CWA's general permitting provision, would regulate releases to groundwater by coal ash impoundments.

Defendant-Appellee Dynegy Midwest Generation, LLC ("Dynegy") is alleged to have stored solid waste in a manner that contaminated groundwater and, in turn, adjacent surface water. Specifically, PRN alleges that Dynegy has stored coal ash in unlined impoundments at its retired Vermillion plant, and that as a result groundwater quality at the facility has been impacted by "leachate" from the ash stored in these impoundments. Appendix to Br. of Pl.-Appellant, *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, No. 18-3644, at APP0032 (7th Cir. July 1, 2020) (Doc. 23) ("Appendix") (Compl. ¶ 52). "Leachate" is a "solution resulting from leaching, as of soluble constituents from soil, landfill, etc., by downward percolating ground water." *See Random House Webster's Unabridged Dictionary* (2d ed. 1999). As alleged in the Complaint, this leachate results when "groundwater flows laterally through the ash, picking up contaminants in the process" and as "precipitation leaching down through the top of the coal ash mixes with the groundwater and further adds to the pollutant load." Appendix at APP0032-33 (Compl. ¶ 53). According to PRN, this "coal ash contaminated groundwater flows" into adjacent surface waters. *Id.* at APP0033 (Compl. ¶ 54).

Congress made a deliberate choice to regulate this very activity under RCRA, not under the CWA. RCRA is a "comprehensive environmental statute that governs the treatment, storage, and disposal" of solid waste. *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996); 42 U.S.C. §§ 6901 *et seq.* (1976). Among other things, RCRA

directs EPA to issue guidelines for states to protect "the quality of the ground and surface waters from leachate contamination" associated with non-hazardous waste, a category that includes CCRs like those at issue here. 42 U.S.C. §§ 6942(c)(1), 6943(a). Under that authority, EPA adopted a program specifically to address the "[m]igration of [c]ontaminated [g]roundwater" into surface waters. EPA, *Memorandum, Interim-Final Guidance for RCRA Corrective Action Environmental Indicators*, at 1 (Feb. 5, 1999).[2] Under this program, EPA analyzes facilities to determine whether contaminated groundwater discharges into surface water and, if so, whether that discharge is causing impacts to surface water requiring remedial action—precisely the scenario alleged here. *See* EPA, *Documentation of Environmental Indicator Determination* (Feb. 5, 1999).[3]

In 2015, EPA took the added step, again under RCRA, of promulgating comprehensive federal standards governing the management of the type of solid waste specifically at issue here: coal ash in surface impoundments and landfills. *See* Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities ("Final Rule"), 80 Fed. Reg. 21,302 (Apr. 17, 2015) (the "CCR Rule"). EPA designed the CCR Rule to ensure "no reasonable probability of adverse effects on health or the environment" from the management of coal ash. *Id.* at 21,311. The CCR Rule encompasses all aspects of coal ash management, storage, and disposal—including extensive monitoring for and remediation of any

[2] Available at https://archive.epa.gov/epawaste/hazard/web/pdf/ei_memo.pdf.
[3] Available at https://archive.epa.gov/epawaste/hazard/web/pdf/ei_guida.pdf.

releases of CCR constituents into groundwater. The provisions of the CCR Rule regulating groundwater also protect surface water from the impact of groundwater contamination. *See id.* at 21,304; 21,322 (noting that EPA's risk assessment developed for the CCR rule included consideration of the "potential impact from the interception of contaminated groundwater plumes by surface water bodies …").

The CCR Rule's groundwater protection requirements are stringent. Not only must groundwater be remediated to the groundwater protection standard established by EPA, but the remedy must (1) safeguard human health and the environment, (2) control the source or sources of the releases to reduce or eliminate further releases of CCR constituents from the unit, (3) remove from the environment as much of the contaminated material that was released from the CCR unit as is feasible, and (4) comply with all applicable RCRA requirements for the management of wastes. *See* 40 C.F.R. § 257.97(b).

