C.A. NO. 24-0682

In The

United States Court of Appeals

For The Twelfth Circuit

STOP COAL CUMBUSTION RESIDUAL ASH PONDS

Appellants,

v.

COMMONWEALTH GENERATING COMPANY

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF VANDALIA

BRIEF FOR APPELLEE
COMMONWEALTH GENERATING COMPANY

Team Number 21

Counsel for Appellee
Commonwealth Generating Company

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JURISDICTIONAL STATEMENT

The United States District Court for the Middle District of Vandalia ("District Court") had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331, because the case involves federal questions arising under the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA"). R. at 12. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, because the appeal is taken from the District Court's final order granting Commonwealth Generating Company's ("ComGen") motion to dismiss the complaint in its entirety, thereby disposing all parties' claims. R. at 13.

The District Court entered its final order on October 31, 2024. R. at 13. Stop Coal Combustion Residual Ash Ponds ("Appellant") filed its notice of appeal on November 10, 2024, within the time limit prescribed by Federal Rule of Appellate Procedure 4(a)(1)(A). R. at 15.

STATEMENT OF THE ISSUES PRESENTED

Issue 1: Whether ComGen's discharge of PFOS and PFBS from Outlet 001 is an unpermitted discharge under the CWA;

Issue 2: Whether, in deciding Issue 1, the Court owes deference to its own decision adopting *Piney Run* (and its reasoning) and to the Environmental Protection Agency's ("EPA") guidance on unpermitted discharges in light of the Supreme Court's decision in *Loper Bright*;

Issue 3: Whether Appellant has standing to challenge ComGen's coal ash closure plan for the Little Green Impoundment; and

Issue 4: Whether Appellant can pursue an RCRA imminent and substantial endangerment claim related to the Little Green Run Impoundment when there is no allegation of endangerment to a living population but only to the environment itself.

STATEMENT OF THE CASE

ComGen is a wholly owned subsidiary of Commonwealth Energy, a multistate electric utility holding company providing electric service in nine states, including Vandalia. R. at 3. ComGen has provided reliable and affordable electricity for over a century, employs over 1,500 Vandalians, and engages in numerous environmental stewardship projects. R. at 4.

In 2015, ComGen launched its "Building a Green Tomorrow" program, aiming to reduce pollution and lower energy costs by transitioning to renewable energy sources. *Id.* ComGen has since constructed five solar facilities and two wind farms and plans to close the Vandalia Generating Station ("Station"), a coal-fired plant, by 2027. *Id.*

The Station has a permit covering its outfalls into the Vandalia River. *Id.* The permit, effective from September 1, 2020, to July 29, 2025, sets limits for numerous pollutants. *Id.* It does not require limits or monitoring for PFOS or PFBS. *Id.* The permit is Vandalia's approved equivalent of a National Pollutant Discharge Elimination System ("NPDES") permit. R. at 4, 11. An informal inquiry occurred between a Department deputy direct and ComGen employee where the employee stated neither PFOS and PFBS were known to be in the Station's discharge, although separate, ongoing litigation showed otherwise. R. at 4, 9. Neither of those of chemicals are mentioned in the permit or permit application. *Id.* Thus, ComGen maintains that PFOS and PFBS are not regulated under the CWA and were not required to be disclosed to the Vandalia Department of Environmental Protection ("Department") during the permit application process. R. at 9.

The Little Green Run Impoundment ("Impoundment") is used for the Station's coal ash disposal. R. at 5. In alignment with its environmental stewardship, ComGen decided to close the Impoundment in place in compliance with the EPA's 2015 rule on the Disposal of Coal Combustion Residuals ("Residuals Rule") and Vandalia's identical regulations. R. at 6. ComGen

submitted its initial application for a closure permit in December 2019, amending it twice through April 2020. *Id.* ComGen's closure plan involves capping the Impoundment in place. *Id.* The Department approved the plan and issued a Closure Permit, valid until 2031. R. at 7. ComGen has invested roughly $50 million implementing its closure plan and expects to spend over $1 billion by its completion in 2031. *Id.*

The first $50 million spent by ComGen was primarily used to install thirteen groundwater monitoring wells both upgradient and downgradient from the Impoundment. *Id.* ComGen must release the yearly monitoring reports from these wells. R. at 8. From 2021 to present, the downgradient wells showed elevated levels of some chemicals, and both industry and environmental groups agree that the leaching has been ongoing for at least five to ten years prior to 2021. *Id.* Nothing indicates, however, that any chemicals will reach the Vandalia River or any public water supply in the next five years. *Id.*

Appellant is an organization whose mission is to protect public water from pollutants and to transition to cleaner, more sustainable energy supplies. *Id.* Appellant took it upon itself to test waters downstream of the Station and detected minute amounts of PFOS and PFBS. R. at 9. Appellant is also concerned with ComGen's closure plan because, among other things, it fears natural disasters may cause the Impoundment to fail. *Id.* Appellant's human health expert recommends downgradient well water not be used for human consumption, and although a housing development may possibly be built within a mile of the Impoundment, there are no concrete plans for downgradient well water to be used as such. *Id.* Finally, some of Appellant's members have self-restricted their use of the Vandalia River over concerns about the chemicals because they find pollution offensive. *Id.*

Appellant, on behalf of its members, filed suit against ComGen on September 3, 2024, alleging (1) it violated the CWA by discharging PFOS and PFBS without a permit for them; (2) its closure plan fails to satisfy the Residuals Rule's standards, due to the leaching of chemicals; and (3) the leaching from Impoundment constitutes an imminent and substantial danger to the environment. R. at 12-13. Appellant sought injunctive relief for all three claims, and civil penalties for the first and third claims. *Id.*

ComGen filed a motion to dismiss. R. at 13. It argued (1) PFOS and PFBS were not statutory pollutants included in any permit application, and thus, the permit shield applies; (2) Appellant's allegations regarding violations of the Residuals Rule were too conclusory and not supported by sufficient facts; and (3) Appellant failed to state a claim because the 12th Circuit does not recognize imminent and substantial danger claims to the environment itself. *Id.*

The District Court granted ComGen's motion to dismiss, holding that (1) no disclosure requirements were violated, and thus, the permit shield applies; (2) Appellant does not have standing to challenge the closure plan because its injuries are not traceable to the closure plan's alleged violations of the Residuals Rule, but from historical pollution; and (3) the RCRA does not support claims of imminent and substantial danger to the environment itself without endangerment or an exposure pathway to a living population. R. at 13-14.

