

CLEAN WATER ACT

Court strikes down Ill. lawsuit in *Maui* mold

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Vermilion Power Station in Illinois. Prairie Rivers Network

A federal appeals court last week tossed out a lawsuit similar to a landmark Clean Water Act case that made its way to the nation's highest bench last year — but the court did not reach the core question in the dispute.

The challenge from the Prairie Rivers Network (PRN) against Dynegy Midwest Generation LLC in Illinois echoed *County of Maui v. Hawaii Wildlife Fund*, which asked whether pollution that moves through groundwater on its way to federally protected waters is subject to permitting requirements under the Clean Water Act. In a ruling issued last year in the *Maui* case, the Supreme Court said that groundwater contamination is covered under a specific set of circumstances.

The decision allowed several cases, including PRN's, to advance after being placed on ice pending the outcome of *Maui*.

But instead of applying the Supreme Court's new test for groundwater pollution, the 7th U.S. Circuit Court of Appeals found last week that PRN did not have standing to file its lawsuit against Dynegy's now-retired Vermilion Power Station in the first place.

"In its complaint, PRN maintains it has more than 1,000 members yet fails to show at least one who has individual standing," wrote Judge Michael Brennan in a June 28 [ruling](#). "Although 'individual members of PRN live near, study, work, and recreate in and around the Middle Fork, including in the vicinity of the Vermilion Power Station,' we do not know — based on the face of the complaint — who these members are or how exactly the alleged discharges will harm them individually."

Senior Judge Joel Flaum and Judge Ilana Rovner also joined Brennan's ruling. All three judges were appointed by Republican presidents.

"We're disappointed by the 7th Circuit's decision, which we think sets a higher bar for environmental plaintiffs," said Thom Cmar, who represented PRN as an Earthjustice attorney. He has since moved to private practice with the firm AltmanNewman Co.

Cmar said the group is considering whether to refile its lawsuit, but it is also keeping a close eye on a new proposed agreement between Illinois and Dynegy to shutter three unlined coal ash ponds at the Vermilion station ([Greenwire](#), June 23).

Those coal ash ponds were at issue in the PRN lawsuit, which alleged that Dynegy violated the Clean Water Act by allowing pollution from the impoundments to travel into the nearby Middle Fork of the Vermilion River.

"There are a lot of moving parts here, but overall we are optimistic that things are moving in the right direction," Cmar said.

Vistra Corp., which merged with Dynegy in 2018, said in an emailed statement that its agreement with Illinois "is an important step in addressing the public's long-standing concerns" about pollution in the Middle Fork of the Vermilion River.

While we believe certain closure alternatives without removal of all the ash would be protective, given the unique nature of the site and to resolve the pending dispute with the State of Illinois, we have agreed to close all of the impoundments by removal," said Jenny Lyon, media relations manager for Vistra.

"Also," she continued, "given the proximity of the impoundments to Illinois' only National Scenic River, the meandering nature of the river, and the recreational uses of the river, we have agreed to take the enhanced measures outlined in the proposed Interim Order."

'Question for another day'

During oral argument last year, the 7th Circuit spent a lot of time questioning how to apply the Supreme Court's *Maui* ruling.

Rovner said at the time that all parties in the case appeared to view *Maui* as a "victory for their side" ([E&E News PM](#), Nov. 13, 2020).

The decision set out a multifactor test for determining whether pollution that moves through groundwater is subject to federal permitting requirements.

In a footnote in last week's ruling, Brennan acknowledged that the decision did not move interested parties any closer to understanding the practical effects of *Maui* in Clean Water Act permitting decisions.

"Because we decide this case on standing," he wrote, "how to apply that decision's multi-factor test for functional discharges is a question for another day."

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