Releases from coal ash impoundments to groundwater may trigger more than remedial action under the CCR Rule. Such releases also serve as the trigger for closure of the coal ash impoundment itself. *See id.* § 257.101(a)(1). Through groundwater monitoring, corrective action, and closure, the federal CCR Rule represents a comprehensive approach to regulating the impact of coal ash impoundments on groundwater and adjacent surface waters. Although the current CCR Rule excludes legacy impoundments—inactive impoundments at inactive facilities, like those here—EPA is presently revising the CCR Rule to cover these impoundments as well. *See Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414,

432-34, 449 (D.C. Cir. 2018) (vacating and remanding the provisions of the CCR Rule that exclude legacy impoundments from regulation); Br. of Def.-Appellee, *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, No. 18-3644, at 24 n.21 (7th Cir. Aug. 31, 2020) (Doc. 31-1) ("Dynegy's Br.").

The year after EPA released the CCR Rule, Congress codified that approach to regulating releases from coal ash impoundments to groundwater in the WIIN Act of 2016, 42 U.S.C. § 6945(d). The WIIN Act amends RCRA to give EPA and states additional authority to regulate groundwater impacted by coal ash impoundments. Specifically, the WIIN Act encourages states to develop permit programs to implement the CCR Rule's regulation of releases from coal ash impoundments to groundwater. *Id.* § 6945(d)(1)(A).[4] The permitting programs must be "*at least* as protective as" the CCR Rule. *Id.* § 6945(d)(1)(B) (emphasis added). Once EPA approves a permit program, it operates "in lieu of" the CCR Rule. *Id.* § 6945(d)(1)(A). If a state does not have an approved permit program, EPA must implement one. *Id.* § 6945(d)(2)(B). EPA's regulation of groundwater releases from coal ash impoundments under the CCR Rule, and Congress' incorporation of those RCRA regulations in the WIIN Act as the means for regulating such releases, confirms that Congress viewed RCRA as the principal regime for regulating the impact of coal ash impoundments on groundwater and related surface waters.

[4] Before Congress took this step, the CCR Rule's requirements (including groundwater protection and closure) were enforceable only by RCRA citizen suit.

This Court must give effect to that explicit policy choice. Though the Supreme Court did not face or address this question in *County of Maui*, it recognized generally that "statutory context limits the reach" of the CWA's general permitting requirement for adding pollutants from point sources to navigable waters. 140 S. Ct. at 1470. Here, the relevant statutory context must include RCRA and the WIIN Act. "[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken *subsequently and more specifically* to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000) (emphasis added). "[T]he specific governs the general," particularly where, as with RCRA and the WIIN Act, "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank,* 566 U.S. 639, 645 (2012) (internal citation omitted).

Following enactment of the CWA's general permitting program, Congress spoke "subsequently and more specifically" to the issue of groundwater pollution from coal ash impoundments. In the 1972 amendments to the CWA that established the NPDES permitting program, Congress specifically considered whether to require NPDES permitting for discharges to groundwater—because groundwater is connected to the surface waters that Congress sought to protect. But Congress affirmatively declined to do so. *Cnty. of Maui*, 140 S. Ct. at 1472 (Congress' "failure to include groundwater in the general EPA permitting provision was deliberate"). In enacting the CWA, Congress understood that groundwater

pollution would be addressed by both state regulation and federal statutes other than the NPDES program: "Congress thought that the problem of groundwater pollution, as distinct from navigable water pollution, would primarily be addressed by the States or perhaps by other federal statutes." *Id.* at 1474. In *County of Maui*, the Supreme Court concluded that the CWA nevertheless reaches some groundwater pollution in limited circumstances. But the Court did not address or foreclose that certain other kinds of groundwater pollution are addressed exclusively by the States or other federal statutes, as Congress envisioned.

As for the type of groundwater pollution at issue here, those "other federal statutes" arrived in the form of RCRA in 1976 (regulating groundwater pollution by solid waste in general) and the WIIN Act in 2016 (regulating groundwater pollution and resulting surface water pollution by coal ash impoundments in particular). These subsequent and more specific statutes must control over "the general EPA permitting provision," *id.* at 1472, that PRN invokes here. If "the intent of Congress is clear, that is the end of the matter; for the court … must give effect to the unambiguously expressed intent of Congress." *Musunuru v. Lynch,* 831 F.3d 880, 890 (7th Cir. 2016) (internal citation omitted); *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts … is to construe the language so as to give effect to the intent of Congress."). To effectuate the deliberate choice by Congress to apply RCRA to the very activity alleged by PRN, this Court must affirm the district court's dismissal of PRN's CWA claim.