STATEMENT OF THE ARGUMENT

The CWA allows for pollutant discharge if it complies with NPDES permit standards or a state's equivalent permit standards. ComGen has a Vandalia Pollutant Discharge Elimination System ("VPDES") permit, approved by the Department, which does not specify any standards regarding PFOS or PFBS. These chemicals were not formally inquired about in the permit application, and any informal inquiries between the Department and a mere employee of ComGen are not binding against ComGen. Because the CWA and VPDES do not regulate PFOS

or PFBS, and because neither the Toxic Substances Control Act ("TSCA") nor legal precedent require ComGen to act on chemicals not mentioned in a permit application, ComGen's chemical discharge is not violative of the CWA.

In determining the above issue, this Court is not bound to adhere to its adoption of *Piney Run* or its reasoning, following the overturning of *Chevron* deference. This Court is now allowed to re-examine its adoption of *Piney Run*, which relied on *Chevron* deference. Instead, the Court should adopt the reasoning in *Atlantic States*, which acknowledges that permits are intended to encompass the most harmful pollutants and the permit shield defense is available to permit-holders who adhere to the permit's requirements. Because ComGen complied with the VDPES permit's requirements and the permit did not mention PFOS or PFBS, the permit shield defense applies, requiring dismissal of Appellant's claim.

Appellant's RCRA challenge to ComGen's closure plan fails for lack of standing and ripeness. Appellant's members do not have standing because their injuries are not traceable to the closure plan and cannot be redressed by stopping it. The claim is not ripe because it relies, at least in part, on hypothetical future events that may never occur. Appellant's members, therefore, will not suffer undue hardship if adjudication is delayed until conditions for the controversy are ideal for review.

Finally, there is no RCRA claim for imminent or substantial danger to health or the environment. The leaching from the Impoundment has not reached any public waters and is not expected to for at least five more years, so it is not imminent. The record is void of anything to support the danger being substantial. Additionally, many courts have held that such claims cannot be based on harm to the environment alone, and some form of life must be put at risk by the alleged contamination. Here, the only claim is danger to the environment itself. Allowing that

claim to go forward opens the flood gates of litigation whenever and wherever any contamination occurs.

ARGUMENT

I. COMGEN'S CHEMICAL DISCHARGE IS PERMITTED UNDER THE CWA BECAUSE OF THEIR STRICT ADHERENCE TO VANDALIA'S PERMIT PROCESS

The CWA and environmental policy in general are no strangers to the ever-changing laws that impact their control. Both Congress and the courts have taken part in limiting the reign of administrative agencies and their statutory interpretation, like that of the EPA's concerning how the CWA is implemented. *Sackett v. EPA*, 598 U.S. 651, 680, 143 S. Ct. 1322, 1342 (2023); *see also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412, 144 S. Ct. 2244, 2273 (2024) (describing that Courts are to use independent judgement in determining if an administrative agency has authority).

Despite administrative changes the past few decades, the CWA still maintains its original legislative intent of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's Waters." 33 U.S.C. § 1251. In part, the CWA regulates pollutant discharge into the Waters of the United States ("WOTUS") by way of the NPDES from any "point source" or conveyance of pollutants. *Id*. §1362(14). States may opt to administer their own NPDES permit program if it complies with the core requirements of the CWA. 50 U.S.C. §1342 (b)(1)(A); *see also* 42 U.S.C. §6945. The EPA recently solidified its trend of delegating permitting authority by clarifying its oversight role. By delegating this authority, the EPA, while maintaining oversight, seeks to limit barriers for states and tribes that administer their own NPDES permit programs. Environmental Protection Agency, 89 Fed. Reg. 103455 (December 18, 2024). Despite the ambiguities regarding the federal-state regulator relationship, most states invoke the authority granted to them as forty-seven states are either partially or fully approved to

implement a state-led permitting process. *COMMENT: NOTHING AT STAKE BUT LIFE'S ESSENTIALS: HOW SOLE RELIANCE ON NEW TEXTUALISM ENDANGERS CLEAN WATER, ENVIRONMENTAL JUSTICE COMMUNITIES, AND ENVIRONMENTAL LAW (AND A JUDICIAL FRAMEWORK TO FIX IT)*, 83 Md. L. Rev. 1313, 1318.

Under the CWA, discharge of pollutants is not authorized unless such discharge complies with the applicable jurisdiction's version of the NPDES. 33 U.S.C. §1311(a). What specifically qualifies as a "pollutant" has long been the source of litigation as pollutants continue to be defined broadly under the CWA, ranging from radioactive materials to mere rock and sand. *Id*. §1363(6); *see also Train v. Colo. Pub. Interest Research Grp., Inc.*, 426 U.S. 1, 23-24, 96 S. Ct. 1938, 1948 (1976) (considering whether the legislative intent of "pollutant" was to include any or all of the source, byproduct, or nuclear waste material). Notably, courts have found that the absence of a specific pollutant in the text of the CWA does not automatically exempt the material in question from regulation under the Act. *United States v. Hamel*, 551 F.2d 107, 110 (6th Cir. 1977). Rather, the Acts breadth has been considered a strategic move by Congress to encompass a greater number of pollutants. *Id*. In addition to "pollutant[s]", the CWA specifies that "toxic pollutant[s]" includes but is not limited to pollutants that can cause disease, abnormalities and affect the quality of the food chain. 33 U.S.C. §1363(13).

In response to the CWA, the TSCA was passed four years later, in part, to address substances not regulated as pollutants under the CWA and more broadly, chemicals entering the atmosphere not through the country's navigable waters. 3 Treatise on Environmental Law § 4B.02 (2024). While the EPA is required to list thousands of chemicals in compliance with the TSCA, the former EPA director himself expressed the complexities of such mandate when stating "compliance with such a permit would be impossible and anybody seeking to harass a

permittee need only analyze that permittee's discharge until determining the presence of a substance not identified in the permit." *Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993). The court in *Atlantic States* ultimately held pollutants not listed in the permitting application are allowed to be discharged if they comply with CWA reporting requirements. *Id*.

a. The CWA's Requirements with Respect to Outlet 001 are Clear Regarding the Duties of ComGen to Maintain Compliance

i. Neither the CWA nor the VPDES regulate PFOS or PFBS

It is uncontested that the CWA prohibits the discharge of pollutants into navigable waters. Nevertheless, the Act allows for pollutant discharge into those waters if it complies with a permit's standards. Here, ComGen's permit—which was approved by the Department—does not specify specific standards for either PFOS or PFBS discharge. Additionally, those chemicals were not formally inquired about during the application process. While Appellant insists that an informal inquiry by a Department deputy director to a mere employee is binding on ComGen, well-established attorney client privilege rules inform us otherwise. Specifically, attorney client privilege only attaches if the following exists: (1) confidential communication, (2) between a client and a lawyer, (3) with the objective of receiving or giving level advice. Jack Tanner, *Top 10 Things in-House Lawyers Need to Know About Ethics*, Colo. Law., July 2016, at 59, 60. Further, the long-time member of the Colorado Bar ethics committee notes, "[A] "client" is a person who regularly consults with the lawyer regarding a particular matter or who has the authority to bind the company regarding the matter." *Id.* at 59. Here, ComGen, as a company, would be the client rather than a mere employee. The record indicates no regular consultations by the employee with a ComGen lawyer nor that the employee was a C-suite or equivalent

employee. R. at 4. Thus, absent attorney client privilege, the employee's words in an informal query do not bind ComGen.

Ultimately, the idea that mere employees cannot bind a company is not only consistent with Rule 1.6 as it relates to corporate ethics but also the formality requirement the District Court stressed. R. at 14; *see also Atlantic States*, 12 F.3d 353 at 357 (describing that discharging pollutants not listed on a permit is not a violation of a disclosure requirement).

ii. Neither the TSCA nor judicial precedent mandate ComGen to perform any action in which a State's Pollutant Discharge Elimination System is silent on

Interpreting the TSCA or judicial precedent to include tens of thousands of chemicals, let alone ones not mentioned in a permit, is both faulty and unworkable. The TSCA substance inventory is unworkable for companies like ComGen to identify what the law requires of them. 1 Toxic Substances Control Act (Gold & Warshaw) Preface to the 2024 Edition (2024). It is likewise impractical for the EPA to administer, as permittees are given little guidance on how to implement their regulator's mandate of preventing "unreasonable risk." *Id.*

Appellant reasons that ComGen blatantly violated the CWA because Vandalia's permit application did not include a burdensome list of pollutants, and a mere employee stated they had no knowledge of PFOS and PFBS discharge. The regulator's inefficiencies, however, cannot be said to implicate ComGen because the permit did not inquire about specific chemicals, nor was a formal inquiry made. After all, if PFOS or PFBS were of significance to the essence of the CWA or the VPDES, it is reasonable to infer they would treat them as they do numerous other chemicals. At a minimum, the Department could inquire about them in the permit application, set limits for discharge, or require monitoring—which they do none of.

Consequentially, courts have generally acknowledged that, case holdings aside, discharge permits are not intended to be a burden on permittees but rather provide some sense of

consistency and reliability to the obligations of the permit holder. *United States v. Gulf States Steel, Inc.*, 54 F. Supp. 2d 1233, 1244 (N.D. Ala. 1999). It is wise to consider the potential repercussions that all-embracing and uncertain administration of programs, such as VPDES, can have. For instance, Appellant's sweeping interpretation of the CWA, like appellant's in *Atlantic States*, is a slippery slope, as "water" itself is also considered a chemical. *Atlantic States*, 12 F.3d 353 at 357. Appellant's request for rash decision making during the lifetime of a permit holder goes beyond the requirements and legislative intent of the CWA and decreases good-faith permittees' trust in authorities.

b. States are Enabled to Enact More Rigorous Environmental Protections Than Required by the Federal Government

Like how most states reacted to the *Kelo v. City of New London* decision by amending their laws to afford more stringent protections for landowners, Vandalia could have taken a similar approach by requiring more stringent water protections than required by the CWA. Diana Berliner, *Looking Back Ten Years After Kelo*, 125 Yale L. J. 82, 84 (2015). After all, the EPA authorizes state enforcement and permitting powers, which Vandalia invoked. R. at 5. Vandalia chose to align its permit application with the minimum standards of the CWA, yet Appellant believes it requires more. The role of the court, however, is to interpret and enforce the laws adopted by the legislature, not the laws Appellant wishes were adopted. Ultimately, unlike numerous other states that have afforded greater protections than the CWA requires, Vandalia permitting program is identical to that of the federal government. Bruce Myers, Catherine McLinn, and James M. McElfish, Jr., *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act*, 2, Environmental Law Institute, Washington, DC, 2013 (showing that 25 states regulate water more broadly than the CWA requires).

c. ComGen's Proactive and Visionary "Building a Green Tomorrow" Program Advances the Legislative Purpose of the CWA

Despite decades of litigation and ambiguity as it relates to the implementation of the CWA, the Acts primary purpose to "restore" and "maintain" the WOTUS has remained rather uncontested. Like the court in *Train*, this Court, decades later, is to look at the current efforts ComGen has undertaken to carry out the legislative intent of the CWA. To this day, courts around the country cite decade old opinions where SCOTUS has asserted the importance of adhering to legislative intent in various legal contexts. *Hicks v. New Millennium Bldg. Sys., LLC*, No. 24-cv-164 (ECT/ECW), 2024 U.S. Dist. LEXIS 168764, at *11 (D. Minn. Sep. 17, 2024) (outlining the importance of legislative intent in the context of a jurisdictional matter).