II. Applying the CWA's general permitting provision here would frustrate Congress' intent to apply RCRA and preclude regulation under the CCR Rule.

The Supreme Court in *County of Maui* acknowledged that its extension of the CWA's general permitting provision to the "functional equivalent" of a direct discharge would create uncertainty for the regulated community, and noted that the legislature or regulatory agencies could draw lines that more clearly define when permitting is required. 140 S. Ct. at 1477. Though the Court did not have reason to address it under the facts in *County of Maui*, some of those lines necessarily already exist, where the "functional equivalent" test abuts existing and sometimes longstanding statutory and regulatory regimes. One such line is present here, where Congress and EPA have already specified that groundwater releases by solid waste impoundments are matters for RCRA and, specifically, the CCR Rule.

As described above, the CCR Rule regulates the migration of pollutants to groundwater from coal ash impoundments. *See* 80 Fed. Reg. at 21,304-05. For example, the CCR Rule requires groundwater monitoring for constituents found in coal ash. *Id*. at 21,397; 40 C.F.R. Part 257, Appendices III and IV. If groundwater contamination is detected above background levels, the facility must undertake more "targeted" groundwater monitoring to determine whether the relevant contaminants are above the CCR Rule's strict groundwater protection standards. 80 Fed. Reg. at 21,404; 40 C.F.R. § 257.95(a). If those standards are exceeded, corrective action to remediate the groundwater is required and must continue until all contaminant levels are at or below the standard. 40 C.F.R. §§ 257.96(a), 257.98(c). Additionally, if an unlined coal ash impoundment contaminates

groundwater in excess of a groundwater protection standard, then it must stop receiving waste (CCR and/or non-CCR wastestreams) and begin closure. *Id.* § 257.101(a)(1). The CCR Rule provides detailed requirements for closing coal ash impoundments. *See id.* § 257.102.

Reading the CWA's general permitting provision to regulate discharges to groundwater from coal ash impoundments would remove those releases entirely from regulation under RCRA and the CCR Rule, contrary to congressional intent as reflected in RCRA and the WIIN Act. As noted, RCRA regulates "solid wastes," 42 U.S.C. §§ 6901 *et seq.*, which include industrial waste like CCR, *id.* § 6903(27). But the statute excludes from its coverage any pollution subject to NPDES permitting under the CWA. *Id.* § 6903(27). That is because Congress made RCRA and the CWA mutually exclusive—if certain conduct is regulated under the CWA and requires an NPDES permit, RCRA does not apply. *See, e.g., Inland Steel Co. v. EPA*, 901 F.2d 1419, 1424 (7th Cir. 1990) (finding that RCRA regulated impacts associated with a deep injection well where the CWA did not) and *Ky. Waterways All. v. Ky. Utilities Comm'n*, 905 F.3d 925, 937 (6th. Cir. 2018) (noting that regulation under RCRA and regulation under the CWA's general permitting provision are mutually exclusive); *see also* 42 U.S.C. § 6905(a)-(b). Thus, if the CWA's NPDES permitting regime applies to the pollution of groundwater by coal ash impoundments, those impoundments (and that pollution of groundwater) are no longer subject to regulation under RCRA or any rule promulgated under it.