As part of ComGen's "Building a Green Tomorrow" program and overall renewable efforts, it strategically selected to close the Station, which would reduce pollution, as defined by the CWA, in order to restore the Vandalia River. The phased closure is imperative to maintain affordable and reliable electricity while simultaneously being considerate of the 1,500 Vandalians ComGen employs. In the meantime, ComGen's efforts to maintain the integrity of the Vandalia River include predicted expenditures exceeding $1 billion by 2031 for its closure plan, having already spent $50 million primarily on the installation of monitoring wells. ComGen's individual commitment rivals the fiscal commitment of Congress and the federal government as a whole. *See* 117 P.L. 58, 135 Stat. 429 (allocating $14 billion through the 2021 Infrastructure Investment and Jobs Act to programs under the CWA, Congress' largest investment ever towards water infrastructure).

II. SCOTUS HAS GIVEN THIS COURT THE AUTONOMY TO ADHERE TO THE TEXT OF THE CWA AND NOT ADMINISTRATIVE OPINIONS

Changes in judicial interpretation require an intricate analysis of legal precedent. For instance, in 2024, SCOTUS overturned "Chevron deference" which presumed that the

institutional knowledge of federal agencies is better guidance than judicial interpretation when omissions occur during lawmaking. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 866, 104 S. Ct. 2778, 2793 (1984). During the last eight years, however, SCOTUS has not invoked such deference. *Loper Bright*, 603 U.S. at 406. Yet, the once binding authority has implicated numerous judicial opinions from various courts whose reasoning relied either fully or partly on *Chevron*. *Id*.

Cases decided under *Chevron's* reasoning require current courts to re-examine precedent they are citing to ensure compliance. Namely, in 2001, *Piney Run* was decided in reliance on the Chevron deference. *Piney Run Pres. Ass'n v. Cty. Comm'rs*, 268 F.3d 255, 264 (4th Cir. 2001). Specifically, the court deferred to the EPA's guidance regarding whether the permit shield rule applied after conducting a Chevron analysis. *Id*. Ultimately, the court held the CWA was not violated when pollutants not listed on a permit application were discharged because the permittee disclosed the discharge. *Id*.

a. Deference to Neither *Piney Run's* Holding Nor the EPA's Guidance is Required Following *Loper Bright*

As society evolves and legislative acts become increasingly complex, judicial review remains the basis through which government functions are interpreted. This was established over two centuries ago, when SCOTUS held that interpretation is vested in the judiciary because "a law repugnant to the constitution is void." *Marbury v. Madison*, 5 U.S. 137, 180 (1803). Prior to the recent *Loper Bright* holding, *Chevron* wrongfully inhibited the notion of judicial review by giving administrative agencies broad and unfettered power.

Over the past decade, there were attempts to conceal the contradicting power balance *Chevron* created. Specifically, administrative law scholar Jack Beerman explained that 5 U.S.C. § 706, which controls judicial review as it relates to statutory interpretation, is so at odds with

Chevron that the court rephrased its interpretation of the statue so it would look more deferential than what Congress intended. *Article: End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 Conn. L. Rev. 779, 782. The notion of conflicting power was on full display in *Piney Run*, adopted by this Court in 2018, whose reasoning is rooted in *Chevron*. Specifically, the notion that a court is justified in deferring to the EPA. Not only is *Piney Run* no longer binding precedent following *Loper Bright*, but it also provides a distinct example of why we should be cautious when shifting decision-making authority. Specifically, in *Loper Bright*, Chief Justice Roberts was unwavering in his warning:

> Rather than safeguarding reliance interests, *Chevron* affirmatively destroys them. Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with "[u]nexplained inconsistency" being "at most . . . a reason for holding an interpretation to be . . . arbitrary and capricious."

Loper Bright, 603 U.S. at 410-11. Consistent with the reasoning seen from the District Court, ComGen was justified in its actions as it maintained compliance with the CWA rather than the EPA's—now prohibited—reading.

b. An Exceedingly Broad Reading of the CWA is Inconsistent With the Act's Permitting Shield Provision

Citizens and entities alike should be able to have a concrete understanding and reliance regarding the regulations their government imposes on them. With respect to the CWA, and specifically a jurisdiction's permitting process authorized by the Act, a permittee must be in full compliance with *all* the terms of its permit to invoke the permit shield defense. *Ohio Valley Envtl. Coal. v. Fola Coal Co., LLC*, 845 F.3d 133, 143 (4th Cir. 2017). Applying the *Ohio Valley* analysis here, ComGen objectively adhered to the plain text of its permit. Specifically, and even arguably straying from custom, ComGen's permit application made no mention of PFOS or PFBS. Thus, ComGen was not required to seek out answers regarding chemicals not listed. It is

rather settled that the permit issuer has the burden of identifying the pertinent regulations and terms to include in a specific permit. Joel Reschly, *The Permit Shield – what it is and what it isn't*, Missouri Department of Natural Resources, https://regform.org/wp-content/uploads/2019/09/Reschly-J-Permit-Shield-Presentation.pdf. *See also* Environmental Protection Agency, 45 Fed. Reg. 33312 (May 19, 1980). ComGen satisfied its burden by answering the queries on the permit in good faith.

Ultimately, a permit applicant needs to be able to rely on the requirements of the permit it holds, as such notice is essential to legal principles like reliance. *Piney Run* is no longer owed deference following *Loper Bright*, and its broad interpretation of the CWA's discharge requirements remains unworkable and ambiguous. For the reasons *Piney Run* fails, *Atlantic States* succeeds. Specifically, *Atlantic States* accounts for the administrative concerns by acknowledging permits are intended to recognize the most harmful pollutants and are not meant to be an exhaustive list that regulates pollutants not mentioned. *Atlantic States*, 12 F.3d 353 at 357. Because ComGen complied with Vandalia's equivalent of the NPDES, Appellant's legal action should be dismissed due to ComGen satisfactorily invoking the permit shield defense as specified by both legal precedent and 33 USC § 1342(k).

c. Even Under the Court's Ruling in *Piney Run*, ComGen Still Prevails as the Circumstances Are Distinct