In light of this statutory regime, requiring an NPDES permit for the release of pollutants from a coal ash impoundment to groundwater would therefore "upend the existing regulatory framework" by statutorily barring application of the CCR Rule to the very thing it was created to regulate—groundwater contamination from coal ash impoundments. *Ky. Utilities*, 905 F.3d at 937-38; *see also United States v. Hayes*, 555 U.S. 415, 427 (2009) (rejecting an interpretation of a statute that would "frustrate Congress' manifest purpose" and would render the statute "a dead letter"). As described above, EPA specifically developed the CCR Rule under RCRA to address groundwater contamination from coal ash impoundments: "[T]he CCR Rule, not the CWA, is the framework envisioned by Congress (by delegating rulemaking authority to the EPA through RCRA) to address the problem of groundwater contamination caused by coal ash impoundments." *Tenn. Clean Water Network v. Tenn. Valley Auth.,* 905 F.3d 436, 446 (6th Cir. 2018), *cert. dismissed sub nom. Tenn. Clean Water Network v. Tenn. Valley Auth.,* 140 S. Ct. 35 (2019).

Moreover, even apart from the statutory bar, adopting PRN's interpretation "would leave the CCR Rule virtually useless." *Ky. Utilities*, 905 F.3d at 938. The CCR Rule's requirement for groundwater monitoring and remediation, and its requirement for closure when triggered by groundwater pollution, are central to the CCR Rule's regulation of coal ash impoundments. *See* 80 Fed. Reg. at 21,409 ("Closure and post-closure care are an integral part of the design and operation of CCR landfills and CCR surface impoundments."); 21,416-20 (discussing groundwater pollution as a trigger for closure and noting that "[t]he closure of CCR

units, and particularly the closure of CCR units that are compelled to close because they fail to comply with the rule's requirements (*e.g.*, … are contaminating groundwater), needs to occur as expeditiously as is feasible"). Rendering the CCR Rule "virtually useless," *Ky. Utilities*, 905 F.3d at 938, contravenes Congress' intent to codify these requirements for coal ash impoundments in the WIIN Act. This is precisely the sort of "bizarre" outcome that the Supreme Court in *County of Maui* said should be avoided. 140 S. Ct. at 1471.

The Supreme Court created the "functional equivalent" test in *County of Maui* to avoid a "large and obvious loophole" in the CWA's general permitting provision, which otherwise requires a permit only for direct discharges from point sources to jurisdictional waters. *Id.* at 1473. There is no such loophole here. Indeed, extending the "functional equivalent" test to require an NPDES permit for releases from a coal ash impoundment to groundwater would effectively create (and then plug) a loophole that was not there to begin with. It would erase the carefully crafted regulatory regime EPA developed, and Congress endorsed, to address the pollution at issue. And it would plug that newly created gap with the "functional equivalent" test. That is nonsensical, illogical, and a perversion of what the Court intended in creating the "functional equivalent" test in *County of Maui*.

III. *County of Maui*'s "functional equivalent" test for application of the CWA's general permitting provision is not satisfied here as requiring a federal permit would not advance the CWA's statutory objectives.

Even if Congress had not already determined that RCRA should apply to the activity at issue, *County of Maui* does not support the extension of CWA NPDES

permitting jurisdiction here, where doing so would not advance the CWA's statutory objectives.

In *County of Maui*, the Supreme Court interpreted the statutory term "discharge of a pollutant" under the CWA to determine "whether the Act requires a permit when pollutants originate from a point source but are conveyed to navigable waters by a nonpoint source, here, groundwater." 140 S. Ct. at 1468. As an initial matter, the coal ash impoundments at issue do not meet the CWA definition of a point source.[5] *See Sierra Club v. Va. Elec. & Power Co.*, 903 F.3d 403, 411 (4th Cir. 2018) (holding that a coal ash impoundment is not a point source because it is not a "discrete conveyance"); *Ky. Utilities*, 905 F.3d at 934 n.8 (the court "doubt[s] the correctness of [the] position" that "coal ash ponds are point sources" because they "are not conveyances" that "take or carry [pollutants] from one place to another").

Moreover, the Supreme Court emphasized that its expansion of NPDES jurisdiction was narrow. *See Cnty. of Maui*, 140 S. Ct. at 1476-77. This was in keeping with the structure of the CWA, which "indicates that, as to groundwater pollution …, Congress intended to leave substantial responsibility and autonomy to the States." *Id.* at 1471.