If attempting to argue a certain set of facts are indistinguishable from another, then details matter. In Piney Run, the heat discharge at issue was a statutory pollutant under the CWA. 33 U.S.C. § 1362(6). This fact is distinct as PFOS and PFBS are not statutory pollutants under the CWA as the EPA has not categorically defined them as toxic pollutants let alone regular pollutants. 33 U.S.C. § 1251. In addition to the CWA not qualifying PFOS and PFBS as statutory pollutants, the 1980 Comprehensive Environmental Response, Compensation, and Liability Act

(CERCLA) do not do so either. 96 P.L. 510, 94 Stat. 2767. There have been attempts however by the EPA to designate these chemicals as falling under § 102 of the CERCLA as "hazardous substances"—such attempts have failed. *PFAS Laws and Regulations*, Environmental Protection Agency, https://19january2021snapshot.epa.gov/pfas/pfas-laws-and-regulations_.html (last visited February 4, 2025). Regardless, such an attempt by the EPA to alter Congress's intent of the CERCLA would not pass constitutional muster in the post *Loper Bright* era. Ultimately, the CWA is not the CERCLA and Appellant's claim is brought under § 505 of the CWA. R. at 13. Given Appellants claim does not align with the legal basis for its claim, the District Court was further justified granting ComGen's motion to dismiss altogether.

III. APPELLANT'S RCRA CHALLENGE TO COMGEN'S CLOSURE PLAN LACKS STANDING AND IS UNRIPE FOR JUDICIAL RESOLUTION

This Court should affirm the District Court's decision that Appellant's RCRA challenge of ComGen's Closure Plan lacked standing. Standing is interwoven with the foundational concept of separation of powers because it prevents the judiciary from being a battleground for issues better settled by other political branches. *Mobile Baykeeper, Inc. v. Alabama Power Co.*, No. CV 1:22-00382-KD-B, 2024 WL 54118, *8 (S.D. Ala. Jan. 4, 2024) (internal citation omitted). Its importance is such that standing can be questioned at any point during the proceedings, even if the parties did not raise it at the initial pleading. *A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, 925 F.3d 1205, 1210 (11th Cir. 2019).

To establish standing, the party that invoked federal jurisdiction must prove the following elements: (1) the plaintiff suffered an "injury in fact" that is both "concrete and particularized" and "actual or imminent", (2) that the injury is "fairly traceable" to the defendant through the action that resulted in the challenge before the court and (3) it must be "likely" not "merely speculative" that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560 (1992). When an organization like Appellant seeks standing, additional elements are required. First, the organization's members must have had standing to sue individually. *Friends of Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Second, the interests the organization seeks to protect must be "germane to the organization's purpose." *Id*. Third, "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id*.

Standing is not the sole requirement for federal jurisdiction as a claim must also be ripe. A claim cannot be ripe for "adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Like standing, ripeness questions a court's subject matter jurisdiction and can be raised by either party at any time or the court *sua sponte*. *National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 808 (2003). Two factors must be addressed in a ripeness inquiry: whether the issues are fit for judicial resolution and whether the plaintiff would suffer hardship if adjudication were delayed. *Abbot Laboratories v. Gardner*, 387 U.S. 136, 149 (2003). The former factor requires that the question presented before the court be a "purely legal one" and whether further factual findings are necessary to "advance [the court's] ability to deal with [it]." *National Park Hospitality Ass'n*, 538 U.S. at 812. As for the second factor, hardship is interpreted as creating "adverse effects of a strictly legal kind." *Id*. at 809. Put plainly, hardship forces the plaintiff to "choose between foregoing lawful activity and risking substantial legal sanctions." *Mobile Baykeeper, Inc.*, No. CV 1:22-00382-KD-B, 2024 WL 54118, *15 (internal quotation omitted).

a. Appellant Lacks Standing Because Its Individual Members Fail to Meet All of the Requisite Elements

Organizational standing requires that the Appellant establish three elements. Appellant's individual members do not have standing in their own right and thus Appellant cannot pass muster under the organizational standing test, regardless of whether it meets the other two requirements. Appellant's challenge to the adequacy of ComGen's coal ash Closure Plan is germane to its mission as an environmental interest organization that seeks to protect public waters from pollutants and the haphazard disposal of coal ash ponds. ComGen agrees with this desire, which is why it is willing to spend over $1 billion towards the safe closure of the Impoundment. Likewise, neither Appellant's contention to the Closure Plan's adequacy under 42 U.S.C. § 6972(a)(1)(A) nor the injunctive relief it requests requires the participation of individual members. The Supreme Court has stated that this prong is better observed as an "administrative convenience" and not structurally linked to the Cases and Controversy requirements of the Constitution. *United Food and Commercial Workers Union Local 751 v. Brown Group Inc.*, 517 U.S. 544, 557 (1996). While Appellant meets these two organizational standing prongs, the test is one of *elements*, not factors, and this Court should uphold the decision of the District Court because Appellant's members lack individual standing.

i. Appellant's members have experienced Injury-In-Fact because the Supreme Court recognizes aesthetic and recreational injuries as such

Appellant meets its burden of showing that one of its members suffered an injury-in-fact. Such an injury must be "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560. The injury must be suffered by the plaintiff or one of its members and not the environment itself. *Friends of Earth, Inc.*, 528 U.S. at 181. Aesthetic and recreational injuries like ceasing to fish, picnic, walk, birdwatch, or wade into a body of water because of its potential contamination qualify as injuries-in-fact. *Id*. at 181-83.

Here, Appellant alleged in its complaint that several of its members have lost enjoyment and lessened their use of Vandalia River due to the Impoundment's runoff. The District Court held this satisfied the injury-in-fact test, in accord with the Supreme Court. However, courts can require that an organization *name* at least one member who suffered the injury in question. *Georgia Republican Party v. Securities and Exchange Commission*, 888 F.3d 1198, 1204 (11th Cir. 2018). It is unclear whether Appellant did so in its complaint.

ii. Appellant's Injuries-In-Fact are not traceable to its challenge of ComGen's Closure Plan because the harm that caused the injuries started years prior

Though Appellant established that some of its members have suffered an aesthetic or recreational injury-in-fact, those injuries are not fairly traceable to its challenge of the Closure Plan under 42 U.S.C. § 6972(a)(1)(A). Traceability is not easily defined, but at minimum the injury-in-fact must be causally linked to the "allegedly unlawful conduct" that brought the defendant into court. *Lujan*, 504 U.S. at 560. This causal link is more than an "attenuated connection", but it does not need to meet the standard of proximate cause. *Grand Canyon Trust v. Energy Fuel Resources (U.S.A.) Inc.*, 269 F.Supp.3d 1173, 1192 (D. Utah 2017); *see also, e.g., Mobile Baykeeper Inc.*, No. CV 1:22-00382-KD-B, 2024 WL 54118, *11. Further, plaintiff need not prove through "scientific certainty" that defendant's challenged action caused the harm, just that there is a "substantial likelihood" that it did. *Maine People's Alliance v. Holtrachem Mfg. Co., LLC*, 211 F.Supp.2d 237, 253 (D. Me 2002); *see also, e.g., Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000). Finally, the allegedly unlawful conduct must be the cause of the injury-in-fact and not some other wrongdoing of the defendant. *Mobile Baykeeper Inc.*, No. CV 1:22-00382-KD-B, 2024 WL 54118, *12.

Appellant brought this claim under 42 U.S.C. § 6972(a)(1)(A) alleging that ComGen's Closure Plan fails to meet the standards set by 40 C.F.R. § 257.102(d). However, Appellant has

failed to establish whether any of its members have suffered a concrete, particularized, actual and imminent injury from the Closure Plan itself. Appellant's complaint fears that possible future natural disasters will cause the Impoundment to catastrophically fail, but this injury is neither concrete nor imminent. It also expresses concern over a potential housing development that *might* be built in the area, but that injury is neither particularized nor actual. Appellant has proven that some of its members have stopped enjoying the Vandalia River even though there is no evidence that the leaching has reached it or will do so in the next five years. These injuries fail to hold water because they are not traceable to ComGen's Closure Plan. Environmental and industry groups agree that the Impoundment began leaking five to ten years before it was first monitored in 2021. ComGen's closure-in-place activities began in 2019. That means that the metals appeared in the groundwater as early as 2011 and as recently as 2016. This makes it impossible to causally link the aesthetic and recreational injuries to the challenged Closure Plan because it was temporally nonexistent. Appellant's injury-in-fact is untraceable to the alleged conduct and does not meet this requirement of standing.

iii. Appellant's Injuries-In-Fact are not redressable because they cannot be remedied by halting ComGen's Closure Plan

Appellant's injuries-in-fact stem from a different action of ComGen than the one brought before this Court. Redressability requires the court to "consider the relationship between the 'judicial relief requested' and the 'injury suffered.'" *California v. Texas*, 593 U.S. 659, 671 (2021). A plaintiff has the burden of proving that there is a "substantial likelihood" his requested relief will "prevent or redress the claimed injury." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79 (1978). In a suit such as this, "the relief sought must not 'merely advance generalized environmental interests', but must specifically redress the plaintiff's

injuries." *Utah Physicians for a Healthy Environment, Inc., v. TAP Worldwide, LLC*, 582 F.Supp.3d 881, 894 (D. Utah 2022).

Appellant's complaint against the adequacy of ComGen's Closure Plan was brought under 42 U.S.C. § 6972(a)(1)(A) seeking injunctive relief. To meet the third prong of the standing analysis, Appellant's injuries are required to have a substantial likelihood of redressability from the Closure Plan's cessation. The problem, however, arises out of the nature of Appellant's injuries. It is established that the injuries-in-fact are of an aesthetic and recreational nature. They are causally linked to leakage into the groundwater that could have started as early as 2011, or as recently as 2016, which is anywhere from eight to three years before ComGen's Closure Plan began. The injunction of ComGen's closure of the Impoundment would not redress these injuries. A judicial resolution that compelled ComGen to implement a closure plan in greater compliance with § 257.102(d) is not "substantially likely" to halt the leaching of the Impoundment. *See, Mobile Baykeeper, Inc.*, No. CV 1:22-00382-KD-B, 2024 WL 54118, *13. If anything, hindering the embankment's closure could have the opposite effect. If the relief sought does not remedy the injury suffered, the essence of redressability is absent. A plaintiff cannot "bootstrap [himself] into federal court" by making such a claim. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998).

b. Appellant's Claim Against ComGen's Closure Plan is Not Ripe Because is Rests of Contingent Events that May Never Occur

Not only does the Appellant's claim regarding ComGen's Closure Plan lack standing, but it is also not ripe for adjudication. A claim is not ripe "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. at 300. Ripeness, like standing, is a multi-pronged test that requires a court to evaluate both the claim's fitness and potential hardship to the plaintiff if judgment was delayed. *Abbott*

Laboratories, 387 U.S. at 149. Fitness requires that the issue before the court is a purely legal one and that no further fact finding is necessary for the court to resolve it. *Id*. It requires a court to inquire whether the alleged harm "will ever come to pass" and ask questions of "finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed." *Milliman, Inc. v. Health Medicare Ultra, Inc.*, 641 F.Supp.2d 113, 118 (D.P.R. 2009).

Hardship asks whether the plaintiff will suffer adverse legal effects if judicial review is delayed. *Ohio Forestry Ass'n, Inc., v. Sierra Club*, 523 U.S. 726, 733 (1998). This hardship suffered usually takes the form of "direct and immediate harm." *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 536 (1st Cir. 1995); *see also, e.g., Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010). Here, the Court should consider what costs the plaintiff would face if adjudication was delayed until "conditions for deciding the controversy are ideal." *Harrel v. The Florida Bar*, 608 F.3d 1241, 1258 (11th Cir. 2010) (citing *Ernst & Young*, 45 F.3d at 535). Costs are not considered hardship, however, if they derive from a plaintiff's "desire to prepare for contingencies…particularly when the [defendant]'s promises and actions suggest the situation [p]laintiff fears may not occur." *Belmont Abbey Coll. v. Sebelius*, 878 F. Supp. 2d 25, 41 (D.D.C. 2012).