The "functional equivalent" test is not satisfied here because requiring a federal permit would not advance the CWA's "underlying statutory objectives." *Id.* at 1477. "The object in a given scenario will be to advance, in a manner consistent

[5] Dynegy disputes that the impoundments are "point sources" under the CWA, but correctly notes that the allegations of the complaint are accepted as true on appeal from dismissal on the pleadings. *See* Dynegy's Br. at 25 n.24.

with the statute's language, the statutory purposes that Congress sought to achieve." *Id.* at 1476. Thus, "[d]ecisions should not create serious risks either of undermining state regulation of groundwater or of creating loopholes that undermine the statute's basic federal regulatory objectives." *Id.* at 1477. Here, the opposite is true. A federal permit here *would* undermine state regulation of groundwater and *is not needed* to avoid a loophole.

First, as Dynegy has explained, Illinois has implemented regulations to manage and protect groundwater independent of the NPDES permitting regime. *See* Dynegy's Br. at 17-18. Illinois' state laws prohibit the discharge of pollutants into *any* state waters, surface or ground, and provide for separate enforcement authority. *See, e.g.,* 415 ILCS 55/1 *et seq.*; 35 Ill. Adm. Code §§ 620 *et seq.*; 35 Ill. Adm. Code §§ 301 *et seq.* Illinois' comprehensive regulation of the groundwater at issue confirms there is no regulatory gap—a fact corroborated by PRN's decision to file a parallel state lawsuit against Dynegy, alleging violations of Illinois' groundwater standards based on exactly the same releases alleged here and seeking exactly the same relief. *See* Dynegy's Br. at 18-19.

Moreover, the Illinois General Assembly recently acted to implement EPA's RCRA-based regulatory requirements for coal ash impoundments at the state level. *See* Def.-Appellee's Statement of Position, *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, No. 18-3644, at 11 (7th Cir. May 21, 2020) (Doc. 16) ("Dynegy's SOP"); 415 ILCS 5/22.59 ("Section 22.59"). Under Section 22.59, the Illinois Environmental Protection Agency issued proposed rules for coal ash

impoundments on March 30, 2020. Dynegy's SOP at 11-12. The rules were developed to "protect the groundwater within the state of Illinois" and "adopt the federal CCR rules in Illinois," and contain "a program for groundwater monitoring and the remediation of contaminated groundwater resulting from leaking CCR surface impoundments," including legacy coal ash impoundments, like those at issue in this case. *Id.* at 12. The rules also require that the owner or operator must "control, minimize, or eliminate" the impact of CCRs on surface waters from any groundwater impacted by the retired impoundment. Attachments: Proposed New 35 Ill. Adm. Code Part 845, *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, R2020-19 (Ill. Pol. Ctrl. Bd. Mar. 30, 2020) at 98, 100.[6] In short, there is an extensive state regulatory program that applies to the groundwater pollution here.

Second, the Supreme Court created the "functional equivalent" test out of concern over a limited set of circumstances not present here, such as where a regulatory gap could allow a discharger to evade regulation by "simply mov[ing] the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater" before reaching navigable waters. *County of Maui*, 140 S. Ct. at 1473. To plug this "large and obvious loophole," the Court fashioned a narrow exception to the CWA's limitation of the NPDES program to direct discharges only, extending permitting requirements to the "*functional equivalent of a direct discharge*." *Id.* at 1473, 1476 (emphasis in original). The alleged discharge at issue

[6] Available at https://pcb.illinois.gov/documents/dsweb/Get/Document-102005.

is nothing like an ongoing discharge from a pipe moved a few yards back—it is the result of diffuse, subsurface releases subject to comprehensive state regulation. *See* Appendix at APP0032-33 (Compl. ¶¶ 53-54); Dynegy's Br. at 3, 17-18.

Accordingly, *County of Maui* does not support application of the "functional equivalent" test for NPDES jurisdiction over the groundwater pollution alleged here.

CONCLUSION

The Court should affirm.

Dated: September 8, 2020

Respectfully submitted,

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CERTIFICATE OF RULE 32 COMPLIANCE

The undersigned counsel states that the foregoing:

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s/ F. William Brownell

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I hereby certify that on this 8th day of September, 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.

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