The weight of the two prongs to the overall ripeness analysis has not been "precisely defined." *Ernst & Young*, 45 F.3d at 535. Jurisdictions tend to agree, however, that both fitness and hardship must be present to establish ripeness. *Id*. (citing *Poe v. Ullman*, 367 U.S. 497, 509 (1961); *Cedars–Sinai Medical Ctr., v. Watkins*, 11 F.3d 1573, 1581 (Fed.Cir.1993)); *see also, e.g., Milliman, Inc.*, 641 F.Supp.2d at 118.

i. Appellant's claim is unfit for review because it is not a purely legal issue and future events may require amendments to the challenged plan

Appellant's claim against ComGen's Closure Plan is unfit for adjudication because it is not a purely legal issue and the final form of the Closure Plan is not yet established. The determination of whether ComGen's Plan meets the requirements outlined by 40 C.F.R. § 257.102(d) would require this Court to apply facts to the regulation's standards. Facts that would "involve extensive, time-consuming judicial consideration of the specifics of an elaborate, technical plan," because Appellant failed to sufficiently plead them in its complaint. *Roanoke River Basin Association v. Duke Energy Progress, LLC*, No. 1:17-CV-707, 2018 WL 2417862, *7 (M.D.N.C. May 29, 2018). Appellant has shown that there has been leaching from the Impoundment, but it is unclear when that leakage began. Appellant, other environmental organizations, and industry groups agree that it was at least a few years before closure-in-place started. With six years left on its permit, ComGen still has time to show that its Plan will "[c]ontrol, minimize or eliminate, to the maximum extent feasible" further leachate as required by § 257.102(d)(1)(iii). While the question of whether ComGen meets the C.F.R.'s standards is a legal one, it would require more than minimal fact-finding from this Court to sufficiently answer.

Additionally, the Closure Plan Appellant has challenged is on its third version, and contemplated future events may require further changes. ComGen's closure-in-place plan for the Impoundment was first placed into record in 2016. It added further details to its plan in July 2019 and then applied for a closure permit with the Department in December of that year. ComGen again amended the plan in April 2020. The plan had three variations in four years and the permit is still valid for another six. Further, the present iteration of the plan is based upon the Impoundment's current surroundings. As Appellant mentioned in its complaint, a large housing development may be built within a mile of the Impoundment within the next six years. This contingent event that might not occur would *necessitate* another amendment of the Closure Plan

under 40 C.F.R. §257.102(b)(3)(iii) ("The owner or operator must amend the closure plan… no later than 60 days after an unanticipated event requires the need to revise an existing written closure plan"). Finally, as Appellant is aware, ComGen is the subject of separate litigation, the resolution of which could further alter its plan regarding the Impoundment. The plan Appellant challenged as inadequate is subject to change based on contingent future events—some of which Appellant outlined in its complaint—and lacks the finality and definiteness required by the fitness prong.

ii. Appellant will suffer no undue hardship if review is delayed because a population that does not exist experiences no harm

Appellant will not suffer undue hardship if adjudication is delayed because the harm it faces is neither direct nor immediate enough to warrant review. Appellant does not face legal consequences from forgoing a lawful activity, so instead the hardship inquiry rests upon the costs suffered by Appellant if this Court delays judgment. Appellant seeks an injunction of the Closure Plan, alleging current harms suffered by its members who no longer enjoy the Vandalia River and potential future harms of its members who may reside in a possible future development near the Impoundment. Both harms are due to leaching of metals from the Impoundment. The former, however, cannot be traced to the Closure Plan's implementation. The latter will only come about if (1) the metals reach the Vandalia River or a public water supply—which will not happen in the next five years, if ever—(2) the housing development is built, and (3) appellant's named members reside there. The Closure Plan has no bearing on the aesthetic and recreational injuries and an injunction today would not change that. Halting the Closure Plan would neither increase nor decrease the harm Appellant is alleging, thus delaying its enjoinment would not worsen their hardship. Since Appellant's members would not suffer additional hardship in a delay of adjudication, this harm is not direct. The future harms Appellant fears are contingent on events

that will not occur for a few years, if they even occur at all. Thus, the conditions to decide this controversy are not ideal, and Appellant's members will not suffer undue hardship with its delay, as this harm is not immediate.

IV. APPELLANT IS UNABLE TO PURSUE A CLAIM UNDER RCRA § 7002(A)(1)(A), 42 U.S.C. § 6972(A)(1)(B) BECAUSE THERE IS NO IMMINENT AND SUBSTANTIAL DANGER TO HEALTH OR AN ASPECT OF THE ENVIRONMENT

The third and final complaint Appellant brought against ComGen is an imminent and substantial danger claim under RCRA § 7002(a)(1)(a) which is also codified in the U.S.C. and states that a person can bring a civil action:

> [A]gainst any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment…

42 U.S.C. § 6972(a)(1)(b). This statute has several factors to consider, none of which are adequately described within the RCRA, but other circuit courts and occasionally the Supreme Court have weighed in. With the inclusion of the phrase "may present" (as opposed to "shall present"), Congress has allowed courts broad discretion to grant "necessary" relief under the RCRA. *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 539 F.Supp.3d 696, 715 (E.D. Ky 2021) (citing *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004)). Though broad, "there is a limit to how far the tentativeness of the word *may* can carry a plaintiff." *Crandall v. City & Cty. of Denver, Co.*, 594 F.3d 1231, 1238 (10th Cir. 2010) (emphasis in original). Endangerment means a "threatened or potential harm" that requires a plaintiff to show "proof of actual harm to health or environment." *Kentucky Waterways Alliance*, 539 F.Supp.3d at 715 (citing *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020 (10th

Cir. 2007). Thus, a potential future harm is a valid endangerment under the RCRA, but the imminent and substantial pieces must also be met. *Id*. (citing *Me. People's All. v. Mallinckrodt, Inc.*, 471 F.3d 277, 296 (1st Cir. 2006)).

To pursue its claim under the U.S.C., the Appellant is required to show that the Impoundment's leaching presents a danger that is both imminent and substantial to health or the environment. Imminent means that the danger "threatens to occur immediately." *Santa Clarita Water Agency v. Whittaker Corporation*, 99 F.4th 458, 485 (9th Cir. 2024) (quoting *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 485-86 (1996)). The Supreme Court has found this language to mean "there must be a threat that is present *now* although the impact of the threat may not be felt until later." *Id*. at 486 (quoting *Price v. United States Navy*, 39 F.3d 1011, 1019 (1994)) (emphasis in original). As for "substantial", there is no clear-cut definition and the RCRA does not expound upon it. However, other circuit courts have interpreted it to mean "serious."[1] A potential harm, though "serious", is still insufficient if it is "remote in time, completely speculative in nature or de minimis in degree." *Kentucky Waterways Alliance*, 539 F.Supp.3d at 715-16 (quoting *Little Hocking Water Ass'n v. E.I. du Pont de Nemours & Co.*, 91 F. Supp. 3d 940, 967 (S.D. Ohio 2015)).

Appellant's claim hinges on this Court's interpretation of the final few words of the statute: "to health or the environment." As it is used in § 6972(a)(1)(b), "health" is widely recognized to be "human health."[2] Courts differ, however, in how they construe "the

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[1] *See, e.g., Simsbury-Avon Preservation Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210 (2nd Cir. 2009); *Burlington N. & Santa Fe Ry. Co.*, 505 F.3d at 1021; *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004).

[2] *See, e.g., 307 Campostella, LLC v. Mullane*, 143 F.Supp.3d 407, 411 (E.D. Va. 2015); *Simsbury-Avon Preservation Club, Inc.*, 575 F.3d at 205 (2nd Cir. 2009); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 260 (3d Cir. 2005); *Schmucker v. Johnson Controls, Inc.*, 477 F.Supp.3d 791, 811 (N.D. Ind. 2020); *Crandall*, 594 F.3d at 1233 (10th Cir. 2010).

environment." Here, the District Court followed a decision from the Southern District of West Virginia, which rejected the contention that contaminants in the groundwater or surface water that had no effect on "humans or ecological organisms" could be considered "an endangerment to the environment in and of itself." *Courtland Co., Inc. v. Union Carbide Corp.*, No. 2:18-CV-01230, 2023 WL 6331069, *99 (S.D.W. Va. Sept. 28, 2023). Holding otherwise could invite an interpretation that the existence of any amount of contaminant in the environment, no matter how minuscule, disrupts its "purity and natural-being" and thus creates an endangerment. *Id*. This would also contradict the presence of the word "substantial" in the statute, which most courts agree to mean "serious." *Id*.

Other courts are in accord. The Northern District of Indiana refused to recognize contaminants in the groundwater and soil as an endangerment to the environment because they were "absent any secondary effects." *Schmucker*, 477 F.Supp.3d at 810. The Eastern District of Wisconsin held that a contamination's presence in the soil or groundwater alone is "insufficient to constitute imminent and substantial endangerment." *Barclay Lofts LLC v. PPG Indus., Inc.*, No. 20-CV-1694, 2024 WL 4224731, *34 (E.D. Wis. Sept. 18, 2024). The Middle District of Florida recognized that contaminated groundwater is not an automatic qualification for an endangerment to the environment without evidence that humans could potentially drink said water. *Miller v. City of Fort Myers*, 424 F.Supp.3d 1136, 1147 (M.D. Fla. 2020). With so many courts focusing on what the contaminants *do* rather than where they *are*, a more accurate interpretation of § 6972(a)(1)(b) may be to ask whether the "contamination presents a risk of harm to some aspect of the environment" rather than the environment as a concept. *Schmucker*, 477 F.Supp.3d at 811.

Some courts favor the narrow view the District Court rejected. The Tenth Circuit decided that § 6972(a)(1)(b)'s phrasing indicated that harm to a living population was not required to establish an endangerment to the environment. *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d at 1021. The Third Circuit determined that water (which includes groundwater and rivers) is part of "the environment in and of itself" such that its contamination would constitute a substantial endangerment. *Interfaith Cmty. Org.*, 399 F.3d at 263. However, the defendant in *Interfaith* conceded that it was discharging into a river and there was a possibility of its contaminants harming "aquatic organisms" within it. *Id*. at 262.

a. In the Interest of First Impression, the Interpretation of "Environment" from *Courtland Co., Inc.* Better Suits the Purpose of § 6972(a)(1)(b)

This Court has the opportunity to establish precedent for all future claims under § 6972(a)(1)(b). Since the statute itself fails to define "environment", case law can be turned to for persuasive, though not binding, guidance. The decision of the District Court and that of others throughout the region and country, indicate that "environment" means more than just the grander concept of environment in and of itself. A drop of oil into a pond will disrupt its natural and pristine nature, but it cannot be said to endanger that environment to a substantial degree. A textualist interpretation of a statute cannot be selective with the words it grants heightened scrutiny. The phrase "imminent and substantial endangerment" is just as—if not more so—integral to the intent of § 6972(a)(1)(b) than the final phrase.

The District Court determined that Appellant failed to establish that the Impoundment posed an imminent and substantial danger to health or the environment. It did so on the grounds that no living population was in imminent or substantial peril. The leaching from the Impoundment has not reached the Vandalia River or any other public water supply nor will it in the next five years, if ever. Appellant's concern of the potential housing development using

groundwater near the Impoundment does not reach the imminency required by the statute because a danger cannot be present to a population that does not exist. If the lower court's interpretation of the statute is too narrow, Appellant would also fail under a test that recognizes dangers to aspects of the environment. Appellant did not allege that the leachate in the groundwater poses any threat to microbes or microscopic organisms that may dwell within it. Appellant only alleged that the groundwater itself was endangered, which is a glass half-full interpretation of § 6972(a)(1)(b). Without alleging an imminent and substantial endangerment to any sort of living population, the claim must fail.

CONCLUSION

For the reasons stated above, ComGen requests that this Court affirm the prudent judgment of the District Court.

Respectfully submitted,

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Counsel for Appellee

Commonwealth Generating Company

CERTIFICATE OF SERVICE

Pursuant to Official Rule IV, Team Members representing Commonwealth Generating Company certify that our Team emailed the brief (PDF version) to the West Virginia University Moot Court Board in accordance with the Official Rules of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 5, 2025.

Respectfully submitted,

Team No. 21